

LAND USE CONTRACTS: GOOD RIDDANCE OR FOND FAREWELL?

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Land use contracts, now destined for execution, are double agents. They are creatures of the Legislature, and therefore public law tools, but they masquerade, in more than name alone, as private law instruments. Since the inception of zoning, the subject of land use has been firmly within the grasp of public law regulators; yet the law of contract is quintessential private law. The dual identity of land use contracts may help to explain why they continue, long after the hasty repeal of the provisions enabling their creation, to vex owners subject to their terms, municipalities seeking to administer and enforce them, and courts trying to interpret them when owners and local governments disagree. It also makes land use contracts a helpful case study in the evolution of land use planning law in British Columbia and raises the question whether, when they terminate on date, 2024, those acquainted with them will be cheering good riddance or bidding a fond farewell.

This paper begins with a (mercifully) cursory attempt to situate land use contracts in a broader historical and theoretical context of both private and public law schemes to regulate land use. It then highlights some of the ongoing difficulties these instruments pose, and how courts have treated them. Finally, it reviews the recently enacted termination provisions alongside the longstanding mechanisms for the modification, variation and discharge of land use contracts.

I. PRIVATE LAW / PUBLIC LAW: WHAT'S THE DIFFERENCE?

Canada's Department of Justice explains the difference between public and private law as follows: private law sets rules between individuals; public law sets rules between individuals and society.¹ If you prefer a more erudite source, consider Yale Professor Michel Rosenfeld's rendition of the same distinction, published in a 2013 issue of the *Journal of International Constitutional Studies*: "law that regulates the vertical relationship between the state and private parties shall be deemed public whereas law that applies to horizontal dealings among private parties shall be labeled private".² Pick your poison. Rosenfeld acknowledges but does not adopt the claim that the public law / private law distinction is useless or irrelevant. In this paper the distinction is helpful to understanding the nature of land use contracts in the broader context of land use regulation, and more practically, the provisions governing their demise.

Contracts, typically, are private law: they codify the rules by which the parties to them have agreed to be governed in the absence of state oversight. Zoning, typically, is public law: zoning bylaws contain rules about land use elected officials have decided to impose on individuals, with or without their consent. Local governments in British Columbia are public law institutions, but are endowed with the powers of natural persons, including the power to enter into contracts. Zoning, since its inception in the early 1900s, has been the tool of choice for local

¹ <http://www.justice.gc.ca/eng/csj-sjc/just/02.html>

² Michel Rosenfeld, "Rethinking the boundaries between public law and private law for the twenty first century: An introduction", (2013) 11 *International Journal of Constitutional Law* 11(2013): 125 at 125.

governments wishing to implement land use regulation in the public interest.³ Yet in many neighbourhoods zoning has also been animated by a desire to protect property rights (a hallowed private law institution),⁴ and at least one Canadian author has argued zoning's role should be limited to shielding the holders of those rights from forces tending to undermine their value.⁵

II. THE PRIVATE LAW OF LAND USE

Long before the advent of zoning, the creation of municipalities in British Columbia, or the delegation of land use regulatory powers to local governments, the private law, through both trespass and nuisance, provided remedies for individuals upset with the manner in which the behaviour of others interfered with their property rights. Even the law of contract, in many ways ill-suited to governing the use of land, got a piece of the action.

A. Property: "Get out..."

Students of property law soon learn that the law of property is a set of rules governing the relationships among people with respect to those things. The most fundamental of these rules is the right to exclude. Ownership in property entails the right to exclusive use which, in the case of land, means the right to keep non-owners out.

B. Trespass: "and stay out..."

An action in trespass is a private law shield protecting property owners. Trespass can be committed without actual entry on land, but requires some voluntary or direct act of physical intrusion.⁶ It allows owners to enforce their right to the exclusive use of land through a court proceeding. And the availability of what courts call "nominal damages" for trespass, which rests on the notion that trespass is actionable even without proof of actual damage, reinforces the sanctity of private property by allowing monetary compensation for violations of the right to exclude, regardless of any further or actual harm.⁷

³ Stuart Banner, *American Property: A History of How, Why and What We Own* (Cambridge: Harvard University Press, 2011), 181-201.

