IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *P.S.D. Enterprises Ltd. v. New Westminster (City),* 2011 BCSC 436

Date: 20110408
Docket: S070992
Registry: Vancouver

Between:

P.S.D. Enterprises Ltd.

Plaintiff

And

Corporation of the City of New Westminster and Tim Whitehead

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:	H. W. Veenstra D. T. McKenzie
Counsel for the Defendants:	J. M. Poole G. Allen
Place and Date of Trial:	New Westminster, B.C. June 21-25, 28-30, July 2, 5-9 and Vancouver, B.C. October 13-15, 2010
Place and Date of Judgment:	Vancouver, B.C. April 8, 2011

Introduction

[1] P.S.D. Enterprises Ltd. (P.S.D.) asserts that the City of New Westminster (the City) has engaged in negligent misrepresentation, negligence, failure to warn and promissory estoppel. This action arises out of events between P.S.D. and the City in 2006 and 2007, involving the City's desire to redevelop the block at 700 Columbia Street in downtown New Westminster, and P.S.D.'s desire to relocate its liquor licences from the Windsor Hotel on that block to another location in New Westminster.

[2] P.S.D. is not proceeding with its claim against Tim Whitehead.

Overview

[3] In 2006, P.S.D. Enterprises Ltd. owned the Windsor Hotel in the 700 block of Columbia Street in New Westminster. P.S.D. held two licences from the Liquor Control and Licensing Board of British Columbia (LCLB): a liquor primary (LP) licence authorizing the pub operation; and a liquor retail store (LRS) licence which authorized the operation of a liquor store. Nirmal Walia, the principal of P.S.D., operated a small hotel, a pub and a liquor store. He had no intention of selling the property or changing his business.

[4] In early 2006, the City of New Westminster explored opportunities to revitalize and redevelop the 700 block of Columbia Street. The City sought interest from Ballenas Project Management Ltd., which had redeveloped another area of downtown New Westminster, to purchase the three properties on that block of Columbia Street, including the Windsor Hotel. The plan was that Ballenas would demolish the hotel and build a new development on the site. Mr. Walia understood that if he agreed to sell his property to Ballenas, the City would take necessary steps to enable him to move his liquor businesses to another property in New Westminster.

[5] Mr. Walia wished to relocate his business to 12th Street in New Westminster and attempted to find a suitable location for a small hotel, pub and liquor store. By

September 2006, based on the types of property available on 12th Street, Mr. Walia decided to open a liquor store only. 12th Street was not zoned for a free standing liquor store; thus a zoning amendment by-law (rezoning) was required.

[6] The rezoning process requires two readings by City council, followed by a public hearing, a third reading by council and, if approved, the imposition of conditions on the applicant. Upon completion of those conditions, the rezoning is placed before council for fourth reading. If the by-law passes fourth reading, rezoning is achieved.

[7] In this case, after the third reading of the by-law passed, and before it came back to council for a fourth reading, Mr. Walia appeared before council and made submissions concerning the community's view and his own plans to open a liquor store on 12th Street. Council, upon receiving legal advice that the public hearing process had been compromised, rescinded third reading. A second public hearing was held and when the rezoning returned for third reading a second time, it was defeated.

[8] Following the rejection of the rezoning, P.S.D. tried to repudiate its purchase and sale agreement with Ballenas. They engaged in litigation. In March 2007, the litigation concluded and Ballenas' purchase of the Windsor Hotel completed. P.S.D. was unable to find another location for its liquor store, and in June 2008 the LCLB cancelled the LRS licence.

[9] P.S.D. claims against the City for damages for negligent misrepresentation. It asserts that:

a) Tim Whitehead, the City's director of development services at the time, provided a guarantee that the City would find a new location for P.S.D.'s liquor business and the liquor business could be moved to a different location in the City (the "guarantee representations");

b) Mr. Whitehead and the senior planner of the City at the time, Steven Scheving, made representations regarding third reading being the

appropriate condition precedent in P.S.D.'s agreement with Ballenas (the "third reading representation");

c) Jim Hurst, a senior planning analyst with the City, represented to Mr. Walia that he should bring his concerns to City Hall (the "Hurst representation"); and

d) The City failed to advise Mr. Walia before he spoke to the council meeting after third reading (the "omission").

[10] P.S.D. claims negligence against the City on the basis that the City employees failed to warn Mr. Walia that he should not speak at a council meeting after third reading.

[11] P.S.D. also asserts that the City should be estopped in this case from rescinding third reading. While that is no longer feasible, P.S.D. claims that an appropriate remedy is an award of damages.

[12] The City denies the allegations but argues that if the court finds the defendant to have committed the tort of negligent misrepresentation, then P.S.D. is contributory negligent.

Chronology

[13] Before 2006, the 700 block of Columbia Street consisted of three buildings: the B.C. Electric Railway (BCER) building at 774 - 782 Columbia Street, built in 1911, the Phillip's block at 752 Columbia Street, built in 1922, and the Windsor Hotel at 738 Columbia Street, built in 1899.

[14] In 2005, the BCER building was operating as a Value Village store. The Salvation Army, which ran a thrift store in property it owned at 811 Columbia Street, agreed to sell its property and purchase the BCER building with the intention of moving its thrift store there.

[15] The City's development services department entered into discussions with the Salvation Army about its plans for the BCER. The Salvation Army advised the City that it intended to make improvements to the interior of the building, but would retain the existing exterior metal cladding.

[16] At the same time the City was exploring opportunities for the possible redevelopment of that block of Columbia Street and considering a heritage revitalization of the block. The City's development services department began discussions with the Salvation Army about its plans for the BCER building. It suggested that the Salvation Army sell some of its density for the BCER building to a developer to provide funding for a heritage revitalization of the exterior of the building. The developer would use the extra density to build a development on the Phillips block site. The City decided to contact Ballenas, who had developed another property in downtown New Westminster. Negotiations involving Ballenas' principal, Peter Newall, the Salvation Army and City officials focused on a concept whereby Ballenas would agree to pay the Salvation Army for a transfer of density to be used for a development; the Salvation Army would use the funds from Ballenas for renovation and revitalization of the BCER building, particularly the heritage building facade; and the City and the Salvation Army would enter into a heritage revitalization agreement and amendments to the zoning by-law to allow for this transfer of density.

[17] The Salvation Army insisted that the exterior renovation to the BCER building had to be completed before it moved its thrift store into that location in early 2007. Tim Whitehead met with Mr. Newall to advise that the City supported the concept.

[18] In the spring of 2006, Ballenas entered into an agreement for the purchase of the Phillips block.

