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CITY OF KELOWNA

MEMORANDUM

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**Date:** October 21, 2008  
**File No.:** 2210-01  
**To:** City Manager  
**From:** City Clerk  
**Subject:** Future of Stuart Park and City Hall Properties

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**RECOMMENDATION:**

THAT staff be instructed to create a Civic Centre Precinct plan, including a comprehensive public consultation process, that would determine appropriate municipal and commercial purposes for Stuart Park and the City Hall block;

AND THAT staff be instructed to determine the trust boundaries and terms for the subject properties, including making application to the court if necessary;

AND THAT the next Council be encouraged to consider placing a question on the ballot during the 2011 Civic Election to determine the opinion of the electors regarding the appropriateness of any municipal and commercial purposes as proposed in the Civic Centre Precinct;

AND THAT Council accept the Reasons for Judgment in *Save the Heritage Simpson Covenant Society v. City of Kelowna*.

**BACKGROUND:**

The principle that Council, as the elected representatives of the citizens of Kelowna, is the appropriate body to determine current and future land uses of City owned land has been the underlying assumption throughout Council's deliberations on the future of Stuart Park and City Hall properties. Council determines what the appropriate uses are primarily through zoning. Changing the existing land use requires a public process in which any interested party may participate.

Council has changed the land use for Stuart Park to P3 - Parks and Open Spaces and adopted a park dedication Bylaw for the site. Removal of the park dedication bylaw would require approval of the electors by referendum or the alternative approval process.

**History of the Subject Lands**

A chronology of the history of the City Hall and Stuart Park sites is attached as Appendix "A". The City purchased two parcels from the Kelowna Sawmill Company in 1945 for the combined sum of \$55,000. As a condition of sale, certain restrictions were agreed to by the parties. These restrictions are commonly referred to as the "Simpson Covenants" as they were registered on title as restrictive covenants (see Appendix "A").

The boundaries of the original parcels have changed over the decades as a result of subdivisions, additional land purchases, lot consolidations and road widenings. A portion of the original waterfront parcel was sold to the Province in 1949 and purchased back by the City in 1996 for \$2,250,000.

### **Previous Council Decisions and the City's Dealings with the Simpson Family**

Council has discussed the historic, current and future of the City Hall and Stuart park sites on numerous occasions since 2003. Council has also met with representatives of the Simpson family in an attempt to come to a mutually-agreeable solution regarding the future of the lands. (see Appendix "B").

### **Legal Challenge**

Council instructed staff to discharge the Covenants from title during the April 30, 2007 Council Meeting. Upon hearing of Council's decision, the Save the Heritage Simpson Covenant Society filed a Certificate of Pending Litigation at the Land Title Office. This prevented the City from discharging the covenants. The subsequent trial was heard in the Supreme Court of British Columbia on June 25 and 26, 2008.

In her Reasons for Judgment, Madam Justice Bruce agreed with the City's position that the covenants were not valid as restrictive covenants. Her Ladyship also agreed with the City's position that the *Municipal Act* in force in 1945 prevented the City from creating a trust over lands for "municipal purposes." The legislation of the day limited a municipality to accepting land in trust for park, hospital or school purposes only.

The judge did find, however, that the conditions surrounding the transfer of the Kelowna Sawmill Company properties to the City created a trust that the lands be used for municipal purposes and not for commercial or industrial purposes and that the lands not be sold. Council decided in August to appeal the Reasons for Judgement.

### **Options**

To summarize, Council has the following options available:

1. Continue with the Appeal;
2. Pursue Remedies to Change or Discharge the Trust;
3. Accept the Ruling and Determine the Trust Conditions; or
4. Do Nothing.

### **1. Appeal**

During the August 18, 2008 Closed Council Meeting, after hearing from the City Solicitor, Council directed staff to appeal the Reasons for Judgment in *Save the Heritage Simpson Covenant Society v. City of Kelowna*. The Appeal will primarily determine whether the Judge was correct in finding that a valid charitable trust was created at common law when the *Municipal Act* in force in 1945 did not authorize a municipality to accept a transfer of property on a trust for municipal purposes. A successful outcome to the appeal would remove all trust conditions from the properties and leave Council unfettered in any decisions relating to these properties, subject to any statutory or Council directed public processes.

#### **Appeal Process Timing:**

Notice of Appeal	Filed August 21, 2008
Appeal Record	Filed by October 17, 2008
City's Factum	30 days after Appeal Record – must be filed by November 16, 2008
Society's Factum	30 days after City's Factum

The City Solicitor's letter dated August 17, 2008, attached as Appendix "C", identifies the grounds for an appeal in greater detail.

## **2. Remedies to Change or Discharge the Trust**

Madam Justice Bruce did not rule on how the trust conditions could be changed or removed. The judge declined to rule in favour of the Society's request for an order that the trust could not be removed without going to a plebiscite. Madam Justice Bruce also alluded to the City perhaps having remedies if it believed that the trust obligations no longer served the interests of the community. The parties were invited to make further submissions on these matters to be considered by Her Ladyship. There is no deadline for either party to inform the court whether they wish to make a further submission. Should Council wish to accept the Reasons for Judgment but want to amend or define the "municipal purpose" or "no commercial" conditions this would be one legal avenue to pursue.

Although Madam Justice Bruce's Judgment uses language similar to that found in s. 184 of the *Community Charter*, it is not clear whether she had this statutory provision in mind which provides an alternative statutory mechanism to vary the trust through a court application.

Council must first form the opinion that the current terms of the trust are no longer in the interests of the municipality. The court is directed to consider how the proposed variation would better further the intentions of the donor or transferor (ie. the Kelowna Sawmill Company).

The properties would continue to be subject to the trust conditions as further defined in any subsequent court application, which may include the direction sought by the Society that the City follow a public process such as a plebiscite. Any future uses of the lands as determined by Council would be subject to the amended trust conditions.

## **3. Accept the Ruling and Determine Trust Boundaries and Terms**

Council could accept the Reasons for Judgment as they are. Any future plans for either site would have to meet the conditions of the trust as established in the Reasons for Judgment. The "no commercial" and "municipal purpose" conditions may limit or in some cases prohibit Council's ability to develop Stuart Park, and to construct a new City Hall or other civic buildings.

## **4. Take No Further Action**

Council could accept the Reasons for Judgment and trust conditions as they are and wait to see if the Society or any other party takes the City to Court for violating the conditions of the trust. This could occur now, or at some time in the future. This carries the risk of a future Council being brought to court for breach of trust.

Should Council decide to abandon the appeal, a survey of the lands covered by the trust conditions should be undertaken along with an assessment of all existing and proposed uses for Stuart Park and the City Hall properties to determine the extent that the trust conditions are being met.

Accepting the Reasons for Judgment would in effect cancel the appeal. Staff recommends having further dialogue with the residents of the City and not with the Society.

### **INTERNAL CIRCULATION TO:**

City Manager  
City Solicitor

### **EXISTING POLICY:**

Jim Stuart Park Dedication Bylaw No. 9809, 2007  
Council Policy 340 City Ownership of Stuart Park and City Hall Block

Considerations that were not applicable to this report:

