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LAND TITLE SEARCH & RESCUE: AN OVERVIEW OF CHARGES, LIENS AND INTERESTS IN LAND

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I. INTRODUCTION

Most local government employees will encounter a title search at some point in their careers. It can be an overwhelming experience; a document filled with words and numbers that mean very little at first glance. And now that local governments have the ability to designate employees to sign and submit electronic land title documents on the local government's behalf, more and more local government staff are reviewing title searches and preparing and filing new charges, liens, and interests in the Land Title Office, asking themselves questions like: When should I use an easement instead of a statutory right of way? What does that legal notation mean? When do I need a housing agreement instead of a 219 covenant? Does this option to purchase need priority over that mortgage? What the heck is a profit à prendre?

This paper attempts to provide an overview of the various charges, liens and interests in land that can be found on a title search, each of which is important for the use, development, regulation, and enjoyment of land in British Columbia. The rules governing such interests are often highly technical and must be followed to ensure that the interests are properly created and legally enforceable.

II. LEGAL NOTATIONS

Legal notations appear on title under a separate heading than charges, liens and interests and include little information beyond a filing number and possibly a date. Unlike charges (which also include a filing number), a person interested in the specifics of a legal notation is typically not able to obtain the details through the Land Title Office. Rather, the individual must undertake further inquiry, such as contacting the local government to obtain details of a permit or calling the Agricultural Land Commission to inquire whether a parcel is in fact located in the ALR.

An example of a common legal notation reads: "This title may be affected by a permit under Part 26 of the *Local Government Act*". (In some cases the notation may still refer to the *Municipal Act*.) Part 26 of the *Local Government Act* concerns planning and land use management, and a permit under Part 26 could be a development permit (s. 920), a temporary use permit (s. 921), or a development variance permit (s. 922). It is important for local governments to note that, when a local government issues a permit under sections 920 to 922, it must file in the Land Title Office a notice that the land described in the notice is subject to the permit. The permit process should not be considered complete until the notice is filed and the notation is shown on title. If the permit is later amended or cancelled, the local government must file a notice of the amendment or cancellation in the Land Title Office. Once a notice is filed, the terms of the permit or any amendment to it are binding on all persons who acquire an interest in the land affected by the permit, so it is very important to file those notices and ensure they show up on title.

Another example of a common legal notation reads: "Notice of Interest, Builders Lien Act (S.3(2)), See CA525070 Filed 2006-07-06". These notations relate to section 3 of the *Builders Lien Act*, which says that an improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner. However, this deemed request does not apply to an improvement made after the owner has filed a Notice of Interest in the Land Title Office. We recommend that, whenever a local government is leasing or licensing its land, and knows that the tenant will be making improvements to the land, the local government should file a Notice of Interest on title so that builders liens do not attach to the local government's ownership interest in the land.

A third example of a common legal notation reads: "This certificate of title may be affected by the Agricultural Land Commission Act". This notation means that the property is most likely located within the Agricultural Land Reserve, which could have a significant impact on how the property can be subdivided and used. For example, where a local government wishes to acquire a statutory right of way and install works on a parcel that is in the ALR, the local government may require ALC approval for that use of the land. This notation is always worth noting.

III. CHARGES, LIENS AND INTERESTS

A. Easements

A common law easement is an interest in land that provides certain rights for one landowner to use the land of another for a specific limited purpose. The land encumbered by the easement is known as the servient tenement and the land that benefits from the easement is known as the dominant tenement. Once registered in the Land Title Office, easements "run with the land" and bind future owners of the servient tenement and benefit future owners of the dominant tenement. The title to the servient tenement shows the easement registered as a charge and the title to the dominant tenement shows the easement registered as a legal notation with reference to the corresponding charge number.

It is important to remember that easements cannot give the holder exclusive possession of the servient tenement. The owner of the burdened land must be left with some reasonable use of the easement area. It is also important to note that an easement cannot impose a positive obligation on the owner of the servient tenement. A positive obligation in an easement is merely a personal covenant from the owner who originally granted the easement; it does not "run with the land" and bind future owners of the servient tenement.

Easements can be granted for a variety of purposes. For example, easements are commonly granted for vehicular or pedestrian access, parking, shared driveways, structural support, and utilities.

Easements can also be granted for nuisances, such as noise, vibration, and even smells. Nuisance easements are used to protect certain land uses from private nuisance claims, giving the owner of land on which a noxious or disruptive land use is conducted the right to create a

nuisance on adjoining land that would otherwise be actionable at common law. For example, where a gravel crushing operation is emitting dust and noise that a neighbour would be entitled to enjoin as a common law nuisance in legal proceedings against the operator, the operator might purchase a nuisance easement from that neighbour before commencing operations. Since the easement "runs with the land", it binds successors in title to the owner who granted it. The City of Vancouver has used nuisance easements to protect itself from claims by the owners of lots adjacent to bridges and bridge approaches, which generate noise, dust, motor vehicle emissions and vibration.

While most easements are positive in nature (i.e. they allow the owner of the dominant tenement to do something on the servient tenement), easements can also be negative in nature. A negative easement prevents the owner of the servient tenement from doing something that he or she would otherwise have a right to do, so as to permit some benefit to flow to the dominant tenement. For example, a negative easement might be used to prevent one landowner from building on or altering his land in such a way as to block sunlight from reaching the dominant owner's property for collection in a solar energy system.

