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BULLETIN

APPROVING OFFICER LIABILITY AND SECTION 219 RELEASES

Local governments, and the Province as well, will welcome two recent Court of Appeal decisions arising from the approval of a subdivision in Sechelt that was ordered to be evacuated following a serious subsidence event. The decisions deal with approving officer liability and the permissible scope of s. 219 covenants required as a condition of subdivision approval. As the branch of government responsible for subdivision approval in the rural areas of the province that present some of the sketchiest terrain for subdivision, the Ministry of Transportation may be particularly relieved.

On the general question of approving officer liability, addressed in *Held v. Sechelt* 2021 BCCA 350, the key issue for the Court in the subdivision lot owners' negligence claim against Sechelt's approving officer was whether, in negligence law, an approving officer owes a "duty of care" to persons who suffer harm in circumstances such as these, solely on the basis that the harm is foreseeable at the time the approval decision is made. Answering this question in the negative, the Court confirmed prior case law indicating that the significant public policy context of approving officer decisions takes these situations beyond the reach of negligence claims. Having reached that conclusion, the Court did not have to address whether, if a duty of care existed, the approving officer's reliance on the applicant's consulting engineer's certification that the site could be safely used for residential dwellings met the applicable standard of care. Nor did the Court have to spend any time on the plaintiffs' strained argument that the approving officer wasn't a "local public officer" for the purposes of the statutory immunity from claims afforded by s. 738 of the *Local Government Act*.

Regarding the scope of s. 219 covenants, the plaintiffs had successfully argued in the B.C. Supreme Court (*Goy v. Sechelt* 2020 BCSC 1242) that the release that the developer had given the District and its officials in the covenant that the approving officer required as a condition of subdivision approval was beyond the scope of s. 219, and therefore did not run with the land to prevent the lot purchasers and their successors in title from suing the District and its officials. In this regard the plaintiffs relied on the fact that s. 219(6)(a) specifically refers to the inclusion in a covenant of an indemnity, but not a release. The Court of Appeal allowed Sechelt's appeal on this point (*Rai v. Sechelt* 2021 BCCA 349). The release was a provision "in respect of the use of land" and therefore authorized by the broad wording of s. 219(2)(a). The specific authorization for inclusion of an indemnity in s. 219(6) was necessary because otherwise an indemnity, being a positive obligation of the covenantor, would be both unregistrable and unenforceable as an interest in land. A covenant not to sue requires no special statutory authorization because it isn't a positive obligation. The Court went on to hold that the release contained in the covenants

charging the lots in the subdivision encompassed the plaintiffs' claims against the District and its officials arising from the subsidence event.

The owners whose new homes in the subdivision remain uninhabitable to this day are free to pursue claims against other defendants including the consulting engineers who provided the "safe use" certification on which the approving officer relied; a "duty of care" analysis could well produce a different outcome for such claims. Not addressed in the litigation is the thorny question of whether it's wise public policy to allow approving officers to duck the liability consequences of ill-advised subdivision approval decisions by relying on releases and indemnities, which subdivision developers (often numbered companies that will have sold subdivision lots and gone out of business by the time an indemnity might have to be called upon) may be only too willing to grant in order to achieve subdivision approval. The "duty of care" analysis in this case would very likely have produced the same result even if Sechelt's approving officer hadn't followed the prudent practice of requiring a "safe use" certification from a third-party engineering consultant.

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