



# District of Lantzville

Incorporated June 2003

June 25, 2013

Open Letter to Lantzville Residents

**Re: Conflict of Interest – Members of Council &  
the proposed water agreement with the City of Nanaimo**

In anticipation of Nanaimo City Council voting in favour to provide the District of Lantzville with a supplemental water supply, Council of the District of Lantzville sought legal advice regarding potential conflicts of interest out of the planned provision of community water to various properties within the District of Lantzville, and specifically those properties owned by members of Council.

To summarize, the legal opinion received by Council states as follows:

In our opinion each member of Council may participate in discussions and vote regarding the proposed agreement with Nanaimo and the proposed local area service for water provision within Upper Lantzville.

Further, in our opinion, none of the Council members have a conflict of interest or are precluded from participating in respect of entering into the agreement with Nanaimo or creating the local area service for the provision of water to those properties within Upper Lantzville.

Residents interested in reading the complete legal opinion including the facts considered and relevant case law are invited to please click on this link [Legal Opinion](#)

Sincerely

**Jack de Jong**  
**Mayor**  
**District of Lantzville**

File: 2400-20-WTR

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**LIDSTONE & COMPANY**  
BARRISTERS AND SOLICITORS

June 24, 2013

BY EMAIL

**Twyla Graff**  
**Chief Administrative Officer**  
**District of Lantzville**  
PO Box 100  
7192 Lantzville Road  
Lantzville, BC V0R 2H0

**Dear Twyla:**

**Re: Conflict of Interest**  
**Our file: 10047-015**

**YOUR REQUEST**

You have requested our opinion regarding the potential conflicts of interest arising out of the planned provision of community water to various properties within the District of Lantzville.

**SUMMARY ANSWER**

In our opinion each member of Council may participate in discussions and vote regarding the proposed agreement with Nanaimo and the proposed local area service for water provision within Upper Lantzville. Potential conflicts of interest in respect of the provision of water to properties within Lower Lantzville will need to be assessed prior to that matter coming before Council.

**FACTS**

Our opinion is based on the following facts. If any of these facts are incorrect please inform us immediately as it may change our legal opinion.

1. There are approximately 1600 parcels of land within the boundaries of the District. Of these, 890 parcels are served with community water, by the District water supply. A further 408 parcels rely on wells for their water supply. The remaining 302 parcels are undeveloped and do not have a water supply.

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2. The District is engaged in discussions with the City of Nanaimo regarding the provision of City water to parcels within Upper Lantzville. In particular, the parties are contemplating an agreement whereby:
  - a. 225 parcels that currently receive District water will be connected to the City water supply instead, once the requisite infrastructure is in place; and
  - b. 50 parcels of new development per year will be eligible for connection to the City water supply.

Councillor Savage owns a property in Upper Lantzville that is served both by a well and by community water from the District. This property will receive City water under proposed agreement.

Other than this property, none of the properties that will be directly affected by the proposed agreement are owned by any member of District Council.

3. In addition, the District is contemplating expanding its water supply service to 211 properties within Upper Lantzville that currently rely on wells for their water supply. It is expected that these connections will be funded by a local area service tax, and that it will be a number of years before this service is complete. One Council member, Councillor Millbank, owns a property within this proposed LSA.
4. At some point in the future, once the properties in Upper Lantzville are served by City water pursuant to the proposed agreement with Nanaimo, the District will have excess capacity in its water supply system, and will be in a position to supply its water to properties within Lower Lantzville. At that time, Council will need to consider and adopt development cost charges, connection fees, and user rates, associated with the provision of District water in Lower Lantzville.
5. Mayor Jack de Jong and Councillors Bratkowski and Dempsey reside in Lower Lantzville. Their properties are served by wells. As noted above, once the properties in Upper Lantzville are serviced with City water, the District will be in a position to service additional parcels within Lower Lantzville with water from the District supply. Accordingly, their properties may receive District water in the future.
6. If/when Mayor Jack de Jong and Councillors Bratkowski and Dempsey receive community water to their properties, they may be

able to subdivide their land, provided they first obtain the requisite OCP re-designations and rezoning.

