

REVITALIZATION TAX EXEMPTIONS

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I. THE BASICS

Revitalization tax exemptions are currently experiencing a surge in popularity in BC. However, they are not as simple as ordinary permissive tax exemptions and municipal staff need to understand the legal steps required to undertake these tax exemptions, and the legal issues surrounding them.

A. The Statute

Section 226 of the *Community Charter*, which authorizes these tax exemptions, establishes a complete code that must be strictly followed.

Section 226(14) confirms that these tax exemptions are an exception to the rule prohibiting financial assistance to a business:

“226(14) The authority to provide a tax exemption under this section is not subject to section 25 (1) [*prohibition against assistance to business*].”

So any tax exemption that extends beyond the box created by section 226 risks being characterized as unlawful assistance to a business.

B. Scope of Tax Exemptions

A section 226 revitalization tax exemption does not include an exemption from:

- taxes, charges or levies for local area services, specified area services, local improvements;
- municipal fees;
- parcel taxes; and
- taxes imposed by a regional district, board of school trustees, hospital district, or other authority.

In fact, section 131(9) of the *School Act* confirms that a revitalization tax exemption does not exempt from school taxes:

“131(9) Despite subsection (1), property that is exempted under

- (a) section 226 [revitalization tax exemptions] of the Community Charter,
or

(b) section 396E [revitalization tax exemptions] of the Vancouver Charter is not exempted from taxation under this Act.”

Section 226(10) of the *Charter* confirms that a revitalization tax exemption applies only to municipal taxes imposed under section 197(1)(a):

“226(10) So long as an exemption certificate has not been cancelled, the land or improvements, or both, subject to the exemption certificate are exempt from taxation under section 197(1)(a) [*municipal property taxes*] as provided in the exemption certificate.”

C. Key Components

There are five key components to undertaking a revitalization tax exemption:

- notice of proposed bylaw;
- consideration of bylaw in conjunction with Financial Plan;
- bylaw;
- agreement (schedule to bylaw); and
- certificate (schedule to bylaw).

Most of these key components are listed as requirements in section 226(3):

“226(3) For a revitalization tax exemption under this section to apply to a particular property,

- (a) the exemption must be in accordance with a revitalization program bylaw under subsection (4),
- (b) an exemption agreement under subsection (7) must apply to the property, and
- (c) an exemption certificate for the property must have been issued under subsection (8).”

D. Notice of Proposed Bylaw

Notice of a proposed revitalization tax exemption bylaw is required by section 227 of the *Charter*:

“226(6) A revitalization program bylaw may be adopted only after

- (a) notice of the proposed bylaw has been given in accordance with section 227 [*notice of permissive tax exemptions*]

227(1) A council must give notice of a proposed bylaw under this Division in accordance with section 94 [*public notice*].”

Please be reminded that notice under section 94 requires not only two newspaper publications, but also posting on the public notice posting board:

“227(3) In the case of a bylaw under section 226 (4) [*revitalization program bylaw*], the notice under subsection (1) of this section must include a general description of each of the following:

- (a) the reasons for and the objectives of the program;
- (b) how the proposed program is intended to accomplish the objectives;
- (c) the kinds of property, or related activities or circumstances, that will be eligible for a tax exemption under the program;
- (d) the extent, amounts and maximum terms of the tax exemptions that may be provided under the program.”

E. Financial Plan

Section 226 requires the bylaw to be considered in conjunction with the Municipality’s Financial Plan:

“226(6) A revitalization program bylaw may be adopted only after

...

- (b) the council has considered the bylaw in conjunction with the objectives and policies set out under section 165 (3.1) (c) [*use of permissive tax exemptions*] in its financial plan.”

Section 165 sets out the corresponding requirement for the Financial Plan:

“165(3.1) The financial plan must set out the objectives and policies of the municipality for the planning period in relation to the following:

...

(d) the use of permissive tax exemptions.”

There is no required timing for this consideration of the Financial Plan, except that it must be done before the revitalization tax exemption bylaw is adopted.