It is important to remember that an easement is a right to use the land of another for a specific and limited purpose. The owner of the dominant tenement cannot use the easement area for any purpose other than that actually permitted by the easement. For example, if an easement was given for vehicular access to and from the dominant tenement, the dominant owner cannot also use the easement area for parking unless the easement specifically allows for that additional use. To do so would amount to a trespass. The owner of the dominant tenement also cannot use the easement area to access lands beyond the dominant tenement. It is well established that use of an easement is confined to the purposes of the dominant tenement: "If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B" (*Harris v. Flower & Sons* (1905) 74 L.J.Ch. 127).

This came up recently in the case of *Lafontaine v. The University of British Columbia* [2012] B.C.J. No. 1105. There, UBC had an easement over a 9-metre wide gravel pathway that benefitted the 13 acre parcel on which the UBC campus was located. UBC eventually consolidated that 13 acre parcel with a number of adjacent parcels and expanded the campus to 97 acres, continuing to use the pathway for the purpose of accessing the entire campus. The BC Supreme Court found that the rule limiting the grantee's rights to those specifically granted to him cannot be overcome by consolidating the dominant tenement with lands beyond. Thus, when UBC consolidated the 13 acre parcel with adjacent lands to create a new 97 acre parcel, the access easement benefitting the 13 acre parcel did not extend to benefit the entire 97 acre parcel. The Court concluded that the easement could only be used to access the original 13 acre portion.

B. Statutory Rights of Way

A statutory right of way is a type of easement and is created by section 218 of the *Land Title Act*. The key difference between a common law easement and a statutory right of way is that a statutory right of way need not benefit another parcel of land. In other words, the requirement for both a dominant tenement and a servient tenement does not apply to statutory rights of way. This enables the creation of an easement for the benefit of the easement holder's undertaking generally, without the need to tie the benefit of the easement to another parcel of land. For this reason, section 218(6) requires that a recital in every statutory right of way state that it "is necessary for the operation and maintenance of the grantee's undertaking" or some wording to that effect.

Statutory rights of way may only be held by those entities specified in section 218 of the *Land Title Act*. The list includes the Crown, Crown corporations and agencies, municipalities, regional districts, public utilities, railway corporations, and pipeline permit holders. Pursuant to section 218(1)(d), other persons may apply to the Minister for the right to hold a statutory right of way.

Local governments most typically acquire statutory rights of way for utilities (e.g. water, sewer, drainage) and for public access (e.g. pedestrian walkways, recreational trails, and even roads). Statutory rights of way are often obtained by local governments at the time of subdivision or as a condition of a rezoning, but they can also be acquired as a condition of a land sale or by way of expropriation.

A statutory right of way burdens the land and subsequent owners of the land, and the title to the subject land shows the statutory right of way as a charge. If the agreement allows for it, a statutory right of way may be assignable, but only to another entity capable of holding a statutory right of way under section 218. Once a person ceases to be an owner of the land subject to the statutory right of way, they are no longer liable for breaches of the statutory right of way that may occur later on.

A statutory right of way can apply to an entire parcel of land or to a portion of a parcel. However, where a statutory right of way only applies to a portion of a parcel, a survey plan must be registered with the right of way document, delineating the area to which the statutory right of way applies. The statutory right of way listed on our sample title search is limited to the area shown on survey Plan BCP63920. In some cases, in order to save on survey costs, a statutory right of way can be registered as a "blanket" charge, such that it burdens the entire parcel of land, but then include wording that narrows the right of way to an unsurveyed area of land. So long as the statutory right of way is in fact registered over the entire parcel of land, the Land Title Office will allow reference to an unsurveyed area shown on a sketch.

However, the Land Title Office will not allow registration of a statutory right of way over an area shown on a survey plan if the right of way agreement also allows the grantee to cross over any portion of the land outside the area shown on the plan. For that reason, if a local government requires access over the entire parcel to get to its works, or requires a working

area outside of the surveyed area, the local government should acquire a blanket right of way that limits the location of the works to the area shown on a plan but gives some additional rights to use the remainder of the land for access or for a working area during construction.

As with common law easements, a statutory right of way cannot impose any positive obligations on the owner of the servient lands. In other words, it cannot require the grantor to do something; it can only require the grantor to refrain from doing something.

This point was driven home by the BC Supreme Court in the recent decision of *Atco Lumber Ltd. v. Kootenay Boundary (Regional District)* 2014 BCSC 524. In that case, the Regional District had expropriated two rights of way, one for a water line and one for the use of an access road. The Court found that the access right of way was invalid because it contained a number of positive obligations.

