

## BC Supreme Court Reaffirms the Broad Discretionary Nature of the DVP Approval Process

The BC Supreme Court, in *1139652 B.C. Ltd. v. Whistler (Resort Municipality)*, 2018 BCSC 1806, recently reaffirmed the discretionary nature of the development variance permit (DVP) approval process under the *Local Government Act* (LGA) and the broad range of factors that may be considered by a local government council in considering an application. While there is nothing novel or remarkable about the Court's decision in this case, the decision does reaffirm a number of principles relating to the DVP approval process, which are highlighted below.

In this case, the Petitioners had sought a DVP to vary certain setbacks under the Resort Municipality of Whistler's (RMOW) zoning bylaw to enable the construction of a single-family home on a small, irregularly shaped lot that had been created pursuant to a road dedication process. The Petitioners had previously sought variances from the Board of Variance, but their application had been refused on the basis that there was no evidence of hardship, nor were the variances sought considered to be minor in nature (as required by section 542 of the LGA).

Council for the RMOW unanimously rejected the DVP application, notwithstanding staff's recommendation to Council that the application be granted. While Council did not provide written reasons for its refusal, it appeared from the transcripts of the Council meeting that a significant factor considered by Council in its rejection of the application was the overwhelming community opposition to the proposed development. Council reviewed numerous letters of opposition which indicated that the community was concerned with the adverse effect the proposed construction would have on the natural environment and the neighbourhood generally, the precedent that the granting of a variance might set for other small parcels created by road dedication and the impact of such development on road access.

The Petitioner subsequently brought an application under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 to challenge Council's decision on both procedural and substantive grounds. In dismissing the petition, the Court reaffirmed a number of principles relating to the DVP process, including the following:

- ◇ an applicant has no vested right to a variance. The granting of a variance is entirely within the discretion of a local government council, who is in turn responsible to the electorate for its land use and planning decisions;
- ◇ in considering the scope of procedural fairness owed by a local government council in the context of a DVP application process, a court will consider not only the nature of the decision, the process followed to make it, and the importance of the decision to the individual affected, but also the statutory scheme governing the decision-making process;
- ◇ in the context of a DVP application, there is no statutory requirement for a local government council to provide written reasons in respect of a rejection of a DVP application, nor is there an express statutory requirement for a public hearing (unlike the case where amendments are being made to zoning bylaws or OCPs). In the absence of an express statutory requirement for a public hearing, the Court will not impose one;
- ◇ while an entitlement to make representations could be inferred by the statutory requirement to provide notice to the applicant and adjacent landowners under section 499 of the LGA, there is no statutory indication that any implied right to make representations mandates an oral hearing;
- ◇ a local government council's discretion to issue a DVP under section 498 of the LGA is not limited by any express statutory criteria, other than the limits on what can be varied under section 498(2) (e.g. a Council cannot vary use or density or a flood plain specification). Thus, if the requested variance is not precluded by section 498(2) there is no restriction on what a council may consider in issuing a DVP, provided that the considerations are not extraneous to statutory purposes (having regard to the broad statutory purposes of a local government as set out in section 1 of the LGA and section 4 of the *Community*

(Continued on page 2)

*Charter*); and

- ◇ it is within the role of a local government council, as the elected representatives of their community, to identify and assess factors relevant to the interest of a community on a variance application.

**October, 2018**

**Pam Jefcoat**

---

This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.



**Pam Jefcoat**  
**604.358.2248**  
**pam@civiclegal.ca**

**Pam Jefcoat** is a partner of the firm and has over 17 years of combined experience in local government and commercial real estate law. Pam is a seasoned advisor on a wide variety of local government and real estate development matters, with a focus on land use planning, subdivision and rezoning and redevelopment of residential, mixed use and industrial properties. Pam brings extensive experience into advising clients on rezoning and permit approval processes, public hearings, phased developments, development agreements, density bonusing, density transfers, the imposition of development cost charges, community amenity contributions, housing agreements, alternative transportation and subdivision servicing requirements. Pam holds a Master's Degree in Public Administration and offers unique insight into matters of public policy and the impacts on urban development.



710 - 900 West Hastings Street, Vancouver, BC, V6C 1E5  
604.639.3639 | [www.civiclegal.ca](http://www.civiclegal.ca) | [Twitter @CivicLegal](https://twitter.com/CivicLegal)