



No. S143862
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

F.C.R.A FALSE CREEK RESIDENTS ASSOCIATION

PETITIONER

AND:

THE CITY OF VANCOUVER

RESPONDENT

Re: BC Place/Expo District Sub-area 9 - Creekside Park

NOTICE OF APPLICATION

Name of applicant: One West Holdings Ltd. ("Concord")

To: The Petitioner, F.C.R.A False Creek Residents Association (the "FCRA");

And: The Respondent, City of Vancouver (the "City")

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on August 26, 2014 at 09:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. That the applicant, Concord, be added to the proceeding in Supreme Court No. S-143862, as a party.

Part 2: FACTUAL BASIS

The Parties

1. The FCRA is a non-profit society incorporated in 2009 under the provisions of the *Society Act*, R.S.B.C. 1996, c. 43, with a head office at 1405-1128 Quebec Street in Vancouver, British Columbia.

2. The City is a municipality incorporated pursuant to the provisions of the *Vancouver Charter*, S.B.C. 1953, c. 53, and has an address at 453 West 12th Avenue in Vancouver, British Columbia.
3. Concord is a company incorporated under the laws of Canada and registered in British Columbia as an extra-provincial company with a head office at P.O. Box 10424, 1300-777 Dunsmuir Street in Vancouver, British Columbia.

Background

4. In order to permit Expo 86 to take place close to the heart of the City, the Province of British Columbia (the "Province") assembled a parcel of land on the North side of False Creek. Following Expo 86, the Province sold most of the site to Concord for redevelopment (the "Concord Pacific Place Lands").
5. Many of the parcels making up the Concord Pacific Place Lands were previously used for industrial purposes and had become contaminated. It was a term of the agreement between Concord and the Province that the Province assume full responsibility for the costs of any soil remediation.
6. Once development of the Concord Pacific Place Lands commenced, it became evident that the costs to the Province of removing all contaminated soil and treating that material off-site would be enormous. The Province then proposed that contaminated soils on development sites be buried on park sites which would become long term storage facilities. The soils would be covered by a protective membrane and the parks built on top of that membrane. The Province would become the owner of the park sites - hence continue to be responsible for the contaminated soils contained in them - and would lease the sites to the City on very long term leases calling for nominal rents.
7. This is the process that has been followed ever since: as development sites have been rezoned, the Province has identified contaminated soils on them and has removed that soil to the next park site to be developed, by agreement with Concord and the

City. Andy Livingstone, Coopers and George Wainborn Parks were all developed in this fashion.

8. Concord has developed most of the Concord Pacific Place Lands. The only areas that are currently undeveloped are sub-areas 6C and 9.

The Statutory Regime

9. On May 17, 1956, the Council of the City of Vancouver passed By-law No. 3575, being the Zoning and Development By-law. The Zoning and Development By-law allows the Director of Planning to relax the provisions of a by-law where literal enforcement would result in unnecessary hardship. Section 3.2.4 provides:

The Development Permit Board, in the exercise of its jurisdiction, may relax the provision of this By-law in any case where literal enforcement would result in unnecessary hardship. In granting any relaxation, the Board shall have regard to the intent of this By-law, the regulations and policies of any Official Development Plan, and other applicable policies and guidelines adopted by Council

(the "Hardship Provision").

10. On February 21, 1984, the Council of the City of Vancouver enacted By-law No. 5744, a by-law to amend the Zoning and Development By-law. By-law No. 5744 created a new Comprehensive Development District known as the BC Place/Expo District (the "BCPED"). All of the Concord Pacific Place Lands fell within the BCPED. A map of the BCPED, as it stood in 2000, can be seen in exhibit "F", Figure 1, to the affidavit #1 of Matthew Meehan.
11. On August 30, 1988, the Council of the City of Vancouver approved the False Creek Policy Broadsheets. The policies are intended to be used by the City and developers to guide future development in the False Creek Area. Section 11 of the False Creek Policy Broadsheets anticipates owners using their property for interim uses to generate some income. Section 11 states:
 - Interim uses should be facilitated provided they are compatible with anticipated permanent uses, the shorelines and water experience, and views across the water.

