

**BINGWI NEYAASHI ANISHINAABEK
MATRIMONIAL REAL PROPERTY LAW**

July 22, 2015

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**BINGWI NEYAASHI ANISHINAABEK
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PREAMBLE

WHEREAS Bingwi Neyaashi Anishinaabek has a profound relationship with the Land;

WHEREAS our existing Aboriginal and Treaty rights are recognized and affirmed under section 35 of the *Constitution Act, 1982*;

WHEREAS the inherent right of self-government is an existing Aboriginal right under section 35 of the *Constitution Act, 1982*;

WHEREAS our authority to govern our lands includes the jurisdiction to address real property issues such as Matrimonial Property upon the breakdown of marriage and common law relationships, and the occupation of the Matrimonial Home, and this inherent right has not been extinguished;

WHEREAS our community's right to self-government in respect of reserve lands is also confirmed by the *Bingwi Neyaashi Anishinaabek Land Code*, which exists under the *First Nations Land Management Act* and which took effect on January 31, 2014;

WHEREAS section 42.1 of our Land Code requires Bingwi Neyaashi Anishinaabek to adopt a spousal property law providing rules and procedures applicable on the breakdown of a marriage and spousal relationship relating to our reserve land;

WHEREAS we wish to see matrimonial real property disputes resolved in a way that does not jeopardize the ability of Bingwi Neyaashi Anishinaabek members to reside on reserve and hold real property on reserve, is in keeping with the best interests of their children, and is fair to both spouses;

WHEREAS this Law will apply in conjunction with applicable federal and provincial laws concerning the division of personal property, real property off-reserve, spousal support, child support, and divorce.

NOW THEREFORE the Bingwi Neyaashi Anishinaabek hereby enacts the following Law:

1. INTERPRETATION AND APPLICATION

1.1 This Law may be cited as the "Bingwi Neyaashi Anishinaabek Matrimonial Real Property Law".

1.2 For the purposes of this Law, the following definitions shall apply:

“BNA” means Bingwi Neyaashi Anishinaabek;

“BNA Land” means all of the land that is subject to the Land Code;

“Child” means a person who is

- (a) the offspring of at least one Spouse,
 - (b) adopted, under Canadian law or Aboriginal custom, by at least one Spouse, or
 - (c) the responsibility of at least one Spouse pursuant to a Customary Care Agreement
- and it includes “children”;

“Council” means the Chief and Council of BNA or any successor elected government of BNA;

“Court” means the Superior Court, the Ontario Court of Justice, or any Ontario court(s) that replaces it as the forum for adjudicating family law disputes;

“Domestic Contract” means:

- (a) an agreement between Spouses who are married to each other, entered into when they were married or when they intended to marry, made in writing, dated, signed by the parties and witnessed by an individual who is at least 19 years of age, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the occupation, possession, or division of Matrimonial Property;
- (b) an agreement between Spouses who are living together in a marriage-like relationship, entered into during the relationship or in contemplation of the relationship, made in writing, dated, signed by the parties and witnessed by an individual who is at least 19 years of age, in which they agree on their respective rights and obligations under the relationship or on separation, with respect to the occupation, possession or division of Matrimonial Property; or
- (c) a separation agreement between Spouses who are living separate and apart, made in writing, dated, signed by the parties and witnessed by an individual who is at least 19 years of age, in which they agree on their respective rights and obligations on separation with respect to the occupation, possession or division of Matrimonial Property.

“Eligible Voter” means a Member who has attained the age of 18 years on or before the date of a vote under this Law.

“Emergency Protection Order” is the order referred to in section 6.1 of this Law;

“Exclusive Occupation Order” is the order referred to in section 5.9 of this Law;

“Family Violence” includes the following actions by a person towards a Spouse or a Child:

- (a) causing or attempting to cause, through an act or omission, physical or sexual abuse including forced confinement or deprivation of the necessities of life, and
- (b) psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour, including through internet or phone communication, which may include, but is not limited to, the following behaviours by the person towards the family member:
 - (i) intimidation, harassment or threats, including threats to harm the family member, other persons, pets or property to obtain the compliance of the family member,
 - (ii) unreasonable demands to know where or with whom the family member is or restrictions on the family member’s activities or contact with friends or family members,
 - (iii) financial abuse, including unreasonable prevention of the family member from access to or knowledge about family income,
 - (iv) stalking or following the family member, or
 - (v) intentional damage to property

but does not include acts of self-protection, or protection of another person, if the force does not exceed what is reasonable in the circumstances;