F. Mandatory Bylaw Contents

Section 226(4) lists what items must be included in a revitalization tax exemption bylaw:

“226(4) A revitalization tax exemption program must be established by a bylaw that includes the following:

- (a) a description of the reasons for and the objectives of the program;
- (b) a description of how the program is intended to accomplish the objectives;
- (c) a description of the kinds of property, or related activities or circumstances, that will be eligible for tax exemptions under the program;
- (d) the extent of the tax exemptions available;
- (e) the amounts of tax exemptions that may be provided under the bylaw, by specifying amounts or by establishing formulas by which the amounts are to be determined, or both;
- (f) the maximum term of a tax exemption that may be provided under the bylaw, which may not be longer than 10 years.”

It is important to ensure that your bylaw contains all these mandatory items.

G. Bylaw – Program Reasons and Objectives

As just mentioned, section 226 requires that the bylaw establish a program, and the bylaw must describe the reasons for and objectives of the program, and how the program is intended to accomplish these objectives:

“226(4) A revitalization tax exemption program must be established by a bylaw that includes the following:

- (a) a description of the reasons for and the objectives of the program;
- (b) a description of how the program is intended to accomplish the objectives.”

Since the bylaw must establish a program, this suggests that the bylaw cannot be tailored such that only one property owner will qualify for the tax exemption. Even though only one owner may choose to apply, the program must be established in such a way that more than one owner could qualify for the tax exemption. For example, we question whether a bylaw creates a program if it grants a revitalization tax exemption for a run-of-river hydro project and only one owner owns property that could take advantage of this exemption.

Another legal issue to be aware of is that the purpose of a revitalization tax exemption is to encourage revitalization:

“226(2) A council may, for the purpose of encouraging revitalization in the municipality, provide tax exemptions for land or improvements, or both, in accordance with this section.”

The word “encourage” has a forward perspective. That is, we question whether a tax exemption program could be established that allowed a tax exemption for owners who had already obtained building permits or commenced construction before the bylaw was adopted. Those owners obviously did not need any encouragement to undertake a revitalization project, and as mentioned, the purpose of the bylaw is to encourage future conduct.

H. Criteria for Eligibility

Section 226 allows municipalities a considerable degree of flexibility in creating a revitalization tax exemption program:

“226(4) A revitalization tax exemption program must be established by a bylaw that includes the following:

...

- (c) a description of the kinds of property, or related activities or circumstances, that will be eligible for tax exemptions under the program;

226(5) A revitalization program bylaw

...

- (b) may be different for
 - (i) different areas of the municipality,
 - (ii) different property classes under the *Assessment Act*,
 - (iii) different classes of land or improvements, or both, as established by the bylaw,
 - (iv) different activities and circumstances related to a property or its uses, as established by the bylaw, and
 - (v) different uses as established by zoning bylaw.”

I. Tax Exemption Amount and Term

Section 226 requires the bylaw to establish the amount of the tax exemption and its duration:

“226(4) A revitalization tax exemption program must be established by a bylaw that includes the following:

...

- (d) the extent of the tax exemptions available;
- (e) the amounts of tax exemptions that may be provided under the bylaw, by specifying amounts or by establishing formulas by which the amounts are to be determined, or both;
- (f) the maximum term of a tax exemption that may be provided under the bylaw, which may not be longer than 10 years.”

In terms of the extent of the exemption, section 226 allows a tax exemption for land only, for improvements only, or for both land and improvements:

“226 (2) A council may, for the purpose of encouraging revitalization in the municipality, provide tax exemptions for land or improvements, or both, in accordance with this section.”

In terms of the amount of the tax exemption, section 226 allows full or partial tax exemptions – for example, a 10% tax exemption on land and a complete tax exemption on improvements.

In many cases the bylaw will need to include a formula for the amount of the tax exemption to be divided among strata lots, if the tax exemption is to encourage development of buildings that may be stratified. Likely the tax exemption will be divided among the strata lots based on their unit entitlement (which is the same basis on which strata fees are levied).

