

## Introduction

Good evening Mayor Adams and councillors. My name is Matt Hulse and I am the articulated student at the University of Victoria Environmental Law Centre. I am here today to speak to the report submitted on behalf of the Campbell River Environmental Committee concerning the “solid non-hazardous waste” landfill proposed by Upland Excavating to be located on Gold River Highway. I understand that this report was received by council on May 9.

The Upland property is not an appropriate place for this type of landfill due to the nature of the proposed landfill and nature of the surrounding area. The Upland property is situated above an aquifer that is hydrologically connected to important fish habitat and municipal drinking water sources. The proposed landfill will accept materials that contain toxic substances. Bringing these elements together in close proximity creates an unnecessary risk to the health of the aquatic environment (which includes a salmon fishery) and the quality of local drinking water. Fish and drinking water are important to the Campbell River community – individual, economic interests should not be allowed to threaten these values.

Fortunately, the law permits Council to do the right thing and the legal thing. The City of Campbell River has the authority to prevent the proposed landfill using its municipal zoning bylaw. This presentation will state the basis for this authority, outline why it not overruled by the issuance of an Operational Certificate (a provincial waste discharge authorization), and why the proposed landfill is not shielded from this zoning authority by the presence of a landfill already on the property. I will also touch on the effect of the type of waste accepted by the proposed landfill and suggest ways the municipality can regulate the proposed landfill outside of zoning bylaws.

## Municipal Authority

The *Local Government Act* provides municipalities with clear authority to regulate with respect to zoning and land use. The City of Campbell River exercises this authority using Zoning Bylaw, 2006, and the zoning law can prevail, even if the Province authorizes a landfill by granting an Operational Certificate, as may happen here. Despite an apparent conflict between the zoning bylaw and the provincial enactment, the zoning bylaw remains operational and is able to validly prevent the landfill. There are a number of reasons for this:

- Canadian case-law states that “municipal and provincial regulation can occur side by side”, on the same issue, and there must be “actual conflict” for provincial paramountcy to occur. (*Spraytech*) “Actual conflict” occurs where one enactment compels what the other forbids (*BC Lottery*). Here, the Operational Certificate would allow the landfill, but not compel it.
- In other cases of apparent conflict, courts have allowed zoning bylaws to stand where it does not “require the respondent to offend the provincial enactment”. A zoning bylaw does not require anyone to do anything. It simply prohibits some land uses and allows others. Indeed, zoning requirements are properly considered to be “just another regulation that the application must comply with in using the land” (*Great Pacific Pumice*).
- The courts have also found that a zoning bylaw can prevent a use of property that was expressly permitted by a provincial authorization – especially where other zones are open to that type of land use. (*Norton*) I understand that Industrial 4 zone allows for landfills elsewhere in Campbell River.

- Finally, s.37(6) of the *Environmental Management Act* contemplates that a conflict may arise between a waste discharge authorization (ie. the operational certificate) and a zoning bylaw. This provision allows the Provincial Cabinet to decide whether the provincial authorization should prevail over the bylaw. This requirement for Cabinet to actively make a decision confirms that provincial paramountcy is not automatic. Incidentally, this type of Provincial decision has never been made by cabinet before.

#### Non-conforming uses

Now that we have established that the City of Campbell River has the Zoning authority to prevent the landfill, (even if the Operational Certificate is granted), we must consider whether they can exercise this ability in this instance. This depends on two things:

- what the zoning bylaw actually says and
- the law around “non-conforming uses”.

In the City of Campbell River zoning bylaw, the Upland property is currently zoned as Industrial 3. This type of zone does not include “landfill” as a permitted use.

This would make your decision easy, if not for the presence of the landfill already operating on the Upland property. This landfill is able to operate now because it is a “non conforming use”. It was a lawful and permitted use by a zoning bylaw when it first took place but, due to a change to the zoning bylaw, it no longer fits within the list of uses permitted by the zoning bylaw.

However, s.528 of the *Local Government Act* serves to protect “non-conforming uses” from the application of the zoning bylaw.

Nevertheless, this protection is not unlimited. Section 530 of the *Local Government Act* only permits a “non-conforming use of land” to continue as long as it does not expand “on a scale or to an extent or degree greater than at the time of the adoption of the land use bylaw.” This means that the existing Upland landfill must stick within the operational parameters that were present in 2006, when the current zoning bylaw -which prohibits landfills in I-3 zones - came into force

The question then becomes: can the proposed landfill continue legally as a non-conforming use? Is it protected as a non-conforming use? Or, is it outside this protection, and therefore in violation of the zoning bylaw, because it is “on a scale, to an extent or degree greater” than the existing landfill? I submit that the proposed landfill is outside of this protection.

