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21ST CENTURY WORKS AND SERVICES BYLAWS

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21ST CENTURY WORKS AND SERVICES BYLAWS

I. INTRODUCTION

During the last few years, our firm has had the opportunity to review and draft either replacements or revisions to numerous local "subdivision servicing" bylaws. Generally speaking, the effect of our work has been to reduce the length of the "front end" of these bylaws, sometimes dramatically, a process that has often required us to provide lengthy explanations as to why time-honoured bylaw content is being removed. In some cases, where servicing standards have not historically been included in the bylaw but have resided in technical "manuals" and "supplements", our efforts have lengthened the bylaw considerably. Because in their basic elements these bylaws don't vary a great deal from one jurisdiction to another, we thought it would be useful to provide some general observations about what these bylaws are, and are not, supposed to cover. We begin with a review of where the historical content of these bylaws originated.

II. STATUTORY HISTORY OF SECTION 938

Prior to 1985, the *Municipal Act* contained in Part 21 a separate division (Division 4) dealing with "Subdivision of Land". Included were the following:

- Authority to establish parcel standards, now part of the zoning power;
- Statutory subdivision approval criteria and requirements;
- Statutory highway dedication requirements;
- Authority for local highway construction standards;
- Authority for local works and services requirements, and limited board of variance powers to vary them;
- Servicing agreement and security options for works and services;
- Statutory park land dedication requirements;
- Statutory water body access requirements;
- Capital cost charge waiver provisions in relation to works provided by subdividers; and
- Simple latecomer charge provisions

Local government "subdivision bylaws" tended to mirror the scope of Division 4 of Part 21 in its entirety. In 1985, the enabling legislation was significantly reorganized with authority for local parcel standards becoming part of the zoning power, statutory standards and requirements for subdivision being either retained in what is now Part 26 of the *Local Government Act* or moved to the *Land Title Act*, and local works and services standards authority, latecomer and servicing agreement provisions being repackaged as ss. 938, 939 and 940 of the *Local Government Act*. Today, bylaws enacted under s. 938 are more accurately characterized as "works and services bylaws". Since 1985, works and services requirements have been applicable in both subdivision and building permit scenarios, and the term "subdivision bylaw" is inaccurate for that reason alone. More significantly, the true scope of s. 938 is the establishment of local requirements and standards for the provision and construction of highway, water, sewer and drainage infrastructure in connection with the subdivision or development of land – being only one aspect of the requirements that apply to land development. The general term that is used for this infrastructure in the statute is "works and services", and that is the term used in this paper.

III. SPARSE CASE LAW

Considering the great cost that can be associated with complying with local government works and services requirements and standards, there is scant recent case law on s. 938 bylaws. In a series of cases – *Norgard v. Anmore (Village)*, [2007] B.C.J. No. 2316, [2008] B.C.J. 1738, [2009] B.C.J. No. 1231 – the BC Supreme Court dealt with the relationship between highway standards enacted under s. 938 and an access route in a bare land strata plan, holding that the approving officer could not apply the bylaw standards automatically given the inapplicability of such a bylaw to a *Strata Property Act* subdivision, and ultimately ordering the approving officer to approve the access route despite his dissatisfaction with the standard of the access route being provided. In *Robins v. Cranbrook (City)*, 2009 B.C.J. No. 509, the Court found that a servicing covenant that had been required as a condition of approval of the subdivision of a residential lot without the provision of the required works and services, was enforceable against the successor in title to the grantor of the covenant and that the City was under no duty to the successor in title to alert them to the existence of the covenant when they made development inquiries. In *Amix Salvage and Sales Ltd. v. Chilliwack (City)*, [2010] B.C.J. No. 2067, the Court held that if a municipality fails to apply its s. 938 bylaw to a subdivision application, it does not come under a duty to install services to the subdivision at its own cost. That none of these cases deals**,** even indirectly**,** with what might be considered the "main event" – the imposition by local governments of (often expensive) servicing requirements on developers – suggests that the basic "user pay" principle that lies behind the s. 938 power is firmly established in British Columbia.

IV. BASIC WORKS AND SERVICE BYLAW CONTENTS

There are some core provisions that should be included in every bylaw adopted under s. 938.

A. General Services Standards

The most important aspect of s. 938 bylaws in relation to the cost of development is the aspect that deals at a very high level with the standard of servicing for the development. As regards highways, what is the standard that applies to the highway fronting the development and any internal highway in a proposed subdivision? Is it a two-lane rural road, or a six-lane arterial highway? If the former, is it paved and does it have parking lanes, boulevards, curbs or sidewalks? If the latter, does it have a landscaped median and boulevards, curbing and sidewalks, traffic signals and street lighting? Must the development be connected to a community water system or is on-site water supply permitted? Community sewer, or on-site disposal? Is a piped drainage system connected to the municipal drainage works required, or are on-site stormwater disposal facilities required? These matters are often addressed in a matrix or table that prescribes general servicing standards either by reference to geographic sub-areas established for the purposes of the bylaw, to zones established in the zoning bylaw, or to some combination of these. The highway standard is often dependent on the classification of highways indicated in a map contained in the official community plan.