J. Agreement

It is odd for a bylaw to provide for an agreement – a contractual commitment between the owner and the municipality. We think the purpose of the agreement in this case is to provide an owner with the assurance that if he pays for architectural plans, obtains a building permit and development permit, and constructs the building in the manner outlined in the agreement, then he is contractually guaranteed to be issued a tax exemption certificate.

On this basis, the agreement would begin when it is fully signed, and the agreement would end when the certificate is issued. That is, the agreement would govern the time frame between the signing of the agreement and the issuance of the certificate.

The agreement would outline all the requirements the owner must meet before he would be entitled to a certificate. Likely these conditions would include:

- construction must be complete;
- the building must be open for business or available for occupancy;
- the construction must comply with the Building Code, all applicable permits and bylaws;
- the owner must provide confirmation that the construction value (the value on which the building permit was issued) meets the bylaw minimum;
- all property taxes must be paid in full;
- if there is a change of owners, the owner must assign the agreement to the new property owners; and
- the agreement would likely address strata subdivision.

Even though the agreement is a private contract between the owner and the municipality, it is part of the overall program established by the bylaw. The form of agreement should be a schedule to the bylaw and the municipality cannot arbitrarily add requirements to the agreement after the program has been established by bylaw.

K. Application

The bylaw will likely establish a procedure for owners to apply to enter into an agreement. For example, owners would need to submit a copy of the land title, the owner's incorporation documents, etc.

This application form does not need to be a schedule to the bylaw (although it could be), but the application form and process cannot allow staff to add substantive requirements above and beyond the bylaw requirements. For example, if Council adopts a bylaw program to encourage revitalization of the municipality by granting tax exemptions for day care centres, staff cannot, through the application process, make it a requirement of an owner that she justify why her daycare centre would benefit the community.

L. The Certificate

Section 226 outlines that issuance of the certificate is mandatory if the owner meets all the requirements of the bylaw and the agreement:

“226(8) Once

- (a) all requirements established in the revitalization program bylaw, and
- (b) any additional requirements established in the exemption agreement have been met,

a revitalization tax exemption certificate must be issued for the property in accordance with the exemption agreement.”

There are certain mandatory contents of a certificate:

“226(9) An exemption certificate must specify the following in accordance with the revitalization program bylaw and the exemption agreement:

- (a) the extent of the tax exemption;
- (b) the amount of the tax exemption or the formula for determining the exemption;
- (c) the term of the tax exemption;

- (d) if applicable, the conditions on which the tax exemption is provided;
- (e) if applicable, that a recapture amount is payable if the exemption certificate is cancelled, and how that amount is to be determined.”

The effect of an issued certificate is a tax exemption to the extent provided in the certificate:

“226(10) So long as an exemption certificate has not been cancelled, the land or improvements, or both, subject to the exemption certificate are exempt from taxation under section 197 (1) (a) [*municipal property taxes*] as provided in the exemption certificate.”

M. Timing of Exemption

A tax exemption will not apply to a calendar year unless the certificate is issued on or before October 31st of the preceding year:

“226(12) An exemption certificate ... does not apply to taxation in a calendar year unless the exemption certificate is issued ... on or before October 31 in the preceding year.”

Municipal finance officials must send a copy of the certificate to the Assessment Authority:

“226(13) The designated municipal officer must

- (a) provide a copy of an exemption certificate to the relevant assessor as soon as practicable after it is issued.”

N. Certificate Conditions

Section 226 allows a tax exemption certificate to be issued on conditions:

“226(5) A revitalization program bylaw

- (a) may include other provisions the council considers advisable respecting the program including, without limiting this,
 - (i) the requirements that must be met before an exemption certificate may be issued,
 - (ii) conditions that must be included in an exemption certificate.”

A revitalization tax exemption will be lost if any of the conditions in the certificate are not fulfilled.

All of the conditions for continuation of the tax exemption should be listed in the certificate and some of these conditions might include:

- non-exempted taxes must be paid – on all properties in the municipality owned by that owner;
- compliance with bylaws, including holding a business license;
- no change in use or zoning; and
- development must be in continuous operation - if building damaged or destroyed, owner must promptly reconstruct (or perhaps the tax exemption should end).