[19] Mr. Walia says that in February or March 2006 he was told by the mayor that something was coming up that would involve the Windsor Hotel. Mr. Walia said the mayor told him that it would be a good deal for Mr. Walia. Mr. Walia says that in February and March 2006 he was invited to meet with Mr. Whitehead. There were several meetings at which Mr. Whitehead introduced the concept of selling the

Windsor Hotel property so that the block could be redeveloped. Mr. Walia says he was willing to sell the Windsor Hotel property but he was not interested in selling his liquor licences. Mr. Walia says he advised Mr. Whitehead that he would consider a sale of the Windsor Hotel for an acceptable price provided he could relocate his pub and liquor store to a new location in New Westminster. On April 12, 2006, Mr. Whitehead met with Mr. Walia and Mr. Newall to discuss the possibility of Ballenas purchasing the Windsor Hotel and including that property in the project. Mr. Walia says that he was told during that meeting that the Salvation Army had strict timelines.

[20] On April 13, 2006 Ballenas made a written offer to purchase the Windsor Hotel from P.S.D. for $1.25 million. P.S.D. rejected the offer and made a counter-proposal for $1.95 million. The counter-proposal specified that the sale would not include the liquor licences and that the contract would be subject to P.S.D. entering into a firm contract to purchase a replacement property for its pub and liquor store.

[21] On April 19, 2006 Mr. Scheving and Mr. Newall made a presentation at an informal information meeting with the mayor and councillors about the status of the plans for the project. The purpose of the information meeting was to express the City objectives of restoring the important heritage buildings, and highlight any challenges to the project.

[22] On April 20, 2006, the City's planning department faxed information to Mr. Walia regarding the ownership of several properties on 12th Street in New Westminster, including the names of the owners of those properties. Mr. Walia was out of the country from April 22 to May 9, 2006. He says when he returned he had discussions with the LCLB and began looking for a site on 12th Street which would accommodate both his pub and a liquor store, and potentially a restaurant and small hotel.

[23] On June 1, 2006, Messrs. Whitehead and Scheving met with Mr. Walia to discuss the potential sale of the Windsor Hotel and the relocation of his pub and liquor store. Mr. Walia says that both Mr. Whitehead and Mr. Scheving "assured him

of the City's support for his relocation." Mr. Walia wanted the commitment in writing. Mr. Whitehead says that he told Mr. Walia he could not offer a guarantee that he would be allowed to move his business if he sold the Windsor Hotel to Ballenas. Mr. Whitehead indicated that as director of development services he was a "professional recommender" and advisor to council, but that it was council's decision whether or not they accepted Mr. Whitehead's recommendation.

[24] On June 5, 2006 the City issued a "comfort letter" to P.S.D. signed by Mr. Whitehead. It acknowledged that the City was assisting Mr. Walia in looking at new locations for his pub and liquor store. The letter states:

> The purpose of this letter is to convey to you the encouragement of the Development Services Department in coming to an agreement with respect to the sale of the Windsor Hotel property in order to bring about a comprehensive redevelopment of this block on Columbia Street. ... I also offer our assistance in your plans to relocate your business from the present location to another area in the City...
>
> ...
>
> As discussed, my Department will assist you by looking at various locations to which you may move your business...
>
> With regard to zoning...[s]taff will work with you and your architect to assist you through the review process in order to expedite development approvals...The City has very knowledgeable personnel who can outline for you the steps to follow and the avenues of consultation needed to bring your application to the City Council's attention.
>
> It is my opinion that your project offers significant benefits to yourself and the city. I would like to help you bring these benefits to fruition. I am especially encouraged by your commitment to reduce the number of seats and to upgrade the scale of your business. I feel that this positive direction will assist to undergird your efforts and help to facilitate the process. I would like to work with you to bring your dreams into reality and I would like to begin now.

[25] Also on June 5, 2006, Ballenas made a further offer to P.S.D. to purchase the Windsor Hotel property for $1.6 million. P.S.D. rejected that offer and made a counteroffer for $2 million. Throughout June 2006, Ballenas and the Salvation Army expressed concern to Mr. Whitehead about time delays resulting from the inclusion of the Windsor Hotel in the Columbia Street revitalization project. The City's preference, expressed through Mr. Whitehead, was that the Windsor Hotel had to be part of the project. On June 9, 2006 Mr. Walia attended a meeting with Mr.

Whitehead. Mr. Walia considered that Mr. Whitehead was angry at him for not coming to terms with Mr. Newall regarding Ballenas' purchase of the Windsor Hotel. Mr. Walia says that Mr. Whitehead said that the City could come in and shut his business down at anytime. Mr. Walia says he felt intimidated that the City was going to take some action which could reduce the value of his property. He was concerned that the City was on the side of Ballenas in its attempt to purchase the property.

[26] Because of this meeting, Mr. Walia said he considered that P.S.D. should negotiate a sale with Ballenas and that it should make further efforts to find an acceptable site for his liquor licences on 12th Street.

[27] Mr. Walia began to look for a smaller property which would accommodate a free standing liquor store. This change of focus was significant, as the City permitted the use of a combined pub and liquor store on 12th Street under the current zoning, but a free standing liquor store would require a full rezoning process, including a public hearing and multiple readings.

[28] On June 15, 2006, P.S.D. arranged to lease property at 628 12th Street, which provided for 1700 square feet of retail space. This would be adequate for a retail liquor store, but not more.

[29] On June 19, 2006, Mr. Walia met with Messrs. Whitehead and Scheving to discuss the status of P.S.D.'s negotiations with Ballenas. They discussed the rezoning application process, including that the rezoning application would have to receive first and second reading from City council, be discussed at a meeting of the advisory planning commission, go through a public hearing process, receive third reading from City council, and then receive fourth reading from City council before it was adopted.

[30] Also discussed at this meeting was the process for rezoning and the effect of third reading. Mr. Walia says that before the meeting he had been advised by his solicitor to seek fourth reading of the rezoning application as a condition on the sale of the Windsor Hotel to Ballenas. Mr. Newall did not wish to wait for fourth reading.

He advised Mr. Walia that he needed to have certainty about the scope of the project by September 2006 in order to meet the Salvation Army's guidelines. He did not want any delay in the completion of any conditions imposed between the third and fourth reading of the rezoning by-law. Mr. Walia says that Messrs. Whitehead and Scheving advised him that third reading is when the substantive decision is made by council. Once the applicant for rezoning satisfies the conditions on third reading it goes back for fourth reading and the council adopts the by-law. Mr. Walia was advised by Mr. Scheving that the council has never turned down a by-law on adoption, which is the fourth reading, once the by-law had already passed third reading. Mr. Walia said that, based on what he was told about third and fourth readings, he agreed that the sale would be subject to the condition of the rezoning by-law passing third reading. Mr. Walia knew that the adoption of the by-law would not occur until fourth reading. He also thought that his choice was either to agree to the third reading condition or not proceed with the deal at all. Mr. Walia signed the purchase and sale agreement and agreed to a third reading as a condition.

[31] On June 21, 2006 P.S.D. and Ballenas entered into a purchase and sale agreement in respect of the Windsor Hotel property. The purchase price was $2 million. The completion date was February 28, 2007. The agreement acknowledged that the sale did not include the liquor licences. There was a vendor's condition providing:

> Notwithstanding anything herein set forth, the Vendor's obligation to complete the Transaction will be subject to the condition that the Council of the City of New Westminster give third reading of a zoning amendment by-law to allow a liquor store to be located on and operated from premises at 628 12th Street, New Westminster.

