

PARTNERING, PRIORITIES AND PERMITTING ... PERSPECTIVES ACROSS CANADA

This issue of Blakes Bulletin on Real Estate focuses on land and infrastructure development. The P3, or public/private partnership model, is surfacing in every jurisdiction but is being extensively employed in British Columbia, and Blakes has been considerably involved in those projects. It is anticipated that more infrastructure and special facility projects will take this path and our first article sketches the outline and essence of these partnerships.

Our second article underlines the care and caution that must be exercised in construction lending due to the complicated umbrella of protection that constitutes the world of construction liens.

On the rapidly evolving front of brownfield remediation and redevelopment, we are highlighting an important British Columbia decision that addresses limits on liability and administrative discretion relating to these sites.

As securities regulation and control over various other commercial and industrial sectors has grown more uniform across the Canadian provinces, we thought it would be interesting to compare and contrast the treatment of land development in three representative regions: Ontario, British Columbia and Québec. You will see by our review the significant level of similarity in treatment but also certain surprising areas of difference.

The regulatory framework governing land development has been in a regular state of flux and the practices in the industry continue to evolve to respond to the new environment. The real estate groups in all of Blakes offices are available to share their expertise with you in order to deal with the various issues raised in this Bulletin.

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PUBLIC-PRIVATE PARTNERSHIPS

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British Columbia is rapidly emerging as a leader in the Canadian public-private partnership (P3) market. The provincial government has established an independent agency, Partnerships BC, with a mandate to develop a wide variety of new public facilities using the public-private partnership model.

With recent successes such as the Sea to Sky Highway Improvement Project and the Richmond-Airport-Vancouver Rapid Transit Project – both of which will serve significant roles during the 2010 Winter Olympic Games and beyond, especially in light of B.C.'s rapid population growth – the British Columbia P3 market is proving that such partnerships can add significant value to the efficient delivery of necessary infrastructure projects.

This article examines the project structure of a typical P3 and looks at the major contractual relationships usually involved in P3s. While P3 transactions and the associated request-for-proposal process are complex, well-established markets exist in the U.K. and Australia where sophisticated P3 models have been developed over many years. These models are being imported and adapted for use in B.C. and, as the Canadian and provincial P3 markets mature and become more familiar with these models, greater opportunities exist for cost-effective, value-added solutions to traditional public sector service delivery.

P3 deals generally consist of a "Concession Agreement", sometimes referred to as a "Design, Build, Finance and Operate" or "DBFO" Agreement, between the governmental agency or authority and the private sector partner, together with a series of "subcontracts" between the private sector partner and various contracting parties who provide the specialized expertise and services for completion of the project. The Concession Agreement usually grants to the private partner a license or a lease over the project lands for a specific term, and requires the private partner to design, build, finance and operate the project for the term.

The essential feature of the Concession Agreement is the transfer of risks inherent in a major real estate development project of this type. In a typical P3 project, the private partner, rather than the government, bears the risks associated with construction, development, financing and operation including risks of site conditions (geotechnical and environmental), title matters and encumbrances, permitting, labour shortages and strikes, general changes in law and certain events of *force majeure*. The overall objective of the risk allocation exercise is to achieve an efficient transfer of risks to the party best able to control and price particular risks, so that the public sector achieves the best value for money in the development and operation of the project.

Having agreed to assume financing, development, maintenance and operating risk, the private partner "subcontracts"

with various parties to off-load the risks to those best able to manage and price them. Typically, the concessionaire will contract with a design-build contractor to provide the design and construction services and with a separate contractor to provide the operations and maintenance services. Each of these third party contractors, in exchange for fixed-price contracts, agrees to assume the risks associated with the provision of their respective services. Typically, these subcontracts are structured as "flow through" contracts whereby the rights and obligations placed on the private partner under the Concession Agreement are flowed down to the subcontractors.

The final basic element of the typical P3 structure is the financing of the development. Depending on the size and nature of the transaction, the financing can take many forms including traditional secured bank debt, syndicated debt, and rated bond financing sometimes with a guarantee/insurance feature. Creating the most efficient combination of debt and equity financing to provide the public sector with the best value for money is key to the success of these P3 projects.

Dispersed among the major contractual relationships is a myriad of secondary contracts. The most important of these are the "direct agreements", firstly, the governmental authority with the lenders to the project and, secondly, both the governmental authority and the lenders with the third party contractors. These direct agreements allow the lenders and the public authority the right, in certain circumstances, to step into the private partner's shoes under the various contracts. Accordingly, the direct agreements provide essential protection to the lenders and to the public sector (and, in some cases, to the third party contractors) against the consequences of default by the private partner under one or more of the basic project agreements.

Ultimately, the typical P3 structure is a complicated matrix of contractual relationships in which all of the necessary financing and specialized expertise to design, build, finance and operate a major development project are brought together in the public-private partnership model. As the Canadian market continues to become more familiar with this model, the opportunities for private sector participation in traditional public sector developments, such as infrastructure revitalization and hospital development, will increase and British Columbia is poised to take full advantage of those opportunities.



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CONSTRUCTION LENDING

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Lenders taking security on Canadian real estate have to consider a number of special factors where construction of the project in respect of which the security is being granted has not yet commenced or where construction will not be complete prior to the advance of funds.

While many of the features of construction loans are similar to those arising for completed real estate projects, there are also important differences. Some of these differences, and the steps that lenders should take to deal with the risks they create, are described below.

FEASIBILITY OF PROJECT

If funds are being borrowed to enable a borrower to complete the construction of improvements, the lender will want to know whether the project is feasible, given the funds available. Are the loan proceeds, together with equity contributions from the borrower, sufficient to complete the project as budgeted? Does the construction budget represent a realistic estimate of the costs to complete the project? The lender must undertake a careful review, often with the help of expert consultants, of the borrower's construction budget and the plans and specifications for the proposed improvements, all with a view to confirming that sufficient funds will be available to complete the project as contemplated.