O. Cancellation of Certificate

Section 226 provides for the cancellation of a certificate by Council if a condition of the tax exemption is not fulfilled:

“226(11) An exemption certificate may be cancelled by the council

- (a) on the request of the property owner, or
- (b) if any of the conditions specified in the exemption certificate are not met.

(12) An exemption ... cancellation does not apply to taxation in a calendar year unless the exemption certificate is ...cancelled ... on or before October 31 in the preceding year.

(13) The designated municipal officer must

...

- (b) if applicable, notify that assessor as soon as practicable after an exemption certificate is cancelled.”

P. Recapture of Taxes

Section 226 allows the bylaw to provide for a recapture of taxes if the certificate conditions are not met:

“226(5) A revitalization program bylaw

- (a) may include other provisions the council considers advisable respecting the program including, without limiting this,

...

- (iii) provision for a recapture amount that must be paid by the owner of the property to the municipality if the conditions specified in the exemption certificate are not met.”

Note that recaptured taxes will be simply a debt owed to the municipality – they cannot be added back to the taxes.

The bylaw will need to consider how far back taxes will be recaptured – from the beginning or only from the time the certificate condition is not met?

Recapture of taxes may become a complicated exercise if the property has changed owners. Can the recaptured taxes all be collected from the current owner, or must the municipality attempt to collect the recaptured taxes in appropriate amounts from the various owners?

Another interesting question is whether the municipality can add interest to the payment of recaptured taxes.

II. PUTTING IT ALL TOGETHER

As you can see, the tax revitalization exemption legislation was enacted in a way to be flexible to allow municipal councils to tailor a particular exemption program to meet their local needs. Although there are some “standard” exemption bylaws and agreements that seem to be replicated between municipalities across BC, there is no “one size fits all” exemption program. We do not recommend working from a precedent bylaw. There are numerous decisions that need to be made by a council before the bylaw, agreement, and certificate can be drafted, so we expect every program should be drafted independently, without heavy reliance on precedent bylaws.

Anyone interested in this topic should also review the Ministry’s 8-page paper: “Revitalization Tax Exemptions: A Primer on the Provisions in the *Community Charter*” available at http://www.cscd.gov.bc.ca/lgd/gov_structure/library/community_charter_revital_tax_exemptions.pdf . Some examples in this paper are drawn from the Ministry paper.

A. What is the object of revitalization?

The aim of this tax exemption legislation is to permit a municipal council to encourage revitalization in the municipality as that council sees fit. We think the standard meaning of “revitalization” is the enhancement of an area by encouraging development, or imbuing the area with new life and vitality. A revitalization program cannot apply to vacant unused land, as

there has been no activity on the land yet that would need to be ‘revitalized’. Revitalization can generally be grouped into three informal categories: environmental, economic and social revitalization. Some examples are as follows:

- Environmental Revitalization
 - encouraging “green” building technology, by listing certain building solutions or techniques that, if used, would attract the tax exemption;
 - encouraging environmental sustainability. If Council wanted to revitalize a particular environmental aspect, (e.g. protecting streams), Council could grant a tax exemption for those developments that use “green” approaches to managing the development/environmental interface (e.g. storm water drainage innovations to reduce runoff into streams); and
 - brownfield redevelopment – to encourage cleanup and redevelopment of a brownfield site, either during or after cleanup occurs.

- Economic Revitalization
 - encouraging investment in buildings in a particular area (capital improvement projects, or redevelopment) in residential, commercial or industrial zones;
 - revitalization of the economic base of a municipality. For example, Council could use the exemption to encourage employment in a particular sector, or encourage a employment sector to employ more citizens; and
 - the intention of the program must be to bring about some change in the future. Granting a tax exemption for a project that a company was going to pursue anyway is not “revitalization”. This can become a difficult distinction to make. Consider a paper mill that is the main employer in the municipality requesting a revitalization tax exemption program. If the mill is asking for an exemption to continue the status quo, this is not a revitalization. If the mill is planning layoffs, and a tax exemption scheme can prevent that imminent change to the status quo, this is revitalization. As you can see this distinction can get hazy, so careful drafting of the reasons and objectives of the program in the bylaw is required.