7. Aside from the Council members already discussed, the residential property owned by Councillor Haime is already connected to the community water supply in Lower Lantzville, and no changes to the water supply to this property are anticipated.
8. Councillor Haime also owns a commercial property in Lower Lantzville that is connected to the District water supply. We understand that there is a suggestion in the community that Councillor Haime wants additional water to the commercial property so that an extension to this building can be built.
9. Councillor Mostad resides in Lower Lantzville, in a home owned by his parent(s). This property is connected to the community water supply, and no changes to the water supply are anticipated.
10. The following issues will be before Council and will require discussion and voting in the future:
  - a. Entering into the agreement with Nanaimo;
  - b. Creating the local area service for the provision of District water to 211 properties within Upper Lantzville;
  - c. Once there is excess capacity in the District supply, the provision of District water to properties within Lower Lantzville.

#### ISSUES

1. What conflicts of interest arise on these facts

#### LAW: CONFLICTS OF INTEREST

Part 4, Division 6 of the *Community Charter* regulates conflicts of interest on the part of council members.

Pursuant to s. 100(1) of the *Community Charter*, the conflict of interest provisions apply in relation to council meetings, council committee meetings, and meetings of: a municipal commission; a parcel tax roll review panel; a board of variance; an advisory body; or a body that may exercise the powers of a municipality or council.

There are two types of conflict of interest: common law conflict of interest and pecuniary interest.

### *Common Law Conflict of Interest*

A common law conflict of interest exists where a council member has an interest in a matter before council, which is distinct from the interest the member has in common with other subjects of local government generally. The test is whether a reasonable person would consider it probable or likely that the member would favour one position over another as a result of this distinct interest.

The consequences of an elected official having a common law conflict of interest in respect of a resolution or bylaw are as follows:

1. Prior to the voting on the matter, a party who is adverse in interest may obtain an injunction to prevent the official from voting, if the court is persuaded that there is a common law conflict of interest;
2. The bylaw or resolution could be set aside if the official's vote would have been necessary to form the majority, unless the disqualification from voting arises from a disqualification from office, in which case s. 261 of the *Local Government Act* would likely save the bylaw or resolution;
3. In some cases, where the interest of the official relates to certain "quasi judicial" decisions, such as the issuance of a permit, the resolution could be set aside as a result of the tainted vote.

Disqualification from office is not a potential consequence of a common law conflict of interest.

Section 100(2) of the *Community Charter* provides that if an elected official attending a meeting considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the official has an interest (other than a pecuniary interest) in the matter that constitutes a conflict of interest, the official must declare this and state in general terms the reason why the official considers this to be the case. After making the declaration, the official must not remain in the meeting, participate in any discussion on the matter, vote on the matter, or attempt to influence voting on the matter.

### *Pecuniary Conflict of Interest*

A pecuniary interest is a financial or monetary interest, whereby there is a recognizable incentive to vote for pecuniary rather than policy reasons. Pecuniary interest has also been defined as something that could monetarily affect land, in the sense of an advantageous or disadvantageous financial impact.

Section 100(2) of the *Community Charter* provides that if an elected official attending a meeting considers that he or she has a pecuniary interest in the matter that is before council, the official must declare this and state in general terms the reason why the official considers this to be the case. After making the declaration, the official must not remain in the meeting, participate in any discussion on the matter, vote on the matter, or attempt to influence voting on the matter. An official who contravenes these provisions is disqualified from holding office, under s. 101(3), unless the contravention was inadvertent or the result of an error in judgment made in good faith.

#### **RELEVANT EXCEPTIONS TO CONFLICTS OF INTEREST**

Section 104(1) of the *Community Charter* provides that the conflict of interest rules do not apply in certain circumstances:

##### **Exceptions from conflict restrictions**

**104 (1)** Sections 100 to 103 do not apply if one or more of the following circumstances applies:

- (a) the pecuniary interest of the council member is a pecuniary interest in common with electors of the municipality generally;
- (b) in the case of a matter that relates to a local service, the pecuniary interest of the council member is in common with other persons who are or would be liable for the local service tax;
- (d) the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter;

##### **a) S. 104(1)(a): interest in common**

This conflict of interest exception was discussed in *Godfrey et al v. Bird and District of North Saanich*, 2005 BCSC 626. At issue in this case was whether Councillor Bird had a conflict of interest with respect to a rezoning which would affect a property belonging to Mr. Schayes, for whom Bird had acted as a realtor on numerous occasions including the purchase of the subject property itself. In addition, over time the men had become friends, they were also business partners with respect to an additional property, and at one time Bird also loaned money from Schayes.

