

An Important Trend in the Law of Nuisance

Approval of subdivisions, issuance of building permits, administration of parks, and the ownership of land are just a few of the myriad matters that involve local government. These activities have the potential to attract liability, as do most areas of responsibility over which local government accepts authority. This is especially so when local governments, in dealing with these land issues, find that hazardous conditions amounting to nuisances are in existence.

There are well known cases involving claims that have been brought against local government for such things as land slippage. The law of nuisance is evolving in respect of the responsibility of governments to remedy or prevent hazards that constitute nuisances.

The law traditionally recognized that, in order for a claim founded in nuisance to be successful, damage from flooding, rock fall, erosion, land slippage, and similar events must have resulted from an actual event or escape of something from one person's land to another person's land. In other words, the landowner, whose land contained the hazard that threatened another's land, would be responsible for damages caused by that hazard, unless the landowner had taken steps to eliminate the hazard. Furthermore, the liability would arise only after the occurrence had taken place and the damage was sustained. The claimant had to prove that he had sustained damages.

Fast forward to today and we find that the courts are now utilizing the concept of "impending harm". This concept means that a landowner may be required to take steps to alleviate a hazard before an event or an escape occurs, on the basis that it is reasonable to do so at some point. Thus, the aggrieved party need not wait to be harmed or for damage to be sustained before bringing an action to require that the hazard constituting the impending harm be remedied or eliminated.

It is understandable that the Courts have moved to a more preventative stance from its past reactive position on the law of nuisance. On proper evidence, if the nuisance can be seen to constitute an "impending harm" to such extent and degree that a damaging event is virtually inevitable, it seems reasonable to order that steps be taken to eliminate the eventuality. This may be particularly true in cases where the hazard constituting the nuisance was created or caused by human activity. The law of nuisance traditionally dealt with the creation of man-made hazards. From a local government perspective, such hazards could include approving subdivisions, granting building permits where the geographic conditions are not appropriate, or in altering or diverting watercourses if those activities may cause flooding.

However, along with expanding the breadth of nuisance law through the concept of impending harm, our Courts appear to be moving toward the application of that principle to naturally occurring conditions or hazards, not limiting it to hazards otherwise created.

This new expansion of the law of nuisance to hazards both impending and naturally occurring should be of great concern to local government. For example, parkland

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and protected areas are often dedicated as such to protect their natural features. Often, local government takes ownership or responsibility for those lands primarily to preserve the green space and natural features with little or no alteration.

The law of nuisance now appears to contemplate that an owner whose land has a naturally occurring condition that may be a hazard to adjoining properties, may be responsible to take steps to eliminate that hazard, despite the harm being merely impending and the condition not being man-made.

Some courts have suggested that there may be a duty to do what is reasonable to reduce or eliminate a naturally occurring hazard with the potential to cause damage to other properties. We know of claims brought by property owners adjacent to parkland where the natural features of that park have been identified for rock fall potential. Whether such a duty will be imposed, and under what circumstances it is deemed to be “reasonable” to reduce or eliminate the hazard, is dependent upon such things as the nature of the danger, the respective financial means of the parties, and the cost to rectify the nuisance or hazard.

Local government has been granted some limited statutory protection, under certain circumstances, such as Section 56 of the Community Charter, in which geotechnical concerns can be addressed on lands prior to the issuance of building permits. However, this does not cover all of the eventualities and conditions under which hazards, including those naturally occurring, may arise or be found.

Currently, a local government faced with identified natural hazards on lands it owns or over which it may have authority has few satisfactory options. The local government’s options are to (a) attempt to remedy the problem at potentially enormous cost, (b) purchase the neighbouring or adjacent lands threatened by the nuisance, or (c) suffer the risk and expense of significant damages and liability imposed by the Courts if such a claim was brought successfully.

In addition, the remedy may result in the obliteration of natural features, which were originally considered to be worthy of preservation.

It may be time for local government to seek legislation from the Province which would provide some protection and relief from claims in nuisance which are derived from naturally occurring conditions. Without such protection, given the manner in which the law of nuisance is evolving, local government can expect to bear the burden of ever increasing liability in this area.

