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Municipal Zoning and Regulation of the Proposed Upland Excavating Landfill

A Submission to the City of Campbell River

on behalf of

Campbell River Environmental Committee

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1. Introduction

Upland Excavating Ltd ("Upland") currently operates a landfill and gravel extraction pit at a site located to the east of McIvor Lake in Campbell River, BC. The landfill is situated over an aquifer that is connected to the Quinsam River (on which Quinsam River Hatchery is located) and Cold Creek. Upland is currently seeking provincial authorization to operate a "solid, non-hazardous waste landfill" at the property and there is a concern in the environmental community that the site will leach harmful substances into the aquifer, contaminating the Quinsam River and Cold Creek, and harming those who use the water – people and fish included.

This memo will explain how, due to municipal laws related to "non-conforming uses", the City of Campbell River might have the ability to restrict or prohibit the proposed landfill, despite provincial authorization. The memo explains the nature of the provincial authorization, outlines how this authorization interacts with municipal zoning bylaws, introduces the concept of non-conforming uses, and explains why the proposed landfill should not be considered a non-conforming use.

In the event that the law related non-conforming uses cannot be used to restrict or prohibit the landfill, for example, if the Upland property is rezoned to permit landfills on the property, the memo has included a number of ways that the municipality can further regulate the landfill to prevent harm to people and the broader environment.

2. Background and Assumed Facts

The legal memo below is based on the following assumed facts, as we currently understand them to be. The paragraphs in this section have been numbered for ease of reference later in the memo. They will be referenced as ("*Facts* at #").

1. In 1992 the Ministry of Environment Lands and Parks issued a permit (PR-10807) under the *Waste Management Act* to Upland Excavating Ltd to operate a landfill at 7311 Gold River Highway, Campbell River ("Upland landfill" or "Upland property").
2. The Upland landfill is located at the southeast corner of McIvor Lake, approximately 150m south of the lake and separated by a highway and a strip of Rural-1 zoned property.[2]
3. McIvor Lake is part of the John Hart Watershed, which provides drinking water to the majority of the City of Campbell River.
4. Rico Lake is located 10m west of the Uplands property[3] and the eastern extent of the lake encroaches onto the property.[4]

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[2] GHD (Feb 2016) *2016 Design, Operations, and Closure Plan – Upland Landfill, Draft for Review* Available 8 March 2016 online: <https://issuu.com/esolutionsgroup/docs/088877-rpt-01-draft_docp_-_wm> ("*Upland Landfill DOC Plan*") at pg 13

[3] *Upland Landfill DOC Plan* at pg 12. **Note**: the close proximity (10m) of the Upland site to Rico Lake as currently proposed does not contravene the BC MoE draft *Landfill Criteria for Municipal Solid Waste* ("*Landfill Criteria*"). The *Landfill Criteria* states that a "*landfill footprint shall not be located with 100m of surface water*" at pg 12. The *Landfill Criteria* defines "landfill footprint" as "the area of the landfill where the MSW is approved to be deposited" (pg 3). This is different from the "landfill

5. McIvor and Rico lakes are hydrologically connected and water may flow from one to the other.[5] Leona Adams, president of the Campbell River Environment Committee (CREC) has noted that Rico Lake has been observed at a higher elevation than McIvor Lake at full reservoir level and there may be a natural geologic pathway to McIvor Lake with permeable geology.
6. Cold Creek and the Quinsam River are located approximately 2km and 4km east of the property, respectively. Cold Creek is fed by an underground aquifer and flows into the Quinsam River.
7. An unconfined sand and gravel aquifer is continuous across the Upland property.[6]
8. The aquifer under the Upland property, Rico Lake, and the Quinsam Hatchery watershed is part of a High Vulnerability IIA Class aquifer.[7] This classification means that the aquifer is "moderately developed with high vulnerability to contamination from surface sources".[8]
9. The municipal zoning designation for the Upland property at the time the permit was issued in 1992 was Industrial Zone 3. The uses permitted in this zone included "landfill". Although there were some small changes to the name of the zone (from "Industrial Zone 3" to "Industrial 3 Zone"), the zone included "landfill" as a permitted use until 2006 -- when the current bylaw (*Zoning Bylaw 3250, 2006*) came into effect. Since then, the Industrial 3 (I-3) Zone, where the Upland landfill is located, has not included "landfill" as a permitted use. There are other I-3 and Industrial 4 (I-4) zones located to the east and north-east of the property
10. The 1992 permit authorized the landfill to accept 3,200m^3/year of "inert municipal" refuse, which was defined in the permit as "*stumps, trees, land clearing waste, selected building demolition debris, and residue of combustion from the open burning of woodwaste*." The permit also allowed the operators to conduct four burnings of stumps, trees, woodwaste etc per year.
11. In October 2013, Upland applied to the Ministry of Environment for a waste discharge authorization for the Upland property.[9] The application sought authorization for "*the discharge of remediated hydrocarbon impacted soils following treatment in a covered bio-remediation facility*". The facility was to apply "*natural and/or enhanced bioremediation and volatilization*" treatments to remediate the soil to the "*industrial land use criteria of the* Contaminated Sites Regulation *schedules, 4, 5, 7, 10 and 11*". The facility would accept up to 28,000 m^3/year of soil. At this time, the Ministry has not granted the permit.

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site" which defined as "the landfill footprint and buffer zone" (pg 3). Rico Lake is 10m from the Upland property, but more than 10m from the proposed landfill footprint.

[4] GHD (Feb 2016) *Hydrogeology and Hydrology Characterization Report – Upland Landfill, Draft for Review*, Available 8 March 2016 online: <https://issuu.com/esolutionsgroup/docs/088877-rpt-02-_draft_hhcr_-_wm> ("*Hydrology Report*") at pg 11.

[5] Personal communication from Greg Ferraro, GHD Consulting, to Leona Adams, President of CREC, 9, March 2016

[6] *Hydrology Report* at pg 10

[7] Terrawest (2014) *Upland Excavating Ltd Technical Assessment, Contaminated Soil Treatment Facility Version 2*. Figure 3 at pg 24

[8] BC Ministry of Environment, *An Aquifer Classification System for Ground Water Management in British Columbia* Available 10 March 2016 online: <http://www.env.gov.bc.ca/wsd/plan_protect_sustain/groundwater/aquifers/Aq_Classification/Aq_Class.html#class>

[9] *Environmental Management Act* – Application Queue. Available online: http://www2.gov.bc.ca/assets/gov/environment/waste-management/waste-discharge-authorization/sap-queue/south_region.pdf

12. In February 2015, Upland applied to the Ministry of Environment for an Operational Certificate (described below). It has not yet been granted.
13. In February 2016, Upland reportedly advised that they had changed consulting firms and dropped their application for a permit -- but had maintained their application for an Operational Certificate to deposit the soil at the property. The newspaper notice for the February 15 public open house information session described the application:

> "*The landfill will receive construction and demolition waste, land clearing debris, and non-hazardous waste soil for discharge into a lined, engineered landfill cell. The landfill will include a leachate collection and treatment system to protect the environment. Progressive final close and an environmental monitoring program will be implemented. The landfill will be designed constructed, and operated in accordance with the Ministry of Environment Draft Second Edition Landfill Criteria for Municipal Solid Waste, dated September 2015*."

The specifications of the proposed landfill are described in the draft *2016 Design, Operations, and Closure Plan* (*"*DOC Plan*"*), which was released at the open house.

14. The landfill will receive 32,890 tonnes of waste a year, consuming approximately 25,300m^3/year of airspace.[10] The landfill will have a total volume of 506,000m^3 over its expected 20 year lifespan.
15. While the exact dimensions of the current landfill are not known, there are ongoing excavations to the Upland property and the current landfill footprint. The footprint of the proposed landfill will be 180m x 200m.[11]
16. The landfill operation will include two treatment ponds: a "lined aeration pond" for the treatment of leachate with a working volume of 1800m^3 (30m x 30m x 2m) and an "armored infiltration pond" (unknown capacity) to allow for the infiltration of treated leachate into the groundwater.
17. The DOC Plan states that the material authorized to be disposed in the landfill is construction and demolition waste (excluding clean wood), land clearing debris, non-hazardous waste soil (predominantly composed of metals and hydrocarbon-impacted soil),[12] and waste asbestos.[13] The landfill will not accept hazardous waste (except waste asbestos), domestic solid waste, sludge and liquid waste, controlled wastes (as defined by the landfill criteria), gypsum drywall, organic waste, recyclables (including cardboard, yard waste, clean wood, and concrete). [14]
18. These materials will produce leachate that will contain sulphate, arsenic, iron, manganese, Total Dissolved Solids, calcium, sulphate, chromium, copper, metals, polycyclic aromatic hydrocarbons (PAHs), volatile organic compounds (VOCs) and petroleum hydrocarbons (PHCs).[15]

[10] *Upland Landfill DOC Plan* at pg 21
[11] *Upland Landfill DOC Plan* at pg 21
[12] Upland *Landfill DOC Plan* at pg 180
[13] *Upland Landfill DOC Plan* at pg 23
[14] *Upland Landfill DOC Plan* at pg 23
[15] *Upland Landfill DOC Plan* at pg 36

19. There are also a number of a "contaminants of concern" that have been found in similar landfills and whose parameters the DOC Plan forecasts will exceed *Contaminated Sites Regulation* ("CSR") standards in the untreated leachate including: Ammonia, Chloride, Phenols, Sulphate, Sulphide, LEPH, Arsenic, Boron, Copper, Iron, Magnesium, Manganese, Sodium and Zinc.[16]

