YOUNG ANDERSON
BARRISTERS & SOLICITORS

JUNE 2024 VOLUME 35, NUMBER 2

NEWSLETTER
LGMA CONFERENCE ISSUE

Bill 16 – Part One: An Overview of Tenant Protections

Bill 16 – 2024: Housing Statutes Amendment Act, *2024, ("Bill 16"), received royal assent on April 25, 2024. Bill 16 follows a series of other bills introduced in the fall of 2023 (Bills 44, 46, and 47), which contain provisions generally designed to increase housing supply by removing zoning constraints, especially on land within existing settled areas and close to transit, and provide new and revised tools for local governments to finance growth. Bill 16 introduces further changes to the* Local Government Act, Vancouver Charter, *and* Community Charter, *introducing new authority for tenant protection, inclusionary zoning, and transportation demand management bylaws, and modifying existing authority for density bonus ("benefits") zoning and the imposition of works and services requirements in connection with the subdivision and development of land. This article, is the first of a three-part series (all conveniently contained in this YA Newsletter) exploring the contents of Bill 16. Part one reviews the new tenant protection powers. Part two looks at density bonusing and inclusionary zoning. Part three addresses new and improved works and services authority, as well as transportation demand management measures.*

Tenancy Protection Measures

It is no secret that a frequent consequence of residential redevelopment is the termination of existing tenancies and significant increases in the amount of rent payable under tenancy agreement for any new rental housing. Section 242 of the *Strata Property Act* gives local governments one tool to curb this trend by requiring approval for the subdivision of previously occupied residential units, and local governments have gone further with various tenant protection policies and even bylaws designed to curb "renovictions" and limit rent increases between tenancies (for example, *0733603 B.C. Ltd v City of Vancouver*, 2022 BCSC 1302 and Bill 27 – *Municipalities Enabling and Validating (No. 5) Amendment Act*, 2024). Broadly speaking, Bill 16 enters the same territory. It provides, through amendments to section 63

of the *Community Charter*, specific authority for municipalities to regulate for the protection of tenants whose tenancies are terminated by proposed redevelopment.

Under the new provisions, councils may, by bylaw, require owners to provide tenants with one or more of the following (s. 63.2 of the *Community Charter*):

(a) notices or information with respect to a redevelopment, a proposed redevelopment or a matter referred to in this section;

(b) financial compensation for the termination of tenancy agreements;

(c) financial or other assistance to find and relocate to comparable replacement units;

(d) the opportunity to exercise rights to enter new agreements for the rental of comparable units in property in which owners have an interest.

A tenant protection bylaw may also regulate tenancies by:

(a) providing for the nature and extent of compensation and assistance, the manner in which it is determined, the manner in which it is given to tenants, and the period in which it must be given;

(b) defining the characteristics of comparable replacement units;

(c) requiring owners who have, or will have after redevelopment, new units available for rent to offer to rent those units to tenants in priority to other persons, and at a rental rate that is less than the rate provided for under an applicable zoning bylaw or housing agreement.

Redevelopment is defined in the new legislation as:

(a) to demolish residential property for the purpose of constructing a new structure on the parcel on which the property was located;

(b) to partially demolish residential property to the extent that one or more rental units within the residential property are completely and irreversibly destroyed.

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Two things stand out about this definition. First, to be a "redevelopment", work on residential property must involve either complete demolition or such demolition that one or more rental units are completely and irreversibly destroyed. Thus, other forms of work on residential property involving extensive construction or renovation, but without an act of demolition, are likely excluded from the ambit of tenant protection bylaws. Second, paragraph (b) suggests that tenants may benefit from tenant protection bylaws even where their unit is not demolished by the redevelopment, so long as their tenancy agreement was terminated in relation to it.

Tenants may benefit from tenant protection bylaws even where their unit is not demolished by the redevelopment, so long as their tenancy agreement was terminated in relation to it.

The new legislation does, however, allow the Province to place limits on this new municipal authority. Section 63.3(1) states that a bylaw enacted under s. 63.2 does not apply to the redevelopment of "prescribed classes of property", enabling the provincial government to remove certain property redevelopments from the ambit of tenant protection bylaws through regulations. So far, no regulations have been enacted.

Furthermore, under s. 63.3(2), if a tenant is entitled to receive financial compensation under the *Residential Tenancy Act* in relation to a redevelopment, then the amount received must be deducted from the amounts payable by an owner under a tenant protection bylaw as financial compensation for the termination of their tenancy agreement or financial assistance to find and relocate to a comparable replacement unit.