The judge held that this exception did not apply to absolve Councillor Bird's conduct regarding the rezoning, because he was aware of the municipal solicitor's opinion that the exception did not apply in this instance. The municipal solicitor has opined that in order for a councillor to have a

pecuniary interest in common with the electors of the District generally, it would be necessary for the pecuniary interest to relate to in excess of 100 properties. The judge concluded that the solicitors were correct in concluding that 100 properties would be the appropriate threshold for this District.

According to the 2006 census information for BC municipalities contained on the CivicInfo website, in 2006 (three years after the legal opinion referred to by the judge above was prepared) there were 4500 private dwellings in the District of North Saanich. Godfrey thus impliedly endorses a community of interest threshold of 2.2%.

As noted above, the District of Lantzville has 1600 properties within its boundaries. Using the same (admittedly inexact) formula, 35 properties is the community of interest threshold in Lantzville. While we raise this as an example of how the community of interest exception has been held to apply in the past and do not wish to intimate that this formula is determinative, in our view it is illustrative of the extent to which a decision may be required to impact the community generally in order to provide a basis for the community of interest exception.

**b) S. 104(1)(b): local area service**

This conflict of interest exception has not been the subject of any judicial consideration, although in our view its effect is clear: council members are entitled to vote in respect of a local service where their pecuniary interests are in common with the other proposed or actual members of the service. In other words, where the pecuniary interest concerns matters that are common to all of the owners, such as the amount of the local service tax, or a benefit to property value resulting from the new infrastructure, the council member's interest does not result in an impermissible conflict.

**c) S. 104(1)(d): remote or insignificant interest**

In *Fairbrass v. Hansma*, 2009 BCSC 878, upheld 2010 BCCA 319, a number of electors sought to have the mayor disqualified from office for discussing and voting on an amendment to an OCP in which he was alleged to have a pecuniary interest. The BC Supreme Court dismissed the petition, and the Court of Appeal upheld that ruling.

The facts at issue were the following. The mayor owned a four acre parcel of land. His two sons co-owned an adjacent ten acre parcel. The zoning in effect for both properties required a minimum parcel size of 75 acres. The properties were thus non-conforming, as were an additional 70 properties within the municipality. Council introduced a bylaw to amend the OCP,

which (among other things) would endorse a policy of rezoning the non-conforming properties to a new zone, with a minimum size of 2.5 acres. The trial judge noted that the OCP amendment would not actually rezone the properties, it would simply make it easier for those landowners to obtain such a rezoning in the future if they chose to do so.

The judge then considered two arguments put forth to support the assertion that the mayor had a direct pecuniary conflict of interest in the OCP amendment. First, it was argued that the mayor could acquire an acre of neighbouring land, and thus be entitled to subdivide his property. Second, it was argued that the minimum parcel size might be amended in the future so as to allow subdivision of the mayor's land without the need to first acquire any additional acreage.

The judge did not accept that either of these possibilities gave rise to a direct pecuniary conflict of interest:

[25] In my opinion, realization of either of these eventualities is an entirely speculative proposition. There was no evidence that the township planned or had even thought about changing the criteria for subdivision of Small Holdings land. Neither was there any evidence that the respondent hoped or intended to enlarge his property by acquisition of additional land from neighbouring property. The petitioners' argument that the court should find that the mayor had a direct pecuniary interest in the OCP amendment because he might at some unspecified date and based on the policy or financial motivations of third parties become entitled to subdivide his parcel of land is to invite the court to make a significant finding of fact without first adducing evidence that the fact exists.

As noted, the Court of Appeal upheld this decision. The Court further commented:

[23] Likewise, the suggestion that a future bylaw may be proposed that permits lots smaller than 2.5 acres is too speculative to found a conclusion the respondent had a forbidden interest in the bylaw. I do not consider that any legislative proposal could be found to provide a direct or indirect pecuniary interest only on the basis the council may pass, in the future, further bylaws replacing the one in issue.

In a similar case, *Conibear v. Dahling*, 2010 BCSC 985, at issue was whether the mayor had a pecuniary conflict of interest and so ought not to have voted on the matter of the Village hosting a music festival. The festival was a joint venture between the Village and a company, and the profits would be shared between them. The mayor was alleged to have a conflict of interest arising out of her familial relationships: the mayor's son and the owner of the company had had a short relationship approximately 14 years prior, which produced a child (the Mayor's granddaughter). The mayor had only



seen the owner twice since the end of the relationship, though she was close with her granddaughter. The Petitioners alleged that the mayor's interests in the welfare and wellbeing of her granddaughter created an indirect pecuniary conflict of interest.

