

DATE: June 7, 2018

FILE: 3060-20/DP 9B 17 – DP 15B 17,
DP 18B 17, DP 21B 17

TO: Chair and Directors
Electoral Areas Services Committee

FROM: Russell Dyson
Chief Administrative Officer

Supported by Russell Dyson
Chief Administrative Officer

R. Dyson

**RE: Fee Refund Request for Withdrawn Applications
(Shoreline Protection Devices and Steep Slopes Development Permit)
Lazo North (Electoral Area B)
1808, 1814, 1810, 1806, 1796, 1800, 1798, 1826, 1818 Astra Road
(Taker/Ulmi/Alsop/Salter/Wong/Speakman/Healy/Ray-Coulthart-Dewey)
PIDs 030-162-726, 030-139-341, 030-162-769, 030-089-697, 030-037-344,
029-459-010, 030-037-352, 005-796-393, 005-796-351)**

Purpose

To present the board with a fee refund request for nine related development permit applications that were withdrawn.

Recommendation from the Chief Administrative Officer:

THAT the fee refund request from the owners of 1808, 1814, 1810, 1806, 1796, 1800, 1798, 1826 and 1818 Astra Road (files DP 9B 17, DP 10B 17, DP 11B 17, DP 12B 17, DP 13B 17, DP 14B 17, DP 15B 17, DP 18B 17 and DP 21B 17), be denied on the basis that the applications were required and had been processed to the point of inclusion on the Electoral Areas Services Committee's agenda.

Executive Summary

- In pursuing construction of slope stabilization and shoreline protection works, as a joint project across numerous properties between Astra Road and the foreshore, nine applications for development permits were accepted.
- Based on a \$400 application fee, a total of \$3600 was collected.
- In October 2017 the Qualified Professional (QP) stated the project should proceed as emergency works, an exemption in the Official Community Plan for when land alterations may occur without a development permit.
- While this clause is intended to allow installation of temporary measures in situations when the timeliness of the application process would place life or property at risk, the QP recommended the full design of the structure be installed and made arrangements for it to be installed prior to the winter weather setting in.
- Comox Valley Regional District (CVRD) staff accepted this as a valid use of the exemption clause but continued processing the applications as these works are intended to be permanent.
- Following distribution of the staff report, dated March 27, 2018, which recommended not issuing the development permits, the applicants withdrew the applications and subsequently requested a refund of the application fees.

- Bylaw No. 328 does not allow for staff to refund application fees once the staff report has been considered by a CVRD officer. The bylaw states that only the board, by resolution, may approve a refund upon written request by an applicant.

Prepared by:

Concurrence:

J. MacLean

A. Mullaly

Jodi MacLean, MCIP, RPP
Rural Planner

Alana Mullaly, M.Pl., MCIP, RPP
Acting General Manager of Planning
and Development Services Branch

Stakeholder Distribution (Upon Agenda Publication)

Applicants	✓
Application agent	✓

Background/Current Situation

The applicants are all owners of residential properties located between Astra Road and the foreshore, from 1796 to 1826 Astra Road. Together they are pursuing a project to address a slope, located between their houses and the sea, that spans their properties and which is experiencing erosion caused by both wave action and upland lateral earth pressure. The QP they hired proposed a long term solution that involves re-grading the slope, reinforcing it with a rock revetment keyed into the toe of the slope, filling the gaps in the top layer of boulders with sand planted with beach grass, and anchoring large woody debris on the foreshore in front of the structure. A development permit is required for land alteration along the shoreline and on a steep slope.

The property owners submitted development permit applications between July 25 and August 4, 2017, with two others joining the project and submitting equivalent applications on September 6 and December 13, 2017, all with the required \$400 application fee pursuant to the Comox Valley Regional District Planning Procedures and Fees Bylaw No. 328, 2014. In total, nine applications were submitted and \$3,600 was collected.

The applicants assigned their QP, Johannes Fischer, P.Eng., to act as agent on their behalf. On October 16, 2017, Mr. Fischer notified the CVRD that the works should proceed as “emergency works...that prevent, control, or reduce erosion or immediate threats to life and property” and scheduled the works to be undertaken in the following month (however, due to difficulties retaining a capable contractor, the works were not undertaken). Section 77 of the Official Community Plan states “*A development permit is not required where the following conditions apply: ... (j) Emergency works to prevent, control, or reduce erosion or immediate threats to life and property...*”. This exemption clause allows for land alteration to occur in situations when the time it takes to prepare an application submission and to process a permit would place life or property at risk. Staff acknowledged the validity of undertaking such work under this emergency works provisions in this situation. However, because the full, permanent design was intended to be implemented, staff did not cease processing the applications. With the assistance of the CVRD engineering department, planning staff continued to correspond with the agent to address the development permit guidelines, including an office meeting between with the agent on November 7, 2017 and submissions of addenda to several of the geotechnical reports submitted with the applications.

