Decision of the Development Permit Board regarding the Court Ordered Reconsideration of Development Permit Application No. DP-2017-00681

At a meeting held on March 20, 2023, the Development Permit Board ("DPB") adopted the following resolution:

> "The Development Permit Board hereby resolves to reconsider Development Permit Application No. DP-2017-00681 in accordance with Mr. Justice Gompers decision in Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City), 2022 BCSC 2150, and in reconsidering the application the DP Board will consider the HA-1A zoning in place on November 6, 2017, rather than the HA-1A zoning as amended after that date. The DP Board further resolves to make this decision public and to set out its reasons with the assistance of Legal Services."

The DPB adopted the resolution in response to recent litigation involving the conduct of the DPB, which compelled the DPB to consider an important issue regarding the proposed development at 105 Keefer Street (the "Property").

In Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City), 2022 BCSC 2150, Mr. Justice Gompers of the BC Supreme Court ordered the DPB to reconsider the Development Permit Application (the "Application") for the Property that the DPB originally refused in November, 2017. A basic issue regarding the reconsideration is what zoning by-laws apply to it. The issue arises because the Property is governed by the HA-1A District Schedule, but Council amended the HA-1A District Schedule in October 2018, after the development permit was refused. It is not certain whether the "old" HA-1A zoning or the "new" HA-1A zoning governs the reconsideration. The issue was specifically raised in the Court decision, but not answered. Mr. Justice Gompers wrote:

> "Finally, in light of my findings, I do not feel it is necessary for me to determine what impact, if any, the October 2018 HA-1A rezoning ought to have on the Board's reconsideration of the DP Application. I say this in particular because it is unclear from the evidence and submissions before me whether the changes to the City's building development regime since the Board's November 6, 2017 decision render it impossible for the DP Application to now be approved, as the City suggests, or whether the Board retains the authority to do so nunc pro tunc or otherwise, as Beedie suggests. I expect that if this question is germane to the Board's reconsideration, the Board will provide an intelligible justification in its reasons that is sufficient for the parties and, if necessary, a reviewing court, to understand."

In order to properly consider the issue, the Chair of the DPB, Corrie Okell, wrote to Beedie (Keefer Street) Holdings Ltd., asking Beedie (Keefer Street) Holdings Ltd. to specifically address it. The letter to Beedie (Keefer Street) Holdings Ltd. and its response are attached as Appendix "A" to this decision. The issue is not straightforward, and raises significant issues about procedural fairness. The issue can be framed as whether it is improper for the City of

Vancouver, through the DPB, to frustrate a development permit application by failing to properly consider it and then changing the rules that govern it. There is no question that if the DPB had properly considered the Application in November 2017, any new proposal to develop the Property would now be subject to the new HA-1A zoning. The issue only arises because the DPB did not properly refuse the Application in 2017.

The DPB Chair's letter to Beedie (Keefer Street) Holdings Ltd. states that the City could reasonably rely on Monarch Holdings Ltd. v. District of Oak Bay (1978), 4 B.C.L.R. 67 (B.C.C.A) to consider the "new" zoning. This court decision stands for a basic proposition that "the race goes to the swift" and that lawfully enacted by-laws should generally govern a current application. In response, Beedie (Keefer Street) Holdings Ltd relies on a series of court cases (see Appendix "A") including Hammer Head Equities Inc. v. Rossland, 2023 BCSC 73 and 391043 Alberta Ltd. v. Village of Canal Flats, 2008 BCSC 1043. In the latter case, the Village of Canal Flats imposed a subdivision condition on a developer that could not be achieved by the developer. The Judge determined that notwithstanding a statutory rule that meant the applicant had lost its protection from a changed by-law, the only suitable remedy would be to not enforce that statutory rule because it would amount to an unfair decision. The basic thrust of the case is that a just remedy should put the applicant into the same position that they would have been but for the wrongful act. Here, the wrongful act was the DPB's inadequate refusal of the Application. Based on this principle, the applicant should be put into the position that they were in when the DPB improperly or wrongfully refused the application.

The law clearly recognizes a remedy that references the Latin phrase "nunc pro tunc", or "now for then". It is unusual. The remedy typically results in a court order being effectively back dated to allow avoid unfairness. Unfairness could result here because the DPB did not properly consider the Application. That is not currently disputed, because the applicant prevailed on that point in court and it is the basic reason the Application was ordered back to the DPB for reconsideration. The DPB could have refused the Application – but it needed to better explain any refusal. The DPB could also have conditionally approved the Application – by stating that the development permit was approved subject to design review. This is the ordinary practice of the DP Board. In the recent history of the City, the Property is the only one where a rezoning was rejected after a Public Hearing and a development permit application was later refused by the DP Board. If the DPB had approved the Application with conditions, then the development would almost certainly have been built by now. If the development permit had been issued before the HA-1A amendments came into effect, the development would have been protected from those amendments by section 568 of the Vancouver Charter.

On balance, the DPB now considers that this basic concern for fairness should prevail, and it will reconsider the Application under the HA-1A zoning as it existed in November 2017, when the DPB improperly refused the Application. The application to be reconsidered is the same application the DPB considered in November 2017, and the process before the DPB will be as similar as is possible in the circumstances. If you have any questions or concerns, please contact the writer.

