

District of Lantzville

REPORT TO COUNCIL

CLOSED (In-Camera) Portion of Special Council Meeting Agenda Item

September 12, 2016

File: 2280.20.9

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AUTHOR: Brad McRae, Chief Administrative Officer

SUBJECT: Clarification on the Lantzville/Nanaimo Water Agreement:
Defining Upper and Lower Lantzville

JUSTIFICATION FOR IN CAMERA MEETING (SECTION 90 EXPLANATION)

This report qualifies for in-camera under Section 90(g) (*litigation or potential litigation*) as well as under solicitor-client privilege. By releasing this information, Council will waive that privilege.

RECOMMENDATION

This report is for information purposes.

ATTACHMENT(S)

1. Legal opinion from Fulton and Co. (25 Jul 2016) regarding the District of Lantzville/City of Nanaimo Water Agreement.

PURPOSE

The purpose of this report is to provide Council with clarity in regarding whether "Upper Lantzville" and "Lower Lantzville" are the same as "Upper Pressure Zone" and "Lower Pressure Zone".

BACKGROUND

In reviewing the current Lantzville/Nanaimo Water Agreement, some clarity was needed in understanding as to whether the terminology referenced within the Agreement (Upper Lantzville/Lower Lantzville) was parallel to Upper Pressure Zone and Lower Pressure Zone, or whether the interpretation could be derived from the location to Highway 19 (common view).

DISCUSSION

Council directed staff to request a legal opinion to provide some clarity to the definitions of "Upper Lantzville" and "Lower Lantzville". Staff requested a legal opinion from Fulton and Co. to give an interpretation of the Agreement due to the fact there are no defining references within the Agreement (Attachment #1).

After reviewing the provided legal opinion, the findings are best summed up in Point #23:

“...there is support within the Agreement for differing interpretations, and it is difficult to conclude which interpretation is to be preferred. However, regardless of the precise meaning of Upper and Lower Lantzville as the expressions appear in the Agreement, in our view Lantzville would be justified in proceeding with the connection of the Upper Pressure Zone as proposed, on the basis that the Agreement specifically contemplates initially connecting 225 premises, which is the number of premises within the existing high pressure zone”.

However, this position is caveated by the following statement:

“... there is a risk that Nanaimo could advance the interpretation that Lantzville is only entitled to initially supply water to the area south of the Highway, and on that basis stop the flow of water to Lantzville”.

Legal Counsel’s opinion, if Council is concerned about potential risk, is to:

1. Seek an Amendment to clarify the meaning of Upper Lantzville and Lower Lantzville;
2. Seek Nanaimo’s agreement prior to connecting to the water systems as proposed;
3. In any event, do not connect more than 225 premises upon the initial connection, and do not connect more than 436 existing premises (plus 50 additional connections per year), regardless of where such premises are located.

Council now has the provided legal opinion laying out the parameters of the perceived definitions. Staff concurs with the comments in Point #23 of the opinion and does agree that, as with any Agreement, there is some risk associated.

Staff has met with representatives of the City of Nanaimo (City Manager and Manager, Water Resources) and has confirmed that both parties believe “Upper Lantzville” and “Lower Lantzville” to mean “Upper Pressure Zone” and “Lower Pressure Zone”.

FINANCIAL IMPLICATIONS

None.

POLICY IMPLICATIONS

None.

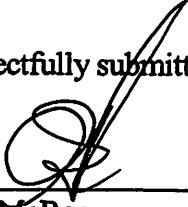
LEGAL IMPLICATIONS

As provided above.

SUMMARY


The provided report gives Council information to consider should they choose to move forward on the Lantzville/Nanaimo Water Agreement.

Respectfully submitted,



Brad McRae
Chief Administrative Officer
District of Lantzville

Reviewed By:

Chief Administrative Officer		Director of Financial Services		Director of Public Works		Director of Corporate Administration	
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In reply refer to

Devin K. Buchanan
File: 71009-2

Direct Line: (250) 851-2326
Email: dbuchanan@fultonco.com

July 25, 2016

VIA EMAIL – brad@lantzville.ca

District of Lantzville
PO Box 100, 7192 Lantzville Road
Lantzville, BC V0R 2H0

Attention: Brad McRae

Dear Sir:

Re: District of Lantzville/City of Nanaimo Water Agreement

THIS DOCUMENT IS PROTECTED BY SOLICITOR-CLIENT PRIVILEGE
Please do not disclose this document without prior consultation with legal counsel.

