

June 18, 2007

File No: 626 050

Ms. Sue Clark
Union of British Columbia Municipalities
Suite 60, 10551 Shellbridge Way
Richmond, B.C.
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Dear Ms. Clark:

**Re: Community Wildfire Protection Plans/Operational Fuel Management
Liability Issues**

You have asked for an opinion concerning certain liability issues that have been raised by local governments in relation to Community Wildfire Protection Plans (CWPP) and the implementation of certain aspects of CWPPs, particularly through operational fuel management projects. The questions are as follows:

1. In relation to CWPPs, local governments have asked whether, by preparing a CWPP, they are exposed to liability if they do not act on the recommendations set out in the CWPP. You advise that local governments have been given access to provincial "strategic threat analysis data" that gives a high level indication of threat to the community. You ask whether liability incurred through preparing a CWPP would be greater than if the local government were aware of the threat but took no steps to plan for it.
2. In relation to Operational Fuel Management programs, local governments have asked the following questions:
 - (a) what are the liability implications if the local government cannot afford to do the mitigative work suggested under the CWPP?
 - (b) if there is more than one high risk area, what is a local government's liability exposure if it decides to work in one area, and fire ends up breaking out somewhere else?
 - (c) if asked to take the lead on a project that includes Crown land, is the local government opening itself up to a liability that would have been the Crown's?
 - (d) if a CWPP is prepared which includes Crown, private and local government-owned land, and begins conducting threat reduction treatments that have been identified in the plan, is the local government

liable for all proposed treatments identified, including on Crown land, when the local government does not have the resources to do so?

Summary of Opinion

1. Recommendations set out in a CWPP may invite local government decision-making at a number of levels:
 - (a) to the extent that legislative decisions are recommended, the local government should not incur any liability if the Council or Board decides not to implement the recommendation, as an exercise of its legislative authority;
 - (b) CWPP recommendations may invite other (i.e. non-legislative) forms of policy decisions. A policy decision respecting the acceptance or implementation, or non-acceptance of a CWPP recommendation should not result in liability, if that decision meets the legal tests formulated by the Courts as to what constitutes a bona fide policy decision;
 - (c) CWPP recommendations may also affect existing local government programs at an operational level. Decisions that are made at the "operational level", whether in implementing a CWPP recommendation that has been approved by the Board or Council, or in operating an existing local government function or service, after a CWPP is prepared and its contents are known to the local government, may result in liability if there is negligence on the part of the local government in making that "operational" decision.
2. In relation to the implementation of CWPPs, specifically through operational fuel management programs:
 - (a) a decision to delay implementation, or to carry out implementation in phases, because of budgetary constraints and other true "policy" considerations should not result in liability, again so long as the decision meets the legal test for what constitutes a bona fide policy decision;
 - (b) the potential for liability will also require consideration of the local government's legal authority to carry out the mitigative work - although not within the scope of the opinion you have requested, there are legal constraints on the ability of the local government to carry out mitigative work on privately-owned lands or Crown land. Ordinarily, liability should not follow if a local government is prevented from carrying out operational fuel management programs because of the lack of cooperation on the part of the Crown or private landowners;

- (c) if a local government "takes the lead" on a project that involves Crown land or privately owned land (for example, a project that has been approved by the Crown and by private owners, and which the local government has agreed to implement), then liability could follow if the local government carries out the work in a negligent manner;
- (d) even if it "accepts", in principle, recommendations in a CWPP that involve privately held or Crown lands, a local government is not thereby automatically made responsible for the cost of carrying out mitigative work on those lands. Decisions as to how those recommendations should be carried out would require consideration of the interests and responsibilities of the owners of those lands.

Discussion

A. Background Information

We have reviewed a number of documents in relation to the CWPP and operational fuel treatment projects contained on the UBCM and the Ministry of Forests and Range websites. We have also reviewed and considered the potential application of existing legislation, including the *Community Charter*, the *Local Government Act*, the *Wildfire Act* and Regulations, the *Forests and Range Practices Act* and the *Fire Services Act*. So far as local governments are concerned, it appears that CWPPs are being prepared within the general framework of existing local government powers. There are no special legislative provisions governing the development of CWPPs (for example, in contrast to the legislative requirement that local governments prepare an emergency plan, under the *Emergency Program Act*). Neither is there any statutory protection from liability in relation to the development or implementation of CWPPs.