The judge concluded that the mayor did not have a direct or indirect pecuniary interest in the Village's venture with the company, and so was not disqualified from office. The judge found that the simple fact of the mayor's familial relationships, without more, was insufficient to create a pecuniary conflict of interest. The judge went on to hold that even if the mayor had had a pecuniary interest, s. 104(1)(d) would apply, as any potential indirect pecuniary interest the mayor could have had was so remote that it could not reasonably be perceived to have influenced her judgment.

#### ANALYSIS

##### 1. The agreement with Nanaimo

Councillor Savage owns a property that will be directly affected by the proposed agreement, in that he will receive City water instead of District water if the agreement goes ahead.

In our view it is not clear that there is a sufficient impact from receiving City as opposed to District water so as to exceed the threshold of a "remote or insignificant interest" and thereby give rise to a conflict of interest. Furthermore, even if a conflict arose on these facts, in our view the community of interest exception would apply. The agreement with Nanaimo will directly affect 225 properties. This is well in excess of the community of interest threshold that was accepted in the Godfrey case.

As no other member of Council owns a property that will be directly affected by the proposed agreement, in our opinion none of the other Council members have a conflict of interest in respect of implementing the agreement either.

As discussed by the judges in the Fairbrass cases above, more than a contingent possible future benefit to an elected official is required in order to give rise to a conflict of interest. For this reason, the potential future benefit of community water provision to properties owned by Council members, resulting from the available capacity in the District system once the Upper Lantzville properties receive City water, is insufficient to preclude these Council members from voting on the agreement.

## 2. Creating the local area service

As the sole Council member with property located within the LSA, only Councillor Millbank is personally affected by the creation of the local area service. In our opinion, Councillor Millbank is exempt from the conflict of interest that would otherwise arise on these facts by virtue of s. 104(1)(b) of the *Community Charter*. Accordingly Councillor Millbank may participate and vote regarding the LSA.

In our view the community of interest exception also applies on these facts, as the LSA will contain 211 properties, which well exceeds the threshold accepted in the Godfrey decision.

## 3. Providing water to Lower Lantzville

Again, as discussed by the judges in the Fairbrass cases above, more than a contingent possible future benefit to an elected official is required in order to give rise to a conflict of interest. For this reason, the potential future benefit of (additional) community water provision to properties owned by Council members, resulting from the available capacity in the District system once the Upper Lantzville properties receive City water, is insufficient to preclude these Council members from voting at this stage. Thus, in our opinion, at this point in time neither Mayor Jack de Jong nor Councillors Bratkowski, Dempsey or Haime have a conflict of interest, because of 104(1)(d) of the *Community Charter*.

That said, when the matter of water provision to Lower Lantzville properties is actually before Council, this issue should be revisited.

### SUMMARY

In short, in our opinion, none of the Council members have a conflict of interest or are precluded from participating in respect of entering into the agreement with Nanaimo or creating the local area service for the provision of District water to 211 properties within Upper Lantzville.

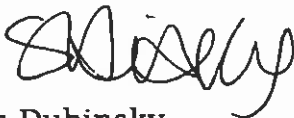
In particular, in our opinion:

1. Councillor Savage's property will be impacted by the agreement, but it is unclear that receiving City as opposed to District water is sufficient to give rise to a conflict of interest. Even if a conflict exists, Councillor Savage is exempt from a conflict due to s. 104(1)(a) of the *Community Charter*;

2. No other Council member's property or properties will be directly affected by the agreement with Nanaimo and in any event the Councillors would be exempt from a conflict due to s. 104(1)(a) of the *Community Charter*;
3. Councillor Millbank is exempt from a conflict of interest in respect of the LSA due to s. 104(1)(a) and (b) of the *Community Charter*;
4. Mayor Jack de Jong and Councillors Bratkowski, Dempsey and Haime (in respect of the commercial property) do not have a conflict at this stage, because of s. 104(1)(d) of the *Community Charter*. That said, they may have a conflict of interest in the future when the matter of water provision to properties in Lower Lantzville is before Council;
5. As no changes to the water service to Councillor Haime's residential property are currently contemplated or planned, Councillor Haime does not have a conflict of interest in respect of this property either.
6. Finally, as Councillor Mostad neither owns a property within the District, nor are any changes contemplated or planned to the water supply to the property his parent(s) own(s) and in which he resides, Councillor Mostad does not have a conflict of interest at this time.

Sincerely,

LIDSTONE & COMPANY



Sara Dubinsky  
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SD/sd