IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.,* 2016 BCSC 489

Date: 20160321
Docket: 13-3547
Registry: Victoria

Between:

Cowichan Valley Regional District

Petitioner

And:

Cobble Hill Holdings Ltd.,
South Island Aggregates Ltd. and
South Island Resource Management Ltd.

Respondents

Before: The Honourable Mr. Justice B. D. MacKenzie

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:	A. Bradley
Counsel for the Respondents: Cobble Hill Holdings Ltd. and South Island Aggregates Ltd.	L.J. Alexander and A.L. Faulkner-Killam
Counsel for the Respondent: South Island Resource Management Ltd.	K.R. Doerksen
Place and Date of Hearing:	Victoria, B.C. November 2-6, 2015; November 23-27, 2015 and December 1, 2015
Place and Date of Judgment:	Victoria, B.C. March 21, 2016

1. Introduction

[1] This litigation focuses on the importation of contaminated soils to a quarry operation north of Victoria, British Columbia, activities which the quarry owner says are reclamation of the quarry.

[2] The petitioner, Cowichan Valley Regional District ("CVRD"), disagrees and says the respondents are operating a landfill, not reclaiming the quarry. It seeks a declaration that the use of the property is either a contaminated soil treatment facility or a landfill facility, and that neither is a permitted use according to CVRD zoning bylaws. The CVRD also seeks injunctive relief to restrain the respondents from such use of the property as well as orders requiring the respondents to remove contaminated soils and related structures from the property, located at 640 Stebbings Road, in the Shawnigan Lake watershed. The property is zoned F-1 (Primary Forestry) according to Shawnigan Lake Zoning Bylaw No. 985 (the "zoning bylaw").

[3] The respondents, Cobble Hill Holdings Ltd. ("CHH") and South Island Aggregates Ltd. ("SIA"), oppose the relief sought in the petition, and seek costs on Scale "C", due to what they submit is the complexity of the issues. CHH is the owner of the property, while SIA operates the quarry pursuant to a permit issued in 2006 under the *Mines Act*, R.S.B.C. 1996, c. 293.

[4] In addition to the 2006 permit issued to SIA authorizing its mining activities, in August 2013, the Ministry of Environment ("MoE") issued a permit pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 (*EMA*), allowing CHH to discharge "refuse … from a contaminated soil treatment facility and a landfill facility" located at the quarry site (emphasis added).

[5] The third respondent, South Island Resource Management Ltd. ("SIRM"), was, by consent, added as a respondent prior to the commencement of the petition proceeding. SIRM is an independent company, incorporated April 20, 2015, and

retained by CHH for the express purpose of carrying out what the respondents submit is the reclamation project at the quarry.

[6] The respondents assert they are not operating a landfill or a contaminated soil treatment facility, as alleged by the CVRD, or any other activities that fall outside the "mining activities" permitted under the zoning bylaw. The respondents say they are merely reclaiming the land as required under the 2006 mining permit. They therefore say that reclamation is either a permitted use under the bylaw, or, as a "core" or integral mining activity, not subject to local government zoning power.

[7] On the other hand, while it is common ground that the petitioner has no jurisdiction over the extraction of aggregate material at the quarry, the CVRD says what is now occurring at the property is the operation of a landfill, a completely separate enterprise, and that these activities are not related to mining activities at all; the petitioner says it is clearly a non-permitted land use. Moreover, the petitioner submits that, even if it is considered reclamation, as the bylaw only permits "crushing milling concentration for shipment" of the aggregate, reclamation is simply a "related mining activity" and, as has been decided in several court decisions, related mining activities that are not a necessary part of the extraction process are subject to local land use bylaws (*Cowichan Valley Regional District v. Norton et al*, 2005 BCSC 1056 (*Norton)*, and *Squamish (District) v. Great Pacific Pumice Inc. et al.,* 2003 BCCA 404 (*Great Pacific Pumice*)).

[8] Not surprisingly, there is significant concern about the importation of contaminated soil to the quarry site, resulting in a 31-day hearing in 2014 before the Environmental Appeal Board ("EAB"), where the CVRD was one of several appellants. The petitioner points out that it filed this petition in October 2013, shortly after the MoE permit was issued, but agreed to put this proceeding on hold, pending the outcome of the EAB appeal. In March 2015 the EAB upheld the validity of the MoE permit, authorizing the importation of contaminated waste to the quarry site. The petitioner then proceeded with the petition. However, as the parties have emphasized, this proceeding is not about re-litigating health and environmental

issues, rather, it focuses on whether the activities are prohibited by the petitioner's land use bylaw.

1.1 Petition proceeding

[9] At the commencement of the hearing, CHH and SIA expressed their concern about the nature of this proceeding and invited the court to "be alive" to the question of whether these issues could be properly resolved by way of petition. Notwithstanding the equivocal position of the respondents on this point, I will consider whether the issues involved in this litigation are suitable to be heard by way of a petition and accompanying affidavits, pursuant to Rule 16-1 of the *Supreme Court Civil Rules* (*Rules*). The petitioner says it is appropriate to proceed by way of petition, as the question is whether the activity now occurring at the quarry is permitted under the bylaw.

[10] It is to be noted, however, that the respondents made no application to refer this matter to the trial list, even though they submitted "this is an appropriate case for the court to convert the proceedings to a trial." Conversely, on the first day of the hearing, counsel for CHH and SIA specifically stated these respondents were not asking for such an order, but then proceeded to make extensive submissions on this point, prompting lengthy reply submissions from the petitioner. Nevertheless, pursuant to both Rule 22-1(7)(d) and Rule 16-1(18), and the comments of the court in *Sherar et al v. Samson's Poultry Farm (1973) Ltd. et al* (1979), 15 B.C.L.R. 283 (S.C.) at 286, an order under Rule 22-1(7)(d) can be made without a formal application, although the equivocal position of the respondents does make one pause. At the same time, the petitioner submitted that only after hearing full submissions and reference to the affidavits and attached documents would I be able to make a proper determination as to whether the matter could be heard by way of petition.

[11] Further complicating the issue somewhat is the fact that two other justices had earlier made orders on such preliminary issues as striking an affidavit filed by the petitioner, cross-examining the affiant of that affidavit, cross-examining the

petitioner's expert witness and ordering the matter to be peremptory on the respondents, after granting their request to adjourn the hearing originally scheduled for early September 2015. The petitioner says that throughout these earlier proceedings there was no suggestion the matter could not proceed by way of petition. It says the respondents are simply attempting to delay the matter further. In fact, the petitioner submits that these earlier decisions reflect the assumption that the parties were content to proceed by way of petition.

[12] In support of the suggestion that the matter should be referred to the trial list, the respondents note that pursuant to Rule 2-1(2)(c), if the sole or principal question is construction of an enactment, the matter is to proceed by way of petition.

[13] However, the respondents say the issue here is not construction of the relevant bylaw, but rather enforcement of the bylaw, having regard to what the petitioner says are the actual activities now taking place on the property, where many of the facts that the petitioner relies on in support of its application for declarations and injunctive relief are in conflict with the position advanced by the respondents.

[14] In addition, the respondents note that "actions" by a municipality to enforce a bylaw or to restrain the contraventions of a bylaw may be brought by a "proceeding" in the Supreme Court, as outlined in s. 274 of the *Community Charter,* S.B.C. 2003, c. 26.

[15] While acknowledging that a "proceeding" would include a proceeding by way of petition, the respondents note that s. 274 refers to a "plaintiff" and "defendant" and a response to a "civil claim," all of which they say indicates the usual procedure is an action. In addition, the respondents say the section references a "proceeding," as opposed to an "application," a point recently canvassed by our Court of Appeal in *Radcliffe v. The Owners, Strata Plan*, 2015 BCCA 448 (*Radcliffe*), where the court noted it was significant that the relief sought was pursuant to s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43, which specifically states that such relief is to be initiated by way of an "application."