20. Asbestos is a hazardous waste, to be managed in accordance with s.40 of the *Hazardous Waste Regulation.*[17]

21. The DOC Plan anticipates that 0.121m^3/year (0.00033m^3/day) of leachate "may potentially leak through the landfill base and enter the mixing zone beneath the landfill footprint".[18]
22. Greg Ferraro, a representative of GHD, the proponent's consultant, confirmed to Leona Adams, president ofCREC, at the proponent's open house that all liners are permeable.[19]
23. A 2001 Environment Canada publication stated that:

> "*It is now accepted that all landfills will eventually release leachate to the surrounding environment and therefore all landfills will have some impact on the water quality of the local ecosystem. Traditionally, solid waste landfills are monitored for nutrients, heavy metals, major ions and volatile organic compounds (VOCs). Many of these constituents have been observed in aquifers at distances up to several kilometres from the landfill source*"[20]

24. The same Environment Canada report also states that there are "*major knowledge gaps in our understanding on municipal solid waste disposal include: … long-term integrity of liner, cover and leachate collection systems*"[21]
25. A more recent Environment and Climate Change Canada publication in 2010 confirmed the threat that municipal landfills pose to groundwater quality:

> *"Among the more significant point sources* [of groundwater contamination] *are municipal landfills and industrial waste disposal sites. When either of these occur in or near sand and gravel aquifers, the potential for widespread contamination is the greatest."*[22]

26. The Landfill DOC Plan proposes to use contaminated soil as daily cover on the landfill.[23]
27. The DOC Plan acknowledges that it is "*likely that precipitation immediately infiltrates the ground surface into the overburden sediments*".[24]
28. The DOC Plan states that *"[of] the total precipitation predicated to fall on the landfill footprint, approximately 3m^3/day will run off of the landfill during Stage 1C development as clean storm*

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[16] *Upland Landfill DOC Plan* at pg 43
[17] *Hazardous Waste Regulation*, BC Reg 63/88, s.40
[18] *Upland Landfill DOC Plan* at pg 61
[19] Personal communication between Greg Ferraro, GHD Consulting, and Leona Adams, President, Campbell River Environmental Committee at Feb 15, 2015 Open House re Upland Excavating Ltd. Application Authorization # 107689
[20] Environment Canada (2001) *Threats to Sources of Drinking Water and Aquatic Ecosystem Health in Canada - Landfills and Waste Disposal* Available 8 March 2016 online: <http://www.ec.gc.ca/inre-nwri/235D11EB-1442-4531-871F-A7BA6EC8C541/threats-eprint.pdf> ("*Threats to Drinking Water*") at pg 51
[21] *Threats to Drinking Water* at pg 54
[22] Environment and Climate Change Canada (2010) *Groundwater Contamination* Available 9 March 2016 online: <https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=6A7FB7B2-1>
[23] *Upland Landfill DOC Plan* at pg 17
[24] *Upland Landfill DOC Plan* at pg 13

water. This runoff will be conveyed via drainage ditches to the northeastern and northwestern corners of the landfill footprint where it will infiltrate through the floor of the existing gravel pit and will ultimately infiltrate into the mixing zone in the sand and gravel overburden aquifer."[25]

29. The *Hydrogeology and Hydrology Characterization Report* ("Hydrology Report") for the proposed landfill states that *"[in] general, the shallow groundwater is flowing to the southeast towards the Quinsam River*."[26] The Drainage Map at figure 3.1 of the Hydrology Report displays the "regional groundwater contour" and confirms this eastward flow towards Cold Creek and the Quinsam River.[27]
30. The Hydrology Report indicates that the Drinking Water (DW) and Aquatic Life Freshwater (FW) standards from the CSR and BC Water Quality Guidelines will apply to the site.
31. The Hydrology Report also notes that "*[based] on the information collected to date, the drinking water exposure pathway cannot be excluded for the site*."[28]
32. To our knowledge, the Provincial Cabinet has never exercised their power under s.37(6) of the *Environmental Management Act* to override a municipal zoning bylaw that was in conflict with a provincial waste discharge authorization.

3. What is an Operational Certificate?

The BC government Waste Management website outlines four types of waste disposal authorizations: Regulations and Codes of Practice, Permits, Approvals, and Waste Management Plans/Operational Certificates. This last type, Waste Management Plans/Operational Certificates, is described as:

> *An Operational Certificate is issued in response to the authorization of a waste management plan. Waste management plans are generally completed by regional government bodies to control the disposal of municipal garbage or sewage. An Operational Certificate is issued to the plan holder, or to private operators discharging under the plan, to specify additional terms and conditions. Operational Certificates are ongoing and may be amended, suspended or cancelled.*[29]

Operational Certificates are addressed in s.28 of the *Environmental Management Act* (EMA). Under this section the Director "*may … issue an operational certificate, with or without conditions, … to any person who is the owner of a site or facility covered by the waste management plan.*"[30] This

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[25] *Upland Landfill DOC Plan* at pg 61
[26] *Hydrology Report* at pg 10
[27] *Hydrology Report* at pg 24
[28] *Hydrology Report* at pg 16
[29] BC Gov (2016) *Activities Requiring Authorizations* Available 9 Feb 2016 online: http://www2.gov.bc.ca/gov/content/environment/waste-management/waste-discharge-authorization/activities-requiring-authorizations
[30] EMA s.28(1) *If a waste management plan is approved by the minister, a director may, in accordance with the regulations, issue an operational certificate, with or without conditions, to the municipality or to any person who is the owner of a site or facility covered by the waste management plan. (2) An operational certificate issued under subsection (1) forms part of and must not conflict with the approved waste management plan. (3) A director may exercise a power or authority in relation to an operational certificate in the same manner and to the same extent as provided by this Act with respect to a permit. (4) At least 14 days before issuing an operational certificate, a director must give notice of his or her intention to issue the operational*

certificate must form part of, and must not conflict with, the waste management plan and the director has the same power and authority in relation to the certificate as they do with a permit issued under s.14 of the EMA. Section 14 of the EMA authorizes the Director to issue a permit for the introduction of waste into the environment, subject to requirements for the protection of the environment. This is the primary means of authorization for waste disposal and was the form of authorization that Upland applied for in October 2013, and subsequently withdrew.

Operational Certificates appear to be tied to the regional district waste management plan, though the plan does not have to authorize the specific activities of the Operational Certificate. Campbell River is serviced by the Comox Strathcona Waste Management Plan.[31] This plan is operationalized by the Comox Valley Regional District. The plan only makes a brief reference to the Upland landfill and burn site as one of four active private demolition, land clearing and construction (DLC) waste disposal facilities authorized by the MoE in the CSWM area.[32] The plan notes that:

> *The private DLC waste disposal facilities are expected to satisfy the same standards as publicly-owned facilities in the CSWM. It is expected that each private DLC waste disposal facility will prepare a proposed action plan and schedule to upgrade the facility to satisfy MoE standards or to phase-out and close the facility, and that the MoE will replace / update / amend the existing authorizations with updated permits or operational certificates that reflect the action plans and requirements. The next Solid Waste Management Plan review / update is expected to include the private DLC waste disposal facilities action plans, schedules, updated authorizations and requirements.*

4. Conflict Between the Operational Certificate & Zoning Bylaw

Before continuing with a discussion about whether the conditions are in place such that a municipal zoning bylaw could prohibit the proposed landfill, this section will first discuss whether a municipal zoning bylaw *can* prohibit the landfill, given that it may be authorized by the province. It may be the case that provincial Operational Certificate grants Upland permission to operate the proposed landfill while the Campbell River zoning bylaw prohibits the landfill. This would appear to put the municipal bylaw in conflict with the provincial Operational Certificate. This section will discuss what occurs when a zoning bylaw prevents a land use that has been permitted by a provincial authorization.

The authority and powers of local governments to enact bylaws are delegated to them from the provincial legislature. Therefore, these "borrowed" powers cannot be used to override the Province's use of its authority and where direct and necessary conflict between a local government bylaw and a provincial law arises, the provincial law will prevail. Section 10 of the *Community Charter* confirms this paramountcy:

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certificate (a) in writing to the person named in the operational certificate, and (b) to the public in accordance with the regulations. (5) A director who gives notice under subsection (4) must allow any person who has been given notice under that subsection to (a) inspect the proposed operational certificate, and (b) provide comments to the director respecting the requirements or conditions of the proposed operational certificate.

[31] AECOM (Dec 2012) *Comox Strathcona Waste Management: 2012 Solid Waste Management Plan* Available 9 Feb 2016 online: http://www.cswm.ca/files/CSWM_amended_solid_waste_plan_2013.pdf ("*CSWM Plan*")

[32] *CSWM Plan* at 34

(1) A *provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.*

(2) *For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment*.[33]

It is important to note that bylaws are not always suspended due to what would seem, on its face, to be a conflict or inconsistency with a provincial enactment. Municipalities can still regulate in areas where provincial regulation is present. The court *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* ("*Spray-tech*") considered the interaction of provincial and municipal legislation and held that "*the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter."*[34] That is to say, for a municipal enactment to be made inoperative by a provincial enactment, there must be actual conflict in the operation of the two. This occurs where "*one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other.*"[35]

Beyond this general rule, the *Environmental Management Act* specifically addresses conflict between local government land use bylaws and an EMA authorization. Section 37(6) states:

"Despite the Local Government Act and the Vancouver Charter, if

(a) a bylaw of a municipality purports to zone land for a use, or

(b) a land use contract under the Local Government Act purports to restrict the use of land to a use

that would not allow the land to be used for the purpose allowed under a permit, approval or order issued in respect of the land or an approved waste management plan respecting the land, the Lieutenant Governor in Council may, by order, suspend the operation of the bylaw or contract to the extent the Lieutenant Governor in Council considers necessary to enable the rights given by the permit approval or order to be exercised."

