YOUNG ANDERSON
BARRISTERS & SOLICITORS

BEYOND ZONING: PDAs, DPs, COVENANTS … AND MORE

NOVEMBER 22, 2019

Michael Quattrocchi and Michael Moll

BEYOND ZONING: PDAs, DPs, COVENANTS … AND MORE

I. INTRODUCTION

To adopt, or not to adopt, that is the question faced by a municipal council member in deciding whether to rezone land. The choice is simple enough - a 'yay' or 'nay' is all that is required. Certainly, a 'yay' requires less effort, as no outward communication (verbal or physical) is required (see section 123(4) of the *Community Charter*). On the other hand, a 'nay' requires at least some clear outward expression and, therefore, effort.

While the decision may be superficially simplistic, council is often considering much more than the zoning changes that will result from bylaw adoption. A staff report to council will typically include a list of general descriptions of expected council conditions and developer proposed amenities, such as requirements for municipal servicing, road and park dedications, public trails, amenity funding and affordable housing commitments. However, the staff report is only the tip of the iceberg, an iceberg made up of a myriad of legal documents aimed at securing those council conditions and amenities. These legal documents can be complex, the result of lengthy negotiations between municipal staff, the rezoning applicant and their respective lawyers. Some council members may choose to read these legal agreements, out of sense of duty, general interest or as a sleep aid. Others may not.

If you choose to read this paper, you will hopefully learn about some of the tools that local governments use to secure rezoning conditions and amenities and how these tools can be used effectively, with an eye to effective implementation.

II. SECTION 219 COVENANTS

A. Section 219 of the *Land Title Act*

At common law, a landowner may grant a 'restrictive covenant' restricting the use of their land, to another landowner for the benefit of that other owner's land.

Section 219 of the *Land Title Act* provides special authority for a landowner to grant a covenant in relation to their property to a municipality, a regional district and a local trust committee under the *Islands Trust Act* (and certain other identified entities), without the requirement that the covenant be for the benefit of another property. Instead, the covenant is for the benefit of the local government generally.

Section 219 permits:

- Covenants of both a negative and a positive nature (unlike common law restrictive covenants, which had to be restrictive or negative in nature), including provisions:

- Respecting the use of land or buildings,
- Respecting the subdivision of land,
- Respecting building on the land (including that the land is not to be built upon at all), and
- That identified parcels of land are not to be separately transferred;

- The inclusion of an indemnity of the local government and provision for the just and equitable apportionment of costs among owners of parcels; and
- The inclusion of a rent charge.

What makes a covenant such a powerful tool is that once the covenant is registered against title to the lands, and provided the covenant is registered with appropriate 'priority' as discussed below, valid covenant provisions will 'run with the land', such that future owners of the property will be bound by such provisions.

B. Covenants Versus Zoning Bylaw

Whether and how a covenant binds an owner of land can be different from a zoning bylaw. A covenant is interpreted under the rules of contractual interpretation (*1114829 B.C. Ltd. v. Whistler (Municipality)*, 2019 BCSC 752 citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53), whereas a bylaw is interpreted under the rules of statutory interpretation [*North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494]. Both interpretive methods focus on the words of the instrument, however, contractual interpretation seeks to discern what the parties agreed to, whereas statutory interpretation seeks to give meaning to council's regulatory purpose.

As will be discussed later in this paper, covenants can also be set aside for different reasons than zoning bylaws. Furthermore, if a zoning bylaw is set aside, there is zoning that fills the void, and council still has an opportunity to rezone. If a covenant is set aside, the owner might simply be set free of the covenant obligations.

C. Local Government Authority To Require Covenants

In several cases, landowners have challenged the validity of covenants that were required without express authority, such as in connection with a rezoning application. These owners would point to specific *Local Government Act* and *Community Charter* provisions requiring or authorizing section 219 covenants (see, for example, section 56 of the *Community Charter*, which in some cases requires registration of a covenant requiring compliance with qualified professional report conditions for construction on lands that are subject to certain natural hazards).

