

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dick v. Coquitlam (City)*,
2013 BCSC 1698

Date: 20130916
Docket: S128222
Registry: New Westminster

Between:

Rodney Daniel Dick and 611481 BC Ltd.

Plaintiffs

And

City of Coquitlam

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Plaintiff Rodney Daniel Dick:

In Person and on behalf of
611481 BC Ltd.

Counsel for the Defendant:

David T. McKnight

Place and Date of Hearing:

New Westminster, B.C.
December 6, 2012 and
February 20, 2013

Place and Date of Judgment:

New Westminster, B.C.
September 16, 2013

[1] The City of Coquitlam applies pursuant to Rule 9-7 of the *Rules of Court* for dismissal of this claim on the basis that the plaintiffs have failed to comply with statutory and bylaw requirements of the City for the development of their property and the City is entitled in law to enforce the requirements of those statutes and bylaws and has therefore breached no duty of care to the plaintiffs.

[2] In addition the City submits that the plaintiffs' claim is statute-barred pursuant to s. 285 of the *Local Government Act*, R.S.B.C. 1996, c. 323, and pursuant to s. 3 of the *Limitation Act*, R.S.B.C. 1996, c. 266, as amended.

[3] Mr. Dick commenced this action on June 11, 2010 by way of Writ of Summons and Statement of Claim.

[4] The Statement of Claim seeks compensation for the years of delays caused to his company and equipment and for loss of business, a permit for his right to work on his property, compensation for the personal stress in not allowing him to build on his property, general damages, special damages, punitive damages, compensatory damages and costs.

[5] The body of the Statement of Claim alleges that he purchased his property in October of 2003 and excavated 2,000-plus dump truck loads of material from October 2003 to November 2003 for the purpose of building a driveway.

[6] He acknowledges that in November 2003 he received a Stop Work Order for unauthorized activity and says that as of the date of the Statement of Claim he still did not have access to his property.

[7] He also acknowledges that he applied for a Conservation Permit in December 2003 to allow for the preparation to build a house but his Conservation Permit was denied due to the amount of material to be removed from the site. He says that this would have required about 100,000 cubic metres of material to be removed to make the slope of his land 2 horizontal to 1 vertical with no retaining walls.

[8] In the Statement of Claim he indicates that he would like a right to re-grade his property to a plan submitted as engineered by Underhill and stamped and approved by BCLS. He alleges the City has refused him the right for seven years to develop the property and has been collecting taxes for the full 3.76 acres.

[9] He acknowledges that without a permit the City forbids the right to remove soil materials exceeding 5,000 cubic metres per year but he says he did not make the land the way it is and he has every legal right to make the most of his property within the standards set forth by the City's bylaws.

[10] He acknowledges that the property requires a large amount of earth to be removed to make it a buildable site and there is no place buildable on the property without doing a large amount of excavation.

[11] The City filed a Statement of Defence on July 26, 2010 denying any liability and stating that it has established a policy with respect to the approval of, building, development and subdivision of the property and with respect to the issuance of permits for those matters. At all times it says it has followed its policy and exercised all reasonable care, skill and diligence, followed all established and required standards, practices and procedures, and complied with all applicable standard statutory requirements, building codes and bylaws.

[12] The Statement of Defence alleges that the system for building, development and subdivision approval and the issuance of permits and bylaw compliance is a matter of policy within the sole discretion of the City for which the City is not answerable at law to the plaintiffs.

[13] The City also alleges that if the plaintiffs suffered loss, damage, injury or expense, it is as a result of their failure to comply with all statutory and bylaw requirements including but not limited to obtaining proper and adequate engineering reports and recommendations for development of the property and complying with all requirements for development and/or subdivision of the property.

[14] Finally the City alleges that the plaintiffs failed to give notice in writing as required by s. 286 of the *Local Government Act* and the defendant has been prejudiced in its defence.

[15] In addition it alleges that the plaintiff's claim is statute-barred pursuant to s. 3 of the *Limitation Act*.

[16] At the time of the hearing of this matter on December 6, 2012, Mr. Dick had filed five personal affidavits.

[17] This judgment was taken on reserve at the conclusion of the hearing but subsequently Mr. Dick sought to tender a sixth affidavit without seeking leave of the Court or even advising counsel for the City.

[18] Upon my advising counsel for the City of the existence of the sixth affidavit, counsel agreed to my consideration of this sixth affidavit as well but did not consent to the admission of any further evidence or argument from Mr. Dick.

[19] Subsequent to that Mr. Dick sought to file an amendment to his Statement of Claim as a Notice of Civil Claim under the new *Rules*.

[20] At another hearing on February 20, 2013, I informed the parties that I will decide the City's application on the material presented to me at the hearing of December 6, 2012, to include only in addition the sixth affidavit of Mr. Dick.

[21] I indicated that if the proposed amendments to the Statement of Claim to change it to a Notice of Civil Claim were already covered in the material and submissions before me on December 6, 2012, I would decide that in this judgment as well, which I intend to do.

[22] Mr. Dick has subsequently sought to file further affidavits which I decline to consider on this application in keeping with the ruling that I made at the hearing of February 20, 2013.

[23] The City has made a number of decisions over the years with respect to applications made by Mr. Dick to develop his property.

[24] The proper legal remedy for Mr. Dick to pursue against the City to compel the City to give him a permit is judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, seeking an order compelling the issuance of permits he seeks or a direction from the Court that the City reconsider and determine Mr. Dick's rights to these permits.

[25] An application for judicial review must be brought by way of a petition proceeding. However, for the purpose of the City's application to have Mr. Dick's claim dismissed under Rule 9-7 of the *Rules of Court*, I will consider Mr. Dick's Statement of Claim as including a petition under the *Judicial Review Procedure Act* seeking an order that the City grant him the necessary permits for development of his property or a reconsideration of its refusals to date.

[26] The property is at 1430 Pipeline Road in the City of Coquitlam. Until February 25, 2010, it was owned by 589969 BC Ltd., a company owned by Mr. Dick's parents, in which Mr. Dick had no ownership interest.

[27] On February 25, 2010, 589969 BC Ltd. sold the property to Mr. Dick personally, who presently owns it.

[28] The co-plaintiff 611481 BC Ltd. is a company owned by Mr. Dick which holds no legal or other interest in the property. It is not mentioned in the Statement of Claim other than as a co-plaintiff.

[29] There being no application before me to have 611481 BC Ltd. removed from the action, I make no order in that regard at this time, although its participation in this claim is still subject to the application of the City to have the entire claim dismissed.

[30] Although Mr. Dick only took ownership of the property on February 25, 2010, his applications date back to 2003 when 589969 BC Ltd. owned the property. The City appears to have accepted Mr. Dick as an agent for that company in the

applications made prior to February 25, 2010. Accordingly I will proceed on that basis.

[31] Pipeline Road proceeds generally in a north and south direction with one lane each way. Mr. Dick's property is on the west side of Pipeline Road just north of Robson Drive in the City of Coquitlam.

[32] The property has an approximately 60 metre elevation change from its western property line at the top (at 130 metres) to its eastern property line at Pipeline Road at the bottom (at 70 metres).

[33] The property consists of about 3.76 acres with grades of between 27 degrees to 31 degrees in some areas and steeper grades of up to 100 degrees in other areas.

[34] The property is zoned RS-2 (One-Family Suburban Residential) under City Zoning Bylaw No. 3000, 1996.

[35] Pipeline Road is said to be a main access road for the residential neighbourhoods in the area and a primary thoroughfare for vehicle and equipment traffic associated with the commercial gravel extraction operations located on Pipeline Road to the north of this lot.

[36] The provisions of Part 10 of the Zoning Bylaw dealing with one-family residential zones incorporate by reference the General Regulations found in Part 5 of the Bylaw, the General Regulations to Residential Zones set out in Part 9 of the Bylaw, and the provisions of Part 6 of the Bylaw dealing with subdivision.

[37] The General Regulations in Part 5 of the Zoning Bylaw require that no building or any part of a building may be constructed, reconstructed, moved or extended on a slope in excess of 20 degrees (36%).

[38] The only exceptions to that set out in the Zoning Bylaw are if it is a slope with a vertical difference in elevation of six metres or less from the toe to the crest or a

slope created with the construction of highways or constructed as a condition of subdivision in accordance with the plans approved by the city engineer.

[39] As one of the facts Mr. Dick puts forth on this application, he admits that from October to November 7, 2003 he removed about 2,000 cubic metres of soil from the property.

[40] On November 7, 2003, the Planning and Development Department of the City wrote to 611481 BC Ltd., taking the position that this activity was contrary to several City bylaws.

[41] One such bylaw named was the City of Coquitlam Conservation Bylaw No. 2454, 1994.

