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May 4, 2020

Via Email

Mayor Wiese and Council
Town of Qualicum Beach
#201 - 660 Primrose Street
Qualicum Beach, BC V9K 1S7

Attn: Mayor Wiese and Council

Dear Mayor Wiese and Council,

Re: Development Proposal at Lot C, Laburnum Road – WITH PREJUDICE

We represent the Qualicum Nature Preservation Society (the “Society”) in relation to the proposed development of Lot C, Laburnum Road in Qualicum Beach (the “Laburnum Lot C” or the “Lot”).

As you may be aware, Ballard Fine Homes Ltd (“Ballard”) has proposed to build two single-family homes on Laburnum Lot C (we refer to this as the “Development Proposal”). Laburnum Lot C falls within two of the Town’s Development Permit Areas (“DPAs”): its Ecological Greenway DPA and its Hazardous Lands DPA. As such, Ballard must obtain a development permit or be exempted from the requirement to obtain one.

Mr. Sales, the Director of Planning for the Town of Qualicum Beach, has informed us that the Development Proposal was exempted from the requirement to obtain a development permit; however, it is clear that the procedures followed in relation to this exemption were improper and incomplete. Based on the available information, it is the Society’s view that the Development Proposal does not meet the requirements for such an exemption in any case. Despite this, there has been extensive land clearing and excavation activities on the Lot, impacting this ecologically sensitive land.

In addition, exempting the Development Proposal from the development permit process is effectively ignoring an important power delegated to local governments to protect the environment.

As the Development Proposal did not meet the criteria for an exemption – or if it did, proper procedures were not followed – **any exemption that was granted must be rescinded, and the Development Proposal must go through the development permit process, and meet all requirements for approval, taking into account that this is an environmentally sensitive area. The land that has been altered to-date must be restored to its original condition and ecological functioning.**

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Given the failure to meet the legal requirements outlined above, our client's position is that **all work at Laburnum Lot C must cease immediately and not be resumed until all required permits, including a development permit, are granted.**

Finally, when the Development Proposal is reviewed under the development permit process, the Society reminds you of Laburnum Lot C's ecological importance: it is wetland, which is an invaluable ecosystem, and was included in the Ecological DPA's area for a reason. Any ecological value that was altered or destroyed by the land clearing, development and excavation activities, must not be discounted in the development permit review process.

These points are elaborated on below.

1. Development Proposal does not meet Criteria for Exemption

a. Ecological Greenway DPA

Laburnum Lot C is part of the Ecological Greenway DPA No. G5 – Little Qualicum/Laburnum (Aquatic Habitat Greenway).¹ Within Area G5, the DPA boundaries include "Aquatic Habitat Greenways that encompass all wetlands, which means all areas of land that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, fens, vernal pools and estuaries, plus wetland buffers, as recommended by a Registered Professional Biologist."²

The justification for establishing protections for the Ecological Greenway DPA is as follows:

Ecological Greenways are important habitats for fish, birds and wildlife, or are representative areas of native vegetation, ecosystems and biodiversity. As some of these areas contain bluffs rising from the Strait of Georgia, there is a need to ensure that development and other activities are carried out in accordance with best practices. The Development Permit designation on the property that contains the Ecological Greenway is necessary to allow development or redevelopment of adjacent properties in a manner that will conserve and restore fish and wildlife habitat and allow flexibility in the form of the development adjacent to the Greenway.³

The OCP makes clear that development permits issued for Aquatic Habitat Greenways "shall be in accordance with the following general guidelines: ...[they] shall remain free of development, except in accordance with the Ecological Greenway Development Permit Area Guidelines."⁴ Other than actions specifically *excluded* from requiring an Ecological Greenway Development Permit,

...no alteration of land or vegetation within the Aquatic Habitat or Upland Habitat Development Permit Areas shall be undertaken:

- a) without a permit issued pursuant to this bylaw; or
- b) contrary to the terms of a permit issued pursuant to this bylaw.

¹ *Town of Qualicum Beach Official Community Plan, Bylaw 800 ["Qualicum Beach OCP"]*, at Schedule 2.4 Ecological Development Permit Areas.

² *Qualicum Beach OCP*, see note 1, at 105.

