YOUNG ANDERSON
BARRISTERS & SOLICITORS

MANAGING THE MARKET: THE AFFORDABLE HOUSING TOOLKIT

NOVEMBER 25, 2016

Mike Quattrocchi, Francesca Marzari and Jay Lancaster

MANAGING THE MARKET: THE AFFORDABLE HOUSING TOOLKIT

I. INTRODUCTION

This paper examines some of the local government powers available to address affordable housing issues in British Columbia. The first part of the paper briefly reviews some of the commonly used tools and then examines some potential tools, focussing on specifically Vancouver's proposed new vacancy tax. The second part of the paper discusses housing agreements and density bonus zoning. The final part looks at how local governments can try to address the impact of short term vacation rentals on affordable housing.

II. TOOLS TO MANAGE SUPPLY AND DEMAND

The affordability of housing, for ownership and rental, is a function of basic economics. Affordability depends on how much housing is for sale and for rent and how many people are chasing such housing. The supply and demand for a particular housing type results in market pricing. If demand for a product goes up, the price goes up (other things being equal), making the product less affordable for some, and unaffordable for others. If the supply of a product goes up, the price falls (other things being equal), making the product more affordable.

The BC government has from time to time used tools targeting demand or supply, in order to affect behaviour. For example, the carbon tax increases the price of fuel, with a view to decreasing fuel consumption (demand) and resulting environmental impacts. On the supply side, legislative changes to reduce the ability of local governments to regulate in relation to buildings may be seen by some as an effort to reduce additional development costs and help to increase the supply of housing.

More recently, the Province has introduced the foreign buyers tax, imposing an additional 15% property transfer tax on the purchase by foreign nationals and foreign corporations of Metro Vancouver real estate. While the efficacy of this tax remains in question, the tax is clearly aimed at reducing some of the demand for housing, thereby reducing prices and increasing affordability.

This part of the paper examines existing local government tools available to try to address housing needs, as well as some potential tools, including Vancouver's proposed vacancy tax.

A. Commonly Used Tools

Below is a brief commentary on several tools commonly used by local governments to address housing issues. These tools are typically 'supply side', in that they result (if successful) in the creation of new housing aimed at addressing a particular policy goal, such as affordability, availability of rental housing and supportive housing.

1. Use of Local Government Funds and Property

(a) Land

Local governments may supply land, for nominal consideration, in order to enable and subsidize the development of a particular housing type. These arrangements typically involve other government agencies, such as BC Housing, or non-profit organizations. A local government might sell or lease a property to a non-profit organization to enable the development of supportive housing.

The form of tenure (lease versus transfer of ownership) is an important consideration for this type of arrangement. In many cases, the local government will want some ability to reacquire the site at some point in the future, so leases are commonly used for this type of arrangement. With an ownership transfer, the local government might consider requiring an option for the local government to re-purchase the land at some point in the future. However, if the project involves the construction of housing or significant investment in renovations, an option to purchase can be problematic for the proponent's project financing. As a result, a lease will generally be preferable where the local government wishes to ensure the return of the property at some point in the future. An option to purchase may still be useful where the local government transfers ownership of vacant land for development, as the option can permit the local government to buy back the property if development is not started in a timely manner.

While it is possible that this type of project might involve a commercial organization, any arrangement with a business would have to comply with the *Community Charter* rules prohibiting the provision of assistance to a business, including by selling or leasing land for less than market value.

(b) Financial Assistance

Local governments may also provide financial assistance in support of affordable housing. For instance, a local government might provide a grant to a non-profit organization to assist with the construction or operation of a housing facility.

Rather than an outright grant, a local government might 'invest' in such a project, such as by purchasing a property or assisting with a purchase of property, and then leasing the property to the organization that will actually provide the housing. Where the local government provides only part of the funds for the purchase of the property, the local government and its partner might jointly own the property and enter into a co-owners agreement to set out the terms of their arrangement. This approach allows the local government to benefit from any equity gains over time.

2. Zoning

Local governments can also use their zoning powers to encourage developers to supply affordable or supportive housing.

(a) Density Bonus

As discussed in more detail below in Part III, Section B, of this paper, section 482 of the *Local Government Act* (LGA) permits a local government to set, in its zoning bylaw, different permitted densities for a property and to require the provision by the owner of affordable or special needs housing in order to move up beyond the base density established for the site. A key element of such a zoning bylaw provision is that the zoning must provide a 'base' density for the property, leaving it to the owner to decide whether to provide any required amenity and use resulting additional density.

(b) Phased Development Agreements

Section 516 of the LGA permits a local government and a developer to enter into a phased development agreement, which can insulate the developer's lands from changes to the zoning bylaw and subdivision servicing bylaw for a term of up to 10 years (or up to 20 years with the approval of the inspector of municipalities). Section 516 permits phased development agreements to include a requirement that the developer provide amenities. Such amenities could include affordable or supportive housing.