[16] As Savage J.A. noted:

> [21] Section 164 of the *Act* refers to an application authorized by the statutory provision to be made to the court. The application thus falls within the broad description of a "proceeding … brought in respect of an application that is authorized by an enactment to be made to the court" within the meaning of Rule 2-1(2) of the *Civil Rules*. The proceeding authorized by s. 164 of the *Act* is referred to as an "application", and thus uses a term associated under the *Civil Rules* with a proceeding brought by petition.

[17] As such, the respondents say the use of the words "action" and "notice of civil claim" in s. 274 of the *Community Charter* could arguably be dispositive of the issue as to whether this matter is properly before the court by way of petition.

[18] But Savage J.A. also considered the fact that the claim in *Radcliffe* was for a "small" liquidated amount, thereby bringing into play the objectives in Rule 1-3 and proportionality as relevant considerations. He concluded:

> [31] In my opinion the judge below did not err in approaching the matter in the way that he did. Given the statutory provision, the amount involved, and the nature of the claim and proportionality, it was appropriate to commence the matter by petition.

[19] The respondents say this is not the case here. All parties have emphasized that the outcome of this proceeding will not only involve millions of dollars to the respondents one way or the other, depending on the ultimate outcome, but is also significant to the public at large as evidenced by the lengthy EAB hearing dealing with health and environment issues and the safety of Shawnigan Lake water.

[20] Moreover, the respondents say the usual reason a matter should be referred to the trial list, pursuant to either the summary trial provisions of Rule 9-7 or the provisions in Rule 22-1 governing chambers proceedings, is when there is a significant dispute as to the facts, especially where, as here, both sides have tendered conflicting expert reports.

[21] The issue of conflicting evidence was considered by Pearlman J. in a two-day hearing in August 2015, when he ordered the respondents could cross-examine the petitioner's expert witness, Ms. Moody, on the basis that cross-examination would

assist the court in resolving material conflicts in the evidence concerning the actual operations being conducted on the property and whether those operations are integral to the reclamation of the quarry.

[22] In this regard, the respondents say this conflict has become even more significant since they have now filed their own expert report in order to rebut the opinion advanced by the petitioner's expert with respect to whether the facilities are integral to, or necessary for, reclamation of the property.

[23] Moreover, after hearing extensive submissions, I ordered the petitioner could cross-examine the respondents' expert. As a result, the respondents say this proceeding has evolved into the type of proceeding contemplated by Ballance J. in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, when she said:

> [50] On this point I would add that the Court ought to be cautious in making orders which have the objective of addressing the resolution of a *bona fide* triable issue through the creation of a hybrid proceeding that permits certain pre-trial and trial mechanisms to the parties, but denies them others. Where the driving underpinning for such an approach is largely one of practicality, it strikes me there is a very real risk of diminishing returns where the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits and possibly a broader scope of cross-examination, selective document disclosure, and other features of the trial process. At some point, the process that looks like a trial, should be a trial.

[24] Other factors which the court should consider when determining whether the matter is suitable to proceed by way of petition were outlined by Bruce J. in *Timberwolf Log Trading Ltd. v. British Columbia*, 2013 BCSC 282 (*Timberwolf*), where she stated:

> [20] The petitioners argue this is an appropriate case for the court to convert the proceedings to a trial pursuant to R. 22-1(7)(d). The factors to consider include the undesirability of multiple proceedings, the desirability of avoiding unnecessary costs and delay, whether the case involves an assessment of credibility and demeanour, and whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute: *Courtenay Lodge Ltd. v. British Columbia*, 2011 BCSC 1132.

[25] There is no question it is well settled that the threshold is low when a party seeks to convert a petition proceeding to a trial pursuant to Rule 22-1(7)(d), and generally an applicant need only show there are serious, disputed questions of fact or law raised by the petition (*Timberwolf* at para. 21).

[26] While there is obviously a triable issue in the present case as evidenced by counsel's exhaustive submissions and the cross-examination of two expert witnesses, I am not satisfied that the relevant facts are in dispute to such a degree that I cannot render a proper decision.

[27] In these circumstances, it is my view that it would be inefficient to spend 11 days litigating this matter and then send it to the trial list, especially where the contents of the documents relied on by the parties do, to a great extent, speak for themselves. In this regard, I am satisfied that, apart from the opinions expressed by the two experts, issues which were covered in extensive cross-examination, there is no significant dispute as to what activities are presently being conducted at the facility, given the only evidence on this point comes from the respondents themselves, as neither the petitioner's expert nor its inspectors have visited the site to actually observe what is taking place at the quarry since the MoE permit was issued. As a result, I am not persuaded it would be in the interests of justice to refer this matter to the trial list and decline to exercise my discretion to do so.

1.2 Withdrawal of an admission

[28] The respondents advanced another preliminary argument. They say that when the CVRD amended the original petition so as to not rely on an affidavit from Mr. Anderson, the past general manager at the CVRD, it was contrary to Rule 7-7(5)(c), prohibiting the withdrawal of an admission made in a pleading or petition without consent or leave of the court. The respondents submit that the petitioner made an admission in the original petition that the activities on the property constituted "reclamation," based on statements in the Anderson affidavit, and that through the amendment the petitioner sought to withdraw that admission, even though the phrase "opportunistic reclamation" was a term used initially by the

MoE in its assessment of the original application by SIA for a permit to treat and discharge contaminated soil and "landfill untreatable waste."

[29] What constitutes an admission for the purpose of the Rules was recently canvassed by Johnston J. in *Ledinski v. Chestnut*, 2015 BCSC 373, noting the long-standing authority on this issue remains *British Columbia Ferry Corp. v. T&N, plc*, [1993] B.C.J. No. 1827 (S.C.), where the court considered the proposed withdrawal of an allegation against the defendants under Rule 31(5)(c) (now Rule 7-7(5)(c)). Justice Braidwood described the application of the Rule as follows:

> [13] The type of admission contemplated in the rule is an admission which would benefit the defendant in its defence of the case remaining after the amendment. Further, the admission contemplated by the rule must be a deliberate concession made by the plaintiff for the benefit of the defendant.
>
> [14] In that pleadings should contain statements of fact, in one sense every pleading is an admission where it contains a statement of fact. But that is not the type of admission contemplated by Rule 31(5). The rule contemplates an admission deliberately made by the party pleading it as a concession to its opponent. No particular form of words need be given but the concession must be clear.

[30] In order for a statement of fact to be considered an admission by the pleading party, there must be unambiguous evidence that it was made for the purpose of a deliberate and clear concession to the other party (see *Ledinski* at paras. 27-28). An amendment will not be caught within the ambit of the Rule even where it proposes to contradict original statements: *Kamei Sushi Japanese Restaurant Ltd. v. Epstein*, (1996) 25 B.C.L.R. (3d) 366.

[31] While the cases cited address statements of facts set out in pleadings and do not deal specifically with petitions, I see no reason why they should not inform the application of the Rule in proceedings brought by way of petition. In these circumstances, I am not persuaded there was a deliberate concession made by the petitioner for the respondents' benefit, or that the amended petition constitutes a withdrawal of an admission by the petitioner that the present activities at the quarry are in fact reclamation.

1.3 Swearing to the truth of the facts in the petition

[32] The respondents advanced a third preliminary objection. They argued that the petition suffers from a fatal flaw in that there was no affiant on behalf of the CVRD swearing to the truth of the facts as set out in the petition. They submit that words to the effect of "I have read the filed Petition and to the best of my knowledge, the facts set out ... therein are true" must be sworn to. Without this, they say, there are no facts in evidence that the petitioner may rely on for any relief.

[33] On this point, the respondents acknowledged that in some cases the court could go through the exercise of "teasing out" the evidence in support of the facts that support the relief sought. However, in a case like this, where the parties rely on volumes of materials, the respondents submit that leaving the court to identify the affidavit and exhibit materials supporting the facts relied upon is fatal to the petition and should result in a dismissal. In my view, this assertion in itself is an admission that there is no magic in the words swearing to the truth of the facts set out in the petition.

