

## A Court's Analysis of an Approving Officer's Decision

The January 2007 Supreme Court of British Columbia decision of Galloway v. Broderick (approving officer for the District of Coldstream) is of some interest to local government.

In the early 1990's, a developer created a subdivision consisting of over 250 lots located on a hillside overlooking the Coldstream Valley, including Lot 6, the subject of this dispute.

Subsequently, in 1995, the developer received approval to place fill in a gully adjacent to the lot to raise it by 10 to 15 feet so as to create a walking path and greenbelt area.

The Petitioner, Mr. Galloway, acquired ownership of Lot 6 from the developer in 2001 and proposed to subdivide Lot 6 into two lots.

Neighbouring property owners opposed the Petitioner's two-lot subdivision application, alleging that they were earlier assured that no development would take place on Lot 6, and that it would remain Open Space.

Under Section 85 of the Land Title Act, if an Approving Officer rejects a subdivision plan, he or she must forthwith notify the applicant in writing and briefly state the reasons. Under Section 85(3), the Approving Officer may refuse to approve a subdivision plan if the Approving Officer considers that the deposit of that plan is against the "public interest".

To facilitate the furtherance of the application, in June of 2002 the Official Community Plan was amended designating one-half of Lot 6 Open Space and the remainder Residential, followed in August of 2002 by the Approving Officer's preliminary layout approval for the two lot subdivision (subject to engineering and geotechnical reports, restrictive covenant, and compliance with minimum lot and frontage requirements).

Ultimately, the Petitioner did not proceed with the proposed two-lot subdivision. Instead, in October of 2005, he applied for approval of a five-lot subdivision of Lot 6.

The Approving Officer rejected the proposed subdivision application in December of 2005, citing a number of reasons including that the proposed subdivision was contrary to the Official Community Plan; roads were substandard; site and topography concerns; storm drainage; concerns of neighbouring property owners; and the five-lot proposal not meeting the community's interests.

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Sections 86 and 87 of the Land Title Act set out in more detail the circumstances in which an Approving Officer may refuse to approve a subdivision plan, including what could be seen as "public interest" considerations. The Court pointed out that these reasons contain items identified by the Approving Officer in his rejection, including: adverse impacts upon adjacent properties or the natural environment; inadequate drainage; insufficient highways; the subdivision being unsuited to the configuration of the land; and lack of conformance with local government bylaws regulating the subdivision of land and zoning.

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The Petitioner sought a review of the Approving Officer's refusal on appeal to the Supreme Court. The standard of review for a Court on such an application is whether the Approving Officer's decision was

- made in bad faith
- made with intent to discriminate against any property owner
- a refusal made on a "specious and totally inadequate factual basis"

Before the Supreme Court, the Petitioner argued that the decision of the Approving Officer should be overturned on the basis that the Approving Officer and the concerned neighbouring property owners were voicing objections based on incorrect assumptions and facts.

The Court reviewed the decision of the Approving Officer and found that the subdivision was not contrary to the Official Community Plan, as subdividing Lot 6 as proposed would not result in developing the Open Space area, and it would remain in its natural state. With respect to the sufficiency of the roads raised by the Approving Officer, the Court pointed out that the Petitioner's subdivision application contemplated the upgrading of the roadway in front of the subdivision and would conform to the applicable bylaw.

The Court also found that the Approving Officer and the neighbouring property owners' concerns as to site restrictions and topography were based upon the mistaken belief that development or construction would take place within the Open Space area. The Court also found that contrary to the Approving Officer's position, the proposed five lots would not negatively impact on the character of the neighbourhood.

Finally, while the Court pointed out that the Approving Officer is clearly entitled to consider the views of adjacent property owners, those views do not necessarily equate to the "public interest", particularly when founded upon an incorrect factual basis.

Accordingly, the Court ordered that preliminary approval of the five-lot residential subdivision (subject to compliance with district bylaw requirements) be granted.