³ *Qualicum Beach OCP*, see note 1, at 107.

⁴ *Qualicum Beach OCP*, see note 1, at 107. Emphasis added.



The aquatic habitat greenway or upland habitat greenway shall be conserved in a vegetated state, free of development of structures or paving.⁵

The only relevant item on the list of actions not requiring an Ecological Greenway Development Permit (we refer to these as “exemptions”) is:

The actions listed below will not require an Ecological Greenway Development Permit, provided they are designed and installed to resist erosion and avoid negative impacts on adjacent habitat areas.

.... Subdivision of land or construction of a building or other structure or the structural alteration of, or addition to, an existing building or other structure where the Subdivision Approving Officer or the Building Inspector, pursuant to Section 56 of the *Community Charter*,⁶ can require the owner of land to provide the Building Inspector or Subdivision Approving Officer with a report certified by a qualified professional that the land may be used safely for the use intended and that the activity complies with all the requirements of all applicable Development Permit Areas.⁷

In relation to the requirement by this exemption, in this case there are two reports that we are aware of that have been conducted in relation to Laburnum Lot C.

The first report is an assessment by Toth and Associates Environmental Services dated May 7, 2019 (the “Environmental Report”, also mentioned above). Though it conducted an environmental assessment of the site and suggests moving one of the homes in the Development Proposal so “there would be no intrusion below the natural boundary of the swampland required,” it also states that “It is our understanding that the Town of Qualicum Beach has not requested a Development Permit application for development of the proposed house sites and therefore we will not provide a discussion of Ecological Greenway DPA guidelines.”⁸ It was also signed by a professional biologist.

⁵ *Qualicum Beach OCP*, see note 1, at 110. Emphasis removed.

⁶ Section 56 of the *Community Charter* discusses the requirements for a geotechnical report: *Community Charter*, SBC 2003, c 26, at s 56:

Requirement for geotechnical report

56 (1) For the purposes of this section:

"construction" means

(a) the new construction of a building or other structure, or

(b) the structural alteration of or addition to an existing building or other structure,

but does not include the repair of an existing building or other structure;

"qualified professional" means

(a) a professional engineer, or

(b) a professional geoscientist

with experience or training in geotechnical study and geohazard assessments.

(2) If

(a) a bylaw regulating the construction of buildings or other structures is in effect, and

(b) a building inspector considers that construction would be on land that is subject to or is likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche,

the building inspector may require the owner of land to provide the building inspector with a report certified by a qualified professional that the land may be used safely for the use intended...

⁷ *Qualicum Beach OCP*, see note 1, at 109.

⁸ Letter from Toth and Associates Environmental Services to Darren Gaudreault (Ballard Find Homes Ltd), re: Assessment of



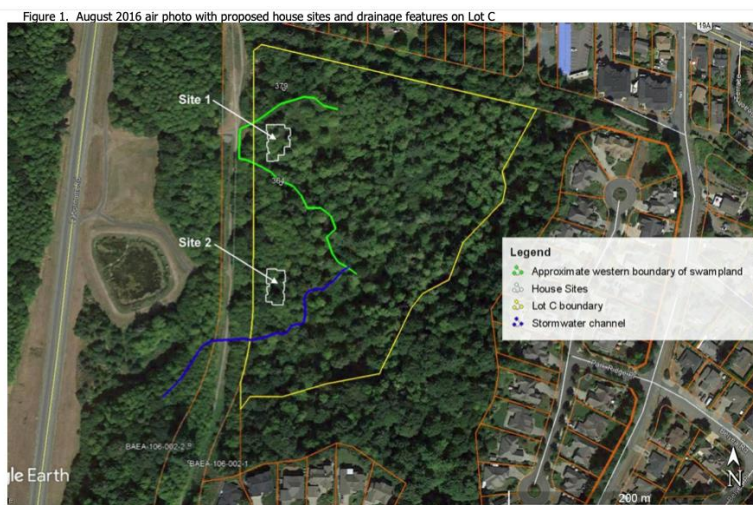
Section 56 of the *Community Charter* (referenced in the above exemption provision) sets out requirements for geotechnical reports and defines “qualified professional” as a registered engineer or registered geoscientist. **Therefore, the Environmental Report does not meet the requirements of this exemption.**

The second report is a “Limited Geotechnical Assessment” by CORE Geotechnical Inc. dated September 30, 2019 (the “Limited Geotechnical Report”). It is signed by a Professional Engineer. However, the area to which it relates does not correspond with the proposed locations of the Development Proposal (noting, however, that the exact home sites are unclear). The following map of the “site location” is included in the Limited Geotechnical Report:



Figure 1: Site Location relative to local landmarks. The site is shaded in grey. North is towards the top of the page. Do not scale.

