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Via Email (legislativeservices@cvrd.bc.ca)

URGENT

Cowichan Valley Regional District (CVRD)
Board of Directors
3rd Floor – 175 Ingram Street
Duncan BC V9L 1N8

Attention: Director Aaron Stone, Chair

Dear Director Stone:

Re: Application No. 03-H-16RS (PID: 008-903-603/Schnitzer Steel)

We are counsel for Schnitzer Steel Canada Ltd. (“**Schnitzer**”), the applicant for Application No. 03-H-16RS (the “**Application**”) concerning PID: 008-903-603 (the “**Lands**”), which came before the Electoral Area Services Committee (“**EASC**”) on December 6, 2023, and then before the Board of Directors (the “**Board**”) on December 13, 2023 (the “**Board Meeting**”).

We write to express our client’s surprise and concern with the Board’s abrupt decision to deny the Application. Schnitzer was not given any notice that the Application was at risk of being denied at the Board meeting on December 13, 2023. Just one week prior, the EASC had considered (and rejected) a motion to recommend the denial of the Application (i.e., the very motion that was spontaneously tabled at the Board Meeting, despite not being on the agenda). Nor was Schnitzer given any reasons for the denial – the denial motion was tabled and carried without debate. We have other concerns with the process used by the Board, which we detail in the sections that follow.

More significantly, however, the Board appears to have lost sight of the purpose and objective of the Application: the current zoning bylaw does not apply to Schnitzer. Auto salvage and metal recycling activities have been ongoing at the Lands since before the inception of the CVRD and before the passage of Electoral Area H Bylaw No. 1020 (the “**Zoning Bylaw**”). Schnitzer’s use of the land is protected by s. 528 of the *Local Government Act*, which protects lawful uses of land, buildings or structures that pre-date the adoption of a land use bylaw.

The Application has never been about deciding whether auto salvage and metal recycling activities can continue on the Lands. Pursuant to s. 528, the pre-existing metal recycling and auto salvage activities are lawful and may be continued indefinitely on the Lands. Further, this status is not a basis to withhold permits, licenses, or any other types of municipal or provincial authorizations: Schnitzer is operating lawfully, and it is entitled to participate in the same permitting and authorization processes that are available to any other lawfully operating business.

Of course, non-conforming use protections have some inherent uncertainties, including because the full scope of the protection can only be conclusively resolved by a court. The Application was designed to address these uncertainties: CVRD would secure regulatory powers over the Lands that it would not otherwise have (including those set out in the draft covenant), and both parties would have greater certainty about the scope of their rights and obligations in relation to the Lands. Significantly – and despite not having any jurisdiction to regulate the environment, *per se* – the CVRD would secure significant conditions that are plainly aimed at environmental protection, not land use regulation.

Throughout the process, Schnitzer has been an engaged participant: it has been willing to agree to conditions for monitoring and testing ground and surface water, to undertake improvements, and to remediate the Lands, all of which it has done in the spirit of working with the CVRD and despite the fact that CVRD's jurisdiction is limited (both because of the s. 528 protections, and because its jurisdiction is confined to land use planning and regulation).

Many of the concerns raised at the Board meeting related to the environment and the protection of the Cassidy Aquifer. Schnitzer has never been opposed to taking steps to protect the aquifer. In addition to the improvements and protection measures implemented on the Lands, it has conducted extensive testing. The results of those tests – conducted by independent experts over several years and with oversight from regulatory bodies and health authorities – are overwhelmingly clear: Schnitzer's activities on the Lands have had no detectable impact on the Cassidy Aquifer. Nonetheless, Schnitzer remains willing to conduct environmental monitoring and testing, with the common goal of minimizing the environmental impacts of its activities.

In denying the Application, the Directors have rejected the primary means by which Schnitzer and the CVRD can work together towards this common goal. Schnitzer is hopeful that the Board will reconsider its decision.

Pursuant to s. 217 of the *Local Government Act*, the chair of the Board has the power to direct the Board to reconsider a matter and vote again at the next meeting of the Board. On behalf of Schnitzer, we respectfully ask the Board to reconsider its decision to deny the Application.

We ask that you advise us by 12:00 p.m. on December 29, 2023 as to whether you will return the matter to the Board for reconsideration, so that we may advise our client of its legal rights in relation to the denial of the Application.

So that our position is clear on the record, we set out below some additional background and context in relation to Schnitzer's activities on the Lands, the Application, and our concerns with the events that transpired at the Board Meeting.

A. Schnitzer's Operations: Provincially Authorized and Legal Non-Conforming

Schnitzer operates a metal recycling facility on the Lands. The metal recycling activities that Schnitzer carries out on the Lands are of the same essential character as the auto salvage and metal recycling activities that have been continuously carried out on the Lands since at least 1963 and, as such, constitute a legal non-conforming use pursuant to s. 528 of the *LGA*. As Schnitzer's non-conforming use of the Lands pre-dates the incorporation of the CVRD, Schnitzer's activities on the Lands are not subject to any land use regulation bylaws adopted by the CVRD, including the Zoning Bylaw, or its prohibition of "the recycling, sorting and storage of heavy metals, batteries, appliances, wrecked motor vehicles or automotive parts."

