

ITEM 25
MANAGER'S REPORT NO. 51
COUNCIL MEETING 85/07/29

RE: LETTER FROM UNION OF BRITISH COLUMBIA MUNICIPALITIES, 313 SIXTH STREET,
NEW WESTMINSTER, B.C., V3L 3A7
LOCAL GOVERNMENT LIABILITY

MUNICIPAL MANAGER'S RECOMMENDATION:

1. THAT the recommendation of the Director Finance be adopted.

* * * * *

TO: MUNICIPAL MANAGER
FROM: DIRECTOR FINANCE
RE: LIABILITY INSURANCE
(CORRESPONDENCE AND PETITIONS)

1985 July 24
File: I54-1
Xref: I55-6

RECOMMENDATION

1. THAT the Ministry of Municipal Affairs be requested to examine the issue of municipal liability, with a view to introducing legislation that would provide a greater degree of protection to local governments; and
2. THAT for information purposes a copy of this report be forwarded to:
 - . The Attorney General for the Province of British Columbia
 - . Rosemary Brown, MLA, Burnaby-Edmonds
 - . Eileen Dailly, MLA, Burnaby-North
 - . Elwood Veitch, MLA, Burnaby-Willingdon
 - . Union of British Columbia Municipalities

BACKGROUND

REPORT

On the agenda there is correspondence from the U.B.C.M. concerning local government liability insurance. This report discusses changes in the insurance industry that have occurred and are continuing and how that is affecting Burnaby. The report also discusses the need for legislative changes, and addresses an enquiry made at the Council meeting of July 15th regarding the potential liability of elected officials.

CHANGES IN LIABILITY INSURANCE

Over the past several months there has been considerable turmoil in the municipal liability insurance market due to withdrawal of some underwriters from this field. The reason for this is believed to be large underwriting losses arising from large settlements awarded by courts, e.g. Brampton, and the continuing exposure of existing underwriters to potentially large awards. The underwriters have responded by withdrawal from the market, increased premiums, and/or higher deductibles, and tighter policy conditions.

Burnaby's liability coverage and costs have been affected by this turmoil. The underwriter, CNA Re-Insurance of London, Ltd., who wrote the first \$1 million coverage of our excess umbrella coverage and errors and omissions, suddenly withdrew from the market, causing a gap in our errors and omissions coverage. Thus there was no coverage between the primary \$500,000 errors and omissions liability, and the \$14 million second excess umbrella liability coverage by Elite. This move could have collapsed our \$14 million secondary umbrella coverage with Elite Insurance because that coverage was conditional on the existence of \$1.0 million of the errors and omissions coverage being in place. See Schedule 1 attached.

Our broker contacted about 20 excess liability underwriters but only two would accept the errors and omissions risk, one of which was unacceptable to the Elite Insurance Company. The coverage for the errors and omissions had to be increased to \$1 million in order to have an underwriter accept the umbrella coverage. We were able to place that with an underwriter called L.W. Biegler at a cost of \$20,000 annually compared with the \$9,200 annually for \$500,000 coverage with Lloyds.

With the \$1 million errors and omissions coverage in place, Elite agreed to underwrite the full umbrella coverage of \$15 million for a cost of \$41,500 annually, compared with \$21,200 annually for the \$14 million coverage prior to CNA withdrawing from the market.

These two changes have increased our coverage slightly and our annual insurance cost for both the errors and omissions and umbrella liability coverage by \$31,100 annually, of which \$22,000 will apply to 1985. See Schedule 1 attached.

General Accident who, according to our broker, is the only primary liability underwriter for municipalities in Canada, has notified our broker that it is withdrawing from the market at the end of its current term on November 16. We are now trying to replace this coverage.

Probably the only way we will be able to obtain the primary liability coverage is through increased deductibles for each claim, which could be as high as \$100,000 per claim, plus increased premiums. Personally, I believe we will be fortunate if we can place the coverage with \$10,000 and \$15,000 deductibles compared with our present \$5,000 (water related) and \$10,000 respectively. I estimate that this will have the effect of doubling our present annual claims cost of about \$45,000. Furthermore, I expect an increase in the premiums which could be as much as 50% to 100% over the present cost of \$40,149 annually.

In our annual budget we anticipated that the cost of liability insurance would increase by about 42% and allowed an additional \$29,000 in the 1985 annual budget. An additional allowance of about \$15,000 to \$25,000 may be necessary at recast budget time.

For 1986 the cost increase for liability insurance premiums and deductibles will probably be about \$100,000.

