



PIBC 2017 Annual Conference: Legal Update

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Overview

- community amenity contributions
- legal effect of “guidelines”
- *Building Act*
- rogue elected officials
- case law and legislation update

Community Amenity Contributions

- Amenities versus servicing
- Risks of not using PDA or amenity zoning
- Gifting
- Traditional development agreements
- Conditions on zoning, DP, etc.
- Disclosure

Community Amenity Contributions

Development Approvals

- Two issues for local government:
- Servicing
- Amenities
- Servicing – sewer/water/highways/drainage/lighting
- Amenities – art/open space/additional park/park improvements/recreation facilities/municipal facilities/theatres/daycare/senior centre/trail or boardwalk improvements/gazebos and benches/foot bridges, etc.
- Amenities: do not include servicing
- Affordable housing

Community Amenity Contributions

Amenities

- Amenities:
- “Gifting”
- Risks of gifting, development agreements, conditions
- Amenity zoning
- Phased development agreements

Community Amenity Contributions

Risks of Gifting

- **“Gifting”**:
- Developers offer amenities
- Some communities have published shopping lists
- Negotiated Amenities
- Some risks of ad hoc gifting or agreements

Community Amenity Contributions

Risks of Gifting (continued)

- LG's subject to "statutory authority"
- LG expectation of an amenity – "invalid consideration" in absence of Amenity Zoning or PDA
- First National v. Highlands
- Consideration of amenities irrelevant, Court found Council exceeded jurisdiction

Community Amenity Contributions

Gifting (continued)

- ◉ Written policy/requirement for “lift” payments
- ◉ Fee?
- ◉ Must be for a service or in relation to regulation [CC] or for costs of development application [LGA]
- ◉ Fees = admin costs
- ◉ See s. 931 (2) LGA and Re Eurig Estate (SCC)

Community Amenity Contributions

Gifting (continued)

- Written policy/requirement for “lift” payments
- Tax?
- Express statutory authority required:
- *Kingstreet v NB* (SCC)
- S. 931(6) LGA often forgotten:
- NO fee, charge, tax, or work unless under an Act

Community Amenity Contributions

Gifting (continued)

- Unauthorized imposition –
- May be recoverable by developer after development approved: Kingstreet

- Note Bill 30, 2006

Community Amenity Contributions

Unjust Enrichment

- PNI v. Victoria (SCC) – three tests:
 - 1. enrichment of community
 - 2. corresponding deprivation of developer
 - 3. absence of authority

- Class action suits: Antoniali

Community Amenity Contributions

Development Agreements

- Collateral conditions to zoning in dev agreement
- BUT LG cannot fetter discretion:
Vancouver v Registrar (BCCA)
PNI v Victoria (SCC)
- LG cannot sell zoning
- LG cannot legislate by way of bylaw = agreement:
Oro v. 576487 Ont. Ltd. (CA)

Community Amenity Contributions

Development Agreements (continued)

- Agreements collateral to rezoning – issues:

1. No express authority
2. Do not bind subsequent owners
3. Enforcement difficult:

[injunction costly and may not be successful,

Downzoning to enforce agreement bad :

Delta v. Nationwide Auctions (SC)]

Community Amenity Contributions

Development agreements (continued)

- As covenants:
- Advantage: runs with land, express authority for land conservation
- Disadvantage: *refusal by Registrar if not clearly s. 219

*no express authority to require, whereas express authority for PDA as covenant

Community Amenity Contributions

Conditions

- Unilateral imposition of conditions – attached to discretionary approval
- E.g., zoning adopted, subject to conditions
- Could result in the zoning being set aside as well:
 - Hall v. Shoreham-by-Sea (CA)
- No statutory authority to approve subject to conditions, to impose or enforce conditions

Community Amenity Contributions

Disclosure

- Land use attributes must be disclosed before the hearing:
 - Pitt Polder v. Pitt Meadows (BCCA)
- Breach of duty of procedural fairness

Community Amenity Contributions

Amenity Zoning

- Amenity zoning:
 - First National v. Highlands (SC)
 - Lambert v. Whistler (SC)
- Must act within scope of s. 904
- MEVA

Community Amenity Contributions

PDA

- Development agreement - include whatever developer and LG agree to
- Can include amenities, servicing, conditions of use, security, enforcement, phasing, term
- Covenant
- Developers like the downzoning protection
- Hearing
- Validity + certainty

Guidelines

- Soft law
- Effect in court proceedings
- Incorporation by reference in bylaws
- Administrative law
- Provincial approvals
- Ministry examples
- Negligence law
- Other examples

Guidelines

- Guidelines – rules of practice, not of hard law
- Can be legally binding
- Practical effect – nudge v. bludgeon
- Lawyers must consult guidelines re legal opinions
- Indirect effect on the law: land use, negligence, aboriginal, environmental

