“Approved as a Permitted Use”

a report by the
Sahtlam Neighbourhood Association

Presented to North Cowichan Committee of the Whole on March 23, 2017

The enclosed narrative provides a history of the purchase and development of the parcel known as Section 4, Range 1, Lot A, Plan EPP35449, hereafter referred to as "the Property". The Property is a split-zoned 46-acre parcel that includes a 15-acre portion that is zoned C8, while the rest of the Property is zoned I2.

The occupation or role of persons named in the footnotes can be found in Appendix A.

Part 1: The Deal with VIKA

Details of the proposed sale of the Property to the Vancouver Island Karting Association (VIKA) are relevant to the current situation with the Vancouver Island Motorsport Circuit (VIMC), so it is necessary to first review that history.

In 2004, VIKA approached North Cowichan (NC) looking to purchase or lease industrial land for a go-kart track.[1] In March 2006, NC identified the Property as a potential site for VIKA. NC came up with a plan to subdivide the Property, rezone one of those parcels to C8 (which would allow for a racetrack), sell the C8 parcel to VIKA, and sell the remaining 4 lots zoned as I2, Heavy Industrial.

In March and May of 2006, council discussed the potential noise problems associated with a go-kart track. On December 9, 2008, council passed the following resolution:

> "That staff draft a bylaw to rezone a portion of the Property from Industrial Heavy (I2) to Commercial Rural Recreation (C8) zone **subject to** the registration of restrictive 219 covenants on title to control noise levels and hours of operation." (emphasis added)

Section 219 of the *Land Title Act*[2] stipulates that a covenant registered against "the title to the land [that is] subject to the covenant" (aka: "the covenantor") is "enforceable against the covenantor and the **successors in title** of the covenantor" (emphasis added). In other words, the restrictive covenant that council wanted to apply to this parcel of land would have applied **to any future buyer of that parcel of land**. Not just VIKA.

This makes sense. Council was being asked to rezone a property from I2 Industrial to a zone that permitted a racetrack. They likely wanted to ensure that whoever ended up buying that parcel would have limits on the amount of noise they could make.

On March 26, 2009, there was a public hearing in which the community voiced its opposition to the proposed karting facility based in part on intrusive noise. This opposition occurred despite council having already passed a resolution to impose restrictive covenants on the property that

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[1] Unless otherwise noted, all dates, events, and wording of resolutions are taken from the history prepared by Alyssa Meiner that was provided to Council at their request

[2] Section 219: "Registration of covenant as to use and alienation"

would limit noise and hours of operation. Residents went so far as to hire a lawyer, who wrote to NC on April 8, 2009:

> "This letter serves as notice that our clients take the position that the proposed operation of the go-kart facility and ancillary activities will constitute an actionable nuisance. If the go-kart operation begins and the interference is unreasonable, the neighbouring residents will seek any and all legal recourse available to deal with the noise and other impacts emanating from the go-kart operation. The group will seek injunctive relief to stop the go-kart operation and damages will be sought."[3]

Council decided to proceed with the rezoning, but the restrictive covenant could not be attached until the property was subdivided (presumably because the covenant would apply to the entire parcel and not just the area that was going to be rezoned). So council rezoned the parcel on the condition that the restrictive covenant be added afterwards. The resolution they passed stated:

> "That in recognition of community concerns regarding noise, traffic and other deleterious effects of the rezoning of the Kart track, and pending Ministry of Transportation approval and subsequent Council adoption of this rezoning, Council reaffirm its commitment to have North Cowichan staff take into account community concerns with respect to the Kart track when considering subdivision and development applications**,** building permits, and the regulatory structure of land use for the property by considering restrictive covenants on the property."

The wording of this resolution reflects the fact that, once the Property had been rezoned, staff would have "delegated authority", and it would be up to them to ensure that those restrictive covenants were put in place.