You have asked for our opinion regarding whether the parties to the Lantzville/Nanaimo Water Agreement (the “Agreement”) intended that the expressions “Upper Lantzville Area” and “Lower Lantzville Area”, as those expressions are used in the Agreement, are synonymous with the Upper Pressure Zone and the Lower Pressure Zone, as outlined in Schedule “A” of the Agreement, or whether those expressions refer to the areas within Lantzville that are separated by Highway 19 (the “Highway”).

A. Background Facts

1. We understand the following to be true. If otherwise, please advise us, as our opinion may change:

- a. Upper Lantzville and Lower Lantzville are generally understood by area residents to be separated by the Highway, with Upper Lantzville being located south or above the Highway and Lower Lantzville being located north or below the Highway.
- b. The Upper and Lower Pressure Zones as identified in Schedule “A” to the Agreement are not co-extensive with the areas generally understood to be Upper and Lower Lantzville, and instead a portion of the Upper Pressure Zone is located within Lower Lantzville (i.e. north of the Highway).
- c. Lantzville proposes to connect its water system to Nanaimo’s water system pursuant to the Agreement, and to begin supplying water to 225 premises located within the existing high pressure zone, which is located partly within each of those areas known by residents as

Lower Lantzville and Upper Lantzville. Before it does so, Lantzville would like some assurance that this proposal would not be in breach of the Agreement.

2. We also understand that Nanaimo may have reservations about the Agreement, and therefore may scrutinize Lantzville's conduct pursuant to the Agreement, possibly with a view to terminating the Agreement.

B. Analysis

3. As a starting point, we note that although "Upper Lantzville Area" and "Lower Lantzville Area" are defined in the Agreement as meaning that part of Lantzville identified as such on Schedule "C", Schedule "C" does not in fact identify these areas; therefore, the meaning of these expressions must be determined on the basis of the wording and context of the Agreement as a whole.
4. On one hand, paragraph 4.1 supports the interpretation that the expressions Upper Lantzville, "Upper Lantzville Area", and Upper Pressure Zone are synonymous.
5. For instance, paragraph 4.1 provides that, within 30 days of connection of the water main to the portion of the Lantzville Water System serving the "Upper Lantzville Area", a connection fee of \$1,330,258.50 is payable by Lantzville to Nanaimo, representing 225 Premises in Upper Lantzville.
6. We understand that there are 225 connections within the 'existing high pressure zone', as identified in blue within Schedule "A" to the Agreement.
7. This high pressure zone is located:
 - a. entirely within the Upper Pressure Zone, as identified in Schedule "A" to the Agreement; and
 - b. only partly within Upper Lantzville, with a portion being located within Lower Lantzville.
8. In our view, interpreting Upper Lantzville and "Upper Lantzville Area" (as those terms are used in paragraph 4.1) to mean Upper Pressure Zone would be consistent with the fact that paragraph 4.1 specifically references 225 Premises, being the number of Premises within the 'existing high pressure zone' located within the Upper Pressure Zone.
9. On the other hand, we note that the expression Upper Lantzville in paragraph 4.1 is not defined, and it is reasonable to conclude that the colloquial meaning was intended (i.e. south of the Highway), especially since the Agreement could simply have used the expression Upper Pressure Zone throughout to eliminate any uncertainty.
10. We note also that paragraph 5.5 of the Agreement supports the interpretation that Upper and Lower Lantzville are not synonymous with the respective pressure zones.
11. Paragraph 5.5 states that Lantzville may use water from the Nanaimo water system within that part of Lower Lantzville on the low side of the pressure reducing valve that separates the high and low pressure areas of Lantzville for the purpose of firefighting.
12. Arguably, this paragraph contemplates that part of Lower Lantzville is on the high side of the pressure reducing valve (i.e. within the Upper Pressure Zone); otherwise, there would be no purpose to stating "within that part of Lower Lantzville on the low side of the pressure reducing valve".