⁴ Robert H. Nelson, *Zoning and Property Rights: An Analysis of the American System of Land-Use Regulation*, (Cambridge: MIT Press, 1977).

⁵ Ed Morgan, "The sword in the zone: Fantasies of land-use planning law," *University of Toronto Law Journal*, 62(2012): 163, at 178.

⁶ *Allison v Radtke*, 2014 BCSC 1832 at para 170.

⁷ "The purpose of an award of nominal damages is, therefore, to recognize the infringement of a legal right": *Skrypnik v Crispin*, 2010 BCSC 140 at para 18.

C. Nuisance: “and don’t bother me...”

Nuisance – a substantial and unreasonable interference with the owner’s use or enjoyment of land⁸ – is in some respects an extension of trespass, and in other ways a precursor to zoning. The threshold for nuisance is evidently higher than for trespass, but the interference can be indirect and the action involuntary.

Drysdale v Dugas,⁹ decided by the Supreme Court of Canada in 1896, concerned a typical urban land use conflict in Montreal. The judgment illustrates some of the concerns underlying both the common law of nuisance, and the modern law of zoning. The defendant, Mr. Dugas, operated a horse stable near two residential properties owned by Mr. Drysdale, who claimed the stable created a nuisance by noise, smells, and “urine and other fetid liquids penetrating the basement of his house.” The Court applied the law of nuisance:

As a general proposition occupiers of lands and houses have a right of action to recover damages for any interference with the comfort and convenience of their occupation. In applying the law, however, regard is to be had, in determining whether the acts complained of are to be considered nuisances to the conditions and surroundings of the property. It would be of course absurd to say that one who establishes a manufactory in the use of which great quantities of smoke are emitted next door to a precisely similar manufactory maintained by his neighbour, whose works also emit smoke, commits a nuisance as regards the latter, though if he established his factory immediately adjoining a mansion in a residential quarter of a large city, he would beyond question be liable for damages for a wrongful use of his property to the detriment of his neighbour.

D. Restrictive Covenants: “or my successors in title”

The private law rules of trespass and nuisance, enforceable against anyone who breaks them, protect property owners against physical intrusion, and substantial and unreasonable interference. The private law of contract allows individuals to invent new rules setting out their rights and obligations as between each other only, yet still turn to the courts for enforcement. Contracts, as private agreements between people, are generally ill-suited to making rules about land, because people are mobile, land is durable, and the doctrine of privity of contract says you can’t be bound by an agreement you didn’t make.

The 19th century English case, *Tulk v Moxhay*,¹⁰ is both an example of and an enduring solution to these difficulties. In 1808 Tulk had agreed to sell some of the land he owned in London’s Leicester Square to Elms. Elms, when he bought the land from Tulk, promised that he, his heirs,

⁸ *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13.

⁹ 1896 26 SCR 20.

¹⁰ [1848] EWHC Ch J34.

and his assigns would keep it “in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order.” He also agreed the inhabitants of Leicester Square (Tulk’s tenants) would have access to the land.

Eventually, Moxhay bought the land Tulk had once sold to Elms. His written purchase agreement did not include Elms’ promise, but he knew about the promise when he bought the land. Moxhay alleged a right to build on the land; Tulk objected. Their dispute raised the question whether Moxhay was bound by Elms’ promise. The Court said he was, and in doing so set the stage for the modern rule abrogating the doctrine of privity of contract in the case of negative covenants, annexed to land, of which a purchaser has notice.