Approving Officers are generally regarded by the courts as being able to act with a high degree of autonomy. In this case, the Court reflected the usual approach by indicating that it should not lightly interfere with an Approving Officer's decision. However, this case is instructive in that it does show the degree to which a Court will analyze the facts upon which an Approving Officer's decision is based, and will overturn that decision if in its view the Approving Officer was operating on an incorrect factual foundation.

***Robert Macquisten***

## **Phased Development Agreements – The Land Use Contract Returns?**

Bill 11, the Community Services Statutes Amendment Act 2007, has introduced what may prove to be the most significant land use and planning law tool for development projects in British Columbia in over a decade – the “phased development agreement” – by adding new sections 905.1 to 905.5 and subsection (8.1) of section 911 of the Local Government Act (LGA).

At this point, we can only speculate about the reasons for this initiative, but strongly suspect that in large part the phased development agreement is the legislature’s response to

1. the legal uncertainties surrounding amenity zoning in British Columbia, particularly in light of the Supreme Court of Canada’s decision in *PNI v. City of Victoria*, and
2. the development community’s desire for greater certainty to protect long term investments, as the makeup and direction of councils change from election to election.

Some of the features of this new planning and development tool recall the land use contract regime of the 1970s, but there are some significant differences.

### **What is a Phased Development Agreement?**

Essentially, the proposed legislation establishes a framework whereby an owner of land and a local government may enter into a comprehensive development agreement concerning, among other things:

- the inclusion of specific features in the development of the owner’s land
- the provision of amenities
- the phasing and timing of the development, and of other matters covered by the agreement

### **“Downzoning Free” Period**

The most significant aspect of the legislation is that the agreement must specify certain provisions of a zoning bylaw, defined as “specified zoning bylaw provisions”. These provisions will remain applicable to the development while the agreement is in effect, unless the owner consents in writing to change them, despite zoning bylaw amendments or repeal.

The intention appears to be to provide local governments with the flexibility to negotiate, on a site specific basis, for amenities and other development features outside of the somewhat limited density bonus provisions of s. 904 of the LGA. At the same time, the legislation addresses the development community’s legitimate concern that, having provided amenities and other benefits to the community in conjunction with a development application, their development rights could be taken away by a future council’s exercise of its legislative discretion to downzone the land.

Of course, this scenario was at the heart of both of the Supreme Court of Canada decisions in *PNI v. Victoria*, from which two important principles emerged:

1. In the absence of express statutory authority, a municipal council’s discretion to downzone land cannot be fettered by agreement with a developer (*PNI No. 1*).
2. If a developer has provided works, services or community amenities in excess of the amenities a local government is entitled to require by statute, and then loses development rights as a result of downzoning, the developer may have a claim against the local government for unjust enrichment, and may therefore be able to recover the cost of the “excess services” it has provided (*PNI No. 2*).

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The phased development agreement seems designed to strike some form of balance by providing a “downzoning free” period during which developers may crystallize their development rights without fear of downzoning.

### **Exceptions**

There are a few statutory exceptions to the “downsizing free period”. Zoning changes which are made to enable the local government to comply with an enactment of BC or Canada, or to comply with the order of a court or arbitrator, or changes that are necessary to address hazardous conditions the local government was not aware of when it entered into the agreement, will all apply even where the developer refuses to agree to their application.

### **Other Key Features**

The phased development agreement may provide for a number of other matters. These may include, but are not limited to, the phasing and timing of the development, registration of restrictive covenants, and provisions for minor amendments, dispute resolution, and early termination.

The proposed legislation does not define what a “phased development” is. Presumably this is intentional, so as to provide some flexibility. Arguably, any development that takes time to build out (and that could be virtually any development) could be the subject of a phased development agreement.

The term of a phased development agreement is limited to ten years or, with the approval of the Inspector of Municipalities, up to twenty years. The agreement may be renewed or extended, as long as the renewal or extension would not have the effect of extending the agreement beyond the maximum term permitted by statute. The agreement may be assigned with the local government’s consent, or the agreement itself may define the person or classes of persons to whom the agreement may be assigned.