B. Technical Standards and Specifications Including Design Standards

The great bulk of works and services bylaws consists of technical standards and specifications for the various types of works that the bylaw requires – highways and water, sewage and drainage systems – and for the design of the works and for the drawings and related information that will be submitted to enable the local government to determine whether what the developer is proposing complies with the bylaw. Generally this part of the bylaw is prepared by the local government's engineering staff or consultants, and recently local governments have been incorporating by reference the master municipal specifications and standard detail drawings published by the Master Municipal Construction Documents Association (MMCD) – currently the "Platinum Edition" published in 2009. This greatly reduces the bulk of the bylaw. With respect to particular matters, the master municipal specifications or standard detail drawings are sometimes replaced with specific specifications or drawings that have been prepared by the local government's staff or consultants to replace the standard MMCD materials. These substitutions are generally set out as schedules to the bylaw.

The reference to engineering consultants raises the question of the appropriate level of involvement of such consultants in the preparation of these bylaws. After reviewing and largely rewriting dozens of works and services bylaws that have been drafted for local governments by

engineering firms, and despite the self-serving appearance of this observation, we're convinced that local governments would be better served by engaging their solicitors to draft these bylaws apart from the technical standards and specifications in the "back end" of the bylaw. Civil engineering and legal drafting call for different skills.

C. MMCD

A number of observations are warranted in relation to MMCD. The key point is that this is a set of documents that was prepared primarily to provide a standard approach to the procurement and construction of typical municipal infrastructure by local governments. Thus the wording of the documents assumes that they are being used in a situation where the municipality is the "owner" – obviously not the case where works are being constructed by a developer pursuant to a s. 938 bylaw (though the local government will eventually be the owner of the works). However the design and construction standards for works or services constructed by developers for a local government are usually the same as the standards that the local government follows itself when constructing the same kind of works or services.

Thus the "Instructions to Tenderers" and the "General Conditions" in Volume II of MMCD, which also contains the master municipal specifications and standard detail drawings, not generally being relevant to the exercise of s. 938 powers, should be excluded in any bylaw reference to this document. Neither are the portions of the master municipal specifications that address "Measurement and Payment" relevant to a situation where the work is being done for a developer. Conversely, there are definitions of terms in the "General Conditions" that are relevant to the interpretation of the master municipal specifications and standard detail drawings, and should be included in the scope of the incorporation by reference. Some local governments have also incorporated by reference the Master Municipal Design Guideline Manual, a separate document prepared by MMCD to govern the design process for works and services they are requiring.

Local governments should also be aware that the MMCD documents are periodically supplemented with updates and corrections. This requires that any bylaw reference to MMCD specify whether the documents are being incorporated into the bylaw as of the date of adoption of the bylaw, or as amended from time to time; both options are permitted under s. 15 of the *Community Charter*. All of the foregoing suggests more detailed incorporation by reference to provisions in the bylaw than might be possible for simpler documentation that is being incorporated in a bylaw in its entirety.

D. Requirements and Standards for On-Site Water Supply: Quantity and Quality

Section 938(5) permits local governments to require that parcels being created by subdivision that are not required to be connected to a community water system have "a source of potable

water having a flow capacity at a rate established in the bylaw". Private water supply systems are governed by provincial law including the *Drinking Water Protection Act* and the *Public Health Act*. The Drinking Water Protection Regulation provides a very basic standard for water potability in terms of microbiological contamination only. By contrast, the Guidelines for Canadian Drinking Water Quality published by Health Canada address dozens of chemical and physical water quality parameters from Aluminum to Zinc, as well as radiological parameters. There is an issue as to whether bylaws enacted under s. 938(5) ought to impose any water potability standard in excess of that prescribed by the Drinking Water Protection Regulation. A bylaw that requires an on-site water supply to comply with the federal Guidelines would seem to require testing for the presence of dozens of substances, many of which are not known to occur naturally in British Columbia, and we have been advised by some clients that such testing is prohibitively expensive. Approving a subdivision that is required by a local bylaw to have a water supply that complies in all respects with the federal Guidelines could well be alleged to be a representation to lot purchasers that the subdivision does in fact comply. If local water potability standards, in addition to flow capacity, are going to be prescribed, we suggest that specific parameters addressed in the federal Guidelines be identified in the bylaw, in place of a more general reference to the Guidelines.

In areas with groundwater availability problems, the prescription of a minimum "flow capacity" seems to increasingly include details as to how the flow capacity must be established, including times of the year at which well tests must be conducted. To the extent that this is a water supply that is intended to be sufficient at all times of the year and the subdivision is, essentially, permanent, such an approach seems both prudent and within the scope of the legislation. With the introduction of the *Water Sustainability Act* and the introduction of groundwater licensing, it's timely to note that the bylaw should not make the acquisition of a provincial groundwater license a precondition to subdivision or building permit approval, any more than it should have in the past required the acquisition of a license to use a surface water supply. Applicants who invest in applications for developments that rely on a water supply requiring a provincial license, without satisfying themselves that such a license will be available, do so at their own risk.

E. Application Procedures to Ensure Compliance with Works and Services Standards – Subdivision and Building Permit

We note below that general subdivision application procedures are beyond the scope of s. 938. However, to the extent that the *Land Title Act* and the Bare Land Strata Regulations prohibit approving officers from approving subdivisions that don't comply with applicable local government bylaws respecting the subdivision of land, it seems appropriate for local governments to prescribe application procedures and requirements that are directly related to establishing such compliance. In this regard we suggest that every s. 938 bylaw set out requirements regarding the nature and level of detail of engineering studies, analysis and

designs that applicants must provide to demonstrate that their subdivision will comply with the bylaw. Similar requirements should be imposed in relation to building permit applicants, either in the building bylaw or in the works and services bylaw. In a larger municipality, this documentation will likely be passed along to engineering or public works staff for review and a recommendation as to whether the subdivision or development is approvable from a works and services perspective. If the application is for preliminary subdivision approval, the documentation will be used to formulate approval conditions included in the preliminary approval letter to the applicant. The fees "to cover the costs of administering and inspecting works and services" that are authorized by s. 931(1)(e) of the *Local Government Act* should be set to permit recovery of staff and engineering consultant costs involved in this internal process, in both municipalities and regional districts, where MOTI approving officers will be referring this type of information for review in relation to local infrastructure requirements and standards.