COST TO COMPLETE BASIS

Once the lender is satisfied that the project is feasible within the parameters of an approved budget, it will usually require that the loan funds be advanced in stages, in a series of separate advances, based upon the progress of completion of construction. This is to ensure that the loan funds being advanced closely match the construction costs being incurred. At the time of each advance, the lender will require that the borrower deliver a written draw request in a prescribed form, confirming the amount of loan funds requested and attaching copies of invoices from contractors to whom the loan funds will be disbursed. In the draw request, the borrower will also be required to certify that, based upon the latest estimates, the aggregate amount of loan funds advanced, together with the unadvanced portion of the loan, will be sufficient to complete the project in accordance with the approved budget and plans. The lender and its consultants will keep a close eye on project expenses in relation to the approved budget and will always want to be satisfied that the undrawn portion of the loan is sufficient to pay the costs to complete the project. If there are any shortfalls, the borrower will be called upon to contribute additional funds to bring the amounts into equilibrium.

PRIORITY OF SECURITY

Since construction may be ongoing for a lengthy period of time, steps will also have to be taken to protect the priority of the lender's mortgage security to the full extent of all funds advanced. On the date of the initial advance of funds, the borrower's lawyers will be required to deliver a title opinion confirming the priority of the mortgage security as of that date. On the dates of subsequent advances, the title opinion will have to be updated to confirm that the security continues to have the required priority with respect to each subsequent advance.

CONSTRUCTION LIENS

Lenders also have to be particularly concerned with the existence of construction liens. As a general rule, no funds should be advanced in the face of a construction lien registered against title to the property, and any liens should be vacated or discharged before subsequent advances occur. In Ontario, construction liens registered after the date of a loan advance can "shelter" under the priority of any unvacated liens that existed at the time of the advance. Thus, by advancing funds in the face of a construction lien, lenders run the risk of losing priority for the amount of the advance not just to existing registered lien claimants, but to all those capable of subsequently sheltering under the unvacated lien. Accordingly, lenders inevitably insist that any construction liens be vacated before making loan advances, since holdbacks, undertakings and other devices do not provide adequate protection for the lender. Fortunately, in Ontario, construction liens can be vacated quickly and borrowers have a court mechanism available to them for posting alternative security for the claim, while freeing title from the lien.

SECURITY DOCUMENTS

In addition to the real and personal property security documents commonly obtained for non-construction loans, construction lenders frequently obtain additional security unique to the fact that the project being secured is under construction. One such item of additional security is an assignment of material contracts pertaining to the construction, including all building and construction contracts, plans and permits. This

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TURNING BROWNFIELDS INTO GREEN

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A recent British Columbia Court of Appeal decision assists developers of contaminated sites.

In *Imperial Oil Limited v. City of Vancouver*, the Court of Appeal of British Columbia recently rejected an attempt by the City of Vancouver to require off-site environmental remediation as a condition of development permit approval. This decision clarifies and brings a level of certainty to municipal involvement in environmental regulation, being one of many challenges facing developers of brownfields.

“Brownfields” are abandoned or under-utilized commercial or industrial sites where potential re-development is complicated by environmental contamination. Notwithstanding the benefits of brownfields redevelopment, including rehabilitation of often scarcely available urban land and increased tax revenues to government from redevelopment, developers often hesitate to redevelop contaminated sites due to the challenges of managing liability, obtaining financing and special planning and environmental issues.

In B.C., municipal and provincial governments use environmental legislation and municipal by-laws to regulate redevelopment. In *Imperial Oil*, the Court took a big step in diminishing the concern that a municipality could stand in the way of brownfields development using its permit approval powers.

Imperial Oil owned and operated a gas station site in Vancouver. In 2000, Imperial Oil, aware of hydrocarbon contamination of the site and the adjacent City property, decommissioned the service station, removing the gas pump islands and underground storage tanks. The company then applied to the City of Vancouver for a development permit to redevelop the site with a new service station having a different design and amenities.

The City initially expressed concerns about the environmental contamination caused by the original gas station onto the adjacent City property. In 2002, the City conditionally approved the development permit application, subject to the requirement that Imperial Oil enter into an off-site soils agreement (OSA) regarding the remediation of the contamination of the adjacent City street before it would approve issuance of the final development permit.

In December 2003, in a separate process under the provincial *Waste Management Act* (now the *Environmental Management Act*), Imperial Oil obtained approval in principle for its plan to remediate the site and adjacent streets during redevelopment, and commenced such remediation. Notwithstanding this

approval, the City still required the OSA before it would issue the development permit.

Imperial Oil applied to the Court for an order compelling the City to issue the development permit on the basis that the OSA required higher remediation standards than those imposed under the provincial regime, and would impose greater and indeterminate liabilities on Imperial Oil to the City and third parties than otherwise required by provincial law. In what would become the key issue in the case, Imperial Oil argued that the City did not have jurisdiction to require the OSA condition.

Each of the trial and appeal Courts agreed with Imperial Oil. The trial Court held that the City’s requirement of the OSA as a pre-condition to a development permit was beyond the scope of the City’s authority, as neither Sections 565A nor 189 of the *Vancouver Charter* conferred the power to impose such a condition. Although the City had the authority to act in the best interests of “good rule and government”, the City’s imposition of the OSA reflected the City’s concern as a landowner for its own prospective financial liabilities for the soil contamination rather than exercising its powers in its capacity as regulator.

The OSA condition was found not to be acceptable. The Court held that there was simply no logical basis for the City to connect the issuance of a development permit to the execution of an OSA. The trial Court allowed the application and ordered the Director of Planning to issue the development permit. The Court of Appeal dismissed the City’s appeal of the trial decision.