**LEGAL/STATUTORY PROCEDURAL REQUIREMENTS:**

**LEGAL/STATUTORY AUTHORITY:**

**PERSONNEL IMPLICATIONS:**

**FINANCIAL/BUDGETARY CONSIDERATIONS:**

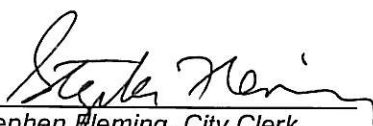
**TECHNICAL REQUIREMENTS:**

**EXTERNAL AGENCY/PUBLIC COMMENTS:**

**COMMUNICATIONS CONSIDERATIONS:**

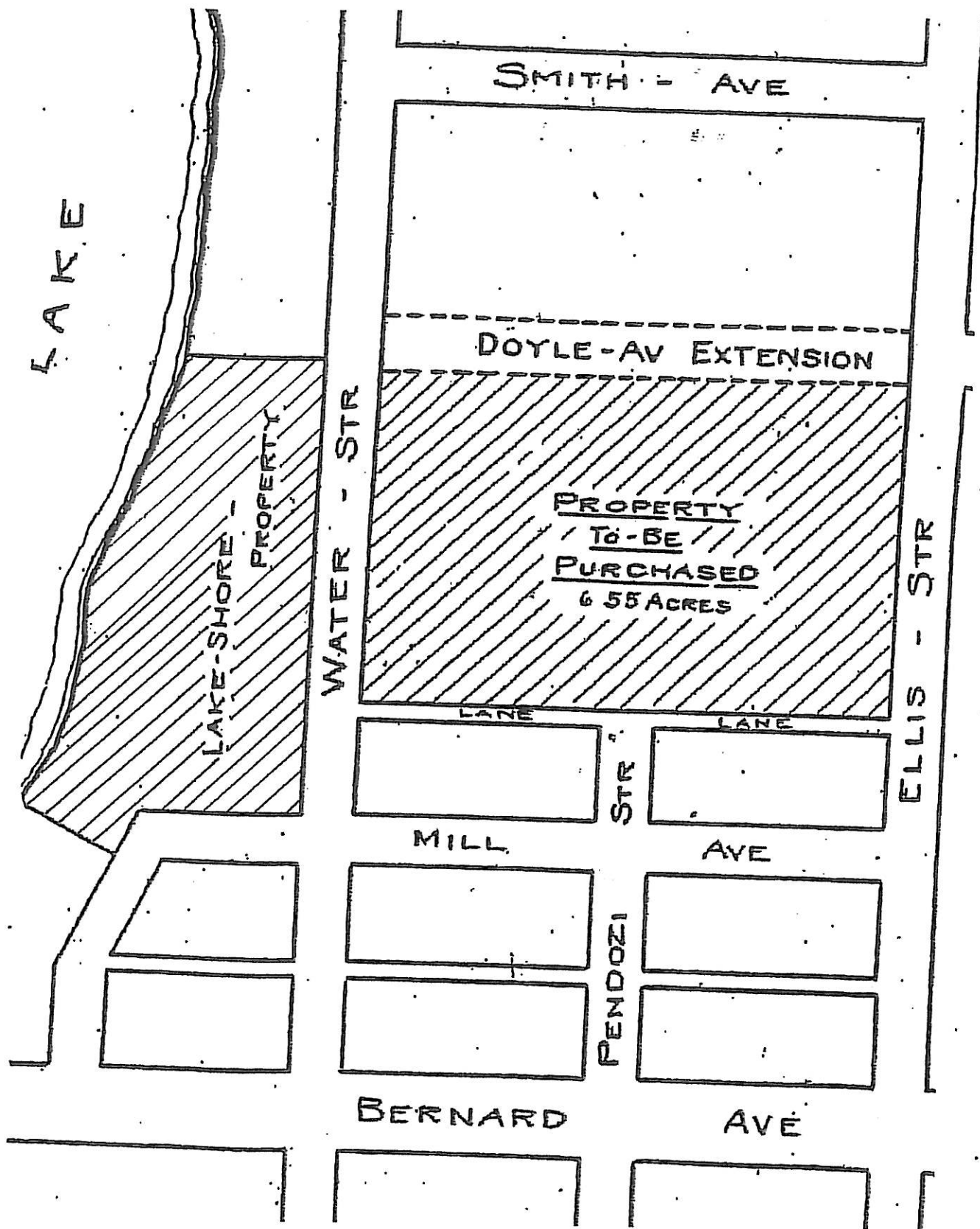
**ALTERNATE RECOMMENDATION**

Submitted by:

  
Stephen Fleming, City Clerk

cc: City Manager  
City Solicitor





Note: Map has been adapted from a map that appeared in the May 3<sup>rd</sup>, 1945 *Kelowna Courier*. Cross-hatching shows the parcels purchased from the Kelowna Sawmill Company.

## **APPENDIX "A"**

### **HISTORICAL DOCUMENTATION**

Note: Copies of records and newspaper articles available in City Clerk's Office

#### **Civic Centre Post-War Project**

- Correspondence and delegation to Council starting in February 1944 requesting that City consider the establishment of a Civic Centre as a Post-war activity
- Civic Centre Post-War Project to include a Sports Arena, Auditorium for music and drama, and a City Hall

#### **Date of Fire**

- According to the *Kelowna Courier*, the date of the fire was Friday, October 13<sup>th</sup>, 1944 and most of the estimated \$30,000 loss was covered by insurance

#### **Offer Letter from Kelowna Sawmill Company Ltd. – November 25<sup>th</sup>, 1944**

- City offered an option to purchase on two lots:
- Lakeshore (old sawmill site)
  - Lot 1 Plan 2208
  - 4.2 acres
  - \$25,000
- Planing Mill site situated between Ellis and Water Streets
  - Part of Plan B 3550
  - 7.56 acres
  - \$30,000
- four conditions placed on option:
  - (1) City may use parcels for civic or community purposes and any buildings erected shall be of attractive design and landscaped suitably;
  - (2) City may not sell property or use it for commercial or industrial purposes;
  - (3) Purchase shall be made within four months;
  - (4) The Company will be allowed at least two years to vacate the land.
- Letter stated Company has plans to establish a new retail business at the foot of Pendozi Street and requested that Council make their decision as early as possible

#### **Civic Centre Site and Proposed Purchase**

- December 11, 1944 Kelowna Civic Centre Committee recommends to Council, after careful consideration, that the City should make arrangements to purchase the 7.52 acre lot for use as a Civic Centre
- December 11, 1944 Council went on record as being in favour of a By-law to authorize the purchase of the above property being submitted to the ratepayers for approval
- No mention is made regarding the Lakeshore site
- January 2, 1945 Inaugural Meeting of Council, "Purchase of Land for Civic Centre Standing Committee" established with Aldermen Ladd, Miller and Jones as members
- January 29, 1945 Company extends Option to purchase to May 1<sup>st</sup>, 1945
- March 22, 1945 community meeting to discuss purchase of a Civic Centre site – reported to Council on April 3, 1945 that meeting unanimously in favour of a referendum to obtain ratepayers expression of opinion as to whether the property west of Water Street should be purchased
- April 9, 1945 Clerk directed to prepare By-law for purchase of 7.56 acre site [Bylaw 1117]
- Option to purchase extended to May 31<sup>st</sup>, 1945
- April 16, 1945 draft of Bylaw 1117 presented to Council for the purchase of District Lot 139, Lot 2 for \$30,000 and subject to conditions named in bylaw – ratepayers to vote on bylaw May 10, 1945; plebiscite question regarding purchase of Lakeshore lot will also be on ballot

- May 10, 1945 plebiscite on "Civic Centre Purchase By-law No. 1117" authorizing the purchase of the Planing Mill site, and asking the electorate as to whether to purchase the waterfront lot as well. The results were:
  - Bylaw 1117 – Yes 645 / No 56
  - Purchase Lot 1 Plan 2208 – Yes 633 / No 69
  - Estimated number of electors in 1945: 1,150

#### **Bylaw 1117 Civic Centre Purchase By-law – Purchase of Company's Lakeshore Sawmill Site**

- Adopted May 21<sup>st</sup>, 1945
- City paid \$30,000 cash
- Authorized the purchase of part of DL 139, Lot 2 subdivision plan T 3172 for \$30,000 subject to the following conditions:
  - (1) The City shall use the property for municipal purposes and any buildings erected shall be of attractive design and landscaped suitably;
  - (2) The City will not sell property or use it for commercial or industrial purposes;
  - (3) The Company shall be allowed two years to vacate the property.
    - Note that the first condition states "municipal purposes" rather than the "civic or community purposes" asked for by the Company.