(c) Negotiation

It is common for municipalities to 'negotiate' with developers for the provision of affordable or supportive housing as part of the rezoning process on a case by case basis. In some cases, these negotiations are based on a local government affordable housing policy. In such a case, the developer agrees to provide such amenities in order to secure a rezoning.

It should be noted that in at least one case, a BC court has frowned upon efforts to secure amenities as part of the rezoning process. In *First National Properties Ltd. v. Highlands (District)* (1996), 30 MPLR (2d) 26 (BCSC), representatives of the municipality had asked the developer whether it was offering any amenities in connection with the developer's application for a rezoning to allow for a higher density. The developer refused to offer any amenities and this was noted in a report to council. The municipality ultimately turned down the rezoning application. The Court noted that the municipality did not have any density bonus provisions in its zoning bylaw and therefore ordered the municipality reconsider the zoning application without considering the provision of any amenity.

(d) Limit on Zoning for Affordable or Supportive Housing

The authority to actually zone a property for affordable or special needs housing is limited by section 482(3) of the LGA. That section provides that a "zoning bylaw may designate an area within a zone for affordable or special needs housing, as such housing is defined in the bylaw, if the owners of the property covered by the designation consent to the designation". Accordingly, a landowner's consent is needed before an area may be designated for such housing under a zoning bylaw.

3. Reducing Development Costs

Local governments may be able to encourage the supply of affordable or supportive housing by reducing costs associated with the construction of such housing. These include:

(a) Variances

A local government may vary servicing requirements and parking requirements through the issuance of a development variance permit under section 498 of the LGA, with a view to reducing development costs associated with affordable or supportive housing.

(b) DCC Waivers and Reductions

Section 563 of the LGA permits a local government to waive or reduce a development cost charge for "not-for-profit rental housing, including supportive living housing" and "for-profit affordable rental housing". Section 563 requires that the local government have a bylaw that establishes details around eligibility and available reductions and other requirements.

B. Inclusive Zoning?

The term 'inclusive zoning' has been used to refer to density bonus provisions aimed at securing affordable housing, where a local government policy sets a certain percentage requirement for affordable housing. The term has also been used in relation to municipal policies respecting the negotiation of the provision of affordable and supportive housing in connection with rezoning. However, a density bonus is voluntary, as the developer is in a position to decide whether it wishes to proceed with the higher density and meet the bylaw's affordable housing conditions. Similarly, negotiation involves an element of voluntariness on the part of the developer.

A broader power to require affordable and supportive housing would put BC local governments in a stronger position to ensure that an appropriate level of affordable or supportive housing is included in any residential development, without the need to allow some base level of development. Such an approach would also provide greater certainty to developers than a 'negotiation' approach and would provide a clearer legal basis for local government action.

The Ontario government recently introduced Bill 7, Promoting Affordable Housing Act, 2016, which would amend the Ontario *Planning Act* to permit the passing of bylaws that "require that the development or redevelopment of specified lands, buildings or structures include the number of affordable housing determined under the regulations or, in the absence of such regulations, the number of affordable housing units determined under the bylaw".

With this type of inclusionary zoning, a municipality would be able to require affordable housing for any particular development, without the need to allow for a base density of development and without negotiation. For instance, a bylaw could simply provide that 10% of all residential units in a development be affordable housing, regardless of the size of the development, perhaps without allowing for the development of a building with less than say 50 units.

At present, local governments in BC must continue to rely on policy, density bonus and negotiation to secure affordable housing from development.

C. A Vacancy Tax

The *Miscellaneous Statutes (Housing Authority Initiatives) Amendment Act* (Bill 28) introduced various measures aimed at responding to issues with BC's real estate and housing market that have been the focus of extensive media coverage over the past few years: *shadow flipping, foreign buyers* and *empty homes*. The measures include amendments to the Vancouver Charter that permit the City of Vancouver to try to increase the costs associated with leaving a property vacant, with a view to increasing the supply of housing using existing stock.

1. Part XXX of the Vancouver Charter

Bill 28 amended the Vancouver Charter by adding a new Part XXX which provides authority for the City of Vancouver to enact a bylaw to impose the vacancy tax on residential properties in the City. The salient points of Part XXX are as follows:

- The tax is imposed on the registered owner, and the bylaw may provide for interest and penalties;
- The City must use resulting tax revenues for "initiatives respecting affordable housing and for the administration and collection of the tax";
- It appears that the determination of non-occupancy must be made in relation to an entire legal parcel, so that if any residential building or part of any building on the parcel is 'occupied' within the meaning of the bylaw, then the parcel is not subject to the tax;
- The tax may be imposed on residential parcel on which no building has been constructed;

- The bylaw must establish when a residential property is to be considered unoccupied and may make categories of residential property, registered owners and vacant property and may make different provisions for different categories;
- The bylaw must establish a 'vacancy reference period', being the applicable period over which vacancy is to be determined;
- The bylaw must establish the rate or amount of the vacancy tax;
- The bylaw must establish exemptions;
- The bylaw may require that a registered owner make a 'property status declaration' and the bylaw may impose fines and penalties for failure to make a declaration or the making of a false declaration; and
- The bylaw may 'deem' a property to be subject to the tax where the owner fails to make the status declaration or makes a false declaration.