[42] Section 930.1 of the *Municipal Act*, R.S.B.C. 1979, c. 290, in force in 1994, provided that a municipal council may, by bylaw:

regulate or prohibit or require the holding of a permit for the removal of soil from and the deposit of soil or other material on, any land in the municipality or any area of the municipality; and

(b) impose rates or levels of fees for the removal or deposit of soils or the application and issuance of a permit.

[43] The Conservation Bylaw enacted pursuant to that authority stated in s. 4.1 that:

Except as permitted in section 4.2, no person will deposit on or remove soil from land within the City unless that person has first obtained a permit in accordance with the provisions of this bylaw.

[44] In the circumstances, the provisions of s. 4.2 are not relevant.

[45] The Conservation Bylaw included requirements for an application for a permit, to include the applicable information set out in Schedule E to the Bylaw, and authorized the director to require certain additional information including a report from a professional engineer.

[46] Schedule E to the Conservation Bylaw indicated that a lot of different information might be required, including re-grading plans, type of soil being deposited or removed, amount of soil being deposited or removed, soil stability provisions, drainage details along top of slopes, and a geotechnical engineering report.

[47] In the letter to Mr. Dick of November 7, 2003, the City also expressed concerns with the stability of the steep vertical cuts within the slope and the potential for slope failure or land-slip and erosion, especially during rainfall events.

[48] It was also pointed out that construction activity had impacted several trees on the site and turned them into hazardous situations and the removal of the hazardous trees or other trees on site would require the owner to obtain a tree-cutting permit as the site was located within a tree-cutting permit area.

[49] The letter stated that action was required to be undertaken immediately including a review and recommendations from a qualified professional engineer in geotechnical matters to stabilize the site, and to ensure that the work does not violate the City's Stream and Drainage System Protection Bylaw.

[50] On December 11, 2003, the City received an engineering report on behalf of Mr. Dick from Jacques Whitford & Associates Ltd. with a geotechnical assessment of a proposed site access road for a residential subdivision of this property.

[51] The City wrote to Mr. Dick on December 17, 2003, acknowledging receipt of this engineering report and point out that there was no current application for a subdivision of the property and the City was therefore unable at the time to provide any comments related to proposed earthworks that were not part of a current subdivision or development application.

[52] Reference was also made to discussions that Mr. Dick had with City staff wherein he had indicated that he wished to construct a house on the property and he was advised that he needed to review the building permit application requirements with the City's permit section in order for the City to comment on the feasibility of his

application as it related to current City of Coquitlam bylaws, including the Building Bylaw, the Zoning Bylaw, the Tree-Cutting Permit Bylaw and the Subdivision and Development Servicing Bylaw.

[53] On December 22, 2003, 589969 BC Ltd. applied for a Conservation Permit as well as for a Subdivision approval.

[54] The City replied on February 13, 2004, acknowledging receipt of both applications and pointing out that the proposed lot configuration shown on the Conservation Permit application differed from the lot configuration shown on the Subdivision application.

[55] The City requested clarification, seeking information as to the lot configuration of the proposed Subdivision application layout and requesting the purpose and intent of the proposed earthworks and construction access road associated with the Conservation Permit application, noting that the three-lot subdivision application did not indicate a proposed road/driveway into the property.

[56] This brought about a reply from Mr. Dick the same day in which he indicated that his intention was to excavate for one single-family residence and build when ready, and when his three-lot subdivision passed approval, build two more.

[57] The City says that because of the magnitude of the earthworks proposed and concerns with slope stability, drainage and other site limitations, and safety concerns, it decided to obtain an independent third party review of the Jacques Whitford engineering report.

[58] For that purpose it consulted with Golder Associates which submitted a report of February 11, 2004 on the Conservation Permit application.

[59] The report noted that the Jacques Whitford report dealt specifically with the construction of an access road and appeared to be general in nature and recommended that detailed drilling be carried out after access to the site was available and a slope stability analysis be carried out when that data was available.

[60] Golder Associates rendered the opinion that although access on the slope was not then available, boreholes could be drilled from the top of the slope which would provide viable relevant information on the geotechnical conditions on the slope and further, shallow pit excavations on the slope might provide useful information.

[61] It recommended that a comprehensive detailed excavation plan be prepared for this work and the plan should define who is the engineer of record for the work and should be detailed in all aspects of development. At a minimum it should address a number of issues including grades and cut and fill slopes, seepage zones, environmental washout problems and cross-drainage, instability issues, environmental issues, and how the housing platform would be developed to ensure that stability is maintained at all times.

[62] On March 5, 2004, the City Manager of Planning and Development sent a memo to the City Manager recommending that Council deny the Conservation Permit for the construction and earthworks associated with a proposed site access road.

[63] The memo made reference to Mr. Dick's stated intention to excavate for one single-family residence and build when ready and pointed out that no building permit had been applied for and such an application would require a development variance permit authorized by Council in relation to s. 519(2)(a)(iv) of the Zoning Bylaw that restricted construction of buildings on a slope in excess of 36% or 20 degrees.

[64] It was noted that the applicant had also applied for a subdivision of the lands and the application was still under review by the City's approving officer.

[65] In addition it was pointed out that Mr. Dick was required to apply for and obtain a tree-cutting permit prior to removal or disturbance of trees on the site and no such permit had been applied for.

[66] On March 15, 2004, Council denied the Conservation Permit for the construction and earthworks associated with a proposed site access road.

[67] This brought about another letter from Mr. Dick of April 8, 2004 which he wrote to the Mayor and Council directly asking what requirement he needed to meet to excavate and remove material for the construction of a house and driveway.

[68] The General Manager of Planning and Development responded on April 26, 2004, stating that the City understood he wished to develop for construction of a single-family home and stating that to assist him in preparing his building permit application certain comments were being provided.

[69] It was pointed out to him that his lot fell within a tree-cutting permit area under the Tree-Cutting Permit Bylaw and that a tree-cutting permit application had to be accompanied by (a) a geotechnical report prepared and sealed by a professional geotechnical engineer certifying that the cutting or removal of trees would not create a danger from flooding, erosion or land slip; (b) a survey prepared and sealed by a registered BC land surveyor showing legal lot boundaries; (c) a site plan; (d) depending on the location and extent of the proposed tree-cutting, a certified arborist's might also be required; and (e) his building permit application would be required to comply with current zoning constraints or else he would have to obtain a separate development variance permit for which he was invited to contact the Development Planning section for information regarding a development variance permit.

[70] The letter went on to indicate that only one building permit application for a single-family dwelling would be considered and enclosed a brochure to assist him on his building permit application.

[71] It was pointed out to him that his building permit application should include a legal survey of the property, a geotechnical report, plan and profile views of the site showing an outline of all proposed buildings and structures, detailed re-grading plans showing existing and proposed finished elevations and cross-sections, details for eliminating any life safety hazards, details for eliminating hazards to adjacent property and structures, a settlement control plan, and details of drainage at the top of the slope.

[72] It was stated that all these elements were part of a preliminary review of the documentation provided and did not represent a complete list and additional information and requirements might be identified upon further review of any submission.

[73] Finally, it was indicated that building permits would only be issued on lots with approved services and access.

[74] The Tree-Cutting Permit Bylaw authorized, in s. 4:

For tree-cutting permits on lands with slopes of 20 degrees or greater, the City of Coquitlam may require an applicant for a permit to provide, at the applicant's expense, a report certified by a professional engineer, that the proposed cutting of trees will not create a danger from flooding or erosion.

[75] Section 6 of the Bylaw required that applications be accompanied by a written description of the proposed tree-cutting and to include information on the purpose and scale of the proposed tree-cutting and the methods to be used, a site plan, methods proposed to control the erosion of the soil from any slopes of the land, proposed methods of access to the site during the cutting, and such further and other information as Council may require.

[76] The *Community Charter* is a provincial statute, S.B.C. 2003, c. 26.

[77] Part 2 of that statute deals with municipal purposes and powers and sets out fundamental powers of a municipality. It specifically states that a council may, by bylaw, regulate, prohibit and impose requirements in relation to trees, protection of the natural environment, buildings and other structures, and the removal of soil and the deposit of soil or other material.

[78] It is stated that these powers to regulate, prohibit and impose requirements include the power to regulate, prohibit and impose requirements as applicable respecting persons, property, things and activities in relation to the matter and, by way of example, prohibit persons from doing things with their property and require persons to do things with their property at their own expense and provide security for fulfilling the requirement.

[79] Section 55 of the *Charter* authorizes council by bylaw to require applicants for building permits to provide the municipality with a certification by a qualified professional that the plans submitted with the permit application comply with the current provincial Building Code and other applicable enactments and authorizes the building inspector who considers that construction would be on land that is subject to or is likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, landslip, rockfall, subsidence or avalanche, to require the owner of land to provide a report certified by a qualified professional that the land may be used safely for the use intended.