As per above, a Section 219 restrictive covenant would apply to any future owners of the land, not just the karting club. It is also not just limited to just go-karts, but all "mechanical devices". Council's resolution of December 9, 2008 states:

> "The intent of the proposed covenant would be that **the land be used by mechanical devices that only operate as follows**:
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> (1) Each device must emit **no more than 82 decibels** at anytime as measured by a sound level metre mounted approximately 30 metres from the location of the device being measured
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> (2) **In the case of a go-kart**, the sound level meter shall be mounted at a height of approximately 1 metre from the ground, and as close to 90 degrees as feasible to the track; and further, that the hours of operation for the track would be limited"

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[3] Letter from L. John Alexander of Cox, Taylor Barristers and Solicitors to NC and VIKA. April 8, 2009

Due to a variety of circumstances, including the need for another public hearing, it wasn't until May 4, 2011 that the rezoning finally happened (Bylaw 3374). In June 2011 the restrictive covenants were requested from VIKA's lawyers, and in August 2011 a contract of purchase and sale was prepared. A Preliminary (Subdivision) Layout Acceptance was issued by NC, and everything seemed set to go...

Then, in a closed session on May 22, 2012, council reviewed a report by Dave Devana,[4] then CAO of NC, that discussed the three options for development, as laid out in an April 26, 2012 engineer's report.[5] In his report, Mr. Devana's states:

> "There are real financial risks associated with this development. As CAO, I am concerned that we may have difficulty selling industrial lots adjacent to a Kart Club due to the noise factor. **I am also very concerned that the Kart Club noise will impact the community in a negative manner, and we will experience noise complaints during its operations**, and given that the operation is permitted under C8 zoning we will not be in a good position to mitigate this community impact." [6]

After reviewing Mr. Devana's report, council decided at that meeting to increase the asking price for the property from $300,000 (plus $150,000 for services) to $825,000 in order to account for losses due to noise from the adjacent go-kart track. In other words, the sale price increased due to assertions by NC that noise from a go-kart track, which had already agreed to maximum noise limits of 82 dB, would devalue the adjacent Heavy Industrial properties, which would have had no noise limits whatsoever.

On October 3, 2012, council passed a resolution to defer the development and sale of the property and to revisit the matter in 2014. One month later (November 7, 2012), Dorothy Alexander, the president of VIKA, introduced NC staff to Peter Trzewik of Three Point Motors (part of the German Auto Import Network, or GAIN).[7]

Ms. Alexander asked NC to consider selling the Property to Three Point Motors,[8] because Mr. Trzewik had offered to build a track for the go-kart club as part of their proposed facility.[9] VIKA told NC they would relinquish their claims to the Property if Mr. Trzewik's group built them a go-kart track.[10] Mr. Trzewik's group ended up purchasing the Property, but they did not follow

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[4] Report by Dave Devana to Regular Council (closed session). May 16, 2012
[5] Report by Ken Horton to Council. April 26, 2012
[6] Report by Dave Devana to Regular Council (closed session). May 16, 2012
[7] The corporate relationship between Three Point Motors, GAIN, Auto World Import Network, and the Ontario numbered company that ultimately purchased the property is complex, but it is non-arms-length
[8] Letter from Dorothy Alexander to Isabel Rimmer. November 10, 2016; also email from Dave Devana to Mark Ruttan and Scott Mack. January 7, 2013
[9] Letter from Dorothy Alexander to Isabel Rimmer. November 10, 2016; also email from Dorothy Alexander to Peter Trzewik. November 19, 2012
[10] email from Dave Devana to Mark Ruttan and Scott Mack. January 7, 2013

through on their promise to VIKA, despite assurances to Ms. Alexander as late as December 2015 that "of course" the new track would accommodate the kart club.[11]

At this time, the Property was in the middle of a three-step process to rezone, subdivide, and attach a restrictive covenant to the C8 portion. Only the first step had been completed. It was clearly not the intention of council when they approved the rezoning to create a split-zoned parcel and sell it as such. NC nevertheless chose to engage with the prospective buyers without first rezoning the Property to a single zone.

Part 2: Approved as a Permitted Use

Selling the Property as a split-zoned parcel ensured the sale would proceed more quickly than if a rezoning had been required. However, the zoning still caused delays in closing the sale due to a conditional subject in GAIN's purchase offer.