2. The Draft Bylaw

As of the time of writing of this paper, the City of Vancouver had included a draft bylaw in an Administrative Report to City Council dated November 6, 2016 for consideration by council at its November 15th meeting. Salient points respecting the draft bylaw include:

- The vacancy tax rate is 1% of assessed value;
- A residential property will be considered vacant if it is not occupied as a principal residence for at least 180 days during the calendar year, or it is not occupied by a tenant or subtenant (for a term of at least 30 days) for at least 180 days during the calendar year;
- Exemptions include:
  - Property owned by a deceased person, where a grant of probate or administration has not yet been provided for the deceased's estate;
  - A property undergoing "redevelopment or major renovations", for which City permits have been issued, where the City Building Official is of the opinion that the work is "being carried out diligently and without unnecessary delay";
  - Where the occupant is undergoing medical or supportive care;
  - A strata lot that cannot be rented due to strata bylaw prohibitions or limitations on rentals (but only if the strata bylaws were in place before the adoption of the vacancy tax bylaw);

- A property that was transferred during the calendar year;
- A property that cannot be occupied due to a court order; and
- Vacant residential land the lawful use of which is limited to vehicle parking or upon which a residential building cannot be constructed due to the size, shape or other "inherent limitation of the parcel";

- The bylaw will first apply to occupancy in 2017, with the first tax imposed in 2018 based on 2017 occupancy;
- In terms of enforcement, the bylaw relies on a self-declaration to be provided by the registered owner;
- The bylaw implements the 'deemed vacancy' authority (mentioned above) where an owner fails to provide a declaration or makes a false declaration; and
- The council report indicates that the City intends to implement an audit program, where audits are performed on a random or specific criteria basis. Where audited, an owner would be required to provide evidence to substantiate occupancy.

With the proposed tax, registered owners face a choice: pay, occupy or lie! … or rent … or sell. It will be interesting to see whether the vacancy tax will have any impact on housing affordability in Vancouver.

III. HOUSING AGREEMENTS AND DENSITY BONUS ZONING

There are a number of tools available to local governments in British Columbia which may be utilized to support, encourage, and regulate affordable and special needs housing. Included in this extensive list are municipal housing authorities, secondary suite policies, housing reserve funds, public-private partnerships, municipally-owned land, reduced development cost charges, reductions in parking requirements, securing provincial or federal funding, housing agreements and density bonus zoning. This part of our paper discusses the latter two tools.

A. Section 483 Housing Agreements

1. Housing Agreements Generally

Under section 483 of the *Local Government Act* (formerly section 905), a local government may enter into a housing agreement with a property owner which may include requirements related to the occupancy of residential premises in order to achieve certain housing-related policy goals. Housing agreements are contractual arrangements, entered into voluntarily between property owners and local governments, often being a condition of rezoning or a sale of land by a local government to a developer. While created by agreement, they are quasi-regulatory in

nature in that they can include restrictions that would not normally be enforceable, particularly with respect to future owners of the housing.

While often structured very similarly to a covenant under section 219 of the *Land Title Act*, a local government may, through a housing agreement, impose requirements that could not otherwise be imposed through a section 219 covenant. While section 219 covenants are beyond the scope of this paper, it is useful to note that a section 219 covenant may concern, *inter alia,* the use of land or a building, construction on the land, or subdivision of the lands, but not necessarily the user of the land. Through section 483 of the *Local Government Act*, the legislature has explicitly provided local governments the authority to impose requirements related to the user of land.

Housing agreements can include various restrictions on housing units, including with respect to:

- The characteristics of persons who may occupy the units;
- The tenure of housing unit;
- Rent controls;
- Re-sale price controls;
- Administration and management of the units; and
- Other terms and conditions regarding occupancy.

Housing agreements "run with the land" against which they are filed to bind future owners and occupiers of the property, in perpetuity (depending on the terms of the particular agreement).

2. Policy

From a policy perspective, housing agreement can address shortcomings in the housing market. For instance, the market may not provide sufficient incentive for owners to developer land for particularly disadvantaged groups, or due to the high cost of housing in a given region, housing agreements could address affordability issues by making housing available to lower income individuals at restricted prices or rents, or by attempting to ensure an adequate supply of rental housing in the municipality.