Not surprisingly, the courts have held that a local government may require an owner to grant a covenant in connection with discretionary decision making, without express authority [*Burnaby (City) v. Marando*, 2003 BCCA 400]. In *Parker v. Kamloops (City)*, 2012 BCSC 61, a landowner had, as part of a rezoning, granted a covenant prohibiting further subdivision of two parcels, and years later asked the Court to set aside the covenant on the basis (among other grounds) that the City did not have authority to require the covenant in connection with the rezoning application. The Court upheld the covenant, stating, "[t]he petitioners opted to grant the covenant so their application would succeed, and in that sense they did so voluntarily; the restrictive covenant was not imposed or compelled".

D. The Use of Section 219 Covenants in the Rezoning Context

Examples of the use of section 219 covenants in the zoning context include:

- Restricting the use of land in a more specific way than under zoning regulations;
- Securing rezoning conditions, such as the construction of amenities or local government services; and
- Requiring a landowner to repair and maintain something on the lands, such as a private drainage facility or a public walkway.

The first two categories are generally 'negative' in nature, in that they restrict the use of the land. These restrictions are not actually engaged until and unless the landowner decides to actually develop the lands. The third category is 'positive', in that the owner must actually get off the couch and do something, failing which the owner will be in breach of the covenant.

1. Restricting the Permitted Use Beyond the Zoning

There are many circumstances where a covenant is used to restrict the use or subdivision of land to a more specific extent than specified in the zoning bylaw.

As an example, where a rezoning application is made, and receives public and council support, based on specific development plans submitted with the rezoning application or with a concurrent development permit application, some local governments will require a covenant restricting the development of the land to the development described in those plans (which are then attached to the covenant). Such a covenant allows for much more detailed development control than could be included in the zoning of the lands. As discussed further below, in this respect a covenant has significant advantages over relying simply on the development permit.

2. Securing Local Government Rezoning Requirements

Covenants are commonly used at the rezoning stage to help ensure that a developer complies with requirements imposed by the local government as a condition of the rezoning, as well as developer promises in relation to the rezoning. Examples of such requirements and

commitments include the construction of local government highway, sewer, water and drainage works, the construction of public trails and walkways, the dedication of land for public purposes, the construction of other amenities such as daycare and playground facilities, the provision of affordable housing and sometimes financial contributions for some specified amenity purpose.

(a) 'Upfront' Amenities - Covenants are the Wrong Tool

It is important to note that a 'negative covenant' is passive and does not actually ensure the amenity is provided. A prohibition on construction until an amenity is provided, does not ensure delivery of the amenity; the amenity will only be delivered if the developer wishes to build. Furthermore, a positive covenant that "the owner will deliver the amenity within 2 years" will be difficult to effectively enforce.

Accordingly, if council expects an amenity to be provided irrespective of when or whether the development proceeds, a covenant alone will not suffice. Where possible in such a case, the amenity should be provided at the time of the rezoning, such as in the case of a financial contribution for some amenity purpose or a transfer of land for public purposes.

Where the 'upfront' amenity is the construction of some work and it cannot practically be provided before the rezoning, the local government could require the developer to provide financial security (cash or an unconditional and irrevocable letter of credit) and enter an agreement with the local government permitting the local government either to use the financial security to construct the amenity if the developer does not do so in a timely manner or to apply the financial contribution towards another amenity or some amenity purpose.

(b) Securing through Development Limits

Where council does not expect or require that the rezoning condition be satisfied upon the rezoning, and need only be satisfied before the commencement of construction, a covenant will be an appropriate legal tool.

In theory, a covenant could try to address such a condition by way of a positive covenant:

> The Owner shall construct a walkway on the lands within 3 years of the date of registration of this agreement in the land title office.

In practice, however, if an owner does not comply with this type of obligation, the local government's enforcement options will be cumbersome, at best, and possibly completely ineffective.