- Interim uses should be moveable, low intensity, or low in capital investment.
 - Time limits on interim uses should be secured through a legal arrangement satisfactory to the Director of Legal Services.
12. On April 20, 1990, the Council of the City of Vancouver enacted By-law No. 6650, which adopted the False Creek North Official Development Plan (the "Development Plan"). The Development Plan established the framework for development of properties, including sub-area 9, stretching from the Granville Bridge in Vancouver east to Quebec Street, nearly all of which were owned by Concord.

13. Section 5 of the Development Plan provides:

The development of False Creek North is expected to occur over many years. Interim uses are appropriate, having regard to the policies set out in the False Creek Policy Broadsheets.

14. The vision under the Development Plan is to extend Creekside Park into sub-area 9. Currently, Creekside Park runs from Science World, north towards the boundary of sub-area 9. See Figures 6, 11 and 12a of the Development Plan, which is exhibit "E" to the affidavit #1 of Matthew Meehan.

15. In October 2000, By-law No. 5744 was amended, *inter alia*, to include a provision limiting the use of sub-area 9 to park and recreational uses and customarily ancillary uses. Section 2.2 of By-law No. 5744 provides:

Despite Section 2.1, uses will be further limited in several of the sub-areas known in Figure 1, as follows:

- (c) sub-area 9 will be limited to park and recreational uses and customarily ancillary uses.

Trigger of the Creekside Park Extension

16. Under the current legal agreements between the City, Concord and the Province, Concord has no obligation, or authorization, to commence construction of the Creekside Park Extension. This obligation will not arise until sub-area 6C is rezoned and excavated.

17. The Province has reserved the right, consistent with previous practice, to relocate the contaminated soils from sub-area 6C onto sub-area 9.
18. In 2004 Concord applied to the City to rezone and develop sub-area 6C. That application was refused in 2005.
19. Events since then have further complicated the picture. In 2013, the City resolved to consider demolishing the Georgia and Dunsmuir viaducts and replacing them with an at-grade road network. The City commissioned a two-year study of that proposal.
20. If the City decides, based on the results of the study, to demolish the viaducts and replace them with an at-grade road network, then it will likely need to seek alterations of the boundaries of sub-areas 6C and 9. Land swaps of that sort are typically worked out in the context of an application to rezone, when the developer's interest in obtaining rezoning may be of assistance to the City in obtaining the desired land swaps.
21. As a result, the City has advised Concord that it has no interest in considering the rezoning of sub-area 6C until the future of the Georgia and Dunsmuir viaducts have been determined.
22. As a result of all of the foregoing, the key steps that must be taken before construction of the Creekside Park Extension are as follows:
 - (a) Completion of the study of removal of the viaducts;
 - (b) A decision by the City as to whether to remove the viaducts;
 - (c) Designing the at-grade road network to a degree sufficient to determine the City's land needs;
 - (d) Concord applying for rezoning of sub-areas 6C and 9 and agreeing with the City on the shapes of sub-areas 6C and 9;
 - (e) The City granting the new zoning for sub-area 6C; and

- (f) Concord excavating sub-area 6C to allow the contaminated soil to be relocated to sub-area 9.
- 23. To help expedite the process, Concord has committed to contributing \$250,000 towards the first step: completing the study of removing the viaducts.

The Application for a Development Permit

- 24. In 2005, Concord brought an application for the construction of two temporary presentation centre buildings, with 62 associated surface parking spaces and one loading zone, on sub-area 9.
- 25. A presentation centre is a place where a potential buyer can go to obtain information on new and existing developments. The presentation centre, staffed with marketing and sales personnel, typically contains vignettes or full suite models for proposed developments as well as other marketing tools to assist a buyer with getting orientated with the local neighbourhood and City.
- 26. Presentation centres have played an integral role in Concord's ability to sell and market developments on Concord Pacific Place Lands.
- 27. Prior to applying for a development permit for sub-area 9, Concord had three presentation centre buildings on Homer Mews in Vancouver. As development of the Homer Mews site was expected to commence in the fall of 2005, Concord needed to move the presentation centre buildings to a new location.
- 28. This would be the third move of the Vancouver presentation centre in 15 years.
- 29. There is limited vacant space in Vancouver to accommodate presentation centre buildings. Relocating to sub-area 9 was ideal because of its proximity to the proposed developments in the area.
- 30. Additionally, in accordance with the agreements between the City, Concord and the Province, sub-area 9 is the last area to be developed in the Concord Pacific Place

Lands. This meant the presentation centre could remain in sub-area 9 for a number of years.