Housing agreements can also temporarily address market shortcomings. For instance, the market may be slow to provide housing developed specifically for the needs of seniors, despite demand, where other forms of housing remain more profitable. In some such cases, there may only be a need to create the supply of housing for the particular group, and the price or rent restrictions which may be imposed through a housing agreement may not be necessary.

3. Obtaining a Housing Agreement

Section 483 provides the authority for local governments and property owners to voluntarily enter into housing agreements. There are four typical scenarios where this will occur.

First, where a local government is selling land to a developer, the local government may require a housing agreement as part of the purchase and sale.

Second, section 482 of the *Local Government Act* (discussed in greater depth elsewhere in this paper), which authorizes zoning density bonuses in exchange for amenities, specifically contemplates the provision of affordable or special needs housing as an amenity. A section 482 bylaw could allow for greater density on a parcel if the owner provides affordable or special needs housing, secured through a housing agreement.

Third, if affordable or special needs housing is required for valid planning reasons in relation to a proposed rezoning, a local government can likely require the provision of affordable housing, secured through a housing agreement, as part of the rezoning process.

Finally, where stratifying an existing building, such as an apartment building, the approval of the "approving authority" is required under section 242 of the *Strata Property Act*. The approving authority is the council (or regional board) unless delegated to the approving officer. In reviewing a proposed conversion, the approving authority may consider the provision of rental accommodation, which could require a housing agreement.

4. Entering into a Housing Agreement

There are certain statutory requirements associated with housing agreements. They must be entered into by bylaw, and any amendments to the housing agreement must also be by bylaw. Typically the authorizing bylaw is brief, and attaches the terms of the housing agreement as a schedule. Housing agreements, as agreements, may not be unilaterally imposed; they must be entered into with the consent of the owner. Furthermore, housing agreements must not vary the use or density from that applicable in the zoning bylaw.

When a housing agreement is entered into or amended, the local government must file a notice in the Land Title Office that the land described in the notice is subject to the housing agreement. Once the notice is filed, the housing agreement and, if applicable, the amendment to it is binding on all persons who acquire an interest in the land affected by the agreement. The notice of a housing agreement shows up as a legal notation on title to the subject property.

It is prudent to also prepare and register housing agreements as covenants under section 219 of the *Land Title Act* (in addition to filing the aforementioned notice). This will help to better ensure that a purchaser of the property is aware of the restrictions contained in the agreement.

As with the registration of other common charges, such as statutory rights of way and section 219 covenants, it is important that a priority agreement be obtained from any registered financial chargeholders, to ensure the housing agreement is binding on them. The local government may not be able to register a priority agreement over the housing agreement legal notation, however, it can register a priority agreement if the housing agreement is also registered as a section 219 covenant. Failure to obtain a priority agreement may leave the local government unable to enforce the housing agreement against the holder of the prior charge, or may result in the discharge of the housing agreement if the chargeholder ever exercises its charge rights, such as if a mortgage holder forecloses.

5. Specific Regulation by Housing Agreement

A housing agreement applies, depending on the terms of the agreement, to a specific property, building or group of buildings, or to specific units within a building, referred to in the legislation as the "housing units". Section 483 provides a non-exhaustive list of terms and conditions that may be included in the housing agreement.

(a) Resale Price Restrictions

Housing agreements may set a maximum price at which a property can be sold in order to preserve the affordability of the housing unit for a particular class of purchasers. Price restrictions will need to be coupled with occupancy restrictions in order to ensure that the target group has an opportunity to purchase the units. In some cases it may be necessary for price restrictions to be coupled with rent restrictions and perhaps tenure restrictions, in order to ensure that a unit is not purchased at a below-market price and then rented at market rent.

Many issues need to be considered in crafting price restrictions. Building maintenance may be an issue where price restrictions are imposed. With price restrictions, it may be desirable to allow the restricted price to account in some way for the condition of the building in order to encourage an owner to maintain and repair the building. For instance, a component of the restricted price for the building (as opposed to land) might be based on some assessment of the value of the building at the time of each sale.

Consideration should also be given to whether or not the restricted price should allow an owner to account for additional improvements made to the property. If the agreement is to account for improvement value, it may be desirable to limit the kinds of improvements that can be accounted for, in order to keep the property affordable. For instance, the agreement might permit accounting for the installation of an energy saving furnace, but not the installation of a swimming pool.

(b) Rentals

In order to increase rental housing stock, a housing agreement can require that housing units be available for rental and occupied by tenants only, and not by owners. If affordability is also a concern, the housing agreement can include restrictions on the rent that may be charged to tenants.

To be effective, rent restrictions need to be coupled with occupancy restrictions to ensure the target group has an opportunity to rent the units.