- Social Revitalization
 - encouraging the construction or preservation of affordable rental housing or affordable ownership housing;
 - neighbourhood rejuvenation projects, or façade improvements and beautification;
 - encourage investment in heritage property;
 - encouraging construction or preservation of cultural amenities, such as daycares, artist work studios or theatres; and
 - redevelopment for community sustainability or increased residential densification.

A municipality can blend these categories together, or have a revitalization program that targets several types of revitalization which may or may not be related.

When section 226 was first enacted, a revitalization tax exemption bylaw had to define an area in which the exemption program applied. That requirement has been removed, so councils are free to state that the exemption program will apply to one or more areas, types of property (by zoning or other characteristics), or to a particular activity or circumstance related to a property. Council may even designate the entire municipality as being eligible for the exemption program.

A commonly asked question is whether a municipality can enact a revitalization tax exemption program that is directed at only one owner. We think a court may view a program under which only one owner could possibly be eligible as an attempt to grant assistance to a business. We recommend that any tax exemption program be described in broad terms – whether through the types or property, or areas of property, or the activities and circumstances to which the exemption applies – so that other owners in a similar situation can have the opportunity to avail themselves of the exemption scheme, whether they choose to do so or not.

Remember that the tax exemption legislation for eligible partnering property, heritage property, riparian property, cemeteries and golf courses under section 225 of the *Community Charter* is a different scheme than the revitalization tax exemption. If your municipality has a program under section 225 that could conceivably overlap with a revitalization tax exemption program under section 226, ensure that the two programs can work together harmoniously (if you want both exemptions to apply at once) or that the bylaws are drafted so no double-dipping is permitted.

B. Reasons and Objectives

When drafting a revitalization tax exemption program, municipal staff will likely spend the majority of their time working on the reasons for and objectives of the program and a description of how the program is intended to accomplish these objectives. Section 226(4) of the *Community Charter* requires that these background explanations for the exemption program are included in the bylaw, and section 227 requires a general description of the program to be part of the public notice. These key descriptions are the public face of the program and will be scrutinized by the community to see whether the results measured up to the intended objective. While there are no court cases considering the tax revitalization legislation to date, the objectives and the description of the exemption program will be integral for a court to determine whether or not an impugned program truly falls within a “revitalization” scheme.

The description of the types of property, activities and circumstances that are eligible for the tax exemption must be clearly and carefully worded to aid interpretation by staff once the program comes into effect. The reasons and objectives should be enough for a property owner to be able to determine on the face of the bylaw whether or not their intended project or circumstances could meet the exemption criteria.

We often see a simple statement in a bylaw that the program “will accomplish its objectives by reducing the tax burden” on owners, and it is possible that a court would find that this is not a sufficient description of how the program will meet its objectives. Unfortunately, we do not have more information from the Ministry about what information should be included in a bylaw to meet the description requirement in section 226(4)(b).

Council and staff should spend time thinking about the immediate and long-term implications of the revitalization objectives and exactly how the exemption program will help to fulfill those objectives. It is also helpful to consider whether or not the revitalization activities or circumstances are likely to occur without any tax exemption incentive being enacted. The implications of tax shift to other properties in the same or other classes of assessment should also be considered.

C. How much tax to exempt?

After considering how much tax Council is willing to forgo in order to bring about the objectives in the bylaw, Council next has to consider how best to define how much tax will be exempted per property in a given year. The amount of tax exemption can be expressed in various ways, such as:

- a flat amount;
- a formula based on the assessed value of the subject property or the improvements or both;

- a formula based on the difference of actual tax payable between the current year and the year before the revitalization activity began; or
- a percentage reduction of actual tax payable.

The amount of the exemption can also vary from year to year, for example giving 100% tax exemption in the first year of the certificate, and then reducing the amount gradually in the following years.

Council may want to consider including in the bylaw a ceiling on the amount of exemption (such as a flat amount) available to a property in a given year, or over the entire exemption term.