III. PUBLIC LAW AND LAND USE REGULATION IN BRITISH COLUMBIA

Despite the utility of trespass, nuisance and restrictive covenants, the advent of zoning in the early 20th century ushered in a rapid, widespread transition to public law land use regulation. Zoning is an archetypal public law instrument. It is not an agreement or even a relationship between individuals; instead, zoning bylaws concern a relationship between the state and individual landowners. Zoning is enacted by elected officials who exercise delegated decision making authority on behalf of a broader public; it creates rights and imposes obligations on people who are not, in the contractual sense, parties to the agreement; and it is enforceable with remedies available only to public bodies. Zoning is therefore a broad power, some forms of which one US author characterized as a “narcotic” to which “several cities...became addicted”.¹¹

These characteristics of zoning as public law are more than trite legal principles. They prompt special rules constraining the enactment of zoning, sometimes referred to as “public law norms”.¹² Local governments wielding their formidable zoning power are required, by both the Legislature and the judiciary, to proceed with caution. In practice this means statutory public hearings of which notice must be given and at which people whose interests are affected have a right to be heard. It means elected officials cannot be biased, distracted by irrelevant considerations, or fettered, lest they exercise their discretion other than in the public interest. It also means courts are vigilant, requiring strict compliance with the statutory precursors to the adoption of, or amendment to, a zoning bylaw.

As a result of courts’ vigilance, local governments in the early decades of delegated zoning authority in British Columbia confronted an enduring principle: local governments are creatures of statute, and they can’t sell zoning unless authorized to do so by statute. In 1955, before Vancouver had its own *Charter*, the BC Court of Appeal applied this principle in *Vancouver v Registrar (Vancouver Land District)*.¹³ The City tried to register in the Land Title Office an agreement to rezone property from residential to light industrial if the owner met certain

¹¹ Donald L. Elliott, *A Better Way to Zone* (Washington: Island Press, 2008).

¹² Daniel Selmi, “The Contract Transformation in Land Use Regulation,” *Stanford Law Review*, 63(2011): 591 at 592.

¹³ [1955] BCJ No 118.

conditions, but the Registrar refused to register the agreement. The Court agreed the agreement could not be registered because it amounted to an agreement to sell zoning and therefore was not an agreement the City was authorized to make.

A. Land Use Contracts: The Legislation

As it turned out, local governments were eager to sell zoning, in many cases so they could afford the extra infrastructure and services new development required. And developers were, for the most part, willing to pay for zoning if it meant they could profit from the development rights zoning gave them. So, in 1971, the province introduced a new version of s. 702(A) of the *Municipal Act*, allowing local governments to enter into land use contracts and, in the words of one BC Supreme Court Justice, “for the first time, to sell zoning to developers for a price equivalent to the cost of the services and the public space requirements associated with development.”¹⁴ The key provisions of the enabling legislation stated:

(3) Upon the application of an owner of land within the development area, or his agent, the Council may [by bylaw (since 1972)], notwithstanding any by-law of the municipality, or section 712 or 713, enter into a land use contract containing such terms and conditions for the use and development of the land as may be mutually agreed upon, and thereafter the use and development of the land shall, notwithstanding any by-law of the municipality, or section 712 or 713, be in accordance with the land use contract.

(4) A contract entered into under subsection (3) shall have the force and effect of a restrictive covenant running with the land and shall be registered in the Land Registry Office by the municipality.

These provisions plainly clothed land use contracts with some of the defining characteristics of both the public and private law tools that preceded them. They were authorized by statute and entered into by elected councils following familiar notice and hearing procedures. At the same time, they were private agreements that bound the parties notwithstanding any bylaws to the contrary. The minute details addressed in some land use contracts (one land use contract purported to ban microwave ovens, for example) illustrate how at least some of the parties to these agreements felt unconstrained by the traditional subject matter of the zoning power (use and density, and siting, size and dimensions).

This is what one MLA said about land use contracts in 1972:

Last year, there was placed in the *Municipal Act* a section known as land use contract and a number of planning people in British Columbia, most of whom were airy-fairy planners, I might say, were unwilling to examine the possibility of using the tools which the Legislature had given.

¹⁴ *Dundee Holdings Ltd v Surrey (District)*, 17 BCLR (2d) 25, at 31.