[80] The Coquitlam Building Bylaw requires a building permit for any work that relates to a building or temporary building and requires every application to be accompanied by plans of the building with respect to which the work is to be carried out in such quantities as prescribed by the General Manager of Planning and Development from time to time, showing the dimensions, proposed use, the dimensions of the parcel on which the building is to be located and the location of the building relative to the parcel's property lines. "Building" under the bylaw includes a retaining wall whose height is not less than 1.2 metres.

[81] Section 23.1(i) requires in relation to retaining walls the application to be accompanied by geotechnical, structural and drainage plans prepared and sealed by a professional engineer for retaining walls.

[82] Section 24.1 provides that an application for a building permit must comply with all applicable City bylaws including the zoning bylaw, development permits, environmental protection bylaws, and traffic, water and drainage bylaws.

[83] On May 19, 2004, Mr. Dick applied for a permit to build a single-family dwelling.

[84] On June 8, 2004, the Subdivision Committee indicated to Mr. Dick it was recommending that the approving officer decline his proposed subdivision sought on December 22, 2003 due to the fact that under s. 86(1)(c)(v) of the *Land Title Act*, the

land was subject to or could be reasonably expected to be subject to erosion and land-slip and under s. 87 of the *Land Title Act* the proposed subdivision did not conform to the City of Coquitlam's Zoning Bylaw as amended (s. 519(2)(iii) and (iv)).

[85] On June 17, 2004, the City confirmed receipt of Mr. Dick's Building Permit application and noted that he proposed to build on a slope that exceeded 20 degrees in contravention of s. 519(2)(iv) of the City's Zoning Bylaw.

[86] He was told that his only recourse was to approach Council for a development variance permit.

[87] On June 21, 2004, Mr. Dick sought this Development Variance Permit for the purpose of excavation for a house and sought a variance to the zoning requirement for construction on a slope exceeding 20 degrees.

[88] Prior to preparation of a report to Council on the Development Variance Permit, the City indicated to the engineering consultant, Ashford Engineering, that it would require from Jacques Whitford a plan demonstrating the extent of cuts and fills associated with the proposed driveway construction, additional cross-sections through the site including a driveway profile, and the estimated quantity of net material to be removed from the property in cubic metres with a specific breakdown of cut and fill volumes.

[89] On November 2, 2004, Ashford Engineering sent to the City a supplementary report of Jacques Whitford dated September 23, 2004 and stated that the Jacques Whitford report confirmed the stability of the site slope would be increased with the removal of the gravel as required to accommodate the proposed single-family dwelling access road and the proposed access driveway would require a net cut of some 101,000 cubic metres of soil.

[90] On June 17, 2004, the Jacques Whitford engineers had written to Mr. Dick indicating that they had completed a geotechnical slope assessment and siltation control system for the proposed residential development on the property with the

purpose being to enable Mr. Dick to obtain development permit approval from the City for the proposed development.

[91] The report confirmed that Mr. Dick was proposing to construct a single-family dwelling to include a new road located on the lower half of the slope consisting of two straight sections and a switchback with general grades ranging from 10 to 12.5%.

[92] It was indicated in the June 17, 2004 report that in order to facilitate the construction of the proposed development, Mr. Dick was proposing to unload the existing slope by means of gravel extraction and the opinion was given in the report that the proposed development could proceed with the construction of an access road and gravel extraction once the siltation control system was constructed. It was stated that the stability of the slope would correspond to factors of safety which were above the minimum requirements for both temporary and permanent works. However for the long-term performance of the proposed single-family dwelling it was stated to be important to confirm the subsurface conditions that had been adopted in the slope stability analysis and it was suggested that this could be ascertained through a drill-hole investigation that might be more easily facilitated once the access road was constructed and gravel extracted from the site. The opinion was expressed that the timing of the proposed subsurface investigation would be better following the construction of the access road.

[93] On November 9, 2004, the City wrote to Mr. Dick responding to the November 2, 2004 memo of Ashford Engineering indicating a net cut of 101,000 cubic metres of soil and advising him that the Soil Removal Regulation Bylaw No. 1914, 1988, regulated the removal of soil substances from lands and specifically limited the maximum quantity to 5,000 cubic metres incidental to building construction in any one-year period.

[94] Based on this it was indicated that the Planning and Development Department would not be proceeding to Council with a proposed Development Variance Permit until such time as Mr. Dick amended his application to be in

compliance with that Soil Removal Bylaw. A copy of the Bylaw was attached for his reference.

[95] It was also indicated that if Mr. Dick did not amend his application by December 17, 2004, his Development Variance Permit application would be put before Council with a recommendation it be declined due to its failure to comply with the City's bylaws.

[96] On January 21, 2005, the City wrote to Mr. Dick confirming that his Development Variance Permit application was seeking a variance in contravention of the Zoning Bylaw on the issue of the slope of the site and his proposal to remove 101,000 cubic metres of excavation exceeded the maximum allowed of 5,000 cubic metres.

[97] The letter confirmed that he was advised to modify his Development Variance Permit application to eliminate this contravention but also confirmed that he did not intend to modify his proposal and he wished the matter to be moved forward as quickly as possible.

[98] He was advised that the file would be brought before the appropriate committee of Council at the next available opportunity with the intention of bringing his Development Variance Permit application to Council for a decision on February 21, 2005.

[99] The letter expressed the City's understanding that Mr. Dick was experiencing a great deal of frustration with the process but the City was attempting to assist him as best it could.

[100] On February 1, 2005, Mr. Dick wrote to the City, asking what information he was lacking that he needed to get the City's support to have this pushed through with a positive outlook.

[101] On February 14, 2005, the City wrote Mr. Dick, indicating that his Development Variance Permit application was scheduled to proceed to the Land

Use and Economic Development committee on February 28, 2005 and Council on March 7, 2005.

[102] The letter set out additional issues that staff had with respect to the extent of earthworks associated with the single-family building permit proposal, including the length of time that would be needed to complete proposed earthworks that had not been provided, the absence of details of how traffic on Pipeline Road would be controlled and how impacts on neighbouring properties of dust and noise would be mitigated, the apparent potential to develop one single-family house on a portion of the site that minimized the extent of earthworks and associated site servicing, and the need for a further assessment from his consulting engineer to better determine the viability of his proposal including borehole and shallow pit excavations to provide valuable relevant information on the geotechnical conditions and other matters of engineering set out in a list.

[103] Mr. Dick responded by letter of February 17, 2005, stating that the City already had three geotechnical reports from Jacques Whitford dated December 11, 2003, June 17, 2004 and September 23, 2004, and those reports should answer all the City questions.

[104] He also set out his answers to all of the issues outlined in the City letter. In answer to the concern for noise and dust affecting neighbouring properties on Pipeline Road, he said there would be no more noise than what the construction required and what the dump trucks from nearby gravel pits created.

[105] In answer to the issue of the apparent potential to develop one single-family house on a portion of the site that minimizes the extent of earthworks and associated site servicing, Mr. Dick responded that, "Whatever it takes to develop my property, and how much money I spend is determined by me. I pay taxes on the whole property, not just a piece of it."

[106] On February 28, 2005, the General Manager of Planning and Development recommended to the City manager that Council not authorize the Development

Variance Permit application which related to development on a slope in excess of 20 degrees (36%).

[107] The report indicated that Mr. Dick was proposing to build a single-family dwelling of about 600 square feet to be located mid-way up the slope, with the construction of an access driveway near the centre of the property. It was stated that the proposed on-site development would result in the excavation and removal of approximately 101,000 cubic metres of material from the slope.

[108] The report confirmed that Mr. Dick had submitted a geotechnical report prepared by a professional engineering consultant but the report had been reviewed by staff and clarification of certain aspects of the proposal had been sought.

[109] The report went on to say that notwithstanding a number of specific concerns as outlined, staff contended that the overall scope of the earthworks proposed was significant. To provide some sense of the magnitude of the earth-moving activity proposed, staff estimated that it would take five dump-truck loads per hour, eight hours per day, five days per week, for a one-year period, in order to complete the proposed site development. Should such a trucking activity occur, staff indicated significant concerns, one being traffic safety, given the limitations of the site access and the area available on-site for the loading of material.

[110] The report pointed out that even though Mr. Dick had submitted a geotechnical report it was premised on geotechnical work being undertaken during the course of excavation and staff recommended that excavation not be permitted to commence until such time as a detailed geotechnical investigation was fully completed by a qualified professional.

[111] On March 7, 2005, Council resolved not to authorize the Development Variance Permit application which related to development on a slope in excess of 20 degrees (36%).