[32] The condition had to be satisfied or waived not later than 50 days after the execution date, by August 10, 2006. Also on that date, Mr. Whitehead issued a formal report to council and committee of the whole recommending that the application for rezoning of the property at 628 12th Street to allow for a free standing liquor store be approved. In his report to council of the whole, Mr. Whitehead stated:

> The development services department recommends that council should only approve free standing liquor stores in exceptional circumstances, for

> instance, where a strategic objective that benefits New Westminster residents city-wide can be obtained. Such is the case with this particular application.
>
> Approval of the 1700 square foot liquor store will assist in bringing "on stream" a major catalytic development encompassing the entire block of the Downtown, with associated city-wide dividends for all New Westminster residents in terms of liveability, economic development and new tax assessment. In the view of the development services department, this greater good is of strategic importance to the future well-being of the city. It should be an overriding consideration.

[33] On June 22, 2006, P.S.D. applied for rezoning of the property at 628 12th Street. That transaction did not proceed as the vendor would not consent to the application for rezoning.

[34] On June 28, 2006, P.S.D. entered into an agreement to purchase property at 944 12th Street from Mahmoud Haghshenas. Mr. Haghshenas also signed a handwritten letter authorizing the purchaser (P.S.D.) to apply for rezoning.

[35] Shortly after he agreed to sell the property, Mr. Haghshenas attended City Hall to discuss plans. He met with Mr. Scheving and Keith Coeuffin, the supervisor of licensing at the City of New Westminster, to see whether he could move his business.

[36] Mr. Haghshenas was advised by Mr. Coeuffin that his specific business could not be relocated without rezoning. Mr. Haghshenas apparently changed his mind and wanted to get out of the agreement. He alleged through his lawyers that Mr. Walia had given him drinks and made him intoxicated prior to his signing the purchase and sale agreement. On July 13, 2006 Mr. Whitehead provided Mr. Haghshenas with a letter conveying the "encouragement and assistance of the development services department in [his plans] to relocate [his business] from 944 12th Street to another area on 12th Street." The letter promised assistance with regard to zoning and an opinion that relocating to another location on 12th Street would be of benefit to the surrounding neighbourhood, the City and Mr. Haghshenas. Mr. Whitehead closed the letter by saying:

> I would like to work with you to bring your dreams into reality and I would like to begin now. Should any one location not prove satisfactory, my department

> will assist you in searching for other locations to which you may move your business.
>
> I look forward to your application for this exciting project.

[37] P.S.D. did not pursue its dealings with Mr. Haghshenas.

[38] On July 16, 2006, P.S.D. entered into an interim lease agreement in respect of property at 804 12th Street. On July 17, 2006 P.S.D. applied for rezoning on that property to provide for a liquor store.

[39] On July 19, 2006 P.S.D. entered into an agreement amending the purchase and sale agreement of June 21, 2006. The amendment provided that the closing date was moved up to January 9, 2007; the purchase price was increased to $2,030,000 and the vendor's condition was amended to reflect the new location at 804 12th Street. A further paragraph was added:

> The foregoing condition is for the sole and exclusive benefit of the Vendor and will be deemed to be waived by the Vendor forthwith upon the Council of the City of New Westminster giving third reading of the zoning amendment by such date.

[40] On July 24, 2006 at a regular council meeting, council gave first and second reading to the zoning amendment by-law and set a public hearing date for August 28, 2006.

[41] On July 26, 2006, P.S.D. submitted an application to the LCLB for the transfer of the LRS licence to 804 12th Street. Also on that date P.S.D.'s rezoning application was considered at a meeting of the City's advisory planning commission. The commission voted not to support the application. Mr. Whitehead advised Mr. Walia that the result was not unexpected and the recommendation of the advisory planning commission was not binding on council.

[42] On August 21, 2006, P.S.D. held an open house at the Carpenters' Hall on 12th Street to discuss the proposed rezoning of 804 12th Street. Mr. Walia said Mr. Whitehead handled the presentation and explained the proposal regarding the liquor store to those in attendance. Mr. Whitehead said Mr. Walia made a presentation of

the elevation drawing for the new liquor store and talked about his business plan. Mr. Whitehead says that he sat in the gallery and then made one remark: his opinion that the liquor store was a positive addition to 12th Street.

[43] In preparation for the August 28, 2006 public hearing of P.S.D.'s rezoning application for 804 12th Street, the City published Notices of Public Hearing in the local newspaper on August 16 and 19, 2006. At the bottom of these notices the City included the following warning in bold type: "no further submissions can be considered by Council after the conclusion of the Public Hearing." Mr. Walia saw the notice and the warning. He says that he thought it only applied to public submissions.

[44] On August 28, 2006, the City held a public hearing regarding P.S.D.'s rezoning application. There was significant opposition to the application. Following the public hearing, council gave third reading approval to the rezoning by-law by a vote of 5 to 2. The resolutions specified four conditions prior to the adoption (fourth reading) of the by-law:

1. Consultation with the surrounding neighbourhood on the final site plan;

2. Consultation with the surrounding neighbourhood on the final building elevations and associated aesthetics;

3. Negotiation of a Good Neighbour Agreement with adjacent residents; and

4. The undertaking of crime prevention through environment design analysis (CPTED).

[45] On September 15, 2006, the LCLB sent separate letters to the City and to P.S.D. The letter summarized the rules:

> A licencee of a LRS must also be the licencee of a liquor-primary establishment.
>
> A licencee will only receive approval to relocate a LRS once all conditions, including the need to have an operating liquor primary establishment, are met.

> Once a LRS is operating at a new location, the licence of the associated liquor primary establishment may be placed into dormancy for 12 months, or longer on approval, due to major renovations, and/or a catastrophic event. During the period the liquor primary licence is dormant, the licencee must maintain a valid interest in the property and the LRS may continue to operate.
>
> A licencee who owns the property or who has a signed lease agreement with the property owner is considered to hold a valid interest in the property.
>
> If the property is sold and the licencee does not retain a valid interest in the property, then the licences for the liquor-primary establishment will be cancelled and the application for the LRS relocation will be terminated.

[46] The contents of the letter raised two factors for P.S.D.'s ongoing business. First, although it could apply to place its LP licence into dormancy, it had to have a "valid interest" in premises for that LP licence. Second, it had to have a new LRS location open and operating prior to the liquor primary premises ceasing to operate, which would occur, in accordance with the amendment agreement, on January 7, 2007.

[47] On September 18, 2006 P.S.D. and Ballenas entered a right of first offer agreement. The agreement required that Ballenas offer the commercial space on the ground floor of its Columbia Street development to P.S.D., who could make an offer on the premises. The agreement stated that a liquor store would not be allowed on the leased premises. The agreement was to satisfy the "valid interest in property" requirement to allow the LP licence to be placed into dormancy.

[48] On September 19, 2006, Ballenas wrote P.S.D., waiving all the conditions precedent and confirming that it considered the purchase and sale agreement in respect of the Windsor Hotel to be firm and binding.