V. OPTIONAL CONTENTS

There are a few additional matters that a local government may want to address in its works and services bylaw**,** and that we think may properly be included.

A. Administrative Requirements Related to Works and Services Agreements

It seems quite common for works and services bylaws to provide a great deal of detail on the administration of works and services agreements, which detail is often then duplicated in a *pro forma* works and services agreement appended to the bylaw as a schedule. Sometimes there are two agreements, one modified to deal with situations where the works and services are completed prior to development approval but the "warranty period" has to be dealt with. There is no requirement in s. 940 that the bylaw address these matters; the legislation simply states that works and services required under s. 938 must be provided before the subdivision or development is approved, unless the applicant enters into an agreement to provide them by a specified date and provides security that will forfeit to the local government in the event that the works are not completed by that date. We have reviewed many bylaws that address the submission of detailed engineering designs for approval; granting of approval for the initiation of construction; issuance of certificates of provisional acceptance of the work and final acceptance; developer responsibilities to repair deficiencies during a "warranty" period; partial and final releases of security; and indemnities of the local government by the developer, usually coupled with an insurance requirement.

It isn't necessary for any of these matters to be addressed in a works and services bylaw, and certainly it isn't necessary to address them twice. While it can be advantageous tactically to have the terms of a works and services agreement prescribed by bylaw, so that developer requests to change the terms can be more easily rebuffed (the bylaw can be varied, but a DVP

would likely be required), local governments sometimes wish to change the terms of the agreement to better suit the works and services, the site, or some other aspect of a particular development situation and they may be constrained by their own bylaw from doing so. The preferable practice is to leave this detail out of the bylaw, establish a standard form works and services agreement that the local government and the developer can change for particular situations as they see fit, and when developers propose undesirable changes in the wording of the agreement, stand on the fact that there is no entitlement to defer the construction of works and services until after the development approval is obtained. If the developer doesn't like the terms that the local government prefers, it can avoid the agreement entirely and build the works and services up front. Developers have zero bargaining leverage in this matter.

The strength of the local government's negotiating position with regard to works and services agreements can potentially be used to resolve another matter that often seems to plague them: the reluctance of developers who are installing excess or extended services reduce the terms of a latecomer agreement to writing. We're aware of many situations where latecomer agreement negotiations have not been concluded, sometimes years after the works have been completed, and the local government nonetheless has to impose latecomer charges without any certainty that the charges will be sufficient once an agreement has been concluded. The undesirability of these situations was accentuated when the government increased the maximum term of these agreements from 10 to 15 years, prompting developers whose agreements had not been concluded (as well as some whose had) to seek to take advantage of the longer maximum term. Because the works and services are often the same as, or closely related to, the works and services whose installation is being addressed in the servicing agreement, it seems sensible and efficient to include in the agreement an additional part that addresses the matters that constitute a latecomer agreement: a general description of the services or services component; the cost of the excess or extended services or services component (including any provisions for finalizing a cost figure once construction has been completed), the benefiting lands, the term of the agreement in years, the portion of the excess cost that benefits each part of the benefiting lands, and the per unit latecomer charge to be imposed over the term of the agreement. (We note here that the Land Title and Survey Authority has recently informed us that it will no longer accept for deposit on title to benefiting lands the "Notice of Latecomer Agreement" that was developed some years ago by the Registrar of Titles and the Ministry of Community Development; there is no authority in the *Local Government Act* for this type of notice to be deposited.)

On the topic of works and services agreements, it's interesting to note that s. 940 speaks of these agreements requiring the developer to construct the works and services by a specified date "or forfeit to the municipality or regional district" the security that has been given "having regard to the cost of installing and paying for all works and services required under the bylaw". Nowhere does the legislation state that the local government has to complete the works and services and apply the forfeited security to the cost of doing so, and at common law it does not

appear that a local government has a duty to any third party to construct such works and services. In most cases of default, the local government will have issued further approvals (building permits for subdivision lots, usually) and thereby acquired a stake in having the works and services completed, though it is by no means clear that the local government would be liable to those permit holders if their buildings end up lacking essential services. In practice, local governments occasionally go through the very painful process of tendering the completion of the works (the original contractor typically having withdrawn its services for non-payment under their construction contract with the developer) and attempting to cover completion costs from the security that has forfeited to it.

B. Delegation of Approval Authority for Frontage Exemptions - S. 944 LGA

To the extent that the minimum highway frontage rule in s. 944 of the *Local Government Act* (10% of lot perimeter) is policed via the subdivision approval process along with the works and services standards, some of these bylaws include a delegation of the local government authority to exempt a particular subdivision from the 10% rule or the rule that the local government has established under s. 944 in place of that rule. Section 944 permits local governments to delegate this power only to an approving officer, and does not address how the delegation is to occur; thus the bylaw procedure described in s. 154 of the *Community Charter* is applicable.