The courts in BC have considered what is a “non-conforming use of land” and what is “on a scale, to an extent or degree greater” than a non-conforming use. The courts have found that a “non-conforming use of land” consists of the “use of the land” itself and “production on the land”.

With respect to “use of the land” itself, “increased activity attendant on natural business growth” is permitted, but the “non-conforming use is confined to the physical limits of the actual use being made of the property [at the time the bylaw was enacted] and does not extend to the entire area” of the property. The amount of land on the Upland property used as a landfill must remain relatively the same as it was when the zoning bylaw came into effect in 2006.

- While we do not have any figures regarding the original footprint, it is apparent from a comparison of the proposed landfill Design Plan with the map in the original permit and from observation of excavating activities on the property that the landfill footprint is going to increase.
- Furthermore, two entirely new uses of the land are proposed: a lined aeration pond (leachate treatment pond) and an infiltration pond. These are not existing uses of the land and will be situated outside of the proposed landfill footprint. The map in the Design Plan depicts only 1 infiltration pond, but elsewhere the Plan indicates there will be 2 ponds with a combined surface area of 3,500m<sup>2</sup>. The aeration pond has a surface area of 900m<sup>2</sup>.

With respect to the issue of “production on the land” it is evident that the proposed landfill will accept and treat significantly more waste material than the existing landfill.

- The existing landfill accepts 3,200m<sup>3</sup> of waste annually. The proposed landfill will accept 25,300m<sup>3</sup> of waste annually. This is an 8-fold increase in material, with a corresponding increase in traffic, noise and related activities at the property.

The increase in the size of the proposed landfill and the increase in the amount of waste accepted and treated at the proposed landfill strongly suggest that this is a use that is “on a scale or to an extent or degree greater” than the existing landfill. This means that the proposed landfill would not continue as a “non-conforming use”, would not be protected from the zoning bylaw, and therefore, would be validly prohibited from operating.

#### Nature of the Material (*Saint Romuald*)

The assessment of the proposed landfill under s.530 of *Local Government Act* does not even consider the nature of the waste material being accepted. This characteristic is taken into account by the Supreme Court of Canada in a Quebec case on non-conforming uses. This case provides a helpful 7-step framework that allows us to see that the nature of accepted waste makes the proposed landfill sufficiently different in kind from the existing landfill, and therefore, no longer a non-conforming use.

The existing landfill accepts “inert municipal waste” – stumps, trees, land clearing waste, selected building demolition waste”. The proposed landfill accepts “construction and demolition waste, land clearing debris, non-hazardous waste soil and waste asbestos”. These materials will contain a number of toxic substances including petroleum hydrocarbons, heavy metals, and other toxic chemical compounds. These materials can enter the groundwater in a number of ways:

- Leaking of leachate through the landfill liners – the Design Plan and engineering consultant both acknowledge that leaks will occur and Environment Canada notes that “*major knowledge gaps in our understanding of municipal solid waste disposal include: ...long term-integrity of liner cover and leachate systems.*”
- Spillage of untreated leachate over the edges of treatment ponds during high rain events,
- Carried into drainage ditches (which drain into the aquifer) by stormwater runoff from the contaminated soil that is used as daily cover for the landfill

The 7-step framework is also concerned with the conflict of the proposed landfill with surrounding land uses. The underlying aquifer is a “high vulnerability class IIA” sand and gravel aquifer. It has a direct hydrological connection to the Cold Creek, the Quinsam River and the Quinsam River Salmon Hatchery.

The Upland property itself is located within the Campbell River Official Community Plan Watershed Development Permit Area – designed as such to provide for long term drinking water quality protection. The property is also located within 10m of Rico Lake and 150m of McIvor Lake, which are also hydrologically connected and part of the John Hart Watershed, which provides water which the City of Campbell River.

The presence of a large amount of toxic substances in close proximity to easily infiltrated hydrology creates a conflict between proposed landfill and broader use of the region as watershed. This further supports the argument that the proposed landfill would not continue as a “non-conforming use” and can be validly prohibited by the zoning bylaw.

#### Conclusion

Putting a large quantity of toxic substances in a landfill on top of an aquifer that feeds local rivers and drinking water sources does not make sense from an environment or public health perspective. Fortunately, the City of Campbell River can prevent this from happening using their zoning bylaws, despite provincial authorization and despite the presence of an existing landfill on the Upland property. This is the right thing to do, and you have the legal ability to do it.

Thank you.