[34] Furthermore, there is nothing in the *Rules* to suggest this is a requirement, only that the petition must be filed with "each affidavit in support" (Rule 16-1(2)). As noted in McLachlin & Taylor's *British Columbia Court Forms,* 2nd ed. (LexisNexis, updated to March 2015), this is a change from the previous Rule 10(4), stating that "a petition shall be supported by affidavit as to all the facts on which the application is based." The authors further explain that "the easiest way of proving those facts [set out in the petition] is to have a person who has direct knowledge of those facts swear as to the truth of those facts." Again, this suggests that there is no absolute requirement, only that this is the "easiest" way of proceeding. I therefore find it is within the court's discretion to allow the petition without an affidavit including words to this effect. Accordingly, I am satisfied that the petition was properly before the court, with affidavits in support of the facts therein.

2. Applicable Legislation

[35] The petitioner, as a local government, has the authority to regulate or prohibit land use, buildings and other structures pursuant to s. 903 of the *Local Government Act,* R.S.B.C. 1996, c. 323 (*LGA*), as it was prior to January 1, 2016.

[36] The definition of "land," for the purpose of the *LGA,* is found in the *Community Charter*:

> Land
>
> (a) for the purposes of assessment and taxation, means land as defined in the Assessment Act, and
>
> (b) for other purposes, includes the surface of water, but does not include
>
> (i) improvements,
>
> (ii) mines or minerals belonging to the Crown, or
>
> (iii) mines or minerals for which title in fee simple has been registered in the land title office …

[37] Under the authority of s. 903 of the *LGA*, the CVRD adopted the applicable zoning bylaw. Relevant to the question of permitted land uses is s. 4.2:

> 4.2 Land or the surface of water shall not be used and structures shall not be constructed altered located or used except as specifically permitted by this bylaw.

[38] Section 7.4(a) of the zoning bylaw specifies the permitted uses of the land in the F-1 zone applicable to the property:

> (1) management and harvesting of primary forest products excluding sawmilling and all manufacturing and dry land log sorting operations;
>
> (2) extraction crushing milling concentration for shipment of mineral resources or aggregate materials excluding all manufacturing;
>
> (3) single family residential dwelling or mobile home;
>
> (4) agriculture silviculture horticulture;
>
> (5) home based business;
>
> (6) bed and breakfast accommodation;
>
> (7) secondary suite or small suite on parcels that are less than 10.0 hectares in area;
>
> (8) secondary suite or a second single family dwelling on parcels that are 10.0 hectares or more in area.

[39] Given the provision in s. 7.4(a)(2), this bylaw permits extraction, that is "mining," and the related specific processing activities. In addition, the respondents emphasize that s. 4.4 of the bylaw states that "all uses permitted by this bylaw include those uses accessory to the permitted principal uses" (emphasis added).

[40] Notwithstanding the permitted uses in the F-1 zone, pursuant to the general land use powers in s. 903 of the *LGA*, the CVRD passed s. 5.20 of the zoning bylaw, pertaining to the importation and "storage" of contaminated waste or soil on land in the CVRD:

> Unless explicitly permitted in a zone, no parcel shall be used for the purpose of storing contaminated waste or contaminated soil, if the contaminated material did not originate on the same legal parcel of land that it is being stored on.

[41] Even though the CVRD referred to this provision in its petition, it says this section need only be considered if I do not accept its primary submission that the present activities at the quarry are not a permitted land use.

3. Position of the Parties

3.1 Position of the petitioner

[42] The petitioner submits that the respondents have taken steps to use the property as a contaminated soil treatment facility and a landfill facility, due to the encapsulation of contaminated soil not originating on the property. It says these land uses are prohibited, relying on the combined operation of s. 4.2 and s. 7.4(a) of the zoning bylaw, outlining the permitted uses in the F-1 zone.

[43] In this regard, the 2013 MoE permit acquired by CHH under the *EMA* authorizes the receipt of up to 100,000 tonnes per year of "contaminated soils and associated ash," referred to as "waste" by the MoE, as well as the discharge of "effluent" from a "contaminated soil treatment facility and landfill facility" located on the property.

[44] The respondents acknowledge they are accepting contaminated soil but depose they are not "treating" any soil, even though "treatment" is authorized under

the MoE permit. I agree with the respondents that there is no evidence to contradict their position on this point.

[45] At the same time, the CVRD concedes that local zoning regulations cannot prevent the respondents from extracting aggregate from the quarry, as it is well settled that mining is a *profit à prendre*, rather than a land use, and therefore not subject to zoning regulations.

[46] However, even though the definition of land in the *Community Charter* expressly excludes “mines” and thus extraction of the resource, the CVRD says “associated mining activities” are not excluded from the definition of land and can be controlled through its zoning power, relying on *Norton* and *Great Pacific Pumice* for this proposition. According to these cases, mining activities, other than extraction, including the storage and processing of materials at a mine site, may be prohibited by a zoning bylaw notwithstanding authorization under a provincial permit, subject to being expressly permitted in any particular bylaw.

[47] As such, the petitioner submits that the importation and landfilling of contaminated soil may be prohibited by its zoning bylaw, even if used for reclamation purposes and even when authorized by the MoE permit. While the CVRD acknowledges that in addition to extraction, which it has no jurisdiction over, the F-1 zone specifically allows some processing activities, it says it can control the “related mining activity” of reclamation, although its primary submission is that the respondents are operating a landfill and not reclaiming the quarry.

[48] The petitioner also notes that, while the activities undertaken by the respondents are authorized by the MoE permit issued under the *EMA*, until such time as the operation of its zoning bylaw is suspended by the Lieutenant Governor in Council, pursuant to s. 37(6) of the *EMA*, the use of the property for these activities is subject to the zoning bylaw. That is, the CVRD says it can prohibit what the MoE permit allows, and only Cabinet can suspend the bylaw, which has not occurred.

3.2 Position of the respondents

[49] The respondents have advanced three arguments in support of their position: (1) the CVRD has no jurisdiction to control a "core" mining activity, including reclamation, through its zoning powers; (2) the activities on the property are permitted under the F-1 zoning bylaw; and (3) the CVRD may not rely on s. 5.20 of the bylaw to prohibit contaminated soil from being stored on the property, as the respondents are not "storing" waste soil or, alternatively, this particular section was not validly enacted. The first two arguments, however, rely on a finding that reclamation is a core or integral mining activity.

[50] I will first deal with the respondents' submission that any "mining activities" on the property are exempt from local government zoning as a result of the exclusion of mines in the definition of "land" in the *Community Charter*. According to the respondents, all activities that fall within the definition of a "mine" as defined in the *Mines Act*, are mining activities and are "necessarily incidental" to the extraction process. They say this includes any activity that can be considered "site reclamation" due to the fact that reclamation is required under the terms of the 2006 mining permit.

[51] The respondents note that, despite several visits to the property prior to the MoE permit being approved, the petitioner's bylaw enforcement officials had not found any of the non-extraction activities conducted on the property to be in breach of the zoning bylaw. The CVRD says this is neither here nor there as the facilities for the permanent encapsulation of waste material were only constructed after the MoE permit was issued. In fact, the CVRD says this circumstance supports its position that the present activities are not a necessary or integral part of extraction as the respondents did not undertake such activities until years after they commenced removing aggregate from the quarry.

[52] In their other argument, the respondents submit that all current activities conducted on the property are permitted uses under the F-1 zoning because the CVRD has specifically allowed mining, that is extraction, as well as "crushing milling

concentration for shipment of mineral resources or aggregate materials." They say that since they are not permitted to carry out extraction without reclamation of the quarry, any reclamation activities must be considered integral to extraction, crushing, and milling, and therefore permissible in the F-1 zone. Alternatively, they submit that these activities are permitted as being reasonably "accessory" to the permitted mining activities, pursuant to s. 4.4 of the bylaw.