The express legislative provision by the EMA for instances of conflict provides further evidence that a provincial authorization is not automatically presumed to override a municipal zoning bylaw - it would not have been necessary to draft such a provision otherwise. Where a zoning bylaw prevents an authorized land use, the authority of the EMA will only be made paramount by a positive decision of the Lieutenant Governor in Council (the Provincial Cabinet). As noted above (*Facts* at 32) such an intervention by Cabinet has never happened before.

Courts in BC have considered the interaction between provincial and municipal enactments. In *British Columbia Lottery Corp v Vancouver (City)* the BC Court of Appeal considered whether a regulation made by the British Columbia Lottery Corporation conflicted with, and therefore overrode, an amendment to a City of Vancouver zoning and development bylaw. In outlining their approach, the court stated that:

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[33] *Community Charter*, s.10
[34] *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* 2001 SCC 40 ("*Spraytech"*) at 39
[35] *Spray-tech* at 34-36

> *"It is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they co-exist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity.*
>
> ***A true and outright conflict can only be said to arise when one enactment compels what the other forbids****….Here, the Vancouver enactment forbids in Vancouver an activity which the lottery enactment authorizes or permits, but does not compel."*[36] (emphasis added)

Although that case concerned two bodies (a City and a crown corporation) that did not have paramountcy over each other, this approach was cited with approval by the Supreme Court of Canada in *Spray-tech,* a case concerning a conflict between a municipality and a province.[37]

Additional examples of where courts have found room for a zoning bylaw to operate alongside a provincial permit arise in *Cowichan Valley (Regional District) v Norton (Norton")*[38] and *Squamish (District) v Great Pacific Pumice* (*"Great Pacific Pumice"*).[39] In both instances, the courts found that the municipal zoning bylaw and the provincial permit did not conflict, but could operate together.

In *Norton* the court held that certain activities can be precluded by a municipal zoning bylaw even if the permit issued under provincial legislation expressly authorized the activities. Here, the court considered whether a regional district was entitled to regulate the use of land to prevent the processing of gravel when a permit issued under the *Mines Act* had authorized the extraction and processing of gravel on the property.[40] The regional district did not object to the excavation of gravel (a field outside local government regulatory authority) but sought an injunction with respect to the processing activities. The court issued the injunction because the processing operations were contrary to the zoning bylaw. The processing activities were found not to be a necessary part of the extraction process and could take place elsewhere in the district where permitted by zoning.[41] Although this was less economically feasible for the defendant, the court noted that the bylaw was valid and was in place before the defendant applied for a permit.

In *Great Pacific Pumice*, a company (Great Pacific Pumice or "GPP") obtained a mineral lease and permit under the *Mineral Tenure Act* and *Mines Act* for a storage and processing operation on Crown land within the District of Squamish. Although the relevant Ministry advised that the lease is subject to the zoning bylaws and would need to be rezoned before processing can begin, GPP commenced operations without obtaining zoning approval from Squamish.[42] The court found that the purpose of the mineral lease and mines permit were to convey the minerals at the property to GPP as a means to

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[36] *British Columbia Lottery Corp v Vancouver (City)* 1999 BCCA 18 ("*BC Lottery Corp*") at 19-20
[37] *Spray-tech* at 38
[38] *Cowichan Valley (Regional District) v Norton* 2005 BCSC 1056 ("*Norton*")
[39] *Squamish (District) v Great Pacific Pumice* 2003 BCCA 404 ("*Great Pacific Pumice*")
[40] *Norton* at 2
[41] *Norton* at 22
[42] *Great Pacific Pumice* at 55- 56

overcome the lack of ownership of the surface of the land by GPP. However, this conveyance did not allow for mining activity without regard for local needs or wishes, nor require that property be used in a particular way and particular purpose and that GPP should be subject to the same control by a municipality as a fee simple owner.[43] As the provincial legislation and permit did not *require* the respondent to offend the bylaw, and the bylaw did not frustrate the application of the legislation or permit or the free entry system in general, the court held that there was no conflict. The bylaw was deemed to be just "*one more regulation with which a miner must comply if he wishes to exercise surface rights derived from a mineral lease*."[44] Therefore, although the mineral lease and mines permit authorized the use of the land, the zoning bylaw remained applicable.

Application to Upland Operational Certificate

Turning to the case at hand, the Operational Certificate would authorize the operation of a landfill on the Upland property. The current zoning bylaw does not allow such uses on the Upland property. However, the Operational Certificate would not compel or require Upland to operate a landfill. Further, the zoning bylaw only pertains to a one aspect of the landfill activity - where it takes place, while the Operational Certificate regulates a different aspect of the landfill activity – how it operates. Therefore, as per *BC Lottery Corp*, there is no instance of "*one enactment compelling what the other forbids*" and the zoning bylaw may not be seen to be in conflict with the Operational Certificate.

Norton and *Great Pacific Pumice* lend further support to the continued application of the zoning bylaw. *Norton* suggests that a zoning bylaw can prevent a use of property that was expressly permitted by a provincial authorization, particularly where other zones are open to that type of land use. In the current situation, landfills are permitted uses in Industrial-4 zones within the municipality of Campbell River.[45]

Great Pacific Pumice confirms that there is no conflict where a municipal bylaw does not *require* the respondent to offend the provincial enactment, and where the bylaw does not frustrate the legislative scheme. The Operational Certificate is not likely to require or compel Upland to operate a solid, non-hazardous waste landfill at their property, and the municipal bylaw does not frustrate the ability of the *Environmental Management Act* to regulate waste management in the province. To paraphrase *Great Pacific Pumice*, the Campbell River zoning bylaw is properly viewed as "*just another regulation that the applicant must comply with in using the land*."

However, there is still the possibility that the Provincial Cabinet might suspend the operation of the bylaw to the extent that they deem necessary to enable the rights given by the Operational Certificate to be exercised under s.37(6) of the EMA. As mentioned above (*Facts* at 32), this has not occurred before to our knowledge.

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[43] *Great Pacific Pumice* at 61-62
[44] *Great Pacific Pumice* at 63
[45] City of Campbell River, *Zoning Bylaw 3250, 2006*

5. Restricting Landfill via Municipal Zoning & Non-Conformity

From the above discussion, we conclude that if local zoning is not in direct and necessary conflict with a provincial Operational Certificate, there may be municipal jurisdiction to prohibit a landfill at a zoned location. It is possible that a zoning bylaw might validly prohibit the new use of the Upland property as a solid, non-hazardous waste landfill -- even if the new landfill is permitted by a provincial Operational Certificate.

Then two fundamental questions arise about the current Campbell River zoning bylaw:

- Does the zoning bylaw prohibit such a new landfill in that location?
- Even if the current zoning prohibits landfills, can the proposed use be saved as a pre-existing "non-conforming use?"

In order to answer these questions, we will briefly discuss the law governing zoning prohibitions and "non-conformity".

5.1 Jurisdiction and Legislation

Municipalities have the authority under s.479 of the *Local Government Act* (LGA) to divide the land within the municipality into zones and regulate the use of land, building and structures with each zone.[46] This power includes the ability to prohibit any use or uses within a zone.[47] A municipal zoning bylaw will list the uses that are permitted in each zone. Typically, uses that are not listed will not be permitted in that zone. This follows from the "implied exclusion approach" of statutory interpretation (ie. items not specified on a list, or capable of being included within a broader category present on the list, are implied to be excluded from the list), an approach that is reinforced where the zoning bylaw explicitly prohibits any uses of land, buildings, or structures except as permitted by the bylaw. The courts will also look to the purpose and intention of the bylaw to determine if a particular use fits within a listed use.[48]

However, a use that is not listed in a zoning bylaw as permitted in a particular zone can still operate legally in that zone if it is a "non-conforming use". A "non-conforming use" is a use that was lawful and permitted by zoning bylaw when it first took place but, by reason of a change to the zoning by-law, does not conform to the uses permitted by the current zoning by-law.[49] Section 528(1) of the *Local Government Act* permits non-conforming uses, stating that:

> *"(1) Subject to this section, if, at the time a land use regulation bylaw is adopted,*
>
> *(a) land, or a building or other structure, to which that bylaw applies is lawfully used, and*
>
> *(b) the use does not conform to the bylaw,*
>
> *the use may be continued as a non-conforming use.*

[46] *Local Government Act* RSBC 2015 c 1 ("*Local Government Act*"), s.479
[47] *Local Government Act*, s.479(3)
[48] *Paldi Khalsa Diwan Society v Cowichan Valley (Regional District)* 2014 BCCA 335 at 39-40.
[49] This definition is derived from the definition of "non-conforming" provided in the *Vancouver Charter* at s.559

Subsequent provisions in the LGA limit or restrict non-conforming uses. The following provisions are relevant to our discussion:

> "528(2) *If a non-conforming use authorized under subsection (1) is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the land use regulation bylaw."*[50]
>
> …
>
> 530 *In relation to land, section 528 [non-conforming uses] does not authorize the non-conforming use of land to be continued on* ***a scale or to an extent or degree greater*** *than that at the time of the adoption of the land use regulation bylaw."* (Emphasis added)

5.2 Case law relating to Non-Conforming Uses

5.2.1 Case law from BC: "…on a scale or to an extent or degree greater…"

A number of BC cases have considered what type of change to a non-conforming use would remove its non-conforming use status because it is "*on a scale or to an extent or degree greater*" than when a zoning bylaw was enacted.[51] [Note: The discussion below deals with interpretation of s. 530 of the current *Local Government Act* and its predecessor provisions, s. 970(6) and s. 911(6) of the *Municipal Act* and s. 911(6) of the *Local Government Act*.]