If this is compared with the map that is included in the Environmental Report, it clearly relates to a different area than where the Development Proposal is planned to occur:



Ballard has listed Laburnum Lot C for sale (as “331 Seacroft Rd”). If the Limited Geotechnical Report’s “site location” is compared with the map that is included with the property listing on Realtor.ca for 331 Seacroft Rd (printed April 3,

proposed house sites on Lot C, dated 7 May 2019 [“*Environmental Report*”], at 3. [Emphasis added]

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2020 and rotated to align with the orientation of the previous two maps), it is also clear that it is in a different area than where Ballard intends for the Development Proposal's homes to be located:



Despite where the Limited Geotechnical Report map included the “site location,” it appears that CORE Geotechnical drilled four excavated test pits alongside the far left boundary of Lot C (outside of the shaded area). However, the Limited Geotechnical Report states that it did not know where the home sites would be: “We understand that the proposed development comprises residential buildings. No further details are known at this stage.”⁹ It concludes that “[i]t is our professional opinion that the site is safe for the use intended”, with the caveat that “[s]hould a different building be proposed than that for which this report was prepared, or if a building is to be located elsewhere on the lot, then further geotechnical input may be required.”¹⁰

Clearly the area that was assessed by the Limited Geotechnical Report does not correspond with the location where the Developer intends to build the two homes that comprise the Development Proposal. **Therefore, the Limited Geotechnical Report does not certify “that the land may be used safely for the use intended” and cannot be used as a basis on which to grant the exemption referenced above.** The Society submits that the lack of details the Limited Geotechnical Report’s author received and included in relation to the Development Proposal renders the report insufficient to certify that the activity in question meets the requirements of the DPA.

As a result, the Environmental Report and the Limited Geotechnical Report do not meet the requirements of the exemption, including not meeting the requirements of section 56 of the *Community Charter*.

b. Hazardous Lands DPA

Laburnum Lot C is also part of Hazardous Lands DPA H1, which is applicable to flood-prone lands and coastal properties that are susceptible to storm damage.

The justification for establishing protections for the Hazardous Lands Greenway DPA is as follows: “Lands including or susceptible to natural hazards may experience erosion, degradation or mass movement and require great care and

⁹ Letter from CORE Geotechnical Inc. to Ballard Fine Homes Ltd. Re: Limited Geotechnical Assessment, dated 30 September 2019 [“Limited Geotechnical Report”], at 5.

¹⁰ Limited Geotechnical Report, see note 9, at 7.



consideration if development and/or disturbance are to occur.”¹¹

Guidelines for Hazardous Lands DPAs include:

1. Development within a Hazardous Land Development Permit Area will generally only be considered where historical subdivision or construction of structures has occurred in the area prior to the designation of Hazardous Lands Development Permit Areas and

- i. The Hazardous Lands Development Permit Area takes up so much of a lot that it makes the lot undevelopable for the use permitted under its existing zoning; or
- ii. Due to topographic, natural hazard, or other environmental constraints on the lot, there is no acceptable building site outside the Hazardous Lands Development Permit Area; or
- iii. All opportunities to relax other development requirements (such as the minimum setback requirements from lot lines) have been exhausted.¹²

Importantly, “[t]he onus lies with the applicant to demonstrate that encroaching into a Hazardous Lands Development Permit Area is necessary, due to the above circumstances, in order to allow the use of the site as otherwise permitted under the existing zoning.”¹³ In this case, neither subdivision nor historical construction of structures has occurred on Laburnum Lot C.