Imperial Oil represents a small victory for prospective developers of contaminated sites by clarifying and limiting certain powers of a municipality with respect to approval of development permits. However, it should be noted that local governments and regulatory approving bodies retain other means of regulating property development beyond the power to issue or place conditions on a development permit, including broader powers under their empowering legislation over subdivision, re-zoning, development variances and the issuance of building permits. Therefore, if a municipality does not approve of a particular brownfields redevelopment, it may find other ways to introduce restrictions with respect to the development approval process.

Nonetheless, the decision of the Court is a step in the right direction to providing greater certainty to developers willing to undertake the challenges of brownfields development.



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CANADIAN LAND DEVELOPMENT: A COMPARATIVE REVIEW BY REGION — THE ONTARIO FRAMEWORK

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LAND REGISTRATION SYSTEMS

Although there has been a gradual and ongoing conversion of lands from Ontario's old Registry Division land registry system into the Land Titles Division (being a form of Torrens land registry system where the registry actually reflects title rather than being a simple repository of documents), that conversion is not yet complete throughout the province. In fact, to facilitate the conversion of land registration to an electronic registration format, the province itself has undertaken responsibility for the conversion of communities of land into the Land Titles system on a qualified conversion basis.

It is a statutory condition precedent to the registration of a plan of subdivision or plan of condominium that the underlying parcel of land be in the Land Titles system with a fee simple absolute title. The conversion to land title essentially involves a full scale title search and notice to all parties according to that search who may have an interest in, or who may abut, the lands. Notice of the application is accompanied by a draft survey showing the boundaries of the parcel. The exercise ultimately fixes the extent of title as reflected on that boundary survey and forecloses any quarrelling by neighbours with the limits of the parcel. The process effectively puts to rest any claims of adverse possession or claims to easement by prescription which might be claimed by reason of old instruments or historical use.

Following certification of the fee simple absolute title, anyone dealing with the lands is entitled to rely upon the interests shown on the face of the parcel register.

POLICY FRAMEWORK FOR DEVELOPMENT APPROVALS

Provincial Policy. Under the authority of the Ontario *Planning Act*, the province has reserved the right to fix overriding provincial policy as it relates to land use planning matters. Under that authority, Cabinet has approved a set of policy statements that are grouped under the three rubrics of:

1. Building strong communities;
2. Wise use and management of resources; and
3. Protecting public health and safety.

Under the *Planning Act*, in the exercise of any authority relating to planning matters by a provincial ministry or agency, a municipality and any other agency or local board exercising

jurisdiction with respect to planning matters, their actions must be consistent with these policy statements. The policies under the rubric of building strong communities are generally directed toward achieving efficiency in the use of infrastructure, the protection of employment areas on a long-term basis, the provision of affordable housing, the containment of development to defined settlement areas and intensification of development within those settlement/urban areas. Under the rubric of wise use and management of resources, the general goals are to protect the province's mineral aggregate resources and its prime agricultural lands, as well as ensuring the protection of significant areas of natural heritage, including wetlands, woodlands, wildlife habitat and areas of natural and scientific interest. Under the rubric of protecting public health and safety, the policies primarily relate to flood hazard and ensuring the protection of persons and property from potential flood damage along the province's lakes and waterways.

It is now common practice in the consideration of any policy or legislative amendment that express consideration be given to the Provincial Policy Statement and that the rationale of consistency be articulated in the justification for the amendments. If that justification is inherent in the adopted amendments, any development approvals given under those approved amendments implicitly also should be treated as consistent with the Provincial Policy Statement. Despite that, individual development applications are often vetted independently against the Provincial Policy Statement even though that policy is typically achieved at a much broader or macro scale and cannot necessarily be applied on a site-specific basis.

Official Plans. The statutory framework in Ontario is that each municipality, whether an upper tier municipality such as a county or regional municipality, or a lower tier municipality such as the various townships, towns and cities, will have an approved policy framework known as an Official Plan. The *Planning Act* sets out a framework for the development of these policy documents, which involves broad consultation and input from the community at large and the various municipal and provincial agencies and departments that have an interest in land use matters. Official Plans typically address the development forecast for the municipality over a variable time horizon, which can be set anywhere from five years to 25 years

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out. These planning documents typically identify those districts in the community that are intended to accommodate residential uses and those intended to accommodate employment uses. The plans usually carry a whole set of strategic goals and operating policies with respect to the various activities of the municipality, including the establishment of standards for the provision of recreational and other services to the population.

The plans also address the long range road network and servicing strategy of the municipality and thereby represent a blueprint for capital spending over a longer term. This is critical in the sense that the *Planning Act* declares that the municipal council shall not pass any by-law nor undertake any public work except in conformity with the approved Official Plan. As such, any development application filed by an owner must be vetted against the policies in the Official Plan and found to conform. Failing that finding of conformity, an owner is obliged to simultaneously file an application for Official Plan amendment in order to achieve the policy adjustment necessary to accommodate the proposal. Failing that amendment, the development proposal cannot move toward approval.

To the extent that the municipal council does not deal with the application on a reasonably timely basis, or if the council refuses the application, the owner has a right to appeal to the Ontario Municipal Board and to put its case before that tribunal. The Ontario Municipal Board has an independent jurisdiction under the *Planning Act* and makes decisions in the public interest. In that regard, the Municipal Board, like all other municipalities and agencies in the province, is bound to render a decision consistent with the Provincial Policy Statement and will typically have considerable regard for the adopted policy framework within the municipality. Save for questions of law for which leave to appeal is given by the Divisional Court, the decisions of the Ontario Municipal Board are final and are binding upon the municipality.