“Interest in BNA Land” means any certificate of possession, lease, permit, or any other equivalent instrument, but does not include rental housing agreements for BNA property. For greater certainty, where there is a Matrimonial Home affixed to BNA Land that is the subject of an Interest in BNA Land, the Interest includes both the land and the Matrimonial Home;

“Land Code” means the Bingwi Neyaashi Anishinaabek Land Code;

“Matrimonial Home” means a dwelling that is ordinarily used for a family purpose and is:

- (a) owned exclusively by one or both Spouses, and
- (b) affixed to BNA Land;

“Matrimonial Property” means

- (a) an Interest in BNA Land that is held by one or both Spouses, that was acquired during the spousal relationship, and that was not received by way of gift or inheritance to only one Spouse;
- (b) where the Interest in BNA Land is held by one or both Spouses and was acquired prior to the spousal relationship or was received during the relationship by way of gift or inheritance to only one Spouse, the share of the Interest that is proportionate to any increased value in the Interest during the course of the relationship;

“Member” means a person whose name appears on the BNA Indian Band membership list or who is entitled to have his or her name appear on that list;

“Spouse” means a person who:

- (a) is married to another person, including through an Aboriginal customary marriage;
- (b) is living with another person in a marriage-like relationship (i.e. “Common Law Spouse”); or
- (c) is a former Spouse.

1.3 A reference to any legislation in this Law includes any amendments or replacements of that legislation.

1.4 This Law applies only to BNA Land and not the remainder of BNA’s traditional territory.

1.5 With the exception of Part 6 (Emergency Protection Orders), this Law only applies where at least one Spouse is a Member.

1.6 For greater certainty,

- (a) With the exception of enforcing rights under s. 5.19 (temporary right of occupation upon death of spouse), a Spouse cannot commence legal proceedings after the death of the other Spouse under this Law, and his or her rights in relation to an Interest in BNA Land or a Matrimonial Home will instead be determined by the applicable law governing the estate of the deceased Spouse;
- (b) where a Spouse dies, the other Spouse may continue any legal proceedings under this Law that were started before the death of that Spouse.

1.7 This Law applies in conjunction with federal, provincial and any BNA family laws concerning the division of personal property, real property off-reserve, spousal support, child support, and divorce.

2. ACCESS TO THE COURT

2.1 Before proceeding to Court, Spouses are strongly encouraged to pursue alternative dispute resolution processes.

2.2 Any Spouse who seeks a Court order based on any provision in this Law, other than section 6 (Emergency Protection Orders) must promptly serve the Council with a copy of the documents filed with the Court.

2.3 The Court shall adjudicate a dispute under this Law with regard to any decisions and orders rendered by a Canadian court or Anishinaabek adjudicative body that settle related family law matters for the Spouses, such as divorce, child custody, spousal support, child support, division of personal property or division of real property off-reserve.

2.4 At the request of Council, the Court shall, before making its decision, allow the Council to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order sought should be made.

2.5 When the Court makes any decision or order under this Law, the Spouse in whose favour the decision is made shall promptly provide a copy of the decision or order to the Council.

2.6 Parties must observe the rules and procedures of the Court, except where they are inconsistent with this Law, in which case this Law prevails.

