

IRENE C. FAULKNER  
BARRISTER & SOLICITOR

COPY

Our File 50015

April 14, 2009

The Honourable Ron Cantelon  
Minister of Agriculture and Lands  
Parliament Buildings  
Victoria, BC

Dear Minister Cantelon:

**Re: Request that you act in the public interest to deny the application for a Victoria Harbour Water Lot Licence of Occupation (Water Lot 1 of District Lot 119 (Esquimalt District - Plan 44757))**

On behalf of the South Island Sea Kayaking Association (SISKA) I request that you deny the above-noted application forthwith, pursuant to your obligation to make licence of occupation decisions in the public interest under section 11 of the *Land Act*.

You have received an application from Community Marine Concepts Ltd. for a licence of occupation for the above-noted Crown lot that extends across much of the Middle Harbour, from Lime Bay to the ferry dock adjacent to Mariner's Landing -- and out to Pelly Island. [See attached map.] It is submitted that the future of Victoria's Harbour depends on the decision that you make on this pending application, and that issuing the requested licence of occupation is clearly contrary to the public interest.

If you issue a private licence of occupation to this developer, the planned Marina will occupy a significant portion of Victoria's harbour -- 2.6 hectares or 6.5 acres, approximately five times the area of all the floating wharves in front of the Empress Hotel. The proposed Marina will also destroy some of Canada's most iconic and beautiful urban views. Views across the harbour to James Bay and the Olympics beyond will be blocked by walls of fiberglass -- the marina is apparently designed to accommodate up to 55 mega yachts, which normally range from 65 to 180 feet in length, and up to three stories high.

For all practical purposes the Marina will eliminate the only safe passageway through the middle harbour for non-powered vessels. The Marina would, *de facto*, displace the sole current

designated passageway for such non-powered vessels.<sup>i</sup> The development site plan indicates that the Marina will extend nearly out to the aerodrome taxiway that is located between Pelly Island and the north shore. This would leave only an extraordinarily narrow channel for non-powered vessels -- whose safety is likely to be further compromised by choppy seas caused by the marina's wave attenuators and traffic congestion.

Recognizing this problem, the Marina is offering to allow paddlers passage through their private Marina. However, there are safety concerns with forcing paddlers to maneuver in a narrow area between mega-yachts. If incidents were to occur, there is a concern that permission to navigate through this private marina could be revoked, leaving non-powered vessels permanently displaced from these navigable waters altogether. In addition there are non-powered vessels such as voyageur canoes and outrigger canoes that by virtue of their length, width and turning radius will not be able to transit through this private marina.

This licence of occupation also threatens the continued operation of competitive paddlesports. Four local performance-paddling organizations are located on the upper harbour or Gorge Waterway and use middle harbour waters to access training and race areas. Performance paddlers train for national and international races, many of which take place on 'big water' in offshore areas. In order to train outside of Ogden Point Breakwater, these outriggers currently transit through the area where the proposed marina is to be located. Training takes place several days a week and races may involve hundreds of competitors. Therefore it is not in the public interest to put the operations of competitive paddle-sports in jeopardy.

In addition to maintaining a natural space for local paddlers, the current traffic scheme with a protected area for non-powered vessels has led to an eco-tourism industry in which local outfitters equip visitors for kayaking excursions.<sup>ii</sup> Losing the right to paddle through the Middle Harbour could seriously undermine this sustainable industry. Thus, the licence of occupation presents a real risk to recreational, sport and commercial users of these waters -- which are renowned as among the best urban paddling waters in the world.

By eliminating, for all practical purposes, the right of the public to paddle in public waters, the proposed Marina would clearly infringe the ancient and fundamental legal right of members of the public to navigate public waters.<sup>iii</sup> This right has existed in the Common Law for centuries, as well as in other legal systems. For example, in the thirteenth century, King Alfonso the Wise of Spain stated the near-universal principle:

*The things that commonly belong to all the creatures that live in this world are these: the Air, the waters that fall in rain; and the ocean and its beach... since every creature that lives can use each of these things, according to its necessities.*

Granting a licence of occupation for the proposed Marina would violate the government's duty to hold such public waters and lands "in trust" for the public -- and to not *eliminate* the public's rights when it privatizes the foreshore.<sup>iv</sup> As the Supreme Court of Canada has ruled, when the

Crown disposes of foreshore to private persons, government owes a duty to the general public to protect public common law rights of access and use of the water.<sup>v</sup>

It should be noted that in addition to the public's legal rights in regard to navigation and to public waters, that other vital public interests are at stake. In addition to boating opportunities, these public waters offer many other values to the public -- including beautiful views, recreational enjoyment for the thousands of walkers who access the WestSong Walkway for exercise and fresh air (including people in wheelchairs and families with strollers), wildlife viewing, and maintenance of biodiversity.