IMPLICATIONS OF TIGHT INSURANCE MARKET

As outlined above, the insurance market has tightened considerably and coverage for liability is getting more and more difficult to obtain. Presumably all municipalities in B.C. are experiencing the same adverse effects.

Clearly, some action needs to be taken before Burnaby and all B.C. municipalities find themselves in a position of either not being able to obtain coverage at all, or with prohibitive deductible clauses, at a high cost. The alternatives available to municipalities include:

- . Self-insurance
- . Improving loss control
- . Pooling, i.e. the banding together of municipalities

Self-insurance implies funding and budget implications which for liability insurance is virtually impossible.

Loss control requires resources which may not be available because of time and budget constraints, plus the specialized skill required.

Pooling is a viable alternative that is being practiced in other areas, e.g. Alberta, Manitoba, Texas and other U.S. communities. Currently the U.B.C.M. is working on establishing an insurance pool for B.C. municipalities.

NEED FOR LEGISLATIVE CHANGE

Insurers are vacating the municipal insurance market because it is too troublesome and costly when compared with the private sector market. Legislative changes need to be introduced that eliminate and discourage claims being made against municipalities, except for legitimate cases of negligence. Such changes might encourage insurers to return to the municipal field and alleviate the conditions we are now experiencing.

The U.B.C.M. has been aggressively pursuing needed changes to Provincial legislation that would provide local government with some degree of protection from liability actions. The following is an extract from a letter that the U.B.C.M. sent to all Cabinet members and M.L.A.'s that describes some of the changes needed:

1. Protection of local government officers and employees from liability when providing information in good faith and without negligence; and, protection from liability regarding the enforcement of by-laws or regulations.
2. Providing that elected officials can be indemnified when joined in actions against the local government.
3. Protection of local government from liability except for negligence, similar to the protection provided to B.C. Hydro and Power Authority.
4. Reasonable limitation periods for claims against a local government and its officials and servants.

ELECTED OFFICIALS

The U.B.C.M. correspondence points out that "a recent case in Richmond saw the Court hold that municipal elected officials could be enjoined in a liability action against the municipality. This case was particularly onerous since the Municipal Act does not provide for indemnification of the elected officials' legal expenses in defending against these actions even if those persons are not liable and have acted within the scope of their duty."

Burnaby has a by-law which states that the municipality will indemnify every officer and employee against any claim for damages arising out of the performance of his duties and in addition pay legal costs incurred in any Court proceeding arising out of the claim.

Elected officials are not officers or employees, therefore they cannot be indemnified for legal costs which might be incurred in defending against actions brought against them.

As pointed out in the previous section, one of the legislative changes needed is to make it possible that elected officials can be indemnified when enjoined in actions against local government.

For information, attached is a copy of a 1983 decision on this issue - Valcourt v. Capital Regional District.

ITEM 25
MANAGER'S REPORT NO. 51
COUNCIL MEETING 85/07/29

- 4 -

176

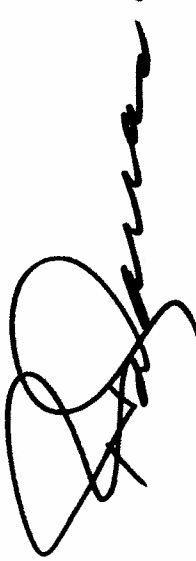
CONCLUSION

Changes occurring in the liability insurance market present very serious implications for Burnaby. Potentially we could be in a position of being unable to buy liability insurance or, if available, at substantially increased cost, coupled with increased deductibles and more restrictive coverage. The creation of an insurance pool for B.C. municipalities by the U.B.C.M. should be supported to the fullest. Legislative changes are needed to discourage and/or eliminate claims being made against municipal-ities and to provide to local government some of the protection the Provincial government provides to itself, its corporations, its officers and employees. For example, municipalities should be immune to actions in nuisance; there should be protection against liability for failure to enforce by-laws; and there should be a way to indemnify elected officials when enjoined in actions against the local government.

It is recommended that the Ministry of Municipal Affairs be requested to examine the issue of municipal liability, with a view to introducing legislation that would provide a greater degree of protection to local governments.