[53] The respondents further submit that the determination of any potential future activities alleged by the petitioner cannot be done in the hypothetical and that no relief is appropriate in anticipation of a breach of the zoning bylaw. The respondents submit that what must be determined is not what might take place in the future, but what is in fact occurring at the site at the present time. I agree with this general submission but also accept the petitioner's submission that it is entitled to seek a resolution of an issue or question between the parties by way of a declaratory order where there is a "cognizable threat to a legal interest" (see *Kaska Dena Council v. British Columbia (Attorney General),* 2008 BCCA 455 at para. 12). Even though the respondents say the treatment facility is not operating at present, the question of whether or not it is a permitted use can be addressed at this point in time. Given the MoE permit allows for the operation of a soil treatment facility, the relief sought on this point is not merely "hypothetical." It is clear to me a "real issue" concerning the relative interests of these parties "has been raised and falls to be determined" (*Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 830). In fact, at one point the respondents said they wanted these questions answered in order to conduct themselves accordingly in the future. In addition, some years ago, dealing with the same bylaw and property very near the present quarry, Melvin J. concluded that the bylaw did not allow a soil treatment facility as a permitted use (*Cowichan Valley Regional District v. Lund Small Holdings Ltd.*, unreported reasons, Victoria Registry No. 00-2934) (*Lund*). Given the evidence presented here, I have no reason not to follow that conclusion. I will deal with this issue at the conclusion of these reasons.

4. Analysis

4.1 Facilities and activities on the property

[54] On October 4, 2006, the Ministry of Energy, Mines and Petroleum Resources, now known as the Ministry of Energy and Mines, issued the permit allowing SIA to operate the quarry. On this point, the respondents say they have been bringing soil to the quarry for reclamation since it began operation in late 2006 or early 2007.

[55] Section 18 of the 2006 mining permit stipulated that "soil or material brought to the site must be free of contaminants." The permit also noted the land and watercourses "shall be reclaimed" to residential use. As the respondents point out, there were no concerns expressed by the petitioner about clean soil being used as fill in order for the respondents to fulfill their reclamation responsibilities. As far as the present end land use of this property is concerned, the respondents note an amendment to the 2006 mining permit in October 2015 changed this from residential to "forestry/industrial."

[56] In April 2009, the original 2006 mining permit was amended, allowing imported soil if it met MoE soil guidelines, as well as requiring an engineering plan showing the location of "the soil storage cell." In the preamble, it states that "this permit contains the requirements of the Ministry … for reclamation."

[57] In October 2011, SIA and CHH applied to the MoE for a permit, which, according to the Ministry Assessment of August 20, 2013, was:

> … a permit to treat and discharge hydrocarbon contaminated soil and landfill untreatable waste (including but not limited to soil) at their active quarry site …
>
> The application is for the treatment and landfilling of a maximum of 100,000 tonnes/year of contaminated soils and associated ash (referred to as material or waste throughout this document). Two types of wastes are proposed to be received at the site. The first type of incoming material is amendable hydrocarbon contaminated soils above the Contaminated Sites Regulation (CSR) Residential or Industrial Land Use (RL or IL) standards but excluding Hazardous Waste (HW) as defined in the Hazardous Waste Regulation (HWR). The proposed soil treatment will reduce hydrocarbon concentrations below the CSR IL standards prior to discharge at the quarry site. The second type of incoming material is untreatable waste above the

> CSR IL standards but excluding HW. This second type of waste is proposed to be permanently encapsulated in engineered landfill cells of various sizes and shapes. The material received at the site is proposed to be used as fill (placed in landfill cells) and, if appropriate, as cover material for the progressive closure of the quarry site. Received soil may also be shipped off site once treated although this is not expected to be common operation. The proponent may also receive soil for direct discharge in the landfill (for direct backfill of the excavation) if soil quality meets final land use.
>
> [Emphasis added.]

The Ministry Assessment continued by describing an "Application Revision" that was required once it was determined that the treatment and landfilling of contaminated soils would require an effluent discharge authorization:

> The initial application submitted on October 12, 2011 was for the discharge of contaminated soils only. However, following the first review of the application MoE identified that an effluent discharge was also part of the proposal (Refer to Section 1.2 below) and that an effluent discharge authorization was required in addition to the soil discharge authorization. The effluent discharge application was submitted with the second draft TAR in February, 2012. The effluent discharge application submitted provided details on the proposed effluent discharge and indicated that the discharge would meet the BC Approved and/or Working Water Quality Guidelines (BCAWWQG), whichever is most stringent, for Freshwater Aquatic Life.

[58] On August 21, 2013, the MoE issued Discharge Permit PR-105809 to CHH, under the provisions of the *EMA*, which provided that CHH:

> … is authorized to discharge refuse to ground and effluent to an ephemeral stream from a contaminated soil treatment facility and a landfill facility located at 640 Stebbings Road, Shawnigan Lake, British Columbia, subject to the terms and conditions listed below. Contravention of any of these conditions is a violation of the *Environmental Management Act* and may lead to prosecution. [Emphasis added.]

The permit then stated under the heading "Authorized Discharges - General Conditions":

> This section applies to the discharge of refuse from a contaminated soil treatment and to the landfill facility.

In addition, under the heading “Authorized Discharge - Landfill Facility,” the permit stipulated that:

> 1.3.1 The authorized works are a landfill, engineered lined landfill cells, perimeter ditches, erosion and sedimentation control infrastructure, primary and secondary containment detection and inspection sumps and associated cleanout ports, catch basins, groundwater monitoring wells, management works and related appurtenances approximately located as shown on Figure A.

[59] Given this permission from the MoE to import and encapsulate contaminated soil, Mr. Mizuik, a director of SIRM and the construction manager, deposed that SIRM has invested “over $6 Million in equipment specifically for operation under the MoE Permit” and “approximately $1.1 million as operating expenditures.”

[60] Mr. Mizuik deposed that current site operations include “aggregate mining,” that is, extraction, as well as “reclamation” required after extraction of the aggregate. The use of “engineered lined cells” and a water treatment system are in place, all with a view, as he puts it, “to ensure careful reclamation.” The petitioner objects to Mr. Mizuik’s use of the word “reclamation” throughout his affidavit, saying this is nothing but his biased, non-expert, personal opinion, and is the ultimate question for the court, and should be given little or no weight. I agree with the petitioner’s general observations, but am not persuaded these comments render his affidavit inadmissible. In any event, the CVRD says these facilities are not used for reclamation of the quarry, but are used as a landfill, a completely different and highly profitable business, operated by SIRM, an independent third party. It is important to recognize however, that it is how the land is being used that is the fundamental issue, not who is using the land.

[61] Mr. Mizuik further deposed that pursuant to the provisions of the MoE permit, the “reclamation” plan for the quarry includes the use of this imported material as bulk fill, to eventually be covered with soil and revegetated. To ensure the continued isolation of the contaminated soils, the engineered lined cells are to be encapsulated with natural and commercial geomembrane covers and liners.

[62] As to the proposed soil treatment facility, Mr. Mizuik deposed that no soil treatment has taken place to date. Waste soils imported so far are only segregated from other materials due to their quality difference. As the respondents emphasize, and as I have already noted, there is no evidence to contradict Mr. Mizuik's evidence that at this point in time, no soil treatment is taking place. No one from the CVRD has been on site to observe what is going on. Nor has Ms. Moody, the petitioner's expert, even though she sought permission to do so, albeit at the last moment. However, given the totality of the evidence, there is no doubt that what is being brought to the facility is being permanently embedded in the engineered cells.

[63] As far as the water treatment system and settling pond are concerned, the respondents submit that water control and containment systems are necessary for a mining operation, and were in place prior to the issuance of the MoE permit; the MoE permit simply required the water treatment to be upgraded.

4.2 Statutory interpretation and the purpose of the F-1 zone

[64] At this juncture, it is worth commenting on the principles of statutory interpretation and the intent of the CVRD in enacting this particular zoning bylaw. As the respondents submit, the issue between the parties is, "at its most basic," an exercise of statutory interpretation to determine the scope of a legislative provision in order to ensure a unified regulatory scheme. All parties made submissions on how these principles should inform my analysis in determining the issues raised in this proceeding.