The local government may also wish to require that a tenant vacate the premises when they cease to meet occupancy requirements. An important consideration in this respect is that tenancy agreements may only be terminated in accordance with the *Residential Tenancy Act*, which provides for limited bases for termination. Unless the rental agreement is for a fixed term, a landlord will not normally be able to evict a tenant without cause. Typically, it will not be "cause" where a tenant ceases to meet housing agreement occupancy restrictions.

If a housing agreement requires that a landlord evict a tenant who ceases to meet occupancy requirements, the landlord will not generally be in a position to do so, unless the rental agreement is for a fixed term. For this reason, a housing agreement might require, as a form of tenure restriction, that rental agreements be for a fixed term (perhaps 1 year). The agreement could also require the landlord to review the status of the tenant before expiry of the agreement and require the tenant to vacate upon expiry of the tenancy agreement if the tenant no longer meets occupancy restrictions.

It may also be important to consider the quality of accommodation provided pursuant to a housing agreement. With rent restricted housing, there is a potential concern with maintaining the quality of the housing. Because the landlord is forced to rent at below market rates, the landlord may try to recoup this 'loss' by cutting corners on maintenance and repairs. This can be a significant concern where a local government expects a for-profit developer to remain as operator of the rental building, post development. Once the developer has received the full benefit of the rezoning in exchange for which it has provided the restricted housing, there may be little motivation for the developer to perform its obligations as landlord. Some possible options for addressing this concern include:

- The housing agreement could require that a portion of rent be set aside for maintenance and repair purposes – these funds could be held and administered by the local government or a non-profit, to ensure they are used appropriately;

- Not-for-profit management – the housing agreement could require that the building be managed by a non-profit, with resources provided to ensure building quality over the long-term;

- It might be feasible to have the developer transfer the rental building to the local government or a non-profit; and

- If the local government or a non-profit will be responsible for maintenance and repairs, funds could be obtained up front from the developer for these purposes, perhaps as part of the rezoning process or local government land sale.

(c) Occupancy Restrictions

Typical occupancy restrictions are directed at seniors, persons with disabilities, first time homebuyers and local residents and employees. Depending on the circumstances and the policy goals, it will often be necessary to have price or rental restrictions working in tandem with occupancy restrictions.

Occupancy restrictions that discriminate on a basis prohibited under the *Charter of Rights and Freedoms* or the B.C. *Human Rights Code* will be invalid and unenforceable. Most, if not all occupancy restrictions on the basis of race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation, sex, age or lawful source of income will contravene the *Charte*r, the *Code*, or both. With respect to age, the Code contains an exception if the space is in a residential premises in which every rental unit is reserved for rental to a person who is 55 years or older. There is also an exception where the rental is for persons with a physical or mental disability, if the unit and premises are designed to accommodate persons with disabilities.

Occupancy restrictions will often allow other persons to reside in the unit, provided at least one occupant qualifies under the occupancy restrictions.

6. Enforcement Issues

The ability to enforce housing agreements is critical to their success in achieving policy goals. Unfortunately, enforcement can be difficult for a variety of reasons.

Firstly, monitoring housing agreement compliance can be difficult and time-consuming. How is the local government to find out the qualification of occupants, the terms of rental agreements and the terms of resale transactions?

Secondly, if a breach is discovered, the available remedies may not be entirely effective. The local government may seek to force compliance by seeking injunctive relief or, alternatively, seeking damages for the breach. The ability to seek damages is of questionable use, as it is not clear that the local government suffers a loss if a housing unit is occupied by someone other than a permitted occupant or if a property is sold for higher than the restricted price. As to injunctive relief, in some cases, this will be effective at stopping an ongoing breach (such as a breach of an occupancy restriction). However, an injunction will not be useful where the

breach is the result of a single completed transaction, such as a land sale above restricted prices. The incorporation of a rent charge into the housing agreement may be of some use, by which the owner accrues a debt in a specified amount to the local government for each day of contravention of the housing agreement.

(a) Resale Restrictions

Right of First Refusal/Option to Purchase – Registration of an Option/RFR in favour of the local government can be an effective means to ensure compliance with property sale restrictions. A right of first refusal enables the local government to match any offer from a third party to purchase the property at the price offered. At the same time, if the RFR is triggered, the option to purchase would enable the local government to purchase the property at the restricted price. The key aspect of the Option/RFR is that the Land Title Office will not allow the owner to sell the property unless the local government waives its interest under the RFR. Accordingly, the owner will not be able to sell without the knowledge of the local government and the local government will be in a position to review a proposed sale transaction to ensure that it is in accordance with price and occupancy restrictions.

(b) Occupancy Restrictions

In order to ensure that a prospective tenant or purchaser meets the housing agreement occupant requirements, it can be effective to have the local government or some other entity review 'applicants' to ensure they meet occupancy criteria. The housing agreement could require that the owner sell or rent only to someone who has been pre-qualified through that process. These kinds of front-end requirements can greatly assist with ensuring housing agreement compliance and reducing the need to rely on expensive and sometimes ineffective legal remedies.