Now what can a municipality do under a land use contract? They can develop the area, promote greater efficiency and quality. They can consider the impact of the development on present and future public costs. They can look to the betterment of the environment. They can look to the fulfilment of community goals ... and they can provide for necessary public space.¹⁵

The early enthusiasm for land use contracts, at least on the development side, soon waned: a 1976 report prepared for the Minister of Municipal Affairs recommended the abolition of the LUC regime;¹⁶ a 1977 report commissioned by the BC Real Estate Association recommended significant changes.¹⁷ The Legislature's debates of August 1977 included the following comments:

The land-use contract has evolved, unfortunately, into an often confusing, counterproductive roadblock. Its original purpose as a special device for controlling exceptional types of developments has been lost in the shuffle. It is now in general use as a substitute for zoning and as an arbitrary revenue producer. Uncertainty, unnecessary costs and excessive delay are the penalties that it has imposed on the community, consumer and developer alike.¹⁸

On the other hand:

Only one person or one group of people will benefit from doing away with land use contracts, and that's the developer.¹⁹

In 1978, the Province repealed 702(A), and local governments could no longer enter into land use contracts.

B. Land Use Contracts: The Cases

The repeal of the enabling legislation blocked any new land use contracts, but did not affect those already registered. Many remain in effect today, as a testament to the uneasy relationship between private agreements about land use, and the public law of zoning. A selection of court decisions pertaining to land use contracts reflects this tension.

¹⁵ British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, 3rd Session, 29th Parliament (Hansard, 8 August 1972): 321.

¹⁶ Joint Committee on Housing (Samuel Bawlf, chair) *Report of the Chairman to the Minister of Municipal Affairs and Housing*, (Victoria, BC: The Committee, 1976).

¹⁷ William Graham, *Improving Land Use Contracts: A Research Report to the BC Real Estate Association*, (Vancouver: William Graham Consultants, 1977).

¹⁸ British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, 2nd Session, 31st Parliament (Hansard, 8 August 1977): 4353.

¹⁹ *Ibid.*

In *Whistler Vale Holdings v Whistler (Municipality)*,²⁰ the plaintiff sought relief from a purported municipal requirement to obtain a development permit for renovations to a Hotel that was subject to LUC. When the parties entered into the contract the enabling legislation was already being phased out and the development permit area scheme available, but they chose the land use contract option. This context made it clear the two avenues for development regulation were distinct. Having entered the contract, which according to legislation superseded any bylaw to the contrary, the municipality could not also impose the development permit requirement.

Two years later, in *Cressey Development Corporation v Richmond (Township)*,²¹ the BC Court of Appeal heard a dispute about Richmond's right to impose otherwise valid public law requirements on a developer with whom it had entered into a land use contract. The contract required the developer to provide significant works, and stated the works "shall comply with all the By-laws of the Municipality." On the basis of this clause Richmond said the developer was required to pay development cost charges before it would be entitled to building permits for the units contemplated in the contract. The Court disagreed, because: "the land use contract was the municipality's once and for all opportunity to impose charges as the condition of allowing this particular development to take place".

In *Martin Corp Ltd v West Vancouver (District)*²² the BC Supreme Court again considered the effect of a clause subjecting the owner to subsequently-adopted municipal bylaws of general application, and again held the clause did not trump the legislative protection afforded by the "notwithstanding any bylaw" clause in s. 702A(3) of the *Municipal Act*. The result, as in *Whistler Vale*, was the municipality could not impose an otherwise valid development permit requirement on land subject to a land use contract.

In *Whistler Vale*, *Martin*, and *Cressey* the municipalities' attempts to exercise their public law powers were scuttled by a contract the Legislature had authorized (and arguably encouraged) them to enter into; in two other cases, local governments found themselves on the losing side of private law claims in respect of land use contracts. *Tri-Crest Investment Corp v Davidson and Co*,²³ made the Village of Lumby liable in negligence for its failure to register a LUC in the Land Title Office, while in *264215 BC Ltd v Surrey (City)*,²⁴ the Court held the City liable for breach of contract after it refused to issue business licenses for uses permitted under the contract. The City's refusal was based on its application of a zoning bylaw definition of commercial use, which the Court said did not limit or otherwise affect the range of commercial uses permitted according to the meaning of that term in the contract.