There has obviously been a great deal of interest and concern in British Columbia regarding the risk of wildfire since the devastating fires of 2003. The Filmon report, which was commissioned by the Province as a result, made a number of recommendations concerning the reduction and mitigation of the wildfire threat, particularly as it affects the so-called "interface area". We understand that the Province has since made available funds through the Ministry of Forests and Range to assist local governments in assessing the risk of wildfire to their community, and creating programs to mitigate that risk.

According to information we have gathered from the UBCM and Ministry of Forests and Range, a CWPP is generally expected to do the following:

1. define risk areas within the community for interface fires (risk areas are generally defined under a CWPP through mapping and description);

2. identify measures necessary to mitigate those risks (those measures may include fuel reduction programs);
3. outline a plan of action to implement the measures (it appears to be expected that the implementation plan contained in the CWPP will recommend and prioritize treatments);
4. the guidelines contained on the Ministry of Forests and Range website suggest that the CWPP will also include a review of existing bylaws and potential recommendations for changes, as well as a commitment to adopt or promote FireSmart principles.

We further understand that local governments that have completed the CWPP process are encouraged, as a next step, to undertake pilot projects in the area of fuel management. We understand that funding sources are also available for such projects, as well as for the implementation of larger scale operational fuel management programs.

The material in relation to these programs contained on the websites is quite generic. We were able to access one CWPP, prepared for the City of Prince George, through the Provincial website. We do not know if that report is representative of a "typical" CWPP, in terms of content and recommendations. We note that the Prince George CWPP largely focuses its recommendations on the incorporation of FireSmart principles in new development, and fuel hazard management of the urban forest. We note that the fuel management recommendations in that report are quite extensive, and do not appear to differentiate between lands that are privately owned, Crown lands or municipally owned lands. The treatment costs recommended appear to run in the order of \$1,000 to \$4,000 per hectare - the estimated total cost for treating the priority areas identified and developing prescriptions for those areas is close to two million. In relation to the implementation of the treatment strategy, the Prince George Report states as follows:

"The interface fuels treatment strategy identifies high risk fuels that have been prioritized for treatment. Ideally, these areas should be considered in sequence and treated accordingly. However, these areas have been identified based on the fire behaviour potential and structures at risk with no consideration for land ownership. In many of these areas, there is more than one landowner and the development of the treatment prescriptions and operational activities must be developed in cooperation between all parties...

In each treatment area all affected and adjacent landowners should be identified and notified of the intended treatments. If all owners are in agreement with the treatment approach and costing, the prescriptions should be developed, reviewed and approved by all parties. If only

certain owners are in agreement, the relative effectiveness of only treating portions of the polygon should be taken into consideration." (emphasis added)

These comments highlight the fact that "treatment" approaches may, in some cases, involve privately held and Crown lands, and that absent cooperation from all affected landowners, the implementation of treatment recommendations will be difficult. If you require further advice in relation to this issue, such as whether a private landowner could be compelled to undertake a fuel management program, we would be happy to review that issue and provide further advice.

B. Local Government Liability - General Considerations

As suggested, decisions concerning the implementation of CWPP recommendations will likely engage local government decision-making at multiple levels.

In the first place, whether the CWPP is prepared by an outside professional, or by local government staff, or both, the report will ultimately be presented to the council or board for review and consideration. A range of potential decisions at the council or board level could follow, beginning with a decision to simply receive the report for information, or a resolution receiving the report and accepting its recommendations in principle. A decision to "accept" a CWPP and its recommendations may also lead to decisions to amend Official Community Plan bylaws, zoning bylaws, and regulatory bylaws in order to implement certain aspects of the report. Other (non-legislative) decisions may be required to implement the recommendations, including decisions for the implementation of fuel management programs. Decisions will also be required on an ongoing basis, once a CWPP's recommendations are incorporated into a Official Community Plan or zoning bylaw, or other regulatory bylaw, as development applications are received and reviewed by the local government, and as regulatory bylaws are administered and enforced. Each type of decision has its own liability considerations.