[65] The petitioner relies on the "implied exclusion approach" of statutory interpretation and s. 4.2 of the zoning bylaw, which states that land shall not be used except as specifically permitted under the bylaw. The petitioner therefore says that since a landfill is not listed as a permitted use in s. 7.4(a), these activities are prohibited.

[66] The respondents reject this implied exclusion approach and say the proper method of statutory interpretation is set out by our Court of Appeal in *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, 2014 BCCA 335 (*Paldi*),

requiring the court to look primarily to the purpose or intention of the bylaw when determining permissible land uses. The respondents submit it is incumbent on the court to ascertain the broad purpose of the bylaw using a purposive and contextual approach. That is, I must attempt to discern the intent of the CVRD when it passed the F-1 zoning bylaw.

[67] On this point, as an "interpretive aid," the respondents understandably emphasize that the F-1 zone permits extraction and processing for shipment of the aggregate, consistent with the petitioner's "South Cowichan Official Community Plan Bylaw No. 3510," which stipulates in Section 12 that, in addition to protecting "forest lands for their long term value":

> The Rural Resource Designation also has potential for other natural resource extraction industries, such as mining and aggregate resource extraction.
>
> …
>
> Lands in the Rural Resource Designation (RUR) are considered suitable for natural resource management, and are not considered as a 'land-bank' for future residential development. There is an abundance of land suited to residential development lying outside of the Rural Resource Designation.

Moreover, under the heading "Rural Resource Designation - Policies," the plan states:

> Policy 12.2: Within the Rural Resource Designation (RUR), the implementing Zoning Bylaw will provide the following zones:
>
> a. RUR-1 Rural Resource 1 Zone, for the management of the forest resource;
>
> b. RUR-2 Rural Resource 2 Zone, for a recreational use in conjunction with forest management; and
>
> c. RUR-3 Rural Resource Quarry/Aggregate 3 Zone, for the management of the aggregate resources and mining, and accessory buildings and structures.
>
> Policy 12.3: The Rural Resource Designation (RUR) is intended to accommodate forest management and other resource land uses, therefore the implementing Zoning Bylaw will provide a minimum parcel size of 80 ha for all zones within the Rural Resource Designation (RUR).

Finally, under the heading “Objectives,” the plan states:

> B. To support and encourage the commercial harvesting of timber, and aggregate resource extraction, consistent with the latest provincial Best Management Practices for natural environment protection ….

[68] In the present case, the intention of the petitioner is clear. As can be readily observed, the CVRD encourages and promotes resource extraction in the area in question, as highlighted by the specific provisions in s. 7.4(a) of the zoning bylaw. As a result, the respondents say that if I was to interpret “extraction” as excluding reclamation, it would require a finding that the CVRD did not intend to allow mining. I disagree. For reasons explained below, I do not find that the CVRD’s intention was to relinquish control over what land use activities can occur on land where a resource is being extracted.

[69] The respondents further submit that the statutes that form the legislative scheme applicable to the property and the activities taking place upon it must be read as a unified scheme, so as to prevent a legislative conflict that defeats the intent of the scheme. In this regard, I am mindful of the comments of the court in *Lake Country (District) v. Kelowna Ogopogo Radio Controllers Association*, 2014 BCCA 189 at paras. 15-17, 25, that in these circumstances I must consider not only the purpose and intent of the CVRD’s bylaw scheme, but also how the zoning power fits within the relevant schemes of the *Mines Act* and the *EMA*. At the same time, the petitioner submits a broad and purposive interpretation is applied to the scope of municipal powers (*Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231).

[70] I will address throughout these reasons my interpretation of the zoning bylaw and how it fits into the overall legislative scheme.

4.3 Is reclamation a core mining activity?

[71] I now turn to the argument advanced by the respondents that regardless of any mining activities purported to be permitted by the zoning bylaw, the CVRD has no jurisdiction to pass a zoning bylaw that directly or indirectly interferes with those

activities that are necessary or integral to extraction of the resource. They submit that, whether or not the activities on the property are explicitly permitted, reclamation is integral to extraction and is therefore a "core" mining activity that cannot be regulated under local government land use power.

[72] Conversely, the petitioner says that these activities, whether or not they are characterized as reclamation, are subject to land use zoning bylaws, and the respondents knew this when they commenced their activities under the MoE permit. In this regard, in an August 21, 2013, letter confirming the authorization to import and discharge "refuse" pursuant to the MoE permit and the provisions of the *EMA*, Mr. Bunce, on behalf of the Director of the *EMA*, stated:

> It is also the responsibility of the Permittee to ensure that all activities conducted under this authorization are carried out with regard to the right of third parties and comply with other applicable legislation that may be in force. [Emphasis added.]

[73] In addition, the CVRD points out that the "Aggregate Operators Best Management Practices Handbook" for B.C. alerts quarry operators that local zoning applies to reclamation activities such that "reclamation options could be restricted."

[74] Even though it is not, in and of itself, determinative of the issue, the CVRD also notes that, with respect to this particular bylaw, the Ministry Assessment states at s. 3.7.5, under the heading "Local bylaw and land use definition," that:

> [T]he property is zoned F-1 - Primary Forestry. This zoning allows for various activities to occur, including the "extraction crushing milling concentration for shipment of mineral resources or aggregate materials excluding all manufacturing." Based on the permitted use and conditions of use listed in the bylaw, it is unclear whether or not the proposed activities (contaminated soil treatment and landfilling) are acceptable uses for the F-1 zoning. The interpretation of the bylaw was left to the Cowichan Valley Regional District (CVRD) planning department as per legal advice. [Emphasis added.]

[75] I note that this caution is similar to the warning from the Ministry of Energy and Mines in *Norton*, that the permit in that case did "not constrain the Cowichan Valley Regional District with respect to enforcing their by-laws" (at para. 20). As such, the petitioner says it is clear the respondents were on notice as to the question of zoning compliance and proceeded with this project "at their peril," and that the

large sum of money expended by SIRM on site preparation and equipment should not overwhelm or even affect the petitioner's position.

[76] So the question is whether reclamation is an integral and necessary aspect of extraction, that is, a "core" mining activity, such that any reclamation activity cannot be regulated by land use bylaws. Even though there are no authorities saying a "core" mining activity is beyond local government land use jurisdiction, the respondents submit that a "core" mining activity is something different than general "mining activities."

[77] In this regard, the respondents say the following definitions in the *Mines Act* are instructive, supporting their submission that reclamation is an integral aspect of mining. In s. 1, "mine" includes "(c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation." In addition, "mining activity" is defined as any activity related to "(b) the production of … gravel or rock, and includes the reclamation of a mine."

[78] Given these definitions, it is clear reclamation is a "mining activity." However, far from undermining its submission, the CVRD says the fact that reclamation is, like extraction, a separate and distinct "mining activity," supports its position that even though the Health, Safety and Reclamation Code for Mines in British Columbia and individual mining permits require reclamation, the CVRD still has the ability under its zoning power to regulate what type of reclamation can occur on the site. That is, while it cannot and does not purport to stop or prevent reclamation of the quarry, it can properly control the type of reclamation activity, having regard to the land uses that are permitted in any given area.

[79] Similarly, there is no issue local governments do not have the authority to regulate extraction of aggregate material (see *Vernon (City) v. Okanagan Excavating (1993) Ltd.* (1993), 84 B.C.L.R. (2d) 130 (S.C.) (*Vernon*), affirmed (1995), 9 B.C.L.R. (3d) 331 (C.A.)). The CVRD submits however, that while extraction of a mineral or aggregate material is not a land use, all other "related activities" are land uses and subject to zoning, citing *Great Pacific Pumice*, and that a mining permit does not

trump local government zoning. That is, the CVRD says all "non-extraction components" are subject to zoning bylaws.