The same exemption options that apply to the Ecological Greenway DPA’s requirement to obtain a development permit apply to Hazardous Lands DPAs’ requirement to obtain a development permit, so the only exemption that may apply to Laburnum Lot C is:

Subdivision of land or construction of a building or other structure or the structural alteration of, or addition to, an existing building or other structure where the Subdivision Approving Officer or the Building Inspector, pursuant to Section 56 of the *Community Charter*, can require the owner of land to provide the Building Inspector or Subdivision Approving Officer with a report certified by a qualified professional that the land may be used safely for the use intended.¹⁴

As outlined above, neither the Environmental Report nor the Geotechnical Report fulfil the requirements of this exemption.

2. Exemption was not Properly Granted

Even if the Development Proposal did qualify for an exemption to the requirements of the Ecological Greenway DPA or the Hazardous Lands DPA, it appears this decision was made improperly. Based on the information that has been made available to us, it appears the decision was not explicitly recorded. This was confirmed on a phone call with Mr. Sales on April 9, 2020 in which he stated that he believed the exemption was granted by “staff” (when pressed, he said it must have been the Building Inspector), and he did not know by what medium it was granted – and that it might have been granted verbally. He did not provide a date on which the decision was made. Based on the statement in the

¹¹ *Qualicum Beach OCP*, see note 1, at 120.

¹² *Qualicum Beach OCP*, see note 1, at 120. Emphasis added.

¹³ *Qualicum Beach OCP*, see note 1, at 120.

¹⁴ *Qualicum Beach OCP*, see note 1, at 123.



Environmental Report, dated May 7, 2019 and described above (“It is our understanding that the Town of Qualicum Beach has not requested a Development Permit application for development of the proposed house sites and therefore we will not provide a discussion of Ecological Greenway DPA guidelines”), we assume the decision, if any, regarding the exemption was made prior to May 7, 2019.

In an email to Mr. Sales on April 10, 2020, our office requested records of the decision to grant an exemption. Such documents have not been provided. Prior to this, on March 13, 2020, a director of the Society, Ezra Morse, also requested these documents under the provincial freedom of information legislation. However, the deadline for the production of these documents has been extended to June 10, 2020.

3. Granting Exemption would be Ignoring Town’s Delegated Power to Protect the Environment

Local governments are provided important powers to protect the environment in their empowering legislation. One such power is the ability to impose DPAs for the “protection of the natural environment, its ecosystems and biological diversity” and “protection of development from hazardous conditions.”¹⁵

Mr. Sales said in an email to a member of the Arrowsmith Parks and Land-Use Council on February 21, 2020, in relation to the Development Proposal: “The owner’s only option now is to build what’s currently permitted in the zoning [two single-family homes], and the Town cannot legally refuse that.”¹⁶ However, while the Town cannot vary density or use (which is dictated by its zoning bylaw) in a development permit, it is still properly within its jurisdiction to require the developer to go through the development permit process, as laid out in the OCP, before granting a development permit. It then can and should include conditions in the development permit that protect the values for which the DPAs were initially implemented.

The requirements of the OCP in relation to DPAs were put in place for a reason, with sound policy considerations. The DPA process must be used in the way it was intended: to put parameters on development that provide for the protection of the ecosystem and protection from hazardous conditions. **The alleged exemption should be rescinded and the Development Proposal made to undergo the full development permit process, with proper consideration of its ecological importance and not discounting the ecological value that has been destroyed by initial land clearing activities.**

4. Area is Ecologically Important

Laburnum Lot C is a wetland, which is an invaluable ecosystem:

Wetlands are helping minimize or even remediate environmental problems. As part of nature's filtration system wetlands absorb and filter sediments, pollutants, and excess nutrients; recharge groundwater; maintain stream flows; control runoff; store flood waters; reduce erosion; stabilize shorelines; and help regulate atmospheric gases and climate cycles.¹⁷

Indeed, “[t]he more scientists come to comprehend wetland functions, the more valuable the benefits they provide

¹⁵ *Local Government Act*, RSBC 2015, c 1, at s 488(1)(a),(b).

¹⁶ Email correspondence from Luke Sales, Town of Qualicum Beach, to Michael Jessen, dated 21 February 2020.