The agreement must be authorized by bylaw and a public hearing must be held before the bylaw is adopted. The agreement may be amended by resolution of Council, and the agreement of the owner, if it is a “minor amendment” as defined by the agreement.

Certain key provisions of the agreement must not be dealt with as minor amendments, and must be authorized by bylaw. These provisions include a “specified zoning bylaw provision” that is protected from changes while the agreement is in effect (unless the developer agrees to the changes in writing) and the agreement’s term and its renewal.

The public hearing requirement applies to a bylaw authorizing an amendment to the agreement.

Development permit provisions to vary a specified zoning bylaw provision that regulates the siting, size or dimensions of a building or use under subsection 903(1)(c)(iii) of the LGA do not apply without the developer’s written agreement. There is one exception: where land is designated under subsections 919.1(1)(a) to (c) of the LGA, namely areas designated as development permit areas for protection of the natural environment, protection of development from hazardous conditions and protection of farming.

### **Not Quite a Land Use Contract**

There are some obvious differences between the phased development agreement and the former land use contract system. The phased development agreement, unlike a land use contract, is not intended as a tool to override or vary existing zoning regulations. It protects development rights, in that it provides the basis for contracts

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that will prevent a local government from changing the specified zoning bylaw provisions of land for a fixed period of time. Also in contrast to the land use contract regime, the zoning bylaw need not designate development areas for the purpose of these agreements. Indeed, this new planning tool appears flexible enough to be used on a site-by-site or ad hoc basis.

### **An Upside for Local Government**

Even though the primary intent of the legislation appears to be to preserve development rights, the phased development agreement offers some advantages to local governments.

The decision in *PNI v. Victoria (No. 2)* introduced an additional element of uncertainty in relation to amenity agreements, particularly the prospect of claims for unjust enrichment where amenities are provided in excess of statutory requirements. The existing density bonus scheme under section 904 of the LGA has its limitations. It does not provide a sufficient framework for amenity agreements where a bona fide density bonus scheme is not included as part of the zoning bylaw. Also, it may not be entirely suitable for site specific development initiatives. In fact, the legal basis for amenity agreements in British Columbia, outside of the limited statutory framework of section 904, has been the subject of some uncertainty.

To date, in order to secure amenities to mitigate the less desirable aspects of certain development proposals, or to secure the promises developers make, some local governments have tried to make the best of the density bonusing provisions of the legislation. Others have required, or received, section 219 Land Title Act restrictive covenants in connection with rezoning applications. Others enter into “Master Development Agreements”. Each approach has its benefits and challenges.

The phased development agreement gives explicit authority for this type of arrangement. It may therefore prove to be a planning and development tool that is as beneficial to local governments as it may be to developers, in that it provides much needed certainty for both sides.

Although this tool may have been intended for “large” development projects, phased development agreements may be adaptable to “smaller” projects, too.

### **Dealing with the Potential Downside**

An important cautionary note: the insertion into Part 26 of the LGA of explicit authority for phased development agreements may be used to argue that other, non-statutory approaches currently being used are unlawful since an implied authority for these other approaches cannot be relied upon where an explicit power to enter into phased development agreements exists.

Bill 11 has been given 3rd reading by the Legislature and has received Royal Assent. It will be brought into force at a later date by regulation. Therefore, consideration should be given by local governments to take advantage of this new tool, after Bill 11 comes into force, to ensure that the potential drawbacks of other approaches are avoided for future rezonings, covenants or development agreements.

***Peter Johnson and Lui Carvello, MCIP***

## **Important Principles of Tendering Law for Local Governments**

A pair of recent judicial decisions highlight the crucial importance of two key principles of tendering law in Canada: the duty to accept only compliant bids, and the duty to treat all bidders fairly. Whether explicitly included in the terms of a tender or not – and most often they are not – these principles come into play in every tendering situation. As the cases demonstrate, owners neglect these principles at their peril.

