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A DEFENCE OF COMMUNITY AMENITY CONTRIBUTIONS

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During my sabbatical earlier this year I wrote a paper on community amenity contributions ("CACs"). I got a little carried away and the paper is over 65 pages long, which is way too long for most people to read let alone to include in this seminar booklet. So instead of the full paper, I've included only its table of contents and several statutory provisions.

My main purpose in writing the paper was to argue that local governments likely have the legal authority to require CACs as a condition of adopting zoning amendments, despite the lack of express statutory authority for them. That position is probably a minority position amongst lawyers and involves addressing a number of quite challenging counter-arguments to my principal thesis which is that CAC regimes are lawful so long as the payments required under them are designed to offset burdens expected to be created by the zoning change at issue or to capture a portion of the benefits of that change.

As regards the legal issues, the paper addresses what I believe are the four main arguments that can be made against the legality of CACs, plus a number of more targeted arguments that might be made in respect of particular CAC regimes or particular CAC conditions.

The first of the four main arguments is that CACs are prohibited by section 193 of the *Community Charter* because there is no express statutory authority for them. Section 193 prohibits a local government from imposing any fee or charge for which there is no express statutory authority.

The second argument against the legality of CACs is that they are prohibited by section 462(5) of the *Local Government Act.* That section prohibits a local government from imposing any additional fee, charge or tax in relation to the development matters referred to in that section other than the application fees referred to in it. An application to initiate changes to a zoning bylaw is one of the development matters referred to in section 462.

The third argument is that CACs are an unconstitutional form of taxation, at least if the amount of the contribution is not closely tied to the cost of addressing development impacts in a way that is proportional amongst zoning applicants. This argument takes special aim at lift-based CAC systems.

The fourth argument is that the Legislature should be presumed to have intended certain unspecified limitations on the zoning power, including that the decision-maker not be influenced by monetary offers. Under this argument, CAC regimes (again especially lift-based regimes) are implicitly prohibited as the unlawful "sale" of zoning.

In addition to the four main arguments, more targeted arguments might be made challenging a particular CAC regime or a particular CAC condition depending on the nature of the regime or condition. For example, if a CAC regime involves the imposition of requirements that are not tied to any objective measure at all so as to ensure proportionality, and therefore fairness, amongst applicants, it is possible an applicant could challenge the CAC regime, or condition established under it, as being unlawfully discriminatory or unreasonable.

I address all of these arguments in the paper. At the end of the day, I continue to believe that CACs are lawful. I do not believe the statutory provisions cited apply to CACs. I do not think CACs are "imposed" in the necessary sense so as to bring them within the reach of section 193 of the *Community Charter*. As regards section 462(5), I think that section is concerned with prohibiting additional fees for the right to *initiate* a zoning application (which is the matter referred to in subsection (1)), not with limiting the nature of conditions that may be established in relation to the *adoption* of a zoning amendment. As regards the taxation argument, I do not believe CACs are a tax at all, whether the amount of the CAC is established by reference to the impacts of the proposed change or the benefit to the applicant of it. CAC regimes lack the element of compulsion necessary to make them taxation regimes. And as regards the fourth argument, my view is that CACs do not constitute an impermissible form of selling zoning. That concept comes into play only where a local government either agrees to adopt or maintain a zoning bylaw in exchange for payment (i.e., the local government unlawfully fetters its discretion) or where a council member receives a payment personally. CAC conditions do neither. They address what I believe are legitimate and relevant consequences of the zoning change itself, without personal gain to members and (if properly constructed) without the sacrifice of future legislative discretion. And finally, as regards the more targeted attacks, I see some potential for them, but only if a local government establishes a very poor CAC system that either invites open-ended horse-trading around CACs or establishes a calculation formula that results in amounts that bear little relationship with either the impacts of the zoning change or the benefits of it.

Moving from the defensive to the offensive, my ultimate view is that the absence of *express* mention of CACs is not fatal to a local government's authority to establish CAC conditions. I reach that conclusion principally because the same is true of every other condition established by a local government in connection with a zoning change. There is no express statutory authority for those conditions either. Indeed, the *Local Government Act* does not identify *any* factors that may properly be considered by a local government in deciding whether to amend its zoning bylaw, and yet local governments very properly consider many factors in deciding whether to do so. Given the silence in the Act, one has to apply some standard or test for determining *which* factors the Legislature intended may properly be considered and which may not. As regards any factor, including CAC offers, we have to make a judgment about the *presumed* intention of the Legislature in deciding whether it wishes the local government to have the authority to consider that factor in deciding whether to adopt zoning amendments. We cannot conclude in advance that CAC conditions are unlawful because there is no express authority for them, otherwise we would have to say that all zoning conditions are unlawful

regardless of their purpose or their connection to the particular zoning change at issue - which is clearly wrong. My view, is that when one examines the nature of the connection between CACs and zoning changes, there is a powerful reason to conclude that the Legislature did intend consideration of them to be lawful, at least so long as the CAC system at issue is designed to capture for the community at large a portion of the financial benefit produced by the zoning regime itself (as is the case with lift-based systems) or to address zoning impacts (as is the case with both lift-based systems and impact-based systems).

On the policy side of the paper, I provide a policy justification for lift-based CAC systems both by exploring the rationale behind them and by comparing them to other legislative regimes under which persons or applicants are fairly charged for the benefit of a special privilege created by the monopolistic nature of the regime itself. I provide that rationale in part to inform the legal analysis as it relates to lift-based systems but also to defend lift-based systems against charges I've heard concerning them. I think lift-based systems have gotten a bad rap, and might in fact be the fairest and most legally defensible CAC systems available. It is not my intention, however, to encourage local governments to use lift-based systems or even to have CAC systems at all. I really don't care one way or the other. That is a policy decision for the local governments to make. My only purpose on the policy side of the paper is to try to show that there is both a policy and legal justification for lift-based systems.