Buyer's Conditions

The offer to purchase the Property for $1 million, formally accepted on April 4, 2013, included the following subject: "**the Buyer must be satisfied that it can use the property for it's [sic] proposed use**" (emphasis added).[12] The key to completing the sale was assuring the buyer's legal representatives that their intended use was allowed under the parcel's split zoning.

On October 19, 2013, counsel for the buyer emailed Blair Russel, Assistant Municipal Solicitor for NC:

> "We just need to confirm that the zoning that we need for this property is in place for **the entire property**…[my] understanding currently is that it is there for a portion of the property and just need to verify that it is in place for all of the property".[13] (emphasis added)

Mr. Russel forwarded the email to Dave Devana, who replied "I thought the zoning issued [sic]...had been satisfied months ago" and directed the lawyer to Scott Mack.[14]

Ten days later, another counsel for the buyer left a voicemail for Mr. Russel, which was followed up with an email, again asking for clarification around the zoning:

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[11] Letter from Dorothy Alexander to Isabel Rimmer. November 10, 2016
[12] Email from Michael S. Greene to Blair Russel, cc: John Srebot. October 29, 2013
[13] Email from John Srebot to Blair Russel. October 19, 2013
[14] Email from Dave Devana to John Srebot, cc: Michael Greene, Mark Ruttan, John Mackay, and Scott Mack. October 20, 2013

> "The site falls under **two different zoning requirements** and we are seeking assurances that our client will be able to utilize the site for its intended purpose, being that of a driver training operation".[15] (emphasis added)

Mr. Russel wrote to staff and explained that the issue of zoning was still unclear:

> "It seems zoning is still an 'issue' and the client requires further assurance about the 'zoning' situation regarding the property".[16]

Mr. Russel also let staff know that, whatever they had told the buyer's lawyers up to this point, it had not satisfied their concerns:

> "As I understand it, we've already explained that since the [sic] part of the property was zoned "**commercial recreational**" and the remainder "**industrial**", this was sufficient for their purposes. Evidently, that is not the case, and they seek further assurances."[17] (emphasis was in the original)

Finally, Mr. Russel reminded staff that if they could not satisfy the lawyers, the deal might fall through (by this time it had already been extended several times):

> "It appears unless North Cowichan gives further assurances of some kind, this may be an issue against moving forward."[18]

In response to these exchanges, Scott Mack wrote a long email to staff and Mr. Russel wherein he explained that the proposed facility was understood to be a "private recreational and testing facility that allows for the use and personal enjoyment of motor vehicles".[19] Mr. Mack concluded: "it would be my expectation that we would issue a Development Permit (or permits if necessary) under the uses "Industrial Use" (I2) and "Recreational Facility" (C8)".[20]

However, Mr. Mack did not explain how two different permitted uses from two different zones would allow for either use anywhere on the property. And the buyer's lawyers had been very specific on that point. Thus, Mr. Russel wrote the following to staff: [21]

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[15] Email from Michael S. Greene to Blair Russel, cc: John Srebot. October 29, 2013
[16] Email from Blair Russel to Scott Mack, cc: Dave Devana, Mark Ruttan, John Mackay. October 29, 2013
[17] Email from Blair Russel to Scott Mack, cc: Dave Devana, Mark Ruttan, John Mackay. October 29, 2013
[18] Email from Blair Russel to Scott Mack, cc: Dave Devana, Mark Ruttan, John Mackay. October 29, 2013
[19] Email from Scott Mack to Dave Devana and Blair Russel, cc: Mark Ruttan and John Mackay. October 30, 2013
[20] Email from Scott Mack to Dave Devana and Blair Russel, cc: Mark Ruttan and John Mackay. October 30, 2013
[21] Email from Blair Russel to Scott Mack and Dave Devana, cc: Mark Ruttan and John Mackay. October 30, 2013

> "I could include [Scott Mack's] full report...OR perhaps you would agree the following [excerpt] might be more appropriate...Then again, perhaps you'd favour a different response...Keep in mind [the lawyer for the buyer] inquired as follows:
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> [Mr. Russel then goes on to quote the lawyer for the buyer]:
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> "As I indicated in my voicemail, the site falls under two different zoning requirements and we are seeking assurances that our client will be able to utilize the site for it's [sic] intended purpose, *being that of a driver training operation*"...*Kindly advise what your client can and will do in order to provide our client with the certainty it requires in order for the sale to proceed*". (italics were added by Mr. Russel)

