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HOT TOPICS IN PLANNING LAW

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I. INTRODUCTION

A review of papers delivered at past iterations of this seminar, purporting to address "hot" topics, provides some insight into our firm's broad interpretation of the word term "hot". Of course, given the Supreme Court of Canada's repeated endorsement of broad interpretation in the local government context, who could fault us for also adopting that approach? Anyway, it turns out a hot topic is, in short, a topic too important to ignore completely, but not quite important enough to warrant a whole paper.

Although British Columbia's real estate market seems to have cooled off a little, at least in some parts of the province, the provincial Legislature and its local government progeny continue to agonize over solutions to what can still reasonably be referred to as an affordable housing crisis. Rental tenure zoning, introduced in May of 2018 as section 481.1 of the *Local Government Act* ("*LGA*") in response to agitation from the Union of BC Municipalities, is already being put to the test. And in September of 2019 the provincial government released a report on the results of a province-wide stakeholder consultation process, as a part of a broader initiative called the "Development Approval Procedures Review". The release of that report was sandwiched between two related planning law moments, one courtesy of the courts and the other thanks to the Legislature, both of which relate, albeit in very different ways, to the question of local government procedures for the assessment of applications for permission to subdivide, develop or otherwise alter land. Finally, a new case on an old, and always vexing, question: can local governments zone for land users, as opposed to land uses?

This paper begins with a closer look at the rental tenure zoning legislation and related amendments to Part 14 of the *LGA* requiring local governments to prepare housing needs reports. It then considers the Development Approval Procedures Review report in the context of a Vancouver case which, although framed as a negligence claim, was all about development procedures where approval, to the applicant's chagrin, was not forthcoming. It then turns to the latest version of a tortured procedural quagmire in which the Province continues to insist local governments must thrash about: the *Riparian Areas Protection Regulation*. Finally, it closes with a quick look at people zoning.

II. RENTAL TENURE ZONING

In 2018 the Legislature granted local governments the power, in addition to the normal zoning power, to create zones of "residential rental tenure" ("RRT"). Through RRT, the Province said, local governments would have a powerful tool to create new areas of rental housing and preserve existing rental stock:

> …importantly, this authority can also protect existing rental tenure. It's an opportunity for local governments to protect their existing rental housing stock. While we know that a new rental supply is an important component of any community's housing stock, it is really, really important that they have the ability to protect housing stock that is currently being used as rental.[1]

The core of the RRT amendments to the *LGA* is section 481.1:

> 481.1 (1) A zoning bylaw may limit the form of tenure to residential rental tenure within a zone or part of a zone for a location in relation to which multi-family residential use is permitted.
>
> (2) A limit under subsection (1) may limit the form of tenure to residential rental tenure in relation to a specified number, portion or percentage of housing units in a building.

RRT must be exercised through a zoning bylaw, and is only available "for a location in relation to which multi-family residential use is permitted". In other words, RRT is a complementary zoning power; it is another layer of zoning regulation that can be applied to land, or a building, with an underlying zoning designation that permits multi-family residential uses.

Section 455 of the *LGA* defines "form of tenure" to mean "the legal basis on which a person occupies a housing unit" but leaves it to the local government exercising this new authority to define the other critical term: "residential rental tenure". The most obvious definition of the term would be something like "a relationship between a landlord and tenant governed by a tenancy agreement". However, given that the Legislature delegated local governments the power to define the term, there must be some acceptable variations. For example, local governments may wish to use the definition to avoid certain "loopholes", such as a situation where a wife rents her unit to her husband, or a numbered company rents to one of its directors.

RRT zoning, even more patently than the zoning power generally, can be used surgically. As section 481.1(2) makes clear, local governments can apply RRT to a specified number, portion or percentage of housing units within a building.

[1] British Columbia, Legislative Assembly, *Hansard,* 41st Parl, 3rd Sess, No 23 (May 9, 2018).

A. Protections for Owners

The RRT amendments to the *LGA* include significant protections for owners of existing housing units.

The operative provision is section 535.1 of the *LGA*:

> (1) If, at the time a zoning bylaw that limits the form of tenure to residential rental tenure is adopted, a housing unit to which the bylaw applies has a form of tenure other than residential rental tenure, the other form of tenure continues as a non-conforming form of tenure.
>
> (2) If, at the time a zoning bylaw that limits the form of tenure to residential rental tenure is adopted, a local government has issued a building permit or a development permit in relation to a building that will contain housing units to which the bylaw would otherwise apply, and the housing units have or may have a form of tenure other than residential rental tenure, the other form of tenure continues as a non-conforming form of tenure.

This section creates a lawful non-conforming tenure ("LNCT") protection for any unit that has a form of tenure other than RRT, on the date the RRT zoning is adopted.