#### **Civic Centre Plan Report – September 1945**

- Council commissioned Harland, Bartholomew and Associates in late May 1945 to prepare a Civic Centre Plan Report
- Council first meets with Vancouver representative on May 31<sup>st</sup>, 1945
- July 7, 1945 Option to purchase Lot 1, Plan 2208 put in abeyance pending report by Harland, Bartholomew
- September 1945 report:
  - Recognizes that there is an urgent need for a civic centre site
  - Examined different options the City had for locating a Civic Centre
  - Ellis-Water Street Planing Mill site best option, but site too small, can't expand to north or east
  - Other Sawmill parcel not suitable for buildings – only good for Park
  - City would need to enlarge the Ellis-Water Street Planing Mill site south to Mill Avenue
- There is no reference in the minutes to Council receiving the Harland, Bartholomew Report nor is there any reference to Council adopting or approving any of the recommendations contained in the Report. Unfortunately, the City does not have any minutes of the Civic Centre Committee.

#### **Expansion of Civic Centre Site**

- October 30, 1945 Clerk instructed to prepare bylaws for purchase of properties on Mill Avenue for submission to ratepayers at December 1945 municipal election
- November 1944 bylaws 1208, 1212 and 1213 given first three readings
- The following three bylaws were adopted at the December 17<sup>th</sup>, 1945 Regular Council Meeting after receiving the assent of the ratepayers
  - Bylaw 1208 Yes 656 / No 111
  - Bylaw 1212 Yes 639 / No 123
  - Bylaw 1213 Yes 652 / No 108
  - Estimated number of electors in 1945: 1,150
- Like Bylaw 1117, Bylaw 1212 contained subjects similar to those requested by the Company
- Bylaws 1208 and 1213 contained no such subjects.

**Bylaw 1208 Civic Centre Purchase and Loan By-law, 1945 – Purchase of Additional Lots**

- Adopted December 17, 1945
- Authorized the City to purchase nine different parcels on Mill Avenue from seven different owners to enlarge the Civic Centre Plan upon the recommendation of Harland, Bartholomew Report
- No subjects are contained in the bylaw restricting the purposes for which these lands may be used.

**Bylaw 1212 – Authorization to Purchase Lot 1, Plan 2208 from Kelowna Sawmill Bylaw 1212**

- Adopted December 17<sup>th</sup>, 1945
- City paid \$25,000 cash and agreed to three conditions:
  - (1) The City shall use the property for municipal purposes and any buildings erected shall be of attractive design and landscaped suitably;
  - (2) The City will not sell property or use it for commercial or industrial purposes;
  - (3) The Company shall be allowed two years to vacate the property.

**Bylaw 1213 Civic Centre Exchange By-law, 1945 – Exchange of Lots**

- Adopted December 17, 1945
- Authorized the City to exchange City owned parcels for parcels from different owners of lots to enlarge the Civic Centre area upon the recommendation of Harland, Bartholomew Report
- No subjects are contained in the bylaw restricting the purposes for which these lands may be used.

**City Correspondence 1946-1947**

- Lot 1 Plan 2208 will be used for making into a park
- Lot 1 Plan 2732 reserved for park purposes and is not for sale [letter to Canadian Legion]
- Lot 1527 foreshore lease for public bathing beach and park – 21 year licence signed with Province July 25, 1947

**Bylaw 1449 Civic Centre Property Exchange By-law, 1949**

- Adopted December 12, 1949 after receiving assent of the electors
  - Yes 682 / No 35 (Number of electors eligible to vote was 2,666)
- Authorised the sale to the Province of Lot B, Lot 1, Lot 139, Plan 2208 in exchange for Lots 2 and 3, Plan 2732
- The bylaw set restrictions on the land being purchased by the Province but did not place any restrictions on the lands purchased by the City
- The restrictions placed on the land purchased by the Province were:
  - (1) The Province will not sell the property or use it for any commercial purposes
  - (2) The land will be kept in order and landscaped in keeping with the adjacent Civic Centre property
- Province also agreed to build a new ferry landing and construct a sea wall along the property it was purchasing
- City agreed to widen the ferry approach along Mill Street to 100'
- Company agreed to release such restrictive covenants and conditions in order to permit this conveyance.

**Wording of Bylaw Questions**

The format and wording of the ballot for elector assent in 1945 and 1949 was:

Bylaw No. \_\_\_\_\_ "Name of Bylaw, 194\_,"  
Shall the Bylaw be confirmed?  
Yes      No

**Municipal Act Requirements for Elector Assent**

It is not clear as to whether bylaws 1117, 1212 and 1213 required elector assent in 1945. Section 59(21) of the *Municipal Act* in force at the time required electoral assent for land purchases over \$2,000. Part VI, Division (1) of the *Municipal Act* required a bylaw receive three-fifths of the votes cast in order to achieve elector assent. Each of these bylaws had purchase prices well exceeding this \$2,000 threshold. However, there was no equivalent to the electoral assent requirement for bylaws for the purpose of purchasing property for municipal purposes. There is no mention in the Council minutes that Council voluntarily placed this requirement upon bylaws 1117, 1212 and 1213. Each bylaw contains sections which state elector assent is required before final adoption.

A reading of the newspaper articles from 1945 indicates that elector assent was seen to be a requirement.

Bylaw 1208 (purchase of lots on Mill Street and Loan Authorization) required elector assent.

According to the *Municipal Act* in force in 1949, Bylaw 1449 required elector approval prior to adoption. At that time, electoral assent was required for any purchase over \$5,118 (one dollar per resident according to last decennial census [1941]).

**Letter from City to S.M. Simpson March 2, 1950**

- Council Minutes February 27, 1950:
  - Copy of proposed letter circulated to Council, advising Company that land acquired by the City, due to an exchange with the Provincial Government, will not be used for commercial purposes and that a portion of the Civic Centre property is being reserved for the Kelowna Yacht Club
  - Alderman Parkinson suggests that the Company be advised that the lot will be given to the Kelowna Yacht Club, provided that they do not obtain alternative quarters
  - Alderman Parkinson was requested to instruct the City Clerk as to the wording of this clause
- Clerk writes to Kelowna Sawmill Company to inform them that the Council agrees and understands that –
  - (1) The land known and described as Lots 2 and 3, Map 2732, save and except that portion of the said lot 2 shown on Reference Plan B4780 will not be used for commercial purposes;
  - (2) That Lot A shown on Plan of Subdivision of lot 1, Plan 2208 DL 139 containing 0.25 acres more or less, is being reserved for the use of the Kelowna Yacht Club. Should the Kelowna Yacht Club find other satisfactory premises the City would cancel this reservation
- October 16, 1950 City Clerk instructed to advise the Kelowna Yacht Club that the portion of the Civic Centre known as Lot A, Plan 5027 is to be leased to the Yacht Club for Club Headquarters and that the design of any building to be erected thereon must be approved by the Council
- October 30, 1950 City Clerk instructed to advise the Kelowna Yacht Club that the City is unable to sell this property but will be pleased to lease it for a period of twenty years at \$1.00 a year

**Letter from S.M. Simpson to H.B. Simpson September 10, 1955**

- S.M. Simpson wrote to his son on September 20, 1955
- States that the "price received [for two Kelowna Sawmill parcels] was much less than could have been realized if held as an investment and sold in blocks or in lots"
- Rather surprised that Council would consider selling Lots 1, 2 and 3 Plan 2732 for a hotel as City agreed to use these lots for community or park purposes



**Letter from Mayor Ladd to S.M. Simpson September 24, 1955**

- Mayor Jack Ladd's response to S.M. Simpson
- Recalls there were discussions "several years ago" regarding restrictions on lots 1, 2 and 3 Plan 2732
- Above lots had been optioned to a company for \$40,000 to build a hotel
- Mayor Ladd: "I would like to leave it to them [the taxpayers] to decide whether the property should be used for a hotel or not."
- Land sale would require elector approval prior to adoption. At that time, electoral assent was required for any purchase over \$8,517 (one dollar per resident according to last decennial census [1951]).