Once a tender call is issued and bids are submitted, each compliant bid gives rise to a contract “A” between the owner and the bidder. Contract “A” includes the duty to accept only compliant bids and the duty to treat all bidders fairly. When the successful bidder is chosen then contract “A” crystallizes, to use the legal term of art, and the parties are bound to proceed with the creation of contract “B”, which is the actual construction contract. At the same point when contract “A” crystallizes with the successful bidder, contract “A” with each of the unsuccessful bidders comes to an end. However, an owner can still be held liable for breaches that occurred during the currency of contract “A”.

### **Tercon**

In *Tercon Contractors Ltd. v. British Columbia*, 2006 BCSC 499 (“Tercon”), the B.C. Supreme Court held the Ministry of Transportation and Highways (“MOTH”) liable for more than \$3 million in damages, being the amount that the plaintiff would have earned in profit had it been selected as the successful bidder on a project to construct a highway extension. What went wrong?

A preliminary question dealt with by the court was whether there was a tender process at all. MOTH raised the argument that it was merely a “request for proposals” (the “RFP”). The court found that it was indeed a tender. Since MOTH was clearly under a tight deadline to complete the construction work, and since it was an express term of the request for proposals that the successful bidder negotiate in good faith to enter into the actual construction contract, or contract “B”, the court held that MOTH intended to enter into contractual relations with the successful bidder.

This was no mere fishing expedition. There is no implied duty of good faith in commercial contracts, so the good faith requirement set out in the RFP would have been meaningless unless MOTH intended the parties to be contractually bound. This point illustrates that the courts will look at the substance of a transaction, rather than the form or the name attached to it.

The substantial question addressed by the court was whether MOTH accepted a non-compliant bid. The RFP required that only parties who had taken part in a pre-RFP consultation would be eligible to submit a bid. The MOTH official responsible for managing the request for proposals was aware throughout that the bid by Brentwood Enterprises Ltd. (“Brentwood”), while compliant on its face since it listed Brentwood as the only bidder, was in fact non-compliant because Brentwood had entered into a joint venture arrangement with another company to bid for and, if successful, to perform the work. That other company had not taken part in the consultation and was not eligible to submit a bid.

The court found that MOTH breached both the duty to accept only compliant bids and the duty to treat all bidders fairly, by selecting a non-compliant bid from Brentwood. Exacerbating the situation and underlining the breach of the duty of fairness was the fact that the MOTH official actually took steps to facilitate the subterfuge by advising Brentwood to submit its bid in the name of Brentwood only, despite his knowledge to the contrary. Even without that actual knowledge, there were inconsistencies in Brentwood’s bid that indicated at least the potential that the bid was non-compliant. Whether the court would have found MOTH in breach in that case is open to question.

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### **Double N**

The Supreme Court of Canada may have answered that question in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 (“Double N”), a decision released earlier this year. This case arose out of the City of Edmonton’s (the “City’s”) 1986 tender call for equipment and operators to move refuse at a landfill. Bidders were required to list information about the equipment to be used, including the year of manufacture, serial number, and the license registration number issued by the City for all such equipment. The tender further required that all equipment was to be “1980 or newer”.

The bid by a company called Sureway Construction of Alberta Ltd. (“Sureway”) was successful, while that by Double N Earthmovers (“DNE”) was not. Sureway’s bid listed a Caterpillar bulldozer as “1977 or 1980 rental unit”, and another as “1980” when in fact the machine was a 1979 model. Prior to the selection of Sureway, a representative of DNE informed the City that Sureway did not have 1980 or newer equipment. City officials responded that since Sureway had bid 1980 or newer equipment, the City would hold Sureway to that bid.

After Sureway’s bid was selected, Sureway was required by the terms of the tender to register its equipment so the City could set up an account. Sureway attempted to register a 1977 bulldozer and a 1979 bulldozer, and the City responded at first by demanding that Sureway rectify the situation within thirty days. A short time later Sureway replied that it had explored all avenues and was nonetheless supplying a 1979 bulldozer. At that point, City officials made the decision that “this file to be allowed to lie peacefully”. It did not.

