

## Selling Land for Local Governments – Part 2

Part 1 of this article, which appeared in the Fall 2009 issue of LoGo Notebook, dealt with several general issues of concern to local governments that sell land. Part 2 focuses on the actual agreement of purchase and sale, including some issues specific to situations where the local government is the seller.

It has been a principle of the law for centuries that an agreement to transfer an interest in land must be in writing, and the value of having a well-drafted agreement of purchase and sale cannot be overestimated. It serves the interests of all parties to a transaction to have the terms of the sale and the mechanics of how the transfer will be completed set out clearly from the beginning. Every piece of land is in some respect unique, and however routine some aspects of the process may be, every transaction is also unique. “Cookie-cutter” agreements may seem desirable as a means of reducing costs, but they must be approached with great caution. Even if a standard form is to be used, legal advice should be obtained to avoid any unpleasant surprises.

### Conditions Precedent

When a local government is selling land, there are a number of issues that the agreement of purchase and sale should address. For instance, the agreement should set out any conditions on which the sale depends. These are referred to as “conditions precedent” or “subject clauses”. Some conditions precedent can be waived by the party they benefit, and some cannot. An example of a condition precedent that could be waived is a condition that the buyer have the property inspected. The buyer could elect to proceed with the transaction despite not having inspected the property.

Those conditions precedent that cannot be waived are referred to as “true” conditions precedent, since the transfer of the land simply cannot occur unless they are satisfied. One example of a true condition precedent is where the parcel being sold has not yet been created by a subdivision. If the subdivision cannot be completed, then the deal will collapse. Other conditions precedent that are essential from a local government perspective are those relating to statutory prerequisites for disposing of land, such as Board or Council approval, and notice of disposition.

Care must be taken to ensure that a condition precedent is not so subjective in nature that it renders the agreement a mere offer, rather than a binding agreement. Where a condition precedent is highly subjective, the agreement must be drafted so as to ensure that it is binding while the condition remains outstanding.

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In *Murray McDermid Holdings Ltd. v. Thater* (1982), 42 B.C.L.R. 119, the British Columbia Supreme Court held that an agreement was a mere offer to sell, and not binding, because it was subject to the approval of the buyer’s president. In other words, approval could be granted or refused on a whim. Likewise, in *Saveheli v. Philp*, 2000 BCSC 815, the British Columbia Supreme Court held the agreement to be a mere offer to purchase where it was subject to the “buyer receiving and being satisfied with information relative to tax implications re: Canadian/U.S. ownership”. There were simply too many variables and subjective elements involved.

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### **Representations and Warranties**

Representations are statements made by one party to the other regarding certain facts about the condition of the property, the state of title, a party's legal status, and other matters. Representations are legally significant because the party to whom they are made is often entitled to rely upon their truth when deciding to enter into an agreement.

Warranties usually go hand in hand with representations. A warranty, as the ordinary use of the term implies, is a promise that if something goes wrong with the item covered by the warranty, the party giving the warranty will make good the resulting damage. In the context of an agreement of purchase and sale, a warranty is a promise that a representation is true. For example, if the seller represents and warrants that there are no outstanding construction debts that could result in a builders' lien against property, and after the transfer of the property a lien is claimed because of the construction debt of the seller, the buyer will have the ability to claim damages from the seller.

Buyers of land will typically seek to extract as many representations and warranties from the seller as possible, while the seller will try to minimize them. Local governments that are selling land should be extremely wary of making representations and warranties, and should only make them if it is absolutely certain that the state of affairs represented is true, and the language used to express the representation does not leave the local government vulnerable to a change in circumstances that is beyond its control.

If a local government is selling property on an "as-is" basis, this should be stated explicitly in the agreement, and language employed that leaves no room for the buyer to argue that it relied upon a representation by the local government. This might be the case where a local government is selling a portion of closed road, or a property obtained through tax sale.

Sellers of land, local governments included, should beware of a statement of adjustments provided by the buyer that includes representations and warranties that were not part of the original agreement of purchase and sale. In many cases these should be rejected.