[112] Mr. Dick was told of this result by a letter of March 21, 2005 from the City and was told of many factors for that including the views expressed by a number of

neighbours in the vicinity of the property about the extensive excavation work that would have to be undertaken to allow Mr. Dick to construct the proposed residence on the property, concerns with the stability of the slope on the property in light of a number of unauthorized activities, including soil and gravel disturbance and removal from the property, concerns with construction of an access road and placement of structures and heavy equipment on the property, concerns over the lack of information on various geotechnical matters such as sediment control, general site conditions, drainage and risk assessment, and concerns over the length of time that would be required to excavate the property to the extent needed to construct the proposed single-family dwelling unit.

[113] In this letter, Mr. Dick was informed that with the denial of the grant of the Development Variance Permit, he had no lawful authority to proceed with any work on the property, all work to date was unauthorized, and as well his application for a building permit to construct could not be approved by staff.

[114] On March 24, 2005, the City issued a Notice of Remedial Action Requirement pursuant to s. 72 of the *Community Charter*, requiring 589969 BC Ltd. as the registered owner to take remedial action of obtaining a slope stability assessment of the property from a professional engineer or geoscientist with experience or training in geotechnical study and geohazard assessments and deliver such a report to Council for the City within 30 days.

[115] The owner was also notified that if the owner failed to take the remedial action within the time frame specified, the City may carry out the remedial action pursuant to s. 17 of the *Charter* with costs to be borne by the registered owner and if unpaid by December 31 in the year, to be added to the property taxes for the property as taxes in arrears.

[116] 589969 BC Ltd. did not carry out the remedial action required by the notice under s. 72 of the *Community Charter* within 30 days of March 24, 2005 and therefore the City went ahead to obtain its own report.

[117] On September 12, 2005, the City sent to Mr. Dick a copy of a Thurber Engineering Ltd. report dated September 7, 2005, but indicated that the report did not address what was intended which was the current stability of the slope, and that the City would be requesting that Thurber do another report that did address that situation.

[118] Thurber sent a further short letter of October 14, 2005 to the City, providing comments on the stability of the current excavation face left by Mr. Dick's activities, stating that the overburden exposed by the excavation was generally dense but the upper face was steep, possibly 1H:1V.

[119] It appears that matters remained in abeyance through to February 23, 2006 when Mr. Dick met with some of the City staff.

[120] The following day, on February 24, 2006, the City wrote a letter to Mr. Dick pointing out that he still had three avenues available to him for advancing development, including a building permit for a single dwelling coupled with a development variance permit permitting him to develop a site at variance with the zoning bylaw, subdivision coupled with a development variance permit permitting him to develop the resulting lots at variance with the zoning bylaw, or a conservation permit.

[121] He was told that each of these vehicles would bring his proposal before Council and it was important for him to choose a single development option. Any approach to Council would entail public notification and would subject his development proposal to public scrutiny.

[122] He was also told that his previous permit applications raised issues that any future application should address or recognize and that a number of these were discussed at the meeting, including:

1. the need for a complete and accurate characterization of his development plans;

2. the need to demonstrate that the proposal being advanced was the best of the development options available;
3. the need for the City to rely on the independent advice of his professional consultants;
4. the need for him to engage the appropriate professionals;
5. the comprehensiveness of the geotechnical assessment and design provided by his professional consultants;
6. the minimization of the duration of the excavation and the amount of haul traffic;
7. the need to address the real and perceived impact of development on neighbours;
8. the need to consult with neighbours; and
9. the nature of public process.

[123] This was stated not to be an exhaustive list and not to provide any guarantee that his application would meet with success.

[124] On May 19, 2006, Beazley Engineering Ltd. applied on behalf of 589969 BC Ltd. for a Conservation Permit to allow removal of the existing soil to allow for construction of a driveway and home as shown in an enclosed drawing.

[125] It was stated that the volume of material to be removed, while quite large, was the minimum required to construct a 15% driveway and a home in accordance with current City requirements.

[126] The City replied to Beazley on June 12, 2006, providing Beazley with the background to its involvement and asking how Beazley wished to proceed.

[127] On June 16, 2006, Mr. Dick sent a letter to the City with a drawing indicating a cut slope at the bottom of the slope next to Pipeline Road and indicating that would require removal of 60,000 metres of soil plus more excavation to build at the bottom with a long, sloping back yard.

[128] Another drawing showed the building site being in the middle of the slope.

[129] On August 14, 2006, the City wrote to Beazley Engineering on its Conservation Permit application, indicating that while the proposal appeared to show two development options, the City continued to have concerns of the magnitude of earthworks and asked a number of questions of Beazley.

[130] On September 15, 2006, the City wrote to Mr. Dick, indicating that they were waiting for the information from Beazley Engineering which had not yet been received and notifying Mr. Dick that if there was no response from him by September 22, the City would take it that no further information would be forwarded to the City for review to support his Conservation Permit application and his application would proceed to Council for its consideration.

[131] On October 27, 2006, the General Manager of Planning and Development sent a memo to the City Manager with a recommendation that the Conservation Permit application that would entail removal of approximately 100,000 cubic metres of soil be denied by Council.

[132] The memo indicated that a meeting had been held on October 18, 2006 with Mr. Dick and his engineering consultants Mr. Beazley and Mr. Denby of Jacques Whitford, along with a Chris Clark of Nilex Inc., a supplier of earth retention materials, to discuss the current status of the application and various proposals to date.

[133] The memo indicated that while the discussion was wide-ranging and touched on different development options, related issues and challenges, in the end a resolution could not be reached and Mr. Dick requested that his Conservation Permit application as submitted be provided to Council for consideration.

[134] The memo indicated that City staff had reviewed the Conservation Permit application and while the information submitted demonstrated a proposal to develop the site, the application as submitted did not evaluate all site development options. Further professional evaluation was recommended regarding a number of issues including how the earthworks and the proposed access road would be constructed in a safe manner, erosion control and avoidance of potential landslip during and post-construction, temporary and permanent drainage controls, and mitigation of impacts to adjacent properties, public roads and the environment.

[135] The memo indicated the significant issue that remained was the review of all site development options and City staff had requested the applicant and his consultants to explore other design options and locations for the proposed single-family dwelling, with the objective of reducing the magnitude and impact of earthworks required on the site.

[136] The memo expressed an understanding that these options might even require further variances to zoning regulations to facilitate the dwelling and the applicant had been advised that City staff would be supportive of set-back and other variances in order to achieve a more site-sensitive solution to the development of a single-family home on the parcel.

[137] It was also pointed out that Beazley Engineering had prepared and submitted drawings showing a proposed house location closer to Pipeline Road on the northeast corner of the property but the proposal still raised a number of design questions and further information had been requested.

[138] The report indicated that while these issues had been identified to the applicant, he had requested that the Conservation Permit application be forwarded to Council for consideration.

[139] Staff indicated a number of concerns regarding the application and recommended Council decline the Conservation Permit application as submitted.

[140] The staff contended there was likely to be alternative approaches to the development of a single-family home on the subject property which would result in significantly less impact to the site and incur much less earthworks. Staff had attempted to explore these options with the applicant; however, insufficient information had been received to adequately evaluate other alternatives and the applicant preferred proceeding based on the Conservation Permit application as submitted.

[141] On October 30, 2006, the committee of the whole of Council heard from Mr. Beazley on behalf of Mr. Dick, indicating that Mr. Dick did not want to build a home with numerous retaining walls, that a geotechnical report had been submitted stating that the slope would be safer when reconstructed, truck traffic should not be an issue, and the house would be approximately 4,000 square feet.

[142] Mr. Dick said he planned to build a retaining wall along Pipeline Road.

[143] The recommendation of the Committee of the whole was that Council deny the Conservation Permit applied for that would involve the removal of approximately 100,000 cubic metres of soil and would require extensive site earthworks to accompany the construction of a proposed driveway and single-family dwelling.

[144] On November 7, 2006, the application came before Council and was rejected.

[145] The applications of Mr. Dick at that point appear to have gone into a lengthy hiatus with no activity involving the City again until April 19, 2007.

[146] At that time, the City wrote Mr. Dick referring to recent approaches to Council and staff regarding his property and pointing out that there were no active applications for the property being processed by the City at that time.

[147] The history was reviewed in this letter and the City indicated to Mr. Dick that if he wished to submit a new application the decision was his. However, in order to have the greatest likelihood of success, he was told any further application should

take into account the issues that had been clearly identified to date, the application process options available, Council's concerns and the concerns of neighbours.

[148] On May 22, 2007, Mr. Dick applied for another Conservation Permit in the name of 589969 BC Ltd.