The fundamental issue is that if you grant a licence of occupation for this water lot, you will be taking an expanse of public waters currently enjoyed by all Victorians, and privatizing those waters for the use of the internationally wealthy. You will also be privatizing irreplaceable views and the shoreline – shifting them from the shared use of the entire community to the private benefit of a handful of mostly foreign-owned luxury yachts.

The Marina may also present a number of environmental risks, including:

- Dredging of the harbour bed could result in the re-suspension of toxic and anoxic (low to no oxygen) contaminants potentially lethal to fish and other organisms.
- The area from the western section of the proposed marina to West Bay is the only part of the harbour still utilized by marine birds for feeding, particularly during the fall and winter seasons. Over the years, bird use of the Victoria Harbour, a federally-designated Migratory Bird Sanctuary, has declined significantly due to increasing vessel and seaplane traffic and decreasing marine feeding habitat.
- The subtidal area between the Songhees Walkway and Pelly Island is the only area of Victoria Harbour that contains significant underwater vegetation that provides necessary habitat for marine birds and fish as they pass through the harbour to reach their spawning areas in the Gorge and Portage inlet. This area could be significantly damaged by the proposed dredging and may not recover due to the shading caused by the proposed docks, floating breakwater and mega yachts.
- Changing the use of these waters from use by non-powered vessels engaged in sustainable, environmentally friendly paddling activities over to use by fossil-fuel burning mega-yachts is inconsistent with the government's climate change initiatives.

For all of the above reasons, the granting of a Crown water lot licence of occupation would be contrary to the public interest. Under s. 11 of the *Land Act*, you may only legally issue such a licence of occupation if the licence of occupation would be "in the public interest."

Furthermore, your Ministry's Crown Land Strategic Policy statement of Crown Land Allocation Principles<sup>vi</sup>, cite the following as the first principles to be followed in making Crown Allocations:

1. *Crown land values are managed for the benefit of the public.*
2. *Economic, environmental and social needs and opportunities are identified and supported.*

The privatization of Victoria's Harbour is inconsistent with both of those principles. Your Strategic Policy Statement goes on to state:

*In valuing Crown land and resources, consideration will be given to their degree of scarcity and the associated economic, social and environmental benefits.*

The publicly-owned waters of Victoria's Harbour and the magnificent views that they afford to Victorians and to visitors are an incredibly scarce resource that should not be squandered and privatized for a select few.

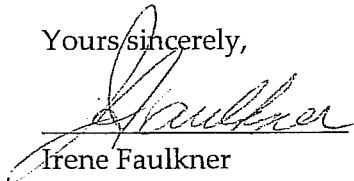
In addition, it should be noted that provincial government policy on disposition of lands for Marinas specifically states:

*Moorage facilities must comply with... local government zoning...<sup>8</sup>*

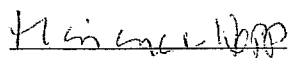
This is not the case in this instance. The water lot in question is zoned as M-3 - Heavy Industrial. The appropriate zoning to permit a marina would be M-6 - Marine Zone. Further, a portion of the water lot in question has already been zoned as VHP - Park by the City of Victoria. Surely, it would be against the public interest to privatize a Crown water lot that has been zoned, in part, for park usage?

In conclusion, we urge you to deny the application for this Victoria Harbour Water Lot Licence of occupation, in the public interest. We would appreciate receiving your timely response to this request.

Yours sincerely,



Irene Faulkner  
Barrister and Solicitor



Marianne Hopp  
Articled Student

Cc: Murray Coell  
Ida Chong  
Client

Endnotes:

<sup>1</sup> See the Port of Victoria Harbour Traffic Scheme.