**1972 Affidavits**

- During negotiations with the City over the renewal of the KYC lease in 1972, five affidavits were submitted to the City to support the Yacht Club's position
- These affidavits make the following references to the Simpson covenants:

**Affidavit of R.F. Parkinson**

- City Alderman 1951 when KYC lease signed
- Had discussions with S.M. Simpson and others involved in the transfer of the property of S.M. Simpson to the City
- S.M. Simpson transferred the property at a greatly reduced price so that a Civic Centre could be established

**Affidavit of Horace Simpson**

- Son of S.M. Simpson
- Property transferred to the City at a greatly reduced price
- Intended that the property should be for the benefit of the citizens of the City for all time and was not to be used as a commercial venture

**Affidavit of Jack Treadgold**

- City Alderman 1951 when KYC lease signed
- Makes no statements concerning the lands sold to the City by the Kelowna Sawmill Co.

**Affidavit of W.B. Hughes-Games**

- Alderman 1944, 1945; City Mayor 1951 when KYC lease signed
- Familiar with the circumstances and intentions of the parties concerned in the transfer of the property of S.M. Simpson to the City
- Property transferred to the City for a nominal amount
- Intended that the property should be used for the benefit of the citizens of the City for all time and was not to be used as a commercial venture

**Affidavit of Dr. Gordon Wilson**

- Executive member of KYC 1951 when lease signed
- Familiar with the circumstances and intentions of the parties concerned in the transfer of the property of S.M. Simpson to the City
- States that one of the conditions of sale was that the Yacht Club be granted 75 feet of lake frontage as long as they should have the need for it tax free

**Correspondence to Alderman Simpson September 3, 1991**

- Director of Corporate Services in a cover memorandum to Alderman Sharron Simpson dated September 3, 1991 encloses a copy of the covenant, legal plans for the two properties and a copy of an article on Kelowna's civic centre project that had appeared in *Civic Administration* magazine circa. 1961

**Letter to Horace Simpson February 25, 1994**

- Director of Corporate Services in a cover letter to Horace Simpson encloses copies of Bylaw 1212, Bylaw 1449 and a copy of the covenant



- Correspondence arose out of City's plans to re-acquire the old Court House site
- City's plans for the site, if acquired, was to "convert it to green space and public-use space"

**Letter to City from Horace Simpson March 7, 1994**

- Horace Simpson in a cover letter to the Director of Corporate Services encloses copies of the 1950 and 1955 correspondence regarding the location of the Yacht Club and the proposed hotel development [see above for details of correspondence]
- Stated that it would have been "most embarrassing" if hotel development had proceeded

**Sale of Old Court House Property 1996**

- Land had been sold to the province in 1949 for the erection of a provincial court house [see above Bylaw 1449]
- Council accepts BCBC's final offer for sale of the old Court House property to the City of Kelowna for a total purchase price of \$2,250,000 on June 26, 1996
- Sale Agreement executed December 23<sup>rd</sup>, 1996

**Courier Newspaper Articles 1944-1945; 1949; 1955** (date and subject of article or editorial)

- October 19, 1944 – Saw Mill Fire
- December 14, 1944 – Saw Mill Property Considered for Civic Site
- April 26, 1945 – Bylaw 1117 and Lakeshore site – articles and editorials
- May 3, 1945 – Bylaw 1117 and Lakeshore site
- May 10, 1945 - Bylaw 1117 and Lakeshore site; Appeal to Ratepayers
- May 17, 1945 – Bylaw 1117 and Lakeshore site – articles and editorials
- May 31, 1945 – Lakeshore site
- November 29, 1945 – Bylaws 1208, 1212, 1213
- December 6, 1945 – Bylaws 1208, 1212, 1213 and editorial
- December 13, 1945 – Bylaws 1208, 1212, 1213 and Appeal to Ratepayers
- December 20, 1945 - Bylaws 1208, 1212, 1213 and editorial
- December 5, 1949 – Bylaw 1449
- December 12, 1949 – Bylaw 1449
- September 15, 1955 – Okanagan Investments Ltd. Hotel option.

## **Appendix "B" Council Direction and Communications with the Simpson Family**

The following represents a list of Council direction and communications with the Simpson family between 2003 and April 30, 2007.

Spring 2003: Concept plans for development of the waterfront between the Sails and the Boat Launch indicate a future commercial use on the northerly portion of the site. Sharron Simpson questioned whether this was in keeping with the conditions of the covenant.

June 9, 2003 Closed Meeting: Staff asked to obtain a legal opinion to clarify ownership of the waterfront lands used by the Kelowna Yacht Club and clarify the matter with the Simpson family. Request for legal opinion not acted upon as staff was negotiating with the Kelowna Yacht Club and neither party wanted to pursue the matter legally.

August 3, 2004: Lawson's Landing development application by Westcorp Inc. considered by the Advisory Planning Commission.

August 9, 2004 Closed Meeting: Council requested a copy of the Covenant prior to the Simpson family meeting with Council, scheduled for August 23<sup>rd</sup>.

August 20, 2004: Simpson Family press conference at the Kelowna Yacht Club: "Land given to Kelowna's citizens at risk in City's latest development scheme" – copy available in Clerk's Office

August 23, 2004 Closed Meeting: Council met with the Simpson family and adopted the following resolution:

THAT the City work with the Simpson family to hire the necessary professionals to determine the legal and policy status of the covenant, at City expense.

August 25 and August 26, 2004: By email, Sharron Simpson declines City offer to hire any legal or other professionals at City expense.

August 27, 2004: Sharron Simpson meets with Manager of CDRE and Deputy City Clerk to share documents pertaining to Simpson Covenant compiled by the Simpson family.

November 1, 2004 Closed Meeting: Legal opinion from City Solicitor presented to Council.

November 8, 2004 Closed Meeting: Historical documentation presented to Council and staff authorized to release all historical documents pertaining to the Simpson Covenant to the Simpson family. A chronological list of the historical documentation pertaining to the Kelowna Saw Mill Covenant is attached as Appendix "B". Copies of each of the documents listed are available in the City Clerk's Office.

November 9, 2004: Manager CDRE and Deputy City Clerk meet with Sharron Simpson to review historical documentation gathered by the City and to share the City's legal opinion with the Simpson family.

November 29, 2004 Closed meeting: Council's consensus not to authorize registration of the quit claim discharge until after hearing back from the Simpson family lawyer and after a Council workshop on the City's interest on use of the waterfront had been held.

December 6, 2004 Closed Meeting: Council adopted the following resolution:

THAT Council does not believe there are restrictions on the land (Lots 1, 2 and 3 and Lot B) that would preclude Council's consideration of applications for Commercial development;

AND THAT the City Solicitor's legal opinion that there is no covenant be released in its entirety as an attachment to a news release after the City manager reports back next week on his meeting with Tom Smithwick. (note: News release never issued and the legal opinion has not been released to the public).

December 13, 2004 Closed Meeting: Report from staff on additional historical information requested by Council.

December 20, 2004 Closed Meeting: Sharron Simpson, Margo Simpson and Tom Smithwick appear before Council and present their proposal for resolving the issue:

- Registration of a new covenant on the original lands as identified in the offer letter to the City dated November 1944
- The waterfront lot between the lake and Water Street be dedicated as Park in perpetuity
- The Yacht Club issues be resolved, not necessarily with the building on its exact current location, but with some longevity of tenancy
- The family's costs, including legal fees, to be dealt with by the City of Kelowna

January 10, 2005 Closed Meeting: City Manager updates Council on his discussions with Mr. Smithwick and clarifies family position as follows:.

- The original Lot 2 (the property that City Hall is on) – the family would like the City to adopt a bylaw which would spell out the history of the original property deal and respect the original intent of the parties, and include a definition of "Commercial Use" to clarify the position of paid parking on the site.
- On Lot 1 ( the waterfront property) – the family would like the City to adopt a bylaw that would cover the land area of the original deal (that goes to the middle of the street as we have it today), spell out the history of it and dedicate the lot as park land.
- The Yacht Club – the family would like the Yacht Club to be provided with ownership or long term tenancy of the existing, or the muster station site or the seniors site. They have indicated that if it is to be the muster station site, they would like some sort of a light house feature that would be a museum for waterfront history. The Yacht Club would have to be part of any kind of MOU.
- Lots 1, 2 and 3 (the Provincial Government properties that were exchanged for the court house building) – they would agree to a release covering the three lots and acknowledge as part of the agreement that there was no intent that these properties would be covered by this deal.
- Legal costs – they expect the City to pay legal costs, estimated to total under \$20,000.