(a) Legislative Decisions

Generally, to the extent that a CWPP recommendation would require the adoption of a bylaw, or another legislative act, liability should not follow from the council or board's decision. Canadian Courts have consistently held that as long as it exercises its powers in good faith, a local government cannot be found liable for negligence in the exercise of its legislative authority: see *Welbridge Holdings Ltd. v Greater Winnipeg (Municipality)* [1971] SCR 957.

(b) Policy v Operational Decisions

The other general principle of importance here is the distinction in law between policy and operational decisions, and the relevance of that distinction to liability issues. As far

as the liability of local governments in negligence is concerned, Canadian Courts have in recent years consistently applied the two part test first articulated by the English House of Lords in *Anns v London Borough of Merton*, [1977] 2 All ER 492, when determining whether a private law duty of care arises on the part of the local government:

1. is there a sufficiently close relationship between the parties such that, in the reasonable contemplation of the alleged tortfeasor, carelessness on its part might cause damage to the other person?
2. If the answer to question 1 is yes, are there any considerations which ought to negative or limit:
 - (a) the scope of the duty;
 - (b) the class of persons to whom it is owed, or see the damage to which a breach may give rise.

In most cases of alleged negligence on the part of a local government, there is little issue as to the application of the first part of the "*Anns*" test. In many cases, the contentious issue concerns whether the decision giving rise to loss or damage was a "policy" decision or a "operational" decision. That is because the Canadian Courts have recognized, in applying the second part of the *Anns* test, that discretionary decisions of a local government based upon considerations of policy, including budgetary, fiscal, social, economic and political considerations, do not give rise to a private law duty of care. On the other hand, actions of municipal officials in implementing policy decisions, or operational activities, are subject to review under ordinary negligence principles.

The distinction between policy and operational decisions was summarized by the Supreme Court of Canada in *Brown v. British Columbia*, [1994] 1 SCR 420 as follows:

"True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

What then is a policy decision? The Supreme Court of Canada has confirmed that it is not necessarily the level at which the decision is made that is determinative - policy decisions can be made at any level within a local government provided the decision is based on financial, economic, social or political factors or constraints: *Brown v British Columbia (Ministry of Transportation and Highways)* [1994] 1 SCR 420. That being said, in the case of local governments, it is more likely that policy decisions concerning CWPPs are going to be made at a council or board level - it is unlikely that decisions of such significance would be delegated to local government staff.

Policy decisions may be reflected in the adoption of a bylaw, but need not be. Policy decisions could equally be reflected in a resolution of a council or board, or even in directives and decisions at an administrative level: *Laurentide Motels v Beauport*, [1989] 1 SCR 705. In the case of a CWPP which may touch upon many aspects of local government authority, a number of policy decisions may be made, some through the adoption of a bylaw, some by resolution, and some through a combination of decisions including resolutions setting policies or priorities, decisions concerning the adoption of financial plans and budgets, and spending decisions for specific projects following on the budget approval process. It is the basis for the decision - the type of considerations (social, political, economic, budgetary) that are behind it - that are important. Once a decision has been accepted as being a "bona fide policy decision", liability in negligence should not follow even if loss or damage is suffered by a third party as a result.

There are some limits, however. For example:

- (a) a decision taken in bad faith or for an improper purpose, or found to be so irrational or unreasonable that it cannot be said to constitute a bona fide exercise of discretion, may give rise to liability: *Just v British Columbia* [1989] 2 SCR 1228;
- (b) inaction for no reason is not a policy discussion taken in the bona fide exercise of discretion: *Kamloops v Nielsen*, [1984] 2 SCR 2.
- (c) a decision that is made not in accordance with the objects of the legislation which conferred the power may give rise to liability: *Laurentide Motels Ltd. v Beauport*, [1989] 1 SCR 705;
- (d) a policy decision not to remedy a dangerous situation, in the face of statutory duty to do so, may itself be evidence of negligence entitling the plaintiff to succeed in an action: *Dorschell v Cambridge (City)* (1980), 3 OR (2d) 714 (CA);
- (e) there has been some suggestion in the case law that a policy decision must be "reasonable" - however this view appears to have been rejected by the Supreme Court of Canada in *Brown v British Columbia*. The applicable test, as noted above, would appear to be whether the decision was so irrational or unreasonable as to constitute an improper exercise of discretion.