DNE sued, alleging the City had breached the duty to accept only compliant bids and the duty to treat all bids fairly under contract “A”. DNE also argued that the City had a duty to investigate Sureway’s bid as a component of its duty to treat all bidders fairly, especially given the fact that DNE had alerted the City as to Sureway’s potential non-compliance.

The majority of the Supreme Court of Canada, like the trial judge and the Alberta Court of Appeal, held that the City did not breach contract “A”. The majority reasoned that at the time contract “A” was in effect, the City was entitled to rely on the face of the bid documents without further investigation, and was entitled to insist upon compliant, 1980 or newer equipment. The City subsequently waived that condition, but that waiver was held by the court to be permissible under the terms of the contract. Moreover, the waiver occurred after contract “B” had been entered into between the City and Sureway, at which point contract “A” was no longer in effect between the City and DNE. The City no longer owed any duty to DNE.

The majority noted that if the duty to treat all bidders fairly included a duty to investigate an apparently compliant bid, such a duty would “overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties”. Furthermore, the majority pointed out that if the allegations made by DNE to the City during the contract “A” stage gave rise to a duty on the part of the City to investigate, it would encourage “unwarranted and unfair attacks by rival bidders and invite unequal treatment of bidders by owners”.

So, the majority ruling in *Double N* seems to answer the question raised by *Tercon*, namely whether, in the absence of actual knowledge of non-compliance, an owner is under a duty to investigate a bid beyond what it states on its face. The answer, at least for now, is “no”. However, *Double N* came very close to going the other way at the

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Supreme Court of Canada. The final result was a 5-4 decision in favour of the City, but that means that slightly less than half of the court would have held the City liable for breach of contract.

The dissenting justices found that because there was an ambiguity (“1977 or 1980”) apparent on the face of Sureway’s bid, the City could not argue that it was entitled to insist upon an apparently compliant bid. That, coupled with repeated warnings from DNE about Sureway’s old equipment, was enough in the eyes of the dissenters to give rise to a duty to investigate – especially since the investigation required little more than a check of the City’s own computer records.

To the majority justices’ statement that owners must be entitled to rely upon the face of bids in order to protect the integrity of the tendering process, the dissenters responded that to allow the City to ignore an apparent ambiguity and later to waive what the dissenters viewed as an essential term of the tender, was to allow Sureway to profit from its deceit, and to allow the City to “escape entirely from its implied obligations”.

What does this mean for future tender calls? It means that for the time being at least, an owner is entitled to accept a bid that is compliant on its face, as long as the owner does not have knowledge to the contrary. It means that for the time being an owner is not under a duty to investigate beyond the face of a bid, again as long as the owner does not have knowledge to the contrary. However, a slightly different set of facts from the ones discussed in Tercon and Double N could give rise to a different result, and the strong dissenting view in Double N could be the majority view the next time around.

How can owners protect themselves? Nothing is certain, but the best practice is to act carefully at all times to ensure that only compliant bids are accepted, and that all bidders are treated fairly. At the very least, this calls for a diligent examination of each bid submitted and a comparison of it with the terms and conditions of the tender call. If doubt arises, owners should seek legal advice before making a decision that could cause significant negative repercussions.

The Tercon and Double N decisions both demonstrate that the “ignore the problem and it will go away” approach is fraught with risk. In Tercon, of course, the Crown was held liable for over \$3 million in damages for lost profit. In Double N, the City may have avoided liability for damages, and it may have been awarded costs, but a case that took over twenty years and a trip to the Supreme Court of Canada to win, and by a nose at that, can hardly be called a resounding success.

**Michael Hargraves**

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2nd Floor, 837 Burdett Avenue  
Victoria, BC, Canada V8W 1B3  
Telephone (250) 380-7744  
Fax (250) 380-3008  
logolaw@sms.bc.ca  
www.sms.bc.ca

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