The culmination of several months of back and forth with the consulting professionals and provincial staff was a staff report dated March 27, 2018, in which the staff recommendation was to refuse issuance of the development permit based on non-compliance with guidelines addressing

mitigation of negative impact to adjacent properties. The report was scheduled for the Electoral Areas Services Committee's (EASC) April 9, 2018 agenda and distributed to stakeholders on March 29, 2018 with an invitation to attend the meeting. EASC received the report but did not make a decision as the applications were withdrawn by the applicants on April 6, 2018. The applicants subsequently requested instructions on how to request a refund of the application fees. Pursuant to Bylaw No. 328, staff is able to provide a 75 per cent refund if the application is withdrawn prior to referrals being issued or a 50 per cent refund if the application is withdrawn before a staff report is signed by a CVRD officer (e.g. Chief Administrative Officer). The bylaw does not allow for a refund of application fees for applications that are refused or receive a refusal recommendation from staff. However, it does allow the board, by resolution, to approve a refund upon written request by an applicant. On May 28, 2018, the applicants provided that written request (Appendix A).

Policy Analysis

Section 462 of the *Local Government Act* (RSBC, 2015, c. 1) (LGA) states that a local government may, by bylaw, impose fees on specific applications and permits. Section 462(2) states that a fee “*must not exceed the estimated average costs of processing, inspection, advertising and administration that are usually related to the type of application or other matter to which the fee relates.*”

Section (18)(b) of Bylaw No. 328, being the “Comox Valley Regional District Planning Procedures and Fees Bylaw No. 328, 2014” states the board has the ability to refund application fees:

“Unless otherwise stated in this bylaw, no refunds for any application that has been considered by a CVRD officer or the board, unless upon written request by the applicant, and the board approves a refund by resolution.”

Options

Staff identifies the following options:

1. Reimburse all, or a portion, of the \$400 application fees; or
2. Deny the refund request given the extensive time spent processing the applications.

Financial Factors

The planning service (functions 500-503) is primarily funded by tax requisition from Electoral Area A (Vancouver Island portion), Electoral Area B and Electoral Area C. The LGA provides the authority to establish application and permit fees. While the authority is premised on a general recovery of the average costs to review and process an application, a key objective is to garner compliance by striking a balance between enabling development and fairly apportioning the costs borne by the overall service participants.

Legal Factors

Pursuant to Section (18)(b) of Bylaw No. 328, the board has the ability to refund planning application fees.

Regional Growth Strategy Implications

There are no direct Regional Growth Strategy implications related to the request for refund.

Intergovernmental Factors

There are no intergovernmental factors related to the request for refund and fee waiver.

Interdepartmental Involvement

Planning staff prepared this report. If the board opts to refund the applicant's fees, planning staff will work with finance staff to issue the refund.

Citizen/Public Relations

Public notification is not required.

Attachments: Appendix A – “Application Fee Refund Request, Dated May 28, 2018”

Kathy and Tim Ray
1818 Astra Road
Comox, BC
V9M 4B4

May 28, 2018

Comox Valley Regional District Board
600 Comox Road
Courtenay, BC
V9N 3P6

Comox Valley Regional District

RECEIVED

File: 3060-20/DP 21B17

MAY 28 2018

To: Dir. Web
A. Mullaly
cc: J. MacLennan

BY EMAIL to Alana Mullaly
AND DELIVERY to CVRD office

Dear Chair and Members:

Re: Development Permit Applications – Withdrawal and Refund of Fees

On behalf of the eight (8) applicants involved in the Astra Road revetment project, I ask the Board to consideration a refund of all application fees paid.

CVRD’s Planning Procedures and Fee’s By-law does not make provision for a refund if an application has proceeded to the point of written staff report signed by a CVRD officer. Such a report was written, signed and placed on the April 9, 2018 Electoral Area Services Committee (EASC) agenda. This is not disputed. The By-law does, however, allow for written submission to be made to the CVRD Board. We believe there are two (2) reasons why the Board should consider a full refund of the fees, namely

- a) The proposed works were/are exempt from the OCP permit application process, and
- b) The confusion and delays have created frustration and for the property owners.

The staff report for the EASC April 9 meeting was pre-circulated to the applicants who were alarmed by the recommendation to deny the applications. The matter was pursued further with A. Mullaly immediately. On April 6, Ms. Mullaly acknowledged the works had been deemed by a professional engineer as an emergency measure and could therefore proceed without permit. More specifically, s.77j of the Official Community Plan exempts emergency works from the development permit application process. All of the applications were therefore withdrawn and the report was not discussed at the April 9 EASC meeting. Ms. Mallaly’s April 6 email is attached.