Guidelines

Soft Law

- Not case law, not legislation
- Formal law = legislation, regs, orders
- Informal law = policy guidelines
- Soft law – practical effect
- Increase in court references to guidelines
- Part of normative framework considered by court or by legislators
- Judicial notice

Guidelines

Effect in Court Proceedings

- 37,000 court cases use guidelines
- Mobil, Murphy Oil et al v. Canada
 - Court upheld R & D guidelines
 - NAFTA panel -\$19M award
- Calgary v. Alberta
 - Minister's Guidelines

Guidelines

Effect in Court (continued)

- Royal Proclamation, 1763
- Guidelines for settlement of Canada
 - Aboriginal land only claimed by treaty with Crown
 - Now s. 35 Constitution Act
 - Referenced in Tsilhqot'in

Guidelines

Effect in Court (continued)

- Minister v. Thamotheran
 - Valid for Chair to issue and use guideline
- Spousal support Advisory Guidelines
- Aboriginal consultation guidelines
 - Apply to conduct of all federal departments
- Central OK Teachers v. BC
 - Commissioner may apply guidelines

Guidelines

Bylaws

- S. 15 Community Charter
- In regulating a matter (limit, restrict, control, authorize, inspect) Council may adopt any standard, code or rule
- Standards, codes, rules can be soft law
- In bylaw, become “hard law”
- Incorporation by reference
 - Bray v. Calgary (Infill Housing Guidelines)

Guidelines

Administrative law

- Procedural fairness
- Bell Canada v. Canadian Telephone Employees Association
 - Do guidelines breach rules of fairness?
- Legitimate expectations
 - Guidelines in pamphlets, on web site

Guidelines

Administrative Law (continued)

- Ombudsperson guidelines
- “meetings”
- OIPC guidance
- Video Surveillance in Public Places

Guidelines

Statutory References

- S. 524 LGA
- “provincial guidelines” means policies, strategies, objectives, standards, guidelines, and plans, in relation to flood control prepared by Minister
- In making flood level/setback bylaws, LG must consider provincial guidelines
- Discretion constrained - requires evidence of due consideration

Guidelines

Development Permit Guidelines

- Statutory effect: s. 488(2)(b)LGA
- Washi Beam v. West Vancouver
- Loewen v. Coquitlam
- Westfair Foods v. Saanich
- 511784 BC Ltd. v. Salmon Arm
- 0742848 BC Ltd. v. Squamish

Guidelines

Ministry Guidelines

- Important re: provincial approvals, grants, agreements
- Guide to Solid Waste Management Planning
- 10-20 year PDA application process guide
- DCC Best Practices Guide
- CACs
- OCP Provincial Policy Guidelines

Guidelines

Other Ministries

- Flood Hazard Area Land Use Management Guidelines
- Flood Construction Reference Plane
- Sea Dike Guidelines
- Water Quality Guidelines

Guidelines

Other Ministries (continued)

- Fire Commissioner Guidelines
- Organic Matter Recycling Guidelines
- Road Geometric Design Guidelines
- Traffic Control Guidelines
- BC Employment Standards Act – Interpretation Guidelines

Guidelines

Negligence

- Legislative or quasi-judicial v. administrative
- Policy v. Operational
- Duty of care ...standard of care
 - Water Quality Guidelines
 - Flood guidelines
 - Sea dike guidelines

Guidelines

Conclusions

- Soft Law – expanding scope and effect
- Continuing education
- Consideration of guidelines: staff reports, resolutions
- Effect of guidelines: statutory v. guidance
- Application of guidelines: bylaws/policies
- Incorporation by reference

Building Act

- Building Act
- Building Act Regulations
- Model Core Building Bylaw

Building Act

Overview

- General Overview of Act
- Review of Three Primary Changes
 - Consistency | Competency | Innovation
- Next Steps
 - Implementation | Transition | Education

Building Act

The Building Act

- **What is it?** B.C.'s first Act dedicated solely to building and construction
- **When does it come into effect?** By regulation, over time, with transition periods
- **Where does it apply?** Throughout B.C. except City of Vancouver and federal lands

Building Act

Primary Changes Under the Building Act - #1

Consistency: Streamlining the 'Rules'

- **Policy Intent:** More consistent building requirements across B.C.
- **Building requirements:** Technical requirements for the construction, alteration, repair and demolition of buildings. A requirement can define the methods, materials, products, assemblies, dimensions or performance required by the regulation.
- **Under the Act:** Only Province can set building requirements

Building Act

Primary Changes Under the Building Act - #1

Consistency: Streamlining the 'Rules'

- **Timeline:**

- Two year transition period from date 'consistency' sections of Act come into effect; after that, local building requirements have no legal effect
- Examples: fire sprinkler, energy efficiency and accessibility requirements