January 14, 2005: List of historical documents considered by Council emailed to Sharron Simpson at her request with an offer to provide copies of any or all documents listed. No response received.

January 17, 2005 Closed Meeting: Council offered individual comments on different aspects of the Simpson family proposal. These ranged from a general acceptance of the terms to refusal to even negotiate.

January 24, 2005 Closed Meeting: Council approves of City Manager's response letter to Tom Smithwick. No response to City Manager's January 27, 2005 letter received.

Spring 2005: City obtains a copy of a September 10, 2004 legal opinion from Porter Ramsay to Kelowna Yacht Club on the subject of the "Position of the Kelowna Yacht Club": "After reviewing the facts,...it has become clear that a legal/court action is not in anyone's best interest in the situation. Consequently, it is my opinion that the battle to protect the rights of the Yacht Club should be fought on a political and tactical level." The opinion then goes on to discuss the Simpson Covenant and makes reference to a select group of historical records pertaining to the history of the covenant lands, and states "If we present these documents as part of a press conference, it will likely force the City to recognise and honour the intent behind the transfer of

the land whether the intentions were verified in writing or not." This appears to be the strategy the Simpson family is following. A copy of opinion available from Clerk's Office.

May 10, 2005: Press Conference – Simpson Covenant – hosted by Residents Associations Coalition of Kelowna (RACK) Meeting notes indicated Sharron Simpson stated "lack of

communication with the City led to the family hiring a lawyer to defend the covenant" and "the City has been uncooperative in that there has been no communication from City Council."

October 20, 2005: Simpson Family Press Release – Where do you stand on the Simpson Covenant? Asked candidates for Mayor and Councillor to state their views on the Simpson Covenant issue.

February 17, 2006: Correspondence to Mayor Shepherd from Sharron Simpson requesting a meeting to work with Mayor Shepherd in reaching a mutually satisfactory resolution of the Simpson covenant issue. Stated the family's position as:

- Registration of a new covenant on the originally negotiated boundaries of the covenant that would reaffirm the original agreement
- Reactivate planning for Stuart Park, which should include the covenanted lands that are currently being used for parking lots
- The covenanted lands be identified by a plaque noting the boundaries and terms of the covenant
- The Simpson family would likely be prepared to contribute towards the funding of the plaque

March 6, 2006 Closed Meeting: Staff asked to provide Council with an update on the Simpson Covenant issue.

April 3, 2006 Closed Meeting: Staff and City Solicitor provide update to Council. Council adopts the following resolution:

THAT the report dated March 27, 2006 from the Planning & Corporate Services Department updating Council on the Kelowna Saw Mill/Simpson Covenant Lands be received for information;

AND THAT staff report back with a recommendation for establishing and protecting the boundaries of the amount of the originally covenanted land that the City is prepared to protect as park and bring forward a strategy for making the information public.

April 10, 2006 Closed Meeting: Council adopts the following resolution:

THAT staff be directed to bring forward the following recommendations to an Open Council Meeting:

THAT staff be instructed to bring forward a rezoning application to rezone Stuart Park to P3 – Parks and Open Space;

AND THAT staff be instructed to register a Section 219 restrictive covenant against the Stuart Park lands that would establish the permitted uses in the Park;

AND THAT staff be instructed to register a Section 219 restrictive covenant against Lot A District Lot 139, ODYD, Plan 5438 [the City Hall site] that would establish the permitted uses on this site;

THAT the City Solicitor be instructed to file releases of the restrictive covenant for Lot A District Lot 139, ODYD, Plan 5438; Lot A District Lot 139, ODYD, Plan 5027; and Lot B District Lot 139, ODYD, Plan 5027 in order to remove the covenants from title;

AND THAT staff be instructed to bring forward for readings consideration bylaws to repeal Bylaw 1117 Civic Centre Purchase Bylaw and Bylaw 1212 Civic Centre Addition Purchase Bylaw 1945;

AND THAT the above be communicated to the Simpson family;

AND THAT staff be instructed to present at the Open Meeting the legal status and historical documentation of the "Simpson Covenant" lands;

AND THAT Council's direction to staff and communications with the Simpson family considered by Council at Closed Meetings since August 2004 be released to the public as part of the above staff presentation.

May 16, 2006: Mayor Shepherd and City staff meet with representatives of the Simpson family and their legal counsel.

May 17, 2006: Letter from Manager, Community Development and Real Estate to Simpson family confirming details of May 16<sup>th</sup> meeting

July 6, 2006: Response from Simpson family received by City. Letter subsequently circulated to Council.

September 11, 2006 Closed Meeting: Simpson letter discussed by Council. Council adopted the following resolutions:

THAT the report dated September 5, 2006 from the Corporate Services Department regarding the future of Stuart Park and City Hall properties be received for information

THAT the southern boundary of Stuart Park be adjusted to include additional area at the southwest corner to complete the P3 zoning from City Park to Stuart Park as shown on concept Map B

October 18, 2006 Closed Meeting: Staff respond to questions and issues raised during the September 11, 2006 Closed Meeting. City Manager instructed to meet with Mr. Smithwick and report back to Council.

December 13, 2006: Letter from Sharron Simpson to Mayor Shepherd requesting response to Ms. Simpson's July 6, 2006 letter.

December 19, 2006: Letter from Mayor Shepherd to Sharron Simpson apologizing for delay and stating a meeting will be held between the City Manager and a representative of the family to discuss the matter further.

March 6, 2007: City staff meet with representatives of the Simpson family and their legal counsel. Family will not agree to the removal of the covenant on the lands, and believes that the boundary of Stuart Park should include the south-east corner of the property.



March 8, 2007: Fax sent by staff to Ms. Simpson confirming that DL 1527 Block F (land fill parcel created by the Province after 1949 for use as ferry dock) was not part of lands purchased from the Kelowna Saw Mill Company.

March 12, 2007 Closed Meeting: Staff report to Council on the March 6<sup>th</sup>, 2007 meeting with the Simpson family. Council adopts the following resolutions:

THAT Council reconsider the south-east property line;

AND THAT the southern boundary for Stuart Park be extended to Queensway Avenue to include the south-east parking lot.

Council adopted a second resolution as follows:

THAT no additional encumbrances be placed or registered on the City Hall or Stuart Park properties;

AND THAT staff be directed to provide Council with options for ways to recognize the history of the lands and the spirit and intent of the 1945 Council decisions.

March 14, 2007: Fax sent by staff to Ms. Simpson stating that Council discussed the issue at the March 12<sup>th</sup>, 2007 Closed Meeting and that staff would pass along any directions staff receive from Council at the appropriate time.

March 19<sup>th</sup>, 2007 Closed Meeting: Staff reported on ways to recognize the history of the lands. Council adopted the following resolution:

THAT Council adopt the following statement recognizing the spirit and intent of the 1945 Council and the direction of the 2007 Council:

WHEREAS starting in February 1944 the Council of the City of Kelowna received correspondence and petitions requesting the City establish a Civic Centre as a Post-War project to include a Sports Arena, Auditorium for music and drama and a new City Hall;

AND WHEREAS the Kelowna Sawmill Company experienced a serious fire at their Kelowna Mill site on October 19, 1944 which resulted in the Company offering to sell the lakeshore Sawmill property and the Planing Mill property between Ellis and Water Street to the City of Kelowna with conditions that the properties be used for municipal purposes, any buildings erected be of attractive design and suitably landscaped, that the City not sell the land or use it for commercial or industrial purposes and that the Company be allowed two years to vacate the properties;

AND WHEREAS on December 11, 1944 the Civic Centre Committee, after careful consideration, recommended that the City purchase the Planing Mill property for use as a Civic Centre;

AND WHEREAS Civic Centre Purchase Bylaw 1117, to purchase the Planing Mill property, was approved by public plebiscite, the City adopted the Land Purchase Bylaw in May 1945;