Local governments considering various definitions of RRT, which as noted above they are free to define, should also consider the question of which occupancy scenarios will gain LNCT under section 535.1 of the *LGA,* which applies to any units occupied on a basis "other than" RRT, however that term has been defined. In other words, different definitions of RRT will result in different units becoming non-conforming.

The LNCT protection is, as mentioned above, robust. Section 535.3 provides that LNCT protection is ongoing, meaning that any change in owners, tenants, or occupants does not, in and of itself, cause a housing unit to lose LNCT. There is no provision equivalent to section 528(2) of the *LGA,* under which lawful non-conforming use protection is lost if an otherwise protected use is discontinued for a period of six months. However, section 535.4 does provide that, in a building that includes strata lots, a unit can lose LNCT where the strata corporation is wound up and there is a disposition of all of the land and buildings of that strata corporation.

B. Strata Units – Where Do They Fit?

Can a local government apply RRT zoning to strata units? The answer to this question, quite simply, is yes. RRT zoning can be applied to any "housing unit", and nothing in the new provisions could be read as exempting a strata unit from the definition of "housing unit".

However, section 481.2 of the *LGA* addresses the relationship between a strata corporation's own bylaws, which may, among other things, restrict rentals, and bylaws passed by a local government under the new rental zoning power:

> 481.2 If a local government adopts a zoning bylaw that limits the form of tenure to residential rental tenure, the zoning bylaw in relation to residential rental tenure does not affect the following:
>
> > (a) any lawful bylaw that a strata corporation may pass under Part 8 *[Rentals]* of the *Strata Property Act*;
> >
> > (b) any lawful rule that a housing cooperative may adopt in relation to the rental of housing.

On its face, this provision, by referring to a bylaw that a strata corporation "may pass", arguably makes no distinction between a strata bylaw in effect on the day an RRT zoning bylaw is adopted and a subsequently-enacted strata bylaw. In some cases, assuming both bylaws continue to operate, this could mean housing units are un-rentable on account of a strata bylaw, but cannot be occupied by owners because of a rental tenure zoning rule.

Regardless of any distinction between pre-existing and post-RRT strata bylaws, there is another possible argument, that section 481.2 means strata bylaws effectively override RRT zoning. On this view, owners of strata units subject to strata bylaw prohibiting rentals, regardless of when the strata bylaw is or was enacted, are free to occupy their units even if zoned for residential rental tenure only. This view seems unlikely on a plain reading of section 481.2, but it remains to be seen how a court would treat strata-titled housing units where zoning and strata bylaws would appear to be at odds with one another.

C. The "Down-Zoning" Problem

Does a zoning amendment that restricts tenure to residential tenure amount to a "*de facto* expropriation"? This argument has been alluded to, but as with the case against any other complaint about loss of market value case by zoning changes, there seems to be a complete answer in section 458 of the *LGA*:

> 458 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from any of the following:
>
> > …
> >
> > (b) the adoption of a bylaw under
> >
> > > (i) Division 5 *[Zoning Bylaws]*,

III. HOUSING NEEDS REPORTS

The new sections 585.1 – 585.4 of the *LGA*, enacted at the same time as the residential rental tenure zoning power, might be cited as an example of the Province reminding local governments there's no free lunch. These sections require municipalities and regional districts, by 2022, to complete housing needs reports. The content of housing needs reports is defined by the *Housing Needs Report Regulation*, BC Reg 90/2019, which specifies a long list of detailed information to be included.

Of note for local governments considering exercising the RRT zoning power is s. 8 of the Regulation, which requires local governments to include the following in a housing needs report:

- If available, the following information in each of the 3 most recent census reports:
  - The number and percentage of households in core housing need;
  - The number and percentage of households in core housing need by form of tenure;
  - The number and percentage of households in extreme core housing need; and
  - The number and percentage of households in extreme core housing need by form of tenure;
- A statement about current needs and anticipated needs for each of the following:
  - Affordable housing;
  - Rental housing;
  - Special needs housing;
  - Housing for seniors;
  - Housing for families; and
  - The number of beds in shelters for individuals experiencing homelessness and the number of housing units for individuals at risk of experiencing homelessness.

This section requires the local government in question to identify the number and percentage of "core housing need" and "extreme core housing need". "Core housing need" is defined in the Dictionary, Census Population, 2016, published by Statistics Canada, as:

> A household is said to be in 'core housing need' if its housing falls below at least one of the adequacy, affordability or suitability standards and it would have to spend 30% or more of its total before-tax income to pay the median rent of alternative local housing that is acceptable (meets all three housing standards).