On November 12, 2013, Mr. Devana wrote to the buyer's lawyer:

> "It is the Municipality's position that the proposed 'Recreational Testing Facility' would be considered a permitted use under the definitions of 'Recreational Facility' (C8) and 'Industrial Use' (I2) so this use is permitted **on any portion of the subject property**".[22] (emphasis added)

Mr. Devana's letter was sufficient for the buyers, the subjects were fulfilled, and the transfer of property took place on February 19, 2014.

Part 3: Challenging the Interpretation

It appears staff realized there might be confusion over their explanation as to how a "vehicle testing and training facility" would be permitted on the entire split-zoned Property. In his lengthy email of October 30, 2013, Scott Mack explained to Mr. Devana and Mr. Russel that there was a backup plan:

> "We are in the early stages of a Zoning Bylaw review, which we hope to complete by mid-2014. Staff expect to bring forward (within the new Zoning Bylaw) a single consistent zoning for the entire site, which would clearly allow for the use described above in order to remove any future uncertainty."[23]

Staff clearly recognized the need to clarify zoning, and had an opportunity to do so before the buyers purchased the property. It would certainly have made the approval process run more smoothly, and it would have eliminated any concerns about "future uncertainty" had they dealt with the zoning first.

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[22] Letter from Dave Devana to John Srebot. November 12, 2013

[23] Email from Scott Mack to Dave Devana and Blair Russel, cc: Mark Ruttan and John Mackay. October 30, 2013

Instead of going through such a rezoning, NC assured the buyers that staff's interpretation of North Cowichan Zoning Bylaw 2950 allowed for a "recreational testing facility" to operate anywhere on the split-zoned property, on the basis that "industrial testing" was allowed on I2, and "recreational facility" was allowed on C8.

It is the position of the Sahtlam Neighbourhood Association (SNA), based on a review of the history and on advice that we have received, that this interpretation of the bylaw is incorrect.

Approval of the motorsport circuit as a permitted use on the property involved three key decisions:

1) Staff determined that the proposed "vehicle testing and training facility" met the definitions of two permitted uses from North Cowichan Bylaw 2950: "industrial testing" (from I2) and "recreational facility" (from C8).

2) Staff combined these two permitted uses ("industrial testing" and "recreational facility") to create a new term, "recreational testing facility", which they approved as a permitted use.

3) Staff determined that either use ("industrial testing" or "recreational use") would be allowed anywhere on the property, regardless of zone.

With respect to Point (1) above, it is the position of the SNA, based on advice we have received, that the activities taking place on the Property do not constitute "industrial testing", at least in part because the vehicles that are being used on the Property have been certified as safe and operable by the manufacturer, were offered for sale, and were purchased by either retailers (in the case of car dealerships) or private owners (in the case of club members and guests).

With respect to Point (2) above, "recreational testing facility" is not listed as a permitted use in North Cowichan Zoning Bylaw 2950. In his November 12, 2013 letter to the buyer's lawyer, Mr. Devana wrote:

> "While not specifically listed as permitted use under the *Zoning Bylaw*, No. 2950, it is the Municipality's position that the proposed "Recreational Testing Facility" would be considered a permitted use"[24]

It is the opinion of the SNA, based on advice we have received, that since "recreational testing facility" is not listed as a permitted use anywhere in North Cowichan Zoning Bylaw 2950, that it is, in fact, not a permitted use.

With respect to Point (3) above, Mr. Devana wrote:

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[24] Letter from Dave Devana to John Srebot. November 12, 2013

> "It is the Municipality's position that the proposed 'Recreational Testing Facility' would be considered a permitted use under the definitions of 'Recreational Facility' (C8) and 'Industrial Use' (I2) so **this use is permitted on any portion of the subject property**".[25] (emphasis added)

However, North Cowichan Zoning Bylaw 2950, Division 2 Part 5, clearly states:

> "No lands, buildings, or structures **in any zone** shall be used by the owner, occupier, or any other person **for any use**, except one which is provided in this Bylaw as being **specifically permitted for the zone in which it is located**." (emphasis added)

It is the opinion of the SNA, based on advice we have received, that the Bylaw clearly restricts permitted uses to the **zone**, and **not the parcel**, in which they are located. North Cowichan Bylaw 2950 does not allow for a "recreational facility" in I2, nor for "industrial testing" in C8.