3. DOMESTIC CONTRACTS

- 3.1 A Member who is married or who is living with his or her Common Law Spouse cannot acquire from BNA an Interest in BNA Land for residential purposes or register an Interest in BNA Land for residential purposes unless the Member
- (a) has a Domestic Contract with his or her Spouse that addresses the occupation and possession of the Matrimonial Home both during the relationship and in the event of relationship breakdown; and
 - (b) demonstrates the existence of those Domestic Contract provisions to the BNA Lands Department in accordance with the relevant BNA policy.
- 3.2 Subject to sections 3.3-3.4 as well as Part 6 (Emergency Protection Orders) a provision in a Domestic Contract that reflects the agreement of the Spouses with respect to an Interest in BNA Land or a Matrimonial Home is valid, binding, and enforceable by the Court, whether the Spouses entered into the Domestic Contract before or after this Law came into force.
- 3.3 A Domestic Contract may provide an Interest in BNA Land, including the right to exclusively occupy a Matrimonial Home, to a Spouse or Child who is not a Member, but such Interest and such rights shall not in any case be greater than a life estate measured by the life of the individual intended to enjoy it. For greater certainty, a provision creating, or intended to create, any greater interest than a life estate in respect of a non-Member is void.
- 3.4 Subject to this Law, the Court, on application by a Spouse, may set aside a Domestic Contract or any provision therein concerning an Interest in BNA Land or a Matrimonial Home upon making a determination that:
- (a) a Spouse failed to disclose to the applicant Spouse any material information in respect of his or her Interests in BNA Land or a Matrimonial Home;
 - (b) the applicant Spouse did not understand the nature or consequences of the Domestic Contract or provision;
 - (c) the Domestic Contract or provision is unconscionable, was entered into under duress, or on the basis of undue influence or fraud; or
 - (d) otherwise in accordance with the law of contract.
- 3.5 Subject to section 3.6, section 3.4 only applies to
- (a) married Spouses;

- (b) Common Law Spouses;
- (c) formerly married Spouses who have been divorced for less than two years as of the application date; and
- (d) former Common Law Spouses who have been living separate and apart for less than two years as of the application date.

3.6 Where the time limit described in section 3.5 has expired

- (a) the formerly married Spouse or former Common Law Spouse may apply to the Court for permission to bring a late claim under section 3.4 on the basis of compelling circumstances;
- (b) the Court shall determine whether the evidence establishes sufficiently compelling reasons for the delay to allow it to proceed, taking into account any prejudice that the other Spouse will suffer from the delay in the application; but
- (c) in no case shall the Court allow late claims to proceed where the married Spouses have been divorced for over five years or where the former Common Law Spouses have been living separate and apart for over five years.

4. DIVISION OF MATRIMONIAL PROPERTY OR COMPENSATION IN LIEU

4.1 Subject to section 4.2, Part 4 only applies to:

- (a) married Spouses who are living separate and apart; and
- (b) formerly married Spouses who have been divorced for less than two years as of the application date.

4.2 Where the time limit described in section 4.1 has expired,

- (a) the Spouse may apply to the Court for permission to bring a late claim under Part 4 on the basis of compelling circumstances;
- (b) the Court shall determine whether the evidence establishes sufficiently compelling reasons for the delay to allow it to proceed, taking into account any prejudice that the other Spouse will suffer from the delay in the proceeding; but
- (c) in no case will the Court allow late claims to proceed where the Spouses have been divorced for over five years.

4.3 Subject to this Law, the Court may make determinations concerning interests in and the division of value of Matrimonial Property and may make orders that are necessary,

reasonable or ancillary to give effect to the determination, including, but not necessarily limited to:

- (a) a declaration as to whether the Spouses fall under section 4.1;
- (b) a declaration as to whether the property at issue is in fact Matrimonial Property;
- (c) a declaration as to the ownership of any Interest in BNA Land;
- (d) where both Spouses own the Matrimonial Property, an order that one Spouse transfer the Matrimonial Property to the other Spouse exclusively, subject to such conditions as the Court deems just in all the circumstances;
- (e) an order that a Spouse who holds Matrimonial Property pay compensation to the other Spouse to recognize the contribution that the other Spouse made to the acquisition, upkeep and/or improvement of the Matrimonial Property, which may include a schedule for payment of the compensation in instalments for a period of up to 10 years so as to avoid unnecessary hardship;
- (f) an order that restrains either Spouse from disposing of or transferring Matrimonial Property, either legally or beneficially, pending the resolution of the Spouses' Matrimonial Property dispute; or
- (g) an order that one Spouse pay compensation to the other Spouse if an Interest in BNA Land has been disposed of, for the purpose of recognizing the contribution that the other Spouse made to the acquisition, upkeep and/or improvement of the Matrimonial Property;
- (h) any appropriate equitable order where one Spouse has intentionally, recklessly, or fraudulently depleted Matrimonial Property.