The Court (quite rightly) found that an indemnity clause and a clause allowing the Regional District to remedy a breach at the owner's cost were positive obligations that could require the payment of money by the owner, something a statutory right of way cannot do. However, the Court also found that a "further assurances" clause, providing that the owner "shall execute all further documents and agreements whatsoever required for the better assuring to the Grantee of the statutory rights of way hereby granted", was an improper positive obligation. The Court also found that a clause giving the Regional District the right, but not the obligation, to maintain the road amounted to a positive obligation because there was no clause in the agreement relieving the owner of maintenance obligations, thereby implying a positive obligation on the owner to maintain the road. Perhaps most surprisingly, the Court also found that a clause restricting the owner from building on or obstructing the right of way area created a positive obligation because there was an existing gate at the entrance to the property. The Court concluded that a clause restricting the owner from obstructing the right of way area amounted to a positive obligation because it required the owner to remove the gate. These clauses are standard in many local government statutory rights of way, but until the *Atco* decision is subject to further judicial consideration, it is advisable to remove similar provisions (or confirm there are no existing obstructions) to avoid similar results. Alternatively, local governments can include positive obligations by way of a 219 covenant, registered concurrently with the statutory right of way.

C. Restrictive Covenants

Restrictive covenants are very similar to and sometimes overlap with negative easements, in that they restrict the use of one property (the servient tenement) for the benefit of another property (the dominant tenement). As with an easement, a restrictive covenant "runs with the land" and binds future owners of the servient tenement and benefits future owners of the dominant tenement. The title to the servient tenement shows the restrictive covenant registered as a charge and the title to the dominant tenement shows the restrictive covenant registered as a legal notation with reference to the corresponding charge number.

In order to have an enforceable restrictive covenant that "runs with the land", the covenant must be negative in substance and must restrict the manner in which the servient owner may use the servient tenement. The restrictive covenant must also "touch and concern" the benefitted land in the sense that it must be connected with the enjoyment of the dominant tenement and must be for its benefit.

By way of example, a restrictive covenant can be used to restrict building height on a parcel in order to protect the dominant owner's view, or to restrict the type of business operated on a parcel so as to limit competition with the dominant owner's business.

The requirement that in order for a restrictive covenant to "run with the land" it must be negative in substance has been strictly enforced by the courts. When determining whether a restrictive covenant is properly negative in nature, the courts have said that the contract must be read as a whole. In *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.* [2009] B.C.J. No. 22, the BC Court of Appeal concluded that a restrictive covenant did not "run with the land" because, when read together, the terms of the covenant created a positive obligation on the owner to operate a golf course. The restrictive covenant in question included the following 3 covenants in favour of an adjacent property owner:

- Covenant 1: Whitlam hereby covenants and agrees that he will not use the Whitlam land for any purpose other than as a golf course including any facilities necessary or incidental thereto and for greater certainty such facilities may include a club house and restaurant and may use the Whitlam land as the location of two (2) residences.

- Covenant 2: Whitlam further covenants to maintain the golf course on the Whitlam land in a proper manner in keeping with its use as a golf course and consistent with a state of repair generally considered acceptable for comparable golf courses.

- Covenant 3: Whitlam further agrees that those persons who shall have purchased the right to camp on the land shall be entitled to preferential rate for the use of the golf course which preferential rate may be negotiated from time to time by the parties hereto but in any event such preferential rate shall be no less than ten (10%) percent less than the rate charged to members of the general public.

While the Court of Appeal agreed with the lower court that Covenant 1 used negative language ("Whitlam will not use the land for any purpose other than as a golf course"), the Court found that the restrictive covenant as a whole was positive in nature and therefore did not run with the land. Covenant 1 could not be read in isolation from Covenants 2 and 3. The covenants to maintain a golf course on the land, to keep it in repair, and to give preferential rates to certain golfers, were consistent with, and only with, Whitlam's positive obligation to use the land as a golf course. The Court said: "Whitlam could hardly maintain the golf course in a proper and

acceptable manner and give preferential rates to certain golfers for its use if he failed to use the land as a golf course at all." The restrictive covenant, when read as a whole, imposed a positive obligation on the covenantor to operate a golf course. As the covenant was not negative in substance, it could not be enforced against a successor in title.

D. Section 219 Covenants

Statutory covenants under section 219 of the *Land Title Act* are based conceptually on restrictive covenants and share many of the same aspects. However, the legislature has provided two important distinguishing features which have expanded their scope from restrictive covenants. First, section 219 covenants do not require that the Crown or municipality own neighbouring land to comprise a "dominant tenement" in relation to the land affected by the covenant. Second, section 219 covenants may impose positive obligations on the owner (e.g. that the land shall be used in a particular manner) rather than just negative obligations. As a result of these changes, section 219 covenants have become one of the most commonly used development tools for local governments in BC.

Section 219 covenants may only be granted in favour of the Crown, a Crown corporation or agency, a municipality, a regional district or a local trust committee under the *Islands Trust Act*. Non-governmental organizations designated by the Minister of Environment, such as the Nature Conservancy of Canada, may also hold section 219 covenants, as may certain entities associated with the Nisga'a Final Agreement.

While some may assume that section 219 covenants are capable of achieving any and all of a local government's goals with respect to development and land use control, there are certain statutory limits imposed by the *Land Title Act* through the various provisions of section 219(2):

1. In Respect of the Use of Land and Buildings

The scope of section 219 in relation to the "use of land" and the "use of a building" is for all practical purposes the same as the scope of zoning enabling legislation, since our Court of Appeal has referred to zoning cases when interpreting the scope of section 219 (see *North Vancouver (District) v. Lunde*, [1998] B.C.J. No. 1560). Section 219 authorizes "provisions in respect of" the use of land or a building, which is very broad and potentially encompasses a wide range of provisions so long as they are in some way functionally connected to the use of the land or a building. It is not uncommon to see a covenant that prohibits all uses on land until specified works are constructed, or until certain obligations or terms are satisfied.