AND WHEREAS a consultant's report recommended in September 1945 there is an urgent need for a Civic Centre Site and the Planing Mill is the best location but the property is too small, the Council submitted three property purchase Bylaws to the electorate to enlarge the Civic Centre Site;



AND WHEREAS Property Purchase Bylaws 1208, 1212 and 1213, to purchase the Sawmill property and nine different properties on Mill Avenue from seven different owners to enlarge the Civic Centre Site, was approved by public plebiscite, the City adopted the Land Purchase Bylaws in December 1945;

AND WHEREAS Memorial Arena built in 1948 and planning for the New City Hall started in 1948 On the Civic Centre Site;

AND WHEREAS the Kelowna Sawmill Company did not object to the City selling the former lakeshore Sawmill site to the Provincial Government to construct a new Court

House in Kelowna, the City sold the property in 1949 on the conditions that the Province not sell the property or use it for any commercial purposes, the land be kept in order and be landscaped in keeping with the adjacent Civic Centre Site, the Province build a new ferry landing and construct a sea wall along the property and Mill Street be widened to 100 feet;

AND WHEREAS the Court House constructed on the old Sawmill site restricted Public access to Okanagan Lake, the City purchased the property back from the Province in 1996 for \$2,250,000 and removed the building to create Jim Stuart Park and preserve public access to the lake;

AND WHEREAS City Councils from 1944 to 2007 have supported public access to Okanagan Lake in Kelowna's downtown and have continued to purchase additional properties to guarantee that public access;

AND WHEREAS the Kelowna Sawmill Covenants do not ensure public access to the properties or to the lake;

AND WHEREAS the City of Kelowna has been advised the Kelowna Sawmill Covenants are not enforceable as restrictive covenants running with the lands, do not create a trust on the lands, do not preserve public access to the lands and should be removed;

NOW THEREFORE the Council of the City of Kelowna confirm the goal of preserving continuous public access to Okanagan Lake from City Park to Knox Mountain Park;

AND THAT Council instruct City Staff to proceed with final design, financing plan and construction of Jim Stuart Park, rezoning of the land to P3 – Park and Open Space use, removal the Kelowna Sawmill Covenant from title to the Lands and erection of a plaque acknowledging purchase of the properties from the Kelowna Sawmill Company and other owners for the Kelowna Civic Centre site;

AND THAT Council instruct City Staff to proceed with an Official Community Plan amendment to reflect Council's goal of preserving continuous public access to Okanagan Lake from City Park to Knox Mountain Park.

AND THAT the primary use of the Stuart Park lands be for park purposes with any commercial uses as an ancillary secondary use in compliance with the zoning of the property only and that the lands purchased from the Kelowna Saw Mill Company as they exist on title today remain City-owned property and not be sold.

A resolution to instruct staff to inquire whether the family would agree to have the Simpson Walkway extend from City Park to Know Mountain was defeated.

Council directed staff to bring this matter back to a public meeting once the Council's direction has been communicated to the Simpson Family

April 17<sup>th</sup>, 2007: Mayor Shepherd, and Councillors Blanleil and Hobson meet with representatives of the family and their legal counsel. Family states they will not agree to the removal of the covenants and threaten a class action legal suit should the City remove the covenants from title.

April 23, 2007 Closed Meeting: Council heard from those members of Council present at the April 17<sup>th</sup>, 2007 meeting with representatives of the family and adopted the following resolution:

THAT Council receive the Report of Corporate Services dated April 18, 2007 for information purposes;

AND THAT staff be directed to release the current Restrictive Covenant registered against the lands and to register, in its place, a new Restrictive Covenant on the Stuart Park lands only;

AND THAT staff bring forward a Report to Council at the April 30, 2007 open Council Meeting;

AND THAT the Report to Council include a recommendation that Council instruct City staff to proceed with final design, financing plan, construction plan for Stuart Park, together with the additional recommendations as set out in the Report of Corporate Services dated April 18, 2007.

April 30, 2007 afternoon Open Meeting staff reported on the Preservation of Downtown Waterfront Lands and adopted the following resolution:

THAT Council adopt the following statement recognizing the spirit and intent of the 1945 and subsequent Councils and the direction of the 2007 Council:

WHEREAS starting in February, 1944 the Council of the City of Kelowna received correspondence and petitions requesting the City establish a Civic Centre as a Post-War project to include a Sports Arena, Auditorium for music and drama and a new City Hall;

AND WHEREAS the Kelowna Sawmill Company experienced a serious fire at their Kelowna Mill site on October 19, 1944 which resulted in the Company offering to sell the lakeshore Sawmill property and the Planing Mill property between Ellis and Water Street to the City of Kelowna with a condition that the properties be used for municipal purposes, any buildings erected be of attractive design and suitably landscaped, that the City not sell the land or use it for commercial or industrial purposes and that the Company be allowed two years to vacate the properties;

AND WHEREAS on December 11, 1944 the Civic Centre Committee, after careful consideration, recommended that the City purchase the Planing Mill property for use as a Civic Centre;

AND WHEREAS Civic Centre Purchase Bylaw 1117, to purchase the Planing Mill property, was approved by public plebiscite, the City adopted the Land Purchase Bylaw in May 1945;

AND WHEREAS a planning consultant's report recommended in September 1945 there is an urgent need for a Civic Centre site and the Planing Mill is the best location but the property is too small, the Council submitted three property purchase Bylaws to the electorate to enlarge the Civic Centre site;

AND WHEREAS Property Purchase Bylaws 1208, 1212 and 1213 to purchase the Sawmill property and nine different properties on Mill Avenue from seven different owners to enlarge the Civic Centre site, was approved by public plebiscite, the City adopted the Land Purchase Bylaws in December 1945;

AND WHEREAS the agreements to purchase the Kelowna Sawmill properties where completed by the City with the conditions contained in the original offer to sell, a Covenant was registered on both properties in 1946 that the properties be used for municipal purposes, any buildings erected be of attractive design and suitably landscaped, that the City not sell the land or use it for commercial or industrial purposes and that the Company be allowed two years to vacate the properties;

AND WHEREAS Memorial Arena built in 1948 and planning for the new City Hall started in 1948 on the Civic Centre Site;

AND WHEREAS the Kelowna Sawmill Company agreed to the City selling the former lakeshore sawmill site to the Provincial Government to construct a new Court House in Kelowna, the City sold the property in 1949 on the conditions that the Province not sell the property or use it for any commercial purposes, the land be kept in order and be landscaped in keeping with the adjacent Civic Centre site, the Province build a new ferry landing and construct a sea wall along the property and Mill Street be widened to 100 feet;

AND WHEREAS the City purchased the property back from the Province in 1996 for \$2,250,000 and removed the building to create Stuart Park and preserve public access to the lake;

AND WHEREAS City Councils from 1944 to 2007 have supported public access to Okanagan Lake in Kelowna's downtown and have continued to purchase additional properties to guarantee that public access;

AND WHEREAS the Kelowna Sawmill Covenants do not ensure public access to the properties or to the lake;

AND WHEREAS the City of Kelowna has been advised the Kelowna Sawmill Covenants are not enforceable as restrictive covenants running with the lands, do not create a trust on the lands, do not preserve public access to the lands and should be removed;

NOW THEREFORE the Council of the City of Kelowna confirm the goal of preserving continuous public access to Okanagan Lake from City Park to Knox Mountain Park;

THAT Council instruct City Staff to proceed with an Official Community Plan amendment to reflect Council's goal of preserving continuous public access to Okanagan Lake from City Park to Knox Mountain Park;

AND THAT Council instruct City staff to proceed with final design, financing plan and development plan for Stuart Park, rezoning of the land to P3 – Park and Open Space use, removal of the Kelowna Sawmill Covenant from title to the Lands and erection of a plaque acknowledging purchase of the properties from the Kelowna Sawmill Company and other owners for the Kelowna Civic Centre site;

AND THAT Council instruct City Staff to proceed with registration of a Section 219 restrictive covenant against the Stuart Park Lands that would establish the permitted uses in the Park;

AND THAT the primary use of the Stuart Park Lands be for park purposes with any commercial uses as an ancillary secondary use in compliance with the zoning of the property only and that the lands purchased from the Kelowna Saw Mill Company as they exist on title today remain City-owned property and not be sold.