4.4 For greater certainty, the Court may not make any declaration or order providing for the transfer of permanent rights in Matrimonial Property to a non-Member Spouse.

4.5 In considering any order under subsection 4.3 (d), (e), (g), and (h) the Court shall begin with the presumption that each Spouse is entitled to an equal share of the value of the Matrimonial Property, and then consider whether this presumption should be varied in light of any of the following factors:

- (a) the date when the Matrimonial Property was acquired or disposed of;
- (b) the length of the relationship;
- (c) the length of the period during which the Spouses have lived separate and apart;
- (d) the needs of each Spouse to become or remain economically independent;

- (e) direct or indirect financial contributions of each Spouse toward the acquisition, upkeep, or improvement of the Matrimonial Property;
- (f) the direct or indirect non-financial contribution of each Spouse to the acquisition, upkeep, or improvement of the Matrimonial Property, including through child-rearing responsibilities;
- (g) the amount of any outstanding debt or other liabilities assumed by either Spouse to acquire, maintain, or improve the Matrimonial Property;
- (h) any relevant order or award by a Canadian court or Anishinaabek adjudicative body regarding the Spouses' family law matters;
- (i) any other factor that the Court considers relevant to an equitable division of the Matrimonial Property.

4.6 The Court shall not make any compensation order under section 4.3(e) until it has been provided with at least one valuation of the Matrimonial Property that has been prepared by a qualified appraiser, and which accounts for the limitations on the ownership rights associated with the Matrimonial Property and, in particular, the feasibility of selling or leasing the Matrimonial Property or replacing it with a new Interest in BNA Land.

4.7 Prior to making an order under 4.3 (d), (g), or (h) the Court may require the Spouses to provide it with at least one valuation of the Matrimonial Property or any component thereof. All appraisals must be prepared by a qualified appraiser and account for the limitations on the ownership rights associated with the Matrimonial Property and, in particular, the feasibility of selling or leasing the Matrimonial Property or replacing it with a new Interest in BNA Land.

4.8 Where the interest of a Spouse in Matrimonial Property is held through a corporation, the Court may order that he or she transfer shares in the corporation to the other Spouse.

5. MATRIMONIAL HOME

5.1 The Court may, on the application of a Spouse, make a declaration as to whether or not the dwelling at issue is a Matrimonial Home.

5.2 Sections 5.3 to 5.7 only apply to Spouses who

- (a) are married; or
- (b) are cohabiting with a Child.

5.3 Subject to the provisions below, both Spouses have an equal right to occupy the Matrimonial Home.

5.4 No Spouse shall dispose of or encumber an Interest in BNA Land that he or she holds and that includes a Matrimonial Home unless:

- (a) the other Spouse joins in the instrument or consents to the transaction;
- (b) the other Spouse has released all rights in relation to the Matrimonial Home by Domestic Contract; or
- (c) the Court has authorized the transaction or has released the Interest in BNA Land from the application of this section.

5.5 If a Spouse disposes of or encumbers an Interest in BNA Land in contravention of section 5.4, the transaction may be set aside on an application to the Court.

5.6 When a person proceeds to realize upon an encumbrance or execution against an Interest in BNA Land held by one Spouse that includes the Matrimonial Home, the Spouse who has a right of occupation under section 5.3 has the same right of redemption or relief against forfeiture as the other Spouse and is entitled to the same notice respecting the claim and its enforcement or realization.

5.7 The Court may, on the application of a Spouse, authorize a disposition or encumbrance of an Interest in BNA Land that includes a Matrimonial Home, provided that such disposition or encumbrance is otherwise authorized under this Law, if the Court finds that the Spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent, and the Court may prescribe conditions including the provision of other comparable accommodation, or payment in place of it, that the Court considers appropriate.

5.8 For the purposes of Sections 5.9 to 5.17 (Exclusive Occupation Orders), "Interest in BNA Land" includes any

- (a) Interest in BNA Land that includes a Matrimonial Home; and
- (b) Certificate of Possession that is being held by BNA pending repayment of a housing loan and that will be transferred to one or both Spouse upon full repayment of the loan.

