

Selling Land for Local Governments – Part 1

Local governments in British Columbia have greater freedom than ever before to sell real property. Gone are the days when it was necessary for Council or the Board to pass a bylaw declaring land surplus. Under the Community Charter and the Local Government Act, a local government requires only a resolution to proceed with the disposal of land, including land with improvements, as long as the land is not dedicated property such as a park or highway, in which case special procedures are required. However, even in the case of non-dedicated land there are certain statutory notice requirements that must be fulfilled, and there are numerous considerations of a more commercial nature that should be kept in mind during the process.

Real estate law generally is a vast and at times highly complex subject, and this article is intended only as a brief discussion of a few key issues related to selling land, including some issues particular to local governments. Part 1 has a general focus on preliminary matters, while Part 2 (which will appear in the next issue of LoGo) will focus on issues that pertain to the contract of purchase and sale.

Special Considerations for Regional Districts

In comparison with municipalities with their with natural person powers, regional districts are somewhat more limited in their ability to sell land. Unlike a municipality, which need not necessarily advertise land for sale prior to reaching an agreement with a purchaser, a regional district typically must not sell land to a person without first offering it to the general public. Regional districts are subject to this additional “check” or “balance” that requires an opportunity for competition among potential purchasers.

Section 186(2) of the Local Government Act does provide a number of exceptions to this general rule. It says that land need not be made available to the public if the disposition is to a not for profit corporation or a public authority, if the disposition is part of a land exchange, if the disposition is part of a public-private partnership that has already gone through a competitive process, or if the disposition is to an adjoining owner for the purpose of consolidation.

Another key difference between municipalities and regional districts is that regional districts are more limited in how they may use the proceeds of disposition. Section 188 of the Local Government Act requires that such proceeds must be placed to the credit of a reserve fund once any debts related to the land are paid.

In the case of park land, section 188(3) specifically requires regional districts to place the proceeds of sale into a reserve fund for park land acquisition. Section 27 of the Community Charter requires municipalities to do the same.

What’s in this issue...

Selling Land for Local Governments – Part 1	1
Court Rejects Major Industry Tax Challenge	5
The OCP Trump Card: By Appeasing Popular Opinion Council Oversteps its Jurisdiction	7

Appraisal

A typical first step in the process of selling land is determining what the land is worth on the open market. If a local government has chosen to engage the services of a real estate agent, then the agent may be able to assist in determining the market value of the land, but usually a real estate appraiser is brought in to perform a specialized analysis.

Knowing the market value of the land is important, not only so that the local government obtains the best sale price possible, but also to be sure the local government does not offend the rules against providing assistance to business.

Selling Land for Local Governments – Part 1

... continued from page 1

Appraisals are often valid for a short period of time only, perhaps 3 to 6 months. Depending on how volatile the market is at any given time, it may be worthwhile to update an appraisal that is more than 6 months old.

Survey

If the land being sold will be created by subdivision, including a road closure, or if the local government will retain a statutory right of way over the land for public works or access to other public lands, then it may be helpful to have a land surveyor prepare the necessary plans beforehand, at least in draft form. In the case of road closure it is actually mandatory, since a survey plan must accompany the closure bylaw.

A survey plan will precisely identify the land for purposes of appraisal, and will also provide prospective purchasers with certainty about what exactly the local government is offering to sell. If a statutory right of way is to be retained, prospective purchasers will know what part of the land will be encumbered by it.

Title Review

A task that should be completed early in the process, and certainly prior to the acceptance of any offer to purchase the land, is a review of legal title to the land. While an appraiser and a land surveyor will each review title for the purposes of their respective services, it is recommended that local governments also conduct a legal review of the title as a whole.

First and foremost, the goal of the review is to ensure there are no restrictions on title that would prevent the sale of the land. Local governments sometimes obtain, by transfer or donation, land that is subject to conditions, such as the condition, for example, that it be used only for park purposes, or the condition that it not be transferred to any other person. These can take the form of limitations on the ownership interest itself, such as a “fee simple on condition” or a “right of reverter”, either of which may permit the previous owner to re-take the land upon breach of a condition, or they could take the form of an option to purchase or a restrictive covenant.

