



No. VLC-S-S-223114
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Comox Valley Regional District

Plaintiff

And:

Union Bay Industries Ltd. and Deep Water Recovery Ltd.

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: The Defendants, Union Bay Industries Ltd. (“**Union Bay Industries**”) and Deep Water Recovery (“**Deep Water**”)

PART 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants’ Response to Facts

1. The facts alleged in the following paragraphs of Part 1 of the Notice of Civil Claim are admitted: 2, 3, 10, and 11.
2. The facts alleged in the following paragraphs of Part 1 of the Notice of Civil Claim are denied: 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, and 27.
3. The facts alleged in the following paragraphs of Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendants: 1, 4, 12, 13, 22, and 23.

Division 2 – Defendants’ Version of Facts

4. Unless expressly admitted herein, the Defendants deny each and every allegation of fact, argument, and all other matters contained in the Plaintiff’s Notice of Civil Claim.

I. Background

5. Union Bay Industries is a company incorporated pursuant to the laws of British Columbia with a registered and records office at 1500-570 Granville Street, Vancouver, British Columbia, V6C 3P1.

6. Union Bay Industries is the registered owner of lands and premises located at 5084 Island Highway South, Union Bay, British Columbia, and legally known and described as follows:

Parcel A (D.D. 27784N) of Lot 11, Nelson District, Except Parts Outlined in Red on Plans 397 R.W. and 1414 R, and Except Those Parts in Plans 7190, 8906, 21511, 22414, 28338, 29341 and 29342, PID 004-758-901

(the “Property”).

7. Union Bay Industries previously operated a log sorting business at the Property.

8. Deep Water is a company incorporated pursuant to the laws of British Columbia with a registered and records office at 1500-570 Granville Street, Vancouver, British Columbia, V6C 3P1.

9. Deep Water is the tenant at the Property.

10. Deep Water’s operations at the Property include a barge loading facility, a storage and works yard and warehousing facility, a waterfront freight handling facility, and marine vessel services. Deep Water has, on occasion, been tasked with performing emergency rescue services on behalf of the Canadian government and the Canadian Coast Guard. To date, Deep Water’s activities have never included work on any motorized vessels, with the exception of one small wooden vessel delivered by the Canadian Coast Guard, as referenced above.

II. The Zoning Bylaw

11. The Property is subject to the Rural Comox Valley Zoning Bylaw No. 520, 2019 (the “Zoning Bylaw”).

12. Pursuant to the Zoning Bylaw, the Property is split into three separate zones:

- (a) the shoreline portion of the Property is designated an "IM" zone, described as "Industrial Marine" (the "**Industrial Marine Zone**");
- (b) the upland portion of the Property is designated a "RU-20" zone, described as "Rural Twenty" (the "**RU-20 Zone**"); and
- (c) the minor remaining portion of the Property is designated a "CR-1" zone, described as "Country Residential One" (the "**CR-1 Zone**").

13. The Property is one of the only commercial sites in the Comox Valley Regional District currently in the Industrial Marine Zone.

14. The Industrial Marine Zone is described in Part 900 of the Zoning Bylaw, in the category of "Commercial / Industrial Zones".

15. Pursuant to s. 908.1 of the Zoning Bylaw, the permitted principal uses on any lot in the Industrial Marine Zone are the following.

- (a) Boat building and repairs and service and sales.
- (b) Seafood processing and sales.
- (c) Marina.
- (d) Barge facility.
- (e) Waterfront freight handling facility.
- (f) Log handling and storage facility.
- (g) Storage and works yard and warehousing.
- (h) Offices.

[Emphasis added.]

16. The italicized words are defined in Part 200 of the Zoning Bylaw. The relevant definitions are:

"boat" means a vessel used for recreation or the transportation of people or goods but does not include any permanent residential or commercial accommodation;

"barge facilities" means an area on the surface of the water together with a ramp facility at an adjacent upland location or a dock facility from an upland location extending into the water which allows for the movement of equipment or goods between a floating barge and the upland;

"storage and works yard" means the use of land for storage, repairs, maintenance and vehicle parking; and

"warehousing" means the use of a building for bulk storage of material, products, goods or merchandise which will be sold elsewhere or, subsequently, transported to another location for sale or consumption, but excludes mini-storage.

17. Without limiting the generality of the foregoing, Deep Water's activities fall within the uses permitted in the Industrial Marine Zone pursuant to s. 908.1 of the Zoning Bylaw, under "[b]oat building and repairs and service and sales", "[b]arge facility", "[w]aterfront freight handling facility", and/or "[s]torage and works yard and warehousing".