5.9 The Court may on application by a Spouse make an Exclusive Occupation Order for the Matrimonial Home or for an Interest in BNA Land in favour of that Spouse for a specified period of time, where all of the following conditions are satisfied:

- (a) the applicant is the primary caregiver of a Member Child;

- (b) the Child is either under the age of 18, pursuing full time studies, or a dependent of the applicant due to disability or illness;
- (c) the Order is in the best interests of the Child; and
- (d) the Order would not conflict with a Domestic Contract.

5.10 Where there has been a relationship breakdown between Spouses and a third party becomes the primary caregiver of their Child, that primary caregiver may apply for an Exclusive Occupation Order under section 5.9 as though he or she were one of the Spouses, with the exception that the condition stipulated in section 5.9(e) need not be satisfied.

5.11 Although applicants may only qualify for an Exclusive Occupation Order where they are the primary caregiver of at least one Member Child, Exclusive Occupation Orders authorize all children in the care of a successful applicant to live on the property while the Order is in force.

5.12 Exclusive Occupation Orders expire upon the earliest of the following dates:

- (a) Court-ordered time limit;
- (b) when the applicant who obtains the order ceases to be the primary caregiver of the Child;
- (c) when the Child turns 18 and is neither pursuing full-time studies nor a dependant by virtue of illness or disability; or
- (d) in the case of an Interest in BNA Land that falls under 5.8(b), the date on which the borrower goes into default on the housing loan.

5.13 Prior to applying for an Exclusive Occupation Order, the applicant must provide notice of his or her application to:

- (a) the respondent Spouse(s); and
- (b) any other Member who holds an Interest in the BNA Land that is the subject of the application

unless those people cannot be located, in which case the applicant will need to provide sufficient evidence on this matter to the Court.

- 5.14 The Spouse(s) against whom an Exclusive Occupation Order is sought and any other Member who holds an interest in the BNA Land that is the subject of the application is entitled to make submissions to the Court about the proposed Order.
- 5.15 Any person in whose favour or against whom an Exclusive Occupation Order is made may apply to the Court to have the Order varied or revoked within the time determined by the Court or, if no time limit is stipulated, at any point while the Order remains in force.
- 5.16 A Spouse making an application under section 5.9 must provide the Court with the following documents:
- (a) any Court order concerning custody and/or access for the Child; and
 - (b) any Domestic Contract between the Spouses.
- 5.17 An third party caregiver making an application under section 5.9 must provide the Court with any Court order concerning custody and/or access for the Child.
- 5.18 An Exclusive Occupation Order may specify any terms that the Court considers appropriate, including but not limited to the following:
- (a) the term of the Order;
 - (b) the extent to which the contents of the Matrimonial Home are to remain in the Home for the duration of the Order;
 - (c) compensation payable by the applicant who obtains the Order to the respondent(s) for use of the Matrimonial Home; and
 - (d) which Spouse is responsible for paying for and ensuring completion of reasonable repairs to the Matrimonial Home.
- 5.19 Section 5.20 only applies to married Spouses and Common Law Spouses.
- 5.20 When a Spouse dies, the surviving Spouse and any Child for whom the surviving Spouse is the primary caregiver has the right to occupy the Matrimonial Home for a period of 180 days after the day on which the death occurs, whether or not the survivor is a Member.

6. EMERGENCY PROTECTION ORDERS

- 6.1 Any Spouse residing on BNA Land, whether or not he or she is a Member or resides in a Matrimonial Home, may make an *ex parte* application to the Court for an Emergency Protection Order for the property where he or she resides.

