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BRITISH COLUMBIA EXPROPRIATION ASSOCIATION 2000 FALL SEMINAR

MUNICIPALITIES - ZONING, DEVELOPMENT PERMITS, SUBDVISION, AND OTHER LAND USE CONTROLS - PREDICTABILITY AND MARKET VALUE

How reasonable are your expectations or your client's expectations about the developability of land? How predictable is your Local Government? or even the planner at the counter at City Hall? When you buy property what assurance do you have, what agreement can you "imply" about its zoning? When is a deal a deal?

This paper will discuss some recent and not so recent trends dealing with the power of the Municipality to control or change land use, and the impact on prediction of market value.

Every commonly accepted definition of highest and best use involves the concept of most likely or probable legal use to which a parcel of land can be put. Easily said, but not easily applied.

The *Local Government Act* (previous to July 2000 known as the *Municipal Act*), now runs to 1040 sections. It is the largest statute in the Province. It is amended constantly. In the area of land use control or management of development, amendments are usually in response to concerns raised by Municipalities and Regional Districts over their ability to respond to what they see as legitimate concerns of the "tyranny of special interests", both organized and otherwise, that are expressed as land is developed and built up across the Province.

The prudent appraiser will usually start his or her analysis of highest and best use by reference to Official Community Plans, and Zoning Bylaws, the primary local laws which control the present use and probable future use of a parcel. However, reference to those documents, or an assumption that they provide predictability at least, is a very dangerous assumption.

ZONING

Municipal Councils can and do change the zoning on a piece of land, often with significant consequences on value.

Two decisions, which are not really municipal law decisions at all, probably best illustrate this point.

In *British Columbia v. Cressey Development Corp.* the Province of British Columbia sought

to enforce an agreement of purchase and sale of land. The Defendant Cressey Development Corp. had purchased a large tract of Crown land for the purposes of developing it in accordance with a very detailed plan developed by the Ministry and upon which the value of the land was based.

The agreement was not conditional upon rezoning, although, because the Province had worked carefully with the Municipality over a number of years, it was understood that rezoning to permit the development would be obtained.

The transaction closed, the prediction made by all of those involved that the land would be rezoned did not come true, and the developer refused to pay the agreed upon instalments of the purchase price on the grounds that the zoning had not changed and the project had become completely uneconomic.

The contractual expectations of the parties, based on detailed planning and appraisal work, simply did not come to pass. The Defendant could not do anything with the land until the zoning was changed.

In the result, the case which started out with the vendor attempting to enforce the contract of purchase and sale, ended up resulting in an order that the Province repay a portion of the purchase price already paid and take the land back.

A more recent decision from the City of Vancouver is *KBK No. 138 Ventures Ltd. v. Canada Safeway Ltd.*

In this case, Canada Safeway sold a "prime redevelopment opportunity" to KBK. The zoning allowed mixed commercial and residential condominium development at an FSR probably around 2.3 to 2.5. The sale price was the greater of 8.8 million dollars or $38.00 per square foot of buildable area as determined by what the City would permit to be built.

A contract was completed, initial deposits paid and immediately thereafter, the City downzoned the property decreasing the maximum FSR to .3. KBK had committed to purchase the piece of land and found out immediately thereafter that it could put about 1/10th of the density that it contemplated. Obviously, KBK refused to pay the balance of the purchase price and demanded its first instalment be returned. Safeway refused to do so and litigation ensued.

Safeway ultimately entered into another agreement to sell the property at 5.4 million dollars.

The Court found that the contract was frustrated.

The case demonstrates the magnitude of the risks inherent in making assumptions about the developability of the piece of property. Undoubtedly, skilled appraisers, planners and property development professionals were involved in a purchase of this magnitude. The change in zoning demonstrated that the assumptions or presumptions which turned out to be wrong, affected the value of the property by a mere $3 million dollars.

MacMillan Bloedel Ltd., not an unsophisticated property owner in this Province, learned a similar lesson the hard way. In the decision of *MacMillan Bloedel Ltd. v. Galiano Island*

Trust Committee, the Courts ultimately upheld a massive downzoning which devalued about 60% of Galiano Island by an order of magnitude.

Frustrated with their inability to obtain approvals for logging, MacMillan Bloedel decided to subdivide its Galiano Island holdings into rural residential acreages and simply sell them. Many people purchased both large and small blocks of land assuming that they could be subdivided to small acreage lots and used as residential or summer homes.