18. At all material times, Deep Water has conducted its activities on the portion of the Property zoned Industrial Marine Zone.

19. Deep Water has not conducted its services on the portions of the Property that are in the RU-20 Zone and/or CR-1 Zone.

20. All of Deep Water's uses of the Property comply with the provisions of the Zoning Bylaw.

III. The Water Lease Is Approved For Deep Water's Activities

21. In addition to the Zoning Bylaw, access and use of the Property is governed by a water lease agreement with the Province of British Columbia.

22. In October 2019, Deep Water applied to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the “Ministry”) for tenure replacement from Industrial Log Handling to Industrial General and in order to modify the water lease to allow for the following:

- (a) the moorage and storage of vessels on the water; and
- (b) the transit of vessels or barges from the water to the land for the specific purposes of vessel repair and recycling.

23. Deep Water submitted an Environmental Management Plan with its application. The Environmental Management Plan is a site-specific plan to protect the local marine environment and sets out, among other things, that:

- (a) Deep Water’s facility provides a vessel decommissioning service for the marine industry on the coast of British Columbia;
- (b) Deep Water’s services consist of the decommissioning of derelict vessels or those at the end of their serviceable life, which is an essential service in that it enables the safe disposal and recycling of those vessels; and
- (c) Deep Water conforms with international quality management standards for effective environmental management.

24. The application process for the tenure replacement and modification to the water lease included consultations with First Nations and the Plaintiff. The Plaintiff did not disagree with or object to Deep Water’s use of the Property during the Ministry’s consultation process.

25. Rather, on March 29, 2021, the Plaintiff wrote to the Ministry in response to Deep Water’s proposed tenure replacement from Industrial Log Handling to Industrial General at the Property and confirmed, among other things, that:

- (a) both the water tenure area and the upland area of the Property are in the Industrial Marine Zone under the Zoning Bylaw;
- (b) this particular zone allows for a “barge facility”; and

(c) the proposed Environmental Management Plan for tenure replacement is consistent with the Zoning Bylaw.

26. In October 2021, the Ministry granted Deep Water's application. The water lease was modified to allow for the storage and transit of vessels or barges from the water to the land to facilitate Deep Water's upland activities.

IV. The Plaintiff Has Approved of Deep Water's Business And Has Admitted That Deep Water's Activities Are Compliant With The Zoning Bylaw

27. Since at least March 2020, the Plaintiff has had full knowledge of the activities being conducted on the Property, and has approved of them, including as follows.

(a) In March 2020, staff and representatives of the Plaintiff attended at the Property for a site visit. At that time, there was at least one barge that had been transferred from the water to the Property. Deep Water indicated to the Plaintiff that the barge would be dismantled and would then be stored/warehoused or shipped. At the conclusion of the site visit, the Plaintiff's staff and representatives did not identify any concerns with Deep Water's operations.

(b) On January 13, 2021, six representatives of the Plaintiff, including senior staff from its Planning and Bylaw Services departments and Director Daniel Arbour representing Electoral Area A (Baynes Sound-Denman Hornby Islands), attended at the Property for another site visit. At that time, there were at least five barges transferred from the water to the Property, one of which was partially dismantled, and approximately one thousand tonnes of prepared material from the dismantling activities, which were being stored/warehoused. During the site visit, Deep Water demonstrated to the Plaintiff what it was doing. At the conclusion of the site visit, the Plaintiff's staff and representatives did not identify any concerns with Deep Water's operations.

(c) Following the site visit, Director Arbour made a public Facebook post, confirming that Deep Water's "[c]urrent activities are in line with zoning" and attaching two photographs depicting two barges transferred from the water to the Property and

materials from modified or dismantled barges, among other things, all of which are characteristic of Deep Water's services.

28. After the site visits referenced at paragraph 27 herein, the Plaintiff represented that Deep Water's activities comply with the Zoning Bylaw to other levels of government. As set out in further detail above, on March 29, 2021, the Plaintiff expressly confirmed Deep Water's compliance with the Zoning Bylaw in a letter to the Ministry in response to the Property's proposed tenure replacement application. The Plaintiff reviewed Deep Water's Environmental Management Plan submitted in support of the application to amend the water tenure, which described some of Deep Water's services (specifically, the sort of services that the Plaintiff complains about in its Notice of Civil Claim), and told the Ministry that "[t]he proposed management plan for tenure replacement is consistent with the Zoning Bylaw."

29. At all material times, the Plaintiff has had ample knowledge of Deep Water's operations and activities, including multiple site visits by the Plaintiff's staff and elected officials, after which several representations were made confirming Deep Water's compliance with the Zoning Bylaw.