7. Housing Agreements – Conclusion

As shown above, housing agreements are very powerful tools for creating and ensuring a supply of affordable and special needs housing. They are also potentially complex tools and the appropriate terms and conditions for a particular housing agreement can vary significantly from community to community and project to project. While theoretically powerful, local governments should also be mindful of the fact that they will have to allocate sufficient resources in order for the housing agreement to be effective in meeting policy goals over the longterm.

B. Section 482 – Density Bonus Zoning

1. Overview

Another worthwhile tool available to local governments in encouraging affordable or special needs housing is density bonus zoning. Under section 482 of the *Local Government Act*, a zoning bylaw may establish different density regulations for a zone, one regulation that is generally applicable (the base density) and another regulation (or regulations) that will apply if the development application meets conditions specified in the bylaw. Density bonus bylaws may require applicants to earn density bonuses by conserving or providing "amenities", and specify the number, kind and extent of amenities that must be provided or conserved.

Section 482 can be useful for local governments to stimulate the creation of affordable and special needs housing, where such housing is considered an "amenity" under section 482.

2. Bylaw Requirements

Where areas of land are pre-zoned for density bonuses, establishing the bases for density bonuses can require a considerable amount of sophisticated planning analysis, as it is necessary to work out both the additional density that may be accommodated, and the appropriate ratio of required amenities or housing to incremental density to be specified in the bylaw. Where local governments spot-zone in response to a specific development proposal, the analysis is somewhat different. In these circumstances, the base density is often set at the previous maximum density, which is lower than the applicant wishes to build. The higher density is the one that the owner really wants, and the amenity or housing specified in the bylaw is the one that the owner has offered to provide, typically as a result of negotiation with the local government.

Where a bylaw provides a density bonus in exchange for the provision of "affordable" or "special needs" housing, the bylaw must provide a definition of each of those terms. The *Local Government Act* is silent on the meaning of both, and as such it is up to each municipality to determine what is "affordable" and who has "special needs" in the context of their community.

A density bonus bylaw may require that affordable or special needs housing be provided in kind, or in the form of cash-in-lieu to be deposited into a housing reserve fund which the local government could use to build affordable housing on land it owns, or to use the funds to purchase land for that purpose.

Where the affordable housing is provided in kind, the bylaw may, for example, specify a percentage of units in the development to be designated as affordable or special needs. Where such a scheme is used, it is important to include the registration of a housing agreement to ensure that the affordable housing units built continue to remain affordable. Section 482 explicitly contemplates the condition that an applicant enter into a housing agreement before building permit issuance as the basis for triggering a density bonus.

3. Limitations

It is important to note that the base density should be sufficient to make practicable all of the uses that are permitted in the zone, as section 482 permits an exchange of amenities for density, and not an exchange of amenities for uses of land that are not otherwise permitted. In *Lambert v. Whistler (Resort Municipality),* 2004 BCSC 342, the Court declared an amenity zoning bylaw to be invalid because a permitted "hotel" use was, given the mandatory components of such a building under other provisions of the bylaw, impossible to develop under the maximum base density. The Court stated:

> The base density for the 3 acre parcel starts out as one building of 100 square metres. The uses permitted under the bylaw are listed, and include a hotel and a train station. However, the hotel could not be constructed within those limitations; the bylaws pertaining to hotel construction in Whistler set out basic requirements that would exceed 100 square meters even without any rooms.
>
> A municipality may enact a bylaw for an ulterior purpose without necessarily invalidating the bylaw, but it must act within the scope of the empowering legislation. The LGA permits bargaining for density; it does not permit bargaining for land use. In my review, this bylaw, through purporting to deal with density, clearly allows the Developers to obtain additional uses by providing amenities to the municipality. Such a transaction is not permitted under the LGA.

Unlike some regulatory regimes such as inclusionary zoning, density bonusing is a voluntary system of exchanges between a local government and land developers. A developer can choose to either develop to the permitted base density with no additional contribution required, or build additional bonus density or floor space in exchange for a contribution to the local government. Because of the voluntary nature of this scheme, some planning uncertainty may arise. An owner could decide to use just the base density and never provide the amenity required to receive the density bonus. Local governments should be cautious of relying on the provision of amenities (whether they are affordable housing or otherwise) solely through density bonus bylaws.

Despite these limited shortcomings, density bonus bylaws remain a useful tool for local governments in encouraging the creation of affordable or special needs housing.

IV. ADDRESSING THE IMPACT OF SHORT TERM VACATION RENTALS ON AFFORDABLE HOUSING

A. The Relationship Between Affordable Housing and Short Term Vacation Rentals

Evidence of the impact of short term vacation rentals on the availability of long term rental stock has been largely anecdotal. Historically, complaints regarding vacation rentals have generally originated from neighbours upset that their residential neighbourhood has turned into the site for a series of frat parties, bachelorettes, and nude hot-tubbing.