- 6.2 A peace officer or other person may also apply for an Emergency Protection Order on behalf of a Spouse.
- 6.3 The Court may grant an Emergency Protection Order if it concludes that:
- (a) Family Violence has occurred and
 - (b) the Order should be made to help ensure the immediate protection of the Spouse or a Child who resides at the property.
- 6.4 The Emergency Protection Order may be for a period of up to 90 days, unless it concerns a rental property and the tenancy expires or terminates sooner, in which case the Order will automatically expire upon expiration or termination of the tenancy.
- 6.5 In deciding whether to grant an Emergency Protection Order, the Court is not bound by the provisions in any Domestic Contract between the Spouses.
- 6.6 An Emergency Protection Order must include a provision directing a peace officer to enforce any provision of the Order upon the request of the applicant or the Council.
- 6.7 An Emergency Protection Order may include any of the following additional provisions:
- (a) a provision requiring the Spouse against whom the Order is made and any other person to vacate the property and prohibiting them from returning to the property;
 - (b) a provision directing a peace officer to remove the Spouse against whom the Order is made and any other person from the property;
 - (c) a provision prohibiting any person who is required to vacate the property from attending within a specified distance from the property;
 - (d) a provision directing a peace officer to accompany the person who is required to vacate the property to the property in order to supervise the removal of personal belongings;
 - (e) any other provision that the Court considers necessary for the immediate protection of the person(s) at risk.
- 6.8 Any person in whose favour or against whom an Emergency Protection Order is made may apply to the Court to have the order varied or revoked within the time determined by the Court or, if no time limit is stipulated, at any point while the order remains in force.
- 6.9 The Council and, where the Emergency Protection Order concerns a property that is not owned by either Spouse, the owner of the Interest in BNA Land subject to the Order, may apply to the Court at any time to have the order varied or revoked, subject to any restrictions imposed on those parties by the terms of the Order.

6.10 A person who obtains an Emergency Protection Order may apply to have it renewed once, for a period of up to 90 days.

6.11 Renewal applications under section 6.10 must be made with notice to the respondent Spouse, the Council, and the owner of the BNA Land that is subject to the order, in accordance with the applicable rules of Court.

7. AMENDING PROCEDURES

7.1 The Council may make amendments to this Law by band council resolution where the amendments do not change the substance of this Law or are ordered by a court of competent jurisdiction. Non-substantive revisions include, but are not necessarily limited to:

- (a) a reference in this Law to legislation or parts thereof that have expired, have been repealed, or suspended;
- (b) minor improvements in the language as may be required to bring out more clearly the intention of BNA without changing the substance of the Law;
- (c) changes in this Law that are required to reconcile seeming inconsistencies with other legislation;
- (d) correction of editing, grammatical or typographical errors; and
- (e) amendments to reference any relevant new or amended BNA laws.

7.2 Before the Council makes substantive amendments to this Law, the following steps must be taken:

- (a) the amendment proposal is introduced at a duly convened meeting of the Council by any Council member or an Eligible Voter;
- (b) Council decides to consider the amendment proposal;
- (c) wording for the proposed amendment is presented at a meeting of Members and that meeting satisfies the following requirements:
 - i. the notice requirements for a meeting of Members set out in sections 15.2 and 15.3 of the Land Code;
 - ii. attendance by 25% of Eligible Voters and a majority of Council members;
 - iii. participation of at least 25% of Eligible Voters in a show of hands vote at the meeting to provide their non-binding views to Council on the amendment proposal;

- (d) Council, taking into account the feedback of Members on the amendment proposal, passes the amendment at a duly convened meeting.

7.3 For greater certainty, prior to adopting a substantive amendment to the Law, Council is entitled to

- (a) take additional procedural steps beyond those stipulated in section 7.2, including but not limited to obtaining input from a BNA committee;
- (b) replace the show of hands vote with a more formal vote; and
- (c) modify the wording of the proposed amendment, as long as the new wording is substantially the same as the wording that was tabled at the meeting of Members or reflects Members' input at the meeting of Members.

8. GENERAL PROVISIONS

8.1 Section 89 of the *Indian Act*, R.S.C. 1985, c. I-5 is inapplicable where a Spouse who is not an Indian within the meaning of the *Indian Act* seeks to enforce a Court order made under this Law.

8.2 If any provision or set of provisions in this Law is for any reason held invalid by a decision of the Court, the invalid provision(s) will, wherever possible, be severed from and not affect the remaining provisions of this Law.

8.3 A person commits an offence by refusing or neglecting, without reasonable excuse, to comply with any Court order made against that person under the provisions of this Law.

8.4 The summary convictions procedures of Part XXVII of the *Criminal Code*, as amended from time to time, apply to offences under this Law.

8.5 A Court order, certified by a proper officer of the Court that made the order, is proof of the order in a prosecution under section 8.4.

8.6 A fine payable under this section shall be remitted to BNA by the Court, after reasonable Court fees have been deducted by the Court.

8.7 This Law shall come into force on the date it is adopted by Council pursuant to a band council resolution.