V. The Plaintiff Seeks To Improperly Re-Interpret The Zoning Bylaw In Bad Faith And For An Improper Purpose

30. Beginning in or around January 2021, Deep Water became aware that a small number of community residents wrote and communicated with the Plaintiff and later the press, expressing unjustified concerns about Deep Water's operations and making baseless accusations of potential adverse impacts, all in an attempt to shut down Deep Water's operations.

31. The fact that the Plaintiff was supportive of Deep Water's operations in early January and March 2021 stands in stark contrast to the Plaintiff's recent reversal of that position, a reversal which coincides with:

- (a) increased pressure and demands from a small number of community residents that the Plaintiff shut down Deep Water's operations; and
- (b) the Plaintiff's upcoming general local election on October 15, 2022.

32. The Plaintiff has acted in bad faith and for an improper purpose in seeking to improperly re-interpret and, in turn, enforce the Zoning Bylaw. Its about face turn is driven by the potential for personal gain of Directors who plan to run for re-election, including, but not limited to, Director Arbour.

VI. The Defendants Are Not Allowing Unpermitted Residential Occupancies On The Property

33. The Defendants are not using any portion of the Property that is zoned Industrial Marine Zone to house individuals in recreational vehicles, as alleged or at all.

34. In the alternative, if the Defendants are allowing the residential use of a recreational vehicle on the Property, which is not admitted, but is denied, it is solely for the purpose of carrying out business and other professional activities and is therefore a permitted use of the Property pursuant to s. 908.1(i)(h) of the Zoning Bylaw.

35. Further, and in the alternative, if the Defendants are allowing the residential use of a recreational vehicle on the Property, which is not admitted, but is denied, it is a permitted accessory use under s. 908.2(i)(a) of the Zoning Bylaw, and is incidental to and necessary for Deep Water's operations.

VII. No Alteration To Glover Park

36. The Property is adjacent to Glover Community Nature Park, legally known and described as follows:

Lot 9, District Lot 11, Nelson District, Plan 8906, PID 005-481-252
("Glover Park").

37. The Defendants have not made any alteration to Glover Park, as alleged or at all. Accordingly, the Defendants had no obligation to obtain a development permit, as alleged or at all.

38. In the alternative, if the Defendants have made any alteration to Glover Park, which is not admitted, but is denied, that alteration was inadvertent.

39. Further, and in the alternative, if the Defendants have made any alteration to Glover Park, which is not admitted but is denied, that alteration has been remedied to its original or near original state.

VIII. The Plaintiff Has Not Delivered a Bylaw Offence Notice

40. Further, and in any event, the Plaintiff has never delivered a Bylaw Offence Notice to the Defendants in respect of the Defendants' alleged contraventions of the Zoning Bylaw, including Deep Water's activities and services at the Property, the alleged residential occupancies on the Property, and/or the alleged alteration to Glover Park, or at all.

PART 2: RESPONSE TO RELIEF SOUGHT

41. The Defendants consent to the granting of the relief sought in the following paragraphs of Part 2 of the Notice of Civil Claim: NONE.

42. The Defendants oppose the granting of the relief sought in the following paragraphs of Part 2 of the Notice of Civil Claim: ALL.

43. The Defendants take no position on the granting of the relief sought in paragraphs of Part 2 of the Notice of Civil Claim: NONE.

PART 3: LEGAL BASIS

IX. Deep Water's Operations Are Compliant with the Zoning Bylaw

44. At all material times, Deep Water's operations have been compliant with the Zoning Bylaw. Deep Water's services are permitted uses of the Property in the Industrial Marine Zone.

45. Section 908.1 of the Zoning Bylaw prescribes the principal uses for lots in the Industrial Marine Zone, which include, *inter alia*, “[b]oat building and repairs and service and sales”, “[b]arge facility”, “[w]aterfront freight handling facility”, and “[s]torage and works yard and warehousing”. Deep Water's activities fall squarely within these uses.

46. The Plaintiff has expressly confirmed that the Defendants' use of the Property is compliant with the Zoning Bylaw. It has communicated its approval to the Defendants, other governmental agencies, and community residents.

47. The Defendants are not using any portion of the Property that is zoned Industrial Marine Zone to house individuals in recreational vehicles, as alleged or at all.

48. In the alternative, if the Defendants are allowing the residential use of a recreational vehicle on the Property, which is not admitted, but is denied, it is solely for the purpose of carrying out business and other professional activities and is therefore a permitted use of the Property pursuant to s. 908.1(i)(h) of the Zoning Bylaw.