A positive covenant can be enforced through a proceeding seeking specific performance: a court order compelling the owner to the required act. This is usually the preferred remedy, but not necessarily a quick one. It is also challenging to make an owner do something with their land that they do not want to do.

A positive covenant could also be enforced through a claim for damages, but it can be challenging to quantify the local government's loss in cases where the positive covenant is intended to secure a benefit for the public. If an owner expects the damages to be low, the owner may see non-compliance as a financially preferred option.

A positive covenant within an agreement could also be enforced by a claim seeking to disentitle the contravening party of benefits granted under the same agreement. As section 219 covenants typically bind owners rather than confer a continuing benefit to owners, this is rarely a practical remedy.

Accordingly, this type of condition is better secured through a land use restriction that precludes development (or a further development state) until the condition is satisfied:

> The land shall not be built upon until the owner completed the construction of the public walkway on the land as described in schedule A.

Provided the local government monitors development activity and covenant compliance, this type of provision is particularly effective, as local government is in a strong position to enforce the covenant, by preventing the development from proceeding until the covenant requirements are satisfied.

(c) Securing with Financial Security

In some cases, the particular requirement will be such that the local government and developer both wish to enable the requirement to be met as development proceeds, such that a 'no build' or 'scorched earth' covenant will not work. For instance, a developer may convince the local government that it is only feasible to construct the public walkway concurrently with the construction of the development. In such a case, the covenant might provide:

> The land shall not be built upon until the owner has entered into an agreement with the municipality (in the form attached as schedule A) to construct the public walkway on the land as described in Schedule B within 1 year of such agreement and has provided the municipality with security for its obligations under such agreement in the form of cash or a letter of credit in an amount equal to 150% of the municipality's estimate of the cost to construct the walkway.

With this arrangement, the owner would only have to proceed with the walkway as the owner develops the lands (not before). Once the owner chooses to proceed, the signed walkway agreement and financial security would permit the municipality to construct the walkway on default of the owner.

(d) Securing Through Use (Occupancy) Prohibitions

In other cases, it may not be practical or desirable for the local government to be in a position to complete the construction of an amenity on developer default. This would be the case if, for instance, a public walkway is to be constructed through and as part of the development to be constructed on the lands. In such a case, the covenant might provide:

> The land shall not be built upon unless the building includes the public walkway described in Schedule A and no building shall be occupied or otherwise used for any purpose until the public walkway is complete.

It should be noted that, at a practical level, a municipality may have a difficult time insisting that a development not be occupied, where council faces angry unit buyers who want to move into their units.

Accordingly, with this type of covenant provision, it will be important for the municipality to monitor development to ensure that the developer is meeting the covenant requirements (e.g., constructing the public walkway) as construction of the development proceeds, and to take timely steps to enforce against a covenant breach.

(e) Positive Covenants

As discussed above, a local government should be cautious in relying on 'positive covenants' that are not also secured by some type of negative restriction on the use of the land.

That said, there may be cases where the use of a positive covenant is appropriate. One example is where developer owned space is to be made available for public use, but the developer (followed by subsequent owners) is to maintain that space at its expense:

> The owner shall maintain and repair the walkway so that it is at all times in a good condition, safe for use by the public.

(f) Statutory Rights of Way for Public Access

While section 219 of the *Land Title Act* permits positive covenants respecting the use of land, where rezoning conditions include that public access be provided to some privately-owned area or facility, this element should be secured by requiring the owner to grant to the local government a statutory right of way. The agreement containing the positive 'owner covenant

to maintain public space' referred to in the preceding paragraph, might also include a right of way along the following lines:

> The owner hereby grants to the municipality a statutory right of way under section 218 of the *Land Title Act* for the municipality and its employees, contractors and licensees (including the public) to use the walkway and to repair and maintain the walkway where the municipality is not satisfied that the owner has done so in accordance with this agreement.

Under such a right of way, the local government is in a position to ensure public access, and to also better ensure the proper maintenance of the public access area.