Another goal of the review is to identify any items that can be removed from title to make it more attractive to purchasers. For example, there may be expired development or other permits listed under the “Legal Notations” section. Or, there might be an easement registered as a charge against the land that permits a neighboring property owner to use a portion of the land for access purposes. If the local government happens to be retaining a statutory right of way over the lands for public highway purposes, the easement may no longer be necessary and the neighboring owner may agree to discharge it.

A piece of land is not just a patch of soil, it is also a unique bundle of legal rights and interests, and it is important in every case to develop a clear understanding of what is being bought and sold. No understanding is complete without a review of title.

Site Profile

If the land is being used, or has in the past been used for any of the numerous industrial and commercial activities prescribed by the Contaminated Sites Regulation under the Environmental Management Act, then a site profile will need to be completed, and provided to the purchaser. The site profile is similar to the property disclosure statement used in residential real estate transactions. The site profile requires the vendor to disclose any knowledge it has of contamination or potential

Selling Land for Local Governments – Part 1

... continued from page 2

contamination on the land, as well as any studies or remediation work that may have been carried out.

The Contaminated Sites Regulation permits a purchaser to waive, in writing, the right to a site profile, but this will usually happen only if the purchaser has a detailed prior knowledge of the land, or is buying the land on an “as-is” basis, in which case it may expect to pay a lower price in compensation for accepting some level of risk. If the purchaser is agreeable to waiving the requirement for a site profile, this should be reflected in the terms of the purchase contract.

Notice of Disposition

For municipalities, section 26 of the Community Charter, and for regional districts section 187 of the Local Government Act, require the provision of public notice prior to the disposition of land or improvements. In the case of a municipality, the exact form of the notice will depend on whether a deal has already been made, or whether the municipality is looking for offers. If a deal is already in place, the notice must identify the land, the buyer, the nature of the disposition (if it is a sale, as opposed to a lease, it will normally be the “fee simple” interest), and the price. In the case of a regional district, or a municipality looking for offers, the notice must identify the land, the nature of the disposition, and the process by which it may be acquired (submission of offers, public auction).

If the land is being sold for less than market value to a person or organization such as a charity, then the local government must also provide public notice of its intention to grant assistance, as required by either section 24 of the Community Charter or section 185 of the Local Government Act. This notice can be combined with the notice of disposition into a single advertisement, but it must clearly state that it provides notice of both kinds, along with all necessary details.

Section 25 of the Community Charter, and sections 181 through 184 of the Local Government Act make it clear that, except in specific circumstances (generally related to heritage conservation or public-private partnerships), a local government is forbidden from providing assistance to business. Among other things, this means the local government cannot sell land to a business for less than market value, nor can the local government grant the business a mortgage, which would amount to lending the business money.

Typically, a business will need to seek private financing to acquire public land, although in some circumstances it may be appropriate to use a form of agreement for sale registered against title to the land as a means of avoiding the mortgage issue. This is something akin to a “layaway” plan for the purchase of the land, which keeps legal title in the hands of the local government until payment in full of the purchase price. Such a transaction is not typical and legal advice should be sought before agreeing to such an arrangement.

Conflicts of Interest and Rezoning

Occasionally, circumstances arise where a local government may consider, or be asked to consider the rezoning of property that it intends to sell. While such a situation may not necessarily run afoul of the law, the best advice is to avoid it if possible. If it cannot be avoided, then extreme caution should be exercised. A council or board must not permit its decision on whether to adopt or defeat a rezoning bylaw to be influenced by an improper purpose or motive, which would include obtaining a better price for the land. Proper zoning and planning considerations must form the basis of the decision.