The purpose of allowing a non-conforming use to continue after a zoning bylaw has been passed is to protect the status quo.[52] Therefore, when considering changes to the use, the focus for a court will be whether the new use maintains the same essential nature, is within the general purpose, and whether the status quo was maintained.[53] To permit the unrestricted extension of a non-conforming use would be to disregard the intent and the purpose of the zoning bylaw.[54] For this reason, the courts will also consider the purpose behind the enactment of the new bylaw that made the use non-conforming.[55]

The "use of land" has been interpreted as the "*the broad purpose for which the land has been historically used, not the precise physical layout of the property at the time a restrictive by-law was passed.*"[56] However, the interpretation of s.530 is broad: it is not limited in application to an increase in the physical use of the land but is extended to the production on the land.[57] The words "scale" and "to an extent or degree greater" have been interpreted as words of measurement that connote change, either in intensity of use, or in length of use, or in scope of use.[58] However, the effect of offending s.530 appears only to limit the non-conforming use to the extent that it offends the provision, not to prohibit

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[50] *Local Government Act*, s.528
[51] This provision has been present in the statute authorizing local government authority since 1985 and has remained largely unchanged over these years, though the subsection number and the title of the statute have changed. The provision has been found as s.970(6) and s.911(6) of the *Municipal Act* and s.911(6) of the *Local Government Act*. It is currently s.530 of the *Local Government Act* R.S.B.C. 2015 c.1.
[52] *Sunshine Coast (Regional District) v Wood Bay Salmon Farms Ltd* [1992] B.C.W.L.D. 2007 ("*Sunshine Coast*") at 22
[53] *Osoyoos (Town) v Nobbs* 2004 BCCA 431 ("*Osoyoos*") at 22
[54] *R. v. Grant* (1983), 23 M.P.L.R. 89 (Ont. C.A.) at p.92, referred to by the court in *Osoyoos* and *Sunshine Coast*
[55] *Sunshine Coast* at 19
[56] *Stroshin Family Trust (Trustees) v Parksville (City)* 2010 BCSC 350 ("*Stroshin*") at 46
[57] *Sunshine Coast* at 17-18, 24, and 26
[58] *Osoyoos* at 23

the use.[59] Thus, an increase in intensity on the land will not necessarily offend s.530 but will allow the original non-conforming use to continue, though the extent of the use will be "*rolled back without interfering with protection given to the status quo".*[60] The non-conforming use will simply be prohibited from expanding in an unlawful manner.

The BC Court of Appeal in *Osoyoos (Town) v Nobbs* ("*Osoyoos*") found that an increase in the use of the property from just the summer season (May-Sept) to the entire year was an impermissible increase in the degree of use. However, the construction of a retaining wall and the addition of amenities did not offend the provision.

The court in *Stroshin Family Trust (Trustees) v Parksville (City)* determined that the replacement of a 12 foot mobile home with 14 foot mobile home was not an increase in the "scale or extent or degree" of the non-conforming use.

In *Sunshine Coast (Regional District) v Wood Bay Salmon Farms Ltd ("Sunshine Coast"),* the court considered the impact of a change of production volume at a fish harvesting and processing operation.[61] The amount of fish processed had increased significantly, most of it originating from other farms. The court deemed that "*the defendant's fish harvesting and processing with respect to fish produced by the defendant continues as a lawful non-conforming use and unaffected by volume, as the use has not changed nor [did] it come within the exception in s. 970(6) of the Municipal Act*."[62] However, the increase in processing of others' fish was found to be contrary to the *Municipal Act* s.970(6) and had to be reduced to the level in place at the time the operation became a non-conforming use.

In *Langley (Township) v Quiring* ("*Quiring*") the court stated that "*a more intense use of land for the same purpose does not necessarily run afoul of s.911(6)*" and found that "*some latitude should be afforded for increased activity attendant upon natural business growth*".[63] Nevertheless, the court affirmed the decision in *Sunshine Coast* that an increase in volume of production on the land could still offend s.911(6). With respect to use of land, the court in *Quiring* held the expansion of the non-conforming area (a gravel lot) to the portion of the property that was not in use prior to the enactment of the zoning bylaw, probably violated both s.911(6) of the *Local Government Act* and the rule that a non-conforming use of land is "*confined to the physical limits of the actual use being made of the property [at the time the bylaw was enacted] and does not extend to the entire area of land encompassed by [the owner's] land title*".[64]

This rule arose in the BC Court of Appeal decision *Cowichan Valley (Regional District) v Little* and does not appear to have been overruled. However, the court in *Stroshin* held that this decision did not establish a rule that a non-conforming use of land has been frozen in time or is confined to the precise

[59] *Nanaimo (City) v Brickyard Enterprises Ltd*. [1993] B.C.J. No. 992 ("*Nanaimo*") at 22
[60] *Nanaimo* at 23
[61] *Sunshine Coast*
[62] *Sunshine Coast* at 24
[63] *Langley (Township) v Quiring* 2003 BCSC 901 ("*Quiring")* at 39
[64] *Quiring* at 20 and 41. The court used "probably" because the evidence available was insufficient to make a ruling on this issue; see para 44-46. Original iteration of the rule in *Cowichan Valley (Regional District) v Little* (BCCA) [1992] BCJ no 2078 at 48

physical layout at the time the bylaw was adopted.[65] Indeed, the primary concern for the court in *Osoyoos*, a more recent BC Court of Appeal decision, was whether the use of the property had changed or intensified and the court was content to allow a number of physical changes to the layout of a lot.[66]

5.2.2 Case law from outside BC: Saint-Romauld (City) v Olivier

Although a BC court would first seek to interpret s.530 of the *Local Government Act* (and predecessor provisions) and related case law in assessing the proposed landfill as a continuing non-conforming use, there are other relevant considerations. The Supreme Court of Canada in *Saint-Romuald (City) v Olivier* considered the nature and extent of a landowner's ability to carry on and change a non-conforming use of their land in the face of a land-use bylaw.[67] Although this case arises from a civil law jurisdiction, the court notes that "*the principles of land use regulation applicable in the common law provinces concerning legal non-conforming uses are also relevant*".[68] This suggests that even though this case has not been frequently considered by BC courts (likely because of the specificity of s.530 of the *Local Government Act* and related caselaw) it would likely be applicable in a common law jurisdiction such as BC.

The court in *Saint-Romuald* focused on changes to the "intensity of use" and the "type of use" and suggested an approach that sought to balance a number of considerations. With regard to intensity, the court noted that in general, "*merely continuing the precise pre-existing activity, even at an intensified level, is clearly protected, but the intensification may be of such a degree as to create a difference in kind*."[69] Such intensification would alter the c*haracter* of the use, making it an altogether different use in terms of its impact on the community. With regard to type of use, the court found that a landowner can also "overreach itself" if

> "*(ii) the addition of new activities or the modification of old activities, (albeit within the same general land use purpose), is seen by the Court as too remote from the earlier activities to be entitled to protection, or if (iii) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours, as compared with what went before*".[70]

The court summarized its approach to determining the limitations on a landowner's non-conforming use of the land as consisting of seven considerations:[71]

1. ***Characterize the purpose of the pre-existing use and the activities that were carried on the property prior to the current bylaw.***

[65] *Stroshin* at 63
[66] Osoyoos (Town) v Nobbs 2002 BCSC 1743 at 25, upheld on this point by the Court of Appeal in *Osoyoos (Town) v Nobbs* 2004 BCCA 431 at 29
[67] *Saint-Romuald (Ville) c. Oliver* 2001 SCC 57 ("*Saint-Romuald*")
[68] *Saint-Romuald* at 1
[69] *Saint-Romuald* at 25
[70] *Saint-Romuald* at 34
[71] *Saint-Romuald* at 39

2. ***Is the new proposed use simply an intensification of the old use (and thus rarely open to objection) or does it go beyond a matter of degree and constitute, in terms of community impact, a difference in kind such that the protection is lost?***
3. ***How remote is the expansion of the activity from the earlier activity?***
4. ***To what extent are the new activities within the original scope of usage? Here, a court will balance the community interest against the interest of the landowner taking into account the nature of the pre-existing use (degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right), and the new or aggravated neighbourhood effects. The greater the disruption, the more tightly drawn will be the definition of pre-existing use or acquired right.***
5. ***The neighbourhood effects as established by the evidence.***
6. ***The consideration of the proper balance in the characterization of the legal non-conforming use (not too general so as to liberate the owner from the constraints of what he actually did and not so narrow as to rob him of flexibility).***
7. ***The definition of acquired non-conforming right will always have an element of subjective judgment but it must be grounded on objective facts.***

5.3 Application of Legislation and Case law to the Upland Solid, Non-Hazardous Waste Landfill

5.3.1 Legislation

In our case, we must consider whether the existing landfill was a permitted use by the municipal zoning bylaws in 1992, when the current Ministry of Environment (MoE) landfill permit was authorized. The enactment in force at the time, *Bylaw No. 760, 1977,* allowed for landfills on the Upland property - as did the subsequent version, *Zoning Bylaw No 2700* (1998). Therefore, the Upland landfill was a legal use of the land at the time the current land-use bylaw, *Zoning Bylaw No 3250, 2006,* ("*Zoning Bylaw, 2006")* came into force in 2006.