### **Closing Matters**

An agreement of purchase and sale should set out which party is responsible for preparing transfer documents, including land title documents, the statement of adjustments, tax documents, and others. Responsibility may be divided, depending on the circumstances, although the more usual arrangement is for the buyer to have its solicitors do the work.

Details of the closing date, the payment of deposits and purchase funds, and other matters relating to the mechanics of closing the transaction should be spelled out as clearly as possible. For example, if the buyer is, or may be relying on a new mortgage to finance the purchase, then the agreement should state that the transfer can take place on the buyer's solicitor's undertaking to pay the purchase price once the mortgage documents are registered. In the case of *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, the British Columbia Court of Appeal held that it is not permissible to close a transaction on the basis of solicitor's undertakings unless the parties have expressly agreed to it in the contract.

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The buyer will be required to pay the Property Transfer Tax when registering the transfer in the Land Title Office. If there is GST/HST applicable to the transaction, who will account for it? Normally the local government selling the property will collect it and account for it with the Canada Revenue Agency, but some corporate buyers may be registered for GST purposes and wish to self-assess the GST/HST. In that case, the agreement should require the buyer to provide a certificate to the local government in order to protect the local government from liability in the event the tax is not paid.

### **Standard Clauses**

A good agreement should contain a few pages of what is sometimes referred to as legal “boilerplate”, also known as the “fine print”. These clauses often deal with matters such as notice, binding effect, assignment, amendment, waiver, interpretation, further assurances, time being of the essence, and others. Although it can be tempting to do away with these clauses in the interest of having a “simple” agreement, the consequences of signing an agreement without them can be anything but simple.

To give just one example, a local government may agree to sell a piece of property to a particular buyer, and for any number of reasons may not want the buyer to assign the agreement to another party. Under the Law and Equity Act, an agreement for the sale of land is deemed to be assignable unless the parties have agreed otherwise in writing. So, unless the agreement prohibits assignment, or requires the prior consent of the local government, the local government may have no control over who the ultimate buyer will be.

Legal boilerplate, while hardly thrilling to read, has been developed by lawyers over many years in response to a variety of potential complications, and the parties to an agreement dispense with it at their peril.

In conclusion, it is no exaggeration to say that selling land, even in what may appear to be the most straightforward of circumstances, is a process full of potential risks. Timely legal advice can assist in identifying and, where possible, minimizing those risks through the creation of a well-drafted agreement of purchase and sale. As Benjamin Franklin once said: “An ounce of prevention is worth a pound of cure”.

***Michael Hargraves***

## Collecting Debts As Unpaid Property Taxes – Know Your Limit, Play Within It

As many local governments know, the treatment of fees, charges, expenses and other amounts due and owing to a municipality or regional district can, in some circumstances, be treated and collected in the same manner and with the same remedies as property taxes; if the amount owing remains unpaid on December 31 of the year it falls due, it may be deemed to be taxes in arrear and collected as such. While this represents one of the more effective enforcement measures in a local government's quiver of remedies, there are limitations and procedures that must be observed.

Section 258 (Special Fees may be Collected as Property Taxes) of the Community Charter is authority for a municipality to collect unpaid fees or other amounts, as property taxes. Although this article deals primarily with municipalities, it must be pointed out that regional districts have similar authority under section 363.2 of the Local Government Act to recover fees, costs and charges as unpaid property taxes, in specific circumstances. The municipal authority reads in part as follows:

- “258(1) This section applies to the following:
- (a) fees imposed, under this Act or the Local Government Act, **for work done or services provided to land or improvements;**
  - (b) fees imposed under section 196(1)(a) [fire and security alarm systems]
  - (c) amounts owing that a municipality is entitled to recover **for work done or services provided to land or improvements** under any other provision of this Act or the Local Government Act that authorizes the municipality to recover amounts in the event of default by a person.

[emphasis added]

- (2) An amount referred to in subsection 1:
- (a) may be collected in the same manner and with the same remedies as property taxes, and
  - (b) if it is due and payable by December 31 and unpaid on that date, is deemed to be taxes in arrear.