It is also recommended that for information purposes a copy of this report be forwarded to:

- . The Attorney General for the Province of British Columbia
- . Rosemary Brown, MLA, Burnaby-Edmonds
- . Eileen Dailly, MLA, Burnaby-North
- . Elwood Veitch, MLA, Burnaby-Willingdon
- . Union of British Columbia Municipalities



Howard Karrias
DIRECTOR FINANCE

Attach.

cc: Municipal Solicitor



ITEM 25
 MANAGER'S REPORT NO. 51
 COUNCIL MEETING 85/07/29

SCHEDULE 1

LIABILITY INSURANCE COVERAGE - PREVIOUS AND PRESENT

<u>Underwriter</u>	<u>Previous Coverage</u> \$	<u>Cost</u> \$	<u>Underwriter</u>	<u>Present Coverage</u> \$	<u>Cost</u> \$
<u>Primary Liability</u>					
General Accident	5,000,000 (1)	40,149	General Accident	5,000,000 (1)	40,149
<u>Primary Errors & Omissions</u>					
Lloyd's (Rowland Hanson)	500,000	9,200	L.W. Biegler	1,000,000	20,000
<u>Excess Liability</u>					
1st excess CNA (London)	1,000,000	7,200		-	-
2nd excess Elite	<u>14,000,000</u>	<u>14,000</u>	Elite	<u>15,000,000</u>	<u>41,500</u>
Total General Liability Coverage	19,000,000 =====	70,549 =====		20,000,000 =====	101,649 =====
Total Errors & Omissions	15,500,000 =====			16,000,000 =====	

Note (1) Includes \$5 million malpractice

ITEM 25
MANAGER'S REPORT NO. 51
COUNCIL MEETING 85/07/29

VALCOURT V. CAPITAL REGIONAL DISTRICT

178

British Columbia Supreme Court,
Legg J.

Heard - September 23, 1983.
Judgment - October 21, 1983.

Officers and servants - Definitions - Officers - Municipal officer or employee - Indemnity for costs - By-law providing that officers and employees of district would be indemnified for any claim for damages by third party - Elected representative not included in definition of "officer or employee" - Municipal Act, R.S.B.C. 1979, c. 290.

The plaintiff, a director of the Capital Regional District Board, claimed against the defendant district for indemnity for her costs and expenses incurred defending herself in a libel action brought by the executive director of the district. Her claim was made under the provisions of By-law No. 240 of the district which provide inter alia that the district will indemnify its officers and employees against any claim for damages by a third party. That by-law was passed pursuant to s. 262 of the Municipal Act which stated in part that the council may, by by-law provide that the municipality will indemnify its officers and employees against a claim for damage against an officer and employee arising out of the performance of his duties and, in addition pay legal costs incurred in a Court proceeding arising out of the claim.

Held - The claim should be dismissed.

Although s. 80 of the Municipal Act equated a member of the council or board of a regional district with a member of a council of a municipality, s. 260 of the Municipal Act did not include an elected legislative officer. "Officer or employee" was not a member of the council of a municipality but rather someone employed or appointed by the council. This meaning was consistent with the whole of the context of the Municipal Act where reference to "officer or employee" was made.

Statutes considered
Municipal Act, R.S.B.C. 1979, c. 290, ss. 80, 82, 83(m), 212, 244-261, 262, 788.

Authorities considered
Rogers, *The Law of Canadian Municipal Corporations* (2nd ed., 1977), pp. 282-83.

Words and phrases considered
officer or employee.

Canadian Abridgment (2nd) Classification
Municipal Corporations VI. 1. a.

ACTION for damages against the Capital Regional District.

Lenore B. Boyes, for plaintiff.
A.D. Macfarlane and Sheryn Walls, for defendant.

(Victoria No. 1473/83)

October 21, 1983. LEGG J.: - The plaintiff claims against the defendant district for indemnity for her costs and expenses incurred defending herself in a libel action brought by the executive director of the district. The libel action was brought against her when she was a member of the board of the district. She claims that under the provisions of By-Law No. 240, the district is required to indemnify her.

The plaintiff is a resident of Salt Spring Island. She was elected as a director fo the Capital Regional District Board in 1979. She vigorously opposed a proposal by the district to install a sewer with an outfall at Ganges Harbour. She made statements regarding a petition which was circulated by the executive director of the district. The petition was circulated on Salt Spring Island and supported the construction of the sewer. Mrs. Valcourt claimed that the petition had been falsely certified. Her remarks were published in a Vancouver newspaper.

The executive director claimed that Mrs. Valcourt's statements were libellous. He brought action against her and the publisher of the newspaper and its reporter. Later the executive director applied to discontinue this action. Mrs. Valcourt opposed such discontinuance but leave was granted to the executive director on October 30, 1981, to discontinue the action.

On July 14, 1982, the plaintiff requested the board of the district to reimburse her for her legal expenses which she had incurred in defending the libel action. These amounted to \$7,212.50.

The board passed a resolution at its meeting on July 14 resolving that she should be "indemnified under Section 2 of By-Law No. 240, subject to review by a solicitor".