C. Delegation of Approval Authority for Strata Conversion - S. 242 SPA

For similar reasons, some local governments that wish to delegate the authority of the council or board to approve a strata conversion under s. 242 of the *Strata Property Act* do so in their works and services bylaw. Section 242 permits this authority to be delegated to an approving officer or "other person", and in this case it allows the delegation to be effected "by resolution". The Act refers to the power being delegated "with respect to a specified type of previously occupied building", suggesting that a general delegation of this power is not an option.

D. Excess and Extended Services Requirements and Delegation of Authority - S. 939 LGA

The authority of the local government to require the construction of excess or extended services under s. 939 is sometimes addressed in the works and services bylaw, with a delegation of authority to the municipal engineer or similar official to require that the developer provide the services, and to make the various determinations that the local government is obliged to make under s 939(5) – quantifying the excess cost, identifying the benefiting properties, and establishing the proportion of the excess cost that benefits each benefiting property. Section 939 does not require any of these powers to be exercised by bylaw, so they may, according to s. 154 of the *Community Charter,* be delegated, but the delegation must be effected by bylaw. To the extent that infrastructure oversizing and the

routing of trunk services are highly technical matters, these seem appropriate matters to delegate to technical staff.

E. Latecomer Charge Interest Rate

Whether or not powers related to excess and extended services are delegated to staff and whether latecomer agreement provisions are included in the standard works and services agreement or a stand-alone latecomer agreement, there is a requirement in s. 939 that latecomer charges include an interest payment, and the interest rate must be established by bylaw. A works and services bylaw that deals with these services seems a logical home for

setting the interest rate, either in a stand-alone provision or within a works and services agreement included in the bylaw as a schedule. The Act refers to interest "calculated annually at a rate established by bylaw"; in the absence of any reference to the interest being compound or simple, simple interest is implied, and the bylaw should simply set the rate.

F. Subdivision Application Fee - S. 931 LGA

Section 931(1)(f) authorizes local governments to impose subdivision application fees, which may vary with the number, size and type of parcels involved in a proposed subdivision, and many local governments historically imposed these fees via the works and services bylaw because the bylaw also addressed subdivision application procedures, a matter that we indicate below lies beyond the jurisdiction of municipal councils and regional boards. Most local governments impose fees in respect of Part 26 matters in the application procedures bylaw required by s. 895, and subdivision application fees tend to be found there, or in a general "fees and charges bylaw" enacted under the *Community Charter*. However there is nothing wrong with establishing these fees in the works and services bylaw.

G. Administration/Inspection Fees - S. 931 LGA

Section 931(1)(e) authorizes fees "to cover the cost of administering and inspecting works and services under this Part that are costs additional to those related to fees under paragraph (a) to (d)", which deal with various Part 26 development applications. These fees can enable the local government to administer its works and services requirements on a full cost recovery basis, but the law in our view requires that the fees be quantified in the bylaw on the basis of underlying calculations geared towards cost recovery, rather than allowing the local government to pass on to the applicant its actual cost of administration and inspection. Again, these fees are sometimes included in a development application procedures bylaw, or a fees and charges bylaw, rather than the works and services bylaw. The most common approach is to set the fee at a percentage of the cost estimate that is prepared for the security obligations under s. 940.

VI. SOME COMMON QUESTIONABLE CONTENTS

Finally, there are some matters covered in bylaws enacted under s. 938 or its predecessors that we think ought not to be addressed in that bylaw, or at all.

A. General Subdivision Application Procedures

Local government bylaws adopted prior to 1985 were generally called "subdivision bylaws" and many of them attempted to provide a "complete code" for the subdivision of land, including detailed subdivision application procedures as well as duplication of statutory requirements such as those pertaining to the dedication of highways and park land. Despite the rewriting of

the enabling legislation in 1985, local government bylaws establishing works and services standards have continued to be referred to as "subdivision" (or "subdivision and development") bylaws, and have continued to address various matters that have been outside the scope of what is now Part 26 of the *Local Government Act* for many years (or that were never within local government jurisdiction in the first place). Included here are subdivision application procedures. For rural areas, where subdivision applications are handled by officials of the Ministry of Transportation and Infrastructure, application procedures are simply prescribed by the Ministry. Our view is that an analogous procedure should be used in municipalities: the approving officer should simply prescribe the application procedures, as part of the exercise of their duties as a statutory decision-maker.

B. Section 943 Waivers

Section 943 of the *Local Government Act* provides a one-year respite from newly-enacted bylaws affecting subdivisions for which application has been made and fees paid by the date of bylaw adoption, unless the applicant chooses to have the bylaw apply. We have noted that general subdivision application procedures have no place in a works and services bylaw enacted under s. 938. After s. 943 was originally enacted, some local governments attempted to avoid its consequences by requiring subdivision applicants to waive the protection of the statute in order to have their application considered. These requirements were challenged in court, successfully, and most of the bylaws in question have since been amended or replaced.

C. On-Site Sewage Disposal Standards and Requirements

Some existing works and services bylaws, having addressed on-site water supply requirements, go on in a similar vein to address on-site sewage disposal requirements, often doing nothing more than requiring the subdivider to obtain a regional health authority approval (that has been unavailable since the Province privatized the administration of on-site sewage disposal standards several years ago). Previously, such approval was a general indication that the developer had investigated the soil conditions sufficiently to demonstrate that proposed parcels were viable for on-site sewage disposal. Constructors of on-site sewage disposal systems are now only required to provide certain "filings" with the regional health authority having jurisdiction, pursuant to the Sewerage System Regulation under the *Public Health Act*, and the B.C. Onsite Sewage Association has been given the primary quality control role in this area. Local government works and services bylaws should remain silent on on-site sewage disposal requirements, beyond identifying areas, if any, in which connection to a community sewer system is not required. Subdividers who create parcels that cannot be serviced in accordance with the Sewerage System Regulation do so at their own risk.

