ACCESSORY USES
KEEPING UP WITH THE TIMES

A standard definition of an accessory use in many zoning bylaws in British Columbia is "customarily incidental to and subordinate to" a principal use permitted in the zone. While such definition is useful for its flexibility, it opens a door that swings both ways. Times change, and what is customarily incidental to a use in one generation may be quite different in another. The early 1900s saw the small town general store with gasoline pumps outside the front door. By the 1960s, at least in large urban areas, no such combination was to be found. Look around today the modern convenience store and the self-serve pumps go hand in glove. Equally as common today, if you allow hotels in a particular zone, you could well end up with a small retail shopping centre. The ground and lower floors of hotels are commonly now filled with up-scale boutiques.

Courts do, in interpreting the standard phraseology of accessory use definitions, take the word "customarily" at face value. In deciding whether something is customarily incidental to another use, the Court will accept evidence of the frequency with which such uses are combined. Zoning bylaws often do not keep up with marketing trends. Today you can go to places where you may eat sushi, have your hair done and let your kids play arcade games. All this is to say, exercise care in sprinkling every zone with the catch-all "accessory use", and nothing more. Some consideration should be given in each zone to identifying emerging trends and objectionable combinations so that accessory uses can be qualified and limited for the purpose of the zone. Obviously, if boutique retail is not perceived as beneficial in all zones where hotels are permitted, then the accessory use provision in the relevant zone should so provide in express language.

Another twist common in some jurisdictions is to further limit the scope and ambit of accessory uses by including in the definition of that term, not only "customarily incidental and subordinate to" but also "exclusively devoted to". The Saskatchewan Court of Appeal has in *R. v. Farmers' Fruit Store* (1985), 37 Sask. R. 241 considered the phrase "exclusively devoted to" in the context of accessory uses. While two judges did not find it necessary to comment on the phrase, one judge held that where such phrase is used, the accessory use must be one that is "solely dedicated to the enhancement of the principal use". Thus, while the standard description of "customarily incidental and subordinate to" could allow two separate, disparate and independent uses (provided that they are commonly coupled together and one is subordinate in importance to the other) the additional test of "exclusively devoted to" narrows the field: the accessory use must exist only to serve and enhance the principal use. Recently the Nova Scotia Supreme Court in *Halifax (Regional Municipality) v. Mrkonjic* (2010) NSSC 434, endorsed the clear limiting effect of the words "exclusively devoted to". If one were to apply the limitation to a hotel, for example, a small news shop selling sundry retail goods and personal grooming items may be exclusively devoted to hotel use; however a fine fur shop, an expensive jewellery store or an art gallery may not be classified as solely dedicated to hotel use. The question in each case is one of fact and degree. In those cases where you wish a very close relationship between principal use and any accessory use, it could be helpful to add the concept of exclusivity to your definition.