2. That Land Is To Be or Is Not To Be Built On

The *Land Title Act* permits provisions that land is to be built on in accordance with the covenant, or is not to be built on, or is not to be built on except in accordance with the covenant. The latter provision authorizes a covenant that requires the owner to construct a

building in compliance with particular designs and specifications, which may be incorporated into the covenant by reference to drawings that have been prepared for the owner or by attaching a copy of the drawings directly to the covenant as a schedule.

3. That Land Is To Be or Is Not To Be Subdivided

A covenant under this subsection may require that land not be subdivided except in a manner specified in the covenant, or may prohibit its subdivision entirely.

4. That Parcels of Land Are Not To Be Transferred Separately

This subsection permits the registration of a covenant not to separately sell or otherwise transfer any parcel of land designated in the covenant, even though the parcels are registered under separate titles (commonly referred to as a "no separate sale" covenant). This device is a useful alternative to requiring an owner to consolidate separate parcels, as it results in the parcels being functionally linked without losing their separate legal identities.

While the Land Title Office examiner ought to investigate the restrictions imposed by each charge prior to transferring a parcel, it is not uncommon for the prohibition under a "no separate sale" covenant to be overlooked. As a result, some local governments have been surprised to discover that a single parcel which was subject to a "no separate sale" covenant has been transferred independently of other parcels on which the covenant was registered. One way to decrease the likelihood of this occurring is to include in the Form C (to which the terms of the covenant are attached) a note that the covenant "restricts dealings", which note is then included on the title search following registration of the covenant. Our sample title search shows a covenant that includes this phrase in the remarks. The intention here is that such a note should alert a title examiner of the existence of a "no separate sale" covenant prior to any transfer of the parcel taking place.

5. Provisions for the Conservation of Land or An Amenity

This provision states "that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant". An "amenity" is defined for the purposes of this provision to include "any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relation to the land that is subject to the covenant".

As illustrated above, the subject matter of a section 219 covenant is not absolute. Land Title Office officials are watchful that the title registry is not used as a "notice board" for information concerning land that does not amount to a registrable covenant under section 219. Typical examples of information that local governments attempt to include in section 219 covenants are acknowledgments of particular facts, such as that the owner's land is in a flood plain or adjacent to a land use that may constitute a nuisance, like a railway, as well as covenants to comply with local government bylaws. While these kinds of "covenants" might be accepted for

deposit when included in a document that contains other registrable, valid section 219 covenants, they may not "run with the land" and may not prove enforceable against successors in title to the grantor, leaving the local government with a false sense of security as to its potential liability to those successors in title.

Furthermore, as with regulatory bylaws, certainty of expression is critical to the enforceability of all covenants. In *Newco Investment Corp. v. British Columbia Transit*, [1987] B.C.J. No. 1266, the Court of Appeal was asked to rule on the validity of a covenant in which the developer had promised to construct "improvements for the public good" having a specified minimum value proportional to the permitted floor space. In determining that the covenant was unenforceable because the requirement was vague and uncertain, the Court stated:

> Covenants such as these which run with the land must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them. In my opinion, the covenants here in question entirely lack definition and precision and are open to a wide variety of interpretations.

A recent decision of BC's Court of Appeal also demonstrates this principle. In *585582 B.C. Ltd. v. Anderson*, 2015 BCCA 261, Anderson challenged the validity of a restrictive covenant registered against his strata lot in a building operated as a resort hotel. The covenant prohibited rental of the strata lot to the public except in accordance with a rental pool management agreement setting out the terms under which the resort's rental manager will rent the unit. The form of agreement was not attached to the covenant and needed to be negotiated between the owner of the strata lot and the rental manager. The Court of Appeal declared the covenant to be void as there was no certainty with respect to the terms of the rental pool management agreement and there was no independent mechanism by which the terms could be established.

Finally, it is important to note that even if a section 219 covenant is accepted for registration in the Land Title Office, s. 219(10) establishes that this is not a determination of the enforceability of the covenant.

E. Modifications and Discharges

Land title charges and interests can be modified or discharged by agreement of the parties. Modifications are registrable in the same manner as the original charge, and require priority over existing financial charges. Discharges of covenants, easements, and statutory rights of way require only the signature of the chargeholder, not the owner.

It is important to mention that, as well as modification or discharge by agreement of the parties, an easement, statutory right of way, restrictive covenant, or section 219 covenant can be modified or cancelled by order of the BC Supreme Court under section 35 of the *Property*

Law Act. Section 35 says that the Court may make an order to modify or cancel a charge if the Court is satisfied that the application is not premature and that one of the following is also true:

- Because of changes in the character of the land, the neighbourhood or other circumstances the Court considers material, the registered charge or interest is obsolete;
- The reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled;
- The persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled;
- Modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or
- The registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

In a recent decision of the BC Supreme Court, *Natura Developments Ltd. v. Ladysmith (Town)*, 2015 BCSC 1673, the landowner unsuccessfully applied to the Court for an order under section 35 cancelling a section 219 covenant. The covenant in question restricted the number of dwelling units on the subject lands to 15 units, whereas the underlying zoning would have permitted 29 dwelling units. Following the Town Council's refusal of a request by the owner to release the covenant to permit the owner to "more easily sell the property", the owner commenced legal action. The owner argued, *inter alia*, that the covenant was obsolete insofar as it committed a previous developer to a particular multi-unit phased development which never came to fruition. The Court rejected this argument, finding that the covenant nevertheless served a purpose in controlling the density of the neighbourhood, which had benefit for the surrounding properties.

