ITEM 3
MANAGER'S REPORT NO. 53
COUNCIL MEETING Aug. 6/74

Re: Rezoning Reference #16/74
From M1 to P8, Bylaw No. 6480
Former Canadian Auto Carrier Property
7370 and 7450 MacPherson Avenue
7422, 7470, 7409, 7411 Buller Avenue
(Item 11, Manager's Report No. 43, June 10, 1974)

At the May 27, 1974 Council meeting we advised that we had received notice of intention from Columbia Estate Company, Limited that they intended to move to quash our Amendment Bylaw No. 27, 1974, by making application to the Supreme Court of B.C.

We have been advised that Mr. Justice Bouck has quashed the Bylaw, and attached for your information is a copy of the Reasons for Judgment.

The Municipal Solicitor has reviewed the Reasons and we do not recommend that the decision be appealed.

No. X.6106/74

ITEM 3
MANAGER'S REPORT NO. 53
COUNCIL MEETING Aug. 6/74

VANCOUVER
JUL 19 1974
REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE MUNICIPAL ACT R.S.B.C. 1960, CHAPTER 255 AND AMENDING ACTS

AND IN THE MATTER OF THE CORPORATION OF THE DISTRICT OF BURNABY BY-LAW NO. 6480, OTHERWISE KNOWN AS BURNABY ZONING BY-LAW 1965, AMENDMENT BY-LAW NO. 27, 1974

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE BOUCK

Counsel for the Applicant, Columbia Estate Company, Limited; R. D. Strilive, Esq.,

Counsel for the Respondent, The Corporation of the District of Burnaby; W. L. Stirling, Esq., Paul E. Kendrick, Esq.

Date and Place of Hearing: Vancouver, B.C. June 26, 27 and 28, 1974

NATURE OF PROCEEDINGS

This is an application by way of an Originating Notice to quash for illegality Burnaby Zoning By-Law 1965, Amendment By-Law No. 27, 1974, adopted by the members of Council of the Respondent on May 6, 1974, as By-Law No. 6480 (hereinafter called "By-Law No. 6480").

FACTS

Columbia Estates Ltd. (Columbia) was at all material times a wholly-owned subsidiary of British Columbia Hydro and Power Authority. The latter also carries on business as British Columbia Hydro Railway (Hydro) in the Lower Mainland area, including the Municipality of Burnaby.

Columbia's main purpose is to purchase and develop industrial real estate adjacent to Hydro railway right-of-way. The

industrial corporations that buy or lease this land from Columbia are carefully chosen so as to generate as much railway traffic as possible for Hydro.

In December of 1964, Columbia sold certain lots known as Lots 41 and 43, District Lot 97, Group 1, Plan 27404, New Westminster District (hereinafter called Lots 41 and 43), to O'Connor Transport Ltd., now known as Canadian Auto Carriers Ltd. (Auto Carriers) with the right of first refusal to re-purchase these lots. Columbia also owned at all relevant times an adjacent lot described as Lot 2, Block J and 27, District Lot 97, Group 1, Plan 21397, New Westminster District (hereinafter called Lot 2).

The Hydro railway which serviced Lots 2, 41 and 43 as well as other property in the area is located on Lots 40 and 42, D.L. 97, Group 1, Plan 27404, New Westminster District (hereinafter called "Lots 40 and 42"). Up until the passage of By-Law No. 6480, Lots 2, 40, 41, 42 and 43 were zoned M1 - Industrial District - Manufacturing District.

In December, 1970, Auto Carriers apparently decided the property was not large enough for its operation and began to look elsewhere for other lands to accommodate its expanding business. Columbia attempted to help Auto Carriers on this re-location and was anxious that Auto Carriers locate on property adjacent to Hydro railway so that it could retain the rail business that it had previously carried on with Auto Carriers.

From approximately December, 1970 to approximately early April, 1974, officials of Columbia had discussions with officials of the Corporation of the District of Burnaby (Burnaby) and

some correspondence was exchanged. During these negotiations Columbia advised Burnaby that it planned to re-acquire Lots 41 and 43 from Auto Carriers and to develop on Lots 2, 41 and 43 warehousing facilities in accordance with its long-term plans.