But even if Schnitzer's use was *not* legally non-conforming, Schnitzer would still not be subject to the Zoning Bylaw, because Schnitzer's vehicle dismantling and recycling operations on the Lands are specifically authorized by the provincial government pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 [**EMA**] and associated regulations, including the *Vehicle Dismantling And Recycling Industry Environmental Planning Regulation*, B.C. Reg. 200/2007 and the *Hazardous Waste Regulation*, B.C. Reg. 63/88.¹ According to s. 37 of the *EMA*, a municipal (or regional district) 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" [emphasis added].

B. The Bylaw Amendment Application

In the Application, Schnitzer sought an amendment to the permitted uses for the I-1 Zone in Cowichan Valley Regional District ("**CVRD**") Electoral Area H Bylaw No. 1020 (the "**Zoning Bylaw**") (via Proposed Electoral Area H Bylaw No. 4194) and the associated official community plan (via Proposed Electoral Area H Bylaw 4195). The Application also included proposed conditions requiring Schnitzer to provide the CVRD with environmental monitoring information and a proposed condition requiring Schnitzer and the landowner, Cassidy Sales & Service (the "**Landowner**"), to sign a covenant in favour of the CVRD.

The Application was first submitted in 2016. Since that time, it has been the subject of extensive consultations and discussions between CVRD, the landowner and external agencies. We will not detail the entire process here, other than to note that none of the external agencies that were consulted were opposed to the Application. The results from those consultations are summarized at **Attachment H** to the November 23, 2023 Staff Report to Committee (the "**Staff Report**"). They include the following (among others):

- **Agricultural Land Commission:** Not opposed. Recommended consideration of setback and buffer requirements on eastern boundary of the Lands, which borders the ALR.
- **Ts'uubaa-asatx Nation:** Not opposed.
- **Ministry of Transportation and Infrastructure:** Supports Application, subject to formal approval under the Transportation Act.
- **Island Health:** Not opposed. Island Health submitted detailed comments regarding routine and ongoing monitoring of groundwater, the imposition of conditions to prevent leachate from discharging from the storm water channels, and the sharing of testing results with authorities and First Nations.
- **North Oyster Fire Department: Ministry of Environment:** Not opposed. Recommended the installation of water storage tanks and other fire protection measures, and that the applicant consult with registered professionals regarding the impact of spills and runoff.
- **Ministry of Agriculture and Food:** Not opposed. Noted that the "proposed rezoning is unlikely to impact agriculture on the adjacent ALR properties to the east or other ALR properties in the surrounding region.

¹ See August 28, 2023 response of the Ministry of Environment and Climate Change in the December 6, 2023 EASC meeting package (p. 79 of 389).

- **Ministry of Environment, Aquatic Habitat Branch:** Not opposed. Recommended the identification of streams and corresponding setbacks.

Following the receipt of comments from these external agencies, as well as public input, staff at the CVRD recommended substantial revisions to the proposed bylaw amendment and covenant. The proposed revisions to the bylaw would limit the re-zoning to the Lands only, and the revisions to the proposed covenant would impose additional environmental monitoring and testing conditions, including the following:

- The establishment of an after-hours scrap metal drop-off area
- The testing of existing groundwater monitoring wells every 12 months, with annual reporting
- The completion of additional site works and testing.

The proposal in the Staff Report also required Schnitzer to provide additional information that was directly responsive to many of the comments provided by the external agencies, including:

- The preparation of an updated Environmental Management Plan;
- The preparation of an updated Storm water Management Plan;
- A Conditions and Impact Assessment prepared by a Qualified Environmental Professional to identify streams or environmentally sensitive areas;
- A Fire Protection Report (to be prepared in conjunction with the Storm water Management Plan).

The revised bylaw, Covenant and conditions reflected years of negotiation and consultation and represented an evidence-based path forward. These conditions and amendments came before the EASC on December 6, 2023.

C. The December EASC and Board Meetings

At the December 6, 2023 EASC meeting, the EASC (sitting eight directors) resolved to recommend that the Board adopt the proposed amendments. It did so only after Director Maartman moved two motions that were each defeated:

- (a) a motion “that it be recommended to the Board that [the Application] be denied”; and
- (b) a motion “that it be recommended to the Board that [the Application] be referred to the next Electoral Area Services Committee meeting” for consideration by a panel of nine EASC directors.

Ultimately, the motion that carried at the EASC was that the Application be recommended to the Board.

At the December 13, 2023 Board Meeting, and to Schnitzer’s surprise, the Board did not ratify the EASC’s recommendation. Rather, a panel of nine EASC directors reconsidered and defeated the proposed amendments. Then, without notice, Director Maartman introduced a novel motion to deny the Application. This motion was not on the agenda, nor communicated to

any of the directors in the open meeting until *after* the vote to defeat the proposed amendments. The denial motion passed without a word of debate, bringing an abrupt and unconsidered end to almost 8 years of negotiation.