Municipalities (though not regional districts) are also permitted to designate development permit areas in their official community plans for the "mitigation of the effects of displacement on tenants who will be or have been displaced from their rental units in relation to a redevelopment or proposed redevelopment, as those terms are defined under section 63.1 of the *Community Charter*". Under s. 491(11) of the *Local Government Act,* a development permit issued by a municipality in a redevelopment protection area may include requirements to comply with all or part of a tenant protection bylaw made under s. 63.2 of the *Community Charter*.

Some of the authority now available to municipalities mirrors tenancy protection measures already available under the *Residential Tenancy Act*, such as tenancy compensation, while other features of Bill 16 represent new forms of tenancy protection, such development permit areas designated for tenant protection. Municipalities, should they choose to enact tenant protection bylaws, will also have the usual mechanisms of bylaw enforcement to ensure compliance with those bylaws: bylaw notice, enforcement by ticketing, long-form prosecution, and injunctive proceedings to require specific performance by property owners.


Christopher Gallardo Ganaban & Eman Jeddy

Bill 16 – Part 2: Density Bonusing and Inclusionary Zoning

In Part 2 of the Bill 16 series, we will examine the amendments to the existing density benefits zoning scheme (a.k.a. density bonus zoning), and the new authority for local governments to require the provision of affordable and special needs housing even outside any density benefits scheme ("inclusionary zoning").

Density Benefits Zoning

Bill 16, the *Housing Statutes Amendment Act*, 2024 (which received royal assent April 25th) amends section 482 of the *Local Government Act* (LGA) to clarify the use of density bonuses and aligns them with inclusionary zoning. It introduces several new conditions and requirements:

1. Land in transit-oriented areas, (defined as areas within 400 metres of an existing or planed bus stop or bus exchange, or a West Coast Express station, and within 800 metres of an existing or planed passenger rail station other than a West Coast Express station) must not have a conditional density rule (density bonus) allowing higher density that is less than or equal to the density of use and the density corresponding to the size and dimension of buildings and other structures set out in regulations for transit-oriented areas.

2. Higher density entitlements under a conditional density rule must not be less than or equal to any higher density provided to the developer under an affordable and special needs housing zoning bylaw.

3. Where conditions for the provision of affordable and special needs housing units are imposed in a bylaw, those conditions must include requirements regarding the number of bedrooms in the units and their ownership and management (the repealed subsection included requirements regarding the number, kind and extent of the housing). If a zoning bylaw imposes such conditions, it must also specify the following:

   a. the required portion of affordable and special needs housing units in a development, defined in the zoning bylaw as either a proportion of all housing units or a percentage of the gross floor area of the residential component of a development;

   b. the form of tenure (ownership or rental) for these units;

   c. the affordability criteria, including sales price or rent; and

   d. the duration of time during which the units must comply with these conditions.

4. A zoning bylaw may permit developers, in certain circumstances set out in the zoning bylaw and at the option of the developer, to make payments in lieu of meeting conditions for affordable and special needs housing units.

5. New consultation and analysis requirements when developing or amending density benefits zoning bylaws. Local governments must provide at least one opportunity for consultation with affected parties. The legislation does not require any consultation to repeal a density benefits zoning bylaw. Regulations regarding notice requirements, the process for consultation, prescribing persons, public authorities and organizations that must be consulted, and circumstances in which no consultation is required may be established by the Lieutenant Governor in Council.

6. Local governments must undertake a financial feasibility analysis and consider the most recent housing needs report when adopting or amending these bylaws.

The transitional provisions (section 797 of the LGA) require local governments with existing density benefits zoning bylaws to amend them by a date yet to be prescribed to align with Bill 16's amendments. This includes amendments related to density in transit-oriented areas, mandatory conditions for affordable and special needs housing units, permitting payments in lieu of meeting conditions, consultation on density benefits zoning bylaws, and analysis and considerations for such bylaws.

If a local government has a proposed density benefits zoning bylaw that has been given first reading and subsequently adopted, they must also amend it by the prescribed date. Certain requirements, such as the annual report, do not apply before the prescribed date. Additionally, a local government is exempt from undertaking a financial feasibility analysis if an equivalent analysis has been or is being conducted. The Lieutenant Governor in Council may prescribe a date for these provisions on or after June 30, 2025.