On learning of the planned sales, the "municipal" authority, in this case the Islands Trust, promptly downzoned the property by removing the permitted use of dwellings and increasing the minimum parcel size in the zone to effectively prevent any further subdivision.

The Bylaws were attacked on the basis of bad faith and MacMillan Bloedel was successful at trial. The Court of Appeal in 1995 overturned the decision, deciding that the Bylaws were enacted in accordance with the purposes and objects outlined in the *Islands Trust Act* and therefore the intentions of the elected officials were largely irrelevant.

Another rather large land owner in the Province, Central Mortgage and Housing Corporation (CMHC) was delivered the same message by the District of North Vancouver, when it had its massive land holdings on the North Shore singled out significantly downzoned, thwarting a large scale residential development project and probably devaluing the lands by several million dollars.

Another unique case where the Court found a contract to exist for specific zoning under a specific development plan is *Pacific National Investments Ltd. v. City of Victoria*. The Supreme Court of Canada will decide shortly whether the contract is enforceable.

SUBDIVISION

How many of you think that the subdividability of land is determined by the minimum lot size set out in the Zoning Bylaw?

If you think that is the test, you are wrong.

Dubuc v. Saanich, a 1994 decision of the Supreme Court summarizes what I believe to be the current state of the law.

Mrs. Dubuc, a realtor with some experience, bought a lot in Saanich that met every single criteria for subdivision and was advertised as "subdividable, with development potential".

The survey tendered to the Municipal Hall met every criteria, shape, size, width, setback, street frontage, etc., etc.

The approving officer rejected the subdivision. There is an appeal process under the *Land Title Act* which allows an appeal to a Supreme Court Judge. The result? Appeal dismissed. The fact is Mrs. Dubuc was not able to persuade her neighbours that a subdivision of one lot

into two was a good idea, she lost.

In considering the input of the owners of nearby properties and in giving some weight to the views of those owners, the Court held that the approving officer was not venturing into the political realm and he was not acting in bad faith. He had all of the relevant facts available to him and it is his decision as to whether or not the public interest is served by the subdivision. It is not for the Court to substitute its views for that of the approving officer.

The ironic thing about the *Dubuc* decision is that the same approving officer was approving similar subdivisions in the same neighbourhoods on a routine basis.

Any appraiser or realtor reviewing the facts surrounding the *Dubuc* property would have properly assumed or presumed subdividability, they would have been wrong.

HOW MUCH LAND DO YOU HAVE TO WORK WITH ANYWAY?

Helen Dale is the approving officer in the beautiful seaside town of Comox. She was desirous of having a waterfront walkway along the harbour. The Burns had the misfortune of wishing to subdivide their land fronting on the harbour.

The approving officer demanded a three meter wide dedication as "highway" on the waterfront for the Town's waterfront walkway.

What do you think that does to the value of waterfront property? Obviously, the Burns did not want to give up the most valuable portion of their property and appealed the decision.

The approving officer referred to the Official Community Plan Bylaw, Greenway Plan adopted for the Municipality, and Parks and Recreation Plan, all of which addressed the waterfront walkway system. The Court thought it entirely reasonable to have reference to the wish lists contained in those planning documents and refused to interfere with Ms. Dale's decision about how much of the private land owners private land should be given up for public purposes with no compensation at all.

Another version of the same assumption with respect to the use of one's own land is demonstrated by the case of *Frobeen v. Central Saanich*. In that case, the Municipality did not demand dedication adjacent to a waterway, but simply designated a wide swath on either side of a waterway for environmental protection purposes. Included in the designation were restrictions on the construction, alteration and extension of buildings and structures, which in that case would have included a portion of the Frobeen's home. The Frobeens brought an application to the Expropriation Compensation Board for compensation, arguing that the designation sterilized the use of much of their property and amounted to injurious affection. The Board dismissed the application on the basis that it did not have jurisdiction to hear the matter. It reached that conclusion on the basis of former section 972 of the *Municipal Act* (now section 914 of the *Local Government Act)*, which provides that compensation is not payable for a reduction in property value due to the adoption of an official community plan or other land use bylaw, except in cases where the bylaw "restricts the use of land to a public use". In the *Frobeen* case, Central Saanich's bylaw did not completely remove the private

uses of the Frobeen's property, and was found to not come within the exception permitted by former section 972. The Board found that the bylaw was instead analogous to other setback provisions commonly found in land use bylaws, which while providing a public benefit, do not eliminate private uses.

