

July 14, 2009

Mayor Dean Fortin & Members of Council  
City of Victoria  
#1 Centennial Square  
Victoria, BC V8W 1P6

Honourable Mayor Dean Fortin and Members of Council for the City of Victoria,

**Re: 1322 Rockland Avenue – Zoning and Land Use**

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We are writing to you on behalf of the Rockland Neighbourhood Association Board of Directors. The Board believes that the property under consideration can, under the current zoning, be used for supportive housing consistent with pre-1985 use. However, the type of supportive housing being proposed represents a dramatic change in use, a violation of the zoning and a substantial change to the neighbourhood. In short, the proposed use would be illegal.

The Board would urge the Mayor and Council to restrict the use of the property to that specifically authorized by the zoning. Alternatively, if a change in use and density is to take place, please recognize that it is a change in zoning and embark on a process of public hearings with all that those entail to allow input by the members of the Rockland Neighbourhood Association and by the citizens of the Rockland community. The authorization of the use being considered would represent an unnecessary and inappropriate disregard for the history for the property and how it is integrated into the Rockland neighbourhood.

The City of Victoria Council and all of the related Municipal legislation which guides the councillors have followed a long tradition of following procedures which allow substantial public input when there are to be dramatic changes to use, density or the character of a neighbourhood. A dramatic change in use on such an important historic site is not the time nor the place to abandon the appropriate public process.

We will explain our concerns and how the illegality of the current proposal arises from a reading of the bylaw informed by the history of the property.

**Current Proposal**

We understand from the information provided at the May 13, 2009 meeting that the proposal was a 35-bed facility with 23 in supportive housing and an additional 12 that required nursing staff support. However, we were advised

June 2, 2009 by Victoria Planning, that if the user decided to occupy the maximum permitted by the building code, two residents per bedroom, a total of 70 would be allowed.

Alan Campbell, VIHA Director of Mental Health and Addiction Services, advised May 13, 2009 that the clients' main issue was mental illness and that addictions were a secondary issue.

### **Current Zoning and Misconceptions**

The suggestion has been made at several meetings that the current zoning is institutional. That is simply not correct. However, given the history of the property and the unique zoning enacted exclusively for this property, such a misapprehension is completely understandable. This unique zoning which is an R-N-2 Zone appears by its wording to have been adopted in approximately 1985. We are admittedly making that assumption from reading the zoning and seeing in it a reference to an anticipated expansion of the building contemplated to be made after 1985.

### **R-N-2 is a Variant of Residential Not Institutional**

The R-N-2 Zone – Rockland Residential Nursing District is based on the Rockland single family dwelling district R1-A Zone and permits all of the uses permitted in the R1-A Zone. In addition, the zoning makes applicable all the R1-A zone regulations. However, the property is not zoned for a general nursing home use as in a Nursing Regulatory Zone and, in fact, it does not permit unrestricted nursing home use.

As you know, Schedule A defines a nursing home as follows:

Nursing Home" means a facility where regular care and supervision is given by a health care professional as well as assistance with the performance of the personal functions and activities necessary for daily living for persons such as the aged or chronically ill who are unable to perform them efficiently for themselves.

This is a very limited class of treatment. Furthermore, people such as the aged or those who are chronically ill could be expected to have extremely restricted mobility and activities. Consequently, they would have an extremely low impact on the quality and character of the neighbourhood and there is no size limit incorporated in the general definition.

### **Rest Home Contrasted**

The R1-A Zone also permits, by incorporating the R1-B Zone uses, Rest Home - Class B, but those homes specifically exclude facilities in which persons are treated for alcohol or drug addiction. Also Rest Home - Class B has an upper limit of 20 persons. The full definition from Schedule A is as follows:

Rest Home - Class B" means a facility in which food, lodging and care are provided with or without charge to more than two but not more than twenty persons, other than members of the operator's family, who, on account of age, infirmity or their physical, mental or psychiatric condition, are given

personal care, but does not include a facility in which persons are detained as prisoners pursuant to judicial process, or a facility in which persons are treated for alcohol or drug addiction.

At the time the Nursing Home and Rest Home - Class B distinctions were drawn, most people with mental or psychiatric conditions were housed in hospitals or institutions. Nevertheless, the Nursing Home definition can be contrasted with the Rest Home - Class B definition because the former simply refers to "the aged or chronically ill" but the range of persons covered by Rest Home - Class B is expanded to "persons . . . who on account of age, infirmity or their physical, mental or psychiatric condition . . . are given personal care . . . but does not include a facility . . . in which persons are treated for alcohol or drug addiction."

Clearly, the Rest Home - Class B category is of specifically limited size and excludes facilities where there is treatment for alcohol or drug addiction, recognizing that such treatment facilities and their occupants do present a differing degree of risk and impact on the neighbourhood. To pretend that the persons who would be staying at the facility would not be treated for their alcohol and drug addiction would be to deny the reality of the situation. To ignore the size limit would be to disregard a limit imposed by the zoning when the range of treatments is expanded at all beyond mere age and infirmity.

#### **Further Limitations of Nursing Home Use to Pre-1985 Actual Use**

However, the zoning on this site (full copy enclosed) is limited by more than the mere limitation to "nursing home". The permitted use under R-N-2 (which is this site's unique zoning) is "nursing homes subject to the following regulations; (i) the uses carried on in a building constructed prior to 1985;". Clearly this zoning was passed in 1985 to ratify the use then being carried on by allowing the particular type of nursing home then being operated and which was expected to be operated on this site in perpetuity.

Essentially, the zoning was passed to allow what was then a non-conforming use and perhaps to allow a slight expansion of the building contemplated to be constructed after 1985. To understand what the limited nursing home use was, a small amount of history is required.