[49] Mr. Walia says that through the rest of September he made numerous inquiries of the development services department to determine the status of the four conditions placed on the third reading of the rezoning. Mr. Walia considered that Mr. Whitehead was no longer returning his calls and he was hearing nothing from the department.

[50] Mr. Walia attended at the development services department office on Friday, September 29, 2006. He spoke to Jim Hurst, a senior planning analyst with the City at the counter. Mr. Walia asked Mr. Hurst what steps were being taken regarding satisfying the conditions attached to third reading and whether he should be hiring a lawyer to assist or whether he should be speaking to council. Mr. Walia says that Mr. Hurst warned him against getting lawyers involved but told him that if he wanted to speak to council to "be my guest". Mr. Hurst recalls that he told Mr. Walia "you can go upstairs and speak to council."

[51] The following Monday, October 2, 2006, Mr. Walia met with Keith Coeuffin to discuss a draft Good Neighbour Agreement. Mr. Walia says he told Mr. Coeuffin that he intended to attend the council meeting that night to advise council that all the terms were agreed to. Mr. Coeuffin does not recall that being said.

[52] In the evening of October 2, 2006, Mr. Walia attended a meeting at City council. Before he spoke, he completed a delegation request form setting out his request to speak. The form contained the following in bold font:

> **IMPORTANT: you are not permitted to make a submission on any land use by-law (eg. OCP amendment, rezoning) after the Public Hearing for that by-law has been concluded (unless the by-law has already been adopted or defeated).**

[53] Mr. Walia did speak at the meeting of City council and made a presentation referring to the Ballenas project, the meeting he had with community groups, and the meetings he had with City staff concerning the Good Neighbour Agreement. Councillor Osterman, who had made it known that he opposed the rezoning, asked Mr. Walia a number of questions. After a few minutes the mayor stated "we will have to move on because we are not allowed to discuss this since it's at third reading already." Mr. Whitehead then stated: "I was going to interject that council should not be taking any further information from Mr. Walia prior to fourth reading. The situation is in staff's hands ... and hopefully we can wrap this up and bring it all forward at the next council meeting."

[54] Council has a rule that it not hear substantive further submissions from a proponent of a by-law change after the public hearing is complete. It is a requirement of the *Local Government Act*, R.S.B.C. 1996, c. 323. The City's *Council Procedure By-law* provides that it "shall not permit any delegation to speak on a by-law where a public hearing has already taken place" (s. 15(1)(c)). In addition, the City has a long standing practice of stopping a proponent from speaking before he or she begins.

[55] The City obtained legal opinions concerning the effect of Mr. Walia's appearance before council. Both opinions considered that Mr. Walia's comments may have compromised the public hearing aspect of the zoning amendment process and that the by-law could potentially be challenged on that basis. A further public hearing was recommended.

[56] On October 16 or 17, 2006, Messrs. Walia and Newall met with Mr. Whitehead and other City officials. They were advised that the City intended to rescind its third reading and hold a new public hearing.

[57] Mr. Walia says that after this meeting, Mr. Newall indicated that it was Ballenas' preference to cancel their agreement and that the new development would go ahead without the Windsor Hotel. Mr. Walia says that he and Mr. Newall had a conversation the next day where Mr. Newall confirmed that he wanted to move ahead with the development just with the Phillips block. Mr. Newall denies that and says that he never agreed to terminate the purchase and sale agreement. The matter resulted in litigation, which found that the purchase and sale agreement remained binding on the parties.

[58] Given the positions of P.S.D. and Ballenas, it was not clear to the City whether the sale of the Windsor Hotel would conclude and whether Mr. Walia intended to move his liquor store to 12th Street. During late October 2006, council was considering holding a meeting to rescind the third reading of the by-law and scheduling a new public hearing. A meeting of council was held on October 19, 2006 but no steps were taken in respect of either.

[59] On November 6, 2006, Mr. Walia contacted the City and asked that the rezoning process for 804 12th Street continue. At a closed council meeting that day, Mr. Whitehead advised that he had to review the CPTED, Good Neighbour Agreement and site planning for the project, and upon completion of that review the process for a further public hearing could proceed. The drafting of the Good Neighbour Agreement and the CPTED analysis did proceed.

[60] On November 7, 2006 the LCLB wrote Mr. Walia to confirm that P.S.D.'s application to transfer its LRS licence to 804 12th Street had been accepted. It asked for detailed floor plans and other information, including the right of first offer with Ballenas which P.S.D. submitted.

[61] On November 10, 2006 counsel for P.S.D. wrote to the City solicitor advising of P.S.D.'s rezoning application and asking that it be dealt with as quickly as possible. He emphasized that the timing was tight and matters would need to proceed quickly.

[62] On November 20, 2006 P.S.D.'s counsel's November 10, 2006 letter was circulated at a closed council meeting. Council asked staff to bring forward a report to council on November 27, 2006. At the closed council meeting of November 27, 2006, council was advised that a report would be forthcoming at a future meeting. The committee of the whole and regular council meeting set for November 27, 2006 were cancelled.

[63] At a regular council meeting on December 4, 2006, council passed a motion that the third reading of the rezoning by-law in regard to 804 12th Street be rescinded. It announced a new public hearing would be held on January 22, 2007.

[64] On December 15, 2006, Ballenas brought a summary trial application before the B.C. Supreme Court seeking specific performance of its agreement with P.S.D. Mr. Justice Truscott reserved his reasons for judgment until January 5, 2007, when he allowed Ballenas' claim for specific performance and ordered that March 15, 2007 was the new completion date for the purchase and sale of the Windsor Hotel.

[65] On January 2, 2007, the LCLB confirmed approval in principle of P.S.D.'s application to transfer its licence to 804 12th Street and approved the floor plans that had been submitted. The right of first offer had been accepted by the LCLB as giving an adequate interest in property to allow for the liquor primary licence to be placed in dormancy.

[66] On the evening of January 22, 2007 a second public hearing was held on the rezoning of 804 12th Street. At the subsequent council meeting, third reading of the rezoning application was defeated unanimously.

[67] After the rezoning was defeated, Mr. Walia attempted to find another location for his pub and liquor store. He made some efforts to sell his licences. He applied to the LCLB for numerous extensions of time, a number of which were granted. On June 6, 2008, P.S.D. was notified that the LCLB was not prepared to grant any further extensions. The LRS licence was cancelled.

Negligent Misrepresentation

[68] The tort of negligent misrepresentation was recently described by Chief Justice Finch in *Smith v. Landstar Properties Inc.*, 2011 BCCA 44 [*Smith*], at paras. 26-31 and paras. 33-35:

> [26] In *Queen v. Cognos Inc.* [[1993] 1 S.C.R. 87] at 110, Mr. Justice Iacobucci identified the five requirements of a claim for negligent misrepresentation:
>
> > The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.
>
> [27] This formulation is helpful for identifying the necessary elements, but it must be remembered that negligent misrepresentation at its base is an action in negligence and shares the same analytical framework. Each of the requirements listed above corresponds with the requirements of a negligence action: duty of care, standard of care, causation and damage.