Appendices

Table of Contents to Main Paper

A DEFENCE OF COMMUNITY AMENITY CONTRIBUTIONS 1

PART 1 – INTRODUCTION 2

A. Outline of Paper 2

B. Types of CAC Programs 3

C. 2014 Provincial CAC Guidelines 5

D. Introduction of the Legal Issues 9

E. Outline of my Position on the Legal Issues 10

PART 2 - POLICY RATIONALE FOR BENEFIT-BASED CACs 12

PART 3 - LEGAL ISSUES 16

A. Are Benefit-based CACs Taxation? 16

1. Kingstreet 16
2. Description of the Reasons CACs are not Taxes 17
3. CACs are not Enforceable by Law 18
4. Regulatory Nexus 23

B. Are CACs Statutorily Authorized? 29

1. Authority to Establish CAC Conditions Under the Zoning Power? 30

(i) Cases against CACs 30

(ii) Cases that Support CACs 39

(iii) Broad Interpretation Required 46

(iv) Incidental Powers 47

(v) Phased Development Agreements 47

2. Are CACs prohibited by Section 193 (1) of the *Community Charter*? 48
3. Are CACs Prohibited by Section 462 (5) of the *Local Government Act* 51

C. Selling Zoning, Irrelevant Considerations, Discrimination and Unreasonableness 53

1. Selling Zoning 53
2. Irrelevant Considerations 54
3. Discrimination and Unreasonableness 57

D. Owner's Remedy if a CAC Condition is Unlawful 59

1. Claims for Recovery of CACs 59

(i) If Unlawful Taxes 59

(ii) If Unlawful Regulatory Charges 60

2. Claims if Amendment Bylaw is not Adopted 63

PART 4 - CONCLUSION 65

Sections 193 and 194 of the *Community Charter*

Authority for fees and taxes

193 (1) A municipality may not impose fees or taxes except as expressly authorized under this or another Act.

(2) Section 12 (1) [authority to establish variations] does not apply in relation to bylaws imposing taxes referred to in section 192 (b), (c), (d) and (e).

(3) A council may only provide an exemption from property taxes if expressly authorized by this Part or another Act.

(4) For the purposes of assessment, taxation, recovery of taxes and tax sale, parcels combined under the Assessment Act to form one parcel are deemed to constitute one parcel.

Municipal fees

194 (1) A council may, by bylaw, impose a fee payable in respect of

(a) all or part of a service of the municipality,

(b) the use of municipal property, or

(c) the exercise of authority to regulate, prohibit or impose requirements.

(2) Without limiting subsection (1), a bylaw under this section may do one or more of the following:

(a) apply outside the municipality, if the bylaw is in relation to an authority that may be exercised outside the municipality;

(b) base the fee on any factor specified in the bylaw and, in addition to the authority under section 12 (1) [variation authority], establish different rates or levels of fees in relation to different factors;

(c) establish fees for obtaining copies of records that are available for public inspection;

(d) establish terms and conditions for payment of a fee, including discounts, interest and penalties;

(e) provide for the refund of a fee.

(3) As exceptions but subject to subsection (3.1), a council may not impose a fee under this section

(a) in relation to Part 3 [Electors and Elections] or 4 [Assent Voting] of the Local Government Act, or

(b) in relation to any other matter for which this or another Act specifically authorizes the imposition of a fee.

(3.1) A council may impose a fee referred to in section 59 (3) [fees for providing disclosure records] of the Local Elections Campaign Financing Act under either that section or this section.

(4) A municipality must make available to the public, on request, a report respecting how a fee imposed under this section was determined.

(5) A municipality may not impose a highway toll unless specifically provided by a Provincial or federal enactment.

Section 462 of the *Local Government Act*

Fees related to applications and inspections

462 (1) A local government may, by bylaw, impose one or more of the following types of fees:

(a) application fees for an application to initiate changes to the provisions of

(i) an official community plan or bylaw under Division 4 [Official Community Plans] of this Part,

(ii) a land use regulation bylaw,

(iii) a bylaw under Division 11 [Subdivision and Development: Requirements and Related Matters] of this Part, or

(iv) a bylaw under Part 15 [Heritage Conservation];

(b) application fees for the issue of

(i) a land use permit under this Part, or

(ii) a heritage alteration permit under section 617;

(c) application fees for an amendment to

(i) a land use contract under section 546 [amendment and discharge of land use contract by agreement], or

(ii) a heritage revitalization agreement under section 610;

(d) application fees for an application to a board of variance;

(e) fees to cover the costs of administering and inspecting works and services under this Part that are costs additional to those related to fees under paragraphs (a) to (d);

(f) subdivision application fees, which may vary with the number, size and type of parcels involved in a proposed subdivision.

(2) A fee imposed under subsection (1) must not exceed the estimated average costs of processing, inspection, advertising and administration that are usually related to the type of application or other matter to which the fee relates.

(3) The minister may make regulations

(a) that the minister considers necessary or advisable respecting the imposition of fees under subsection (1), and

(b) prescribing fees for applications referred to in subsection (1) (f).

(4) A regulation under subsection (3) prevails over a bylaw under subsection (1) to the extent of any conflict.

(5) No other fee, charge or tax may be imposed in addition to a fee under subsection (1) as a condition of the matter referred to in that subsection to which the fee relates.

(6) A local government, the City of Vancouver or an approving officer must not do either of the following unless authorized by this Act, by another Act or by a bylaw made under the authority of this Act or another Act:

(a) impose a fee, charge or tax;

(b)require a work or service to be provided.

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