

VIA EMAIL: jerrydombowsky@wells.ca

March 5, 2024

Jerry Dombowsky
Chief Administrative Officer
District of Wells
PO Box 219
Wells, BC V0K 2R0

Dear Mr. Dombowsky:

**Re: Jurisdiction over Mining Activities
Our File No. 00260-0108**

You have requested our opinion on the extent of municipal jurisdiction in respect of gold mining activities proposed within District boundaries by Osisko Development Inc. These activities are described in detail in Osisko's permit application to the Ministry of Energy, Mines and Low Carbon Innovation and the Ministry of Environment and Climate Change; the Environmental Assessment Report prepared by the B.C. Environmental Assessment Office dated September 2023; the Environmental Assessment Certificate issued by the Ministers of Energy, Mines and Low Carbon Innovation and Environment and Climate Change on October 10, 2023; and the University of Victoria Environmental Law Centre's October 2022 report on "Legal Issues Related to the Proposed Gold Mining Project in Wells, B.C.".

Environmental Law Centre Report

The ELC concludes on page 26 of its report as follows:

Wells has authority to regulate the use of land within their boundaries through zoning bylaws and regulating activities. Although mines and minerals are excluded from this jurisdiction and under the exclusive jurisdiction of the province, this limitation is confined to activities which are essential to mining. Municipalities can regulate some secondary mining and processing activities. In our view, the evidence shows that these municipal powers extend to the Concentrator Building in this case.

Our Opinion

As we will explain below, it's our opinion that these conclusions are incorrect. They appear to result from misinterpretation of the case law on municipal jurisdiction over mining activities, particularly the B.C. Court of Appeal's most recent decision in *O.K. Industries v. Highlands (District)* 2022 BCCA 12. In our view, the District's jurisdiction over land use management would not extend to the proposed concentrator building if its operation is within the scope of the operator's permit issued under the *Mines Act* (which seems likely if a permit is issued). Further, whether any particular activity is "essential" or "integral" to

the extraction of minerals from the ground, the question to which ELC devotes the bulk of its report, is not the key criterion for exclusive provincial jurisdiction that the B.C. Court of Appeal has identified in the most recent case law.

Broadly speaking, the focus of the case law on jurisdictional issues related to mining and quarrying has been on the meaning of the term “use of land” in s. 479 of the *Local Government Act*, the zoning power, and particularly on the meaning of the word “land”, which has a statutory definition (in the *Community Charter*) that applies to the interpretation of s. 479. The definition is as follows (underlining added for emphasis):

(a) for the purposes of assessment and taxation, means land as defined in the Assessment Act, and

(b) for other purposes, includes the surface of water, but does not include

- i. improvements,*
- ii. mines or minerals belonging to the Crown, or*
- iii. mines or minerals for which title in fee simple has been registered in the land title office;*

If land is statutorily excluded from the definition of “land”, then the municipal authority to regulate “the use of land” by means of a zoning bylaw cannot be exercised in relation to that land. In a series of cases beginning in 1995 and culminating in the Court of Appeal’s most recent pronouncement on these issues in *O.K. Industries Ltd. v. District of Highlands*, the interpretation of the “mines or minerals” exclusion has been expanding, resulting in a corresponding reduction in the scope of the zoning power and other municipal powers that may be exercised in relation to “land”.¹ The current state of the law is expressed in this key passage from the Court of Appeal’s *O.K. Industries* decision (at para. 100):

The zoning power of the District, prescribed by the Local Government Act and the Community Charter, is exercisable only in relation to the use of land. Given the legislative history outlined above, it is my opinion that the exclusion of “mines” from the definition of “land” in those empowering statutes should be construed in relation to the comprehensive legislative scheme enacted in the current Mines Act, the [Health and Safety Reclamation] Code, the Mineral Tenure Act and related statutes. I consider such an interpretation to be consistent with both Cobble Hill and Pumice, both of which recognized that the meaning of “mines or minerals” in these municipal statutes must be related to the statutory regime governing the mining industry. Interpreting “mines” in a manner consistent with the definition of “mine” now contained in the Mines Act provides a

¹ This includes the prohibition on the alteration of land in a development permit area unless a development permit is obtained (s. 489 of the *Local Government Act*).

coherent and consistent expression of overall legislative intent in the context of today's mining industry.

The *Mines Act* definition of "mine" to which the Court of Appeal refers is as follows (underlining added for emphasis):

In this Act "mine" includes

- a) *a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,*
- b) *all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,*
- c) *all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,*
- d) *closed and abandoned mines, and*
- e) *a place designated by the chief inspector as a mine;*

Thus, excluded from local government jurisdiction to regulate the "use of land" is any "mine" as defined in the *Mines Act*, including any activity that is specifically included in subsection (c) of the definition, which includes processing and concentrating activities, and that is authorized by a *Mines Act* permit. This most recent approach to the interpretation of the scope of the zoning power represents a significant shift from an interpretation based on the history of the statutory definition of "land" and historical usages of mining terms, to a purposive interpretation importing contemporary mining legislation including the *Mines Act* and its very broad definition of a "mine".

We trust that this opinion will be helpful to the District in dealing with the Osisko project.

Sincerely,

YOUNG ANDERSON



Bill Buholzer

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BB/jms