E. Additional Covenant Considerations

1. Registration in Land Title Office

In order for a covenant to be binding on future owners of a parcel (the critical benefit of a covenant), the covenant needs to be registered in the land title office against title to the lands subject to the covenant. To be registrable, the covenant needs to be signed by the person who owns the lands at the time the covenant is submitted to the land title office for registration.

With that in mind, the safest course is to require full registration of the covenant before adoption of the zoning amendment bylaw. This means that title to the lands shows the covenant as registered (not pending registration), with appropriate priority as discussed below.

Why is this the safest course? By deferring registration of the covenant until after adoption of the zoning amendment bylaw, it is possible that the covenant might not ever be registered. Even where signed by the owner, the land title office could reject an application to register a covenant for various reasons. For instance, the land title office sometimes rejects an application where it considers some provision of the covenant to be invalid. As a second example, if a "certificate of pending litigation" is filed against title to the lands before registration of the covenant, the land title office is prevented from registering the covenant.

If the zoning amendment bylaw is adopted, but the covenant cannot be registered for some reason, and this cannot be overcome, then a key element of council's approval of the rezoning may not be satisfied. Unless the owner and council can come up with some other way to address council's needs, council would have to rezone the lands in order to return to the position it was in before bylaw adoption.

Some local governments may proceed with bylaw adoption after the covenant is fully signed (including as to priority) and the developer's lawyer has provided an undertaking to register the covenant following bylaw adoption. With this approach, 'time risk' for land title office rejection of the covenant is reduced, but this rejection risk is not eliminated.

Other local governments simply require that the covenant be signed by the owner (and as to priority) and in the municipality's hands before bylaw adoption, usually with undertakings from the owner's lawyer to register the covenant after receipt of the covenant signed by the municipality. Once the zoning bylaw is adopted, the local government signs the covenant and provides it to the developer's lawyer for registration. This approach further delays covenant registration and lengthens the time period over which title to the property could change and affect covenant registrability.

2. Priority

If there are other charges already on title to the affected lands, then depending on the nature of the charge, it may be necessary to have the charge holder sign a priority agreement granting the covenant priority over the charge. The priority agreement is usually attached to the covenant, so the covenant document is then signed by both the owner and the charge holder.

For instance, if there is a mortgage on title to the property, it is essential that the mortgage holder grant priority to the covenant. A failure to do so could see the covenant lost in the event the mortgage holder proceeds to enforce the mortgage at some point in the future.

The priority agreement should be registered concurrently with registration of the covenant.

3. *Property Law Act* Applications for Covenant Discharge

As discussed further below, a person may apply to court under section 35 of the *Property Law Act* to have a covenant modified or discharged. Section 35(2) of the *Property Law Act*, lists the following grounds upon which a covenant can be modified or cancelled:

- 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.

There are numerous cases where owners have applied to court under this section to have section 219 covenants set aside.

Accordingly, where possible, a land use restriction should be included in a zoning bylaw, rather than (or at least in addition to) a covenant. If a covenant is discharged, the restrictions are lost and not replaced. Conversely, where a court sets aside a zoning amendment bylaw, the previous zoning regulations applicable to the lands remain and the local government may be able to re-do the zoning amendment bylaw.

4. Public Hearings for Amendments to Zoning Covenants?

In *Capital Regional District v. Saanich (District)* (1980), B.C.L.R. 154, the Court held that a public hearing was required for Saanich to discharge a covenant taken as part of a rezoning. Council had, in directing the preparation of the zoning amendment bylaw, accepted the planner's suggestion that a covenant be required to limit the proposed shopping centre development to 295,000 square feet. At the public hearing for the bylaw, a report was read out that indicated the developer had agreed to the covenant. A short time after the rezoning and covenant registration, the developer asked Saanich to discharge the covenant in order to enable the addition of a large store, which would enlarge the project to 495,000 square feet. Council agreed and passed a resolution authorizing the discharge of the covenant. The Capital Regional District was concerned that the enlarged version of the development would impede the realization of the objectives of the Regional District's official regional plan and challenged the validity of council's decision. The Court held that because the discharge resolution was "an attempt by Saanich to regulate the size of the … site by allowing it to go ahead at 495,000 square feet, it is a zoning bylaw ... As such it cannot be done through the method of a simple resolution". Accordingly, Saanich was prevented from discharging the covenant without first complying with the public notice and hearing requirements applicable to a zoning amendment bylaw.