Another recent case that considered this issue was the decision of the Nova Scotia Court of Appeal in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* [1999] N.S.J. No. 283. In that case, a group of waterfront lots were designated as a beach under Nova Scotia's *Beaches Act*. This resulted in the imposition of strict land use regulations on those lands, prohibiting some activities, while only allowing others with a ministerial permit. Applications by the owners to build houses on the lands using concrete foundations were refused by the minister. In rejecting the application, the minister referred to a report which said that concrete foundations damaged beach dune systems. The evidence also indicated that at least one other house would not be permitted, even without the land being designated as beach. At trial, the evidence established that the properties could be used for traditional recreational purposes. An action by the owners for a declaration of expropriation and an entitlement to compensation was allowed at trial, the judge finding that there had been virtually a complete loss of the bundle or property rights to the Province. On appeal, the trial judgment was reversed and the action dismissed. The Court of Appeal held that the owners had to prove that they lost all reasonable private uses of their land, either from the beach designation, or the associated regulations. The Court noted that the loss of economic value was not a loss of an interest in land under the Nova Scotia statute. The Court also noted that none of the parties had considered whether there were other ways that the lands could have been developed in a manner consistent with the *Beaches Act*. There had been no application to develop some of the lots in question, while other uses may have been allowed on others.

While it is arguable that the *Mariner* claim may have been made prematurely, it is important to remember that compensation will only rarely be awarded in cases where restrictions are placed on the development potential of land. There are sound policy reasons for this. There is a give and take in land use planning in which private benefits are allowed, but at the potential cost of limiting those benefits to provide benefits for society at large. These benefits may vary from the perceived desirability of having setbacks from one's neighbours in low and medium density residential areas, to the more intangible benefits of restrictions over development in locations of general public interest (e.g., beaches, viewpoints, areas of environmental importance).

The issues raised by *Frobeen* and *Mariner* may become more frequent in British Columbia once the remainder of the *Fish Protection Act* is brought into force. Section 12 of the *Fish Protection Act* permits Cabinet to establish policy directives to protect and enhance riparian areas that Cabinet considers "may be subject to residential, commercial or industrial development". If a policy directive is made, local governments subject to directive (which may vary by location, local government power, and "different circumstances as established by the directives") must (1) include riparian area protection provisions in their land use bylaws that are in accordance with the directive and (2) ensure that land use bylaws and permits provide a level of protection that is comparable to or exceed the established by the directive.

Section 11 of the *Fish Protection Act* (also not yet in force) permits the Comptroller or regional water manager under the *Water Act* to reduce the quantity of water under a water

license by up to 5 percent in order to provide additional water for fish and fish habitat. The section also states that no action lies and no compensation is payable in respect of a reduction or change under that section.

DEVELOPMENT PERMITS

The news is a little better with respect to development permits.

In 1997 the Court of Appeal dealt with the case of *Westfair Foods Limited v. Saanich*. It held that in issuing a development permit, that a Municipal Council is required to exercise its discretion judicially. In other words, the Municipal Council had to apply objective standards set out in the Zoning Bylaw and the guidelines contained within the Official Community Plan for the development permit area in question.

In the case of *48 Fraser Highway Land Limited v. Langley*, the land owner had applied for a development permit to build a commercial development on the Fraser Highway including restaurants, auto services, retail services and some residential units, probably best described as a "strip mall".

The planning staff reviewed the proposal for compliance with the guidelines in the Official Community Plan indicated that the proposal complied in all respects and recommended issuance of the permit.

The Council did not want to issue the development permit because of their concern about future traffic problems, left turn access and potential future alignment of roads (expropriation?) (effect of the scheme?).

The Court held that Council's refusal to issue the development permit effectively disallowed the development which on its face complied with all bylaws. The Court also held that if Council wishes to take such a step, there must be some evidence that Council has considered relevant and proper matters in reaching that decision and that it has valid reasons for refusing to issue the permit. The Court ordered the Council to make its decision properly by applying only the guidelines in the Official Community Plan. If the Council wishes to decide again to refuse to issue the development permit, it is required by the Court to articulate its reasons for the refusal by reference to the guidelines.