<sup>2</sup> Paddle-sport outfitters who engage in training and rental operations are legitimate marine users of these waters whose access should not be subordinated to that of any other marine user, particularly since they are operating environmentally sustainable businesses.

<sup>3</sup> See *Friends of Oldman River v. Canada* [1992] 1 S.C.R. 3, regarding the common law right to navigate.

<sup>4</sup> See *Canfor v. British Columbia*, [2004] 2 S.C.R. 74, where the Supreme Court of Canada held that the Crown acts as a *parens patriae* (in the role of a parent) in respect of public rights. This is a trust-like relationship. Chief Justice Lamer cited the Crown's trust duty in *Comite pour la Republique due Canada v. Canada*, [1991] 1 S.C.R. 139 at p. 154 when he cites "...the special nature of government property. The very nature of the relationship of existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The 'quasi-fiduciary' nature of the government's right of ownership was indeed clearly set out by the US Supreme Court in *Hague v. Committee for Industrial Organizations*..."

In the seminal case on public trust doctrine, the U.S. Supreme Court held that the state holds title to the lands under navigable water and controls the waters above them. This title is "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, have liberty of fishing therein, freed from the obstruction or interference of private parties" -- See *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). The court held that government could grant parcels of land under navigable waters to provide for wharves, piers, docks and other structures in aid of commerce as long as they improve the public interest or *do not substantially impair the public interest in the lands and waters remaining*.

<sup>5</sup> In *Rhodes v. Perusse* (1908) 41 S.C.R. 264 at 268 the Supreme Court of Canada held that while the Crown has a right to dispose of Crown foreshore to private persons, "in doing so it owed a duty to the general public ... to protect them in the enjoyment of the common law right of access et sortie to the river..."

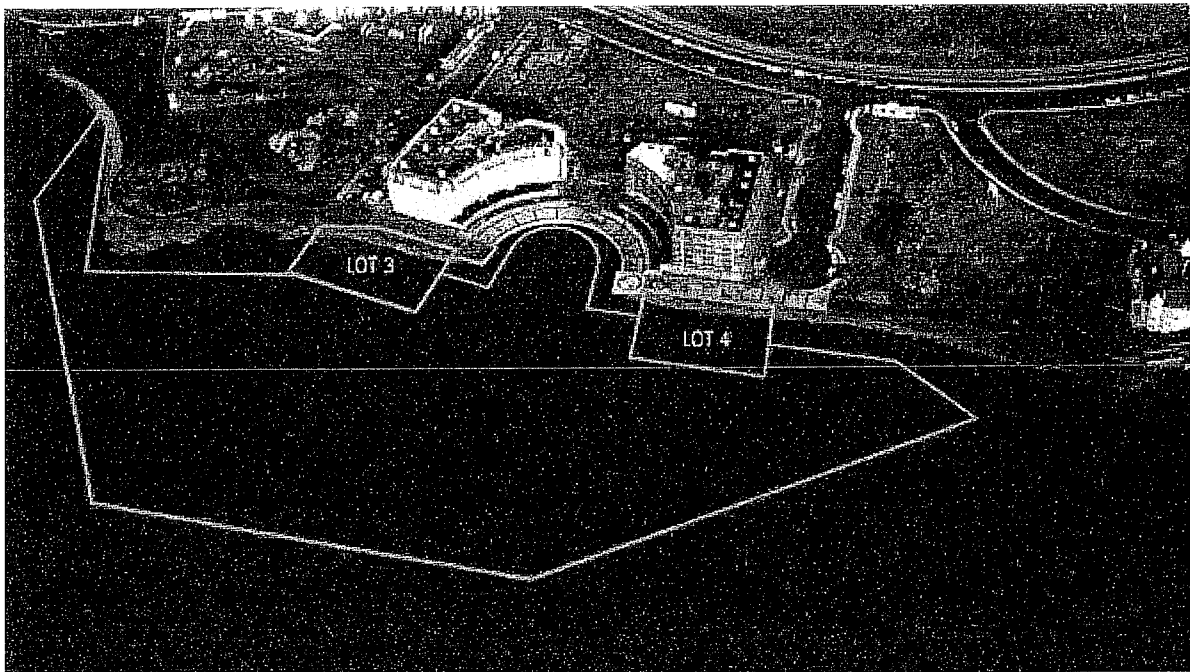
<sup>6</sup> June 2, 2008.