In or around June of 1973, Auto Carriers eventually vacated the premises and Columbia repurchased Lots 41 and 43 from it under its right of first refusal. As the discussions for re-development between Columbia and Burnaby progressed, Columbia informed Burnaby in the summer of 1973, that the nature of the new development on Lots 2, 41 and 43, would be a pool car warehouse distribution centre. Up until early April,1974, there is no indication that any officials of Burnaby or any of its elected representatives informed Columbia that such a development would not be acceptable to Burnaby.

In the meantime, on July 16, 1973, a motion had been made by an Alderman of Burnaby Council, as follows:

> "That a presentation be made to the Provincial Government requesting the 11.38 acre site in the 7400 block Buller Avenue now leased by Canadian Auto Carriers Ltd. from the B.C. Hydro and Power Authority be designated as a park and ride terminal because the location makes it ideal for this type of use and the eventual connection for a rapid transit system on the Central Park Line."

I infer from the facts that the 7400 block Buller Avenue was in fact Lots 41 and 43.

It is important to note that there is a strong inference in the material to indicate that throughout the negotiations between Columbia and Burnaby, Columbia was looked upon by both itself and Burnaby as being synonymous with Hydro although

it was in fact a separate legal entity. Mr. P.E. Grant, who held discussions with Burnaby on behalf of Columbia was also manager of the Industrial Development Department of B.C. Hydro and Power Authority.

The next significant item arose from a Minute of Burnaby Council of July 30, 1973, wherein it directed the Deputy Municipal Clerk to write the Minister of Municipal Affairs requesting the province to retain the Auto Carriers site in government ownership "until such time as an adequate study has been made by the Bureau of Transit to determine the suitability of the site as a location for a "Park and Ride" facility."

Following this, on December 21st, 1973, Hydro wrote Mr. A.L. Parr, Director of Planning, Burnaby, and advised him of its intentions to redevelop Lots 2, 41 and 43 as a pool car terminal area, enclosing four copies of a comprehensive development plan in respect to these lots. The letter said:

> "We now propose to break up the existing 12± acre site into smaller sections, as shown, and develop pool car terminal areas. The buildings and areas are to be developed in accordance with the latest industrial concepts with particular concern for aesthetic values.
>
> "Would you please arrange to have the enclosed plan reviewed and advise us of particular changes, if any, that the municipality would favour, at this time, regarding our preliminary concept for the McPherson Avenue area."

Apparently no reply was made by Burnaby to this request, since the Affidavit filed by Mr. Parr indicates he considered all discussions between himself and Mr. Grant up to March 23, 1974, of a "vague and general nature".

On January 28, 1974, an Alderman of Burnaby served a Notice of Motion on Council which was subsequently introduced at the meeting of Council on February 4, 1974, and read as follows:

> "Whereas there is a need for a park and ride facility in South Burnaby; and
>
> Whereas the B.C. Hydro will be the authority to conduct this system; and
>
> Whereas the B.C. Hydro has ownership of the Canadian Auto Carriers large site; and
>
> Whereas the site is on the Central Park proposed rapid transit line; and
>
> Whereas this Council should protect this large blacktopped area;
>
> Therefore be it resolved that this Council re-zoned this site to ensure its available use as a park and ride site."

This Resolution was referred by Council to the Planning Department on February 4, 1974, for a study and comment.

On February 15, 1974, representatives of Columbia had further discussions with representatives of Burnaby in respect to the proposed development of Lots 2, 41 and 43, but no mention was made to Columbia of the proposal to re-zone the lands for a "Park and Ride" facility.

On March 23, 1974, an application was made by Beedie Construction Ltd., on behalf of Columbia for preliminary plan approval of the new development of Lots 2, 41 and 43.