[149] The form did not set out why a Conservation Permit was being sought and this led to a follow-up letter of May 25, 2007 from the City to Mr. Dick, indicating that the letter was being provided to assist him in completing his latest Conservation Permit application. The City understanding was stated that his proposal was identical to his previous applications, that no new information was going to be provided, and that he would be referring to information already provided to the City with previous applications.

[150] The letter went on to say that given this direction and after a further review of the application form, the City had conducted a review of previous Conservation Permit applications of his and outlined them in the letter.

[151] The letter stated that if it was his intention to include these already-existing reports and drawings with his latest application, the City requested written confirmation from Jacques Whitford and Beazley Engineering that the material remained applicable and valid for City review in conjunction with the current application.

[152] The letter also noted that Mr. Dick had been given a copy of the City's Conservation Bylaw which included Schedule E, a checklist of items that might be required to be submitted in order to contain a Conservation Permit. The City noted several of the outstanding items that needed to be submitted in Schedule E to initiate a review of his Conservation Permit application and a copy of that Schedule E with the items noted was attached.

[153] The matter seems to have gone into an abeyance again at that point in time because the next message from Mr. Dick was a letter of March 16, 2008 in which he said that he was proposing to build three houses with house foundations five metres

above Pipeline Road. The letter said the foundations were to be placed on flat ground similar to the house to the north and a three-lot subdivision did not require to be pre-approved by Council.

[154] He also indicated that he could not reduce the amount of excavation to meet building requirements.

[155] On April 3, 2008, the City wrote to Mr. Dick acknowledging receipt of an application from him for subdivision that was received at the front counter on March 4, 2008. He was told that staff had reviewed the application and regretted to advise that it was incomplete and as such the City was unable to process the application any further.

[156] The letter also indicated that his current proposal was very similar to previous applications and in order to adequately deal with the site constraints and to have the greatest likelihood of success, his application should address the issues that had already been clearly identified to date.

[157] There was no further attempt by Mr. Dick to advance any application until early 2009.

[158] On January 29, 2009, Mr. Dick sent a letter to the City seeking an answer whether he could build on his property, yes or no, whether he could re-grade his property to the bylaws of the City, yes or no, whether the City accepted the drawings of his engineers, yes or no, and to please mark up the drawing and tell him what was wrong with the reports from 2003 until then.

[159] On February 13, 2009, Mr. Dick sent two further letters. One of them indicated that he could not meet the requirements of reducing the amount of earth to be removed, but the City's engineer Thurber did not have a problem with his proposal and the City would have its chance to explain in court.

[160] The second letter was a short one that simply asked whether he was allowed to put a retaining wall on his property.

[161] The City responded on February 16, 2009, acknowledging his communications and informing him that his proposed work of creating a terrace at a nominal elevation of 100 metres by means of substantial soil removal from the upper portion of the site could only be done under a permit issued pursuant to the Conservation Bylaw or as work incidental to work authorized under a building permit or as part of subdivision approval.

[162] He was also informed that the Building Bylaw permitted an owner to construct retaining walls only under a duly-authorized building permit but apart from that the Zoning Bylaw prohibited the construction of any structure, including a retaining wall, at a slope in excess of 20 degrees.

[163] He was told that this prohibition was not absolute as Council might issue a development variance permit but such permission would be based on Council's consideration of the merits of the application and subject to any conditions Council should choose to impose.

[164] In summary it was stated that under the City's Bylaws he could develop his property but any development activity could not be undertaken at his sole discretion, but only after he had obtained the appropriate approvals.

[165] Mr. Dick apparently met with the Mayor on March 3, 2009 and subsequently on March 13, 2009 the City wrote Mr. Dick a letter, pointing out that based on the discussion and review of the material he had submitted, it appeared he proposed to re-grade the subject property to create a building platform at the northeast corner of the site, against Pipeline Road.

[166] The letter said that given the preliminary nature of his material, one option the City offered him to consider was to apply for a soil conservation permit to remove material in excess of 500 cubic metres permitted for landscaping and apply for a building permit for the construction of a retaining wall exceeding 1.2 metres in height, together with an application for a development variance permit to develop on a site with a slope exceeding 20 degrees. On completion he would apply for a

building permit for his dwelling. Alternatively it was suggested he could apply for building permits for construction of the retaining walls and the dwelling and a development permit.

[167] It was stated that these applications could run concurrently as once the DVP application was authorized by Council and the engineered designed approved and inspected site preparation work reached completion, he could apply for a building permit for the actual dwelling.

[168] Alternatively it was stated that he could apply for the building permits for the construction of retaining walls exceeding 1.2 metres in height and the dwelling, and as well a DVP application would be necessary for the proposed development on a site with a slope exceeding 20 degrees. Again, these applications could be processed concurrently.

[169] It was stated that once he selected his preferred development approach, City staff were available to discuss with him the specific requirements that were necessary to productively move forward with his development concept. He was told that it would be necessary for his applications to take into account the need for a complete and accurate description and illustration of the development proposal and the accompanying plans, the need to engage the appropriate professionals, the need for the City to rely on the independent advice of his professional consultants, the minimization of the amount and duration of excavation and the resulting additional truck traffic on Pipeline Road, and the need to address the impact of the proposed development on neighbours, noting that development of the lands (either soil conservation or building permit) would require Council approval.

[170] He was told that once he had had an opportunity to review the letter and select the development approach, he was to call the General Manager of Planning and Development to determine the next steps in proceeding forward.

[171] Mr. Dick submitted another Conservation Permit application on April 20, 2009.

[172] On May 4, 2009, the City wrote to him confirming that he did not propose to provide any new information but to refer to information already provided on previous applications and his previous applications were listed in the letter.

[173] The new application proposed construction of a dwelling platform four metres above Pipeline Road. Clarification was sought by the City.

[174] He was also told that his professional consultants would need to provide updated reports and drawings to accurately reflect his new proposal with updated letters of assurance.

[175] His attention was also brought to the requirements of Schedule E of the Conservation Bylaw and another copy of Schedule E was provided to him at that time.

[176] The letter indicated that City review of the application would commence once all of the noted items had been addressed and a written response and confirmation of the proposal from him was provided.

[177] A meeting was held between Mr. Dick and the City on July 14, 2009 at the property.

[178] On July 15, 2009, a letter was sent to Mr. Dick.

[179] Mr. Dick was reminded in the letter that City Council, on July 6, 2009, had approved a resolution dealing with his most recent Conservation Permit application, directing staff to notify property owners when the Conservation Permit application with the necessary additional information was returned to Council for further consideration.

[180] The letter said that while a number of issues remain outstanding and would require resolution, including but not limited to the associated tree removal/permits, site access, site safety and drainage/sediment/erosion control, staff had attempted to narrow the most significant technical issues down to the three areas of:

1. clear and updated explanation of the proposal with plans and reports prepared and endorsed by the appropriate professionals;
2. given the magnitude of the proposal, professional evaluation and certification that the proposal as submitted was a safe and viable development option to facilitate development of a single-family dwelling on the site; and
3. assurance (certification) by the professional consultants endorsing the plan, that they would be involved for the duration of the project and would assume full responsibility for the earthworks.

[181] He was told that while a number of other issues and considerations would have to be resolved, it was felt that if he could adequately and properly resolve these three issues, staff would be in a position to provide the adjoining property owners with appropriate information on the proposal as directed by Council and subsequently bring the application back to Council for further consideration.

[182] Mr. Dick was told that the Conservation Permit was one step in the site development process that needed to be resolved specific to the earthworks proposed, that future development applications including subdivision, tree-clearing, building and development variance permits would all require separate applications and resolution of associated requirements and given the complex nature of the site this would need to be resolved one step at a time.

[183] Mr. Dick was asked to provide the information requested so the General Manager of Planning and Development could ensure the public notification process commenced and related information was provided back to Council for further consideration.

[184] Mr. Dick sent numerous faxes and made numerous telephone calls to various City employees and City Council over the summer and fall of 2009.

[185] The City received a copy of a letter from Beazley Engineering of November 13, 2009 to Mr. Dick, indicating that in August 2006 it had been instructed not to provide the City with requested information as he was not interested in building a house at the location shown close to Pipeline Road and he wished the Conservation Permit application of May 19, 2006 to proceed as requested with the re-grading and driveway.

[186] It was pointed out that the City, on September 15, 2006, had once again requested further information that Mr. Dick had instructed Beazley not to provide.

[187] The City received a letter from Mr. Dick of November 13, 2009, indicating that he planned to remove 15 feet from the top of the slope and expose the west property line.

[188] The City also received a copy of a letter of October 19, 2009 from Stantec (formerly Jacques Whitford).

[189] The City also received copies of December 11, 2003 and September 23, 2004 letters to Mr. Dick from Jacques Whitford.