¹⁷ British Columbia, “Wetlands in BC” (accessed 4 May 2020), online: <<https://www2.gov.bc.ca/gov/content/environment/air-land-water/water/water-planning-strategies/wetlands-in-bc>> [“Wetlands webpage”].



society are understood to be.”¹⁸

And yet wetlands now only comprise 5% of B.C.’s land base,¹⁹ and 70% of wetlands in the Victoria region have been destroyed.²⁰

In addition, Laburnum Lot C is included in the provincial Sensitive Ecosystem Inventory (SEI),²¹ as an older second growth forest. The area is in proximity to a bald eagle nest, barred owls and is used by black-tailed deer.²² Based on our client’s observations, it also is used by Northern red-legged frogs, which is a provincially blue-listed species.²³

The Town’s OCP is supportive of preserving ecosystems and “[i]n accordance with the *Local Government Act*, all bylaws enacted, permits issued, and works undertaken must be consistent with the policies contained in this Plan.”²⁴ For example, the OCP states: “[t]he Town shall consider the importance of Coastal Douglas-fir ecosystems and associated wildlife and vegetation when considering proposed changes in land use or designation.”²⁵ The Coastal Douglas-fir ecosystem includes wetlands.²⁶

The OCP also describes requiring development proposals in DPAs to go through a “rigorous permitting procedure.”²⁷ The procedure employed in this case appears to be anything but rigorous.

The Town even relies on its Ecological Greenway DPA and Hazardous Lands DPA to show compliance with the Regional District of Nanaimo’s Regional Growth Strategy²⁸ – so it is particularly egregious that it appears to be ignoring or side-stepping the requirements of these DPAs in practice.

If and when the Proposed Development is made to undergo the development permitting process, the Aquatic Habitat Greenway Guidelines (included in the OCP) state that some features should be maintained under the terms of the

¹⁸ Wetland Stewardship Partnership, *A Wetland Action Plan for British Columbia* (March 2010), at 8, online:

<https://bcwetlands.ca/files.wordpress.com/2016/11/bcwetlandactionplan_wsp_2010.pdf> [*“WSP Action Plan”*].

¹⁹ *Wetlands webpage*, see note 17.

²⁰ *WSP Action Plan*, see note 18, at 15.

²¹ Environment Canada, “Sensitive Ecosystems Inventory of East Vancouver Island and Gulf Islands: Disturbance Mapping and Re-evaluation of Major Riparian Corridors” (March 2004), online:

<http://a100.gov.bc.ca/appsdata/acat/documents/r2124/sei_9914_map92F-038_1112906095271_254df925e1ff482d9354e77bf6f1f9fc.pdf>.

²² *Environmental Report*, see note 8, at 2-3.

²³ This indicates that it is of special concern. “Special Concern have characteristics that make them particularly sensitive or vulnerable to human activities or natural events”: BC Species and Ecosystem Explorer (accessed 4 May 2020), online:

<<http://a100.gov.bc.ca/pub/eswp/search.do>>.

²⁴ *Qualicum Beach OCP*, see note 1, at 80.

²⁵ *Qualicum Beach OCP*, see note 1, at 63.

²⁶ Coastal Douglas-fir & Associated Ecosystems Conservation Partnership, “What is the Coastal Douglas-fir Biogeoclimatic Zone?” (accessed 4 May 2020), online: <<http://www.cdfcp.ca/index.php/about/what-is-the-cdf>>.

²⁷ *Qualicum Beach OCP*, see note 1, at 61, in a section titled “Development Constraints”:

Numerous locations in Qualicum Beach are subject to development constraints due to unstable ground conditions, flooding, environmental sensitivity or other conditions. As stated in the Sustainability Plan, “there is a limit to the amount of human activity that can be supported by our ecosystems”. Where known, these areas are identified by Development Permit Areas, so that any consideration of construction or development will be subject to a rigorous permitting procedure.

