

THE CORPORATION OF THE CITY OF COURTENAY

Office of the Mayor
830 Cliffe Avenue
Courtenay, B.C.
V9N 2J7



Phone (250) 334-4441
Fax (250) 334-4241
info@courtenay.ca

City File No.: 2430-20

August 6, 2014

Mike Hamilton
Friends of Maple Pool

Dear Mr. Hamilton:

Re: Maple Pool Campground Proposal

I write on behalf of Council in response to your letter of June 16, 2014 on behalf of the Friends of Maple Pool requesting that the City unilaterally rezone the Maple Pool property and discontinue the enforcement proceedings on the following basis:

1. The Friends would:
 - a. Address the flooding and swift river currents on the property through a combination of flood protection works and raising the area where the residential units sit in accordance with a geotechnical engineer's plan;
 - b. Obtain all approvals from DFO and MOE for the works;
2. The property owners would sign a covenant that rents would not be raised above normal cost of living except in "circumstances beyond their control";
3. The property owners and residents would sign a waiver of liability releasing the City for all liability in relation to flooding;
4. The City would:
 - a. Unilaterally rezone the property to permit its current use without requiring a rezoning application from the property owners;
 - b. Not "add any more cost to the project by demanding expensive studies, permits, DDC's, etc." to be paid by the owners; and
 - c. Discontinue the enforcement proceedings.

You requested a "clear and unambiguous response from Council, even if negative." In our conversations, the City understood that you are looking to know if there are any "showstoppers" that would prevent their

plan from moving forward, including, most significantly, whether the City would consider a unilateral rezoning.

The City's Commitments: Rezoning and Litigation

Council has considered your proposal, and has indicated that they are open to considering a unilateral rezoning of the Lins' property to allow multiple dwelling units on site, which would save the Lins substantial amounts of cost in relation to the application process. However, further consideration of the proposal is dependent on the Lins demonstrating their full agreement to the commitments in this letter, as well as meeting a number of legal pre-requisites that bind or affect the City as much as they do the property owners. These are outlined below.

You should also be aware that re-zoning is a public process that requires a public hearing which Council must approach with an open mind, even where the City initiates the rezoning. In this case, an amendment to the Official Community Plan would also be required, as the OCP does not currently permit multi-residential use on this property, or construction in the Tsolum River flood plain. Therefore, the City cannot make a commitment that the property will be rezoned, only that it is prepared to consider initiating such a rezoning, to undertake the considerable staff time and cost of preparing bylaws to amend the Official Community Plan and rezoning the property, and to put the amendment before the community at a public hearing.

A unilateral rezoning by Council does not require the owners to pay the rezoning application costs. Ordinarily, a rezoning that significantly increases the permitted density of a parcel (and consequently significantly increases the value of the property) would also have to address the provision of amenities for the increased use of the area. As part of this proposal, the City is prepared to consider the affordable housing commitments being made by the owner, as discussed below, and no other fees are contemplated in relation to the increase in density should the City proceed to unilaterally rezone the property.

Council is also prepared to suspend the legal action until the new year to allow the Friends of Maple Pool, together with the Lins and the residents, to pursue their part of the agreement and to meet the legal pre-requisites for the rezoning option.

The Friends' Commitments: Flood Risks and Protection

The Friends propose to address the issue on the property relating to construction within the 200 year floodplain of the Tsolum River, and the potential for swift running currents in parts of the Lins' property. The legislation that governs construction in the 200 year flood plain is the *Local Government Act*, and specifically s. 910 of that Act.

It is contrary to s. 910 of the *Local Government Act* and Provincial Guidelines for the City to permit the underside of any structure used for residential purposes to be located below the flood construction level for the property, or to permit the placement of fill within the 30 metre setback to the Tsolum River. This level and setback is established in the City's Floodplain Management Bylaw, No. 1743, but is based on Provincial mapping, guidelines and requirements.

However, s. 910(5) of the *Local Government Act* does permit the City to consider an exemption to these requirements for a specific parcel of land if the City receives “a report that the land may be used safely for the use intended,” certified by a professional engineer with experience in geotechnical engineering.” Such an exemption would have to be applied for by the Lins, and considered by Council. As a condition of granting an exemption, the City would also require a covenant from the owner which would include a waiver of liability and an indemnity for damage to the property and to occupants as a result of flood. No fee is currently payable to the City for an application under s. 905.

We understand that the Friends may have an engineer with experience in geotechnical engineering who would be willing to prepare a plan and report for the purpose of seeking an exemption to the flood construction level on the property. Section 910(5) of the *Local Government Act* requires that this report accompany an application for the specific exemptions requested to the flood construction requirements, supported by plans showing the location of the fill and the proposed residential units, and a certification from the engineer that the use of the units shown on the plan within the floodplain could safely be used for year-long residential use, as proposed.

If the engineer is not prepared to certify such a report, or the Lins are not prepared to enter a covenant waiving liability and indemnifying the City in relation to their own and their residents’ claims, then this would be a “showstopper” as the City is not legally able to ignore the flood construction limits in the Provincial guidelines and in its bylaw.