Robert Macquisten

Watch Your Schedules - LTO Rejects BC FireSmart Manual

Recent attempts to have the BC FireSmart Manual included as a schedule to a covenant registered under section 219 of the Land Title Act (“S. 219 Covenant”) have been rejected by the Land Title & Survey Authority (“LTO”). The issue arises because some local governments have included the registration of a S. 219 Covenant either as a condition of, or exemption from, a development permit requirement. For example, an OCP Guideline provided that “development...shall be in accordance with the BC FireSmart Manual for Homeowners”.

In our recent experience, the Covenant’s operative clauses referred to “use” and “building” provisions specifically, which clearly are valid s. 219 clauses. However, the LTO was concerned with other aspects of the Manual and advised: “There are many vague ‘suggestions’ ... that are open to interpretation and cannot be contained in a covenant.” The compromise of stating specifically the relevant use and building provisions of the attached Manual in the text of the covenant was also rejected. In addition, attaching the FireSmart Manual for background context or information purposes only was deemed unacceptable because, among other reasons, the registry is “not a notice board”.

In consultation with the Registrar, we determined that the LTO will accept a reference to the FireSmart Manual in the preamble or recital paragraphs, but they are adamant that the FireSmart Manual itself cannot be attached as a Schedule and thereby become part of the operative provisions of a S. 219 Covenant.

In light of the above discussions and assuming consistent application of this position by LTO, we recommend the following:

- Planners should be careful in drafting provisions that refer to the FireSmart Manual in their Official Community Plans, Zoning Bylaws and/or Development Permits. If there is anything in the FireSmart Manual that should be included as a condition in a Covenant, then the planner needs to take the time to specifically extract from the Manual the applicable restrictions or requirements intended for inclusion in the text of the covenant itself and ensure that the provisions are worded in clear and enforceable language. Alternatively, consider including them in the Development Permit, rather than a Covenant, further to section 920(7.1) of the Local Government Act.
- At the general level, local governments will need to be more vigilant about their drafting of S.219 Covenants and attached Schedules. Schedules that are not property specific or that include irrelevant or descriptive (guideline) provisions are unlikely to be accepted by the LTO (even though they may aid in the interpretation of the relevant provisions).

It appears that the attachment of professional reports that are specific to the property in question should continue to be acceptable. In particular, section 56 of the Community Charter specifically refers to “conditions specified in the report” and the geotechnical report should continue to be attached as a schedule to the s.219 Covenant required under s.56(5).

Lui Carvello, MCIP

Legal Descriptions of Land – “Plan” Ahead

Clients frequently ask about what sort of legal description the registrar at the Land Title Office will accept in a particular case, whether it is in relation to a subdivision of land, or the creation of an interest in land such as a statutory right-of-way or a lease. While historically the use of the “metes and bounds” method of legal description may have been an acceptable alternative to the use of a survey plan, and while it may seem a tantalizing and inexpensive shortcut to the use of a survey plan, the reality is that the method has fallen out of favour in modern times and is rarely, if ever, accepted by the registrar. The same is true, for the most part, with respect to other corner-cutting methods such as abbreviated descriptions and sketch plans.

A plan prepared and certified by a British Columbia land surveyor is the preferred, and generally the only acceptable method of depicting an area of land to be titled or where an interest is taken over an existing titled property. There are several types of survey plans, ranging from the relatively simple to the highly complex, with corresponding differences in cost. This article provides a brief overview of various methods of legal description and their appropriate use.

Metes and Bounds

As noted at the outset, this method is rarely if ever accepted in modern times. Briefly, a “metes and bounds” description is a purely written description of an area of land, “metes” referring to measurements, and “bounds” referring to boundaries.

Although such descriptions can vary in length, some being fairly brief and some being quite long (see the Schedule to the BC Interpretation Act defining the area of the province for a true head-scratcher), they all have one thing in common – they are often not very clear, especially to the lay person. Furthermore, they cannot provide the accuracy and certainty offered by a survey plan.

The first rule in describing land is to make the description unambiguous. That is why the registrar discourages metes and bounds descriptions. If you are even considering using metes and bounds, talk to your lawyer or your land surveyor first, and they should consult with the Land Title Office as to the suitability of this option.