13. We did not identify any other provisions within the Agreement that positively support one interpretation or the other.
14. While we acknowledge the uncertainty over the meaning of these expressions, in our view, the fundamental terms and overall intent of the Agreement support that, pursuant to paragraph 4.1, Lantzville may supply water to the 225 premises located within the existing high pressure zone upon the initial connection with Nanaimo's water system, and upon payment of the connection fee, including some premises that are located within what is understood to be Lower Lantzville.
15. We hold this view on the basis that it would be inconsistent with the wording of paragraph 4.1, and with the physical layout of the existing high pressure zone that would be supplied with water upon the initial connection to Nanaimo's water system, to interpret the Agreement to mean that Lantzville may only supply water to the area south of the Highway.
16. This brings us to the question of the risk to Lantzville in proceeding with the proposed connection.

C. Risk

17. The underlying issue with respect to the interpretation of Upper Lantzville and Lower Lantzville is the extent to which Lantzville could be considered to have breached the Agreement if it supplied water, pursuant to paragraph 4.1, to premises that are within Lower Lantzville.
18. We note that under paragraph 6.6 of the Agreement, Lantzville is limited to connecting 436 Premises in total, plus an additional 50 Premises per year in Upper Lantzville, until such time as Nanaimo secured sufficient additional water supply. Similarly, under paragraph 4.3 of the Agreement, Nanaimo is under no obligation to supply water to any premises in Lower Lantzville until Nanaimo has notified Lantzville in writing that it has secured additional water supply.
19. In our view, so long as Lantzville does not exceed the limit on the number of connections pursuant to paragraphs 4.1, 4.2, and 6.6 (i.e. 436, plus 50 additional connections per year), then whether the connected Premises are within Upper Lantzville or Lower Lantzville is arguably irrelevant. In other words, it appears that Nanaimo would not be prejudiced by Lantzville's proposed connection, so long as Lantzville is not supplying water to more premises than it paid for.
20. The situation would be different if Lantzville sought to exceed the connection limits under paragraphs 4.1, 4.2, and 6.6 on the basis of its interpretation of Upper Lantzville and Lower Lantzville, but we understand that is not the case here.
21. However, we note that Nanaimo could rely on a strict reading of paragraphs 4.3 and 6.6, as well as the colloquial meaning of Lower Lantzville, and stop the supply of water to Lantzville on the basis that Lantzville would be supplying water to premises in Lower Lantzville without Nanaimo's prior written notice that an additional water supply had been secured.
22. To mitigate this risk, in addition to ensuring that Lantzville does not exceed the number of connections specified in the Agreement, Lantzville could:
 - a. Negotiate an amendment to the Agreement to clarify the meaning of Upper and Lower Lantzville; or
 - b. Seek Nanaimo's prior agreement to connecting the water systems as proposed.

D. Conclusion

23. As set out above, there is support within the Agreement for differing interpretations, and it is difficult to conclude which interpretation is to be preferred. However, regardless of the precise meaning of Upper and Lower Lantzville as the expressions appear in the Agreement, in our view Lantzville would be justified in proceeding with the connection of the Upper Pressure Zone as proposed, on the basis that the Agreement specifically contemplates initially connecting 225 premises, which is the number of premises within the existing high pressure zone.
24. However, as in any case where more than one interpretation of contractual provisions are possible, there is a risk that Nanaimo could advance the interpretation that Lantzville is only entitled to initially supply water to the area south of the Highway, and on that basis stop the flow of water to Lantzville.
25. To mitigate this risk, we suggest the following steps could be taken:
- a. Seek an amendment to the Agreement to clarify the meaning of Upper Lantzville and Lower Lantzville;
 - b. Seek Nanaimo's agreement prior to connecting the water systems as proposed;
 - c. In any event, do not connect more than 225 premises upon the initial connection, and do not connect more than 436 existing premises in total (plus 50 additional connections per year), regardless of where such premises are located.

We trust you find the foregoing to be in order. If you have any additional questions or concerns, please do not hesitate to contact us.

Yours very truly,

FULTON & COMPANY LLP

Per:


DEVIN K. BUCHANAN ®

DKB/bjr