In contrast, *Zoning Bylaw, 2006* does not include "landfill" as a permitted use in the I-3 zone.[72] The "implied exclusion approach" suggests that the absence of this landfill in the list of permitted I-3 uses means that this use is not permitted. More importantly, s.4.1(a) of *Zoning Bylaw, 2006* states that "*No person shall use or occupy any buildings, structure or land, including land covered by water, except as expressly permitted by this bylaw, and everything that is not expressly permitted is prohibited.*"[73] Thus, the current zoning bylaw prohibits the landfill as a use on property in the I-3 zone. However, due to the lawful existence of the landfill on the Upland property at the time the current bylaw came into effect and the operation of s.528 of the LGA, the landfill may continue as a legal non-conforming use on the Upland property.

However, if certain circumstances are present s.528 (2) and s.530 of the LGA will impose some limits and restrictions on the continuation of the existing landfill as a non-conforming use.

[72] City of Campbell River, *Zoning Bylaw 3250*, *2006* ("*Zoning Bylaw*, *2006*") at s.5.16
[73] *Zoning Bylaw*, *2006* at s.4.1(a)

Under s.528(2), the landfill will be subject to the current zoning bylaw if the operation of the landfill has been discontinued for a continuous period of 6 months or more. We do not have any evidence to indicate this has been the case in this instance.

Under s.530, the proposed landfill may be validly prevented by the municipality if it is found to be sufficiently different from the original use that attracted non-conforming use status. Therefore, we must determine whether the proposed solid, non-hazardous waste landfill could be considered to be "on a scale or to an extent or degree greater than" the original inert municipal landfill and burn site.[74] If the existing and proposed uses are essentially the same, the proposed landfill will continue as a "non-conforming use" and the *Zoning Bylaw, 2006* cannot prohibit the new development. On the other hand, if the proposed use has changed such that the proposed landfill is sufficiently greater in scale, extent or degree than the existing landfill, the proposed landfill will not be considered an acceptable "non-conforming use". In that case, *Zoning Bylaw, 2006* will apply to prevent this use of the Upland property.

5.3.2 Caselaw from BC: "…on a scale or to an extent or degree greater…"

The current use of the Upland property is as a landfill, thus the nature of the current non-conforming use is essentially the disposal of solid waste. As the proposed use is for the disposal of solid waste the general purpose and essential nature of the use remain the same.

However, while the purpose of s.528 is to protect the status quo, it is arguable that the proposed landfill does not actually reflect the status quo -- due to an increase in use of the land and an increase in the production on the land.

The expansion of the landfill footprint and the addition of two treatment ponds constitute an increase in the use of land. This type of expansion is prohibited by the rule stated in *Quiring* and *Little*: that non-conforming use of the land is "*confined to the physical limits of the actual use being made of the property [at the time the bylaw was enacted] and does not extend to the entire area of land encompassed by [the owner's] land title*". The proposed landfill footprint will be 180m x 200m. Although we do not know the dimensions of the current landfill, a comparison of the DOC Plan with the original Site Plan, ongoing excavation at the property, and the large increase in accepted material all indicate this is a significant expansion to the landfill footprint. The addition of the aeration pond and infiltration pond are new additions to the land and will be situated outside of the proposed landfill footprint. Although the map of the site only depicts a single infiltration pond,[75] the DOC Plan states there will be two infiltration ponds that will store and infiltrate surface runoff from the landfill.[76] The dimensions of the infiltration ponds are not given, though the bottom surface area each infiltration pond is estimated as 2,200m^2 and the top surface area of both of the ponds is 3,500m^2. The lined aeration pond (or "leachate treatment pond") has dimensions of 30x 30m x 2m and a working volume of 1800m^3.[77] The expansion of the landfill footprint and the addition of the treatment ponds cannot be characterized as

[74] *Local Government Act*, s. 530 states: "*In relation to land, section 528 [non-conforming uses] does not authorize the non-conforming use of land to be continued on* ***a scale or to an extent or degree greater*** *than that at the time of the adoption of the land use regulation bylaw."*
[75] *Upland Landfill DOC Plan*, Figure 14.1 at pg 80 and C-02 at pg 100
[76] *Upland Landfill DOC Plan*, at pg 54
[77] *Upland Landfill DOC Plan*, Figure 9.1 at pg 76

mere changes to the physical layout of the land but constitute a significant unlawful increase in the use of land beyond the dimensions of the current landfill onto other parts of the Upland property.

Furthermore, the significant increase in the volume of material accepted at the proposed landfill constitutes an increase in the production on the land. The current landfill is authorized to accept 3,200 m^3/year of material. The proposed landfill will accept 25,300m^3/year of material, with a total capacity of 506,000m^3. As determined in *Sunshine Coast* this change in the "production on the land" is captured by a proper interpretation of s.530. The comparison of the current and proposed landfills using the volumes of disposal is also appropriate given that the words "scale or to an extent or degree greater" have been interpreted by the court in *Osoyoos* as words of measurement that connote change, in this case, in intensity of use. Although this increase in intensity on the land will not necessarily offend s.530 itself to the extent that the non-conforming use is absolutely prohibited, a court might require that the volume of waste disposed at the proposed landfill be "*rolled back"* to the volume of accepted material authorized by the existing permit.

In the current situation, the almost 8-fold increase of accepted waste material and the significant expansion of land use at the proposed landfill likely goes beyond an "*increased activity attendant upon natural business growth*" that the Court would have allowed in *Langley*. Preventing this major transformation of the landfill does not freeze the non-conforming use in time -- there are simply other, less drastic ways that the landfill operation could expand without offending s.530.

The comparison of volume of waste also recalls the *Sunshine Coast* case, in which an increase in salmon processing triggered a roll back of the extent of the operation. It may be relevant that the court sought to restrict the increase of other producers' salmon; the respondent was not constrained from increasing processing of their own fish. Here, Upland is processing others' waste, though they have done this from the start.

5.3.3 Caselaw from outside BC: Saint-Romuald (City) v Olivier

The following discussion will apply the seven factors outlined by the court in *Saint-Romuald* to the facts of the proposed Upland landfill in order to assist the consideration of how a non-conforming use can lawfully change and expand.

1. ***Characterize the purpose of the pre-existing use and the activities that were carried on the property prior to the current bylaw.***

The 1992 permit authorizes the "*discharge* [of] *refuse from Campbell River and the surrounding area to the land and air contaminants from a regulated open burning operation*." Thus, the purpose of the pre-existing (and current) use of the Upland property could be characterized as community solid waste disposal and the activities carried on the property are a landfill and burn site limited to refuse from the community of Campbell River and surrounding area.

2. ***Is the new proposed use simply an intensification of the old use (and thus rarely open to objection) or does it go beyond a matter of degree and constitute, in terms of community impact, a difference in kind such that the protection is lost?***

The proposed use is for a solid, non-hazardous waste landfill. This could be considered to be "within the same general land use" (solid waste disposal) as the current use -- but it is arguable that the intensity and type of use are significantly different in kind.

As noted above, the existing landfill accepts 3,200 m^3/year of material. The proposed landfill will receive 32,890 tonnes of waste a year, consuming approximately 25,300m^3/year of airspace.[78] The landfill has total volume of 506,000m^3 over its expected 20 year lifespan. This is a significant increase in the amount of waste disposal, which corresponds to a similar increase in traffic, noise, and related activities at the property. There are ongoing excavations to the property which will increase the landfill footprint to 180m x 200m.[79] The landfill will also include two treatment ponds: a "lined aeration pond" for the treatment of leachate with a working volume of 1800m^3 (30m x 30m x 2m) and an "armored infiltration pond" (unknown capacity) to allow for the infiltration of treated leachate into the groundwater. These ponds represent a new use of the land. These facts indicate both a significant increase in the intensity of production on the land and a significant increase in the use of the land itself.

Furthermore, the new proposed use is more than simply an intensification of the old use. The change to the type of material accepted contributes to a "difference in kind" because the new material poses a real impact to the community. The current landfill accepts "inert municipal" refuse consisting of "*stumps, trees, land clearing waste, selected building demolition debris, and residue of combustion from the open burning of woodwaste*." The proposed Upland landfill will accept construction and demolition waste, land clearing debris, non-hazardous waste soil (predominantly composed of metals and hydrocarbon-impacted soil), and waste asbestos (a hazardous waste).[80] These materials will produce leachate containing sulphate, arsenic, iron, manganese, Total Dissolved Solids, calcium, sulphate, chromium, copper, metals, polycyclic aromatic hydrocarbons (PAHs), volatile organics compounds (VOCs) and petroleum hydrocarbons (PHCs).[81] A number of "contaminants of concern" whose parameters will exceed *Contaminated Sites Regulation* ("CSR") standards in the untreated leachate are expected to be present in this landfill including: Ammonia, Chloride, Phenols, Sulphate, Sulphide, LEPH, Arsenic, Boron, Copper, Iron, Magnesium, Manganese, Sodium and Zinc.