²⁸ The OCP’s Regional Context Statement identifies inconsistencies between the OCP and the Regional District of Nanaimo’s Regional Growth Strategy: *Qualicum Beach OCP*, see note 1, at Appendix B.²⁸



development permit, including: all watercourses; vegetation overhanging the water; dense vegetation in riparian zones; sloping terrain or ravines; sources of large organic debris; vegetation variety in the riparian zone; and veteran and standing dead wildlife trees.²⁹ Of note are “sloping terrain or ravines, which form the banks of the watercourse. These areas are often highly susceptible to erosion or landslip if their vegetation is removed. Setbacks from the top of bank are established as a part of the watercourse leave area to provide protection for the vegetation that helps keep these steep slopes stable.”³⁰ The Guidelines go on to say that “Watercourse Leave Areas... are wetlands that are important for many species, including amphibians and reptiles.”³¹

5. Land Clearing must not be Rewarded

As mentioned, there has been extensive land clearing activities that have taken place on the Lot in the past three months, before either a development permit or a building permit was granted. The Society has observed the following:

- A large trench of natural soil was removed from the trail area on Seacroft Road and piled to the east onto Laburnum Lot C;
- Sewer and water lines were installed in a trench along Seacroft Road;
- The trench on Seacroft Road was filled with large gravel fill that was brought onto the Lot;
- About an acre of homesite was cleared to the southwest of Lot C (this included clearing, grubbing and grading) – see photos of the site before, and the site after land clearing, below;
- There has been preliminary clearing in the northwest corner of Laburnum Lot C;
- The soil removed from Seacroft Road, which was piled in a long hill on Laburnum Lot C along the road, was subsequently smoothed out over the southern clearing on Laburnum Lot C, creating a gradual mound. There is currently a difference of about 3-4 feet between Seacroft Road and Laburnum Lot C, when they were previously at the same level.

²⁹ *Qualicum Beach OCP*, see note 1, at 111.

³⁰ *Qualicum Beach OCP*, see note 1, at 111.

³¹ *Qualicum Beach OCP*, see note 1, at 111.



Southwest of Laburnum Lot C, before clearing: photo taken by Pat Jacobson, February 1, 2020



Southwest of Laburnum Lot C, after clearing: photo taken by Ezra Morse, February 24, 2020

These activities are clearly in furtherance of the type of development that is included in the Development Proposal. For these activities to proceed when there has been no formal exemption from the requirement to obtain a development permit – and no building permit issued – is against both the spirit and letter of the OCP and the Town's Building Bylaw. The OCP's Ecological Greenway DPA Guidelines state that aquatic habitat greenways "shall be

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conserved in a vegetated state”³² and the Town’s Building Bylaw states that no excavation or other work related to construction may be done until a building permit has been issued.³³

The fact that some of the ecological value of the Lot has been altered or destroyed by these land clearing activities **must not result in a less rigorous development review process or fewer or less stringent conditions on any development permit that is eventually issued.** Condoning or rewarding this type of activity could set a problematic precedent.

6. Conclusion

The Proposed Development’s exemption from the requirement to obtain a development permit was granted improperly and does not appear to meet the requirements of the Ecological Greenway DPA or Hazardous Lands DPA in any case. The exemption must be rescinded and any development that is proposed on Laburnum Lot C be made to undergo a fulsome development permit review process, in the “rigorous” fashion that is contemplated by the OCP. The review process must give due consideration to the environmentally sensitive nature of the area and the fact that extensive land clearing was done prior to any permits being issued.

If and when the exemption is rescinded, the Society asks that it be permitted to make submissions to Council on any development that is proposed on Laburnum Lot C. The DPAs exist to ensure development proceeds in a way that is protective of the values espoused by the DPA, as outlined in the OCP – this is achieved through conditions in a development permit.

Last, given the above, any land clearing on Laburnum Lot C must cease immediately and must not proceed until a development permit is granted, if any.

We understand that Laburnum Lot C has been successfully protected by previous Councils, as no development has been approved for the past 20 years. The Society urges you not to undo these decades of conservation.

We trust you will give this your immediate attention and look forward to an early reply. Should you have questions or wish to discuss this matter further in a video or audio call please contact the undersigned.

Yours Truly,

ARBUTUS LAW GROUP LLP

Erin Gray
Barrister and Solicitor

c.c.: Qualicum Nature Preservation Society; Luke Sales, Director of Planning, Town of Qualicum Beach; Mark Eshpeter, Building Inspector, Town of Qualicum Beach; Daniel Sailland, Chief Administrative Officer, Town of Qualicum Beach

³² *Qualicum Beach OCP*, see note 1, at 110.

³³ Town of Qualicum Beach, *Building Bylaw, Bylaw No. 643*, at s. 5.2.