Building Act

Primary Changes Under the Building Act - #1

Consistency: Streamlining the 'Rules'

- **Variations from the BC Building Code:** Local governments can apply to Province if they have a **compelling reason**
- If approved, enacted as a provincial building regulation
- Province to establish criteria for types of requests that will be considered

Building Act

Primary Changes Under the Building Act - #2

Competency: Building Official Qualifications

- Membership, exams, continuing professional development, registrar, annual report
- **Timeline:** Six months + 3.5 years = 4 years total, from time sections come into effect
- **Registrar:** Intended as the BOABC

Building Act

Primary Changes Under the Building Act

Innovation: Support the Construction Sector and Local Governments

- **Innovative Proposals:** Provincial review process
- **Building Code Appeal Board:** Expanding scope

Building Act

Model Core Building Bylaw

- Proposed bylaw:
 - Modern language/user friendly
 - Consistent with new Building Act
 - Expedite/simplify approvals/inspections
 - Liability protection
 - Best practices
 - Two versions: small communities and larger developing cities

Building Act

BYLAW – Unrestricted Matters

- Fire access routes
- Flood protection level
- Heritage character
- Wildfire hazards (DP)
- Exterior design/finish (DP)
- Energy/GHG emissions (DP)
- District energy system
- Sound insulation

Building Act

Variations - optional

- Step Code
- Fire sprinklering
- Variations
 - Requested by one or more LG's
 - Application to requestors

BC Code Change

Building Act

Unrestricted vehicles

- Covenant
- Phased development agreement
- Development permit
- Conditions of sale of LG land

Rogue Elected Officials

- General issues
- Breach of confidentiality
- Remedies
- Improper conduct
- Unlawful meetings
- Bullying and harassment
- Investigations

Rogue Elected Officials

General Issues

- Council watchers and haters get elected
- Co-option policies
- Examples: paper bag councillor, pen-in-cheek councillor, gavel toss councillor
- Harassment policy contraventions
- A word about defamation
- No impeachment in BC

Rogue Elected Officials

Breach of Confidentiality

- S. 117 Community Charter
 - Former members
 - Records held in confidence
 - Information considered in camera
 - Until council/board releases to public
- Skakun
 - Clear breach of section

Rogue Elected Officials

Breach of Confidentiality (continued)

- Exceptions: FIPPA or litigation
 - Exceptions do not apply to elected officials
- Harassment policy: leak of a complaint or process = independent violation
- Breach of FIPPA
- Personal information presumption [s. 22(3) (d)] absent consent
- Section 30.4 and s. 74.1(1) - offence

Rogue Elected Officials

Remedies

- Refer to police – prosecution
- Damage claim, s. 117
- Removal from appointments
- Stipend reduction
- Censure motion
- pillories

Rogue Elected Officials

Remedies (continued)

- Council or board decision: procedural fairness
- Hearing opportunity
- Notice of hearing
- Time to prepare
- Provision of records to be considered
- Consequences
- Legal representation
- Reasons

Rogue Elected Officials

Remedies (continued)

- Prosecution
 - Section 30.4 FIPPA – one year limit
 - S.117 CC/s. 5 Offence Act – six months
- Privacy Act
 - Section 1 – tort to violate privacy of “person” (includes a LG)
 - Limitation period – two years

Rogue Elected Officials

Improper Conduct

- S. 133 Community Charter
- Expulsion from meetings
- Mayor: removal order if conduct threatening or interferes with meeting conduct
- Police response: peace officer may enforce as a court order
 - therefore need agreement with police or court order

Rogue Elected Officials

Improper Conduct (continued)

- High threshold for injunction
- Charter Rights protected (freedom of expression in a political context)
- Port Coquitlam v. Osberg
- Elected official expulsion rare

Rogue Elected Officials

Unlawful Meetings

- Meeting in private to advance cause
- Ss. 89, 90 CC
- Southam v. Hamilton
- Southam v. Ottawa
- Yellowknife Property Owners v. Yellowknife
- London v. RSJ Holdings (SCC)
- Email exchanges
- Ombudsperson indicia of meetings

Rogue Elected Officials

Bullying and Harassment

- WorkSafe BC policies in place
- Apply to elected officials (as claimants or accused)
- If LG aware of breach or receives complaint, must follow policy
- Investigation stage enables other elected officials and Staff to remain neutral

Rogue Elected Officials

Investigations

- Bullying and harassment policy: must follow policy procedure
- Other issues:
- Select committee + s. 134 (examination of witnesses under oath and subpoena of records)
- Independent investigator
- Liaison with police and prosecutor (re: WorkSafe BC Burns Lake Mill Disaster Inquiry)