The materials to be accepted at the proposed landfill are both qualitatively and quantitatively different from the material accepted at the existing landfill. The proposed materials contain, and will release, toxic substances that can have an impact on water quality and human and ecological health. The risk of harm to the surrounding environment from these substances is exacerbated by the significant volume of the proposed materials, thus creating a change in the use that is beyond a matter of degree and constitutes, in terms of community impact, a difference in kind such that the protection is lost.

[78] *Upland Landfill DOC Plan* at pg 12
[79] *Upland Landfill DOC Plan* at pg 12
[80] *Upland Landfill DOC Plan* at pg 23
[81] *Upland Landfill DOC Plan* at pg 36

3. How remote is the expansion of the activity from the earlier activity?

The question of remoteness asks whether a new activity, while different, is still closely related to what had gone before. Remoteness will occur where there is the replacement of one use by a different use.[82] Here, the property will still be used as a landfill for the disposal of waste. This is the same use.

Although not making a reference directly to remoteness on this point, the court in *Saint-Romauld* use an example of a family pig farm expanding to a "factory in the country" to suggest that the significant intensification of a use may be enough to "alter the character" and make it an altogether different use.[83] That is, sufficient intensification may create remoteness, despite an otherwise similarity in use. As noted above, the volume of material disposed of at the landfill will significantly increase from 3,200m^3 to 25,300m^3 annually, the type of material will change from "inert municipal refuse" to construction and demolition waste, land clearing debris, contaminated waste soil, and waste asbestos, and there will be the expansion of the operating area of the property to include the aeration pond and the infiltration ponds.

Thus, while the existing and proposed uses are similar, the major changes to:

- the landfill footprint and new treatment ponds
- the volume of the material disposed and
- the character of the material disposed

suggest that the issue of remoteness might be overcome by the intensification and resulting change in character of the use.

4. To what extent are the new activities within the original scope of usage? Here, a court will balance the community interest against the interest of the landowner -- taking into account the nature of the pre-existing use (degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right), and the new or aggravated neighbourhood effects. The greater the disruption, the more tightly drawn will be the definition of pre-existing use or acquired right.

The use of the property as a landfill may or may not clash with the other uses permitted within the I-3 zone; and landfill is a permitted use within the I-4 zone. However, it is significant to note that "landfill" was removed from the list of permitted uses in the I-3 zone when the *Zoning Bylaw, 2006* came into force – though we do not have sufficient evidence to draw definitive conclusions about this. The uses of the surrounding Rural-1 land and the other I-3 and I-4 zoned lands are also unknown to the author.

However, the Upland property falls within an area that has recognized and important uses for its water resources. The property is located within the Watershed Development Permit Area (DPA), designated as such in the City of Campbell River Official Community Plan to ensure the protection of local drinking water. The purpose of this designation is to "*provide for long term water quality protection within the drinking watershed and provide protection for the natural environment, its*

[82] *Saint-Romuald* at 41
[83] *Saint-Romuald* at 25

ecosystems and biological diversity."[84] The property is within a few hundred metres from McIvor Lake and the property borders on Rico Lake[85], which is hydraulically connected to McIvor Lake. McIvor Lake is part of the John Hart Watershed, which provides drinking water to the majority of the City of Campbell River. McIvor Lake itself is considered to be a potential secondary drinking water source for the City,[86] however, the *District of Campbell River Proposed Development Regulations and Guidelines for Watershed Protection* states that "*the current trend in land use development around McIvor Lake may conflict with long term plans for a secondary potable water supply*."[87] Further, the unconfined sand and gravel aquifer under the Upland property is part of a larger High Vulnerability IIA Class aquifer; this allows for a direct groundwater connection between the Upland property and Cold Creek, the Quinsam River, and the Quinsam River Hatchery, a valuable spawning ground for Pink, Coho and Chinook salmon.

Although the property will still be used as a landfill, the changes to the type and intensity of use demonstrate a high degree of remoteness between the current and proposed uses. As noted above, the volume of material disposed of at the landfill will significantly increase from 3,200m^3 to 25,300m^3 annually, and the type of material will change from "inert municipal refuse" to construction and demolition waste, land clearing debris, contaminated waste soil, and waste asbestos.

These changes to the landfill will introduce new and aggravated neighbourhood effects: a risk of contaminants from the waste entering the local aquifer and waterways, posing harm to local residents and the viability of the Quinsam salmon hatchery. "

The aggravated neighbourhood effects that may arise in relation to the proposed Upland landfill include:

- The proposed accepted waste is expected to contain a number of potentially harmful chemical substances (*Facts* at 17-20) that could leach into the groundwater through the liners or spill over the edges of the treatment ponds during high rain events.

- The proposed use of contaminated soil as daily cover on the landfill[88] would allow rain to run off the surface of the landfill, potentially pulling contaminants outside of the lined landfill cell. As noted above (*Facts* at 28), this storm water *"will infiltrate through the floor of the existing gravel pit and will ultimately infiltrate into the mixing zone in the sand and gravel overburden aquifer."*[89]

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[84] City of Campbell River, *Official Community Plan Bylaw No. 3476, 2012*, Schedule A ("*CR-OCP*") at 239

[85] Upland documents indicate that the property abuts Rico Lake. Section 2.1.2 of the Operation Report states that Rico Lake is 10m west of the site and section 3.1 of the Hydrology Report states that "the eastern extent of Rico Lake encroaches onto the site". GHD (Feb 2016) *2016 Design, Operations, and Closure Plan – Upland Landfill, Draft for Review* Available 8 March 2016 online: <https://issuu.com/esolutionsgroup/docs/088877-rpt-01-draft_docp_-_wm> ("*Upland Landfill DOC Plan*")

[86] BC Ministry of Environment (2012) *Water Quality Assessment and Objectives for the John Hart Lake Community Watershed and McIvor Lake - Technical Report* Available 9 March 2016 online: <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2012_2/523810/wqo_techinical_john_hart_mcivor.pdf>

[87] District of Campbell River Proposed Regulations and Guidelines for Watershed Protection at pg 26-5.4.1

[88] *Upland Landfill DOC Plan* at pg 17

[89] *Upland Landfill DOC Plan* at pg 61

- Leachate is expected to enter into the aquifer through the base of the landfill (*Facts* at 21-24). It is anticipated that 0.121m^3/year (0.00033m^3/day) of leachate "may potentially leak through the landfill base and enter the mixing zone beneath the landfill footprint".[90] Greg Ferraro, a representative of GHD, the proponent's consultant, confirmed at the open house that all liners are permeable.[91] Environment Canada states that there are "*major knowledge gaps in our understanding on municipal solid waste disposal include: … long-term integrity of liner, cover and leachate collection systems*".[92] There is further concern that punctures during installation and seam faults could cause holes in the geomembrane liners.

- Environment Canada has stated that landfills are a significant source of groundwater contamination, noting that it "*is now accepted that all landfills will eventually release leachate to the surrounding environment"* and that when *"municipal landfills and industrial waste disposal sites… occur in or near sand and gravel aquifers, the potential for widespread contamination is the greatest."* (*Facts* at 23-25)

- It is "*likely that precipitation immediately infiltrates the ground surface into the overburden sediments*", suggesting that any contaminated waste spilt outside of the liner landfill cell would make its way into the aquifer. (*Facts* at 27)

- The landfill is hydrologically connected to nearby water bodies including the watershed that supplies the Quinsam Hatchery, Cold Creek, and the Quinsam River (*Facts* at 6-8) The direction of groundwater flow suggests that landfill contaminants that enter the underlying aquifer will travel in the direction of these water bodies (*Facts* at 29).[93]

- Contaminants may enter into McIvor Lake via Rico Lake, which encroaches onto the Upland property, as the two water bodies may be hydrologically connected and water may flow from one to the other. (*Facts* at 5) Recall that McIvor Lake is part of the John Hart Watershed, which provides drinking water to the City of Campbell River. (*Facts* at 3)

- The Hydrology Report prepared by GHD for Upland indicates that the Drinking Water (DW) and Aquatic Life Freshwater (FW) standards from the CSR and BC Water Quality Guidelines will apply to the site (*Facts* at 30). The application of these standards is positive in that the DW standards are the highest possible standards in the CSR. However, this clearly contemplates that substances that enter the groundwater may find their way to a drinking water source. This may be what is meant by the following statement in the Hydrology Report: "*[based] on the information collected to date, the drinking water exposure pathway cannot be excluded*

[90] *Upland Landfill DOC Plan* at pg 61
[91] Personal communication with Campbell River Environmental Committee President Leona Adams, Upland Excavating February 15, 2016 Open House Notes re Upland Excavating Ltd. Application Authorization # 107689.
[92] *Threats to Drinking Water* at pg 54
[93] Email from Leona Adams Feb 15, 2016 - information from Open House

for the site."[94] This is a cause for concern, in light of the potential for contaminants to enter the groundwater through runoff, spills, and leaks.

Although the pre-existing landfill might not clash with the surrounding land uses, the proposed solid non-hazardous landfill is likely to do so, particularly with respect to the use of water. This is suggested by the proximity and connection of the landfill to the local hydrological features, the high degree of remoteness arising from the change in volume and type of material, and the introduction of new aggravated neighbourhood effects to groundwater quality.

5. The neighbourhood effects as established by the evidence.

The effects of the proposed landfill on the "neighbourhood" cannot yet be determined, particularly without the full technical assessment. Ground and surface water monitoring will be necessary. However, there are serious concerns that a leak in the liner under the treatment ponds, or through the bentonite liner under the soil deposit, or heavy rainfall might cause leachate spill out of the treatment ponds and enter into the aquifer that feeds into the Hatchery watershed, Cold Creek, or Quinsam River. The effect of the contamination of these water bodies might include harm to fish and human health. The Quinsam River hatchery is reportedly worth $100 million.[95]

The risk of contamination to the aquifer and the river system might be established by expert consideration of the hydrological report and through comparison of the facility technical assessment with industry best practices and provincial guidelines.