#### **History of Use – Importance of Historical Site**

This house was the most expensive house built in the City of Victoria in 1894 at a cost of \$15,000.00. At the time, that represented approximately 1/10th of the cost of the original part of the new B.C. legislature building. It was built for Mr. Hewitt Bostock who started the Province newspaper, was elected a federal Liberal MP for Yale Cariboo in 1896 and was appointed to the Senate in 1904 and was named as Speaker and held that position until his death in 1930.

The property was also owned from 1901 to 1911 by James Douglas Prentice, the MLA for Lillooet and later provincial Minister of Finance.

In 1912, the estate was sold to the Agnew family and it was inherited by Kathleen Agnew by 1922 when her father died. She continued to live in the house with five servants through the next 30 years. However, in 1950 she gave

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the house to the Women's Auxiliary of the Diocesan Board of the Anglican Church for use as a home for aging Anglican women. She refused to allow the home to be named after her and so it was named the Caroline Macklem Home in honour of another generous Anglican woman who had set up a trust fund for the care of the elderly. The Caroline Macklem Home was expected to operate in perpetuity. This unique zoning was granted with that in mind.

Unfortunately, in 1998 the Anglican Church Women Dioceses of British Columbia, who operated the Caroline Macklem Home for 50 years as a nursing home for elderly women, were forced to close their facility.

### **Reading the Zoning Bylaw, Giving All Provisions Legal Effect**

A proper reading of the R-N-2 Zone definition and the restriction on the nursing home use must be read with that history in mind. The special nursing home use permitted was "nursing homes, subject to the following regulations; (i) the uses carried on in a building constructed prior to 1985;"

If unlimited nursing home use had been intended, then one particular thing is certain and another is possible. It is possible that if unlimited nursing home use had been intended, the property would not have been left with R1-A Rockland Residential uses and regulations but would have been converted to some institutional zoning. It was not. It was left with residual residential uses. However, what is certain is that if unlimited nursing home use had been intended there would have been no need for the words restricting it to "the uses carried on in a building constructed prior to 1985".

Clearly, those provisions of the zoning bylaw must be given meaning and must have been intended to serve a purpose. Their purpose was to limit the nursing home use to the actual use that was being carried on. At a minimum, that limited use would be a restriction to caring for the elderly. If it would not be deemed offensive to our current human rights legislation, it might also be deemed to be a limitation to caring for elderly females who were neither mentally ill nor recovering from substance or alcohol abuse.

The Victoria Planning memo circulated to the Association on June 2nd attempts to gloss over this restriction by rewording it. That memo says the first regulation limiting nursing home use is "this use must be in a building that was constructed prior to 1985". However, the bylaw actually says for permitted uses: "nursing homes, subject to the following regulations; (i) the uses carried on in a building constructed prior to 1985" (underlining added). There is a world of difference between the planning department interpretation and the actual wording. "Uses" does not mean the same as "use is". We bring this to Council's attention so that it will have the correct legal wording upon which to reconsider Planning's mistaken and misleading analysis.

What is absolutely clear is that an unlimited nursing home use was not enacted. The R-N-2 Zoning required that the nursing home use would have to be the pre-existing use. A court must give legal effect to the limitation of nursing home uses contained in the bylaw by interpreting the bylaw in light of the factual context in which it was passed; a wise and prudent council should do no less.

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### **Disregard of Density**

The Board and, no doubt, the City Councillors recognize that density is a factor in use. Many prescribed uses are distinguished from other uses by a combination of the intensity of activity and the size of the operation or the number of occupants. The wording of this bylaw does not expressly state either the type of nursing home nor the density of use allowed. It simply incorporates the historical use and limits the use to pre-1985 use. We submit that reference to the pre-existing use includes an implied reference both to the character and the size of the existing operation.

At the time of enactment of the R-N-2 Zone, the use carried on was a use of nursing home for elderly female patrons with 28 single-bed units.

Our understanding is that the building has been renovated or is in the process of being renovated for, or the proposal is for 35 units on the lower two floors and, in fact, there is a third floor remaining for development. While an argument could be made that if this were zoned for an unlimited nursing home use, there would not be any restriction on density or size of the operation, in this particular case there is a reasonable argument to be made that nursing home use is limited to the use carried on in a building constructed prior to 1985.

A ramping-up of that intensity to 35 units represents a 25 per cent increase in density. If we assume that the user might choose to occupy to the full extent of the building code under their proposal, that would increase to 70 occupants. That would represent an increase of intensity of use to 250 per cent of the prior historical use.

If we assume the third floor will be developed with the same number of units per floor, the total density will be 187 per cent of the historical use if the bedrooms are only single occupancy. If the user goes to double occupancy bedrooms, the density will be 374 per cent of historical use. We would submit that would be a violation of not only the letter of this special zoning put into place to authorize the pre-existing use but would be a violation of the intent of the exception made for Caroline Macklem Home.

### **Conclusion**

Many years ago, the City Council of Victoria passed this special zoning for this special property with the intention of authorizing the pre-existing use by describing it as a form of residential nursing home restricted to the pre-existing use. We would submit that no other form or density of nursing home use is permitted. If a rest home use is desired to allow for treatment of psychiatric problems, then the size limitations of Rest Home - Class B must be adhered to. If the proposal is to allow for mental or psychiatric treatment and drug or alcohol treatment and exceed 20 persons, a rezoning is required.

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We would respectfully submit that the current proposal fails to fit within either the site specific zoning or the residual classes of zoning.

Yours truly,

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per:



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- cc: Wei Tu  
Deborah Day, Manager of City Planning  
Dave Clark, Secretary of Rockland Neighbourhood Association  
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Enclosure(s): R-N-2 Zoning

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