The susceptibility of covenants, in particular, to such judicial intervention is another important factor in any decision whether to implement land use control through public law devices like zoning regulations or development permits, since the Court has no similar jurisdiction in relation to public land use control.

F. Section 905 Housing Agreements

Under section 905 of the *Local Government Act*, a local government may enter into a housing agreement with a landowner which may include requirements related to the occupancy of residential premises in order to achieve certain housing-related policy goals. Housing

agreements may be required in a number of circumstances, including as a condition of rezoning, or where a local government is selling land to a developer and wants to ensure that the land will be used for a particular type of housing.

While often structured very similarly to a section 219 covenant, a local government may, through a housing agreement, impose requirements that could not otherwise be imposed through a section 219 covenant. As discussed earlier, a section 219 covenant concerns the use of land or a building, or subdivision of the lands, but not necessarily the user of the land.

In *North Vancouver (District) v. Lunde*, [1998] B.C.J. No. 1560, the Court of Appeal held that a covenant limiting the occupancy of housing units to persons 50 years of age and older, granted by the owner as a condition of rezoning the land on which they were constructed, was within the District's powers under what is now section 219 of the *Land Title Act*. The decision rests on the court's earlier decision in *Faminow v. North Vancouver (District)*, [1988] B.C.J. No. 351 in which the Court of Appeal held that zoning restrictions dealing with who uses land will be upheld if they are reasonable in the circumstances. While the above cases illustrate that it may be possible to use a section 219 covenant to restrict the users of land, it is generally advisable to use a housing agreement rather than, or in conjunction with, a covenant. Through section 905 of the *Local Government Act*, the legislature has explicitly provided local governments the authority to imposed requirements related to the user of land, and it is advisable to make use of that specific authority.

A housing agreement applies, depending on the terms of the agreement, to a specific property, building or group of buildings, or to specific units within a building, referred to in the legislation as the "housing units". Section 905 provides a non-exhaustive list of terms and conditions that may be included in the housing agreement.

Included in this list is the form of tenure of the housing units. The housing agreement may specify whether the housing units are to remain in fee simple ownership, as long-term leaseholds, or most-commonly, as rental or short-term lease interests. Some housing agreements include requirements that the housing unit be only used as a permanent residence by a qualified individual (as opposed to a seasonal or second residence). The availability of the housing units to a class of persons, such as seniors, persons with disabilities, or low-income persons may also be regulated with specific criteria articulated in the agreement. It is important to note that the specified class of persons must not contravene the *Canadian Charter of Rights and Freedoms* or the *BC Human Rights Code*.

The administration and management of the housing units, including the manner in which the housing units will be made available to persons within the specific class may also be regulated through the agreement. The specifics under this power may be quite broad, from requiring a list of all residents of the housing units to be sent to the City on an annual basis, to requiring additional terms to the tenancy agreement (provided the additional terms do not conflict with or negate provisions of the *Residential Tenancy Act*). Finally, the housing agreement may

include rents and leases, sale or share prices that may be charged, and the rates at which these may be increased over time. The last provision makes housing agreements a particularly attractive way for a local government to ensure a stock of affordable housing, although the administration of housing agreements can be onerous on local government staff.

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

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

While not necessary for their long term enforceability, housing agreements are often also registered on title as section 219 covenants. As the agreement often includes obligations imposed under both section 905 of the *Local Government Act* and section 219 of the *Land Title Act*, it is generally advisable to register the agreement as both a section 219 covenant (which would show up as a charge on title) and to file a notice of the housing agreement as a legal notation.

G. Leases and Licenses

The main difference between a lease and a license is that a lease creates an interest in land, while a license does not. A lease creates the relationship of landlord and tenant to which certain rights and obligations apply, and confers on the tenant a right to exclusive possession. Since it is an interest in the land, a lease can be registered on title to the land in the Land Title Office.

In contrast, a license is a personal right between the licensor and licensee and does not create any estate or interest in the land. A license gives the licensee a contractual right to use the property in a manner which would otherwise be a trespass. A license most often does not give the right of exclusive possession, but it may, so long as it is only intended that the occupier should have a personal privilege with no actual interest in the land. As a license is not an interest in land, it cannot be registered in the Land Title Office.

A lease of part of a parcel for a term exceeding 3 years (including rights of renewal) cannot be registered in the Land Title Office unless it is accompanied by a leasehold subdivision plan, approved by the Approving Officer. This is because a long-term lease of a part of a parcel effectively subdivides the land without the owner going through a proper subdivision approval process. The rule against the registration of long-term leases of parts of parcels helps to ensure

that municipal authorities retain control over subdivision as a means of regulating zoning, drainage, utility supply, siting, use, and land development generally in the public interest. However, although a lease of part of a parcel for a term exceeding 3 years is not registrable and creates no legal interest in the land, the lease may still create personal rights between the parties to the lease (*International Paper Industries Ltd. v. Top Line Industries Inc.* [1995] B.C.J. No. 2924).