This legislation around split-zoning is far from unusual. It is consistent with zoning bylaws in several neighbouring communities around Vancouver Island. For example, Cowichan Valley Regional District (CVRD) Area E Zoning Bylaw 1840 states:

> "Any use not specifically permitted in this bylaw is prohibited in all zones and where a particular use is expressly permitted in one zone, **such use is prohibited in all zones where it is not expressly permitted**" (Section 4.9, *Prohibited Uses*)

CVRD Area D Zoning Bylaw 3373:

> "Where a parcel contains more than one zone: (a) **Each zoned area shall be treated as a separate parcel for the purpose of determining compliance** with the provisions of its zone; and (b) All uses, buildings or structures that are accessory to a principal use, building or structure are permitted only within the area of the parcel zoned for the principal use, building or structure to which the uses, buildings or structures are accessory." (Section 4.7, *Split-Zoned Parcels*)

City of Victoria Zoning Regulation Bylaw:

> "Where part only of a lot is contained within a zone, the regulations, if any, applicable in that zone to the use of land and buildings, to the size, shape and siting of buildings, and to off-street parking and loading space shall all be complied with **within the boundaries of that part of the lot as though that part constituted the entire lot**, and as though the remainder of the lot did not exist" (Section 18; emphasis added)

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[25] Letter from Dave Devana to John Srebot. November 12, 2013

> “where a particular use of land or buildings is expressly authorized in one zone, such use is **prohibited in all zones where it is not also expressly authorized**” (Section 17, Subsection 1)

This may explain why the buyer’s lawyers repeatedly asked for clarification on the zoning issue (see above). They were not satisfied until Mr. Devana specified in writing that their proposed use would be permitted “on any portion of the subject property”.[26]

To summarize, it is our position that:

1) The activities taking place on the Property are inconsistent with the permitted uses for I2, including “industrial testing”.
2) According to North Cowichan Zoning Bylaw 2950, “recreational testing facility” is not a permitted use in any zone.
3) North Cowichan Zoning Bylaw 2950 states that permitted uses are restricted to the zones in which they are a permitted use.

Accordingly, it is our position, based on advice we have received, that VIMC is operating in **violation of North Cowichan Zoning Bylaw 2950.**

Part 4: Outcome for the Community

The present difficulties around noise and improper zoning could have been avoided if NC had chosen to rezone the property to a single zone before offering it for sale. This would have prompted a public hearing and given the community a chance to discuss whether they wanted a motorsport circuit in their backyard. Perhaps if more eyes had studied the proposed development, it would have become clear that this was not a quiet little “test track” for street-legal vehicles.

Instead, staff approved the development of a motorsports facility (a) without any public consultation, despite knowing public opposition was a likely outcome; (b) without requiring any noise impact assessments or noise mitigation engineering, despite such measures being common practice in the motorsports industry; and (c) without any restrictions on noise or hours of operation, despite a resolution by Council that clearly stated their intention to impose such limits on the C8 portion of the Property.

Those decisions have had a significant impact on our community. There are approximately 250 rural acreages that are negatively affected by noise from VIMC. As of this week, the first BC

[26] Letter from Dave Devana to John Srebot. November 12, 2013

Assessment appeals have been returned with judgement. The appeals board determined that proximity to VIMC reduced the assessed value of two properties on Mina Drive by $88,000 and $183,000, respectively (15% and 45% of previous assessed value, respectively).[27] This indicates a potential aggregate loss in property values in the tens of millions of dollars.