[190] On November 27, 2009, the General Manager of Planning and Development recommended to the City Manager that Council decline the latest Conservation Permit application for this property on the basis that the applicant had not complied with the resolution of Council to provide the necessary information so that the Conservation Permit application could be returned to Council for further consideration. Instead it was stated that Mr. Dick had continued to pursue the application without addressing the three significant issues requiring additional information and that he had been told that staff would be in a position to move to the public notification process once these three issues had been adequately addressed.

[191] The report indicated the three issues remained outstanding but said Mr. Dick had subsequently met with and frequently contacted staff to discuss other land use and development scenarios that did not advance those issues any further, and while he had submitted the letters from Stantec Consulting, Beazley and Jacques Whitford

and this confirmed he had consulted engineering professionals, it did not address previous questions and concerns raised by staff and Council.

[192] Mr. Dick appeared before the Land Use and Economic Development standing committee on Monday, November 30, 2009 with respect to his Conservation Permit application and advised that he was unable to reduce the amount of excavation on the property more than what he already had and he was not prepared to construct a 60-foot-high retaining wall as it would greatly reduce the size of his lot.

[193] The committee recommended that Council decline the Conservation Permit application and Council did so on December 7, 2009.

[194] The City wrote Mr. Dick on December 11, 2009 informing him that his Conservation Permit application had been denied and the application was now considered closed.

[195] On February 2, 2010, Mr. Dick filed yet another Conservation Permit application in the name of 589969 BC Ltd. with the description of a proposed project to remove and level the top of the property to an elevation of 124 metres geodesic two to one slope on the west property line.

[196] The City replied on February 12, 2010, acknowledging receipt of this application and pointing out that it appeared to be different than his previous applications, and updated details, plans and related engineering assessments were required to complete the application.

[197] Again the City noted that Mr. Dick had been provided with a copy of Schedule E of the City's Conservation Bylaw with the checklist of items that might be required to be submitted in order to obtain the Conservation Permit, and another copy of Schedule E was attached to the letter with items highlighted in yellow as required to address his application.

[198] Finally around April 30, 2010 the City received an application from Mr. Dick for a five-lot bare land strata lot subdivision that included his property and the property immediately north of his property on Pipeline Road.

[199] The City replied on May 12, 2010 and informed Mr. Dick that his subdivision application was incomplete and the City was unable to process the application any further.

[200] It pointed out to him that the application was incomplete for the reason that he did not provide any written authorization from the current owner of the property he included north of his property to the subdivision application, he did not send the required application fee, he did not indicate the current title for the property north of his property, and the survey plan submitted in connection with his application needed to be amended to include location, dimensions and set-backs of all existing buildings and structures to be retained on the site, building envelopes indicating all required zoning bylaw set-backs, existing grades at each corner of the lots, or spot elevation/contours of the property at one metre intervals, and all existing trees within the lands and on adjacent road allowances that were 20 centimetres (eight inches) in diameter or greater when measured than 1.4 metres (four feet six inches) above the ground.

[201] He was told again that his property presented challenges to development and any development proposal would need to satisfactorily address a range of site constraints, that to date he had been unable to clearly demonstrate to the City that his proposal, which included the removal of significant volumes of soil from the site, would be the safest and least disruptive development option, and staff continued to highlight the need to have his professional consultants provide this information along with their assessment and recommendations in that regard.

[202] It was stated that until that complete information was submitted it was anticipated that Council, the approving officer and the public would continue to raise questions and issues that would be unresolved such that his application would be unable to proceed.

[203] On August 18, 2010, the City wrote to Mr. Dick, informing him that it was advised he had been conducting works on the property including removal of soil from the property and he had created a situation on or near Pipeline Road which appeared a threat to the safety of passing motorists as a result of falling rocks and other debris.

[204] He was reminded that he was not authorized to conduct any works that included soil removal on the property and told that should he disregard the order the City would take enforcement action against him without further notice.

[205] On January 17, 2011, Mr. Dick wrote again to the Mayor and Council requesting a meeting and indicating that his lot required a substantial amount of excavation to make it 100% usable to build and meet the Building Code requirements. He said in this letter that he reduced the amount of excavation from the original plan in 2003 back to the minimum of two to one slope which was acceptable under the Building Bylaw, that in 2003 his engineer's report said it was safe for him to excavate a driveway to do a geotechnical report, and that he would have an engineer come to the site with every 20 feet he took off the top of the property to ensure the safety of the operation.

[206] He also indicated in this letter that he had already removed 300 to 400 truckloads out of the corner where he had access to load the trucks.

[207] On February 8, 2011, the City wrote to Mr. Dick, indicating that his latest Conservation Permit application submitted on February 2, 2010 had been referred for consideration by Council's Land Use and Economic Development standing committee on February 28, 2011.

[208] It pointed out to him that apart from his application form no new reports had been received in support of his application and as such in reaching a recommendation staff would be considering those documents submitted in support of his Conservation Permit applications back in 2003, 2006 and 2009, all of which had been declined. Those documents were listed in the letter.

[209] He was asked if he had any additional reports he would like staff to consider and if so to ensure that they were submitted no later than the end of business on February 18, 2011.

[210] On February 21, 2011, the General Manager of Planning and Development sent another memo to the City Manager, recommending that Council advise Mr. Dick that his Conservation Permit application was incomplete and that the application was being referred back to staff with the processing of the application held in abeyance until he submitted the necessary supporting information.

[211] The memo to the City Manager noted that the subject application was to remove and level the top of the property and the proposal differed from previous Conservation Permit applications which had proposed a more substantial reconfiguration of the entire slope and had been declined.

[212] It was stated that previous information provided by the owner, including details of previous site earthworks and engineering assessments, were inconsistent with the current application and therefore the information needed to be updated.

[213] It was pointed out that Mr. Dick continued to express frustration with previous applications and the request by staff that additional information be submitted.

[214] The memo indicated that he had not submitted information on the purpose of the proposal to remove several metres of soil materials from the top of his property and had not allowed staff to meet with his professional consultants to discuss the application and associated technical issues and questions.

[215] The memo indicated that Mr. Dick had been told that failure to submit the required information would result in the application being deemed incomplete, and he had been given until the close of business on February 18, 2011 to submit any additional information. No additional information had been received.

[216] Nevertheless it was stated Mr. Dick wished the application to be forwarded to Council for consideration as it was and staff recommended that the application be

referred back to staff and the application be held in abeyance until the owner submitted the necessary information to the City.

[217] On February 28, 2011, the Land Use and Economic Development standing committee suggested that Mr. Dick meet with the Manager of Development Services to discuss the matter further and recommended that Council advise Mr. Dick that his Conservation Permit application was incomplete and the matter was being referred back to staff until he submitted the necessary supporting information.

[218] On March 15, 2011, the City met with Mr. Dick and a new consultant, Geo Media Engineering Ltd., where a lengthy discussion was held about the City's requirements for conservation permits in general and specifically with respect to Mr. Dick's property because of its steep topography and because of the magnitude of earthworks proposed as part of his permit application.

[219] This appears to have followed upon Mr. Dick resubmitting his February 2, 2010 Conservation Permit application as an amended application by taking out the reference to elevation 124 metric geodesic to indicate that the proposed project was to remove and level the top of the property to a two to one slope on the west property line.

[220] On March 30, 2011, the City wrote Mr. Dick a letter, informing him of Council's decision to return the application to staff, and pointing out that he had submitted a formal Amendment to the Conservation Permit application on March 2, 2011 to modify the extent of earthworks proposed on his property, but no new technical material had been submitted by his consulting engineer that endorsed previous information in relation to the current application.

[221] It was noted that at the meeting of March 15, 2011 Mr. Grandberg of Geo Media Engineering had confirmed that he had not yet visited the site.

[222] The City's concerns were repeated once again in this letter to Mr. Dick and once again Schedule E was attached as well as Schedule A dealing with

geotechnical engineering report requirements and Schedule D dealing with assurance of professional design and commitment for field review - geotechnical.

[223] Mr. Dick was told that the City awaited submission of his preliminary information from his consulting engineer and he was urged to take proper action.

[224] Another meeting was held with Mr. Dick on May 5, 2011 and subsequently on June 9, 2011 the City wrote Mr. Dick another letter.

[225] This letter pointed out that since the March 30, 2011 letter, Mr. Dick had submitted a May 24, 2011 letter with attached slope displacement calculation report from Geo Media dated May 19, 2011, a letter dated May 25, 2011 requesting whether the property could be subdivided into three lots, and a letter dated May 26, 2011 including a Schedule D assurance of professional design and commitment for field review completed and signed on December 11, 2003 by Wayne Quong, P.Eng.