Inclusionary Zoning

Bill 16 includes new legislation for the provision of affordable and special needs housing units. Prior to Bill 16, the LGA empowered local governments to establish density benefits to incentivize the provision of affordable and special needs housing and to enter into housing agreements with landowners to secure such housing, as well as designate areas for affordable and special needs housing with consent of the property owner. We have already set out some of the changes that Bill 16 has made to density benefit rules, but it also allows for other changes to how local governments may require and manage affordable and special needs housing.

The LGA under section 482.7 now authorizes local governments to adopt zoning bylaws which can, among other things, require developments to include affordable and special needs housing units, establish requirements for these units, create density benefit-like schemes where lands are subject to these requirements (seemingly unrestricted by some transit-oriented area requirements), and provide alternative ways to satisfy the obligation to build these types of housing.

Just as with a density bonusing bylaw, where a zoning bylaw requires affordable and special needs housing, it must also establish requirements respecting: the form of tenure, the affordability of the units, and the length

of time which the units are subject to these requirements. In order to secure these requirements, the LGA now requires the local government and the property owner to enter into a housing agreement prior to a building permit being issued.

Similar to the new density benefits zoning, local governments must also undertake consultation during the development of the new zoning bylaw by providing one or more opportunities it considers appropriate for consultation with persons, public authorities, and organizations that will be affected by the zoning bylaw. The local government must also undertake a financial feasibility analysis, consider the most recent housing needs report, consider whether the bylaw will deter development, and meet any other prescribed requirements.

The new legislation for both the density benefits and affordable and special needs housing zoning allows developers to avoid meeting conditions in the density benefits zoning or placing the required housing units on the specific site being developed by providing the required housing units by agreement on other lands or, where the option exists and the developer elects, paying money to the local government equal to the capital costs of providing the benefits/required housing. Any monies received in such a manner must then be placed in an appropriate reserve fund.

Information, considerations, and analysis used to adopt or amend either of the bylaws described above must be made available to the public upon request. Additionally, before June 30th of each year, a local government which has adopted either of these bylaws must prepare, consider, and make available to the public a report detailing the amenities or housing units provided under these zoning bylaws, monies received, and any expenditures under the respective reserve funds.


Timothy Luk & Alexandra Greenberg

Bill 16 – Part 3: Infrastructure and Transportation Demand Management

Among the legislative changes implemented through Bill 16, the Housing Statutes Amendment Act, *2024 (which received Royal April 25th), local governments now have expanded authorities to secure transportation infrastructure, a new servicing officer position, and the authority to require transportation demand management measures. Part 3 of this Bill 16 series will focus on these areas of expanded local government authority, as well as a survey of revisions to the works and services authority.*

Infrastructure: Sections 506, 506.01, 506.02 & 506.03

Prior to Bill 16 receiving royal assent, section 506 of the *Local Government Act* empowered local governments to regulate and require the provision of works and services in respect of new subdivisions within their boundaries. This included roads, water, sewage, and drainage.

Under the new section 506, now divided into sections 506, 506.01, 506.02 and 506.03, local governments can require, by bylaw, a wider range of site-specific works and services in respect of new subdivisions and developments. Examples include bicycle parking facilities, transit shelters, waste disposal and recycling containers, public transit and sustainable design features providing for energy and water conservation, reduction in greenhouse gas emissions and climate resilience. Furthermore, the new section 506 also requires local governments to require specific factors when developing bylaws, and authorizes the Lieutenant Governor in Council to make regulations prescribing specific requirements in relation to works and services.

Section 506.01 comprises the provisions that were encompassed within subsections (4) and (5) of the repealed section 506 and section 506.02 comprises the provisions that were encompassed within subsections (6) and (7) of the repealed provision.

Section 506.03 comprises the provisions that were encompassed within subsections (8), (9), (10) and (11) of the repealed section 506 and revises subsections 506 (8) to (11) so that, whereas under the repealed section 506 a local government could only require the works specified in section 506 that are directly attributable to the subdivision or development, requirements under section 506.03 "may be made only to the extent that they are directly attributable to the development of land". While "subdivision" has been taken out, the language ostensibly also expands the authority to land generally.

Transportation Improvements: Sections 513 & 527.1

Bill 16 amends the LGA by adding the new sections 513.1 – 513.3 and 527.1. In a nutshell, these provisions grant local governments new authorities to require a range of transportation-related measures that would apply to new developments, with the goals of reducing dependence on motor vehicles and increasing sustainable transportation options.