On March 25, 1974, at a Council meeting of Burnaby, a manager's report was sent to Council in which there was a recitation of the activities by the officials of Burnaby with respect to the above matter, but no mention was made in

the report of the negotiations that had been going on between Columbia and Burnaby in which Columbia had expressed its intentions to re-develop the property. In that report, the Planning Department said the following:

> "Notwithstanding the current B.C. Hydro ownership of the site which protects it from private development, until the Bureau of Transit Services has made its determination respecting 'Park and Ride', the pool car use and operation proposed for the site by the B.C. Hydro cannot be supported by the Planning Department as being suitable under the current M1 zoning on the site.
>
> "In keeping with the intended motion brought before Council on February 4, 1974, the Planning Department believes there is a need to protect the site and preclude the intended railway pool car use by B.C. Hydro.
>
> "In order that the proceeding may be secured several alternative courses of action are available to Council:
>
> (a) Obtain assurance from the Province that B.C. Hydro will not develop the site industrially as currently proposed.
>
> (b) Acquire the site from B.C. Hydro.
>
> (c) Re-zone the site from the current M1 zone to CD (Comprehensive Development) zone.
>
> "Of the preceeding, the Planning Department believes (c) to be the only viable alternative course of action and we would so recommend."

On April 2, 1974, Columbia received a letter of March 28, 1974 advising Columbia of a public hearing on April 23, 1974, to consider the re-zoning of the subject property from M1 to P8. The letter went on to explain:

> "The Council felt that since the site was intended to be used for a park and ride facility, it would be more appropriate that the land be zoned 'parking district' (P8)."

Also, on April 2, 1974, the Director of Planning for Burnaby advised Beedie Construction Ltd. that the proposed development set out in its letter of March 23, 1974, did not comply with the relevant Burnaby zoning By-Law and was therefore rejected.

On April 19, 1974, Hydro wrote the Mayor and Council of the Municipality of Burnaby, objecting to the proposed re-zoning and set out some of the history of its negotiations mentioned above. The facts indicate that Hydro continued to assume that Lots 2, 41 and 43 belonged to it and so no zoning By-Law passed under the provisions of the Municipal Act would affect the development by reason of the protection Hydro assumed it had from the operation of provincial statutes under section 53(1) of the British Columbia Hydro and Power Authority Act, S.B.C. 1964, Ch. 7. Neither Columbia nor Hydro appeared at the public hearing held for the purpose of enquiring into the re-zoning of the property but relied instead on the letter of April 19, 1974, objecting to the re-zoning and presumably on section 53(1) of the statute referred to above.

After the public hearing the By-Law in question was given three readings by the Council on April 29, 1974 and was finally adopted on May 6, 1974. The By-Law re-zoned not only Lots 2, 41 and 43, owned by Columbia, but also Lots 40 and 42, owned by British Columbia Hydro and Power Authority and Lot 3A being a small fractional piece in the south-west corner of Lot 43 owned by Burnaby as P8 - Parking District.

In these proceedings Hydro is not complaining about the re-zoning of Lots 40 and 40 and is apparently relying on s. 53(1) of the above Act which by its terms does not apply to Columbia.

ISSUE

Is By-Law No. 6480 ultra vires the Council of Burnaby and therefore liable to be quashed under the provisions of the Municipal Act, R.S.B.C. 1960, Ch. 255, s. 238.

Counsel for Columbia set out a number of grounds in its Originating Notice of Motion as to why By-Law No. 6480 should be quashed. Because of the view I take, it is only necessary for me to consider the issue of ultra vires.

Unlike an act of Parliament or the Legislature, the Courts may look behind the face of a Municipal By-Law to discover its true purpose. The reason for allowing such an enquiry is because a Municipal Council is a subordinate form of representative government which derives its authority from a statute of the Legislature, rather than from historical precedent. This type of investigation is more often made when a Court is asked to quash a By-Law as being unreasonable, discriminatory, colorable or passed in bad faith. It arises from the concept that the Legislature only intended to give to a Municipal Council the powers that are set out in the Municipal Act if they are acted upon reasonably, fairly and in a non-discriminatory way.

However, it would seem that if a Court can explore the surrounding circumstances involving allegations on these matters, there is nothing wrong in principle in considering the facts which deal with the purpose or intent of the zoning By-Law to ascertain if it is ultra vires the statute authorizing its passage.

These facts illustrate three major purposes existing in the mind of Burnaby Council at the time it passed By-Law No. 6480:

1. The land was zoned for possible future use by persons who may wish to park their automobiles and ride on some form of intra-urban or inter-urban rail transit system.