D. Requirements/Standards For Telecommunications, Hydro, Gas Service

The reference to "underground wiring" in s. 938(1)(b) tends to cause some confusion about the extent of local government authority to require that subdivisions be provided with electricity and telecommunications services. The better view is that local government authority extends only to requiring any wiring that is being provided to be installed underground. Telus has, we understand, been signaling its intention to provide no land line service at all in some new subdivisions, and we see nothing in s. 938 that enables local governments to require subdividers to arrange for this service to be provided. As regards electricity service, BC residents are also allowed to live "off the grid", though approving officers may consider that it is against the public interest to approve a residential subdivision in circumstances where there is no supply of power for the typical array of household equipment and appliances. The power utilities are subject to the jurisdiction of the B.C. Utilities Commission as regards their obligations to provide service to customers willing to pay their rates, and telecoms are similarly subject to the jurisdiction of the CRTC.

We suggest that, as a practical matter, the authority to require that wiring be provided underground be exercised by clearly indicating in the works and services bylaw the areas and circumstances in which wiring must be installed underground rather than overhead, and ensuring that road construction standards for those areas include specifications for underground ducts and vaults that meet the standards required by the relevant power and telecommunications utilities should they wish to use them.

E. Community Mailboxes

Some works and services bylaws similarly purport to require subdividers to prove that they have made arrangements with Canada Post for the installation of community mailboxes within or adjacent to a subdivision. Canada Post itself has gone so far as to suggest to local governments that works and services agreements require developers to provide evidence that "satisfactory arrangements, financial and otherwise, have been made with Canada Post Corporation for the installation of Community Mail Boxes (CMB) as required by Canada Post Corporation and as shown on the approved [engineering drawings] at the time of sidewalk and/or curb installation", and to "provide notice to prospective purchasers of the locations of CMBs and that home/business mail delivery will be provided by CMB, provided the developer has paid for the activation and equipment installation of the CMBs." Local governments have no authority to extract these kinds of obligations from developers, so such requirements should be addressed neither in works and services bylaws nor in standard works and services agreements. These are matters for developers to address separately with Canada Post Corporation, though obviously it makes sense for the developer's engineering consultant to coordinate the physical facilities that result from these arrangements with municipal infrastructure requirements.

F. Standards for Private Works in Strata Plans

Works and services bylaws should not attempt to impose servicing standards in relation to bare land strata subdivisions. Section 938(3) prohibits the imposition of requirements under s. 938(1)(b) or (c) in respect of a subdivision under the *Strata Property Act*. Subsection 938(1)(b) deals with highways and highway-related infrastructure such as sidewalks and street lighting, and s. 938(1)(c) deals with water, sewer and drainage systems: these works are subject only to the standards set out in the Bare Land Strata Regulations. As regards the internal roads in a bare land strata plan, to the extent that the term "highway" is defined for the purposes of s. 938(1)(b) (via the definition in the *Community Charter*) to exclude private rights of way on private property, it may be that the standards for "highways" set out in a s. 938(1)(b) bylaw could not apply to these roads even in the absence of s. 938(3). Section 6 of the Bare Land Strata Regulations provides standards for access routes, which generally enable the approving officer to ensure that they are wide enough to afford sufficient emergency vehicle access. An approving officer requirement that a private road in a bare land strata plan not be gated, to allow emergency access, was upheld in *Norgard v. Anmore (Village)*, 2007 BCSC 1571. (To the extent that municipalities are concerned about the maintenance of private roads in strata plans, in relation to emergency vehicle access, there is a little-used power in s. 39(d) of the *Community Charter* to enact a bylaw to "require owners of private highways to maintain them in a clean, fit and safe state and to post suitable private thoroughfare signs". This would support a requirement that these roads be ploughed in the wintertime for emergency vehicle access.)

On-site water, sewage and drainage systems in bare land strata plans must according to the Bare Land Strata Regulations comply with "the standards set out in the codes, or where the codes do not provide standards, in accordance with standards generally accepted as good engineering practice". The term "code" is defined in the Regulation to mean the B.C. Building Code and regulations made under the *Health Act*, *Gas Safety Act* or *Electrical Safety Act*. (These enactments have been replaced by the *Public Health Act* and the *Safety Standards Act*.) None of these enactments sets out standards analogous to those contained in s. 938 bylaws, so there are no "codes" for the purposes of these references in the Bare Land Strata Regulations, and "good engineering practice" is the applicable standard.

The standard to which water, sewer and drainage works have been provided in bare land strata plans is a matter of considerable concern to local governments, to the extent that the systems are usually connected to local government systems and upstream (in the case of sewer and drainage works) and downstream (in the case of water supply works) private systems can impact and endanger local government systems. Deficiencies in the design or construction of these systems will also come back to haunt local governments if strata corporations request their local government to take the system over as part of municipal infrastructure at some point in the future. Local fire departments are interested in the design and maintenance of fire

hydrant systems in strata subdivisions, for practical reasons related to firefighting. The effect of s. 938(3) is that an unspecified standard applies to the design and construction of these works; "generally accepted good engineering practice" enables developers to construct these systems to a significantly lower standard than many municipalities and regional districts have incorporated into their s. 938 bylaws, either specifically or via the MMCD. Approving officers are entitled to require the subdivision applicant to produce a certification by a qualified professional engineer that the works have been designed and constructed in accordance with "standards generally accepted as good engineering practice", but aren't entitled to look behind such a certification unless they have a particular concern substantiated by an engineer with suitable qualifications. The mere fact that the proposed standards are lower than those incorporated into the local government's standards doesn't mean that they are not "generally accepted as good engineering practice"; some local governments have simply chosen higher standards for publicly owned works.