[80] In this regard, the CVRD says the court's conclusion in *Norton* is dispositive of this question. In *Norton*, the court concluded that *Great Pacific Pumice* makes it clear that even though a provincial permit allows for extraction, other "associated mining activities" are still subject to land use bylaws and resulting land use restrictions, as these bylaws do not interfere with the right to excavate, such that there is no conflict between these enactments.

[81] As a result, the court in *Norton* found the respondents' processing operations were contrary to the CVRD's A-1 zoning bylaw. The petitioner points out that in *Norton*, Macaulay J. held that, although it would be wrong for a local government to attempt to control the right to excavate through zoning, the local government did have the authority to control the use of the surface of the land for mining purposes "apart from the extraction of the gravel" (see also *Nanaimo (Regional District) v. Jameson Quarries Ltd. et al*, 2005 BCSC 1639 at para. 39 (*Jameson*)). While the respondents do not challenge the validity of the court's conclusion in *Norton*, they emphasize that the zoning in *Norton* did not allow for mine "processing," nor did it deal with reclamation, and say "the case demonstrates where the line might be between core mining activities, and those that are not necessary to the mining process."

[82] In *Jameson*, Warren J. considered *Norton* and *Great Pacific Pumice* and found that crushing and screening activities are necessary to make gravel "transportable" and fall within the definition of a *profit à prendre,* and therefore may not be regulated by zoning. But the court emphasized that these activities "are an integral part of the extraction operation" as opposed to overall mining (at para. 50) (emphasis added).

[83] In this regard, Warren J. confirmed that:

> [47] In *Great Pacific*, Huddart J.A. was clear that related mining activities do fall within the scope of s. 903 of the *LGA* and a land use bylaw. *Cowichan*

> applied the law in *Great Pacific* and clarified that activities relating to the marketability of rock that are not necessary for its extraction fall within the scope of a land use bylaw. Therefore, if any of defendants' operations are not necessary to extract the gravel, they are subject to the RDN's *Land Use Bylaw* and are thus in breach of it.

[84] In order to be consistent with the conclusion reached in *Great Pacific Pumice*, the respondents submit that any activities that are integral and necessary to extraction cannot be subject to local government land use regulation, but at a certain point subsequent activities unrelated to extraction of the resource can be. I accept this general proposition. However, the respondents go on to submit that:

> The proper conclusion of law is that the Petitioner is without jurisdiction to interfere with core mining activities. It is only once the mining process is complete, that the "land use" jurisdiction is engaged. That is the proper place to draw the line.

[85] The respondents submit "this is the first case that appears to consider on which side of the line reclamation falls." They say that the line should be drawn in favour of a conclusion that reclamation is an integral and necessary aspect of extraction and therefore any reclamation activity cannot be regulated by land use bylaws, because under s. 10(1) of the *Mines Act*, any application for a mining permit must include a plan for reclamation.

[86] I am unable to accede to the respondents' submission. I am satisfied that the decisions in *Jameson* and *Norton* support the position advanced by the petitioner and are contrary to the respondents' submission, such that even if the activities presently being undertaken at the property can be considered reclamation, they can still be regulated by the CVRD's land use bylaw. In my view, it is only activities that are integral to extraction of the resource that can escape local land use regulation. Moreover, I am unable to agree that reclamation is an integral and necessary aspect of the actual extraction process, such that a local government is precluded from exercising its zoning power to restrict reclamation activities. In my view, to accede to the submission advanced by the respondents would be contrary to the general principles enunciated in both *Great Pacific Pumice* and *Vernon*.

[87] In addition, returning to the principles of statutory interpretation, in finding that a local government may exercise its zoning power over reclamation activities, I see no conflict with the relevant provincial legislation. In this regard, the respondents have framed the question as follows: “Can the two regulations co-exist?”, relying on *Peachland (District) v. Peachland Self Storage Ltd.*, 2012 BCSC 1872, aff’d 2013 BCCA 273, for the proposition that if one regulation prohibits what the other compels, then the law is clear, they cannot co-exist.

[88] Here the respondents submit these enactments cannot co-exist because, since mining is occurring, reclamation is required under the *Mines Act*. They say if a bylaw purports to prohibit reclamation, it makes compliance with the requirement to reclaim impossible, in turn making it impossible to mine. The respondents say the enactments conflict and it would create a “perverse” result to give the CVRD jurisdiction over reclamation activities. They say it would create a dual regulation, allowing a local government to decide what mining processes are or are not acceptable to it. The respondents say to interpret the legislative scheme in this way, would be to defeat the responsibility of the Ministry of Energy and Mines as the sole regulator of mines in the province, as the petitioner’s zoning restrictions would render impossible compliance with mining requirements or interfere with the long-standing provincial interest in ensuring that mines are not regulated by land use bylaws.

[89] I am unable to accept that such a conflict exists. In my view, these enactments are capable of existing together harmoniously as an integrated regulatory scheme pertaining to land use and mining legislation. The CVRD is not attempting to prohibit reclamation activities; it simply seeks to restrict them to comply with permitted land uses under the zoning bylaw. As for the MoE permit, it gives permission to the respondents to import waste and permanently encapsulate it if they so desire. The permit in no way compels the respondents to do anything, nor does the zoning bylaw prohibit in any way extraction of the aggregate material (see *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.*, 2008 BCSC 1251). I conclude the regulations can co-exist.

[90] The CVRD's intention or purpose in passing the bylaw was to permit the extraction of resources, including other specific mining activities. However, in my view, this does not mean the petitioner intended to relinquish its jurisdiction to control what land use activities occur on land where a resource is being extracted, as long as any land use restriction does not interfere with or prohibit extraction of the resource. I cannot agree with the respondents when they say that if I interpret extraction to exclude reclamation, they could not extract the aggregate and this would mean the CVRD did not intend to allow mining. As the Court of Appeal outlined in *Nielson v. Langley (Township*), [1982] B.C.J. No. 2313, at para. 18, the interpretation of municipal bylaws should be done with a view to giving effect to the intention of the municipal council. I am satisfied the intent of the CVRD is clearly to permit extraction and the specified processing activities, at the same time enforcing the zoning bylaw.

[91] In my view, even though there must be a reclamation plan in order to obtain a mining permit, reclamation is not a "core" or integral mining activity that escapes local zoning regulations. It is different than extraction of the mineral or aggregate. As a result, I am satisfied that the petitioner has jurisdiction to regulate non-extraction mining activities, including reclamation activities.

[92] For the same reasons, I am unable to agree with the respondents' other argument that <u>any</u> activity that might be considered reclamation is a principal permitted use. While this bylaw specifically permits other mining activities, I am satisfied that even if the importation and encapsulation of this material could be considered reclamation, as this activity is not integral to the extraction of the aggregate, it cannot be considered a permitted land use under s. 7.4 of the zoning bylaw.

[93] Having reached these conclusions, I pause to note the petitioner advised that it retained their expert, Ms. Moody, to respond to the respondents' submission that the facilities and activities in question were integral or "core" to the extraction of aggregate at the quarry. The respondents retained their expert, Mr. Beresford, in response to Ms. Moody's opinion. While much time was spent cross-examining

these experts on whether they considered the activities on the property normal or necessary for reclamation, neither one was specifically asked to provide an opinion as to whether reclamation is a "core" mining activity, even though Ms. Moody did ultimately opine that these activities were not integral for reclamation of the quarry. Be that as it may, I did not need the assistance of expert evidence to determine that these activities are not integral to the extraction of the resource. I have, however, considered their evidence in determining whether these activities could be considered necessary or normal reclamation of this small quarry, as will be apparent later in these reasons.

4.4 Are the activities permitted as an accessory use?

[94] Having determined that the non-extraction activities presently being carried on by the respondents are subject to the zoning bylaw, and are not a principal permitted use, I now address the respondents' argument that these activities are, if not a principal permitted use as integral to extraction, at least "accessory" to mining, as provided for in s. 4.4 of the zoning bylaw. The respondents submit that reclamation activities are accessory uses in that they are ancillary to the principal permitted uses of extraction, crushing and milling. Again, they argue that to interpret the bylaw in a way that prohibits reclamation as an accessory use would exclude mining, contrary to the CVRD's clear intention to allow mining in this area.