[226] The letter also indicated that a subdivision sketch submitted on May 26, 2011 but dated February 9, 2004 with handwritten notations, did not denote whether it was to be a permanent road to serve a possible future subdivision or a temporary road to allow excavation of the site, and the plan had not been endorsed by his qualified professional.

[227] A bare land strata plan from Underhill & Underhill Professional Land Surveyors submitted on May 26, 2011, but dated April 15, 2010, showed a proposed five-lot bare land strata subdivision as well as two site sections showing the original site slope and a proposed two to one slope, but the plan had not been prepared or endorsed by his qualified professional.

[228] Another plan of survey of the subject land prepared by Underhill & Underhill Professional Land Surveyors submitted on May 26, 2011, but dated April 21, 2001, showed a site section as well as a proposed 12.5% road and proposed survey grades of the road, but with no cover information and no explanation from his qualified professional on this plan.

[229] Several plans were submitted on June 3, 2011 but with no cover information or documentation to relate this to the current proposal by his qualified professional. Handwritten notations had been added to the plans with no explanation.

[230] It was noted that with the exception of the geotechnical reports, none of the information submitted had been endorsed by his qualified professional, Darryl Grandberg of Geo Media. Further the majority of the plans submitted were stated to be of a standard that was inadequate to support the application.

[231] Mr. Dick was told again that all submissions needed to be prepared by professional consultants based on standards of professional practice based on detailed data collection and analysis, appropriate methodology and complete documentation. He was told the City could not accept hand-sketched notations on previously photocopied material from previous studies with no supporting technical basis in relation to the current application, or use conceptual subdivision-based plans as part of his submissions, as the City was not considering a subdivision application.

[232] The City also said it could not accept information or submissions without cover information or documentation as to their purpose or their relationship to his geotechnical or other technical reports, or any plans or associated information in relation to the technical aspects of the proposal that were not endorsed by his qualified professional.

[233] He was told that continuing submissions of material of inferior quality without oversight by his qualified professional would not be acceptable and would prevent the City from undertaking the necessary review to complete the processing of the application.

[234] He was told the City required Geo Media as the qualified professional to provide letters of assurance to ensure complete oversight of all construction phases of his application and the December 11, 2003 assurance provided by Mr. Quong pertained to a previous proposal and was not acceptable.

[235] Mr. Dick was reminded again of the requirement to satisfy Schedule E of the Conservation Bylaw and that he consult with owners of adjacent properties and this preliminary feedback be included in his next submission.

[236] In relation to the May 4, 2011 geotechnical report submitted by Geo Media, the City noted several issues that had been identified as part of the preliminary review, including that the report was focused on excavation and construction of single-family dwellings rather than the elements that were the subject of the Conservation Permit application, including the proposed excavation and earthworks to re-profile the entire slope, as well as ancillary issues (access, slope stability, erosion and sediment control, etc.) that was the subject of the application request.

[237] It was said the May 4, 2011 geotechnical report relied on limited field exploration review and limited laboratory testing on soil samples and while the report raised concerns and made recommendations in relation to loose soils, construction and excavation requirements, and required oversight by a geotechnical engineer, letters of assurance that Geo Media would oversee all construction and excavation were not provided.

[238] The report also cited the September 14, 2004 excavation plan prepared by Jacques Whitford and said the excavation plan did not appear to be sufficiently detailed to ensure appropriate measures and controls would be in place to address safety and geotechnical slope stability through the excavation process.

[239] Further, the report confirmed that Mr. Dick had told the City in a telephone conversation of June 6, 2011 that the plan was prepared by him and not Jacques Whitford and it was very concerning to the City that his qualified professional had accepted these representations as those of Jacques Whitford despite the fact that Mr. Dick admitted that he had completed the plan.

[240] It was also noted that there was no discussion in the May 4, 2011 Geo Media geotechnical report about site access and constraints or requirements in relation to establishing an access road on the site for excavation and the report did not address

a number of the issues and requirements noted in the March 30, 2011 letter from the City.

[241] Given all of this, the City indicated an intention to proceed with an independent external peer review of these reports by another qualified professional.

[242] However it noted that on June 8, 2008 Mr. Dick had requested both verbally and in writing that his application proceed immediately to Council and no further processing be undertaken. He was told that being the case staff would proceed with his request and would include a summary of the current deficiencies in relation to his current application for Council's information.

[243] The City sought an independent external peer review of Mr. Dick's reports from Geo Media, by Golder Associates. Golder reviewed the two Geo Media reports of May 4, 2011 and May 19, 2011 for a proposed three-lot residential subdivision.

[244] Golder concluded that the geotechnical assessments undertaken by Geo Media were general in nature and insufficient for detailed design and the level of effort required at the Conservation Permit application stage for authorization to carry out earthworks in advance of future development.

[245] In Golder's opinion the limited nature of the geotechnical investigations carried out to that date did not appear to address the inherent risks that might prevail within the hillside area.

[246] In particular there was no specific geotechnical documentation confirming the soil or groundwater conditions in the vicinity where most of the construction effort was to take place.

[247] The City says that one of the biggest shortcomings of the supporting materials provided by Mr. Dick in respect of his 2010 Conservation Permit application was that the materials were directed towards the condition of his lot after the proposed earthworks were complete but provided little if any information about

the process by which the land would be excavated over the estimated three-to-five-year period.

[248] On June 30, 2011, the City wrote Mr. Dick again, referring to a meeting of the previous day with the City representatives when Mr. Dick indicated an intention to proceed with land clearing and soil removal activities on the property notwithstanding that no Conservation Permit had been issued for this work and in fact the property remained subject to a Stop Work Order preventing that work.

[249] He was reminded that he was not authorized to conduct any activities involving soil removal of the property and failure to comply with the City's Conservation Bylaw and Stop Work Order could result in the City taking enforcement action against him without further notice.

[250] On June 20, 2012, the City wrote to Mr. Dick, indicating that the City had not received any response to any of the outstanding materials required for the Conservation Permit application and therefore pursuant to s. 10.1 of the City's Development Procedures Bylaw his Conservation Permit application had been closed.

[251] There are three provincial statutes that are applicable to the applications for permits that Mr. Dick has made over the years since 2003. They are the *Community Charter*, S.B.C. 2003, c. 26, the *Local Government Act*, R.S.B.C. 1996, c. 323, and the *Land Title Act*, R.S.B.C. 1996, c. 250.

[252] The *Community Charter* authorizes council, by bylaw, to regulate, prohibit and impose requirements in relation to trees, protection of the natural environment, buildings and other structures, and the removal of soil and the deposit of soil or other material (s. 8(3)).

[253] Section 8(8) sets out as examples of the powers of council to regulate, prohibit and impose requirements that persons may engage in a regulated activity only in accordance with the rules established by the bylaw, and persons can be

prohibited from doing things with their property or be required to do things with their property and at their own expense.

[254] Section 15(1) of the *Charter* authorizes council in regulating under the *Charter* or under the *Local Government Act*, to provide for a system of licences, permits or approvals, including by doing one or more of prohibiting an activity or thing until a licence, permit or approval has been granted, providing for the granting and a refusal of licences, permits and approvals, providing for the effective periods of licences, permits and approvals, and establishing terms and conditions of the licence, permit or approval.

[255] Dealing with building permits, s. 55(2) authorizes the council by bylaw to require applicants for building permits, in circumstances as specified in the bylaw that relate to site conditions, provide the municipality with a certification by a qualified professional that the plans submitted with the permit application comply with the current provincial Building Code and other applicable enactments respecting safety, and authorize building inspectors for the municipality to require applicants for building permits to provide the municipality with that certification if the building inspector considers it is warranted by the circumstances.

[256] Section 56(2) authorizes the building inspector to require the owner of land to provide the building inspector with a report certified by a qualified professional that the land may be used safely for the use intended, if the building inspector considers that construction would be on land that is subject to or is likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche.

[257] The *Local Government Act* states that the purpose of the *Act* is to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and s. 903(1) of the *Act* authorize a local government by bylaw to divide the whole or part of the municipality into zones and regulate within a zone the use of land, buildings and other structures.

[258] The *Land Title Act*, under s. 77, authorizes municipal council to appoint an approving officer to govern subdivisions and under s. 86 authorizes the approving officer to consider matters in approving a subdivision application including whether the land is subject, or could reasonably be expected to be subject, to flooding, erosion, land slip or avalanche.

[259] The Conservation Bylaw of the City of Coquitlam stipulates in s. 4.1 that no person will deposit on or remove soil from land within the City unless that person has first obtained a permit in accordance with the provisions of the Bylaw.