Zoning. In Ontario, the right to use land is governed by zoning by-laws. The zoning authority is essentially entrusted to the lower tier municipalities. As a result of municipal reorganization in Ontario in the recent past, there are now a number of single tier municipalities in major urban areas. The Cities of Toronto, Ottawa, Hamilton and Sudbury are now all single tier municipalities and exercise jurisdiction across the entire spectrum of authority available to upper and lower tier municipalities.

The zoning by-law assigns the legal entitlements with respect to the use of land and fixes the development standards which must be observed in connection with any permitted use of land, such as the maximum gross floor area and coverage of buildings, setbacks from lot lines, minimum required on-site parking, minimum landscaped open space provision and such other matters as the by-law may address.

To the extent that a developer's project cannot be undertaken within the provisions of the existing zoning on the parcel of land, all municipalities will receive applications to amend the zoning by-law. Those applications must provide certain minimum prescribed information and such additional information as may be required by the local council in order to properly assess the requested amendment. In some instances, the additional information required by the municipality can involve rather sophisticated analyses of impacts on the environment, local traffic networks, economic impacts or other matters identified by the municipal council as issues within that community. The process for consideration of these applications and enactment of amending by-laws is governed by the *Planning Act*. The *Planning Act* does require that there be notice to the public with respect to any such application and that the municipal council hold at least one "statutory public meeting" at which anyone may come forward and address the council with their views on the proposal.

As with Official Plan amendments, the council may adopt them or refuse them. Any decision by a municipal council (or any failure to decide within the prescribed time limits) triggers a right of appeal to the Ontario Municipal Board by any person. A developer who is facing a refusal may take its case before the Municipal Board and attempt to secure the amendment at that level. An amendment enacted by the municipal council which is objected to by one or more residents or other third parties can also be appealed to the Ontario Municipal Board and that objection will be tested by the Board in the forum of a hearing where evidence is given under oath and subject to cross-examination. As with Official Plan amendments, the Board hears these appeals in light of the Provincial Policy Statement and the municipality's approved Official Plan policy framework, as well as such other policies or considerations which are determined to be relevant and germane by the Municipal Board.

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Subdivision/Severance of Land. The subdivision or severance of parcels of land is also governed by processes mandated under the *Planning Act*. The *Planning Act* sets out criteria that must be regarded in the consideration of any application for subdivision approval, which criteria demand consideration of the impact of the subdivision upon approved policy and the infrastructure of the municipality, including the ability of the municipality to adequately service the lands, both in terms of utilities and municipal services, as well as the provision of community facilities such as parks, community centres and schools.

If an assessment is made that the subdivision proposal will meet the mandated statutory criteria, the approval authority is empowered to give draft approval and to impose conditions which must be satisfied before final approval of the plan will be given. Those conditions typically relate to the settlement of arrangements between the developer and the municipality or other interested agencies regarding the provision of services to the lands and the provision of capital contributions to deal with off-site impacts as a consequence of development.

The process of subdivision approval now includes an obligation on the part of the municipality to give notice to the public of the proposal and, similar to the zoning amendment process, to afford the public an opportunity to make comment upon the application to the council.

Contemporary subdivision approval typically includes an obligation to undertake an archaeological assessment of the lands and a programme for preservation of any artifacts which may be found in the course of that assessment. In Ontario, the management of storm drainage has evolved so that there is now generally universal adherence to a principle that post-development flows to the receiving watercourses should not be any greater in volume or intensity than pre-development flows. This principle is intended to preserve the ecological function of the natural watercourses and to protect fish, plant and wildlife habitat as it has evolved in that watershed. The consequence of this is that most broad scale development involves the establishment of storm water management facilities in the form of stormwater detention ponds.

Subdivision approval also necessitates the identification and reservation of sites for future schools, recreational facilities and parkland. In Ontario, a municipality is entitled to require a parkland contribution from residential development up to 5% of the land area within the development parcel or up to 2% of the area within the parcel regarding non-residential development. For higher density residential development, there is an alternative requirement of one hectare of land for every 300 dwelling units.

The principle now well settled is that development pays its own way and it is a regular feature of subdivision/development agreements that the developer will fully fund the cost of all piped services, roads and utilities and other public improvements necessary to service the subdivided lands. These agreements are also typically accompanied by financial securities for the full cost of the public works to be undertaken so that in the event of default, the municipality is in a position to fund itself to complete those works without recourse to its own treasury.

Condominium Approval. Condominium approval follows a process similar to that prescribed for subdivision approval. The prime difference between subdivision approval and condominium approval is that most of the services within a condominium development constitute common elements within the condominium corporation rather than public assets such as public highway, public parkland and other public features. As a result, the processes tend to be somewhat abridged as these essentially constitute building projects that are largely regulated through the zoning amendment and site plan approval exercises on a parcel-specific basis.

Ontario's *Condominium Act* recently underwent a wholesale revision to provide for a host of new forms of condominium. Specifically, that Act now allows for the creation of common elements condominium corporations (which consist only of common elements, the lands which have the benefit of those common elements being outside the condominium corporation but identified as "parcels of tied land"), phased condominium corporations, vacant land condominium corporations (which essentially amount to parcels of land that constitute the units without physical improvements, the purchaser undertaking construction on the land parcel and being the owner of the structure) and leasehold condominium corporations.

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Development Charges/Capital Contributions. To normalize the ability of the municipalities to fund growth and secure contribution for major capital works that would be triggered by development and growth, Ontario has a *Development Charges Act*. The purpose of the Act is to create a decision-making framework for projecting capital costs likely to be incurred by a municipality that has growth potential and to devise a charge of universal application which allows the municipality to secure incremental contribution from development as it occurs. This mechanism essentially sets the groundwork for equitable contribution by all owners who are undertaking development toward those major capital projects which facilitate development, such as expansion of water treatment facilities and water distribution networks, expansion of sewage treatment plants and major trunk sewage systems, the reconstruction of major arterial roads to add lanes and other projects of that character which provide broad scale benefit and for which individual owners should make proportionate contribution.