49. Further, and in the alternative, if the Defendants are allowing the residential use of a recreational vehicle on the Property, which is not admitted, but is denied, it is a permitted accessory use under s. 908.2(i)(a) of the Zoning Bylaw, and is incidental to and necessary for Deep Water's operations.

50. The Defendants have not made alterations to Glover Park, as alleged or at all. Accordingly, the Defendants had and continue to have no obligation to obtain a development permit, as alleged or at all.

51. In the alternative, if the Defendants have made any alteration to Glover Park, which is not admitted, but is denied, that alteration was inadvertent.

52. Further, and in the alternative, if the Defendants have made any alteration to Glover Park, which is not admitted but is denied, that alteration has been remedied to its original or near original state.

X. The Plaintiff Is Not Entitled To Injunctive Relief

53. There is no factual or legal basis in the Notice of Civil Claim to grant the injunctive relief sought by the Plaintiff.

54. The Plaintiff is not entitled to an injunction against the Defendants for the following reasons, among others.

- (a) The Defendants are not in breach of the Zoning Bylaw. Deep Water's activities fall squarely within the uses permitted in the Industrial Marine Zone, which the Plaintiff has confirmed.

- (b) The Plaintiff has never provided a Bylaw Offence Notice to the Defendants in respect of the activities conducted on the Property, or at all.
- (c) In any event, the Plaintiff has acted in bad faith and for an improper purpose in seeking to re-interpret and enforce the Zoning Bylaw against the Defendants, and throughout the course of its dealings with Deep Water. The Plaintiff has refused to engage with Deep Water in respect of its activities.

55. Further, and in the alternative, there are exceptional circumstances that justify the refusal of an injunction including, but not limited to, the following.

- (a) The Plaintiff held that Deep Water's operations are in compliance with the Zoning Bylaw and confirmed compliance with other levels of government for the purpose of granting Deep Water a change of tenure for the Property.
- (b) The injunction would cause Deep Water significant hardship.
- (c) The injunction would not actually serve any public interest.

XI. If Injunctive Relief Is Granted, Its Effect Should Be Suspended

56. If Deep Water's operations are held to be in violation of the Zoning Bylaw, which is not admitted, but is denied, this Court should exercise its discretion to delay the granting of an injunction.

57. Where an injunction is warranted, the Court has the discretion to suspend the imposition of the injunction. Courts have in numerous cases delayed the application of an injunction to allow a rezoning or relocation to take place.

58. In the event that the Plaintiff is successful in establishing that it is entitled to injunctive relief against the Defendants, this is an appropriate case for a delay, in light of circumstances including, but not limited to, the following.

- (a) If Deep Water's operations violate the Zoning Bylaw, which is not admitted, but is denied, it was not clear, given the Plaintiff's conduct and representations

confirming that Deep Water's services were compliant with the Zoning Bylaw, including statements made to the Ministry.

- (b) The substantial expenditures that Deep Water has incurred in good faith to keep its operations compliant with the requirements of other regulatory authorities, and to prevent its operations from having impacts beyond the Property's boundaries.
- (c) Deep Water's operations produce no meaningful external and/or adverse impacts to other properties.
- (d) The significant hardship and negative implications for Deep Water's ongoing business and its employees.
- (e) The unavailability of alternative properties in the Comox Valley Regional District with appropriate zoning or in other areas in close proximity.

59. The Plaintiff's claim must be dismissed, with costs to the Defendants.

Defendants' address for service:

BORDEN LADNER GERVAIS LLP
1200 Waterfront Centre
200 Burrard Street
P.O. Box 48600
Vancouver, British Columbia
V7X 1T2
Attention: Matthew G. Swanson

Fax number for service (if any):

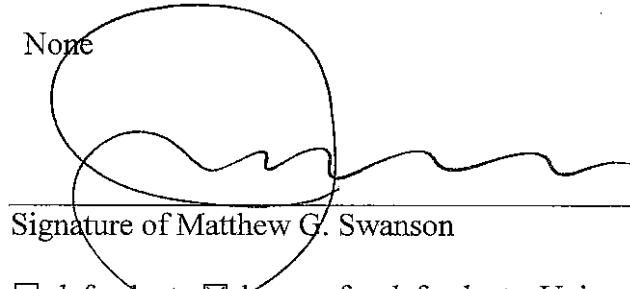
None

E-mail address for service (if any):

None

Date: May 11, 2022

Signature of Matthew G. Swanson

A handwritten signature in black ink, appearing to read "Matthew G. Swanson", is enclosed within a large, roughly circular outline. Below the signature, the text "Signature of Matthew G. Swanson" is printed in a standard font.

defendants lawyer for defendants, Union Bay Industries Ltd. and Deep Water Recovery Ltd.

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.