G. Highway Dedications > 20 m in Width

Approving officers are given authority in s. 75 of the *Land Title Act* to require subdividers to dedicate highways within their subdivision, and to require the widening of existing highways abutting the subdivision, in each case to the extent of the subdivider's control (that is, out of the land being subdivided). Without cross-referencing these powers, s. 945 of the *Local Government Act* separately authorizes the approving officer to require the dedication, without compensation, of highways up to 20 m in width within a subdivision, and of areas required to widen to 20 m an existing highway that borders or is within the subdivision. (There is an exception for areas where the topography is such that a greater width is required to support an 8 m roadway.) We believe that s. 945 would, certainly in municipalities and perhaps in rural areas as well, be interpreted as a limitation on the approving officer's powers under the *Land Title Act*.

However, some municipalities have arterial highway standards that require a right of way width greater than 20 m, and some s. 938 bylaws include a highway construction standard that requires a right of way in excess of 20 m, begging the question of how the additional right of way is going to be obtained. We don't read s. 938 as enabling a municipality to establish a highway dedication requirement that exceeds that permitted by s. 945; it is a power to require "works and services", not land dedications. Generally, powers to require owners to part with their land without receiving compensation will not be implied; they must be expressly given, as in s. 945. Thus, highway construction standards in a works and services bylaw should address the construction of works in rights-of-way of the width that is actually available, unless the local government intends in all cases to supplement statutory dedication requirements with purchases of additional right of way. (It may be possible for the zoning bylaw to give developers an incentive to dedicate additional right of way without compensation, by permitting specified uses of land only if the parcel fronts on a highway having a minimum width of, say, 25 m.)

H. Parcel Standards Covered by the Zoning Bylaw

We have noted above that pre-1985, local government authority to establish minimum parcel standards was conferred in the part of the *Municipal Act* that dealt with subdivision servicing. Since 1985, the appropriate location for these regulations is the zoning bylaw. Because there is a public notice and hearing requirement for a zoning bylaw and s. 938 bylaws are not normally adopted in accordance with those requirements, parcel standards contained in a works and services bylaw are legally vulnerable. Over the past 30 years most of these standards have been removed in works and services bylaw updates and revisions.

I. Local Government Financial Commitments to Share Servicing Costs

In a few instances we have come across old bylaw provisions purporting to commit the local government to share in the cost of developer-installed infrastructure that has excess capacity. As noted earlier, it is appropriate to address certain "excess and extended services" matters in works and services bylaws. However, commitments that the local government will cover excess costs reflect statutory provisions that were repealed long ago. For example, s. 570 of the 1960 *Municipal Act* enabled a municipal council, with ministerial approval, to enact a bylaw establishing the conditions under which the municipality would extend a sewer or utility system, and some bylaws established the condition that developers pay for the extension less any "excess capacity" component, which would be covered by the local government. Provisions that require the local government to automatically absorb these costs are very likely invalid, under the current financial management rules in the *Community Charter*, and are unnecessary in that s. 939 clearly entitles the local government to cost-share in these works if it chooses to do so.

VII. GREY AREAS

There are a couple of matters that fall into neither the "clearly included" and "probably invalid" categories, that are of course the matters on which we are almost always asked for an opinion while a works and services bylaw is being reviewed and rewritten.

A. Cash In Lieu Of Providing Works And Services

Probably the most frequently-asked legal question regarding local government works and services requirements is whether the bylaw, or the officials administering the bylaw, can allow or require development applicants to pay cash in lieu of constructing off-site works and services. These questions arise in a variety of circumstances, including:

- In relation to paving standards, there is no local paving contractor and the local government would like to take the developer's money and engage an itinerant paving contractor to do the work next time they're in town

- In relation to highway works, the bylaw requires only a half road, if a half road is constructed it will likely be heavily damaged by the time the other half is constructed, and it makes more sense to take the first developer's money and construct the whole road at once later on

- In relation to works of all kinds, economies of scale make it more sensible to take cash contributions from a number of developers and construct a large section of works at once rather than having each developer construct a small portion of that section of works

- In relation to all kinds of works, the existing standard of works in the immediate vicinity is adequate and the local government would rather apply the value of the required works and services to constructing needed works elsewhere

The *Local Government Act* does not provide a cash-in-lieu option, as it does for other matters such as park land dedication and the provision of off-street parking spaces. This militates against reading s. 938 as impliedly permitting a cash-in-lieu scheme. In addition, the requirement in s. 938(8)(a) that works and service requirements be "directly attributable to the subdivision or development" weakens any argument that a local government may, instead of requiring a developer to construct works and services, allow or require them to pay cash in lieu of doing so, to enable the local government to construct the works and services at some future, perhaps unspecified time. If the need for works and services is attributable to the subdivision or development, how can it responsibly be approved without the works and services actually being provided? We are aware of one case in which a class action against a municipality was certified under the *Class Proceedings Act* to enable the class members to claim recovery of cash paid in relation to the provision of works and services: *Antoniali v. Coquitlam (City)*, 2005 BCSC 1310. The payment was in the form of a "deposit" which would be returned in the event that the owner actually constructed the works and services themselves, but it appears that the payment may have been treated, in reality, as simply a payment in lieu of providing the works and services. In our experience, many municipalities have cash balances in reserve from this source, with no current plans to spend them and no clear idea of how they will or should be spent.