The municipality is obliged to reconsider its growth projections and capital programme at least every five years and revise its development charge by-law accordingly. To encourage industrial development, the province has included a statutory exemption from charges under the Act for additions to industrial buildings up to 50% of the existing floor area. Although the *Development Charges Act* allows for full cost recovery against development lands (subject to certain modest municipal contributions for certain services), many municipalities have decided to assume some of these capital costs as a municipal responsibility in the interest of establishing development charges which do not discourage certain types of land use, especially employment-related development.

Site Plan Approval. The most detailed level of development approval is exercised through site plan approval. Under Section 41 of the *Planning Act*, a municipality is entitled to define a site plan control area and exercise specific development review over individual projects. Under this authority, the municipality can require the submission of a plan for approval which shows the siting of the building and any other structures on the parcel, the driveways and parking areas, the landscaped areas, lighting and other features of the site development. The muni-

cipality has authority to require the developer to adjust the location of those features. Although most urban municipalities have adopted urban design standards and policies which are meant to govern the review and approval of these plans, this exercise does involve a fairly significant discretionary element and is often significantly influenced by the state of existing and proposed development in the immediate vicinity of the site. Although the *Planning Act* does not mandate this as an exercise requiring public consultation and input, a number of municipal councils have transformed the process into one involving the public. As with the other processes discussed above, an owner who has failed to achieve approval or who is being offered approval on terms and conditions unacceptable to the owner, has the right to appeal to the Ontario Municipal Board to hear the matter and settle the site plan.

Building Permits. The final construction of buildings is dependent upon the issuance of a building permit. In Ontario, that matter is governed by the *Building Code Act* and the Ontario Building Code. This is uniform throughout the province. The legislation does not permit local codes. The Building Code is a very technical document which is essentially designed to ensure structural integrity of buildings and the protection of the public entering and occupying those buildings from fire and other hazards. The premise of the *Building Code Act* is that an owner is entitled to a permit to construct provided that the application for the permit conforms with all applicable law. That phrase comprehends any and all necessary precedent approvals, including site plan approval from the municipality, zoning which supports the building as proposed, permissions which may be necessary from the local Conservation Authority, permits which may be required from one or more provincial ministries arising out of the proximity to major public highway or sensitive natural features and a host of other matters that are prescribed by regulation under the Act.



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VARIANCES AND SIMILARITIES IN THE BRITISH COLUMBIA FRAMEWORK

GREG UMBACH AND TANYA SADLO

LAND REGISTRATION SYSTEMS

British Columbia has a Torrens land registration system which ensures certainty of title through the principle of “indefeasible title” based on the land title registry. Instruments are endorsed and recorded on title to a property. A certificate of indefeasible title is issued which can be relied upon as the actual state of the title, absent fraud or notice of unregistered interests. Unlike in Ontario, there is usually no need to go through any steps relating to the certification of title.

POLICY FRAMEWORK FOR DEVELOPMENT APPROVALS

Provincial Policy. B.C. does not have a *Planning Act*. Most restrictions and controls on development are established by local governments under the Community Charter and the *Local Government Act*, which contains extensive land use regulations, zoning powers and subdivision powers. The Community Charter came into force on January 1, 2004 and while it is anticipated that the land use provisions of the *Local Government Act* will be moved into the Community Charter in some form, this has not yet occurred.

The legislative regime enables local governments to adopt regional growth strategies and official community plans for the establishment of a framework for land use regulations and zoning by-laws. Local governments are not required to adopt either an official community plan or a zoning by-law. If no such by-laws have been enacted by a local government, land use is governed by generally applicable provincial laws, the common law and any restrictive covenants and building schemes that may be registered on title to properties.

While the B.C. Legislature has largely delegated its jurisdiction over land use and development control to local governments, the provincial government continues to control a number of areas including agricultural land, forest land, riparian land, heritage sites and highways. Additionally, a number of provisions in various statutes permit the provincial government to be involved in local government planning and zoning processes.

Regional Growth Strategies. A distinctive aspect of development in B.C. is that regional district boards have the powers, under the *Local Government Act*, to adopt “regional growth strategies” which provide a policy context for the

community plans of regional districts and their member municipalities. The provincial government has set forth a number of substantive goals that regional growth strategies should work towards which include, among other things, the avoidance of urban sprawl, protection of environmentally sensitive areas, reduction of pollution, protection of water and promotion of energy conservation.

Following the adoption of a regional growth strategy, all by-laws adopted and works and services undertaken by a regional district board must be consistent with the strategy. Additionally, local governments must amend their official community plans within two years to include a “regional context statement” that sets out the relationship between the plan and the regional growth strategy and how the plan is to be made consistent with the growth strategy in the future.

Official Community Plans. Official community plans in B.C. are similar to those in Ontario. An official community plan, while not mandatory, is a general statement of the broad objectives and policies of a municipality regarding the form and character of existing and proposed land use and servicing requirements contained in the area covered by the plan. Additionally, an official community plan may create a policy context that guides development rights within the affected area.

Every community plan that is adopted must conform to the content requirements set out in the *Local Government Act* and, like in Ontario, must be adopted with broad consultation with the public, adjacent local governments, first nations, school boards, improvement districts and other governmental agencies. There are a number of mandatory requirements for official community plans which include addressing the residential requirements to meet housing needs over the following five years, the location, amount and type of existing and proposed commercial, industrial, institutional, agricultural, recreational and public utility land uses, the location of proposed public facilities such as parks, schools and waste disposal sites, the location of major road, sewer and water systems and policies for affordable housing.