In contrast, as stated, decisions at the "operational" level, involving the implementation of a policy decision, are subject to review based upon common law principles of negligence.

C. Application of These Principles to the Implementation of CWPPs

As noted, it is likely that local government decisions concerning the acceptance, adoption and implementation of CWPP recommendations will be made at a number of levels. A number of those decisions may well represent bona fide policy decisions of the local government, from which common law liability should not follow. For example:

1. a resolution by a council or board to "accept in principle" a CWPP would likely be regarded as a bona fide policy decision - the decisions that follow, as to when and in what order to implement or carry out the CWPP's recommendations may also be policy decisions, where based on the factors described above;
2. there would be some risk in "receiving" a CWPP report, but then simply ignoring it - on the basis that inaction, or a failure to decide, may not constitute a bona fide exercise of discretion. If CWPP recommendations are not accepted, or a decision is made not to implement those recommendations, or to defer their implementation, the decision should be based on the factors described above - political, fiscal, economic, social considerations.
3. to the extent that decisions were made to amend (or not) local government bylaws, such as the Official Community Plan bylaw, or a zoning bylaw, so as to incorporate policy statements and development permit provisions respecting wildfire hazard issues, that would clearly represent a policy decision, as well as a legislative decision in respect of which a duty of care should not arise, for the reasons outlined above. Note that a decision not to proceed with such legislative changes may give rise to difficulties down the road, when the local government finds that absent such legislative provisions, it lacks the authority to refuse development approval, or to attach appropriate conditions to development in high risk areas;
4. from our review of the Prince George CWPP report, fuel management programs appear to potentially involve the expenditure of significant public funds. It is highly unlikely that a local government which, for reasons of budgetary constraints, decided to delay the implementation of a fuel management program, or decided to implement the program (for example, giving priority to higher risk areas first) in stages, could be held liable as a result of that decision. That is not to say that such decisions may not lead to claims and litigation, only that assuming there is a basis upon which to demonstrate the decision was a "policy decision", based upon budgetary constraints, that such claims would have a reasonable chance of being successfully defended;

5. on the other hand, once decisions are made at a policy level, it is not outside the realm of possibility that liability could flow if, in implementing that policy, a local government acted in an negligent manner. Obvious examples would include:
 - (a) the subsequent approval of development in a wildfire development permit area, without giving due regard to duly adopted development permit guidelines;
 - (b) having decided to undertake a fuel management program, the local government carried out the work in a negligent manner, or failed to complete the program in accordance with the recommendations made by a professional forester or other qualified person.

In order to address these potential concerns, and when considering whether and how to implement the recommendations set out in a CWPP, local governments should as much as possible strive to base their decisions on the factors which the Courts have accepted as being the hallmarks of a policy decision. Recommendations should not be "accepted" in an unqualified manner without giving full consideration to the cost or other implications of implementing those recommendations. Consultants who are hired to assist in the preparation of CWPPs should be instructed carefully so that legitimate local government concerns, that may limit the ability of a local government to implement a report's recommendations, are reflected in the report (e.g. wording such as "subject to funding being available" could be included). If a local government decides that a CWPP report's recommendations cannot be implemented, or can only be implemented in stages, the "policy" reasons for that decision should be fully canvassed at the board or council level, and those reasons documented. This will certainly assist in defending any claims based upon allegations of negligence that may be brought in future.

Please let me know if you have any questions arising from the foregoing.

Yours truly

STAPLES McDANNOLD STEWART

per:

Peter Johnson

PJ/WG