[28] In *Hercules Managements Ltd v. Ernst & Young,* [1997] 2 S.C.R. 165], Mr. Justice La Forest made it clear that the *Anns* test for a duty of care (*Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492, now updated by *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537) applies in cases of negligent misrepresentation. He said the following at para. 22:

> The first branch of the *Anns/Kamloops* test demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the latter, carelessness on its part may cause damage to the former. The existence of such a relationship - which has come to be known as a relationship of "neighbourhood" or "proximity" - distinguishes those circumstances in which the defendant owes a *prima facie* duty of care to the plaintiff from those where no such duty exists. In the context of a negligent misrepresentation action, then, deciding whether or not a *prima facie* duty of care exists necessitates an investigation into whether the defendant-representor and the plaintiff-representee can be said to be in a relationship of proximity or neighbourhood.

And at para. 24:

> To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in *Cognos*, supra, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

[29] The key inquiries are whether reliance by the plaintiff was reasonably foreseeable by the defendant and whether that reliance by the plaintiff was reasonable...

[30] At para. 43 of *Hercules Managements*, Mr. Justice La Forest cited with approval five *indicia* of reasonable reliance identified by Professor Bruce Feldthusen:

> (1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
>
> (2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
>
> (3) The advice or information was provided in the course of the defendant's business.
>
> (4) The information or advice was given deliberately, and not on a social occasion.
>
> (5) The information or advice was given in response to a specific enquiry or request.

> While these five indicia are not a strict test of reasonable reliance, they help distinguish cases where reliance is reasonable from those where it is not. As all of the *indicia* are present in this case, a prima facie duty of care exists.
>
> [31] The second stage of the *Anns* test considers whether there are policy considerations that negative the *prima facie* duty of care established at the first stage...
>
> [33] A deliberate misrepresentation may be more accurately described as fraudulent rather than negligent, but that cannot act to bar the claim in negligence, notwithstanding the fact that fraud or deceit was not pleaded by the plaintiff. Injustice would result if defendants were absolved of liability because their actions were deliberate rather than careless. In *Queen v. Cognos Inc.* at 125, Mr. Justice Iacobucci said the following:
>
> > Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care.
>
> [34] Although the comments reject the idea that moral blameworthiness is a necessary element of negligent misrepresentation, the obverse must also be true. If subjective belief in the truth of statements is irrelevant in negligence, knowledge that the statement is false cannot act to bar a claim for negligent misrepresentation.
>
> [35] The final two required elements are causation and damage...

Duty of Care

[69] P.S.D.'s reliance on the members of the development services and planning teams was reasonably foreseeable. The City employees were aware that Mr. Walia was not familiar with business relocation issues or rezoning processes. This is shown in the evidence of Mr. Scheving in examination for discovery where he agreed that Mr. Walia did not know about licensing issues; in the evidence of Mr. Hurst where he described P.S.D. as a "mom and pop" operation; and in the evidence that the City provided assistance to Mr. Walia in preparing for the open house and the public meetings which were required for rezoning. In addition, I accept that Mr. Walia initially had no intention of selling the Windsor Hotel or moving his business and did not do so until he was approached by the City in early 2006. I further find that members of the planning department seeking to develop the City's downtown

were encouraging and proactive in urging Mr. Walia to sell the Windsor Hotel and relocate his business.

[70] I also find that Mr. Walia's reliance on the City was reasonable, addressing the five *indicia* set out in *Hercules Managements*. The City had a direct or indirect financial interest in respect of which the representation was made: it was the job of the City's employees in the planning department; the City is professional and possesses special skill, judgment and knowledge in matters of rezoning; the advice and information was provided in the course of the City's business; and the information and advice was given deliberately and in response to specific inquiries or requests by Mr. Walia.

[71] There are several authorities in which the courts have found the duty of care between a property owner and a municipality to exist, where a municipal officer or employee provides advice relating to zoning issues which affect an owner's property: *Jung v. Burnaby (District)* (1978), 91 D.L.R. (3d) 592 (B.C.S.C.); W*indsor Motors Ltd. v. District of Powell River* (1969), 4 D.L.R. (3d) 155 (B.C.C.A.); *Harris v. Fredericton Junction (Village)* (1993), 109 D.L.R. (4th) 115 (N.B.Q.B.).

Misrepresentation

Guarantee representation

[72] P.S.D. asserts that Mr. Whitehead guaranteed that the City would find a new location for P.S.D.'s liquor business and that the liquor business could be moved to a different location. The guarantee representation was clearly untrue as Mr. Whitehead could not make any such guarantees on behalf of the City. P.S.D. asserts that Mr. Whitehead did not exercise the standard of care required, as he "absolutely" failed to provide the advice to Mr. Walia that a reasonably prudent planning advisor would provide, namely that such assurances could not be provided because the decision to rezone ultimately rested with council.

[73] I find that Mr. Whitehead did not make the guarantee representation. While he was proactive in urging Mr. Walia to proceed with the sale to Ballenas and the relocation of his business to 12th Street, he did not make any guarantees. The

comfort letter of June 5, 2006 falls short of a guarantee. It provides words of assistance and encouragement only. It does not suggest that there are binding legal relations between P.S.D. and the City.

[74] I accept that Mr. Walia wanted a written guarantee and considered that he was provided such a guarantee in the comfort letter. However, the comfort letter does not establish that the City intended to create a contractual arrangement in the manner of a guarantee between P.S.D. and the City. Further, as the City points out, a municipality cannot enter into a contractual arrangement which fetters its own legislative discretion. This was confirmed in *Vancouver (City) v. British Columbia (Registrar of Land Registration District)*, [1955] 2 D.L.R. 709 (B.C.C.A.) at para. 23:

> 23 Looking at it in another way, a contract of a municipal corporation by which it engages in advance that its council will pass a by-law involving the exercise of a discretion such as that vested in it by the *Town Planning Act* is contrary to public policy, for by introducing the extraneous consideration of a possible claim against the City for its failure to pass the by-law the contract tends to restrict the freedom of the individual members to decide the merits solely upon the relevant circumstances, as the law requires. I do not think the law will support any such prejudgment by contract of the question to be decided upon the submission of such a by-law any more than it will the judgment of a Judge delivered before he had heard the evidence.

Third reading representations

[75] P.S.D. alleges that Steven Scheving and Tim Whitehead's representations that third reading was an appropriate condition precedent in P.S.D.'s agreement with Ballenas was misleading given:

1. the foreseeable use of the representation (the insertion of such a condition into the agreement between Ballenas and P.S.D.);

2. the probable damage resulting from an inaccurate statement (the failure to relocate the plaintiff's business and the loss of the LRS licence);

3. the seniority and experience of Messrs. Scheving and Whitehead; and

4. Messrs. Scheving and Whitehead's failure to divulge past examples of rescission of third readings due to procedural defects and/or the potential for rescission of a third reading.