Local governments should be aware of this decision when considering significant changes to a zoning covenant and may wish to obtain legal advice on the amendment process.

F. Enforcement of Section 219 Covenants

1. Monitoring Covenant Compliance is Essential!

A local government needs to be diligent in monitoring compliance with a covenant, in order for a covenant to effectively achieve its purpose. The monitoring approach will depend on the nature of the covenant requirement. Appropriate staff will need to be aware of the covenant requirement in order to monitor compliance.

If the covenant prohibits the construction of a building before the developer has provided financial security and entered into an agreement for construction of a public walkway, the local government may be able to use building permit requirements to monitor whether the construction has started. If building construction gets underway without the developer having complied with the covenant requirements (e.g., by providing walkway security and agreement), it may be difficult to obtain voluntary compliance with the requirement.

In other cases, the nature of the covenant requirement may be such that the local government needs to pro-actively inspect the property from time to time to ensure compliance. For instance, if the public walkway is to be constructed as building construction proceeds, it will be important to ensure this is taking place and to take prompt action to ensure compliance in the event of contravention. Enforcing non-compliance with a development requirement only after the development is complete leaves the local government in a weaker enforcement position.

2. Court Order

If enforcement action is required, the typical remedy is to commence a proceeding in the British Columbia Supreme Court to seek relief for a breach of covenant. This relief could be in the form of an order compelling the owner to perform a positive obligation, an order requiring the owner to cease a prohibited obligation or an order permitting the local government act to do whatever the owner has failed to do at the owner's expense.

An action to enforce a covenant is materially different from an action to enforce a land use bylaw. In bylaw enforcement, the court will generally grant a local government a relief in response to a contravention even if the local government does not take enforcement action for many years (*Salt Spring Island Local Trust Committee v. Guinness*, 2010 BCSC 1218). Historically lax enforcement does not give an owner an excuse to avoid a duly enacted law. In contrast, a covenant is a proprietary right; if a local government is lax in responding to a contravention of a term of a covenant, the court may find that the local government's conduct renders it inequitable to later grant the local government an order enforcing that covenant.

III. PHASED DEVELOPMENT AGREEMENTS

Developers and local governments sometimes enter into 'phased development agreements' as part of a rezoning. From the developer's perspective, this type of agreement protects a development from zoning changes. A council or regional board may also see benefit in preventing future elected officials from frustrating the development through downzoning. Also, the *Local Government Act* expressly provides that phased development agreements may include amenity requirements, a feature that would seem to be attractive to local governments. All that said, given the common practice of obtaining amenities as zoning pre-conditions, it is typically the developer who seeks a phased development agreement as part of a rezoning process.

A. Statutory Authority

Phased development agreements (PDAs) are 'creatures of statute' governed by sections 515 to 522 of the *Local Government Act*. A PDA is an agreement between a local government and a land owner, and its key feature is that it identifies "specified zoning provisions" of the local government's zoning bylaw (and may also identify provisions of the local government's subdivision servicing bylaw). If, during the term of the PDA, the local government amends the zoning bylaw in a manner that changes any of those "specified zoning provisions", the changes do not apply to the development of the owner's lands as described in the PDA.

In addition, pursuant to section 516, a PDA may include provisions respecting amenities, specific features of the development, the phasing and timing of the development and other matters, the registration of section 219 covenants, dispute resolution and early termination.

It is worth noting that a PDA does not prevent the local government from changing zoning for the PDA lands. Rather the PDA insulates the development described in the PDA from the zoning change and only during the term of the PDA.