Similarly, "extreme core housing need" "has the same meaning as core housing need except that the household has shelter costs for housing that are more than 50% of total before-tax household income". What is particularly interesting about this section is that local governments must list the number and percentage of these categories by "form of tenure", which has the same meaning as in section 455 of the *LGA*. Local governments could potentially address areas of core housing need, at least in the rental context, with RRT zoning.

The RRT zoning power does not have to be exercised *because* of a housing needs report but local governments would do well to consider whether their RRT zoning objectives align with the areas of need set out in their housing needs report.

IV. THE PROVINCE'S "DAPR" REPORT

In early November, 2019, the Minister of Municipal Affairs and Housing, Selina Robinson, speaking to a room full of planners, provided evidence that at least one of the Province's lawmakers thinks local government development review procedures is a hot planning issue. Minister Robinson indicated the Province's view that onerous local government development review procedures have a role to play in delaying or preventing the creation of new affordable housing. The report summarizes recommendations from a six-month province-wide consultation process, which was phase 3 of the broader DAPR initiative, in the following general topic areas:

- Local government application processes;
- Local government approval processes;
- Development finance tools;
- Subdivision; and
- Provincial referrals and regulatory requirements.

Not surprisingly, the report targets things like "lengthy and complicated review processes", inconsistent requirements and processes between different jurisdictions, staff shortages, lengthy internal and external referral processes, and a lack of understanding about the subdivision processes and the role of the approving officer, and suggests "training" and "checklists" as proposed solutions.

To the Province's credit, there's more. Among its more provocative and far-reaching recommendations, the report mentions alternatives to the public hearing process, increased authority to delegate decisions currently reserved for elected officials, and a review of the whole development permit scheme in the *LGA*. Other recommendations, such as reducing the number of readings required before bylaw adoption, seem less compelling, but are nonetheless labelled as "high" importance. Perhaps some of the questionable rankings will give way in the next phase of this provincial review process: "Initiate Solutions". Regardless, based on the text of the phase 3 report and the fact that a phase 4 is promised, local governments can expect some changes, including perhaps legislative changes, in response to at least some of the recommendations in the DAPR report.

V. DEVELOPMENT PROCEDURES IN COURT

If the Province's attention to local government development procedures isn't enough to convince you it's a hot topic, consider that the City of Vancouver is undertaking a similar, internally-driven review of its procedures, and remember the City found itself defending those procedures at both levels of court. At the end of 2017 the British Columbia Supreme Court said the City was negligent for unreasonably delaying an owner's application to demolish a heritage house, in part because the delay disentitled the owner to compensation for loss of property value caused by a heritage designation. The Court of Appeal's 2019 decision that local governments could not be negligent for slow decisions on permit applications was a relief in that particular case, but should be cold comfort to local governments who do take too long to make decisions on complete permit applications. The Court of Appeal emphasized that, although negligence was not the answer for the disappointed property owners in *Wu*, applicants <u>are</u> entitled to decisions within a reasonable time, and courts can order local governments to make decisions where they fail to do so.

The Court in *Wu* did not provide any guidance on the question of when delays become so long as to warrant an order that a local government made a decision immediately, but the decision should never be taken as permission to delay decisions indefinitely. On that point, the Court in *Wu* reinforced the view that local governments should take the Province's DAPR report seriously, rather than ignoring it because of immunity against negligence claims.

VI. DEVELOPMENT PROCEDURES IN THE WEEDS

Even if local governments could be found negligent for unreasonable delays in processing development applications, would it be a defence to such a claim that the delays were the result of a local government's attempts to follow a byzantine "directive" emanating from the Province itself? Although *Wu* has rendered that question moot, it's hard not to note that hot on the heels of releasing its Development Approval Procedures Review report, the Province also replaced the ever-baffling (to local governments, at least) *Riparian Areas Regulation* with a new directive under the *Riparian Areas Protection Act*: the *Riparian Area Protection Regulation*. This Regulation, which came into force on November 1, 2019, and its predecessors, should be of interest to any local government whose boundaries contain watercourses providing, or linked to, fish habitat, and not just because of the new name.

Local governments are still obliged to regulate development in and around watercourses, in order to prevent damage to fish habitat. This duty is established by section 12(4) of the *Riparian Areas Protection Act* (formerly, the *Fish Protection Act*), which says, under the heading "Provincial directives on streamside protection":

> If a directive under subsection (1) applies, a local government must
>
> > (a) include in its zoning and land use bylaws riparian area protection provisions in accordance with the directive, or
> >
> > (b) ensure that its bylaws and permits under Part 14 of the Local Government Act … provide a level of protection that, in the opinion of the local government, is comparable to or exceeds that established by the directive.