2. That while no such transit system was in operation at the time, this might come about in the near future, and so the land should be held or reserved for this possibility.

3. The Council had in mind a public purpose for this land, rather than a private one, and this is supported by the fact that the By-Law was passed on Council's own initiative and not at the request of a private individual.

Counsel for Burnaby says that authority to pass By-Law No. 6480 comes from section 702(1)(a) of the Municipal Act, which reads as follows:

"702(1) The Council may by By-Law (hereinafter referred to as a Zoning By-Law):

(a) divide the whole or a portion of the area of the municipality into zones and define each zone either by map, plan, or description, or any combination thereof;"

This particular section contains unrestrictive language, but it is only an enabling section and gives no clue as to the breadth of the zoning power. A principle of statutory interpretation requires me to look at the whole of the Municipal Act to ascertain the intention of the Legislature.

Under Section 464 of the statute dealing with acquisition of real property, a municipality may acquire real property, and under Section 465 it may develop this property or "reserve any portion of the lands for municipal or public purposes."

Under Section 467(1) dealing with the disposal of property allows a municipality to "reserve for a particular municipal

or other public purpose any land owned by the municipality".

Section 504 relating to municipal works gives the municipal council the right to "acquire...and hold real or personal property for municipal purposes".

Section 563 dealing with the establishment of a public transit system by a municipality allows it to expropriate property for this purpose.

Section 621 which refers to parks and community buildings allows a municipal council through a by-law to acquire by purchase or lease any real or personal property for community uses and to hold the same.

Section 706 provides that property shall not be deemed to be taken or injuriously affected by a zoning by-law except when land is zoned "exclusively for public use".

Section 822 deals with cemetaries and gives to a municipal council the right to acquire and hold real property for a crematoria or columbaria.

Section 866 allows a municipal council to acquire and hold real property within the municipality for the public purpose of "off-street parking facilities" and provide for its operation and management.

This last section strongly implies that off-street parking facilities are a matter of "public purpose". In addition, the common law suggests this is a reasonable assumption to make. In St. Vital v. Winnipeg, (1946) 1 D.L.R. 497, the

Supreme Court of Canada considered the meaning of the word "public use" when applied to the Winnipeg charter. Hudson, J. held at page 500:

> "As to the second objection, the expression 'public use' must be taken, I think, to include any such use as by the manner of place and time reasonably may be said to promote the health, welfare or happiness of citizens, or any substantial number of them."

This definition was applied so as to allow the City of Winnipeg to acquire property outside its boundaries for a golf course since the Court found that a golf course promoted the health, welfare and happiness of a substantial number of citizens of the City of Winnipeg.

In the case at bar, the obvious purpose of By-Law No. 6480 is for the benefit of a substantial number of the citizens of Burnaby who may wish to make use of a "park and ride" parking lot in the event of an inter-urban or intra-urban rail transportation system is developed. In that sense the zoning by Burnaby Council was for a public use or public purpose.

Turning for the moment to the question of freezing or holding land, some of the sections of the Municipal Act to which I have previously referred specifically provide for the right of a municipality once it has acquired land to "reserve" it, (Sections 465 and 467) or "hold" it, (Sections 621, 822 and 866). From these sections it would appear that the Legislature was setting out a method by which land acquired for a public purpose or public use may be reserved, held or controlled by the municipality without its development.

This review of the Municipal Act leaves little doubt that the Legislature did not intend to allow a municipal council

to reserve private lands for a public use or public purpose by the device of a zoning by-law. Rather, it can only be done through a purchase or expropriation of these lands where allowed by the Act. If there is any uncertainty, I must resolve it in favour of Columbia, because I should not infer from the statute that the Legislature intended to deprive Columbia of its commonlaw right to use the lands as it so wished, subject to the laws of nuisance. Any such intention must be clearly expressed and should not be arrived at by implication. See Regina v. Girvan, (1956) O.W.N. 73 at 75. See also Re Caldwell and Toronto, (1935) 2 D.L.R. 623 at 626.

JUDGMENT

It follows that By-Law No. 6480 must be quashed. Columbia is entitled to its costs.

J.L.E. Dowd J.

Vancouver, B.C.
July 19th, 1974.