<sup>7</sup> See B.C. Ministry of Agriculture and Lands -How to apply for Crown Land for Marinas and Yacht Clubs (Commercial), [http://www.al.gov.bc.ca/clad/tenure\\_programs/programs/marinas/index.html](http://www.al.gov.bc.ca/clad/tenure_programs/programs/marinas/index.html) This Ministry website states: "Moorage facilities must comply with Canadian Coast Guard regulations, local government zoning and building regulations."

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## Aerial View – Marina Lots. Lots 3 and 4 are privately owned by Community Marine Concepts.



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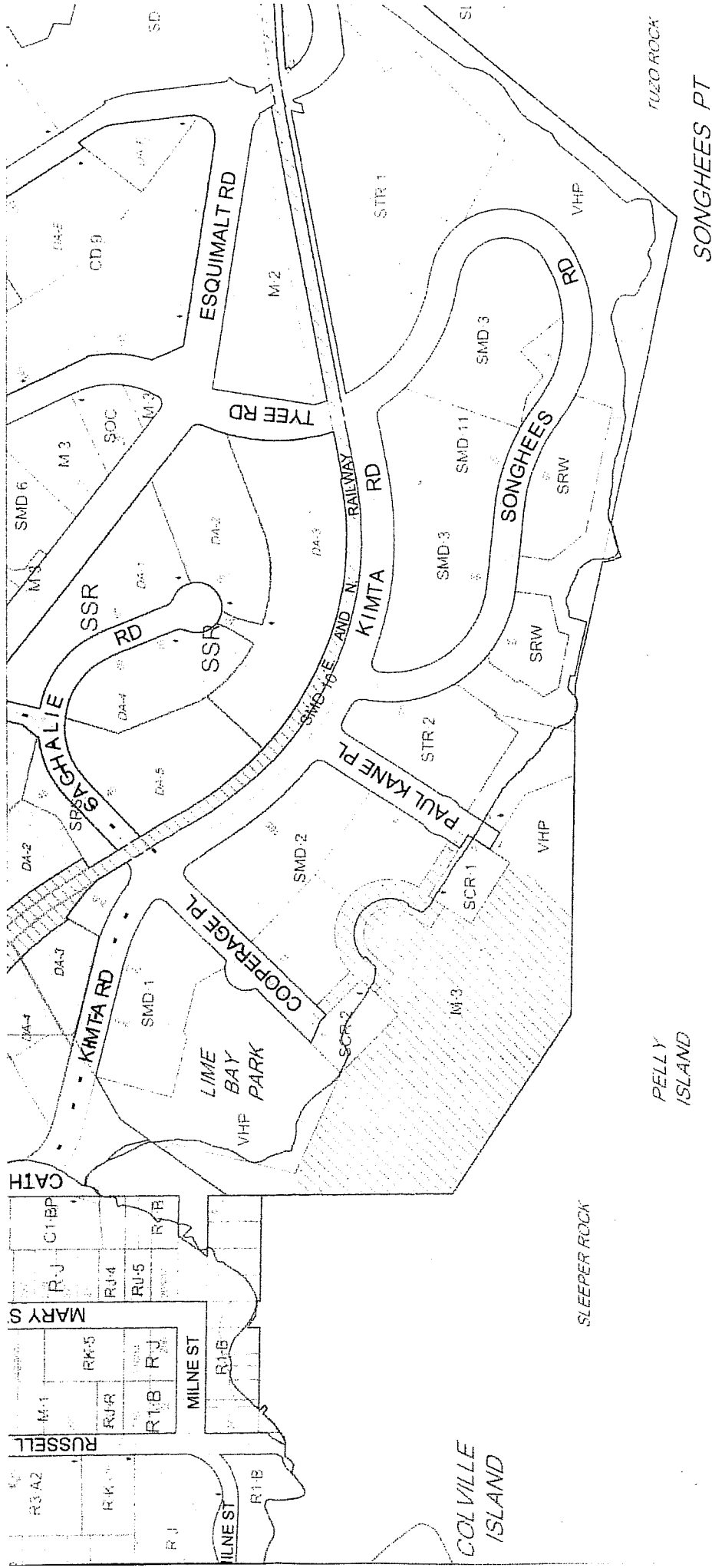
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Zoning map