This should not come as a surprise. NC knew that a motorsports facility was likely to impact property values and the surrounding community. When considering the sale to VIKA, who had agreed to noise limits of 82 dB, Mr. Devana told council:

> "There are real financial risks associated with this development. As CAO, I am concerned that **we may have difficulty selling industrial lots adjacent to a Kart Club due to the noise factor**.."[28] (emphasis added)

Summary

This report details the history of the property that was owned by North Cowichan and sold to the current owners in 2014. The main points are:

1) It was never the intention of council, when they rezoned a portion of the property from I2 to C8, to create a split-zoned parcel that would be sold without further subdivision.

2) Despite this, when the current owners approached NC about buying the property for use as a "vehicle testing and training facility", NC determined that rezoning was unnecessary.

3) The decision not to seek a rezoning application resulted in conditions that were biased entirely in favour of the prospective buyers and, by extension, of NC, who stood to benefit from the sale.

4) The decision not to seek a rezoning application resulted in conditions that were biased against residents living in the vicinity of the property, whose previous objections to a proposed motorsports facility and concerns about noise had been made known to NC during public hearings and through legal correspondence.

5) NC approved the facility without any requirements for noise control despite having previously claimed that noise from a proposed karting facility (restricted to 82 dB) would significantly devalue the surrounding industrial parcels owned by NC.

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[27] Personal communication to Isabel Rimmer confirming verbal notices from BC Assessment that appeals have been granted for those amounts, letters were en route at the time of this report

[28] Report by Dave Devana to Regular Council (closed session). May 16, 2012

6) Staff approved the development permit for VIMC on the basis that it was engaging in “industrial testing”; however, the activities taking place on the Property are inconsistent with “industrial testing”.

7) Staff approved the development permit for VIMC on the basis that it was a “recreational testing facility”, even though no such permitted use is listed for any zone in North Cowichan Zoning Bylaw 2950.

8) Staff determined that combining two uses (“recreational” and “industrial”) into one descriptor (“recreational testing facility”) would allow either use to take place anywhere on the split-zoned Property, which is a direct contravention of Division 2, Section 5 of North Cowichan Zoning Bylaw 2950.

These actions and their consequences have had a severe impact on residents living in the vicinity of VIMC, who are regularly experiencing excessive and intrusive noise from the track. We have the right to peaceful enjoyment of our rural properties. This situation has been a hardship for many residents, especially those suffering from health conditions that are negatively affected by noise and stress. Our property values have decreased as a result of being adjacent to a motorsports facility that is operating without any noise limits, a situation that is virtually unheard-of in today’s motorsport industry.

Conclusion

This report demonstrates that VIMC is currently operating in violation of North Cowichan Zoning Bylaw 2950, and that permission to do so was granted by NC staff in contravention of that bylaw.

Given the flawed process that resulted in approval of Phase 1 as a permitted use, and given our informed position that the Vancouver Island Motorsport Circuit is not engaging in “industrial testing” or any other permitted use under I2 zoning, the Sahtlam Neighbourhood Association requests that North Cowichan deny any application permits for Phase 2 - specifically, the I2 zoned parcel known as Section 4, Range 1, or any adjacent properties owned by VIMC - until such time as the zoning can be properly and thoroughly addressed.

APPENDIX A: Role or occupation of persons cited in footnotes

in alphabetical order by first name

Alyssa Meiner, Deputy Director of Corporate Services for North Cowichan

Blair Russel, Assistant Municipal Solicitor for the Corporation of the District of North Cowichan

Dave Devana, Chief Administrative Officer for North Cowichan

Dorothy Alexander, President of Vancouver Island Karting Association

Isabel Rimmer, President of Sahtlam Neighbourhood Association

John Mackay, Director of Engineering and Operations for North Cowichan

John Srebot, General Counsel for Auto World Imports, Thornhill, ON

Ken Horton, Project Engineer for North Cowichan

Mark Ruttan, Director of Corporate Services for North Cowichan

Michael S. Greene, Barrister and Solicitor, Cook Roberts LLP, Victoria, BC

Peter Trzewik, Principal at Three Point Motors (Victoria, BC), German Auto Import Network (Vancouver Island), and Vancouver Island Motorsport Circuit (Cowichan Valley)

Scott Mack, Director of Development Services for North Cowichan