As optional content for an official community plan, areas may be designated in which no development may occur without the owner having applied for and obtained a development

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permit. The rationale for development permit areas is to protect the natural environment, protect farming and heritage sites, revitalize an area or to control the character of development in a certain area. The requirement for development permits in certain areas has a significant impact on development in such areas as it also enables the local government to impose conditions, based on guidelines set out in the official community plan, that can significantly affect the size and character of the development and its cost.

All by-laws enacted or works undertaken by a council or regional board after an official community plan is adopted must be consistent with the plan. Hence, where a local government wishes to amend a zoning by-law and the amendment is not consistent with the official community plan, the local government will have to amend the official community plan at the same time that it amends the zoning by-law.

Zoning. As in Ontario, the right to use land in B.C. is governed by zoning by-laws. Zoning bylaws operate in substantially the same manner as in Ontario and all local governments in B.C. will accept "rezoning" applications, which are really requests for zoning amendment bylaws and are subject to all the same procedures as the original zoning by-law.

Generally, a public hearing is held when a zoning by-law is being enacted. However, unlike Ontario, a local government may waive a public hearing in certain cases where an official community plan has been adopted and other requirements have been complied with.

A developer may also obtain a development variance permit from a local government's board of variance. The board of variance is authorized to order minor variances of the provisions of a zoning by-law in cases where strict enforcement of those requirements would result in undue hardship. Decisions of the board of variance are final. However, a decision may be quashed by the B.C. Supreme Court where the board has acted outside its defined authority.

Land Use Contracts. In contrast to Ontario, the development of certain parcels of land in B.C. is regulated exclusively by land use contracts entered into by the owner and the local government, which were experimented with between 1972 and 1977 as a form of "contract zoning". Land Use Contracts enabled an owner and the local government to set out in a

single document the requirements of the local government for the development of particular parcels of land and the obligations of the developer for services, building design, etc. Although the legislation authorizing land use contracts has been repealed, many were registered in the land titles offices during this time period and continue to be in force.

Land use contracts may only be amended by a by-law of the local government with the agreement of the owner of any parcel of land covered by the amendment, by a development variance permit or development permit where the amendment does not affect the permitted use or density of any parcel, or in the manner specified in the land use contract. Land use contracts may be discharged by by-law with the agreement of the owner. The B.C. Supreme Court also has jurisdiction to cancel a land use contract for certain specified reasons set out in the *Property Law Act*.

Subdivision/Severance of Land. Despite B.C.'s long history with the Torrens system, the subdivision of land was not initially viewed as a matter of public interest and, accordingly, early land registration statutes did not require subdivisions be approved by governmental authority. In 1906, the legislature intervened with the *Land Registry Act* which provided for the first municipal controls affecting subdivisions. Presently in B.C., subdivisions must comply with Part 7 of the *Land Title Act*. Subdivision (which includes land assembly) is granted by the approving officer of a municipality and, in rural areas, has historically been subject to approval by an approving officer employed by the Minister of Transportation.

The *Land Title Act* sets out matters to be considered by the approving officer on an application for subdivision approval. Two main considerations are compliance with an official community plan regarding land use designation, flood plain and protected watercourses and, secondly, compliance with the subdivision and zoning by-laws which set the standards for lot size, shape, density, services and access. Rezoning, if required, must be completed prior to subdivision approval. A developer must show that the proposed development will have adequate services for sanitary sewage and storm water disposal, water, roads, sidewalks, street lights, etc., all at the developer's cost. Other considerations when reviewing a subdivision include, but are not limited to, provision of adequate buildable area on each

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lot, adequate roads, lanes and emergency access, accommodation of future road plans, adequate parks, open spaces and walkways, preservation of natural features and views, compatibility of subdivision pattern with the neighbourhood and the protection of future subdivision potential. The approving officer ensures that all appropriate governmental agencies, such as Fisheries and Oceans or the Ministry of Transportation, as well as utility entities, are notified of the proposed subdivision and that adequate professional reports are obtained for any areas of concern. The approving officer exercises a great deal of discretion and while the decision can be challenged, the Courts generally defer to the approving officer.

Since by-laws are subject to change at any time, the *Local Government Act* essentially freezes by-law amendments relating to a subdivision for a period of 12 months following the submission of an application for preliminary approval of a subdivision plan.

Strata Development Approval. In B.C., approvals for strata properties are governed by the *Strata Property Act*. Approval for strata plans in B.C. differs from regular subdivisions in that as a general rule, building strata plans are not subject to an approving officer's approval unless there is a proposal to convert a previously occupied building to strata lots. "New-condominiums", consisting of leases of portions of a building for terms longer than 20 years do require approval. Two types of strata plans require approval from the approving officer: (i) a bare land strata plan and (ii) a phased strata plan. Bare land strata plans are often attractive to developers because although zoning by-law requirements for minimum parcel areas and frontages apply, parcel size "averaging" in order to create some lots of less than the minimum area prescribed by a zoning by-law can be advantageous. Furthermore, internal private access roads may not need to be built to municipal standards.

Development Cost Charges. In B.C., the authority to impose development cost charges by by-law is created by the *Local Government Act*. Municipalities and regional districts in B.C. levy development cost charges as a condition of subdivision approval, building permit issuance and zoning amendments in an effort to offset the servicing costs created outside the boundaries of new developments. In addition to actual pay-

ments, many municipalities require that offsite and on-site works be provided. It is possible for more than one local government to levy development cost charges within a municipality. A regional district board may impose development cost charges within municipalities when the board is responsible for providing a work, service or park land. Improvement districts have authority to impose charges for capital expenditures. In some circumstances, sewerage and drainage districts have the authority to impose additional development cost charges for the construction of regional sewage collection and disposal facilities.