Furthermore, a PDA protects the development as described in the PDA from zoning changes. Depending on how the PDA describes the development, it is possible that some development of the PDA lands might not be protected from zoning changes.

B. PDA Process & Elements

1. Bylaw and Public Hearing

Section 516 provides that a bylaw is required to authorize a PDA.

Section 518 requires the local government to hold a public hearing for the PDA and that the local government cannot waive this requirement.

Most commonly, the PDA bylaw process will accompany a zoning bylaw amendment process.

2. Notice on Title

Section 521 requires that the local government file a notice with the land title office that the lands described in the notice are subject to the PDA. Once filed, title searches of the PDA lands will show a legal notation that the lands are subject to a PDA. The PDA itself is not available from the land title office and must be obtained from the local government.

Section 521 indicates that section 503 applies to such a notice. This may mean that the PDA would be binding on persons who acquire an interest in the PDA lands. If so, this would be a somewhat surprising result, given that the PDA may not have been assigned to that subsequent owner (see comments on assignment below), in which case the owner would not have the benefit of the PDA.

3. PDA Assignment

Section 517(5) permits the developer who signs the PDA to assign the PDA to a subsequent owner of PDA lands, but only if the assignment is to a person named in the PDA or to a person within a class of persons named in the PDA, or if the local government agrees to the assignment.

Accordingly, if the developer sells all or some of the PDA lands, but does not assign the PDA to the new owner of the PDA lands, the new owner will not have the benefit of the PDA and the protection from zoning changes provided by the PDA.

4. PDA Term

Pursuant to section 517, a PDA must have a term of no longer than 10 years, unless inspector approval is obtained for a longer term, which may not exceed 20 years. The inspector's office has published a document entitled, "Inspector of Municipalities 10 to 20-Year Phased Development Agreement Application Guide and FAQ's", outlining the process for seeking a term of more than 10 years.

This means that a PDA will expire, as will the protection from zoning changes and the developer's obligations under the PDA.

C. Observations on PDAs

Aside from identifying the "specified zoning provisions" and, if applicable, specified subdivision servicing bylaw provisions, the key element of a PDA will be the identification of any amenities and how and when they are to be provided. In many respects, the same considerations for securing zoning conditions with covenants will apply to drafting PDA amenity provisions.

1. Companion Covenant to Ensure PDA Restrictions 'Run with the Land'

Section 516 includes specific authority for a PDA to include a requirement for registration of section 219 covenants and local governments should exercise this option to secure the amenities provided for in the PDA. Registration of a covenant will ensure these provisions 'run with the land' to bind future owners. This is important given the uncertain effect of a PDA on subsequent owners of the PDA lands.

2. Be Realistic with PDA Termination Clauses

A PDA may include a provision permitting the local government to terminate the PDA in the event of developer failure to comply with the PDA. While such a provision can be useful, terminating the PDA may not have a significant impact on the developer if the underlying zoning remains in place. As such, termination is not likely to be an effective remedy in relation to a developer's failure to provide a required amenity, so amenities should be secured by other means, such as through the registration of a covenant.

3. Loss of PDA Benefit on Termination – The Zoning Remains!

If a PDA is terminated or expires, the developer may no longer have any obligations under the PDA, including to provide amenities. This may be the case even if the local government has left the 'specified zoning' in place. To be clear, unless the local government has at some point down zoned the lands after the signing of the PDA, then if the PDA is terminated or expires, the developer under the PDA (and the land owner) will have the benefit of the zoning, without the burden of the PDA.

Accordingly, the PDA amenities should also be secured in the normal way by requiring registration of a section 219 covenant as a condition of the rezoning (not simply as a PDA).

On this point, if registration of the covenant is also a PDA requirement, the PDA should include wording stating that the covenant will survive the expiry or earlier termination of the PDA.

4. Avoid Dispute Resolution Clauses

Generally speaking, there would seem to be little reason for a local government to agree to include a dispute resolution provision in a PDA. Such a provision is likely to give rise to uncertainty for the local government and potentially compromise enforcement decisions.