[260] Section 5.1 of the Bylaw requires that an application for a permit include the applicable information set out in Schedule “E” to the Bylaw and s. 5.2 stipulates that after a preliminary review of any application for a permit made pursuant to s. 5.1, additional information may be required by the Director of a survey plan prepared by a surveyor showing the area in which the removal or deposit of soil is to occur with details of the surface of the permit lands before and after the removal or deposit as the case may be, as well as existing drainage methods before removal or deposit, the drainage methods to be used during removal or deposit and the drainage methods to be implemented following completion of the removal or deposit.

[261] In addition the Director of Permits and Licences may seek a report from a professional engineer containing a completed Schedule “D” Assurance of Professional Design and Commitment for Field Review, drawings and design prepared in accordance with Schedule “A” of the Bylaw showing the design of all permanent and temporary slopes, drainage, pre-load and landscaping on the permit lands, a certification that all aspects of the soil removal or deposit contemplated in the permit application will comply with the provisions of Part 8 of the British Columbia Building Code and a certification that the work will not injuriously affect adjacent land, structures, buildings or utilities.

[262] The Director may also seek information on the location of the site from which soil is to be moved from or the site to which soil is to be moved to.

[263] Section 6.3 authorizes the Director or Council to refuse to issue a permit if the proposed removal or deposit of soil will or is reasonably likely to contravene any bylaw of the City, or result in soil on the permit lands or on adjacent land becoming soft soil or susceptible to erosion, slippage, landslides, slumping or settling, or may threaten the health, safety or welfare of the public or be otherwise contrary to the public interest.

[264] Schedule “E” to the Conservation Bylaw lists a number of information that may be required as part of the permit application process.

[265] The Zoning Bylaw under s. 519(3) provides that no building or structure can be built on a slope in excess of 20 degrees.

[266] The Building Bylaw under Article 23.1 authorizes the building inspector, if the parcel contains slopes in excess of 15%, to require the applicant for a building permit to provide additional details on proposed final grading, retaining structures and drainage provisions.

[267] Article 24.2 authorizes the General Manager of Planning and Development to cancel an application if the applicant does not provide the City with requested additional information after 90 days of the written notification of the requirement.

[268] The Soil Removal Regulation Bylaw included a provision as of 1989 that no person shall remove any soil substance from lands within the District of Coquitlam unless the removal of soil substance is incidental to building construction or landscaping activities for which approval has been granted by the District of Coquitlam and the quantity of soil substance is less than 5,000 cubic metres.

[269] The Stream and Drainage Protection Bylaw provides that an owner or other person undertaking any construction work requiring a permit, permission or approval by the City, with the exception of construction work related to a building permit for the construction of a single or two-family dwelling, to submit a sediment control plan that complies with the requirements of s. 7 of the Bylaw as part of the application for the permit, permission or approval prior to proceeding with the construction work.

[270] The Tree Management Bylaw No. 4091, 2010 sets out a definition of “protected tree” and requires a permit for the cutting down or damage to a protected tree.

[271] If slopes are greater than 60%, a detailed site assessment prepared by a geotechnical engineer may be required by the General Manager along with a tree replacement plan as part of the tree-cutting permit application.

[272] The Tree-Cutting Permit Bylaw No. 2169, 1990 designates shaded land shown on maps attached as Schedules “A” and “B” that may be subject to flooding, erosion, land slip or avalanches, as tree-cutting permit areas. Mr. Dick’s land falls within these areas.

[273] In addition, apart from these areas, any slope of 20 degrees or greater, where the slope has a vertical height of three metres or greater, are designated as tree-cutting permit areas and a tree-cutting permit is required before any person cuts any trees within a designated tree-cutting permit area.

[274] For tree-cutting permits on lands with slopes of 20 degrees or greater, the City may require an applicant for a permit to provide at the applicant’s expense a report certified by a professional engineer that the proposed cutting of trees will not create a danger from flooding or erosion.

[275] There are two standards of review of decisions of council or permit officers that are applicable to the claims of Mr. Dick.

Law

[276] The first standard is one of correctness as to whether the City acted within its jurisdiction in refusing to issue Mr. Dick permits through the years.

[277] Mr. Dick does not challenge the jurisdiction of the City to issue or refuse to issue permits to him.

[278] In any event it is clear to me that the City has that jurisdiction under the applicable statute or bylaw that pertains to Mr. Dick's applications for permits.

[279] The second standard is whether the council or permit officer has acted reasonably in exercising their discretion.

[280] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada said the following about reasonableness:

47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[281] In a previous case of *Vancouver (City) v. Simpson*, [1977] 1 S.C.R. 71, Mr. Justice Martland cited with approval the lower court's reasons as follows:

Where, as here, there is direct statutory foundation for the ground given for the decision to approve or disapprove, and where it is not shown that that decision, despite its impact on an individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should, in my opinion, be no interference by the court with municipal officials honestly endeavouring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas.

[282] This deferential standard has been maintained in more recent decisions such as *Young v. Cowichan Valley (Regional District)*, 2005 BCSC 114, where the court said:

30 The nature of discretionary decision making is set out in *511784 BC Ltd. v. Salmon Arm (District)*, 19 M.P.L.R. (3d) 23 (B.C.S.C.), where, at page 243, the court observed:

All discretion is inherently discriminatory in that decisions are made which result in a choice or distinction being made. The exercise of

discretionary power is only unlawful if the discretion is exercised in an improper discriminatory manner, that is for some improper purpose or on some irrelevant basis. (See *Bignell Enterprises Ltd. v. Campbell River (District)* (1996) 34 M.P.L.R. (2d) 193 (B.C.S.C.).

31 Where a Regional District Board has made a decision within its jurisdiction, the appropriate test is that set out in *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 (S.C.C.) adopting the following from *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 per McLachlin J. (as she then was), at 244:

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, [1993] 1 S.C.R. 674, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate bodies as community representatives.

Discussion

[283] Mr. Dick has made multiple applications through the years for different permits that fall under different bylaws or a combination of bylaws, principally under the Conservation Bylaw.

[284] Mr. Dick's property is very challenging for development as it has a slope that varies from 27 degrees to 31 degrees in some areas and grades of up to 100 degrees in other areas

[285] On each application City staff informed Mr. Dick why his application for a permit was rejected and what was missing.

[286] While Mr. Dick supplied the City with letters from engineers he had retained, the City turned to Golder Associates for independent advice and declined to authorize the permits on the basis of those engineering opinions for reasons given to Mr. Dick by the City. Mr. Dick refused to update his engineering opinions when he changed his applications.

[287] On my review of the City's reasons for denying the applications through the years, I find those reasons to be reasonable and in accordance with the authority given to the City under the provincial statutes and their bylaws.

[288] Instead of seeking to meet the requirements of the City Mr. Dick elected to have his permit applications put before Council directly without meeting the City requirements, with the result that in each case Council declined to issue a permit.

[289] Mr. Dick must understand that the councillors do not have the expertise in these areas held by the City staff members and will unlikely grant a permit that is not endorsed by staff for perfectly good reasons.

[290] Through the years Mr. Dick has changed course of seeking building permits to conservation permits for construction of a driveway and single-family dwelling, to development four metres above Pipeline Road at the bottom of his slope, to development at the top of his slope, to a five-lot bare-land strata lot subdivision, and then to a three-lot bare-land strata lot subdivision submitted through Geo Media Engineers.

[291] He even proposed to obtain a permit for development to include the property of his next-door-neighbour without any approval of his next-door-neighbour being offered to the City.

[292] Mr. Dick may be understandably frustrated with all of the bylaw requirements, but he must realize and accept that his property sits in a municipality with bylaws authorized by the provincial government, and not in unorganized territory out in the hinterlands somewhere.

[293] At no point in time has the City said that no development on his property will be allowed. To the contrary, it has spent a great deal of time and effort in trying to make Mr. Dick understand what he needed to do to obtain permit approval. Meetings were held with Mr. Dick and the letters I have outlined from the City indicate genuine efforts on the part of the City to assist Mr. Dick.

[294] However, the City does not have any authority to issue permits that would place surrounding neighbours and the general public at risk from land slip, or anyone who might purchase any structure on his property that had been given a permit for which there was land slippage following development.

[295] There is no evidence that the City ever acted in bad faith towards Mr. Dick nor did the approving officer dealing with his subdivision applications.

[296] I am completely satisfied that the City acted reasonably in rejecting Mr. Dick's applications for the reasons given by the City at those times.

[297] The claim of Mr. Dick and 611481 BC Ltd. as set out in Mr. Dick's Statement of Claim issued June 11, 2010, as well as his January 31, 2013 proposed changes that are already covered in his Statement of Claim, are dismissed pursuant to Rule 9-7 of the *Rules of Court*.

[298] In addition, if this application should be considered to be a petition under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, the relief Mr. Dick and his company seek is refused.

[299] Mr. Dick will pay the costs of the action of the City under Appendix B at Scale B.

"The Honourable Mr. Justice Truscott"