[76] P.S.D. argues that these constitute a breach of the standard of care. The representations made by Messrs. Scheving and Whitehead to P.S.D. did not point out the potential risk of agreeing to third reading as a condition of the purchase and sale agreement, and such a risk was within the special knowledge of Mr. Scheving and could have easily been conveyed.

[77] The City says that although Mr. Whitehead was familiar with the process through which by-laws were passed at the City, and knew that the by-law did not come into force until it passed fourth reading, Mr. Walia was also aware of this fact. Mr. Scheving told Mr. Walia that it was rare for a by-law that passed third reading not to pass fourth reading, but he and Mr. Whitehead advised Mr. Walia that the by-law was still subject to the discretion of council at the fourth reading. The City says that Mr. Whitehead knew that council often placed conditions on a by-law after third reading which must be satisfied before the by-law would be returned to council for a fourth reading. There were a number of conditions placed on P.S.D. in regard to the zoning amendment by-law at third reading. The City also argues that it was unreasonable for Mr. Walia to rely on these statements; Mr. Walia was receiving legal advice from his solicitor, Kevin Moore, throughout the process and his solicitor had specifically advised him that he should insist that his contract with Ballenas be contingent on final adoption of the zoning amendment by-law, not third reading. Mr. Walia's agreement to the third reading condition was contrary to the advice of Mr. Moore.

[78] I find that Mr. Walia was aware that a by-law does not come into force until it passes fourth reading. He was advised of this by his solicitor and he knew that council made binding decisions for the City. I agree with the City that it was unreasonable in this circumstance for Mr. Walia to rely on the statements made by Messrs. Whitehead and Scheving. The reliance was unwarranted, particularly in that

Mr. Walia acted contrary to the legal advice which he was given. In accordance with *Kemaldean v. Edmonton (City)* (1984), 52 A.R. 97 (Q.B.) the reasonableness of the plaintiff's reliance on a statement by the defendant "must be judged in light of the fact that he was acting under the advice of a solicitor presumed to be fully competent in planning matters" (at para. 43).

[79] Mr. Walia could have insisted on fourth reading being the operative condition with the potential risk of not making a deal with Ballenas. It was his decision as a businessman with the benefit of legal advice to freely choose to do otherwise.

Hurst representation

[80] P.S.D. asserts that Mr. Hurst was a long time planner who had knowledge of redevelopment applications and relocation issues. He had had a number of discussions and meetings with Mr. Walia on the issue of relocation prior to the discussion in late September. Mr. Hurst was aware of the potential effect of council hearing submissions from one party on a by-law after the by-law had completed third reading. P.S.D. asserts that Mr. Hurst's representation satisfies the five *indicia* in *Hercules Managements*. While Mr. Hurst's financial interest in the context of his being a municipal employee may be debatable, he had an indirect financial interest in Mr. Walia's transaction as he was a planner, and his employment and income are related to such transactions. Mr. Hurst's representation was provided in the course of business and related directly to planning and rezoning matters. Mr. Walia was inquiring about how to move the matter forward and Mr. Hurst advised him that he should go see council. While it may not have been deliberate advice, it was clearly given in response to a request from Mr. Walia.

[81] The City submits that Mr. Hurst's statement to Mr. Walia should be properly interpreted as a suggestion that Mr. Walia speak to council members informally and outside of the confines of a council meeting. The statement was not a misrepresentation, was not negligent and was not relied upon by Mr. Walia. Even if he relied upon the statement, Mr. Walia's reliance was unreasonable because Mr. Walia knew that Mr. Hurst was not heavily involved in the file and that Mr. Hurst was

not qualified to give advice on whether it would be appropriate to speak to council. Finally, the interaction between Mr. Walia and Mr. Hurst was brief, lasting only two to three minutes and Mr. Walia agreed that Mr. Hurst indicated during this time that he had no involvement with Mr. Walia's file and could not assist him.

[82] The City argues that the five *indicia* of reasonable reliance set out in *Hercules Managements* have not been satisfied. Mr. Hurst did not have a direct or indirect financial interest in Mr. Walia's transaction. While Mr. Hurst is a professional with special skill and judgment, it is not on the issue of municipal council procedure. The advice was not provided in the course of Mr. Hurst's business, which is planning and development. The advice was not given deliberately, but was an offhand response at the end of a short exchange.

[83] I find that it was not reasonable for Mr. Walia to rely on Mr. Hurst's offhand comment about speaking to council. Mr. Hurst did not say to speak to council at a council meeting. In the context of the exchange and with Mr. Walia's knowledge of Mr. Hurst's lack of involvement in his file, it cannot be construed as a "representation". Even if it is so construed, is not necessarily negligent or fraudulent.

[84] The concept of reasonable reliance was explained in *Micron Construction Ltd. v. Hongkong Bank of Canada*, 2000 BCCA 141 at paras. 102 and 103:

> [102] ... [T]he more relevant question is whether the reliance was reasonable having regard to all of the circumstances known to and affecting both parties...
>
> [103] The confusion inherent in the term "reasonable reliance" might be reduced if the term "justifiable reliance" was employed to state the test for imposing liability. That is a term which Professor Blom has employed in this context, as in this passage in his 1986-1987 article (*supra*, para. 86) at p. 283:
>
> > I would suggest the following general proposition, the underlying rationale of which extends beyond negligent misstatement to all forms of negligence:
> >
> > > In a case of negligent misstatement causing pure economic loss on a contract or other financial transaction, it is not enough that the average person would foreseeably rely on the defendant's statements. The defendant owes the plaintiff no duty of care unless a reasonably prudent and

> sceptical person, in the plaintiff's position, would have been led by the defendant's words or conduct to believe that he had an assurance of the defendant's taking reasonable care, equivalent in weight to the defendant's promise.

[85] Mr. Walia cannot establish that Mr. Hurst led him to believe that Mr. Hurst was taking reasonable care in arriving at any representation regarding communication with council. Further, Mr. Hurst did not advise Mr. Walia that he should make a presentation to the council meeting.

Omission

[86] P.S.D. claims that the City's failure to advise him that he should not address council at its October 2, 2006 meeting was misleading. P.S.D. refers to the *Council Procedure By-law* No. 6910 s.15(1)(c) which states:

> Council must not permit a delegation to address a meeting of the Council regarding a by-law where a public hearing has been held as required under an enactment as a prerequisite to the adoption of the by-law ("the delegation by-law").

[87] P.S.D. asserts that Mr. Walia was not aware of council's by-laws or procedures. He had earlier been advised by Mr. Hurst to go speak to council. P.S.D. argues that the City employees who were present at the council meeting had a duty to positively advise Mr. Walia of the potential consequence of his actions and by failing to do so they impliedly represented to Mr. Walia that he could speak to council. The purpose of the policy and the by-law, which required City employees and council to stop an individual from speaking on a matter, was to avoid exactly the type of situation that occurred here: rescission of third reading due to a procedural defect.