5. Avoid including Local Government Obligations in PDA

Again, generally speaking, there would seem to be little reason to include local government obligations in a PDA. The PDA will provide the required protection from zoning changes (and possible subdivision servicing bylaw changes), as well as amity requirements. Beyond that, local government obligations will simply create unnecessary liability exposure for the local government.

IV. HOUSING AGREEMENTS

Housing agreements are used to secure the ongoing provision of affordable housing on a property. Housing agreements are powerful tools, because they can include significant housing unit requirements that could not be included as lawful and enforceable zoning requirements or provisions under a section 219 covenant. This paper includes some general comments on housing agreements, both in relation to the procedure for obtaining such agreements, and on the enforcement of such agreements.

A. Statutory Authority

Section 483 of the *Local Government Act* permits a local government to, by bylaw, enter into a housing agreement with an owner of land regarding the "occupancy" of housing units identified in the agreement. Section 483(2) permits such an agreement to include terms and conditions regarding the housing units agreed to by the owner and the local government, including:

- The form of tenure of the housing units;
- The availability of the housing units to classes of persons identified in the agreement or the housing agreement bylaw;
- The administration and management of the housing units, including the manner in which the housing units will be made available to persons within identified classes of persons; and
- Rents and lease, sale or share prices that may be charged, and the rates at which these may be increased over time, as specified in the agreement or as determined in accordance with a formula specified in the agreement.

In short, a housing agreement can be used to control the tenure of the occupation (e.g., rental only), the type of occupant (based for instance on age, gender or income) and the cost of occupying housing units (through rent and resale price controls).

For the most part, these powers go beyond what may be included in a zoning bylaw, or as a use restriction under a section 219 covenant.

B. Housing Agreement Process

1. Bylaw Requirement

As noted, a local government must adopt an authorizing bylaw in order to enter into a housing agreement.

A bylaw is also required to authorize any amendment to a housing agreement.

2. Filing Notice of the Housing Agreement in the Land Title Office

A housing agreement is not registrable against title to lands in the same manner as a section 219 covenant or a statutory right of way. Rather, section 483(5) requires that the local government file a notice of the agreement in the land title office that the land described in the notice is subject to a housing agreement under section 483.

Once filed, such a notice will appear on title searches of the identified lands as a 'legal notation'. If one asks the land title office for a copy of the notice, all the person will receive is a copy of the notice. The person must then ask the local government for a copy of the housing agreement.

Nevertheless, the filing of the notice is critical for the local government, as section 483(6) provides that once the notice is filed "the housing agreement … is binding on all persons who acquire an interest in the land affected by it…". Accordingly, it is the filing of this notice that operates to make the housing agreement binding on future owners of the property (and others who acquire any interest in the property).

Notice must also be filed of any amendment to a housing agreement.

C. Companion Covenant

At the time of a rezoning, it will typically be the case that the housing units that will be subject to the housing agreement will not yet exist, as they will be included in the development to be constructed after the rezoning. In that context, a section 219 covenant will be typically required at the time of the rezoning in order to secure the construction of the affordable housing units that will be the subject of the housing agreement:

"The first building to be constructed on the land will include the construction of the affordable housing units as described in Schedule A and no additional buildings may be constructed on the lands until the first building, including the affordable housing units, are ready for use and occupancy and the municipality has issued an occupancy permit for such building."

Sometimes this type of provision is included in the same agreement as the housing agreement provisions, such that the agreement is registered as both a covenant under section 219 of the *Land Title Act* and as a housing agreement under section 483 of the *Local Government Act*. Strictly speaking, such a combined instrument is two different instruments. Accordingly, it remains essential that in addition to registering the agreement as a section 219 covenant, the local government also files a notice of the housing agreement as required by section 483.