The rule against registration does not apply where the lease is of a building or part of a building. In those instances, the lease is registrable without the requirement for a leasehold subdivision plan approved by the Approving Officer, although a reference plan delineating the leased premises is generally still required.

H. Options to Purchase

An option to purchase is a right to buy property at some point in the future for either a pre-determined price or a price to be determined by an agreed-upon method. The right lasts until a specified time has expired or the owner of the property has fulfilled certain obligations. If the option holder lets the period pass, the option expires and becomes null and void. The holder of an option is under no obligation to buy the property; however, the owner of the property is obliged to sell the property to the holder of the option if the holder meets all terms and conditions of the option.

There are three principal features to remember with an option to purchase: (1) exclusivity and irrevocability of the offer to sell within the time period specified in the option; (2) specification of how the contract of sale may be created by the option holder; and (3) obligation of the parties to enter into a contract of sale if the option is exercised. Unlike a right of first refusal, an option to purchase gives the holder an interest in the land.

In order to be contractually enforceable, an option to purchase must be given in exchange for consideration, or value. This is separate and apart from the actual purchase price for the property. The value of an option purchase is a matter of negotiation between parties and will often depend on the length of the option period. Option fees are typically nonrefundable. In other words, if the option holder decides not to exercise his or her option to purchase within the time allowed, the option holder forfeits the option fee. However, if the option is exercised, the option fee is usually applied towards the purchase price.

One of the key considerations when negotiating an option to purchase is addressing the price that the option holder will pay for the property, should they choose to exercise the option. Sometimes the purchase price is a set price that is determined based on the current value of the property. This approach, while simple, does not always make sense, as the longer the option period, the higher the likelihood of fluctuating property values. Therefore, when longer

option periods are contracted for, the parties usually agree to determine the actual value of the property at the time the option is exercised, by way of one or more appraisals. Ultimately, so long as both parties are in agreement as to how the value of the property is to be determined, the option agreement will be enforceable.

There are various circumstances where a person may desire to have an option to purchase a piece of property. For example, a developer wishing to assemble a tract of land for a shopping centre may not want to be bound by a number of agreements of purchase and sale on the various parcels of land making up the tract. In this situation, options on the various parcels would be preferable as the developer likely would not want any of the parcels of land if he were unable to purchase all of the parcels. In other cases, a prospective purchaser simply wishes to buy time before he makes his final decision whether to purchase. An option is an appropriate vehicle for a purchaser who wants to tie up the property while he does some further investigation, without liability to purchase.

Options are also used by local governments as a way of securing certain development obligations, such that they can only be exercised if certain development benchmarks are not met. It is common practice for local government vendors to sell land subject to an option to purchase that allows the local government to re-acquire the property if development has not commenced within a certain amount of time. It is generally advisable to tie an option to purchase to an early stage of development (e.g. securing a building permit, construction of foundations, etc.), allowing the local government to repurchase the property if those early benchmarks are not met. Most local governments do not wish to repurchase a property with a partially constructed development (with potential liens and associated headaches) on it.

One important thing to keep in mind is that the Land Title Office will not register an option to purchase over part of a parcel, since subdivision approval has not yet been obtained. This was considered by the BC Court of Appeal in *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.* 2009 BCCA 36, in connection with the granting of an option to purchase a portion of common property. In that case, when the bare land strata plan was originally registered, the common property of each phase contained a parkland area, and the developer granted itself options to acquire the parkland areas and later assigned those options to a third party. The strata corporation challenged the options on the basis that they were "dispositions" of common property as contemplated under the old *Condominium Act* and, therefore, they were prohibited by section 73 of the *Land Title Act* because the statutory subdivision requirements had not been met. The *Condominium Act* specifically stated that a disposition of all or part of the common property was a subdivision of land under the *Land Title Act*. The Court found in favour of the strata corporation and determined that the act of granting the options was indeed a "disposition" and therefore amounted to a subdivision under the *Condominium Act*. Accordingly, the options were invalid because subdivision approval had not been obtained as required by the *Land Title Act*. The current *Strata Property Act* contains similar wording to the old *Condominium Act* and so it is quite likely that an option to purchase a portion of common property, without prior subdivision approval, will be invalid.

That said, where we are not dealing with strata common property, we have been successful in registering options to purchase as blanket charges, with wording in the document limiting the purchaser's option to an area shown on a plan. Unlike the *Strata Property Act*, there is no language in the *Land Title Act* that says that any "disposition" amounts to a subdivision of land. The agreement of purchase and sale that is triggered by the exercise of the option is then made conditional on the approving officer approving the subdivision of the land. This means that, even if the option holder exercises the option, the sale of the land may fall through if subdivision approval is not obtained. Where local governments include options to purchase as part of their highway reservation agreements, this is the approach that is most often taken. However, without a court decision directly on point, there is still some amount of uncertainty with this approach.