31. On June 22, 2005, the Development Permit Staff Committee recommended (the "Committee Report") that the Development Permit Board (the "Board") approve the application as submitted with a number of conditions, including:

- (a) producing a Site Management Plan to the satisfaction of the Director of Planning;
 - (b) designing a development to provide temporary pedestrian lighting, signage and appropriate markings along the seawall wall/bike route;
 - (c) designing and constructing access to Carrall Street;
 - (d) widening the seawall by approximately 5' along the site and removal of the fence north of the seawall; and
 - (e) initiating a design process for the future Creekside Park extension, in consultation with neighbours
- (the "First Conditions").

32. The Committee Report stated that it was appropriate for the Board to consider approving the application under the Hardship Provision.

33. The Committee Report concluded that Concord would face unnecessary hardship if the application was denied. The Committee Report stated:

Staff believe it would be an unnecessary hardship to the applicant to deny the use of this site, given that there are few other vacant sites in the vicinity, and each would likely trigger a requirement for multiple relocations.

34. On July 19, 2005, the Board granted Concord a development permit numbered DE409317, permitting the construction of two temporary presentation centres, parking and one loading space, for a period of three years from the date of occupancy.

35. In 2006, the Director of Planning approved amendments to DE409317, which allowed for the addition of a third presentation building on the site.
36. Concord spent approximately one half million dollars in satisfying the First Conditions and approximately three and one half million dollars in relocating and constructing the presentation centre buildings.
37. The date of occupancy was determined to be March 2008, leading the development permit to expire in 2011.
38. In 2011, Concord brought an application to renew DE409317 for an additional three years.
39. On April 26, 2011, the Development Permit Staff Committee recommended that the Board approve the application as submitted, subject to conditions, including:
 - (a) enhancing the public water edge and seaside greenway to the satisfaction of the Director of Planning, the General Manager of Engineering Services and the General Manager of Parks and Recreation;
 - (b) providing a separated bicycle path for northbound cyclists;
 - (c) enhancing the property edge of Pacific Boulevard, Carrall Street Greenway south of Pacific and the southeast corner of sub-area 9; and
 - (d) providing a Site Management Plan
(the "Second Conditions").
40. Concord spent approximately one hundred thousand dollars in satisfying the Second Conditions.
41. On May 16, 2011 the Board approved an extension to DE409317 for an additional three years, expiring on May 16, 2014.

42. On May 21, 2014, the FCRA filed a Petition against the City pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "Petition"), seeking the following relief:
- (a) A declaration that BCPED Bylaw No. 5744 and the Development Plan preclude the use of sub-area 9 of the BCPED for commercial uses, specifically for commercial sales of residential developments, for a commercial parking operation and for commercial land rentals.
 - (b) Alternatively, a declaration that the current commercial uses of sub-area 9 of the BCPED fail to meet the criteria set out in the Vancouver Charter for the relaxation provisions of Bylaw 5744 or the Official Development Plan for False Creek North.
 - (c) An order in the nature of prohibition to prevent the City from issuing a permit over sub-area 9 of the BCPED which contravenes Bylaw No. 5744 and the Development Plan, including any temporary development permit for a sales centre, or any permit for a commercial parking operation or commercial land rentals.
43. The relief sought by the FCRA would have little effect on the Respondent City. Its dominant effect would be to stop Concord's commercial activities on sub-area 9, including the operation of its presentation centre.
44. Losing the ability to operate a presentation centre on sub-area 9 would negatively impact Concord's ability to sell and market developments in the Concord Pacific Place Lands. This is because sub-area 9 offers advantages that no other space in Vancouver has.
45. The primary advantage with sub-area 9 is its location. The presentation centre is located just off the seawall, overlooking False Creek. This helps to provide buyers with a premium sales experience.
46. In addition, Concord is able to market the developments in conjunction with the local community. The presentation centre is walking distance to the current and proposed developments in the Concord Pacific Place Lands. Buyers are encouraged to go outside and walk to the development sites. Being able to walk along the seawall, and experience the community, is an important marketing tool.