The growing popularity and ease with which homeowners are able to make their homes available through sites like Airbnb has generated a new kind of complaint about the use of rental suites for short term accommodation: rental prices that out compete long term rentals, and potentially push house prices up as well.

It was only about 10 years ago that we began to hear complaints that prices for an average house were being driven up by people buying a second home in a popular tourist destination and subsidizing the cost through vacation rentals. This tended to anger locals who found house prices rising around them. However, it no longer appears to be just second homes that have become a magnet for tourist accommodation uses. Recent trends show that secondary suites, laneway houses, and even principal dwellings are regularly made available through sites like Airbnb.

Furthermore, there is increasing evidence that these listings are significantly out-competing long term rentals in certain markets.

This is a concern for all local governments who have legalized secondary suites (and other infill housing) in the last two decades, in part to address the need for affordable rental housing in their communities. Today, we are seeing that, not only do these suites increase the value (and therefore the cost) of the homes themselves, there is an increasing chance that they will not be used for long term rental housing at all.

This issue has recently been the subject of substantial research and a detailed staff report in Vancouver. In this report, it was determined that "there is a strong financial incentive to rent short-term in Vancouver. Entire unit listings rented for more than three or four months a year are generating more income as a short term rental than they would if they were rented for the full year to a long term tenant."[1]

That same report found that Airbnb listings in Vancouver have almost doubled every year since 2013. In 2015, there were approximately 6400 distinct listings. Of those listings, 75% are for entire dwelling units as opposed to shared accommodations, and more than 25% were rented for a total of more than 90 days in 2015. Another interesting statistic from the Vancouver report is that approximately 17% per cent of the short term rental operators listed more than one property. Vancouver is not alone in finding that a significant proportion of Airbnb listings, particularly for units that are rented out for more than 90 days per year, are operated by a few operators. A similar study in New York state found 45,000 short-term rentals in New York City, with 6% of the hosts operating 36% of the rentals.[2]

[1] City of Vancouver Administrative Report Re Regulating Short-Term Rentals in Vancouver, September 28, 2016.
[2] "*N.Y enacts restrictions on Airbnb*," www.cbc.ca/news/business/airbnb-nyc-san-francisco-1.3815703

B. The Application of Common Bylaw Provisions to Short Term Vacation Rentals

Short term rentals of less than 30 days, or rentals for short term vacation purposes, are not generally permitted in residential areas under most zoning bylaws in British Columbia. In almost every case where the definition of "residential" has been interpreted, it has been found to apply to permanent or principal living places, or homes.[3] Only in rare instances have bylaw definitions for "residential" been restricted to a particular type of structure,[4] rather than by residential use. Overall, it is fair to say that the courts have found that residential zones preclude commercial uses like short term vacation rentals, unless they are specifically authorized in that zone.

It is also fairly common that bylaws, to the extent that they attempt to distinguish between residential and temporary commercial rentals, use a 30 day minimum occupancy period or a reference to rentals that fall under the *Residential Tenancy Act*.

Many bylaws expressly authorize some amount of commercial activity within residential zones, often as a home occupation. Furthermore, many allow bed and breakfasts or tourism accommodation more generally to be operated as a form of home occupation within principal dwellings. In cases where bylaws expressly define and permit tourist accommodation, the conclusion that such uses are not permitted in other zones or locations has been supported.[5] However, the lack of such a definition does not mean that the tourist accomodation use is implicitly permitted. Absent express provisions permitting short term vacation rentals, or tourist accommodation in a residential unit, the courts have found that such a use, even if infrequent, is not permitted as an "accessory" or "ancillary" use.[6]

Where tourist accommodation uses are permitted as a "secondary" use, it should also not be assumed that the principal residential use must be simultaneously present. For example, the BC Supreme Court accepted that the rental of a second home for 3-4 months of the year to short term vacation renters met the requirement that such a use be secondary to a principal residential use, even where the homeowners did not occupy the house the rest of the year.[7]

[3] See *Whistler v. Miller*, 2001 BCSC 100; *Whislter v. Wright,* 2003 BCSC 1192; *Canmore Property Management Inc. v Canmore Town*, 2000 ABQB 645; *Canmore v. Fossheim*, 2000 ABCA 71, and *North Pender Island v. Conconi*, 2010 BCCA 494.
[4] *0757107 BC Ltd. v. Town of Lake Cowichan*, 2008 BCSC 961.
[5] *Supra*, note 3
[6] *Whistler v. Miller*, 2001 BCSC 100; *Whislter v. Wright,* 2003 BCSC 1192.
[7] *Okanagan-Similkameen (Regional District) v Leach,* 2012 BCSC 63 at para 110.