I. Rights of First Refusal

A right of first refusal is typically a promise by the owner of property not to sell that property without first offering it to the holder of the right on the same terms and conditions. If the owner receives a bona fide offer that they want to accept, the holder of the right of first refusal has a specified amount of time to match that offer and buy the property. While an option to purchase is usually used when a prospective purchaser knows that they want the land or that they may want it within a certain time period, a right of first refusal is usually used if the potential purchaser wants to have the opportunity to buy the land should it come on the market at some point in the future.

The distinguishing feature of a right of refusal is that it is a negative right. It confers no immediate right to the prospective purchaser but instead it imposes an obligation on the owner that, should they decide to sell, they cannot do so without giving the prospective purchaser the first chance to buy. It is different from an option in that it is conditional and contingent on the will or desire of the owner to sell.

Another distinguishing feature of a right of first refusal is that, unlike an option to purchase, a right of first refusal does not give the holder any interest in the land. In *Canadian Long Island Petroleums Limited v. Irving Industries*, [1974], 6 W.W.R. 385, the Supreme Court of Canada held that a right of first refusal is not an interest in land; it is a mere contractual interest. Therefore, registration of a right of first refusal will not act as an absolute protection of the RFR holder's interest. However, successors in title to the grantor of the right of first refusal may still be bound if they take the property with actual notice of the right. Therefore, registration of the right of first refusal would provide notice to successors in title and would help to protect the RFR holder's rights.

A person who contracts to receive a right of first refusal is entitled to receive notice of the owner's willingness to accept an outside offer to purchase and of the price offered. That notice is then deemed to constitute an offer to sell the property to the RFR holder on the same terms and conditions as those contained in the outside offer. The RFR holder then has a limited amount of time in which he can choose to accept the offer and purchase the property or

choose not to accept. If the RFR holder chooses to waive his right to purchase the property then, depending on the terms set out in the RFR, the RFR may continue to remain on title with the new owner taking the land subject to the RFR.

While a right of first refusal does not hinder the owner's right to sell his property, it could have a chilling effect on a prospective buyer who would not wish to invest time and money in investigating the property if a right of first refusal had been granted.

Rights of first refusal are often found in leases, as they can offer some protection to a tenant who has invested time and money in developing the property for his own use and who wishes to protect his leasehold interest but is not primarily interested in purchasing the property. If a tenant feels threatened by a purchase of the property by a third party under a bona fide offer, he can then match the offer and purchase the property himself.

Rights of first refusal are also used where the RFR holder is the owner of a neighbouring property and has some interest in the ownership or development of that property. For example, in a residential area, a neighbour may be interested in retaining the buffer zone of a grassy area between the properties or in preventing an undesirable development of the land. He then has the right to match the offer and purchase that property to protect his situation.

J. Exceptions and Reservations

When transferring property to a new owner, section 181 of the *Land Title Act* gives the transferor the ability to impose certain exceptions and reserve certain rights from being transferred to the purchaser. The estate or interest remaining in, and the rights reserved to the transferor, are then registered as a charge against title.

For example, most properties in Nanaimo have Exceptions and Reservations registered on title in favour of the Esquimalt and Nanaimo Railway Company. This is because many years ago, when the Esquimalt and Nanaimo Railway Company built its railway from Victoria to the north, in exchange for building the railroad it was given a belt of land on either side of the railway. E&N has now sold off most of this land, but from every piece it sold it excepted and reserved to itself certain mineral rights, as well as a right to cut down trees for railway purposes. These rights are now shown as Exceptions and Reservations on title to each property.

Other exceptions and reservations may attach to the original Crown grant. In most cases these are mineral rights. The extent of the rights reserved to the Crown is determined by the date on which the Crown grant was issued. Historically, the Crown would reserve any rights to gold and silver, but over time the Crown has modified its reservation clauses and has increased their scope, such that they now often reserve all minerals, including oil and gas.

K. Profits à Prendre

A profit à prendre is a right to enter onto the land of another and take some product or part of the land from it. The thing taken must be part of the land and it must be susceptible to ownership. Unlike easements, profits à prendre may exist in gross, meaning they do not require a dominant tenement, though they may also be appurtenant to a dominant tenement. In BC, profits à prendre without a dominant tenement are the norm. A profit à prendre carries with it implied or express rights that are necessary for its enjoyment.

A profit à prendre can be either held with others or exclusively. Unless a profit à prendre is stated to be exclusive, a landowner may grant other rights to other parties.

The most typical uses of profits à prendre in BC are rights to take gravel or timber. However, profits may also exist as a right to take minerals that were not reserved to the Crown in the original Crown grant of the land in question.

L. Priority and Consent Agreements

Interests in land (such as charges) registered in the Land Title Office rank in priority in accordance with their date and time of registration. If a covenant, for example, is deposited subsequent to the deposit of a financial charge like a mortgage, a foreclosure of the mortgage will ordinarily result in the covenantee (i.e. the local government) losing its interest in land altogether because the covenant is not binding on the prior chargeholder.

When section 219 covenants, easements, and statutory rights of way are required, there is usually a public interest rationale for the agreement. It is therefore desirable from the covenantee's point of view to have the covenant registered in priority to financial charges that have been registered before the local government's charge. As a result, it is standard practice in British Columbia to require priority and consent agreements as part of agreements such as covenants, easements, and statutory rights of way.