...”

This provision acts as a useful collection tool for fees and charges that a municipality imposes or amounts that a municipality is entitled to recover for work done or services provided to the land or improvements by the municipality. This includes, for example:

- fees, charges or other amounts owing in relation to water, sewer and other services provided to land, buildings etc.;
- a municipality's costs for cleaning up an untidy premises authorized under an unsightly premises bylaw;
- removing a retaining wall extending from a property that unlawfully encroaches onto a highway.

Section 17 (Municipal Action at Defaulter's Expense) provides further authority for a municipality:

- “17(1) The authority of a council under this or another Act to **require that something be done** includes the authority

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to direct that, **if the person that is subject to the requirement fails to take the required action**, the municipality may:

- (a) fulfill the requirement at the expense of the person, and
  - (b) recover the costs incurred from that person as a debt.
- (2) [Sections 258 and 259 apply] to an amount recoverable under subsection (1) that is incurred for work done or services provided in relation to land or improvements.

*[emphasis added]*

In other words, where a council has authority to require that something be done under the Community Charter or Local Government Act (or any other Act), that authority includes the municipality's right, where a person fails to take the required action, to fulfill the requirement at that person's expense and recover those costs in the same manner as unpaid taxes.

Thus, the municipality is entitled to treat that amount as unpaid property taxes and collect that amount as such provided

- (a) a bylaw is enacted that specifically requires something to be done or not be done,
- (b) a person fails to take the required action and
- (c) the municipality is authorized under the bylaw to fulfill that requirement at the expense of the offender and recover the costs of the removal as a debt.

As you can expect, there are numerous examples under the Community Charter that authorize municipalities to impose requirements. (The general authority of a municipality to "require something to be done" comes from section 8, which authorizes councils to, by bylaw, regulate, prohibit and impose requirements in relation to such things as municipal services, public places, public health, protection of the natural environment, animals, buildings and other structures).

However, as some municipalities have recently discovered, the proper steps must be followed and the statutory limits observed, before such authority can be exercised.

First, there must be clear statutory authority to:

- (a) charge fees;
- (b) require work be done;
- (c) carry out the work; and
- (d) recover such fees or such costs as unpaid taxes.

Second, there must be a bylaw (or in rare cases, a council resolution) that specifically authorizes the municipality to do those things listed above.

The following is a non-exhaustive list of some of the mistakes that, in our experience, municipalities may make:

- there is no statutory authority for requiring something be done or not be done;
- there is no statutory authority to undertake work or services to land or improvements, or for the municipality to recover costs of such work as unpaid taxes;

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- statutory authority exists, but there is no bylaw provision authorizing the municipality to undertake the work or recover fees, charges or costs as unpaid taxes.

Specific examples of where costs are not recoverable as taxes, are a highway encroachment that does not form part of private property (e.g., boulevard garden) or waste deposited on a highway. The removal of the encroachment or waste by municipal workers does not constitute work done or services performed to land or improvements in that the work is not done on land or improvements against which property taxes are assessed; it is work done on a highway with no physical connection to the taxable property.

This Article does not take the place of comprehensive legal advice on the matter, but it is clear that while this remedy can be an effective tool, there are procedures and limitations that local governments must be aware of when considering the recovery of debts due to them.

***David Pilling***

## **Derelict and Abandoned Manufactured Homes**

With building bylaws demanding increasingly strict construction standards, today's manufactured homes are being built to stand the test of time, much like conventional houses. Unfortunately, neglect and British Columbia's climatic conditions are turning existing holiday ramblers into ramshackle structures. Since older manufactured homes have tended to decrease in value as they age and fall into disrepair, their abandonment can be an appealing option to owners. The owner simply ceases paying rent on their manufactured home pad to the park landlord, and moves onto greener pastures.

When the landlord of a manufactured home park refuses to deal with abandoned dilapidated manufactured homes situated in their park, the problem falls to the local government. Such structures often attract squatters and are used for undesirable purposes, becoming public nuisances. The structures are, at the very least, offensive to the community. More seriously, the structures can be so dilapidated that they are structurally unsound and open to the elements, so creating hazardous conditions.