According to s. 114(4) of the *Community Charter*, a municipal council has all necessary power to do anything "incidental or conducive" to the exercise of any power conferred by the *Charter* or any other enactment. (Regional districts are given equivalent powers in s. 798 of the *Local Government Act*.) In our view, requiring or allowing a cash-in-lieu option in at least some of the circumstances described above could be considered both incidental and conducive to the power to require the works and services to actually be constructed. However, where the local government is simply using its authority to lever a cash contribution in circumstances where no off-site works and service requirements could reasonably be attributed to the subdivision or

development that is triggering the payment (the fourth scenario described above), we see a problem: there is no legitimate works and services requirement in lieu of which the developer would be paying the cash.

Where cash in lieu is accepted or required, it would be important for the validity of the scheme that the funds be kept in properly established reserve funds and that the local government have a program in place for spending the funds when the appropriate opportunity arises – for example, the paving contractor is in town, or sufficient funds have accumulated to permit a project of reasonable scope, from a civil engineering perspective, to be undertaken.

B. Administrative Variances and Discretion Regarding Standards

Drafting works and services bylaws involves achieving a balance between the requirement that works and services standards be "established" in the bylaw as required by ss. 938(1)(b) and (c), and providing sufficient flexibility that the bylaw can be applied and enforced without excessive reliance on the council or board's authority to vary the bylaw by DVP or the limited jurisdiction of the board of variance where an applicant cannot or does not wish to comply with every detail in the standards and specifications for the works. Municipal councils and regional boards cannot reasonably be expected to anticipate, with bylaw language, every servicing exigency that might possibly arise within its jurisdiction. This issue has frequently arisen in relation to local government desire to embrace or at least entertain "green infrastructure" alternatives to the standards that have traditionally been recommended by civil engineering firms, without engaging the statutory variance process. A s. 938 bylaw that requires developers to construct highway, water distribution, sewage collection and disposal and drainage disposal systems in accordance with the standards and specifications prescribed in the bylaw "or such alternative standards as may be acceptable to the City Engineer" would in all likelihood be an excessive re-delegation of the council's powers, and contrary to the rule in s. 154 of the *Community Charter* that a local government may not delegate to an official a power (such as the s. 938 power) that is exercisable only by bylaw. We have dealt above with what we think is a permissible incorporation by reference of the master municipal specifications and standard detail drawings published by the MMCD Association; this approach is permitted by s. 15(2)(a)(i) of the *Community Charter*, which contemplates the adoption of a standard published by a provincial standards association. The key question here is whether a person who must comply with the bylaw can tell with reasonable certainty, by consulting the bylaw itself, what requirements will apply to their project; this is the standard that a local government regulatory regime must generally meet.

At common law it is permissible for a municipal council or regional board, in enacting a bylaw, to delegate to an official the authority to exercise judgment and discretion that is within the official's technical expertise: *R. v. Joy Oil* (1963), 41 D.L.R. (2d) 291 (Ontario Court of Appeal). In that case, the Court refused to find an excessive re-delegation to Toronto's Fire Chief in a bylaw

stipulating that "every wholesale storage depot, port terminal, and other property, where flammable liquids are stored in bulk storage shall be provided with foam fire-extinguishing equipment and such quantities of foam-producing materials ready for immediate use as may be directed by the Chief of the Fire Department". By contrast, in *R. v. Horback* (1967), 64 D.L.R. (2d) 17, the B.C. Supreme Court saw excessive delegation in a Vancouver bylaw providing that "If upon inspection defects are disclosed in the safety features of a motor-vehicle or trailer which are, in the opinion of the Superintendent, dangerous to the driver of the vehicle or to other persons or property, he may so certify and in such case may cause the vehicle to be removed by towing or other means to a place where repairs or correction of the defects are to be carried out." A comparison of these two bylaw provisions suggests that the first is rather narrow in that the Fire Chief's powers extend to determining types and quantities of equipment and materials that are specified in the bylaw, while the second is rather broad in that the types of safety defects that might lead to a vehicle being summarily taken off the road are not specified. Where between these two poles of permissible and impermissible re-delegation a particular works and services bylaw provision might fall will often be difficult to tell, but a general guideline would be that the provision is valid if the discretion that is being exercised is not one that the Legislature could reasonably have expected to be exercised by the council or board itself, because of the technical nature of the matter. Another would be that the greater the cost consequences to the developer of the discretion that is being exercised, the more likely it is that the Legislature would be considered to have intended that the discretion would be exercised by local elected officials rather than technical staff.

VIII. OTHER MATTERS

There are a couple of other matters related to works and services bylaws that local governments should keep in mind when revising and replacing the bylaws.

A. Variance of S. 938 Bylaws

Boards of variance have limited jurisdiction to vary s. 938 bylaws on hardship grounds (s. 901(1)(d)). The jurisdiction is limited in relation to the types of areas in which it may be exercised and the types of servicing standards that can be varied. The board has jurisdiction only in relation to areas "zoned for agricultural or industrial use". This should not be read as if it said "zoned exclusively for agricultural or industrial use" as such zoning is increasingly rare; rather it should be read as if it said "zoned so as to permit any agricultural or industrial use". The board may only vary a requirement under s. 938(1)(c) that a water distribution system, fire hydrant system, sewage collection system, sewage disposal system, drainage collection system or drainage disposal system be provided in such an area in accordance with bylaw standards. Requirements for highway works (including sidewalks, boulevards, boulevard crossings, transit bays, street lighting and underground wiring) imposed under s. 938(1)(b) cannot be varied. The wording of the statute suggests that the board could relieve the developer from providing the

system at all, or alternatively vary the standards at which it must be provided. These applications are rare.