Various iterations of "a directive" referred to in this provision have been in effect since at least 2001, which means local governments must pick (a) or (b). Under (a), a local government must ensure its "zoning and land use bylaws" provide protection "in accordance with the directive". Under (b), often referred to as the "meet or beat" option, the scheme relies on "bylaws and permits" to provide protection that "in the opinion of the local government, is comparable to or exceed that established by the directive". There is a preliminary question whether the local government zoning power could ever include provisions in accordance with the directive, because the directive applies to virtually all land alteration and development, including subdivision, whereas zoning is generally limited to regulating the use of land, and the siting, size and dimensions of buildings and other structures. The more obvious regulatory scheme is a development permit scheme, but again, section 12(4)(a) of the *Act* only contemplates zoning regulations, leaving anything else subject only to the "meet or beat" option in section 12(4)(b).

None of this is new, but as of November 1, 2019, there is a new "directive" for local governments: the *Riparian Areas Protection Regulation*. The new regulation seems in some respects to be an attempt to clear up any misunderstandings about the relationship between the regulation and section 12(4) of the *Act*, by stating that the regulation itself does not apply in relation to a local government that is complying with 12(4)(b) of the *Act* (the "meet or beat" option). However, the regulation does say it applies to a development proposed to occur in a riparian assessment area, in respect of which a local government has the power under Part 14 of the *LGA* to "regulate, prohibit or impose requirements in relation to the development". Again, this would seem to include developments that might be regulated other than by zoning or land use bylaws, but only a zoning or land use bylaw is a candidate for compliance with 12(4)(a) of the *Act* in the first place. Assuming the *Regulation* does apply, it requires either an "approval-based scheme" or a "rules-based scheme", and in either case development near streams must be prohibited unless the local government has received an "assessment report" submitted to the minister by a qualified environmental professional, and the development proceeds only in accordance with the report and any recommendations in it. The summary? Meet the new boss, same as the old boss.

All of this to say two things: first, if the Province really wants local governments to grease the wheels for development approvals, the *Riparian Areas Protection Act*, and not just the *Regulation*, remains ripe for (further) reconsideration; and second, if you're struggling to understand what the Province is trying to say with the new *Regulation*, you're probably in good company.

VII. USER VS. USE

At least since the Supreme Court of Canada's decision in *R. v. Bell*, it has become an enduring planning law myth that zoning bylaws can target "uses" but cannot target "users". Even the British Columbia Court of Appeal, most recently in *Bulkley-Nechako (Regional District) v. FRD Holdings Inc.,* 2019 BCCA 122, has been guilty of misunderstanding the more subtle ratio of the *Bell* case. In *FRD Holdings* the Court declared it "well-settled law that a bylaw may not, without specific provision, regulate the users of property."

In another decision from 2019 the British Columbia Supreme Court undertook a more careful review of the law in this area. In *1114829 B.C. v. Whistler (Municipality),* 2019 BCSC 752 [*Whistler*], two numbered companies challenged rental pool covenants, a Business Licence Bylaw, and a Zoning Bylaw, in part on the basis that the covenants and bylaws impermissibly regulated users rather than the use of land. The petitioners relied heavily on the *Bell* case but the Court in *Whistler* said *Bell* was not so much concerned with a user/use distinction as such, but rather with the unreasonable or inequitable consequences of such a distinction.

The Court in *Whistler* was not going out on a limb; it cited previous decisions of our Court of Appeal that had already considered *Bell*, and decided the Supreme Court of Canada's real concern was with the unreasonable consequences of any zoning rule. Ultimately, the Court in *Whistler* reached the following conclusion:

> [147] There is no clear demarcation between use versus user. The jurisprudence is nuanced. Where there is a user distinction, courts typically focus on the consequences of the distinction rather than the fact of distinction per se. The underlying concern of the courts is whether the regulation of the user is reasonable or whether distinctions are based on irrelevant considerations regarding the purpose or manner of use. In other words, every use of land involves a user. There is no binary distinction but a continuum of use that must be decided in each case.

If planners can take anything from this passage it's that there is not, and never has been, a rule against user distinctions in zoning bylaws. The rule is that local governments can't use the power to regulate land use unreasonably. So, for example, in *School District No. 61 v. District of Oak Bay,* 2006 BCCA 28 [*Oak Bay*], the Court overturned a bylaw that purported to authorize public schools but not private schools because the Court could find no meaningful distinction between the use of land by a public or private school – the use of land as a school was the same.

Oak Bay is distinct from *Whistler*, where the petitioners were concerned that they could not operate their rental units on an *ad hoc* basis, but were forced to enter into rental pool arrangements. The rental pool covenants and bylaws prohibited the petitioners from operating their units, for example, through websites such as Airbnb. This use, the Court found, was markedly different than a hotel-style accommodation that was contemplated by the zoning. In other words, what the petitioners tried to characterize as an unlawful "user" distinction was in fact a proper regulation in respect of land use, and therefore a valid zoning rule.

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