[95] In response, the petitioner says the respondents' reference to "accessory" uses goes too far. The CVRD points out that the term "accessory" is defined in the bylaw as "ancillary or subordinate to a principal use." It says that even if these activities were considered reclamation, they are not "clearly necessary or dependent upon or affiliated with the principal use" of extraction, or crushing or milling for shipment (see *Home Depot Canada v. Richmond (City)* (1996), 33 M.P.L.R. (2d) 227 (S.C.)). As such, the CVRD says s. 4.4 does not advance the respondents' argument. As I have noted, the petitioner agrees "mining" is allowed. It says however that this means extraction, and while reclamation is part of the general mining process, and s. 4.4. refers to uses that are "accessory" to extraction, crushing or milling, this does not mean that the respondents are free to bring in waste material

pursuant to the provisions of the permit and permanently place it in the ground. The petitioner says an "accessory" mining use must be affiliated with extraction and processing of the aggregate material and cannot include the importation of soil waste. The petitioner asks: how can the operation of a completely different business be an accessory use to the extraction, crushing and milling of the aggregate? The petitioner says these activities are not related or accessory whatsoever to the permitted mining activities, let alone "clearly necessary or dependent upon" them.

[96] Turning to the interpretation of this section of the bylaw, I am satisfied the purpose broadly served by the F-1 zone is to allow for the extraction of minerals and aggregate, as well as crushing, milling and concentration for shipment, and that the purpose of s. 4.4 is to allow uses that are ancillary, or necessary, to the actual permitted uses, that is, activities that are required in order to extract the aggregate and get it to the marketplace. As a result, I am unable to agree with the respondents that the activities taking place on the property are "accessory" to extraction, crushing or milling, such that they can be considered a permitted accessory use.

4.5 Is it a landfill?

[97] I now turn to the petitioner's submission that the respondents are operating a landfill, as opposed to reclaiming the quarry.

[98] In this regard, while the CVRD agrees reclamation is required after the extraction of aggregate, it does say it is able to control how the land is used, irrespective of what is allowed in the MoE permit. On this point, it is interesting to note that when the EAB found in favour of the respondents, and dismissed the appeal brought by the CVRD and others, it observed at para. 3 of its reasons "that landfilling in this case does not mean that contaminated soils are simply deposited into the quarry; rather, the soil (and ash) will be encapsulated in engineered cells specifically for this purpose."

[99] In support of its submission that this is a landfill operation, the CVRD notes that "refuse" is defined in s. 1 of the *EMA* as the disposal of "discarded or abandoned materials, substances or objects."

[100] The CVRD refers to the definition of "waste" in *The New Shorter Oxford English Dictionary*, 4th ed., 1993, as "unwanted material." *The Oxford Dictionary* defines a "landfill" as:

> (a) the disposal of refuse by burying it under layers of earth; (b) refuse disposed of under layers of earth, an area filled in by this process.

The CVRD submits that the key feature of a landfill is the permanent disposal of waste and this is precisely what is presently occurring at this quarry.

[101] The petitioner says the fact that the MoE permit clearly refers to the respondents' present operation as a "landfill facility" for waste material as well as SIA's own reference in its permit application to "landfill untreatable waste," supports its submission that what the respondents are operating is indeed a landfill, a use not permitted under the bylaw. On the other hand, even though the respondents acknowledge that contaminated soil is being imported to the site, they say that the only "waste" they are bringing in is still considered "soil," and say it should not matter that the permit refers to "waste" or a "landfill" operation, as this is not evidence as to what is occurring at the quarry. I do not disagree with this general statement, but am satisfied the documentation referred to does have evidentiary value.

[102] In these circumstances, Mr. Kelly, the President of CHH, deposed there is no "municipal waste" being imported to the site. This evidence is uncontradicted. Nevertheless, the question still remains whether the permanent encapsulation of contaminated soil, which will remain on the property indefinitely in engineered landfill cells, is in fact using the land as a landfill.

[103] While the CVRD acknowledges that reclamation is required because mining is only a temporary use of the land, it says the alleged reclamation here is unnecessary, and if the respondents want to reclaim the land by filling the quarry, they can do it with clean soil just as they were doing prior to obtaining a permit to import waste or refuse. The petitioner says the respondents are operating a landfill, as contemplated by the MoE permit, under the guise of mining reclamation.

[104] In support of its position that the activities are not "necessary" or "normal" for reclamation of this quarry, the petitioner relies on the expert evidence of Ms. Moody, until recently the senior reclamation "expert" for the Ministry of Energy and Mines. In this regard, during lengthy cross-examination, Ms. Moody did not say this is not reclamation, but pursuant to her review of all the "technical documents" that were provided, concluded this is not necessary or normal reclamation for a small quarry like this one. She testified that there are other less expensive and "quicker" ways to reclaim the property without the potential necessity for long-term monitoring once the quarry ceases to operate, as opposed to this "Cadillac" project. Ms. Moody testified these activities are not necessary in order to reclaim this quarry, as there are options other than by landfilling, and that "this was an unusually large scale approach" and a much more complex system than she would expect for a relatively small quarry.

[105] Similarly, the CVRD emphasizes that the respondents' original 2006 Notice of Work and Reclamation Plan did not contemplate these extensive facilities, and that the current activities are only now "necessary" in order to comply with the MoE permit, allowing the importation of contaminated soil to the quarry.

[106] On the other hand, as the respondents have argued throughout, because the F-1 zone permits mining, and resource extraction is one of the principal objectives outlined in the petitioner's Official Community Plan, they say reclamation is necessary in order to operate a mine, and it matters not that the only reason a highly engineered facility is necessary is in order to comply with the strict standards set out in the MoE permit.

[107] In this regard, the respondents say the evidence of their expert, Mr. Beresford, a professional engineer, consultant, and a past inspector for the Ministry of Energy and Mines, establishes that the activities being carried out by the respondents are in accordance with accepted mining practices and "constitute an acceptable method of reclaiming the mine."

[108] While the CVRD does not necessarily agree with Mr. Beresford's evidence on this specific point, it says Mr. Beresford's evidence does not assist the respondents,

as his opinion does not establish that what is taking place is "necessary" for the reclamation of a small quarry such as this one, as opposed to a major mine that discharges waste from its own operation. The CVRD says the only reason these facilities could be considered necessary is because the respondents are operating a landfill, as envisaged by the MoE when it authorized a permit to do just that. In these circumstances, the CVRD says Mr. Beresford does not contradict Ms. Moody's evidence that engineered cells, required for the encapsulation of the imported waste, are not necessary to reclaim the land. Moreover, Mr. Beresford acknowledged that he considered this a "normal" reclamation project in relation to the particular activity permitted by the MoE permit, that is, the importation and permanent encapsulation of waste from contaminated sites.

[109] I also agree with the petitioner that Ms. Moody is much more familiar than Mr. Beresford with the 37 mines in the province that have MoE waste discharge permits and that most are major mines that deal with waste that is a result of their own extraction activities, as opposed to importing waste from contaminated sites and then landfilling it at a quarry site.

[110] Further support for the petitioner's position is found in the fact that Ms. Moody points out that only one quarry in the province has a waste discharge permit, indicating that a landfill facility would not be a "normal" reclamation activity for a quarry. I accept Ms. Moody's evidence on these matters.

[111] Nevertheless, the respondents emphasize that prior to the MoE permit, the CVRD was content with the importation of clean soil for ongoing quarry reclamation. What has changed, as the respondents have put it, is the quality of the soil or the material that is being brought to the facility. What has changed as far as the petitioner is concerned is that the waste soil being brought to the property is to be permanently encapsulated in highly engineered landfill cells, necessary only because that was what the MoE permit demanded, in order to satisfy its concerns about health and environmental issues.