When enacting development cost charge by-laws, local governments are required to make public the process by which the charges are established. Certain developments are exempt from development cost charges, such as residential buildings containing less than four self-contained dwelling units, developments that do not "impose new capital cost burdens" and developments that are not served, directly or indirectly, by the works or park land acquisition funded by the development cost charge. To avoid complex calculations used to collect fees from future developers in the same area, most municipalities require a waiver of developer's rights to collect any "late-comer" charges from adjacent lands.

Site Plan Approval. Unlike in Ontario, B.C. does not have a *Planning Act* and therefore site plan approval is not a separate power of a municipality. Approvals for siting in a development occur at the subdivision stage or at permitting.

Development Permits/Development Variance Permits. In B.C., when an official community plan designates an area as a development permit area, development permits are necessary. Development permits allow a local government to both vary or supplement zoning bylaw provisions with site-specific development controls. The development permit usually imposes conditions on the site's development in addition to the regulations found in the applicable zoning by-law. There are limits on the conditions that can be imposed in development permits depending on the purpose of the development permit area designation. A local government is required to pass a development approval procedures by-law that sets out how applications for development permits are to be made and processed.

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Notice to others of the application is not required but often local governments provide for a public hearing for such permits. Often, security must be posted by the developer as a condition of the development permit to ensure that the lands are developed in accordance with the permit.

The *Local Government Act* also enables local governments to issue development variance permits which vary provisions of a zoning or subdivision by-law, except for those regarding the use or density of land. A development variance permit differs from a development permit in that a development variance permit is voluntary, it may only vary certain by-laws, it may be issued for any land, not just land within an area designated in the official community plan (although it is unlikely it would be issued for land outside a designated area) and the guidelines and objectives required by the *Local Government Act* for a development permit are not required for development variance permits.

Building Permits. In B.C., like in Ontario, the final construction of buildings is dependent upon the issuance of a building permit. The *Local Government Act* delegates two different, yet unrelated, legislative powers to regulate construction. As in Ontario, in B.C. there is a Building Code established by the Provincial Minister of Community, Aboriginal and Women's Services that governs the construction and demolition of buildings.

The other source of authority in B.C. are building by-laws passed by local governments pursuant to the *Local Government Act* and *Community Charter*. Furthermore, in B.C., certain matters such as emergency exits and smoke alarms fall within the scope of statutes such as the *Fire Services Act*.

The provisions of the *Community Charter* and *Local Government Act* allow a regional district, by by-law, to require a building permit before construction may begin but not all local governments adopt such by-laws. However, even when a building by-law has not been adopted, the Building Code and other applicable provincial statutes still apply. The building by-law itself sets out what triggers the need for a building permit. Unlike Ontario, conditions may be attached to building permits, which include obtaining engineering reports and restricting the type, size and location of improvements on the land.



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VARIANCES AND SIMILARITIES IN THE QUÉBEC FRAMEWORK

STEVE SAMSON AND JAN-HENDRIK BURGER

As Québec is a civil law jurisdiction, real estate law is conceptually different. In Québec, ownership is always an absolute right and it allows the owner to grant different dismemberments (interests) such as use, servitude (an easement at Common law) or emphyteusis (a ground lease at Common law). Land, as well as any construction and works of a permanent nature located on land, are called immovable whereas ownership and all dismemberments are called immovable real rights.

LAND REGISTRATION SYSTEMS

Like all other Canadian provinces, Québec has a public land registration system. Registration is required for all acquisition, creation, recognition, modification, transmission, or extinction of an immovable real right in order to be opposable to third parties. Since 2003, information held by Québec land registry offices has been transferred to the Internet. Such information includes deeds filed in the land register since 1974 (soon to be available from 1947), legal discharges dating back to 2003, and plans of renovated lots, which can now only be accessed through the Internet. Since the information is exclusively on the Internet, it may be relied upon as it appears electronically. The creation of a distinct lot, by cadastral number, is one of the requirements to be met for the purpose of obtaining any building permit.

POLICY FRAMEWORK FOR DEVELOPMENT APPROVALS

The *Act Respecting Land Use Planning and Development* (the Act) requires each Regional County Municipality (RCM) to have a Land Use Planning and Development Plan (the Plan). An RCM (similar to the "regional municipalities" in Ontario and the "regional districts" in British Columbia) are an agglomeration of many local municipalities. Each municipality in the RCM will be bound by the general guidelines expressed in the Plan. The Plan must determine the general aims of land development policy of the RCM, delimit urbanisation perimeters, identify zones where land occupation is subject to special restrictions for reasons of public safety (like flood zones), identify any part of the territory that is of historical, cultural, or ecological interest to the RCM, and plan the organisation of land transport.

Planning Programme. Local municipalities in the territory of the RCM will use the Plan to enact a local Planning Programme. The guidelines expressed in the Planning Programme must comply with the RCM Plan. Local municipalities use the Planning Programme to enact various types of by-laws, such as zoning by-laws, subdivision by-laws, building by-laws, comprehensive development programmes, site planning and architectural integration programmes, as well as municipal works agreements. A local Planning Programme has obligatory content requirements as set out in the Act, but it may also contain various additional projects. For example, a Planning Programme may contain a particular development project which aims to revitalise a part of the municipality. Such a development project is often accompanied by a programme for the acquisition of buildings or land. In this sense, the Québec framework is similar to the one in B.C., which contains mandatory content requirements and optional content guidelines for community plans. All by-laws enacted by the local municipalities must comply with the guidelines included in both the RCM Plan and the Planning Programme. If a local municipality amends or revises a local Planning Programme on its own initiative, the RCM must verify the regional conformity of the change and the municipality will have to modify its development by-laws accordingly. The cities of Montréal and Québec must additionally comply with their own constitutive legislation.