[88] Mr. Walia relies on these authorities:

1. *House of Barrs Ltd. v. The Toronto Dominion Bank*, [1997] 43 B.C.L.R. (3d) 117 (S.C.) where the court stated (at para 27): "There is no dispute that at law a misrepresentation can be a failure to divulge material information - it being just as misleading as a positive misstatement ..."

2. *Cognos*, where the Court stated (at para. 76):

> Undoubtedly, there will be cases such as the present one where the surrounding circumstances are such that it makes little difference, if any, how one characterizes the manner in which the representation is made, and where it would be unjust to deny recovery simply because the representation relied on is said to be implied rather than express...

3. *Spinks v. Canada*, [1996] 2 F.C. 563, where the Court of Appeal dealt with a misstatement of a government employee and set out the considerations for determining the standard of care at para. 33:

> I might emphasize that the standard of care here is that which is reasonably expected of a staffing officer in the circumstances. ... An advisor's responsibility is not one of complete or perfect disclosure. Trivia need not be mentioned. The duty rather, is one of reasonable disclosure, and what is reasonable varies according to circumstances. The mere failure to divulge is but one factor among others to be considered in deciding whether there has been negligence...
>
> Thus, where an advising person possesses or can easily obtain important and relevant information, and where this advising person fails to divulge this information in circumstances where economic loss is reasonably expected, the standard of care will have been breached. One of the key questions, here, is whether the supplier of information should have known that the information given or withheld was misleading...

[89] The City refers to the warnings placed on the notices of public hearing published in the local newspaper and on the delegation request form that Mr. Walia completed and signed when he arrived at the October 2, 2006 council meeting before being placed on the speakers list. Mr. Walia acknowledged that he read the notice on the delegation form which warned, in bold font, “Important: you are not permitted to make a submission on any land use by-law (eg ... rezoning) after the Public Hearing for the by-law has been concluded ...” Mr. Walia said that he filled out the top half of the delegation request form and scanned the bottom of the form to see where the line was for his signature, and he signed the form.

[90] The City argues that once Mr. Walia saw the warning on the delegation request form, it was incumbent upon him to either refrain from making submissions on the zoning amendment by-law or at least seek clarification as to what he was

permitted to say. It was not reasonable to rely on his interpretation of what Mr. Hurst had commented to him on September 29, 2006.

[91] I have already found that Mr. Walia did not justifiably rely on Mr. Hurst's statement that he could speak to council, and do not consider it as a feature of the omission. I also find that Mr. Walia either read or ignored the notice on the delegation request form. The warning was present and clear. P.S.D. has not satisfied the fourth requirement in *Cognos*: that Mr. Walia "must have relied, in a reasonable manner, on said negligent misrepresentation."

Negligence

[92] P.S.D. asserts that City staff members were negligent in failing to follow the City's own policies and a by-law related to the council meeting process.

[93] A municipality is immune from liability and negligence when the claim for damages is based on a good faith exercise of its legislative function: *Welbridge Holding Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957 at 969. In *Cooper v. Hobart*, 2001 SCC 79, the court considered both the foundation of this immunity and the distinction between government policy and the execution of policy. The court stated at para. 38:

> 38. ... It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons -- more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters.

[94] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the court held that "as a general rule, the traditional tort law duty of care will apply to a government agency in

the same way that it will apply to an individual ...” However, the court in *Just* determined that “a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions” (at para. 28). The analysis of whether such an exemption, which has been called policy immunity, exists must precede a traditional torts analysis, even where a duty of care may be found to exist (at para. 29).

[95] Before engaging in a traditional negligence analysis, therefore, I must consider whether an exemption by way of statute or policy-making decision exists.

[96] In *Les Enterprises Sibeca Inc. v. Municipality of Frelighsburg*, 2004 SCC 61, at para. 24, the Court noted that the purpose behind allowing “considerable latitude” to elected public bodies is to ensure that political disputes are resolved as democratically as possible. The Court held that in the absence of constitutional issues, it would be “inconceivable” for the courts to interfere in the process by which municipalities perform the functions that require them to take multiple and sometimes conflicting interests into consideration. Courts may only intervene in this process if there is evidence of bad faith.

[97] In *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 [*Kamloops*], the Court cited Lord Wilberforce’s distinction in *Anns* between “policy” and “operational” decisions:

> ... Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this ‘discretion’ meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many ‘operational’ powers or duties have in them some element of ‘discretion.’ It can safely be said that the more ‘operational’ a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

[98] In *Atlantic Leasing Ltd. v. Newfoundland* [1997] 164 Nfld. & P.E.I.R. 119 (NL C.A.), the court discussed the distinction between policy and operational decisions (at paras. 82 and 84):

> [82] It should also be noted that it has been observed by some writers that the policy/operational distinction has its problems and is very difficult in some cases for courts to apply...
>
> [84] ... Procedural aspects of governmental decision-making may therefore be generally regarded as "operational" where they relate to the process of implementation of other decisions.

[99] In *Birch Builders Ltd. v. Esquimalt*, (1992), 66 B.C.L.R. (2d) 208 (C.A.) the court applied the distinction at paras. 15 and 16:

> I note here that it is not pleaded by the plaintiffs that the clerk, Mr. Gray, was negligent and that the defendant municipality is liable vicariously for that negligence. The plea in the statement of claim is that:
>
> > 24. The sole reason for the invalidity of Development Permit No. 2 issued by Esquimalt to the Plaintiffs on November 14, 1988, was the negligence of Esquimalt in not adopting a resolution authorizing the issuance of the Development Permit as required by Section 971 of the Municipal Act, R.S.B.C. 1979, c. 290.
>
> In my opinion, on the basis of the statement of claim as it is before us, the principles enunciated in Welbridge apply to this case. That is what the Chambers judge held and with respect I agree with him. I do not think the principles enunciated by the Supreme Court of Canada in the *Just* case apply to a case such as this where what is under attack is what, in my opinion, is the legislative function of the municipal council. The passage of the required resolution for the issuance of a development permit is a legislative function. Likewise, the failure to pass such a resolution was legislative, not operational as that concept is developed in Just.

[100] In this case, the following statutory authority is relevant: s. 124 of the *Community Charter*, S.B.C. 2003, c. 26, which provides:

> **Procedure by-laws**
>
> **124** (1) A council must, by by-law, establish the general procedures to be followed by council and council committees in conducting their business.
>
> (2) Without limiting the matters that may be dealt with under this section, a council must, by by-law, do the following:
>
> (a) establish rules of procedure for council meetings, including the manner by which resolutions may be passed and the manner by which by-laws may be adopted in accordance with Division 3 *[By-law Procedures]* of this Part;
>
> (b) establish rules of procedure for meetings of council committees;
>
> (c) provide for the taking of minutes of council meetings and council committee meetings, including requiring certification of those minutes;

> (d) provide for advance public notice respecting the time, place and date of council committee meetings and establish the procedures for giving that notice;
>
> (e) identify places that are to be public notice posting places for the purposes of section 94 *[public notice]*;
>
> (f) establish the procedure for designating a person under section 130 *[designation of member to act in place of the mayor]*;
>
> (g) establish the first regular council meeting date referred to in section 125 (1) *[council meetings]* as a day in the first 10 days of December following a general local election.
>
> (3) A by-law under this section must not be amended, or repealed and substituted, unless the council first gives notice in accordance with section 94 *[public notice]* describing the proposed changes in general terms.