47. Further, the presentation centre, comprised of three buildings, is visible from the nearby streets, sky train, seawall and entertainment venues. The presentation centre's location generates a lot of walk-in traffic.
48. There is no other vacant space in Vancouver that would allow Concord to offer buyers the same selling experience as sub-area 9.
49. If Concord were required to move the presentation centre, it would cost in the range of two to three million dollars and result in the presentation centre being closed for approximately 6-9 months. A closure of the presentation centre would result in a loss of business and revenue to Concord.
50. Despite the importance of the presentation centre to Concord, the FCRA did not name Concord as a party to the Petition.
51. On May 24, 2014, counsel for Concord e-mailed counsel for the FCRA, requesting to have Concord joined as a party to the proceeding.
52. Counsel for the FCRA replied on May 27, 2014, indicating that the FCRA would not consent to Concord being joined as a party. The FCRA indicated that it would not oppose Concord participating as an intervenor.

Part 3: LEGAL BASIS

1. There does not appear to be any disagreement between Concord and the FCRA that Concord should be permitted to participate in the proceeding. The issue for determination is the degree and status of Concord's involvement.
2. Concord submits that status as an intervenor would be grossly inadequate in the circumstances and accordingly, seeks to be added as a party to the proceeding.
3. The difference between being an intervenor and a party is significant. "Intervenors" have been described by the BC Court of Appeal as "persons or associations that are permitted to participate in proceedings to promote their own views, though the proceeding will not determine their legal rights" [emphasis added.] This definition helps to illuminate the reason why Concord submits it must be added as a party to

the proceeding: the Petition seeks to eliminate Concord's right to operate its presentation centre on sub-area 9.

Kitimat (District) v. British Columbia (Minister of Energy and Mines),
2006 BCCA 562 at para. 45 [*Kitimat*]

4. There are two key differences between the procedural rights of a party and an intervenor, over which the Court has no discretion:
 - (a) An intervenor does not have the ability to appeal an order under the *Court of Appeal Act*; and
 - (b) An intervenor cannot bring applications within the Petition proceeding.

Kitimat at paras. 15 and 26

5. Both of these rights are fundamental to Concord's ability to protect its interests. If the Court makes an order adverse to Concord's direct interests, Concord should be permitted to appeal the matter. It is contrary to the interests of justice to require Concord to rely on a decision of the City to bring an appeal.
6. In addition, status as an intervenor would prevent Concord from bringing procedural applications which may assist Concord in advancing its case. For instance, Concord is minded to bring an application to allow for cross-examination on the affidavit of Fern Jeffries. The FCRA is relying on Ms. Jeffries' affidavit to support its Petition to restrain Concord's activities on sub-area 9. Ms. Jeffries' affidavit makes allegations about Concord's presentation centre buildings and Concord's conduct. Cross-examination of Ms. Jeffries on her affidavit will assist the Court in finding the facts on which the Petition is to be decided.
7. Under Rule 6-2(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, the Court has the discretion to add a party at any stage of the proceeding.
8. Concord submits it is entitled to be added as a party to the Petition under Rule 6-2(7)(b)(i) or Rule 6-2(7)(c).

Concord ought to have been joined as a party

9. Under Rule 6-2(7)(b)(i), the court may add a party to a proceeding if that person ought to have been joined as a party.
10. It is well settled that a party "ought to have been joined" if his or her participation is necessary. A party is necessary if his or her direct interests might be affected by the granting of the relief sought.
11. In *Morishita v. Corporation of the Township of Richmond* (1990), 44 B.C.L.R. (2d) 390 (C.A.). Madam Justice Southin held:

...generally, it is necessary to make a person whose direct interest might be affected by the granting of the relief sought, a respondent to a petition for judicial review and a failure to do so is fatal.
12. A party has a direct interest in a proceeding if he or she is "affected by the precise outcome between the parties", rather than "affected by the answer to the legal question in dispute".