Selling Land for Local Governments – Part 1

... continued from page 3

The danger inherent in such a situation is reflected in the following statement of the British Columbia Court of Appeal in the case of *Eddington v. Surrey* (District), [1985] B.C.J. No. 1925, at paragraph 5:

From the time that Surrey accepted Woodward's proposal in August, 1981, the municipality was clearly in a conflict of interest position. On the one hand, it had to consider the appropriateness of rezoning the lands in question, while on the other hand, it had obviously made up its mind that it desired to obtain the \$1,900,000 for its 20 acres and, further, to permit the construction of the shopping complex.

While the court in that case struck down the rezoning bylaw on the basis that Surrey, having withheld information about the proposed development in the lead-up to the public hearing, had failed to “move with scrupulous care to meet the requirements of procedural fairness”, it remains to be seen what the court would have made of the clear conflict of interest had there not been procedural grounds available to strike down the bylaw.

In *Surfside R.V. Resort Ltd. v. Parksville (City)*, [1993] B.C.J. No. 1651, the British Columbia Supreme Court struck down a rezoning bylaw on the procedural basis of insufficient notice of a public hearing. Parksville had for some time been engaged in seeking to purchase the property in question, or to encourage conservation groups to purchase it, in order to protect environmentally sensitive lands.

The court did recognize that Parksville had taken many steps to separate the issue of rezoning from the issue of acquisition, and the court rejected the allegation that Parksville had acted in bad faith with the motive of acquiring the land at a lower price through downzoning. However, the failure to exercise “scrupulous fairness” in its procedure was fatal to Parksville’s rezoning bylaw. As noted by the court, at paragraphs 24 and 25:

Where a municipality finds itself in a position of potential conflict of interest it must, as I have set out, act with greater care than usual to see that its purpose and motives remain directed towards the zoning or other regulation under consideration and not towards any improper purpose... The other requirement on a municipality where it finds itself in a potential conflict is one of scrupulous fairness in procedure towards the applicant.

What these cases demonstrate is that, at the very least, a local government that considers rezoning land it intends to sell is likely to be the subject of intense scrutiny.

[To be continued in the next issue of LoGo.]

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Court Rejects Major Industry Tax Challenge

As reported in the Summer 2009 issue of Logo Notebook, several major industrial companies launched legal proceedings challenging the extent of local government taxation on major industrial properties.

On October 16, 2009, the British Columbia Supreme Court dismissed the challenge brought by Catalyst Paper Corporation against the District of North Cowichan.

The Court held that it had the jurisdiction to review the reasonableness of a local government taxation bylaw. Such a review, however, is very limited and constrained by both the statutory authorization for such a bylaw and the fact driven, policy laden and discretionary nature of a local government decision such as this. After confirming that Courts are to give municipal decisions considerable deference, the Court stated:

The cautions expressed in each of these cases about judicial interference with municipal decision making resonate even more strongly in a case such as this one where what is at issue is a discretionary decision that is largely unfettered by any statutory restrictions.

...

Sections 1 and 3 of the Community Charter confirm that municipalities “require ... adequate powers and discretion to address existing and future community needs” and the “authority to determine the levels of municipal expenditures and taxation that are appropriate for their purposes”. Furthermore, s. 3 of the Community Charter confirms that Councils are to have “the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities”. These objects, at least in significant measure, are achieved through s. 165 and s. 197 of the Community Charter. In setting its financial plan and adopting its property taxing bylaw Council performs a vital role. It is a role that requires Council to weigh and balance the interests of its constituents. Council must take into account the circumstances, both short term and long term, of the community. It will be making fundamental discretionary decisions about what services to offer, what services to reduce, and what services to expand. It will of necessity consider how the revenue for these services is to be raised. The exercise of the power conferred by s. 197 is “fact driven, policy laden and discretionary. Thus, the range of outcomes” is broad.

...

Barring something aberrant or “overwhelming”, barring a decision “no reasonable body could come to”, a court will not revisit the outcomes or “outer boundaries” determined by Council to be appropriate. It will not substitute its own view of a more suitable outcome.