[101] The City enacted the delegation by-law: Council Procedure By-law No. 6910, s. 15(1)(c) which provides: "Council must not permit a delegation to address a meeting of the Council regarding a by-law where a public hearing has been held as required under an enactment as a prerequisite to the adoption of the by-law".

[102] P.S.D. asserts that it is challenging the manner in which certain government policies and practices were implemented. In P.S.D.'s submission, By-law No. 6910 was enacted as part of a policy decision to take steps to avoid exactly the type of situation that occurred here: rescission of third reading due to a procedural defect. P.S.D. says that council's decision not to stop Mr. Walia once he began speaking, when it became clear to the City employees and to the mayor that Mr. Walia was discussing the Windsor Hotel relocation, was an operational decision. More particularly, P.S.D. argues that the decisions of the City clerk, the mayor and Mr. Whitehead not to intervene sooner were operational decisions.

[103] P.S.D. also urges that the City will not be shielded from these employees' negligent actions. While City staff may potentially be acting in a legislative capacity during the course of a council meeting, they also acted in an operational capacity while performing their employment duties not related to their legislative functions. P.S.D. refers to the case of *Harris v. Fredericton Junction* (1993), 109 D.L.R. (4th)

115 (N.B.Q.B.), in which the court held that representations made over the course of a municipal council meeting were not legislative in nature.

[104] In this case, the negligence complained of is that the City clerk, whose duties include the running of council meetings, failed to carry out his operational duty of stopping a delegation from speaking at a council meeting. The clerk would not be providing advice to council on by-law issues or acting in a legislative capacity at this point. Mr. Walia also asserts that the mayor and Mr. Whitehead should have prevented him from speaking to council.

[105] The City argues that council was acting within its legislative function at the council meeting. Its immunity to liability in negligence for the exercise of its legislative function applies to the actions of its staff. The City argues that the only way for P.S.D. to avoid the impact of this immunity to liability is to establish bad faith, which has not been pleaded and has not been established.

[106] The City says that the staff members in attendance at the October 2, 2006 council meeting were directly involved in carrying out the council's legislative function. The staff members were in attendance in order to facilitate the council meeting and assist the council in hearing delegations, obtaining information relating to issues before council, and voting on proposed resolutions and by-laws. These, the City argues, are functions which are at the very core of the council's legislative authority.

[107] The City further asserts that even if P.S.D. establishes that the City staff who attended the council meeting on October 2, 2006, had a duty to stop Mr. Walia from making statements that put the third reading of the zoning amendment by-law in jeopardy and that City staff knew or ought to have known that Mr. Walia was making these statements, any failure of the City staff to stop Mr. Walia does not destroy the City's immunity from liability for negligence in the exercise of its legislative function, unless the actions are taken in bad faith.

[108] I note the principle set out in *Anns*, and reiterated in *Kamloops*, that deference is afforded to a policy decision, but that less deference will attach to the practical execution of that policy decision. It is the practical execution of the policy decision that is described as “operational” in the case law. To phrase it another way, in imposing on one of its officials a duty to enforce one of its by-laws or resolutions, the City imposes on that employee an operational duty. Although I am mindful of the statement at para. 25 in *Just* that “a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances”, I am of the view that such reasonable decision must nevertheless be of a policy rather than an operational nature.

[109] In the present case, the policy decision was the enactment of By-law No. 6910. The phrase “Council must not permit a delegation to address a meeting of the Council regarding a by-law where a public hearing has been held ...” imposed on Council and on City employees an operational duty to implement its policy. Accordingly, actions such as the publication of the Notices of Public Hearing on August 16 and 19, 2006, the printing of the notice regarding submissions on the delegation request form, and the actions of City employees and Council toward delegations addressing Council meetings may all be considered operational in nature.

[110] Having determined that the decision not to stop Mr. Walia from addressing council was an operational one, I must now determine whether it was negligent.

Duty of Care

[111] As I noted above, there are several authorities where the courts have found a duty of care between a property owner and a municipality. In *Odhavji Estate v. Woodhouse*, 2003 SCC 69 [*Odhavji*], the Supreme Court of Canada sets out the requirements for duty of care to exist in relation to an action against public authority: reasonable foreseeability, sufficient proximity and the absence of overriding policy that negatives or otherwise restricts the duty (at para. 52).

[112] In this case, I find that the City did have a duty of care with regard to following its own policies and by-law with regard to the council meeting process. Harm from failure to follow such policies and the by-law is reasonably foreseeable. In *Odhavji*, the court referred to the statement in *Hercules Managements* that proximity would be made out where "the circumstances of the relationship inhering between P.S.D. and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of P.S.D.'s legitimate interests in conducting his or her affairs" (at para. 49). In my view, such is the nature of the relationship between Mr. Walia and the City. Having determined that there is no overriding policy that negatives the duty, I find that a duty of care exists in this case.

Standard of Care

[113] P.S.D. argues City officials and employees failed to abide by their own by-law and procedures, and so breached the standard of care. P.S.D. says the evidence demonstrates that in other circumstances where a member of the public appeared to speak in regard to a by-law that had passed third reading, the City council or its employees took steps to stop the person from doing so. The failure of the City to abide by its own standard practices may be evidence of negligence. In contrast, the City argues that it took reasonable steps to advise the public, including Mr. Walia, of the limitation on speaking to a by-law that had passed third reading, in its notices in the newspaper and its warnings on the delegation form.

[114] The standard practice of the City in executing its policy, as stated in By-law No. 6910, not to permit delegations to speak on matters that had passed public hearing and third reading, appears to have been to inform the public about the policy through publication in the newspaper and on the delegation request form. In addition, City council members and employees would stop members of the public from speaking with regard to a by-law that had passed third reading, where possible.

[115] In this case, it appears that the City abided by its standard practice. P.S.D. does not argue that its practice is below the standard of care. Notices were published in the newspaper, the delegation request form which Mr. Walia filled out

contained a warning not to speak on a matter that had passed third reading, and council members did stop Mr. Walia once he began to speak about the by-law. It is unfortunate that they did not stop him before the public hearing process was compromised, but in my view this is insufficient to establish a breach of the standard of care.

[116] Having determined that there was no breach of the standard of care, I cannot find negligence in this case.

Conclusion

[117] P.S.D. has not satisfied me that the City engaged in negligent representation or negligence in its dealings with Mr. Walia or P.S.D. It is unnecessary to consider P.S.D.'s claim for damages.

[118] The action is dismissed. Unless there are matters of which I am unaware, the City is entitled to costs at Scale B. If they wish, the parties can make submission in respect of costs and may arrange to do so through trial scheduling.

"Gropper J."