Council will need to think through the long-term implications of the exemptions. Consider what the program will cost the municipality, not only in terms of 'lost' tax revenue, but staff time and overhead for processing and confirming compliance with the program, and any capital costs associated with the activities and circumstances being encouraged by the program. For example, if the program will encourage new development, consider if there is a need for any capital infrastructure works that the municipality will have to build to service that new development.

Be careful in thinking through how your exemption process will work. For example, if the revitalization is for commercial beautification through activities like exterior painting and improved awnings, but the amount of the exemption is tied to any increase in assessment value of the improvements on the property (which would not be affected by those activities), the program will not meet the objectives, and therefore may not be valuable to the community. In this example, the tax exemption should be based on invoices confirming the amount spent on beautification, with an exemption amount based on a formula tied to those invoices.

D. How long should the exemption be in effect?

While the maximum time of the revitalization tax exemption is ten years as set by section 226, Council should consider carefully how long any particular tax exemption should run under the program, having regard to the benefit to the community for the tax revenue foregone for that property.

Council should also consider creating a deadline after which no further certificates will be issued under the bylaw, or some other termination date for the program. In this way, Council will not need to amend the bylaw to terminate the program as it will already have a built-in end date, at which point the program can be evaluated for its effectiveness. Alternatively, the bylaw will need to be repealed to terminate the exemption program, and in that repealing bylaw state that there will be no further agreements after the date the bylaw is repealed (but if an owner has an agreement under the repealed bylaw, the agreement would govern issuance of the certificate and the certificate would continue in force).

E. Requirements and conditions

Every revitalization tax exemption program should have clear direction to an owner as to what requirements and conditions must be met before an exemption certificate is issued, including the conditions to keep the certificate in force. Will the exemption take effect on the completion of the desired activity, or will starting the activity be enough? For example, if the program is for affordable ownership housing, will the exemption operate as soon as a building permit is issued so long as the developer can prove it is meeting certain targets, or will the exemption come into effect only when the transfer to the first low-income owner is completed? For clarity, these requirements and conditions must be stated, even if briefly, in the bylaw, and then given more detail and clarity in the agreement and certificate.

If the exemption is to support an ongoing activity, ensure that the conditions include no change in the use of the property, or that the activity or circumstances must be in continuous operation for the owner to receive the exemption benefit.

If the exemption is for a development or an activity, consider what will happen if the improvements are damaged or destroyed so that they cannot be used for a significant period of time. Must the owner promptly reconstruct? If the owner opts not to reconstruct, does the owner have to repay the amount of any exemption already received? Or should the exemption end when the building is destroyed, and the owner can choose to reapply under the revitalization tax exemption program once the owner reconstructs?

It is also possible to have an revitalization tax exemption agreement require side agreements, such as s. 219 covenants on the property. This could be helpful in ensuring continued use of the protected or revitalized activity or circumstances, such as heritage property, environmental improvement, or affordable housing.

When drafting the bylaw and agreement, consider whether the tax exemption should be transferred to a new property owner if the property is sold. The certificate is issued for the property, but the agreement is personal to each owner, so it is possible to design a program such that one of the conditions of the exemption is that the exemption will no longer apply if the property is transferred.

F. TILMA

Finally, the Ministry primer on revitalization tax exemptions mentions that municipalities need to consider the BC/Alberta Trade, Investment and Labour Mobility Agreement (TILMA) when setting up a revitalization tax exemption program. Although municipalities are not parties to TILMA, Article 12 of TILMA prohibits municipalities from providing unfair, investment-distorting business subsidies. It is possible that a revitalization tax exemption program could be drafted in a manner that provides a discriminatory, investment-distorting subsidy to a business, thereby

falling afoul of TILMA. However, as revitalization schemes are directed at tax exemption for the owners of property, and not at tax exemptions for investment or business enterprises, the vast majority of revitalization tax exemption programs promote the environmental, economic or social well-being of their communities in a manner that do not result in investment-distorting subsidies to businesses.

NOTES