[112] In this regard, the respondents say the CVRD is seeking an injunction with respect to the "methodology of reclamation" and it should not be able to dictate to the operator of a mine what reclamation activities can occur. I disagree. Again, the petitioner is not preventing reclamation of the quarry. As the petitioner asserts, "reclamation must simply restore the land to the potential land uses permitted by the zoning bylaw" and when a property owner creates a land use contrary to zoning, this comes clearly within municipal jurisdiction. Similarly, I agree with the petitioner that it is entirely possible for the respondents to reclaim the quarry without carrying on the present activities, which are required only in order to comply with the MoE permit. Even though this will mean the type of reclamation will be "controlled" by the petitioner's land use bylaw, I do not see this as objectionable or inappropriate. Indeed, as mentioned, the Best Management Practices Handbook alerts quarry operators to the possibility that local government zoning bylaws could very well restrict "reclamation options."

[113] Even though Ms. Moody does not say that these activities cannot be viewed as reclamation, I accept her evidence that they are not necessary or normal reclamation activities for a small quarry such as this one. I also agree with the CVRD that whether the respondents are operating a landfill or reclaiming the quarry depends on the context of the activity and what is actually occurring on site. While I give due weight to the opinions of both experts, having regard to the totality of the evidence, I am satisfied the petitioner has established that the permanent encapsulation of waste soil in the engineered cells has, in fact, created a landfill that is properly characterized as a land use, and is subject to the zoning bylaw. Moreover, I am satisfied a landfill is not a permitted use, either under the "implied exclusion approach" and the operation of s. 4.2 and s. 7.4 of the zoning bylaw, or pursuant to the test of statutory interpretation as outlined in *Paldi*.

5. Section 5.20

[114] I now turn to consider whether these conclusions have rendered unnecessary a determination as to the applicability of s. 5.20 of the zoning bylaw.

[115] In this regard, even though the CVRD referred to s. 5.20 in its amended petition as an alternative argument in support of its position, its primary argument was that the landfilling of imported waste on the property is not a permitted principal or accessory land use, whether or not s. 5.20 applies. The petitioner submitted that if its land use argument was successful, I need not consider whether this provision is applicable or properly enacted pursuant to local government land use jurisdiction.

[116] Similarly, while the respondents disputed the validity of s. 5.20, they too argued it was not necessary to consider s. 5.20 because "bringing soil to the mine is not storage" as the soil or "waste" is not brought for the purpose of "storage" or for the purpose of remaining separate from the land. Rather they argued, it is being permanently deposited into encapsulated cells and becomes "part of the land." As such, the respondents had submitted s. 5.20 is inapplicable even if it was validly enacted. The primary position of CHH and SIA was clearly stated in their written submissions at para. 81:

> The fact is the petition does not allege any current violation with respect to the treatment facility or the storage of soil. There is no evidence that either activity is ongoing.

[117] What was somewhat inconsistent, however, was the respondents then went on to submit that adding soil to the land "is the deposit of soil, which whether worded as storage or otherwise, cannot be controlled without a s. 723 bylaw, and cannot be controlled as to quality without ministerial approval."

[118] Be that as it may, it was only if the petitioner was unsuccessful on its primary argument would it be necessary to consider the respondents' "alternative" argument that s. 5.20 is *ultra vires* the CVRD's power to zone land uses, on the basis that, if a local government wishes to control the quality of soil being deposited on land, contaminated or not, that power is found in s. 723 of the *LGA* (as it then was), not

pursuant to the land use power in s. 903, and that without ministerial approval, local governments cannot pass any provision that refers to the quality of soil.

[119] However, having considered the principal submissions of the parties, and having accepted the petitioner's primary argument that the activities in question are not a permitted land use, it is not necessary to consider the applicability of s. 5.20 or whether it was validly enacted, in order to resolve the present dispute between the parties.

6. Relief Sought

[120] Turning to the practical effects of the relief sought by the CVRD, I appreciate the respondents' concern that, if I were to attempt to order some form of quality control in order to monitor the degree of contamination in the "waste" coming onto the property, this would require the court to engage in "setting some unknown contamination or soil quality standard for soil imported to this mine, without any of the complex technical and regulatory process that accompanies such a decision." I agree with the respondents that there is no evidence or science which would allow this court to "fashion" an order as to the quality of the imported soil that would be appropriate or consistent with the MoE permit, or effective or enforceable. However, an order prohibiting the importation of contaminated soil that needs to be permanently encapsulated in an engineered cell alleviates the necessity of embarking on a quality control assessment. In this regard, such an order would not forbid an activity that the respondents are compelled to perform. All it would provide for is that whatever reclamation activity the respondents elect to use, it must comply with the petitioner's zoning bylaw.

[121] Moreover, as I have found the petitioner has established that the respondents are in fact using the land as a landfill, a land use that contravenes the zoning bylaw, it is well settled that "the public interest is at stake in the enforcement of a zoning by-law" (*Langley (Township) v. Wood,* 1999 BCCA 260 at para. 17), such that once a breach is established, any discretion to refuse injunctive relief will be limited to exceptional cases. Consistent with the comments of the Court of Appeal in *District of*

West Vancouver (Corporation of) v. Liu, 2016 BCCA 96, I am persuaded there are no exceptional circumstances in this case that would warrant non-enforcement of the bylaw, even though there will be significant financial repercussions for all the respondents.

[122] Finally, as mentioned, s. 7.4(a)(2) of the zoning bylaw, outlining the permitted land uses of "extraction crushing milling concentration for shipment," is the same enactment Melvin J. considered in *Lund*, when determining whether treatment of soil or the removal of contaminants would be a permitted use.

[123] Justice Melvin had no trouble concluding that to include this type of activity as a permitted use would be "stretching the language significantly," noting the permitted activities are specifically related to the extraction and shipment of mineral resources or aggregate materials. As a result, as the petitioner has submitted, the court in *Lund* concluded a soil treatment facility is not a permitted use. Given the evidence in the present case and the unambiguous provisions of the bylaw, I agree with that conclusion.

7. Orders

[124] Given these conclusions, I therefore order that:

(a) Following the decision in *Lund*, there is a declaration that a contaminated soil treatment facility is not a permitted use on the property located at 640 Stebbings Road, in the Cowichan Valley Regional District, under the zoning bylaw;

(b) There is a declaration that the landfill facility located at 640 Stebbings Road, in the Cowichan Valley Regional District, is not a permitted use under the zoning bylaw;

(c) There is a declaration that the permanent encapsulation in engineered cells of refuse, waste or contaminated soil not originating on the property is not a permitted land use at the

property at 640 Stebbings Road, in the Cowichan Valley Regional District;

(d) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd. and South Island Aggregates Ltd., and all persons having notice of this order from using, or allowing, or permitting the use of, the property as a contaminated soil treatment facility, contrary to the zoning bylaw;

(e) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd. and South Island Aggregates Ltd., and all persons having notice of this order from using, or allowing, or permitting the use of, the property as a landfill facility, contrary to the zoning bylaw;

(f) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd., and South Island Aggregates Ltd., from importing onto the property located at 640 Stebbings Road, in the Cowichan Valley Regional District, any waste material, including contaminated soil, that is required to be permanently encapsulated in engineered cells.

[125] Because of the difficulty in enforcing a mandatory injunction, and in separating the different material now on site, I decline to order the removal of any facilities or product presently situated on the property. I accept the respondents' submission that what is presently situated on the property, such as the concrete lock blocks in the soil management area and the upgraded water treatment system, can be a legitimate and important use within the parameters of extraction and the other permitted mining activities of crushing and milling. As far as the application for removal of the material that has already been encapsulated within the engineered landfill is concerned, I defer to the expertise of the MoE and the EAB as to the safety of this product and decline to order its removal.

[126] Turning to costs, the petitioner has been successful and is entitled to costs on Scale B.

"B.D. MacKenzie, J."
The Honourable Mr. Justice B.D. MacKenzie