Not only are there no discernable reasons in the record to support the Board's denial of the Application, but the reasons in the record would support the opposite decision. Mere days before the Board's decision, the EASC defeated a motion to recommend denial of the Application, and a number of Directors articulated compelling reasons for staying the course and continuing with the Application:

- Director Acton commented that by allowing the Application process to unfold and engaging with Schnitzer, "we have a better opportunity to actually protect the aquifer";
- Director McClinton said that it came down to "what changes we're legally able to enact". He explained it was most responsible to take a "proactive approach, and put things in place that help us protect [the aquifer]", and that it was "time to do what we can with the tools that we have";
- Director Wilson explained his desire to reach an "acceptable compromise" and expressed that "if we deny this, then it is my understanding that the operation will continue exactly as it is right now without any changes at all"; and
- Director Abbott explained that he would "rather be at the table negotiating with the operators and the landowner to arrive at a better solution, because as we have been counselled, it can continue regardless of a denial".

D. The Board Meeting: Procedural and Substantive Defects

If Chair refuses to return this matter for reconsideration, we will seek instructions to challenge the Board's decision in court, pursuant to s. 623 of the *LGA*.

For the Board's benefit, we would underscore that zoning bylaw amendment applications affecting particular parcels of land attract procedural fairness obligations to the applicant (in this case, Schnitzer). Those obligations include requirements to provide notice, reasons, and an opportunity for the applicant to be heard.² The Board is required, as a matter of procedural fairness, to "fully disclose the relevant information considered"³ in reaching its decisions (which in this case, would include the reasons for denying the Application). The requirement that a local government provide reasons when denying a rezoning application "serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials".⁴ Moreover, the Board is required by law to carry on all of its business in open, public meetings.⁵ The Board is prohibited from considering any matters not listed on the agenda.⁶

² See e.g., *Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District*, 2012 BCSC 756; *Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)*, 2012 BCCA 338.

³ See e.g., *Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District*, 2012 BCSC 756 at para. 103.

⁴ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 a para. 12.

⁵ *Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District No. 39*, 2023 BCSC 2123 at para. 46; *Community Charter*, S.B.C. 2003, c. 26 at para. 89; CVRD Bylaw No. 2889 (Regional Board Procedures Bylaw) at s. 10.

⁶ CVRD Bylaw No. 2889 (Regional Board Procedures Bylaw) at s. 14(d).

It is apparent on the face of the Board's decision that it was procedurally and substantively flawed, and that Schnitzer was denied procedural fairness: Schnitzer received no notice of the motion to deny, which was improperly excluded from the agenda. Moreover, Schnitzer received no reasons for the denial of its Application, as the denial of the Application was not debated. Schnitzer was not aware of the vote to deny the Application until after it concluded, and had no opportunity to make submissions.

Simply put, Schnitzer had a reasonable expectation that the Board would not abruptly and arbitrarily deny the Application after a years long engagement process, without giving any reasons for doing so, particularly after the EASC had defeated a motion recommending denial.

E. A Path Forward

Although the Application file is now closed, the chair of the Board has the authority return the Application for reconsideration at the next meeting of the Board, which we understand will be held on January 10, 2024.⁷ We ask the chair to exercise this authority and direct the Board to reconsider the Application at the next meeting.

Schnitzer believes that an acceptable compromise can be reached if the Board stays the course recommended by its professional staff and works with Schnitzer. To reach such a solution, Schnitzer must be afforded the time and opportunity to address the concerns that have been articulated at EASC and Board meetings, as well as those concerns that may be expressed in the future, without the Board abruptly reversing course. For example:

- Board members have expressed concerns about the generational impact of a zoning amendment. If given the opportunity to respond to this concern, Schnitzer would have emphasized its openness to working with the CVRD to find potential mechanisms for time-limiting these effects.
- Similarly, Schnitzer heard Director McClinton articulate the concern at the Board meeting that “the biggest thing for me is not having the owner at the table”. If given the opportunity to respond to this concern before the vote, Schnitzer would have underscored the fact that the Landowner had already agreed to the terms of the proposed covenant.

Schnitzer also wishes to emphasize once again that there is no evidence that its operations are negatively impacting the Cassidy aquifer. To the contrary, Schnitzer is a recognized industry leader and recipient of myriad environmental sustainability awards. Schnitzer has always made evidence-based environmental decisions following the advice of its scientific advisors regulatory authorities, like the Ministry of Environment and Vancouver Island Health Authority, and it intends to continue doing so.

⁷ *Local Government Act*, R.S.B.C. 2015, c. 1 at s. 217; CVRD Bylaw No. 2889 (Regional Board Procedures Bylaw) at s. 5(a).

Yours truly,

McCarthy Tétrault LLP

Per:

A handwritten signature in black ink, appearing to read "K. Hanowski". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Kevan Hanowski

c: Danielle Myles Wilson (*Chief Administrative Officer, CVRD*)
Ann Kjerulf (*General Manager, Land User Services*)
Mike Tippett (*Division Manager, Community Planning – Land Use Services Department*)