This resolution was amended at the same meeting to read ". . . subject to review by an outside solicitor". The resolution was then amended a second time to read in its final form:

"Moved by Director Pollen, seconded by Director Blencoe, that the City of Victoria solicitor be asked to review By-Law No. 240 as to the applicability in this case."

The City of Victoria solicitor gave his opinion. In part he stated:

". . . that it would be beyond the power of the Board to reimburse one of its Directors for her legal expenses in connection with an action brought against her, even if such action relates to the performance of her duties. In my opinion By-Law No. 240, which relates to the indemnification of officers and employees against claims for damages and to the payment of legal costs in connection with such claims, was enacted pursuant to the provisions of Section 262, and the expression 'officers and employees' used in that section has the same meaning as is contemplated by Section 251 of the Municipal Act, which enables a municipal council to hire officers and employees. A member of a municipal council or a regional board is not herself an officer. The provisions of Section 4 of the By-Law, based on Section 262(3) of the Municipal Act, clearly indicates that it is intended to apply to persons who are employed by the Board whether as 'officers' or 'employees'."

Mrs. Valcourt testified that a further opinion was obtained from another solicitor to the effect that she was an officer of the board of the district and entitled to be reimbursed her expenses. There was no evidence before me of the basis for that opinion.

The plaintiff has vigorously opposed the installation of the sewage system by the district on Salt Spring Island. She has instituted proceedings against the district seeking a declaration that the petition circulated by the executive director does not comply with the provisions of the Municipal Act, R.S.B.C. 1979, c. 290. She has sought to enjoin the district from proceeding with the construction of the sewer project. She has attacked the validity of steps taken by the board of the district to implement the decision to proceed with the sewer. On the occasion when she spoke to the newspaper reporter whose report was the subject of the libel action she complained that the executive director had certified the petition without complying with the Municipal Act.

By-Law 240, under which the plaintiff claims indemnity,
reads:

"CAPITAL REGIONAL DISTRICT
BY-LAW NO. 240

A BY-LAW TO INDEMNIFY OFFICERS AND EMPLOYEES
AGAINST DAMAGE CLAIMS

The Board of the Capital Regional District in open meeting assembled, enact as follows:

1. In this By-law, 'district' means the Capital Regional District.
2. The District will indemnify its officers and employees against any claim for damages by a third party against an officer or employee arising out of the performance of his duties and, in addition, pay legal costs arising therefrom.
3. The District will not seek indemnity against its officers and employees where the actions of those officers or employees result in a claim for damages against the District by a third party.
4. The provisions of Sections 2 and 3 hereof do not apply in any case where an officer or employee
 - (a) has been grossly negligent, or
 - (b) has acted econtrary to the terms and conditions of his employment, or
 - (c) has acted contrary to an order given him by a person in authority over him.
5. This By-law may be cited as the 'Officers and Employees Indemnity By-law, 1975'.

READ A FIRST TIME THIS 29th day of October 1975.
READ A SECOND TIME THIS 26th day of November1975.
READ A THIRD TIME THIS 26th day of November1975.
RECONSIDERED AND FINALLY ADOPTED THIS 26th day of November, 1975."

Mrs. Valcourt received monthly remuneration in her capacity as a director of the board of the district. She testified that she presented the views of her constituents when she attended board meetings. She was a member of a number of committees of the board. In connection with her duties she gave instructions to members of the staff of the district from time to time. She said that she frequently expressed her views to the media on matters of concern to her constituents as part of her responsibility as a director of the board.

Counsel on behalf of Mrs. Valcourt submitted that when the plaintiff spoke to the reporter she did so as a member of the board, and it was her duty to speak to her constituents through the media to explain the circumstances under which the petition initiated by the executive director was being circulated, and that when she did so she was an "officer or employee" within the meaning of the by-Law.

Counsel for the district submitted that the by-law must be read in the context of the Municipal Act and when so read the expression "officer or employee" does not extend to a member of a regional district board or of a municipal council.

I agree with the submission of counsel for the district. The plaintiff was clearly an officer of the board of the district in the sense that her duties were those of a legislative officer. But I do not think that she was therefore an "officer or employee" within the meaning of the by-Law.

The author of Rogers on Municipalities [The Law of Canadian Municipal Corporations] notes the difference between an elected legislative officer and an officer appointed by a municipal or regional council. At pp. 282-83 he states:

"While members of municipal councils, other than council heads, are in one sense, officers of the municipality they

are merely legislative officers and perform no executive or ministerial functions."

The author goes on to note that the head of a municipal council is declared by the Municipal Act of Ontario, R.S.O. 1980, c. 302, to be the chief executive officer of the corporation and refers to the provisions of the Act of that province in his further discussion.