²⁰ (1980) 21 BCLR 384.

²¹ 132 DLR (3d) 166.

²² 85 BCLR (2d) 305.

²³ (1988) 24 BCLR (2d) 248.

²⁴ 2009 BCSC 1336.

In each of these cases municipalities, arguably thanks to legislation providing statutory authorization for a hybrid form of the traditionally public zoning power, struggled to reconcile their public law impulses with private, contractually-defined rights and obligations.

IV. GETTING RID OF LAND USE CONTRACTS

Courts have been quick to treat land use contracts as purely private contracts. In *Fort Victoria Holdings Ltd v Victoria (City)*,²⁵ followed in *Surrey*, the Court applied the standard principles of contractual interpretation to land use contracts: “The sovereign rule in the construction of the [land use] contract is to give effect to the intention of the parties as expressed in the whole of the contract itself and to give effect, if possible, to every provision contained therein.” Yet as the recently-enacted land use contract termination provisions in ss. 914.1 – 914.4 of the *Local Government Act* make plain, their statutory origins allow for their statutory demise.

The *Local Government Act* now includes two avenues for doing away with land use contracts, while the *Property Law Act*²⁶ continues to provide another. The latter, though beyond the scope of this paper, is notable because it allows an owner to apply to a court to “modify or cancel” a land use contract without first applying to, or in any way seeking approval of, a local government. All avenues are easier to comprehend in light of the dual identity of land use contracts.

Section 930 of the *Local Government Act*, the longstanding scheme for amending LUCs, allows local governments to “vary, modify or discharge” a land use contract by bylaw, or in the manner specified in the contract. Section 930 also allows for variation or modification, but not discharge, by development permit or development variance permit. As a further constraint, any change effected by one of these types of permits must not alter “the use or density of use of any parcel against which the contract is registered”. This constraint mimics the application of development permits and development variance permits to regular zoning rules: use and density changes are out of bounds.

Changing a LUC with an amendment bylaw, as opposed to a permit, requires the agreement of the parties to the contract: the local government, and “the owner of any parcel that is described in the bylaw as being covered by the amendment”. This provision makes land use contracts like any other contract. Only the parties must agree to change the terms of their agreement. However, if use and density are on the table, the bylaw is subject to the notice and hearing provisions in ss. 890 - 894 of the *Local Government Act* apply, and again the special public law status of land use contracts is undeniable.

The new regime, termination of land use contracts under ss. 914.1 – 914.4 of the *Local Government Act*, also trumps typical private law rules. It dispenses with any requirement for the agreement or consent of parties other than the local government and instead requires notification alone. The default scenario, under s. 914.1, is automatic termination of all land use

²⁵ [1973] BCJ No 677, at para 5.

²⁶ RSBC 1996, c 37, s. 35(1)(b).

contracts in the province on June 30, 2024. The impact of this dramatic legislative fiat is mollified by an obligation to which local governments should be alert: by June 30, 2022 local governments with jurisdiction over land subject to a land use contract must deliver notice of its termination to the owners, and adopt a zoning bylaw that will apply to the land on June 30, 2024. The notice must state where and when zoning bylaws are available for public inspection and any zoning bylaw required to meet the obligation to adopt zoning that will apply when the contract is terminated is subject to the usual public hearing requirements. Unless a pre-existing zoning bylaw qualifies, local governments would be wise to prepare replacement zoning well in advance of June 30, 2022.