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**By Email**

**REPLY TO: KELOWNA OFFICE**

August 17, 2008

Mr. Stephen Fleming  
City Clerk  
City of Kelowna  
1435 Water Street  
Kelowna, BC V1Y 1J4

Dear Mr. Fleming:

**Re: Reasons for Judgment in Save the Heritage Simpson Covenant Society v. City of Kelowna**  
**Our File No. 00122-0405**

Madam Justice Bruce's reasons for judgment were filed August 13, 2008 in which she found that the conditions within the transfer to the City of the Lakeshore and Old Mill site parcels were not valid as restrictive covenants but operated to create a trust that the lands be used for municipal purposes and not for commercial or industrial purposes. We will review the judgment from the standpoint of whether the court's reasons on the trust issue provided grounds for appeal. Any appeal must be filed within 30 days of the judgment. We summarize our views on pages 6 and 7.

Given the court's decision that the conditions in the 1946 transfer did not meet the requirements for a valid and enforceable restrictive covenant, we do not propose to review that portion of the judgment in any detail. In our view the reasons provide a thorough discussion of, and correct application of, established legal principles on the requirements for valid restrictive covenants, estoppel by representation, and whether the legislative regime governing the registration of covenants and other charges in 1946 could shield the covenants from court review as to their fundamental validity. If the City were to appeal the finding that a trust exists over the lands, it would be open to the Society to cross appeal the dismissal of its claim on the restrictive covenant validity but we consider it highly unlikely that the Court of Appeal would overturn Justice Bruce and find that the conditions constitute a valid restrictive covenant.

We will review the judgment's treatment of the trust question under five themes or sub-issues.

**Evidentiary Issues** – In finding against the City's argument respecting the admissibility of the 1972 affidavits of Horace Simpson, W.B. Hughes-Games and R.F. Parkinson, the judge concluded that they were admissible on the principled approach to the admission of hearsay evidence. In addition, respecting the Hughes-Games and Parkinson affidavits, the judge ruled that they were admissible as declarations against interest and that "the City must be taken to be



bound by the statements of its officials, and the predecessors of those officials" (para. 42). This was a point that had not been argued by the Society and was inserted by the judge of her own initiative. Had we had notice that the admission of the statements were going to be justified as declarations against interest we would have argued that both Hughes-Games and Parkinson were no longer representatives of the City at the time they made the affidavits and accordingly their statements ought not to be counted as declarations against the municipality that they formerly represented.

The court also glossed over the fact that the affidavits were provided in connection with the "unrelated dispute" involving the yacht club (para. 136). The statements that it was Stanley Simpson's intention that a portion of the lands be used for the benefit of the yacht club (Hughes-Games) and that it was a condition of the transfer that a portion be used for a yacht club (Parkinson) are inconsistent with later comments of Stanley Simpson and the terms of the transfer and ought to have caused the court to be concerned about accepting their statements as reliable, a key component of the principled hearsay admission test. While Justice Bruce accords weight to their affidavit comments that the price was "nominal" or "greatly reduced", common sense would suggest that any characterization of \$55,000 in 1945 as nominal is hyperbole.

**Statutory vs. Common Law Trust** – We argued that before the court could find that the lands were subject to a trust it must be satisfied that the governing legislation in 1945-46 provided that a municipality could accept a transfer of land for general municipal purposes (as opposed to park, hospital or school purposes) on trust conditions. Justice Bruce accepted the City's argument that the *Municipal Act* of the day did not allow for the creation of a trust over property transferred for municipal purposes. As a consequence she was satisfied that any trust must be established under common law principles.

The conclusion that a trust could not operate under the 1945 *Municipal Act* provisions is significant. However, our view is that the court erred in not taking this conclusion as determinative that no trust could be established unless it was permissible to do so under the legislation of the time and that it was not open to the court to revert to common law principles. Justice Bruce adverted to this issue when she made reference to the *Community Charter* which accords municipalities natural person powers, and thus the authority to hold land subject to a trust. We are not aware of this point having been squarely addressed in any B.C. case. We think it is an important point that could be advanced on any appeal by the City; that in the absence of a statutory foundation for the creation of a trust binding a municipality, a court cannot resort in the alternative to common law principles to find a trust.

**"Municipal Purposes" as a Charitable Purpose** – Having concluded that a trust could only arise by reference to common law principles, the judge went on to consider whether the requirement that the lands be used for "municipal purposes" was sufficient to establish a charitable purpose as the law defines that term. The case law requires in relation to the fourth category of charitable purpose (applicable here) that the purpose be beneficial to the community. She stated that she had "no difficulty" concluding that the phrase municipal purposes connoted a purpose that was beneficial to the community just as a trust with respect to park land would satisfy the community benefit test. The court relied on the extrinsic evidence (outside of the



deed itself) that the purpose of the City acquiring the land was to build a new city hall and civic centre. She found this consistent with the City's mandate to provide public services, as opposed to its "entrepreneurial" mandate. Later she referred to one of the standard texts on trusts as citing museums, libraries, public halls, reading rooms and an observatory as being objects of general public utility that were sufficient to satisfy the charitable purpose test. While it might appear to lie ill in the mouth of the City to argue that provision of land for "municipal purposes", even for a city hall, does not rise to a charitable purpose, the issue is whether the phrase adequately defines a charitable purpose of being for the benefit of the community, even with the benefit of extrinsic evidence. No case thus far has "developed" the law (to borrow the term used by Justice Bruce) to the point that a municipal purpose of providing a city hall provides the broader community benefit typically found in the range of purposes and uses recognized as charitable by the courts.

**Construction of the Document** – The case law, although not entirely clear, suggests that courts can look at the surrounding circumstances as well as the deed in determining whether the parties intended to create a trust. There is no appellate authority in this province that has settled this question or whether the document interpretation approach should be the primary approach to discerning the parties intention. On the construction of the 1946 transfer the factors reviewed by Justice Bruce do not support the notion that the parties intended to create a trust. First, the deed does not contain any express words of trust. To the contrary, the language of the deed is more consistent with an intent to create a restrictive covenant, although one that failed for the reasons set out earlier by the judge. The judge sought to distinguish a decision involving the Winfield and Okanagan Centre Irrigation District where the court held that the language in the deed that created a determinable fee indicated that the parties did not intend to establish a trust.

The language of the deed that the court found supportive of a trust was the generic phrase "municipal purposes", which can equally be argued is not indicative of such an intent. Justice Bruce though reasoned that the use of the more generic phrase would give the City the flexibility to change the use of the lands over time but still remain true to the condition, and that this supported the notion that the use of the lands would be limited in perpetuity – one of the hallmarks of a trust. In addition, the restriction against sale of the land was seen as consistent with the intent to bind the City in perpetuity. On issues of document construction the Court of Appeal does not afford the court below any deference in reviewing its decision. We think there is a good basis for arguing that the interpretation that Justice Bruce placed on the document was particularly strained and that, as between the construction of the document itself and the exploration of the surrounding circumstances, the document interpretation should be primary and on that basis the court should not have found that a trust had been established. However, we should note that in considering one aspect of the surrounding evidence, Justice Bruce felt putting the purchase bylaws to a referendum vote did not imply an intention to create a trust.

**Market Value and the \$55,000 Consideration** – The court acknowledged that the properties were not gifted to the City and that while purchasing the lands for some financial consideration does not necessarily defeat an intention to create a trust, charitable purposes are normally associated with gifts or bequests.