6. The consideration of the proper balance in the characterization of the legal non-conforming use (not too general so as to liberate the owner from the constraints of what he actually did before and not so narrow as to rob him of flexibility in the reasonable evolution of prior activities).

The court in *Saint-Romuald* noted that businesses should be permitted a reasonable amount of renewal and change. The degree of flexibility depends on the nature of the use, for example, a nightclub business needs some renewal and change to attract clients. To address this particular consideration, more information on the economics of landfill operation may be required -- to determine how much flexibility a landfill requires and whether the proposed landfill oversteps the appropriate margin. For example, it might be important to understand whether the pre-existing use of the property as an inert municipal solid waste landfill would likely remain economically viable. Other questions include: will there continue to be a steady inflow of inert municipal waste from the Campbell River area? Are there other similar materials that the landfill could accept that would more closely fit the current permit conditions? Is the proposed increase in quantity and change of type of disposal material necessary to maintain the economic viability of the Upland business?

7. ***The definition of acquired non-conforming right will always have an element of subjective judgment but it must be grounded on objective facts***.

This is generally taken to mean that the outcome of the characterization analysis should not turn on personal value judgements.

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[94] *Hydrology Report* at pg 16

[95] Leona Adams, quoted in *Campbell River Mirror* (24 March 2016) *CREC: Landfill puts water supply at risk*, online: <http://www.campbellrivermirror.com/news/373432331.html?print=true>

Summary of Factors

To summarize the application of the *Saint-Romuald* factors to the proposed Upland landfill, the purpose of the pre-existing use can be characterized as solid waste disposal and the activities carried on prior to the current bylaw can be characterized as landfill and burn site. The proposed use as a solid, non-hazardous waste landfill is also solid waste disposal. This would be considered to be "within the same general land use" as the current use.

However, the proposed use will accept 25,300m^3/year (32,890 tonnes) of material, a significant increase from 3,200 m^3/year that is currently accepted. The proposed use will also introduce a leachate treatment pond (volume of 1800m^3) and an infiltration pond. Instead of "inert municipal waste", the proposed landfill will accept construction and demolition waste, land clearing debris, non-hazardous waste soil (comprised of metals and hydrocarbon-impacted soil), and waste asbestos, materials that will release a number of toxic substances. This arguably constitutes more than an intensification of the use – going beyond a matter of degree to constitute a difference in *character* in terms of its impact to the community.

On its face, the degree of remoteness between the current and proposed uses is not large; they are both landfills. However, the significant intensification and change in character described above may be enough to overcome the apparent similarity in uses and establish a sufficient degree of remoteness.

The proposed landfill is outside of the original scope of usage. The proposed landfill may or may not conflict with the other uses on the land around the Upland property, but it does appear to conflict with broader use of the region as a watershed that provides drinking water to the City of Campbell River and water for aquatic habitat in Cold Creek and Quinsam River. This conflict arises from the new or aggravated neighbourhood effects introduced by the presence of toxic substances (contained within the proposed landfill material) into a watershed where the hydrology will transport them into the water system. This could create a significant disruption to local residents and aquatic life.

The neighbourhood effects cannot be fully determined until sometime after the landfill is operational, however, given the proximity and hydrological connection of the landfill to drinking water and important fish habitat, it would be prudent to implement the precautionary principle and avoid any harm before it can occur.

More information is required to determine the proper balance between the current landfill operation and Upland's flexibility to alter that use.

Avoiding personal value judgements of whether landfills are appropriate or not, and maintaining a focus on the facts at hand, it would appear that the proposed landfill is significantly different from the existing landfill in both size and nature of the material accepted. Due to the location of the property within a watershed, the deposition, storage, and decomposition of a large quantity of toxic material at the site presents a threat to the drinking water and aquatic habitats. As such, there are serious concerns whether it should remain as a non-conforming use that can continue under the City of Campbell River *Zoning Bylaw, 2006.*

5.4 Conclusion

In conclusion, there appears to be a viable argument that the proposed use of the Upland property as a non-hazardous solid waste landfill is sufficiently different from the existing use as an inert municipal waste landfill and burn site such that the proposed use cannot continue to be a "non-conforming use". This argument can be made by applying the law set out under s.530 of the *Local Government Act* with assistance from the framework outlined in *Saint-Romuald.* The significant increase in volume of material to be disposed at the site, the drastically different nature of the material accepted at the site, and resulting risk of contamination to the groundwater and surrounding watershed, which supplies both drinking water and supports fish-bearing streams, are key factors that support this argument.

6. Another Potential Approach -- Municipal Regulation of Solid, Non-Hazardous Waste Landfill

In addition to zoning, there are avenues that the City of Campbell River can take to regulate the landfill and protect water quality, human health and the wellbeing of salmon. The following section will discuss means by which a municipality and the regional district could regulate the proposed landfill.

It is important to note that a municipal bylaw cannot directly or indirectly prohibit a solid, non-hazardous waste landfill through regulation for a few reasons. First, the bylaw would have no effect because it conflicts with the provincially enacted Operational Certificate. Section 37(1) of the *Environmental Management Act* clearly states that the Act will prevail over a municipal enactment where conflict exists:

> *Despite the Community Charter, [or] the Local Government Act…*
>
> > *(a) a bylaw of a municipality, other than a bylaw under section 30 [sewage in regional districts], … or 33 [disposal of municipal solid waste in other regional districts], or*
> > *(b) a permit, licence, approval or other document issued under the authority of a municipal bylaw*
>
> *that conflicts with this Act, the regulations, an approved waste management plan or a permit, approval or order under this Act is without effect to the extent of the conflict."*

Second, s.7(c) of the *Community Charter* prevents municipalities from using their "fundamental powers" to do things that their zoning and land use powers cannot. Thus, since the municipality cannot use a zoning bylaw to generally prohibit a solid, non-hazardous waste landfill (as discussed above), they would not be able to enact another bylaw under s.8 to achieve the same goal. Finally, although perhaps a moot point, a Minister is unlikely to approve such a bylaw.

However, it is equally important to note that a bylaw is not in conflict simply because it imposes a more stringent regulatory standard than provincial legislation – a party could comply with both laws by complying with the stricter requirement.

6.1 Various Potential Means of Regulation

A 2012 ELC report: *Mitigating Community Impacts of Mining Operations: Options for Local Governments* outlines a number of ways that local governments can use bylaws to regulate mining operations within their jurisdiction. The following sections were drawn from this report: Public Health, Removal and Disposal of Soil, Protection of the Natural Environment, Screening and Landscaping, Drainage Areas, and Development Permit Areas.

Under s.8(3) of the *Community Charter* municipalities have authority to "*regulate, prohibit and impose requirements* [by bylaw] *in relation to* …

> (*i) public health;*
> *(j) the protection of the natural environment; …*
> *(m) the removal of soil and the deposit of soil or other material".*

However, these areas of jurisdiction fall within the "sphere of concurrent authority" under s.9 of the *Community Charter*, meaning that the Province has an interest in, and can also regulate these matters.[96] As such, a council may not adopt a bylaw concerning public health, the protection of the natural environment, or soil removal or deposit unless the bylaw is in accordance with a regulation, in accordance with an agreement with the Minister, or approved by the Minster responsible.[97]

The *Local Government Act* also provides municipalities with authority to regulate landfills with respect to:

- Screening and landscaping (s.527)
- Drainage areas (s.306)
- Development Permit Areas (s.488)

6.1.1 Public Health

Municipalities are granted the fundamental power to *"by bylaw, regulate, prohibit and impose requirements in relation to… public health*".[98] However, before exercising this power they are required to seek ministerial approval, unless the bylaw is already authorized by regulation or by a prior agreement between the municipality and the minister responsible.[99]

The *Public Health Bylaws Regulation* clarifies that municipalities may pass bylaws in relation to "*the protection, promotion or preservation of the health of individuals*", or "*the maintenance of sanitary conditions in the municipality*", so long as they first consult with the regional health board or medical health officer responsible for public health matters within the municipality, and deposit a copy of the bylaw with the minister.[100]

Regional districts are granted authority to "*regulate and prohibit for the purposes of maintaining, promoting or preserving public health or maintaining sanitary conditions,* [and to] *undertake any other*

[96] *Community Charter*, *s.9(1)*
[97] *Community Charter*, s.9(3)
[98] *Community Charter*, s.8(3)(i)
[99] *Community Charter*, ss. 9(1)(a) and 9(3)
[100] *Public Health Bylaws Regulation*, s.2(1) and (2)

measures it considers necessary for those purposes."[101] These powers are subject to the same limitations and requirements as those of municipalities.[102]

The public health power has not been widely used. Several local governments have passed or contemplated passing smoking bans under this power,[103] and Richmond's Public Health Protection Bylaw No. 6989 regulates a range of health issues, including noise.[104] It is worth investigating what other applications these powers might have in regulating potential health issues arising from contaminated waste disposal operations

6.1.2 Protection of the Natural Environment

Municipalities are granted a specific power to "regulate, prohibit and impose requirements in relation to… protection of the natural environment".[105] However, this power falls under the "spheres of concurrent authority" described in s. 9 of the *Community Charter*, so municipalities are required to seek ministerial approval before using it, unless the bylaw is already authorized by regulation or by a prior agreement between the municipality and the Minister responsible.[106]