DEVELOPMENT COST CHARGES

The viability of many land subdivisions, multi family developments, and indeed commercial developments are substantially impacted by the amount of development cost charges imposed by municipalities. The last few years have seen dramatic impacts on the pace of development caused by DCC's.

Any development approach appraisal must directly factor in DCC's as a cost of development. As well, even a comparable approach appraisal must be careful to adjust as between

properties that may be in different DCC regimes, or which sold at different times when different levels of DCC's applied.

The challenge is predicting those costs. You cannot simply go to the Municipal Hall and read the numbers from the Bylaw.

Section 933 of the *Local Government Act* specifies that Development Cost Charges are not payable if the contemplated development does not impose new capital cost burdens on the Municipality or if the Development Cost Charge has been previously paid. In addition, if the actual construction costs of the development include doing works that are included in the list of projects contemplated by the DCC Bylaw, the developer is entitled to credits.

There are several recent cases dealing with the issue of whether or not a development does or does not impose new capital cost burdens on the municipality and whether or not the charge should be deemed to have been previously paid. There is a glimmer of hope for some predictability in this area.

In the case of *549196 B.C. Limited v. Kamloops*, the Trial Court held that DCCs were not payable when a downtown hotel site was redeveloped. The site in question had a hotel on it for almost a hundred years, the hotel burnt down in 1979, and the land owner wished to rebuild in 1998. Because the lot was in the middle of downtown, it was already serviced and the land owner argued that no "new" capital cost burdens would be incurred.

The Court of Appeal disagreed, and overturned the decision, and stated that the applicable test is with respect to the status of the land immediately before the application for a building permit. If the land in question is vacant land immediately before the application and will have a building on it that will impose a load on sewer, water, streets, parking, etc., etc., etc., then these are "new" capital cost burdens.

In the case of *Seasons Memorial Park v. North Vancouver,* the Court did not require a cemetery operation to pay development cost charges on a mausoleum building. The proponent was able to argue the occupants of that building would probably not be imposing too much of a new capital cost burden on roads, water, sewer, etc., and I tend to agree that you usually do not see the residents of a mausoleum building being too active.

The important point in this decision is that the Court determined that the burden was on the Municipality to show the development in question would propose new capital cost burdens.

In other words, there are potential savings or reductions in costs depending on how one approaches the payments of DCCs, but as yet they are particularly difficult to assess with any certainty.

SUMMARY

Despite all of these apparent obstacles, uncertainties, and complications, land owners still develop dreams and press on towards the realization of these dreams. Those who are successful are sometimes rewarded handsomely.

It is difficult if not impossible to dissuade others that it is unlikely they will realize their dreams, and land is bought and sold everyday in British Columbia on prices that are inflated by those dreams. However, if one were to apply reasonable contingencies for every one of the uncertainties discussed in this paper, one would discount the value of every parcel of land in British Columbia to almost nil.

The challenge is to identify the realities in the middle.

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British Columbia (Minister of Crown Lands) v. Cressey Development Corp.

[1992] 4 W.W.R. 357
66 B.C.L.R. (2d) 146
23 R.P.R. (2d) 258
[1992] B.C.J. No. 646
DRS 93-00371
Vancouver Registry No. C907822

British Columbia Supreme Court
Hutchinson J.

March 25, 1992
(30 pp.)

Sale of land —Breach of contract —Frustration —Agreement of purchase and sale —Land purchased for development purposes —Land not rezoned.

This was an action for breach of contract of an agreement of purchase and sale of land. The defendant purchased the land for the purpose of developing it. The agreement was not conditional upon rezoning, although it was understood that rezoning would be obtained within eight months of the closing of the transaction. The transaction closed but the defendant failed to pay the agreed instalments of the purchase price on the ground that zoning was not changed. Rezoning did not take place and the defendant claimed that the contract was therefore frustrated.

HELD: The action was dismissed. The contract was frustrated. The parties contracted in the reasonable expectation that rezoning would be completed shortly thereafter, and subdivision and sale of lots would then proceed. The contractual obligations of the defendant could not be performed for reasons beyond the control of the parties. The defendant could not do anything with the land until zoning was changed. It was beyond the contemplation of the parties that two years later the land would not have been rezoned.

STATUTES, REGULATIONS AND RULES CITED:

British Columbia Supreme Court Rules, Rule 18, 18A.

Court Order Interest Act, R.S.B.C. 1979, c. 76.