The Society relied exclusively on the decision of Madam Justice Morrison in *Save Our Waterfront Parks Society v. City of Vancouver* for the proposition that financial consideration in exchange for land does not defeat a public purpose trust. There the City paid the CPR \$185,000 in 1919 pursuant to a deed that required the lands be used for the purposes of a public park. Justice Morrison held that there was no evidence that confirmed that the land was purchased for 1919 fair market value. We argued that the decision that Justice Morrison relied on, *Brisbane City Council v. AG Queensland* (1978 Privy Council), did not actually support the proposition that financial consideration would not necessarily defeat the establishment of a trust. It was clear in the *Brisbane* case that the payment was only to retire an overdraft debt of the vendor society and was “clearly inferior to the value of the land.” This statement does not support the interpretation that lead Justice Morrison to put the onus on the City of Vancouver to lead evidence that it paid market value. Nevertheless we attempted through Mr. Parkhill’s appraisal to provide evidence that the \$55,000 paid represented market value at the time. If accepted that evidence would have lead to a strong inference that no trust was intended. On an appeal we would argue that the Court of Appeal should conclude that the onus should have been with the party seeking to establish the existence of a trust – the Society – to show that the price paid was less, and substantially less, than market value, consistent with a charitable intention.

We believe that there are a number of errors in the judge’s reasoning with respect to the evidence bearing on the valuation question

Critique of Parkhill Appraisal – The judge was critical of several areas of Mr. Parkhill’s appraisal.

- (i) She claimed he failed to consider the possible impact on the City’s later sale price of the fact that a number of the comparable properties had been acquired by the City for non-payment of taxes. Mr. Parkhill duly noted this in his report but there was no evidence that the City sold these properties for less than market value and it would have been speculation on Mr. Parkhill’s part to adjust the sale prices for this possibility.
- (ii) Second, it was asserted Mr. Parkhill failed to take into account unspecified “social factors” likely prevailing after the Second World War in the judge’s view that “may” have influenced the City’s sale prices. This seems to find fault for not engaging in speculation.
- (iii) Mr. Parkhill was criticized for engaging in conjecture without evidence in reasoning that in certain cases sale prices reflected a significant weighting towards improvements, as opposed to land. This comment seems rather harsh in light of the fact that there was little direct evidence that could be

obtained on a number of points and that Mr. Parkhill understandably instead resorted to inference.

- (iv) The judge concluded that the private properties on Mill Street were the best comparables and she was critical of Mr. Parkhill in attributing significant value to the improvements, at the expense of the underlying land. However, the judge is in error in equating the low salvage value of the improvements with their market value when affixed to the land. Additionally, the judge misread the Bartholomew report on the description of the Mill Avenue buildings when she says that the improvements received a minimal and quite negative description. Instead the Bartholomew report merely referred to the undesirability of the proposed "stately group of [civic] buildings" abutting a narrow lane traversing "the rear of a row of heterogeneous buildings ranging from old dwellings to a laundry and a broadcasting station" (which was quoted by Mr. Parkhill in his appraisal report). The only negative reference was that the dwellings were old. Yet to the judge this suggested the "structures were unsightly and run down." (The judge also mistakenly referenced the civic centre committee, instead of the Bartholomew report, as the source of the comment on the Mill Avenue buildings. There is no reference in any of the evidence to the committee commenting on the condition of the Mill Avenue properties.)

Sawmill Company Financial Statements – In evidence were a number of annual financial statements for the Company that included values for real estate in the statement of assets and liabilities. The judge quickly dismissed these value statements as not capable of being equated with market value. She referred to the statements as indicating the "book value" of the Company's properties and that they were disclosed for income tax purposes. There is no evidence to support the conclusion that the financial statements of property values were disclosed for income tax purposes or that income tax was payable according to asset values, as opposed to revenues; the statements are part of the annual report filed under the provincial Companies Act. As to the judge's assertion they only show book value, of the 8 financial statements put in evidence only 2 refer to the real estate value as book value. Not referred to by the judge was the \$15,000 write down in the value of the real estate recorded in the 1932 financial year and the subsequent appreciation in values reported from 1939 to 1945, which is suggestive of the recorded values being the Company's and its auditor's view of their worth. For 1945 the total value of the Company's real estate was recorded as \$41,912.67, some \$13,000 less than what the City paid for the two parcels. This certainly casts doubt on an April 1945 Courier editorial that the price was considerably lower than the value placed on the property by the Simpson Company.

Reliance on Newspaper Accounts and 1972 Affidavits – The newspaper accounts were said by Justice Bruce to indicate that the City Council of the time and the

civic committee negotiating with Simpson believed that the price was considerably below fair market value. A careful analysis of the newspaper accounts indicates that of all the references to the sale price being below market value, none of them are attributable to a civic official. They are variously unattributed, as in "it is said" (but not by whom) or attributed to others in the community, as in "real estate men agree". The only statements attributed directly to a civic official were those of Alderman Hughes-Games who described how the 3 council members had started with a 20 year old assessment and "arrived at the present figure on the present assessments south of Bernard Avenue as compared with those on the north of that avenue." The resulting \$30,000 was felt to be fair to City Council and within \$1,000 of the asking price. This process does not support the claim that City officials were in agreement that the price was below market value. An earlier article referred to the City committee members meeting with Mr. Simpson and agreeing upon a valuation of \$30,000 on the condition imposed by Simpson that the property be used for "community purposes". The trial judge summed up the evidence of the City's position as agreeing that the price was well below market value and that council made representations to Kelowna residents in this regard. Again, the newspaper articles do not quote any city council members as representing that the properties were being acquired at below market value.

With respect to the court's reliance on the 1972 affidavits, we discussed at the outset why we feel they should not have been admitted as hearsay given their unreliability. Additionally, we have noted above the statements of Ald. Hughes-Games in a 1945 newspaper article which contradict his 1972 affidavit that the price paid was nominal.

At the appeal court level we would be able to take a different approach on the market value than we were required to take before Justice Bruce. The Court of Appeal need not show any deference to the prior decisions of Supreme Court judges in the way that other Supreme Court judges must. The test established by Justice Morrison in *Save Our Waterfront Parks Society*, that anything less than full market value consideration is supportive of a trust relationship, appears incorrect. We would argue from the same starting point, recognized by Justice Bruce, that charitable purposes are normally associated with gifts or bequests and that so long as the consideration paid is substantial, and not necessarily market value, the court should not infer a charitable purpose giving rise to a trust.

### Summary

Our view is that there are solid grounds for appeal. On factual issues where there is conflicting evidence and where the matter involves the assessment of the evidence as a whole, the Court of Appeal tends to show considerable deference to trial judges, even where the evidence is received solely in affidavit form, as in this case. On issues relating to the admissibility of evidence, little deference is shown. If the only identified error concerned the court's weighing of the evidence going to whether the price paid by the City represented market value, the City would have very

much of an uphill task on appeal. However, in this case we consider that Justice Bruce made errors in admitting unreliable hearsay, serious errors in her reading of the historical newspaper accounts (not involving weighing conflicting evidence) and in levelling criticisms of Mr. Parkhill's evidence that no one undertaking a task involving transactions 60+ years ago could have reasonably overcome.

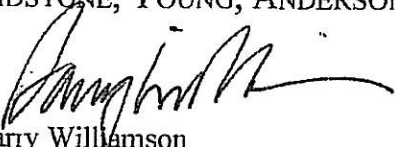
As to the grounds relating to the construction of the deed, which is devoid of any references to a trust being intended, and general municipal purposes not being sufficient to establish a charitable purpose, these are issues where the appeal court could provide clarity, and which in our view have real merit.

The most substantial ground for appeal relates to Justice Bruce's conclusion that the *Municipal Act* of 1945 did not authorize the City acquiring land for general municipal purposes (as opposed to park or hospital purposes) under a trust, but that she could go on to consider whether a trust could have been established at common law. Our view is that having decided there was no statutory authority to purchase the land on trust, that was the end of the matter; resort to common law principles would only be appropriate in the case of a trustee that was not a public body having to operate in accordance with prescribed statutory limitations. We consider that this ground, along with the other grounds in support, provides the City with a very viable case on appeal.

We look forward to the opportunity to meet with you and Council to discuss the judgment, its implications and the question of whether it should be appealed.

Yours truly,

LIDSTONE, YOUNG, ANDERSON



Barry Williamson  
williamson@lya.bc.ca

BW/bsw

cc: Ron Mattiussi, City Manager

App. #5258