In Montréal, the land use planning regime applicable to the Montréal Metro Community (Montréal), is complemented by an *Act Respecting the Communauté Métropolitaine de Montréal* (LCMM). Beyond the Plan provided for under the Act, Montréal also has powers pursuant to the LCMM to define criteria under a scheme relating to the urbanization of its territory, to policies with regard to the supply of drinking water and wastewater treatment, to urban consolidation, natural resource protection and optimization of public infrastructure and public services. A further obligation on Montréal is to determine the approximate density of occupation of the land throughout its territory. Montréal must also define the areas that are of metropolitan interest and outline the development potential of the residential, commercial and industrial sectors covered in the Plan.

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ZONING BY-LAWS

Zoning authority, as in Ontario, is entrusted to the local municipality, which fixes the development standards which must be observed with respect to the use of land. In Québec, the Act provides for alternate mechanisms to amend zoning by-laws for the purpose of land development. Generally, the municipality can modify or replace its by-laws on an applicant's initiative or its own initiative. This process requires the municipality to hold public consultations, conduct a referendum and verify that the proposed by-law complies with the Planning Programme and the RCM Plan.

Alternately, if the municipality has enacted a by-law governing comprehensive development programmes (CDP), a proponent who wishes to develop a zone within the municipality's territory must first submit a description of the proposed CDP. Once this CDP has been approved by the municipality, the normal process required to modify a by-law will be engaged.

Municipalities can also enact Site Planning and Architectural Integration Programmes (SPAIP). SPAIP are used to regulate the look, design and quality of construction. Both CDP and SPAIP by-laws fulfill a function similar to a site plan approval in Ontario.

SUBDIVISION BY-LAWS

Local municipalities are also entrusted with the power to make subdivision by-laws. Such by-laws may require that the owner of any landsite obtain the prior approval of the municipality for any plan of subdivision. Such plan will have to comply with the terms and conditions set out in the by-laws (i.e., use, size of subdivision, access, etc.). The owner may also be required to obtain a subdivision permit and pay fees to the municipality to obtain such a permit.

The municipalities may require, as a preliminary condition to the approval of the subdivision, that the owner (i) give up to 10% of the landsite to establish parks and playgrounds and to preserve natural areas; or (ii) pay a fee up to 10% of the value of the land; or (iii) contribute with a combination of the above not exceeding 10% of the value of the land. Such conditions may also be applicable to the issuance of a construction permit under the zoning by-laws. These powers granted to municipalities are consistent with the B.C. and Ontario frameworks,

which are also geared to ensure the provision of community facilities and to accommodate the environment.

DIVIDED CO-OWNERSHIP

In Québec, divided co-ownership of immovables is regulated by the *Civil Code of Quebec*. Although a divided co-ownership development (condominium at common law) requires no specific planning approval in Québec, the projected development must comply with the zoning by-laws and possibly with an existing CDP or SPAIP. Furthermore, some municipal restrictions may apply regarding conversion of existing rental buildings into condominiums in areas, for example, where there is a lack of rental properties.

Once the project development is in compliance with municipal by-laws and if applicable, with existing CDP or SPAIP, a divided co-ownership is established by publishing a declaration at the land registry offices under which ownership of the immovable is divided into fractions which are intended to be further transferred to different co-owners in a document called the Declaration of Co-ownership (Declaration).

Alienation of such private fraction – commonly known as condo – is void unless the said Declaration and the cadastral plan have been modified prior to such alienation so as (i) to create a new fraction having its own cadastral number and (ii) to determine the relative value of such fraction or to record the modifications made to the boundaries between adjacent condos.

Upon the publication of the Declaration, the co-owners as a body constitute a legal person called a syndicate, the objects of which are to preserve the immovable, to maintain and manage the common portions, to protect the rights attaching to the immovable or the co-ownership and to take all measures directed to the common interest.

CAPITAL CONTRIBUTIONS

In Québec, local municipalities do not have a direct power to impose capital contribution upon developers. This is unlike the legal framework in Ontario and B.C., where development cost charges can be levied. The Act prescribes that the municipalities can only enact a by-law which subordinates the issuance of a building permit, subdivision permit or a certificate of author-

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isation to the making of an agreement pertaining to work for the construction of municipal infrastructure and to the payment or apportionment of expenditures incurred in respect of such work.

In the case of a CDP, the municipal council may require the owners of the immovables situated in the zone contemplated in the programme to assume the cost of certain components of the programme, particularly of infrastructure and public services, and to furnish such financial guarantees as it determines.

BUILDING PERMITS

The issuance of building permits in Québec is similar to Ontario and B.C. Although Québec has a *Building Act* that specifies the minimum safety standards applicable to all construction works in the province, building permits are issued pursuant to the Act by each of the local municipalities.

A municipal council can require a building permit or a certificate of authorization, which shall be issued by the officer designated in the Act provided that (i) the application is in conformity with the zoning and building by-laws; (ii) the applicant has provided the information required by the officer pursuant to the Act; (iii) the application is accompanied with all the plans and documents required by by-law; and (iv) the fee for obtaining the permit or the certificate has been paid.

Construction Lending

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will enable the lender to complete the project with the existing team of contractors and suppliers if the lender is forced to realize on its security. Depending upon the corporate structure of the borrower, it may also be appropriate to obtain a completion guarantee from a principal or parent company of the borrower.

INSURANCE

Insurance requirements are different for projects under construction than for completed projects. The borrower will be required to take out builders "all risk" insurance, which provides for enhanced coverage for buildings under construction.

Depending on the size of the project, it may also be appropriate to require that the borrower's contractors obtain specified insurance coverage and that the borrower's architect and engineers have errors and omissions coverage in place.

The foregoing represents only a brief summary of some of the issues arising with respect to construction loans. In consultation with legal counsel, lenders can take a number of steps to ensure that their interests are best protected, notwithstanding that the underlying real estate asset is under construction.

PROFESSIONAL NOTES

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