The *Spheres of Concurrent Jurisdiction - Environment and Wildlife Regulation* grants municipalities authority to "*regulate, prohibit and impose requirements in relation to polluting or obstructing, or impeding the flow of, a stream, creek, waterway, watercourse, waterworks, ditch, drain or sewer, whether or not it is located on private property*".[107] The use of the environmental protection power to protect water in this way has been pre-approved by regulation, so it would not require special permission from the Minister. Regional Districts do not possess an analogous watercourse protection power.[108] There are several waterway protection bylaws in the province – see the District of North Vancouver's Environmental Protection Bylaw.[109] Metchosin also has a comprehensive bylaw.[110]

The *Environment and Wildlife Regulation* allows municipalities to regulate with respect to feeding or attracting dangerous wildlife,[111] but does not expressly allow for any wildlife protection measures, such as for salmon. Any bylaws attempting to regulate wildlife for this purpose would require Ministerial approval. Regional Districts do not possess an analogous environmental protection power, and their animal powers do not appear to apply to wildlife.[112]

At this point in time, these powers to protect the environment do not appear to have been widely used, though some jurisdictions have invoked them in passing cosmetic pesticide regulations.[113]

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[101] *Local Government Act*, s.523(1)
[102] *Local Government Act*, s.523(2)
[103] City of Surrey *Public Health Smoking Protection Bylaw No. 16694*.
[104] It is not clear, however, that this bylaw was actually passed pursuant to the public health power.
[105] *Community Charter*, s.8(3)(j)
[106] *Community Charter*, s.9(1)(b) and (c), and s.9(3)
[107] *Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation*, B.C. Reg. 144/2004. ("*Environment and Wildlife Regulation*"), s. 2(1)(a)
[108] *Local Government Act*, s.318
[109] District of North Vancouver *Environmental Protection and Preservation Bylaw* 6515
[110] District of Metchosin *Discharge of Waste Bylaw* No.267
[111] *Environment and Wildlife Regulation*, s. 2(1)(c)
[112] *Local Government Act*, s.318
[113] District of Saanich, *Pesticide Bylaw*, 2010, No. 9054

Municipalities interested in protecting local wildlife and critical habitat from the effects of mining and other industrial operations may wish to investigate other potential uses of these powers by bylaw and seek approval from the provincial government. Wildlife and species at risk are already regulated at the provincial[114] and federal[115] levels, but there may be room for complementary measures on a local level.

6.1.3 Removal and Disposal of Soil

Municipalities may, "*…by bylaw, regulate, prohibit and impose requirements in relation to… the removal of soil and the deposit of soil or other material*."[116] They may also charge fees for obtaining a permit to carry on these activities, and/or charge fees for the actual removal or deposit of soil.[117]

As noted above, some types of soil deposit/removal provisions may require approval by the Minister. These include provisions that prohibit soil removal, or that prohibit soil deposit with reference to its quality or contamination, as these fall under the "spheres of concurrent jurisdiction" provisions in the *Community Charter*.

Soil deposit and removal bylaws offer many options for protecting local watercourses and groundwater, both generally and as part of the permitting process. They can be used to require proponents to gather essential hydrological data prior to beginning operations and can mandate the identification and implementation of mitigation measures. However, such bylaws may well specifically conflict with the provincial Operational Certificate in this case -- therefore we will not elaborate on this option at this time.

6.1.4 Screening and Landscaping

Under s.527 of the Local Government Act, local governments may *"by bylaw, require, set standards for and regulate the provision of screening or landscaping for one or more of the following purposes: …*

(b) preserving, protecting, restoring and enhancing the natural environment;

(c) *preventing hazardous conditions*."[118]

Such a bylaw may also "*set different requirements, standards and regulations for… (a) different zones; (b) different uses within a zone; [or] (c) different locations within a zone.*"[119]

These powers can be used expressly environmental protection purposes and might be imposed to require vegetative buffers around water features, and/or to require that natural vegetation be maintained in certain circumstances.

6.1.5 Drainage Control

Regional Districts are empowered to regulate, by bylaw, "*…the design and installation of drainage and sewerage works provided by persons other than the regional district*."[120] Municipalities possess

[114] *Wildlife Act*, [RSBC 1996] C. 488
[115] *Species At Risk Act*, S.C. 2002, c. 29.
[116] *Community Charter*, s.8(3)(m)
[117] *Community Charter*, s.195(1)
[118] *Local Government Act*, s.527(1)
[119] *Local Government Act*, s.527(2)
[120] *Local Government Act*, s.306(a)

similar powers.[121] It is possible that these powers could be used to prescribe specific drainage control requirements..

6.1.6 Development Permit Areas

Local Governments may designate Development Permit Areas (DPA) in their Official Community Plans for the purpose of protection of the natural environment, its ecosystems and biodiversity.[122] The local government can then require development permits before construction or land alteration can begin on land within the permit area,[123] and these permits can be used to impose various requirements, including designation of where development can occur, protection of specified natural features, construction of works to protect watercourses, and use of protective measures such as tree-planting to protect fish habitat and control drainage or erosion.[124]

- Specifying areas of land that must remain free of development, except in accordance with specified conditions;[125]
- Requiring specified natural features or areas to be preserved, protected, restored or enhanced;[126]
- Requiring works to be constructed to preserve, protect, restore or enhance specified natural features of the environment;[127]
- Requiring protection measures, including that vegetation or trees be planted or retained in order to preserve, protect, restore or enhance fish habitat or riparian areas, control drainage, or control erosion or protect banks.[128]

Development Approval Information Areas (DAIA) can also be used in conjunction with DPAs, to require an applicant for a development permit provide information, at their own expense, on the anticipated impact of a proposed activity on the natural environment.[129] This might operate as an alternative mechanism by which Upland could be required to provide information on local hydrology or the presence of species at risk and their critical habitat, and to commission an environmental impact assessment.

The Uplands property appears to be located in the Watershed Development Permit Area. This area is part of the lakes system from which Campbell River obtains its drinking water. The objective of this designation is to "*provide for long term water quality protection within the drinking watershed and provide protection for the natural environment, its ecosystems and biological diversity.*"[130]

The Development Guidelines include a number of provisions that seek to protect the well-being of the watershed including provisions that

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[121] *Community Charter*, s.69(a)
[122] *Local Government Act*, s.488(1)
[123] *Local Government Act*, s.489
[124] *Local Government Act*, s.491
[125] *Local Government Act*, s.491(1)(a)
[126] *Local Government Act*, s. 491(1)(b)
[127] *Local Government Act*, s.491(1)(d)
[128] *Local Government Act*, s.491(1)(e)
[129] *Local Government Act*, s.484
[130] City of Campbell River, *Official Community Plan Bylaw No. 3476, 2012*, Schedule A ("*CR-OCP*") at 239

- Require an Environmental Impact Assessment to define and evaluate the cumulative effects of a proposed development on the lakes and watercourses
- Manage and minimize stormwater run-off
- Require sediment drainage management plans
- Require a vegetation management plan
- Prohibit the use of chemical fertilizers or pesticides
- Prohibit the removal of trees or clearing of vegetation in some instances
- Regulate construction of docks
- Prohibit gravel extraction where there is less than 50m between the associated disturbance and the closest surface water body or where runoff and ground water drain into the watershed
- Ensure adequate financial security is provided prior to beginning construction
- Provide for location of sewage disposal
- Minimize alteration of natural drainage of the site
- Provide for fuel storage and refuelling and ensure adequate provision for containment of spills.[131]

Note that in this case some of the above provisions might contradict the Operational Certificate -- and such municipal requirements cannot contradict the provincial Certificate.

7. Conclusion

To conclude, the existing landfill is a "non-conforming use" that can exist on the Upland property, even though this use is not permitted by the City of Campbell River *Zoning Bylaw, 2006*. The proposed landfill might be considered to be a continuation of this "non-conforming use" because the basic nature of the existing and proposed uses is similar: disposal of solid waste. However, an argument could be made that the proposed use is not a non-conforming use if it is *"on a scale or to an extent or degree greater"* than the current landfill, as per s.530 of the *Local Government Act*. Further argument as to whether the proposed landfill can continue as a "non-conforming use" can be drawn from consideration of the factors set out in *Saint-Romuald*. The significant increase in volume of material to be disposed at the site, the expansion of the landfill footprint, the addition of leachate treatment ponds on the site, the drastically different nature of the material accepted at the site, and risk of contamination to the groundwater and surrounding watershed are key factors that support the argument that the proposed use is not an acceptable "non-conforming use".

If the proposed landfill is found not to be a "non-conforming use", then the *Zoning Bylaw, 2006* might prevent the operation of the proposed landfill, or at the very least, restrict it to the same scale as the current landfill. As per case law concerning the interaction between municipal land use bylaws and provincial enactments, this would not be seen to conflict with the Operational Certificate -- and the *Zoning Bylaw, 2006* would remain in effect.

If the proposed landfill is found to be a continuation of the "non-conforming use" or the City of Campbell River rezones the Upland site to Industrial Zone 4, which permits landfills, there are still means

[131] *CR-OCP* at 22-14 to 22-16

by which the City can regulate the landfill and protect the watershed. The municipality could do this using their authority to regulate in respect of public health, the protection of the natural environment and the removal or deposit of soil or other material under the *Community Charter* and to regulate landfills with respect to screening and landscaping, drainage areas, and Development Permit Areas under the *Local Government Act.*