

Zoning Out

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Is Your Natural Resource Development Subject to Municipal Controls? Cowichan Valley Regional District v. Cobble Hill Holdings Ltd.



Cobble Hill owned land within the Cowichan Valley Regional District (the CVRD). A rock quarry operated on the land. The quarry permit issued by the Chief Inspector of Mines carried reclamation conditions.

In 2009 the quarry operator obtained a permit from the Ministry of Environment (MOE) to fill the quarry with clean fill. In 2011 the operator had a better idea; it applied to the MOE and obtained an amended MOE permit to permit the disposal of contaminated soil in lined and capped cells in the quarry excavation. It also obtained MOE approval to build and operate an asphalt pad upon which contaminated soil would be processed through bioremediation.

The CVRD was the local zoning authority. It took the position that this amounted to the operation of an illegal landfill, outside of the permitted uses under its zoning by-laws for the “forestry” zone. The CVRD brought a court action to stop the activity.

Cobble Hill and the operator responded, saying that the CVRD had no jurisdiction over mining activities, that the quarry was a mine and that reclamation was integral to the scheme of mine regulation.

In its November 3, 2016 decision, the British Columbia Court of Appeal agreed with Cobble Hill. It held that under the BC *Mines Act* a quarry is a mine. It found that reclamation is part of “mining activity” under the *Act* and that it was not the same as the operation of a landfill. Moreover, the Court found that the Province had enacted a comprehensive scheme of regulation applicable to mines and mining, that the *Municipal Act* and the *Community Charter* excluded from mining the CVRD’s jurisdiction over the regulation of uses of “land”. The CVRD therefore did not have zoning jurisdiction over mining within its boundaries. Mine reclamation fell within the regulatory sphere of the Chief Inspector of Mines and the MOE. The disposal of contaminated soil in the quarry excavation could continue in accordance with the MOE approval.

That was not the end of it. The Court said that operation of the soil treatment pad was independent of the act of reclaiming the quarry by backfilling the excavation. The treatment

facility was therefore subject to zoning and was not a permitted use of the land. An injunction was ordered to prevent its operation.

Municipalities derive their authority from provincial legislation. They enjoy only the powers that are granted by legislation and those additional, implied powers as may be necessary to give effect to the purposes of the municipality. Not all municipal and land use and planning legislation in Canada specifically excludes jurisdiction over mines. In other provinces it might take a lot to convince a court that a mine is not governed by municipal zoning restrictions. The same can be said for forestry or other natural resource developments. The Yukon Government's web site mentions, somewhat indirectly, that mining operations in organized municipalities may also be subject to municipal land use controls:

Regarding the rights issued under the mining acts and precedence over the planning and zoning of a municipal government; the *Quartz Mining Act*, *Placer Mining Act* and the *Municipal Act* are all Yukon law. Any obligations and rights issued through any of these pieces of legislation must respect the jurisdiction of other Yukon legislation.

Provinces with free entry systems often avoid conflicts between mining uses and municipal development by withdrawing populated or developed areas of the province from prospecting. The province may also have an ability to withdraw just the surface access rights from holders of existing Crown mineral dispositions. For example, in Manitoba, under Section 144 of *The Mines and Minerals Act*:

Where, in the opinion of the minister, surface rights in respect of a parcel of land on which a claim or mineral lease is located are required for an urban centre, subdivision as defined in *The Planning Act*, summer resort area or public purpose or it is in the public interest to do so, the minister may by notice in writing to the holder of the claim or mineral lease ... cancel the mineral access rights of the holder.

The effect of municipal and sometimes provincial regulation is often overlooked in the planning and operation of natural resource developments. This is especially the case where the development is on the fringes, in less settled, less populous municipalities.

Not all natural resource developments take place in a municipality. A good deal of the North across Western Canada is "unorganized territory". That is not to say that there are no restrictions. In those cases, the decision-making, regulatory and permit powers may rest with the local administrative body, the Province or both. When facilities are being built or altered, chances are that building permits and other approvals will be required from the Province. This can come as a surprise to owners of projects that have a long history with little involvement with regulatory authorities.

It is good practice to first understand the scope of authority of any municipal and provincial

land use and building regulations before embarking on a project.

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