The other route is early termination, which local governments can effect by bylaw under 914.2, regardless of any private law rules or contractual terms requiring the consent or agreement of other parties. A local government must not adopt a bylaw to terminate a land use contract early, under s. 914.2, without first holding a public hearing in accordance with s. 890, and the early termination bylaw cannot come into force until a year after it is adopted. Moreover, local governments must, within 10 days of adopting the bylaw, deliver “written notice of the termination ... to the owner of land that is within the jurisdiction of the local government and subject to the land use contract.” The notice must inform the owner of the opportunity to apply to a board of variance for an exemption under s. 901.1. That section contemplates an order that, in spite of the date specified in the termination bylaw, the contract continues to apply to an owner until no later than June 30, 2024. The order is available “if the board finds that the timing of the termination of the land use contract by the bylaw would cause undue hardship to the applicant.” The wording of this exemption provision, consistent with the fact of automatic termination, does not allow complaints about the termination *per se*, but only its timing. The exemption seems designed to allow owners with unused development rights under a contract to request extra time to realize those rights before they expire.

In the case of early termination by bylaw, local governments must also, within 30 days after adopting the bylaw, notify the Land Title Office for each parcel of land subject to a land use contract that will be terminated. The notification requirements, both to the Land Title Office and owners, are detailed in s.914.3 of the *Local Government Act*, and may prove time-consuming for local governments with numerous contracts covering hundreds or thousands of parcels in their boundaries.

A further caveat on an early termination bylaw is it must not be adopted unless the local government has adopted a zoning bylaw that will apply to the land on the date the termination bylaw comes into force. As with any zoning bylaw, a bylaw setting out the zoning to apply on early termination is subject to the public hearing requirement in s. 890, which could be fulfilled at the hearing the local government is required to hold for the early termination bylaw.

The requirement for replacement zoning, which applies to both automatic and early termination of land use contracts, is elusive. In most cases land that is subject to a land use contract was also subject to a zoning bylaw when the contract took effect. Although land use contracts operate notwithstanding any bylaw, many explicitly provide that certain zoning

regulations continue to apply and the legislation never prevented a local government from exercising the zoning power with respect to land use contract lands. Yet many zoning bylaws in force when a land use contract took over have now been amended, or repealed and replaced. These facts seem to create some ambiguity with respect to the duty of local governments to adopt zoning that will apply to land when a contract terminates. It's not clear, for example, whether the local government can rely on the underlying zoning, assuming there is underlying zoning, or whether they must repeal that zoning and adopt new zoning in all cases. Unless the legislature sees fit to rejig the termination provisions, this ambiguity will remain, but in any event local governments might see the termination of a land use contract as an opportunity to refresh what may be outdated zoning. If there is no zoning at all in place with respect to these lands, there is no ambiguity: the zoning power must be exercised well in advance of termination.

Regardless of the correct interpretation of the statute, the prudent course is a careful review of each contract, any pre-existing or subsequently adopted zoning that may apply to the land, and any applicable official community plan designations. There is no requirement under automatic or early termination for the zoning that will apply on termination to describe what is actually built on the land, but as with any zoning bylaw it must be consistent with the applicable official community plan. If any development on the land does not meet the requirements of the zoning that applies on termination, it becomes non-conforming and is protected by s. 911 of the *Act*.

V. CONCLUSION

Land use contracts, viewed in their appropriate historical and theoretical context, are emblematic of the evolution of the zoning power in British Columbia and across North America. As a hybrid land use regulatory tool with distinctive public and private law features, the lasting impact of land use contracts is remarkable given the brief period during which they were actually authorized. Though these instruments are now destined for extinction, many of the features of land use regulation that land use contracts could encompass are now found elsewhere in Part 26 of the *Local Government Act*. Development permits, development cost charges, density bonusing and phased development agreements all complement the conventional zoning power in a manner similar to what land use contracts tried to accomplish. They permit a more nuanced approach to land use regulation, and, more or less explicitly, condone a version of the kind of bargaining that is the hallmark of any contract. So despite the termination of land use contracts, the uneasy co-mingling of public law and private law in the arena of land use regulation will persist. This fact alone merits an ongoing acknowledgement of, and perhaps an effort to reconcile, the sometimes contradictory tenets of these two traditions.

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