It is therefore important for local governments who are considering the extent they wish to permit tourist accommodation uses in residential zones to expressly consider and outline criteria for this use such as:

- Whether a regular occupant of the property is required to be present at the time of the tourist accommodation use (a distinction between principal and secondary uses alone is likely insufficient in this regard);
- Whether use of a property as a second home is sufficient to establish a principal residential use (noting that courts will likely read that into a bylaw if it is not expressly stated); and
- Under what conditions and terms the use of a principal dwelling unit or any secondary dwelling unit, or a portion of them, may be used for short term vacation rental.

C. Regulatory Approaches to Increasing Affordable Housing through Curbing Vacation Rentals

Local governments in communities where the availability of short term rentals is believed to be impacting the supply of long term affordable housing may wish to review their existing bylaws.

In some cases, expressly permitting vacation rentals in some zones or circumstances may actually improve enforceability with respect to rentals that are of concern. For example, the City of Vancouver has identified rental housing affordability as a primary goal of its policies. It is nevertheless currently considering expressly allowing temporary rentals of principal residences (currently not permitted), while cracking down on short term rental of secondary suites and laneway houses intended to provide long-term rental stock.[8]

Other communities have taken the opposite approach. Some have prohibited short term rentals of principal dwellings, but allowed short term rentals as part of a shared space, or in a cottage or secondary suite, as an accessory use to the principal dwelling. This approach is more common in communities with a lot of second homes, and may be seen as an effort to assist the local tourist economy. It allows the income from short-term rentals to go to permanent residents, rather than owners living outside the community, while also providing a level of quality control by having the operator on hand at all times.

[8] See September 28 staff report, *supra.*

Both types of regulation must address the question of what qualifies as a principal use, and whether limits on the number of days or proportion of the year that a property might be rented are required. Regulatory details relating to establishing a principal use and the number of days in a year that short term rentals are permitted are issues that tend to be better refined in business license regulations or temporary use permits, as they engage issues often outside the broad zoning authority.

With respect to identifying whether an owner uses the house as a principal residence, homeowner grant information may be of assistance, and proof of qualifying for the grant may be requested for licenses that are restricted to principal residences. Depending on the value of the homes, however, this will not work in all markets. It also will not work for long term tenants who would equally be permitted to take advantage of any zoning or business licensing permissions to rent their unit, or a unit on the property they rent, short term.

It will be particularly interesting to see how the City of Vancouver chooses to address this problem, as they have clearly indicated that long term tenants or lessees would equally be entitled to rent their residential unit short term while they were travelling, provided their lease allows it. However, there is much room for abuse in a situation where property owners might overcome the homeowner grant or principal residence requirement through creative lease arrangements with tenants who sublet through Airbnb. A statutory declaration, or some type of reporting through the business license authority, may help to address this.

Even more intriguing is Vancouver's proposal not to limit the total number of days that a principle residence might be rented short term in a year due to enforcement issues. Both the rental of a principal residence and rental of a secondary unit as an accessory use generally assume or require that there is a principal resident using the property the bulk of the year. By comparison, many US cities, including San Francisco and Austin, Texas, have set limits on the total number of nights that a unit may be rented for short term purposes annually. In San Francisco, this was apparently calculated on the basis of the break-even point between long term and short term rentals, in order to encourage longer term rentals overall.[9]

However, enforcement against owners exceeding their annual limit is notoriously difficult. Litigation can provide for discovery processes where information on rental availability is required, but it is rare that disclosing information in discovery is not resisted. Prior to litigation, it would be difficult to determine whether a short-term rental cap has been exceeded in a regulatory scheme that allows a certain number of rentals but not more. Viewing calendars on websites such as VRBO or Airbnb will tell you when a property is not available, but not whether it is rented short-term or long-term.

[9] *Ibid.*

An obvious answer might appear to be requiring regular reporting of rental times and lengths through business licensing of short term rentals. However, that also relies on voluntary compliance (although it is an improvement over no information). Attempts in Anaheim, Santa Monica, San Francisco, and New York to require the rental platforms themselves to share this type of information or to otherwise enforce local requirements has resulted in legal challenges by Airbnb. Airbnb has agreed, however, to include business license registration information on licensed listings.[10]

At this time, local governments are best advised to focus on the owner or occupant of property, rather than the rental platform itself. Regulatory attempts to impose or enforce license requirements on internet brokers not located within the local government's jurisdiction are not likely to be successful. However, licensing or permit requirements imposed on the owners or occupants of residential property are available to local governments, even where the unit is rented through an operator like Airbnb. In addition, local short term vacation rental managers may be the subject of mandatory business licensing requirements.

D. Short Term Vacation Rentals: Conclusion

Short term vacation rentals may be a boon to some communities and a scourge to others. Local governments can use both their zoning and business license powers to help direct the market toward longer term rentals if that is their objective.

[10] *Supra*, Note 2.

NOTES