Finding an owner who has abandoned a manufactured home can be expensive or impossible, despite the ability to search provincial registries for their whereabouts. Even if they can be located, the legal solutions available are limited in a practical sense. It is often more pragmatic for a local government to address the problem directly with the landlord of the manufactured home park.

Where a manufactured home park landlord is uncooperative, a local government may consider imposing remedial action requirements on the landlord with respect to the abandoned manufactured homes. Regional districts may impose remedial action requirements to manufactured homes that constitute hazardous conditions.

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Municipalities may do the same, but they have additional power to impose remedial action requirements on the landlord where the abandoned manufactured homes are declared nuisances, including circumstances where the manufactured homes are so dilapidated or unclean as to be offensive to the community. The procedures to impose remedial action are set out in the Community Charter (the “Charter”) and, in the case of regional districts, also in the Local Government Act (the “Act”).

In the absence of the landlord’s compliance with properly-imposed remedial action requirements, the Charter and Act permit both regional districts and municipalities to enter onto the lands of a manufactured home park and demolish and remove abandoned manufactured homes. The costs incurred may be recovered from the landlord as a debt.

Before a local government considers imposing remedial action requirements on a manufactured home park landlord, the local government must consider whether the landlord would face any obstacles in complying with provincial legislation governing manufactured homes including, most significantly, the Manufactured Home Park Tenancy Regulation, B.C. Reg. 481/2003.

The British Columbia Supreme Court recently heard from the landlord of a manufactured home park with a number of abandoned manufactured homes, which either created hazardous conditions or were declared nuisances, in *Kurpil v. District of Port Edwards* (sic). The manufactured homes raised alarm bells in the District of Port Edward, because they were attracting squatters and drug users. Unable to locate the owners of the homes after taking reasonable steps to do so, Port Edward imposed remedial action requirements on the landlord of the manufactured home park, the late Ms. Kurpil, who unfortunately passed away during the Court proceedings. Before she died, Ms. Kurpil had clearly refused to comply with the remedial action requirements, and so Port Edward carefully made the decision to lawfully enter onto the park and demolish and remove the homes. Port Edward billed Ms. Kurpil for the cost of doing so, and the landlord disputed this charge.

Ms. Kurpil’s estate submitted to the Court that, in addition to not owning the abandoned manufactured homes, she was unable to simultaneously comply with both the legislation governing manufactured homes and the remedial action requirements. Port Edward led evidence that the manufactured homes were worthless and Ms. Kurpil’s estate failed to lead any evidence in this regard. Since the Manufactured Home Park Tenancy Regulation expressly permitted the landlord to dispose of worthless abandoned property on her lands, Port Edward argued that there was no barrier to dual compliance, and Madam Justice Dillon agreed. Moreover, Madam Justice Dillon stated: “Notably, [Ms. Kurpil] never asked for more time [to comply with the requirements of the Manufactured Home Park Tenancy Regulation] as she could have”.

Remedial action can be an effective tool for local governments to address dilapidated manufactured homes that are hazardous or nuisances. However, it is essential for local governments to follow the proper remedial action procedural steps, in addition to carefully considering how the provincial legislation governing manufactured homes applies to each unique situation. As the *Kurpil v. District of Port Edwards* (sic) decision confirmed, it was important that Port Edward determined the value of the abandoned manufactured homes in light of the requirements of the Manufactured Home Park Tenancy Regulation, and further satisfied itself that Ms. Kurpil agreed the manufactured homes had no value.

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In addition to carefully considering how any other legislation may limit a landlord's ability to comply with remedial action requirements, it is good practice for local governments to communicate in writing to landlords that they will grant reasonable additional time for compliance to accommodate the requirements of any applicable legislation, notably the legislation directly applicable to manufactured homes, including the Manufactured Home Park Tenancy Regulation.

***Robert Peterson***

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Design and layout by Jacqueline D. Staples  
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