After agreeing that local government has the power to discriminate by imposing different rates of taxation on different classes of property, the Court rejected the argument put forward by Catalyst that the taxation bylaw was unreasonable because the property taxes imposed on major industrial properties were disproportionate to the level of services consumed by major industry. The Court stated that:

... a consideration of the actual exercise undertaken by Council in adopting a financial plan and the taxing bylaw that is to give effect to that plan, reveals that the exercise is not, at core, empirical. Instead it reflects the application of judgment based on a knowledge of the community, the community’s needs, the economic challenges it faces, the adequacy of

Court Rejects Major Industry Tax Challenge

... continued from page 5

the services it provides, and myriad other considerations. It involves a weighing of multiple competing interests. Though it is an exercise that is not amenable to precise calculations or “concrete assessments”, it remains nevertheless a rational exercise.

In a similar vein, the application of a consumption model contemplates a linear, or roughly linear, relationship with property taxes. The more services the members of a property class use, the higher the taxes of the class. This formulation is, however, at odds with the entitlement of a municipality to discriminate in fixing property tax rates. The very essence of a right to discriminate is that Council can deviate, albeit for relevant purposes, from such a linear relationship or from the need to treat members of different classes in the same way.”

The Court stated that in such a challenge there is an obligation on the local government to ensure that there is information in the record before the Court from which the Court can determine the factors Council considered in its deliberations. Satisfied that there was such evidence, the Court stated:

Council had a great deal of relevant information available to it, all of which was rationally connected to the exercise it faced. Finally, and most importantly, the inherent nature of Council’s decision making exercise under s. 197 in relation to the Bylaw is one in which there are multiple competing objectives and policies, where the respective merits of these competing objectives are not easily quantified or measured and in respect of which no precise expression, which would capture the disparate views of Council, can be expected.

Accordingly, the Court concluded that the tax rates bylaw was reasonable and within the range of possible and acceptable outcomes and the challenge by Catalyst was dismissed.

The significance of this case for local government is that, despite dismissing the challenge to the bylaw, the Court has now placed local government under the microscope in these bylaw challenges and raised an expectation for local government to justify the bylaw as being reasonable and lawful.

First, the Court held it had the jurisdiction to review a local government legislative act, such as a budget, for reasonableness even when such decisions are largely political in nature.

Second, the Court held that local government has an obligation to disclose some of the factors and considerations underlying the adoption of the bylaw and fixing the tax rates. In other words, local government has to show the basis for its decision making in order to demonstrate that the bylaw was reasonable.

Third, the Court held that, even though formal reasons are not required, the local government must provide sufficient evidence to show the Court how and on what basis the decision was made and to satisfy the Court that the decision was rational. This amounts to a requirement to give reasons to the Court.

This case represents a transfer and reversal of the onus of proof, which is supposed to be on the party challenging the bylaw, to local government if it hopes to have its bylaw held to be reasonable and lawful. Staff should ensure that staff reports or other documentation include the factors, considerations and reasons for local government decision making so that evidence exists that can be provided to the Court should there be a challenge to a bylaw.

Guy McDannold

The OCP Trump Card: By Appeasing Popular Opinion Council Oversteps its Jurisdiction

It is a problem often shared by local governments: letters to the editor start pouring into the local newspaper from citizens concerned about a new condo development. The complaints are commonplace, but usually revolve around the proposed new building somehow not fitting into the community. The trouble is that the condo developer has met the requirements of all of the applicable bylaws. No variances are required, or only minor ones are at stake. The local government wishes to be accountable to its constituents, but senses its hands are tied. In situations where a proposed real-estate project requires a development permit by virtue of an official community plan (“OCP”), it can be tempting for the local government to attempt to decline the development permit for the very reasons that have pitted the community against the project.

While the local government believes that it is acting in good faith in the interest of the community by refusing the development permit, the Supreme Court of British Columbia has now confirmed that local governments have no authority to decline development permits for projects which conform to the guidelines of an OCP if the refusal is based on consideration of criteria not contained in the OCP. By way of background, section 919.1 of the Local Government Act provides local governments with the opportunity to designate development permit areas in their OCP for one or more purposes enumerated in that section.