Exemption for Emergency Works

The emergency nature of the works was understood by the applicants from the beginning, yet little or no guidance with respect to their potential exemption was provided. The language in Lewkowich Engineering Associates Ltd. (LEA) Geotechnical Evaluation and Steep Slope Stabilization Design, as submitted with our (1818 Astra Rd) application, stated:

“The backshore slopes along this reach are subject to direct wave attack during storm events. Continued erosion will result in further loss of property and eventually place the building foundation at risk. LEA recommends the installation of a slope toe revetment to protect existing buildings and ancillary structures, and to prevent further loss of property.”

Similar language is contained in all of the applications.

Some of the LEA reports also contain an additional caution regarding the potential need for underpinning, namely:

“However, it (underpinning) may become necessary if installation of the toe revetment is delayed and erosion of the foreshore slope continues.”

The emergency nature of the works was again confirmed by LEA in a separate email dated October 18, 2017, a copy of which is attached.

Had the applicants been advised, either at the time of submission and/or on October 18, 2017 that the works were (or even might be) exempt and could therefore proceed WITHOUT permit, the applications would have been withdrawn sooner and no report or signature of a CVRD officer would have been required. In fact, our application (1818 Astra) the last in the group, was submitted on December 13, 2017 after works of an emergency nature were confirmed by LEA. On the contrary, the applicants were told repeatedly that if emergency works were undertaken, a permit would still be required and additional conditions and/or alterations might be imposed. We now know that was incorrect.

Delay and Confusion

The Region-wide OCP amendment, which eliminated the need for rezoning of the subject lands, had been contemplated by staff prior to any concerns being raised about the Astra Bay shoreline. Staff's deliberate deferral of our files through that process was appreciated. While the amendment and delay may have added to the confusion, nothing changed in regard to the OCP s.77j exemption. Neither the need for slope stabilization nor our comprehensive design changed after original submission. The process may have been unclear in the beginning and we appreciate staff has taken a cautious approach. We would expect nothing less for our tax dollars. But the lack of clarity and mis-interpretation of the CVRD documents has created much angst and cost for the applicants. Had the exemption from permit requirement for emergency works been drawn to our attention earlier, this could have been avoided.

This has been a costly endeavour to date and the actual work has not yet begun. The owners only seek to protect their assets as permitted and the costs for some are crippling. In addition to the engineering and construction costs, Provincial application fees have been paid and written permissions have now been issued based on the same information submitted to CVRD last summer. The duplication of fees was unnecessary and we ask for a full refund of the portion paid to CVRD.

Sincerely,



Kathy and Tim Ray

(on behalf of our Astra Rd neighbours - #1826 (Healy), #1814 (Ulmi), #1810 (Alsop), #1808 (Taker), #1806 (Salter), #1800 (Speakman), and #s1798 and 1796 (Wong))

From: Johannes Fischer [mailto:jfischer@lewkowich.com]
Sent: Wednesday, October 18, 2017 11:47 AM
To: Alana Mullaly <amullaly@comoxvalleyrd.ca>
Cc: Jodi MacLean <jmacLean@comoxvalleyrd.ca>; Ron and Sandi Ulmi
'Chris Hudec' <chudec@lewkowich.com>
Subject: RE: [Possible SPAM] RE: Development Permits (Astra Road foreshore)
Importance: Low

Hello Alana,

As of this morning, the tentative construction start date is on November 14 (subject to change).

We've seen evidence of wave erosion and/or slope instability on all the properties addressed in our geotechnical reports. Therefore, we recommend emergency works for the following properties: 1796, 1798, 1800, 1806, 1808, 1810, 1814, 1818, and 1826 Astra Road.

Best regards,

Johannes Fischer, P.Eng.

Lewkowich Engineering Associates Ltd.

2351B Rosewall Crescent. Courtenay, BC V9N 8R9

250-334-0384 (Office), 250-756-3831 (Fax), 250-702-5336 (Mobile)



Sent from my iPhone

From: Alana Mullaly amullaly@comoxvalleyrd.ca
Subject: RE: Development Permit Application - 1818 Astra Rd - Slope
Stabilization
Date: Apr 6, 2018 at 12:00:35 PM
To: Kathy Coulthart-Dewey kathy.coulthart.dewey@gmail.com

Hi Kathy,

Thank you for the written confirmation advising of withdrawal of your development permit application (file DP 21B 17).

You can proceed with the works, without a development permit, per Johannes Fischer's recommendation that the works be undertaken as an emergency measure. The works are exempt from the requirement to obtain a development permit per s. 77(j) of our Official Community Plan (Bylaw No. 337, 2014).

Please note that the above constitutes an exemption from the CVRD's development permit requirement but does not relieve an owner from any requirements that senior government might have.

I will advise our electoral areas services committee that you have withdrawn your application on April 9th, 2017.

Kind regards,
Alana

Alana Mullaly, MCIP RPP
Manager of Planning Services, Planning and Development Services Branch

Comox Valley Regional District
600 Comox Road
Courtenay, BC V9N 3P6
Tel: 250-334-6051
Toll free: 1-800-331-6007 Fax: 250-334-8156
Fax: 250-334-8156