In my opinion when the provisions of the Municipal Act of British Columbia (R.S.B.C. 1979, c. 290) are examined, it is clear that By-Law 240 must be read so that the words "officer or employee" have the same special meaning as that given by Rogers and do not include a director of the board of the district, such as Mrs. Valcourt.

Section 80 of the Municipal Act of British Columbia equates a member of a council or board of a regional district with a member of a council of a municipality.

By-Law 240 was enacted pursuant to s. 262 of the Municipal Act. That section states:

"262. (1) The council may, by a vote of not less than 2/3 of all members, pay a sum required for the protection, defence or indemnification of an officer or employee of the municipality where an action or prosecution is brought against him in connection with the performance of his duties, or where an inquiry under Part 2 of the Inquiry Act or other proceeding involves the administration of a department of the municipality or the conduct of a part of the municipality or the necessarily incurred and damages recovered. The council shall not pay a fine imposed on an officer or employee on his conviction for a criminal offence.

(2) The council may by bylaw provide that the municipality will indemnify its officers and employees against a claim for damages against an officer or employee arising out of the performance of his duties and, in addition, pay legal costs incurred in a court proceeding arising out of the claim.

(3) The council may in a bylaw under subsection (2) provide that the municipality will not seek indemnity against its officers and employees where the actions of those officers or employees result in a claim for damages against the municipality by a third party unless the officer or employee has been grossly negligent or has acted contrary to the terms of his employment or to an order of a superior."

The wording of this section, particularly the words in subs. (3):

"... unless the officer or employee . . . has acted contrary to the terms of his employment or to an order of a superior."

suggest that the "officer or employee" is not a member of the council of a municipality but rather someone employed or appointed by the council.

In my opinion that meaning is consistent with the whole of the context of the Municipal Act where reference to "officer" or "employee" is made.

I turn first to ss. 244 to 261 of the Municipal Act which immediately precede s. 262.

Section 251 states that the council may provide by by-law to carry on good government of a municipality. Clearly, the expression "officers and employees" in this section is used in contradistinction to members of a council. The members of a council would not have to provide by by-law that they themselves were necessary to the good government of the municipality. The word "officers" mentioned in this section does not include elected members of a council.

Section 252 of the Municipal Act states that the council may in the same or separate by-law or by collective agreement fix officers' or employees' remuneration and other benefits and conditions of employment, as well as matters relating to appointment, promotion and dismissal. Again it is clear that such a by-law could have no application to a member of a council.

Section 253 of the Municipal Act makes possible the appointment of a person to two or more "offices or positions". This can have no application to a member of a council.

Section 255(2) defines for the purposes of s. 255 the persons who are deemed to be "officers of the municipality" and makes provision for their protection against arbitrary dismissal. Again this could have no application to a member of a council.

Section 257 prescribes an oath of office for an "officer". Section 212 prescribes an oath of office for a person elected as mayor or alderman. Section 212 would have been superfluous if mayors and aldermen were "officers". The same could be said for directors of a regional district.

Section 258 refers to the commencement of employment of an officer or of a permanent employee. Clearly a member of council does not "commence employment".

When I examine other provisions of the Municipal Act in addition to those which immediately precede s. 262 I am further confirmed in my conclusion that the plaintiff was not an officer or servant of the regional district within the meaning of those words as used in other sections of the Municipal Act.

Section 82 draws a distinction between a member of council and an employee or salaried officer of the municipality. Section 83(m) when read with s. 82, indicates that the remuneration received by a member of council is contrasted with the remuneration paid to an employee or salaried officer of the municipality. Section 788 of the Municipal Act provides for the remuneration of directors of a regional district and authorized a regional board to provide for their remuneration by by-law. Mrs. Valcourt testified that she was paid a monthly remuneration. No evidence was given concerning the by-law under which this remuneration was paid but I must infer that the district acted in accordance with the provisions of the Municipal Act and that a by-law authorized the remuneration which she received under the provisions of s. 788. Thus the fact that she received remuneration does not indicate that she was an officer of the district within the meaning of that expression in the by-law.

Another section which supports the conclusion I have reached is s. 239. That section provides that the mayor is the head and chief executive officer of the municipality. In my opinion by contrast with other members of a council, the mayor is made a chief executive officer. But it is clear from subs. (e) of that section that the expression "officer or employee" is again used on contradistinction to the word "council". Here is another example of the words "officer or employee" having a meaning other than an elected legislative officer such as Mrs. Valcourt.

For the foregoing reasons the action brought by the plaintiff must be dismissed with costs.

Action dismissed.