Can. Labour Congress v. Bhindi (1985), 61 B.C.L.R. 85 (C.A.)
13. It is abundantly clear that Concord has a direct interest in the outcome of the Petition. Concord owns sub-area 9. A granting of the relief sought would eliminate Concord's ability to operate its presentation centre, or other commercial activities, in the area.
14. Concord's presentation centre is uniquely positioned to provide potential buyers with a premium sales experience. The presentation centre is located on the seawall overlooking False Creek. Buyers can obtain information on developments and view suite models or vignettes while experiencing some of the best views False Creek has to offer. It is this environment that has enhanced Concord's ability to sell and market numerous developments in the Concord Pacific Place Lands.

15. In addition, Concord has invested significant resources in the construction and maintenance of the presentation centre buildings as well as completing the First and Second Conditions.
16. Concord's ability to market and sell developments would be hampered if Concord was to lose its presentation centre on sub-area 9. In particular:
 - (a) There is no other vacant space in Vancouver that would provide customers with the same selling experience as sub-area 9;
 - (b) The cost of moving the presentation centre would be approximately 2-3 million dollars; and
 - (c) Moving would result in the presentation centre being closed for approximately 6-9 months, leading to a loss of business and revenue.
17. Given Concord's direct interest in the outcome of the proceeding, Concord ought to have been joined as a party.
18. In addition, it is the merits of Concord's application to the Board for a temporary development permit that is under review. Any participant in an administrative hearing should be named as a respondent to any judicial review proceeding connected with it.

British Columbia (Police Complaint Commissioner) v. Murphy,
2003 BCSC 279 at para. 53

It would be just and convenient to determine the issues between Concord and the FCRA

19. Rule 6-2(7)(c) lowers the threshold for adding a party to a proceeding. Under Rule 6-2(7)(c), the Court may add a party to a petition for judicial review if the party demonstrates:
 - (a) an interest in the object or subject of the litigation sufficient to require joinder;and

(b) that it is just and convenient to determine the question or issue between that party and the one already in the proceeding.

Kitimat at paras. 34-35

20. The FCRA seeks remedies that directly restrict Concord's use of sub-area 9. As such, Concord has an interest in the outcome of the litigation sufficient to require joinder.
21. Concord submits it would be just and convenient to determine the issues between the FCRA and Concord in relation to the temporary use of sub-area 9. The FCRA, in not opposing Concord's participation as an intervenor, does not seriously contest this point.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Matthew Meehan, sworn July 24, 2014;
2. Affidavit #1 of Thelma Zindoga, sworn July 24, 2014;
3. Pleadings filed herein; and
4. Such further and other material as counsel may advise and the Court may permit.

The applicant estimates that the application will take 90 minutes

- | | |
|-------------------------------------|---|
| <input checked="" type="checkbox"/> | This matter is within the jurisdiction of a master. |
| <input type="checkbox"/> | This matter is not within the jurisdiction of a master. |

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and

- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: 24/July/2014

Signature of _____

- Applicant
- Lawyer for Applicant

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To be completed by the court only:

Order made

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

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> | discovery: comply with demand for documents |
| <input type="checkbox"/> | discovery: production of additional documents |
| <input type="checkbox"/> | other matters concerning document discovery |
| <input type="checkbox"/> | extend oral discovery |
| <input type="checkbox"/> | other matter concerning oral discovery |
| <input type="checkbox"/> | amend pleadings |
| <input checked="" type="checkbox"/> | add/change parties |
| <input type="checkbox"/> | summary judgment |
| <input type="checkbox"/> | summary trial |
| <input type="checkbox"/> | service |
| <input type="checkbox"/> | mediation |
| <input type="checkbox"/> | adjournments |
| <input type="checkbox"/> | proceedings at trial |
| <input type="checkbox"/> | case plan orders: amend |
| <input type="checkbox"/> | case plan orders: other |
| <input type="checkbox"/> | experts |

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