However, not all financial charges will require a priority agreement. A common example is a mortgage of an interest in land less than the fee simple. Some utilities, such as Fortis, will bundle together all or some of their various rights of way and mortgage the bundle of rights in order to raise capital. While that mortgage is clearly a financial charge that may have been registered prior to the local government's charge, if the lender were to foreclose, the foreclosure would not impact the local government's charge. On the sample title search, Mortgage CA318571 shown in favour of Royal Bank of Canada includes the remarks "RK2793", which refers to the registration number of Fortis' SRW. Priority is not needed for this mortgage, despite having been registered prior to a local government's charge, as it is registered only against the statutory right away, not against the fee simple of the lands.

Sample Title Search

CURRENT INFORMATION ONLY - NO CANCELLED INFORMATION SHOWN

Land Title District	NEW CALEDONIA
Land Title Office	NEW CALEDONIA
Title Number	MJ98765
From Title Number	M15704
Application Entered	2005-10-16
Application Received	2005-10-13
Registered Owner in Fee Simple	
Registered Owner/Mailing Address:	RYAN GOSLING, ACTOR EVA MENDES, ACTRESS 14853 60 AVE, BEAVERTON, BC V3S 1R8 AS JOINT TENANTS
Taxation Authority	CITY OF BEAVERTON
Description of Land	
Parcel Identifier:	110-469-575
Legal Description:	LOT E SECTION 16 DOWNTOWN DISTRICT PLAN BCP43252

Legal Notations

THIS TITLE MAY BE AFFECTED BY A PERMIT UNDER PART 26 OF THE LOCAL GOVERNMENT ACT, SEE EW140077

NOTICE OF INTEREST, BUILDERS LIEN ACT (S.3(2)), SEE CA525070 FILED 2006-07-06

HERETO IS ANNEXED EASEMENT BX317472 OVER PART OF LOT C, PLAN BCP43452

NOTICE OF HOUSING AGREEMENT UNDER SECTION 905 LOCAL GOVERNMENT ACT, SEE CA246870

THIS CERTIFICATE OF TITLE MAY BE AFFECTED BY THE AGRICULTURAL LAND COMMISSION ACT: SEE AGRICULTURAL LAND RESERVE PLAN NO. 5, DEPOSITED JULY 26, 2974

Charges, Liens and Interests

Nature:	UNDERSURFACE AND OTHER EXC & RES
Registration Number:	ED55665
Registration Date and Time:	1990-04-14 11:56
Registered Owner:	HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
Remarks:	INTER ALIA PURSUANT TO SECTION 47 OF THE LAND ACT

Nature:	PROFIT A PRENDRE
Registration Number:	RK2638
Registration Date and Time:	1996-01-03 13:15
Registered Owner:	PACIFIC FOREST PRODUCTS LIMITED
Remarks:	INCORPORATION NO. 435169

Nature:	STATUTORY RIGHT OF WAY
Registration Number:	BL142080
Registration Date and Time:	1997-12-05 14:33
Registered Owner:	CITY OF BEAVERTON
Remarks:	PART IN PLAN BCP63920

Nature:	RIGHT OF FIRST REFUSAL
Registration Number:	BA375642
Registration Date and Time:	2006-05-11 10:09
Registered Owner:	JUSTIN BIEBER

Nature:	LEASE
Registration Number:	RK3158
Registration Date and Time:	2006-11-21 14:48
Registered Owner:	MICHAEL J. FOX
Remarks:	OVER PART ON PLAN BCP25402

Nature:	STATUTORY RIGHT OF WAY
Registration Number:	RK2793
Registration Date and Time:	2011-01-04 15:34
Registered Owner:	FORTISBC ENERGY INC.
Remarks:	INCORPORATION NO. BC1023718 INTER ALIA PART IN PLAN BCP44183

Nature:	MORTGAGE
Registration Number:	CA318571
Registration Date and Time:	2012-03-22 14:03
Registered Owner:	ROYAL BANK OF
Remarks:	CANADA RK2793

Nature:	MORTGAGE
Registration Number:	CA1722525
Registration Date and Time:	2012-04-18 12:40
Registered Owner:	BANK OF NOVA SCOTIA
Nature:	OPTION TO PURCHASE
Registration Number:	CA621045
Registration Date and Time:	2014-01-04 8:32
Registered Owner:	CELINE DION
Nature:	COVENANT
Registration Number:	CA246872
Registration Date and Time:	2014-11-21 14:48
Registered Owner:	CITY OF BEAVERTON
Nature:	COVENANT
Registration Number:	CA246871
Registration Date and Time:	2014-11-21 14:49
Registered Owner:	CITY OF BEAVERTON
Remarks:	RESTRICTS DEALINGS
Nature:	PRIORITY AGREEMENT
Registration Number:	CA246873
Registration Date and Time:	2014-11-21 11:50
Remarks:	GRANTING CA246872 PRIORITY OVER CA1722525 AND CA1722526
Nature:	CERTIFICATE OF PENDING LITIGATION
Registration Number:	BB102003
Registration Date and Time:	2015-05-18 16:21
Registered Owner:	EVA MENDES
Duplicate Indefeasible Title	OUTSTANDING
Transfers	NONE
Pending Applications	NONE

NOTES

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