In addition, it should be noted that any report would also have to address the control of the flood currents that have been identified by the Provincial Emergency Program. In this regard, it appears that the Friends may be planning to rely on the presence of lock blocks placed without permit within the 30 metre floodplain setback to the property.

Any design or plan that relies on the placement of lock-blocks, fill, or other construction within the 30 metres of the Tsolum River would be contrary not only to s. 910 of the *Local Government Act* and the Floodplain Management Bylaw, but also the *Riparian Area Regulation (RAR)* of the *Fish Protection Act*, and the development permit area requirements in the City’s Official Community Plan (OCP) and Local Area Plan (LAP). Such work may be considered where supported by both a professional engineer as to flood and safety issues (under s. 910(5) of the *Local Government Act*), and by a qualified environmental professional under the OCP, LAP and RAR, but development permit fees and further studies and reports would be required, which the City cannot waive. As this relates to compliance with Provincial as well as municipal requirements, compliance with these provisions is not optional and cannot be addressed through rezoning by the City.

We understand that you also expect to obtain all necessary DFO, MOE, and K’ómoks First Nation approvals for works in and about a stream, and these would also be a pre-requisite to the City proceeding with a rezoning to permit the proposed development to proceed.

The Property Owners and Residents: Liability Waivers and Affordable Housing Covenant

Your proposal includes a commitment from the owners that they would enter into what would essentially be an affordable housing covenant. This covenant is critical to the City’s further consideration of the

proposal, and would have to address the City's policies in this regard, including the provision of safe and affordable housing.

With respect to affordable housing, we understand that the owners have agreed to enter into a covenant whereby the rent will only be increased by ordinary inflation or in other circumstances beyond their control. Any provision in the proposed covenant for increases in rent beyond normal inflation would have to be reviewed and approved by the City. The proposed rezoning of the property to permit year-round multi-family residential use would very substantially increase the value of the Lins' property, and the covenant would have to address that this significant benefit to the property owner could not be used for anything other than the provision of affordable housing to those in need of it.

With respect to safe housing, the proposal is to house people in a floodplain. Therefore, satisfactorily addressing the flooding risks would be a pre-requisite for advancing a rezoning bylaw.

In addition, the owners will have to address the safety of the proposed residential units themselves. This means that the dwelling units proposed must either meet BC Building Code requirements for residential use, or CSA standards for residential use, with elevated pads that meet building permit requirements. The City assumes that any engineering report that would review the safety of the elevation and placement of the living units in terms of flooding would also address this concern in terms of year round residential use of the units. This issue is also a "showstopper" for the City, and the City will not rezone property and issue permits for a development that provides residential units that do not meet minimum safety standards for the residents.

In addition, a covenant signed by the land owners containing a waiver and indemnity is generally required for any exemption to the flood construction levels or setbacks under s. 905 of the *Local Government Act*. Your proposal indicates that waivers of liability would also be provided from the current residents. It would also be necessary for the owners to carry sufficient insurance to address any losses that might be incurred by their tenants in the event of a flood, as the City and the residents would be looking to rely on the covenant in this event.

CONCLUSION

In conclusion, the City is prepared to consider a unilateral rezoning of the property to allow for multi-residential affordable housing units, including the necessary OCP amendments in this regard. The City is also prepared to suspend its litigation to allow the owners and the Friends to address the legal pre-requisites for the proposed rezoning, as follows:

1. An application under s. 910(5) of the *Local Government Act* that includes a certified engineered report and drawings showing the proposed flood protection works and all structures within the flood plain, stating all exemptions required to the flood constriction level and setbacks, together with a certification that the use of the units shown in the drawings comply with applicable *Code* requirements and may be safely used for residential purposes;
2. No alterations of land or development within 30 metres of the Tsolum River, and removal of the lock blocks within this area (or in the alternative a development permit application and flood

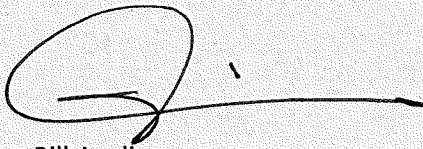
protection exemption application with the required reports to support the permit and exemption requested for works within 30 metres of the River);

3. A covenant from the property owner waiving liability in relation to the proposed floodplain exemption, and indemnifying the City for losses suffered by residents, with insurance for this purpose, together with individual releases from the current residents; and
4. An affordable housing covenant satisfactory to the owners and the City.

The Council has not set a hard and fast date by which the above must be addressed. However, we expect that Council will again consider whether to proceed with the litigation and the proposed rezoning sometime early in the new year, at which point the City will consider whether significant progress on each of the above requirements has been made.

Should you consider that any of the above legal pre-requisites to rezoning this site are not possible for the Friends and owners together to meet, I would appreciate hearing from you on this as soon as possible.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Bill Anglin
Acting Mayor