V. DEVELOPMENT PERMITS

The topic of development permits is complex. This paper only briefly examines development permits (DPs) from the perspective of the rezoning application. In this respect, it is common for a rezoning application to also include a DP application. A developer may wish to have these two discretionary approvals complete at the same time. Also, the local government, and the public, may wish to have a more detailed understanding of the development proposal, which the DP process may require.

A. The DP Scheme Generally

The DP scheme is set out in sections 488 through 491 of the *Local Government Act*. Under that scheme a local government's official community plan may designate development permit areas for one or more of the purposes set out in section 488(1), and must also describe the "special conditions or objectives that justify" each designation. Also, the OCP (or the zoning bylaw) must specify guidelines respecting how to address the special conditions or objectives identified in the OCP for each DP area.

DP area purposes include (paraphrasing) the protection of the natural environment, the protection from hazardous conditions, the protection of farming, the establishment of objectives for the form and character of multi-family residential development or of commercial, industrial or multi-family residential development, the establishment of objectives to promote energy conservation, water conservation or the reduction of green house gas emissions and for other purposes.

A developer must obtain a DP if the developer wishes to subdivide land within a DP area or construct, alter or add to a building or structure in a DP area (for some types of DP areas, a DP is required to alter land).

B. Legal Effect of DP

The DP will, once issued, permit the development to which the DP application relates. In other words, if a developer applies for and obtains a DP for construction of a 24-unit residential development within a DP area establishing objectives for the form and character of multi-family residential development, the permit will permit that development.

Pursuant to section 501 of the *Local Government Act*, land must be developed strictly in accordance with the DP, and the DP is binding on the local government as well as the permit holder.

Pursuant to section 503, the local government must file a notice with the land title office that the land described in the notice is the subject of a DP. Once filed, the notice appears as a legal notation on title searches of the affected lands and its terms are binding on all persons who acquire an interest in the lands.

A DP can expire. Section 504 provides, "Subject to the terms of the permit, if the holder of a land use permit does not substantially start any construction with respect to which the permit was issued within 2 years after the date it is issued, the permit lapses".

C. Rezoning Considerations in relation to Development Permits

1. Limitations on DP Requirements

What terms and conditions may be included in a DP? On this, the *Local Government Act* is quite specific, as section 491 lists the possible requirements for each type of DP Areas. For, instance, for a multi-family residential development DP area, subsection (7) provides that a DP "may include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures".

While the scope of potential requirements for each type of DP area varies, the point here is that the scope for each is limited by the legislation. A local government is not permitted to, as a pre-requisite to issuing a DP, impose requirements on an owner that go beyond the scope permitted by the applicable provision of section 491 [see, for instance, *Imperial Oil Ltd. v. McAfee*, 2005 BCCA 402].

This is important to remember when considering a rezoning application, with or without a concurrent DP application. A local government should not rely on the DP scheme as a means to secure amenities and other requirements that could be addressed at the rezoning stage. Rather, it is at the rezoning stage that a local government has the greatest discretion to require amenities and impose conditions, including requirements for section 219 covenants and other legal instruments.

2. A DP May Lapse; An Owner May Apply for Another DP

An owner who holds a DP has satisfied the requirements of section 488 in relation to the development described in the DP. This does not mean that the owner cannot proceed with a different development, provided they obtain a new DP for that development.

Similarly, as noted above, a DP may lapse where the owner does "substantially start" construction of the permitted development within 2 years of permit issuance. This does not preclude the owner from applying for a DP for a different development.

In either of the above scenarios, if the owner returns with a new DP application that complies with zoning, the local government must assess the application for compliance with its DP requirements. The local government is not in a position to insist that the owner proceed with the same development that was authorized under the existing or lapsed DP.

Accordingly, a local government may wish to include DP plans in a section 219 covenant required as a zoning condition, if the local government wishes to ensure that development is restricted to what is proposed in the DP application. A covenant does not expire, thereby giving the local government greater assurance that if and when development proceeds it will proceed in accordance with the plans submitted to the local government and the public at the time of the rezoning application.

NOTES