Abbreviated Descriptions

An abbreviated description is, as its name suggests, an abbreviated or shorthand type of description, sometimes confused with a metes and bounds description. An example might be “The West 3 Metres of Lot 1, Fictional District, Plan 12345”, in relation to a road widening strip being taken under a statutory right of way. Under ideal circumstances, such as where the lot features perpendicular boundary lines with no jogs or curves, the registrar may accept such an abbreviated description. However, the registrar is not required to accept such an abbreviated description, and even if the registrar does, he or she may require an explanatory plan to be filed as well.

Prior to proceeding on the basis of an abbreviated description, it is essential to speak to your lawyer or land surveyor.

Sketch Plans

Sketch plans are plans drawn to scale that do not have to be prepared by a land surveyor, sometimes permitted by the registrar to describe the lease of all or part of a building. The legislation only allows the registrar to exercise his or her discretion to accept a sketch plan in cases of hardship or economic loss. In practical reality, this means the sketch plan will very rarely, if ever, be an option for local governments. If you need further assurance before ruling out a sketch plan, speak to your lawyer or land surveyor.

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Explanatory Plans

An explanatory plan is a legal plan prepared by a land surveyor and registered in the Land Title Office. What distinguishes it from other types of survey plans is that it does not require a field survey or the placement of survey markers on the property concerned. An explanatory plan is based upon existing survey plans and land title records. The ability to create an explanatory plan, where circumstances permit, can often result in significant cost savings in comparison to plans that require field work.

There are, however, only certain circumstances in which an explanatory plan is an available option. A useful guideline is to consider whether a layperson would be able to locate the boundary of the interest created without the benefit of survey markers being placed on the property. Among other things, an explanatory plan will only be acceptable if the boundary lines being created do not feature excessive curves or jogs or involve a natural boundary (such as a watercourse), if the “parent” plan upon which the explanatory plan is based is not a metes and bounds or abbreviated description or an explanatory plan itself, and if the registrar is satisfied that a field survey is not required.

What this means in practical terms is another repetition of a common theme: speak to your lawyer or land surveyor, and if necessary they will consult with the registrar. Whether or not the circumstances are appropriate for the use of an explanatory plan is a question that should be addressed in every individual case.

Reference Plans

Reference plans, like subdivision plans, do require a field survey and the placement of survey markers on the ground. What distinguishes a reference plan from a subdivision plan is that in many circumstances a reference plan does not have to go through the full subdivision approval process. There are, however, some factors that must be borne in mind when you are contemplating whether a reference plan is appropriate.

First, the registrar has the discretion to decide whether a reference plan is appropriate. Typically a reference plan may be permitted where only a single parcel or area of land is being described. Examples may include the consolidation of two or more adjoining lots into one, the re-establishment of lot boundaries, the creation of an easement or right of way, and the transfer or lease of a parcel to a public body such as a municipality or the Crown.

Second, case law in British Columbia has made it clear that the registrar has discretion to consider the issue of legal access to a parcel created by a reference plan, notwithstanding that a reference plan may not require the approval of the subdivision approving officer. In fact, the courts encourage it. This promotes consistency, and prevents the use of reference plans as a means to avoid providing legal access. Even when a parcel is being transferred, leased or donated to a local government for public purposes under section 99(1)(h) of the Land Title Act, legal access may be an issue.

The appropriateness of a reference plan should be discussed with your lawyer or land surveyor.

Subdivision Plans

Subdivision plans are typically used for situations where one or more parcels of land are being divided into several smaller parcels. They require the full array of field work by a land surveyor, as well as approving officer approval and are therefore generally

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the most expensive. The subdivision process as a whole is typically a lengthy and costly one, often requiring submission of preliminary plans to approving agencies for review, provision of lot servicing (for example water, sewer, hydro, drainage, etc.), and sometimes rezoning to accommodate the new parcels.

Conclusion

In conclusion, it is fitting to note the most basic underlying reason for the necessity of a survey plan when describing a legal interest in land. The reason is that a legal interest in land is only as certain and enforceable as the physical definition of it. Lawyers take great care to ensure that the language creating legal interests, and the rights they entail, is as certain as possible. It only makes sense to ensure that the physical definition of where those rights apply is as certain as possible as well.

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