Municipal councils and regional boards have jurisdiction to vary s. 938 bylaws by development variance permit. These permits are dealt with on an *ad hoc* basis and the reasons for variance applications are probably limitless, though many of them probably come down to the question of cost.

Section 938 bylaws may also be varied by development permit, in accordance with the applicable DP guidelines. We have rarely seen DP guidelines that address the circumstances in which, and the extent to which, works and services standards may be varied by this means. An example of such a guideline would be a "natural environment" or "hazardous conditions" area in which a maximum highway gradient could be varied to minimize alteration of the natural topography in a subdivision.

B. Administration of Works and Services Bylaws: Subdivision and Building Permit Applications

The general scheme of s. 938 is that works and services requirements will be imposed when a subdivision application or building permit application is made. The references in s. 87(b) of the *Land Title Act* and s. 2 of the Bare Land Strata Regulations to, respectively, "bylaws regulating the subdivision of land" and "relevant bylaws", would include bylaws enacted under s. 938; the approving officer cannot lawfully approve a subdivision or bare land strata plan that does not comply with the applicable s. 938 bylaw. The approving officer commonly refers the applicant's works and services proposals to local government engineering staff or consultants for review, and this includes Ministry of Transportation approving officers handling subdivision applications in rural areas.

As regards building permit applications that trigger works and services requirements, we suggested earlier that the works and services bylaw or the building bylaw require the building permit applicant to provide sufficient information, prepared by a professional engineer, to enable the local government to determine whether proposed works and services required in connection with building projects comply with the bylaw. If this is addressed in the works and services bylaw, the building bylaw should at least make reference to the local building official confirming compliance with the works and services bylaw during the building permit application process. Again, an internal referral of the application to the local government official who reviews works and services proposals is usual, as these matters may be beyond the expertise of the building official handling the permit application.

C. Administration of Works and Services Bylaws: Rezoning and DP Applications

A word or two is also in order as regards the application of works and services requirements and standards in the processing of zoning amendment and development permit applications. Generally speaking, these local government approvals, when required in relation to a particular development, are obtained prior to the subdivision or building permit application that triggers the application of works and services requirements, and it is unnecessary to introduce works and services requirements, especially the requirement to provide works and services security, at this early stage of development approval. In regard to zoning amendment applications, it is one thing to ensure that the developer's land can feasibly be provided with services at the standard prescribed by local bylaws, as a condition precedent to rezoning. It is quite another to require the applicant to prepare engineering drawings and specifications for the works and a construction cost estimate, and post security in the amount of 100% or more of that cost, as a condition precedent to rezoning.

Development project financing is quite often conditional on the adoption of a zoning amendment bylaw, and in those circumstances the developer is typically unable to incur the cost of preparing engineering drawings and specifications, let alone arrange security in an amount equal to or exceeding the construction cost, before the zoning is in place. Because the local government has levers to obtain these things at the subdivision approval or building permit stage of development, such rezoning conditions seem unnecessary. These comments apply with equal force in regard to the development permit stage of development approval, with the additional factor that applicants are entitled to receive DPs as long as their development complies with the applicable DP guidelines. Having said that, there may be circumstances in which the construction of the works and services itself requires a DP, and the works must be designed to at least some extent in order that the DP application can be made. In such cases, it is still unnecessary to require the applicant to provide the works and services security when the DP is issued.

None of this is to say that it's not a good idea for a local government to give a developer a heads-up at an early stage as to obligations that will arise later in the approval processes related to their rezoning or development permit application; this is often the rationale for addressing these matters in third reading resolutions, development covenants taken prior to rezoning, and development permit conditions. The downside of providing gratuitous information at this stage of development approval is that if anything is missed, the local government may be laying the foundation for a claim for negligent misrepresentation, and if there is a pattern of providing this information and it is not provided at all in one instance to a repeat customer, there may be a claim that the developer has a "legitimate expectation" that all approval requirements will be disclosed at this early stage, that the local government has breached.

D. Effect of Phased Development Agreements

Phased development agreements under s. 905.1 of the *Local Government Act* may specify provisions of a s. 938 bylaw whose amendment or repeal does not apply to the land that is subject to the agreement unless the developer of the land agrees that the changes apply. This puts the works and services standards on the same footing as any zoning bylaw provisions for which the developer has negotiated stability during the term of the agreement in exchange for the provision of amenities, the inclusion of specific features of the development, or other terms and conditions sought by the local government in the negotiation of the agreement – though there is no reason that a developer could not negotiate a phased development agreement in relation to s. 938 bylaw requirements alone. A general review and rewrite of a s. 938 bylaw will generally not apply to property that is the subject of a PDA unless the owner agrees in writing: s. 905.1(5), *Local Government Act*. Thus the repealed bylaw may continue to apply to PDA lands for some years after its repeal, unless the owner of those lands can be convinced that the changes in the bylaw as regards their land are insignificant and that they should therefore agree in writing that the local government doesn't have to administer development approvals for their land in accordance with the repealed bylaw until the term of the PDA expires.

NOTES