Corrie Okell, Board Chair
corrie.okell@vancouver.ca

CITY OF VANCOUVER

DEVELOPMENT, BUILDINGS AND LICENSING
Development Permit Board

January 26, 2023

Dear Rob Fiorvento,
[Rob.Fiorvento@beedie.ca]

This letter relates to the recent litigation between the City of Vancouver and Beedie (Keefer Street) Holdings Ltd. ("Beedie") regarding the proposed development at 105 Keefer St, Vancouver. We are sending this to you as the corporate applicant.

As you know, BC Supreme Court Justice Brongers has ordered the City's Development Permit Board ("DP Board") to reconsider the development permit application that was the focus of the litigation. The DP Board is starting to undertake this work, however before we finalize the processing schedule and potential Board dates, the DP Board would like to consider your position on two preliminary issues regarding the reconsideration.

The first issue contemplates the application to be submitted by Beedie. The City's understanding is that the same development permit application that was submitted in 2017 is to be remitted for reconsideration. This suggests to us that the exact same application will be reconsidered, and that no new application or amendments would be submitted or considered by the Board. If this reflects your understanding, please confirm. If it is not your understanding, we ask that you please explain to the DP Board what you understand to should be submitted for reconsideration. We also ask that you provide a timeframe for submittal.

The second issue concerns the zoning by-law that governs the reconsideration. As you know, Council amended the current HA-1A zoning in October 2018. That zoning governs development applications for this site and in the immediate area today. Based on the BC Court of Appeal's ruling in *Monarch Holdings Ltd. v. District of Oak Bay* (1978), 4 B.C.L.R. 67 (B.C.C.A), it is reasonable to assume that the HA-1A zoning would also apply to the development permit application submitted for reconsideration.

Please confirm whether you agree that the current zoning governs the application. If this is not your position, please explain your understanding of what zoning should be applied to the reconsideration and your legal rationale for your position.

Thank you for your consideration and please be aware your written position and this letter will form part of the record of the DP Board's proceedings.

If you have any questions or concerns, please contact the writer.

Corrie L. Okell

Corrie Okell, Board Chair
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Beedie Living

February 10, 2023

BY EMAIL (corrie.okell@vancouver.ca)

City of Vancouver
Development, Buildings and Licensing
453 West 12th Avenue
Vancouver, BC V5Y 1V4

Attn: Corrie Okell, Board Chair

Re: **Proposed Development at 105 Keefer Street, Vancouver ("105 Keefer")**

Dear Corrie,

We confirm receipt of your letter dated January 26, 2023 (the "**City's Letter**") relating to recent litigation between the City of Vancouver (the "**City**") and Beedie (Keefer Street) Holdings Ltd. ("**Beedie**") regarding Beedie's proposed development at 105 Keefer.

We confirm that on Friday, February 3, 2023, Beedie submitted to the City our development permit application for 105 Keefer in the same form and content as those that were before the development permit board in 2017.

To answer your zoning question at paragraphs 4 and 5 of the City's Letter, the *Monarch* decision has no application in respect of this project at 105 Keefer.

In consequence of Judge Brongers' conclusion that the Board's 2017 decision did not meet the test of reasonableness, Beedie is entitled to obtain the permit it had applied for *nunc pro tunc*, as a matter of principle, equity, fairness and access to justice. The basis and purpose of such orders is set out in *Messari et al v. Alberelli et al*, 2017 ONSC 5304 and in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 90.

The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, applied extensively by Judge Brongers in his reasons for judgment, reinforces the grounding for the foregoing principles to be applied to the case before us. Most specifically, from the court's *dicta* at para. 67 of *Vavilov*, it can be determined that, to allow the City to escape the consequences of its failure in November 2017 to apply the City's longstanding practice in determining Beedie's development permit application, by relying on a subsequent zoning amendment, would be "antithetical to the courts' constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority".

Comparable rationale was applied in January 2023 by the BC Supreme Court in the case of *Hammer Head Equities Inc. v. Rossland*, 2023 BCSC 73. Having considered the principles in *Vavilov*, the court in *Hammer Head* applied broadly an earlier decision in *391043 Alberta Ltd. v. Village of Canal Flats*, 2008 BCSC 1043 which, the court held, "stands for a broader and simpler proposition… that, to be adequate, a remedy must put the petitioner in the same situation… it would have been in had the respondent acted properly in accordance with the law... It is incumbent on the court to make orders, which are responsive to the circumstances of this case, and provide meaningful relief to the petitioners for the wrongs they have suffered." As a result, the petitioner was permitted to proceed with its development despite a subsequent by-law amendment.

For these reasons, the City must apply its longstanding practice having regard to the 2013 by-law provisions which existed at the time this matter came to the development permit board in 2017.

Finally, there are the issues of whether the City, in denying the earlier application, acted without due regard to its obligations of procedural fairness and good faith. These issues remain outstanding in the context of a potential appeal, which we have agreed to put to the side for the moment, and which if accepted, would only reinforce the court's obligations.

Fortunately, it should be unnecessary to deal with any potential appeal, or to have Judge Brongers re-address this matter as contemplated at para. 111 of his judgment, if the application is granted, conditions fulfilled and development permit issued.

Sincerely yours,

Kyle M. Wilson
General Counsel

Cc: Rob Fiorvento, Managing Partner

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