The Case

In the recent case which has shed light on the matter, *Yearsley v. White Rock (City)* 2009 BCSC 719, Yearsley sought a court declaration that White Rock’s refusal to issue a development permit for his property was unlawful and of no force and effect. Consequently, he submitted, the Court could order White Rock to issue the permit to him or specify what changes he had to make so that a permit would be granted. Yearsley’s position was that White Rock had exceeded its jurisdiction by acting on improper and extraneous considerations in refusing to issue the development permit. White Rock argued in response that the decision was lawful and reasonable in accordance with its bylaws.

Background

The property in question was occupied by a two-storey commercial building, and Yearsley proposed to replace it with a six-storey mixed commercial/residential building in an area that was subject to development permit requirements. Building height was governed by White Rock’s zoning bylaw and White Rock’s official community plan guidelines for the development permit area made no references to height. There were no other factors set out in the planning staff’s report to Council to indicate the application in any way contravened any other provision, except for minor variances that were not at issue.

White Rock decided to hold public meetings on the development permit application for the purpose of “reviewing the form and character” of the proposed building, and did so over two days. At these meetings, the public voiced concerns primarily regarding the height of the proposed building and issues surrounding the disruption of views in the neighborhood. On the second day of these hearings, the agenda for the meeting identified the motion: “that staff be authorized to issue Development Permit No. 292”. However, Council declined to issue the permit and they gave their reasons for doing so at a subsequent Council meeting. Some of the reasons given were:

The OCP Trump Card

... continued from page 7

Because people who spoke at the meeting were concerned that the design did not fit the form or character of the neighborhood”, and “because an overwhelming amount of people came to Council expressing their concern and outrage about the potential character and form of the building eroding the neighborhood.

Issues

The issues the court had before it were: (1) whether White Rock exceeded its jurisdiction by taking into account irrelevant or extraneous criteria outside of the bylaws and the OCP guidelines in refusing to issue the development permit; (2) whether White Rock acted reasonably in refusing to issue the permit; and (3) if White Rock acted outside its jurisdiction, what was the appropriate remedy to be granted to Yearsley.

Decision

Madam Justice Dillon held that the standard to be applied in matters related to questions of jurisdiction (arising, in this case, from the refusal to issue a development permit) was correctness. She held that reliance on public opinion was not a relevant consideration, as it was not linked to legitimate factors within the zoning bylaw or the OCP. The court also found that the true reasons Council acted to refuse the application were unspecified, vague-stated concerns that were not referenced in the OCP, including implied concerns about height. Accordingly, the failure to give adequate reasons to inform Yearsley how to comply suggested that councillors could not give reasons because it was known that height was not a proper consideration within the context of the application.

The overall conclusion of the court was that White Rock took into consideration matters that were not within the OCP guidelines, and supported public opposition to the height of the proposed development, even though the development permit application met all of the zoning and other requirements. The court concluded that, in doing so, Council acted in excess of its jurisdiction, and its decision to refuse the permit must be quashed. The court declared that the Council resolution refusing to grant the development permit was unlawful and of no force and effect. As for the appropriate remedy, White Rock was ordered to issue the development permit to Yearsley. This was due to the fact that the staff report to Council on the matter indicated that the proposed development complied with all the bylaws and OCP guidelines. Furthermore, White Rock had not shown that there was a legitimate problem with the application that required further consideration from council.

Conclusion

It is essential that local governments, which have created development permit areas in their OCP pursuant to the Local Government Act, take care to issue and decline development permits according to the guidelines they have enacted in their OCP. Consideration of extraneous criteria to decline development permits, such as public sentiment, will not be tolerated by the Court. Not only is the Court willing to order the local government to issue the development permit, it will order costs against the local government. Although the issue has not been raised in case law to date, it would not be surprising for a developer to seek special costs against a local government that declines a development permit for extraneous reasons.

Maja Stupar and Robert Peterson