Sections 513.1 to 513.3

Pursuant to section 513, an approving officer could require an owner to provide, as a condition of subdivision approval, a portion of the land to be subdivided for highway use. Bill 16 expands this authority so that approving officers can, pursuant to section 513.1, require, as a condition of subdivision approval, a portion of land for transportation infrastructure that supports walking, bicycling, public transit or other alternative forms of transportation.

The newly added section 513.2 establishes a role of "servicing officer", which can be designated by a local government by bylaw and from a class of persons prescribed by regulation (no regulation as of yet), and confers powers on a servicing officer to require, as a condition of issuing a building permit, a portion of land for highway use. The newly added section 513.3 allows a servicing officer to require an owner to provide land, as a condition of issuing a building permit, for the purposes of constructing and installing sustainable design features and transportation infrastructure. Collectively, sections 513.1 to 513.3 provide local governments with more opportunity to consider, at various stages of the development process, whether land within the development could support alternative forms of sustainable transportation.

Section 527.1

The new section 527.1 creates a new authority under which local governments may, by bylaw, define and require transportation demand management measures in respect of development of land. This authority is to be used for the purpose of improving the movement of people and goods, reducing motor vehicle dependence and increasing sustainable transportation. "Transportation demand management measure" is broadly defined as including, without limitation, the following:

(a) Electric vehicle charging stations, end-of-trip facilities, secure bicycle parking facilities and secure scooter parking facilities;

(b) Any other measure or thing to advance transportation demand management as prescribed by regulation.

To facilitate the purpose of transportation demand management, local governments may enact bylaws which do one or more of the following:

(a) Require owners or occupiers of any land, or any building or other structure, to provide one or more transportation demand management measures;

(b) Establish design standards for transportation demand management measures required under paragraph (a);

(c) As an alternative to complying with a requirement to provide transportation demand management measures under paragraph (a), permit, at the option of the owner or occupier of the land or the building or other structure, the payment to the local government of any amount of money specified in the bylaw;

(d) Authorize the payment of money out of the reserve fund established elsewhere in section 527.1.

Requirements and restrictions of transportation demand management bylaws are set out in subsections 527.1(3) through (6). Further requirements and restrictions may be established by regulation of the Lieutenant Governor in Council.

Further, section 527.1 establishes a reserve fund as an alternative to providing transportation demand management measures. Money in the reserve fund may only be used for paying capital costs of construction or debt associated with the construction of transportation demand management measures, including through a partnering agreement.

Finally, subsections 527.1(10) and (11) provide that a local government must prepare a report, which must be made available to the public, respecting the previous year in relation to how the funds in the reserve fund were used and the projected timeline for future projects.

Local governments now have the authority to require an increased range of site-specific works and services, including transportation demand management measures, in new developments. These expanded authorities give local governments the flexibility to assess how each development can support municipal works and sustainable transportation options at various stages of the development process.


Julia Tikhonova & Ayesha Ali

Haida Nation's title to Haida Gwaii recognized by the Province by agreement and legislation

April 2024 was a month of historic development for the island region of Haida Gwaii. First, on April 14, the Province of British Columbia (the "Province") and the Haida Nation (the "Nation") entered into the Gaayhllxid/Gíihlagalgang "Rising Tide" Haida Title Lands Agreement (the "Agreement*"), which "recognizes and affirms" the Nation's Aboriginal title to Haida Gwaii, and sets out a transitional procedure to reconcile overlapping law and jurisdiction between the Nation and the Province in light of the newly recognized and affirmed title. Second, on April 22, the* Haida Nation Recognition Amendment Act, 2024 *(the "Act") was introduced to the British Columbia legislative assembly. The Act confirms the Agreement, and puts the Province's recognition of the Nation's title to Haida Gwaii into law. As with the Agreement, the Act supports a transitional procedure to address overlapping jurisdiction on Haida Gwaii.*

The Agreement and Act represent a major milestone in the Nation's decades-long effort to have their title in Haida Gwaii formally recognized by the Province, through both negotiation and litigation. While a major milestone, both the Province and the Haida have said that the Agreement and Act do not represent a complete conclusion to this effort, as a number of elements of the implementation and impact of the Nation's title to Haida Gwaii remain to be worked out.

Background

Understanding the significance and potential impacts of the Agreement and Act starts with understanding what Aboriginal title is. Aboriginal title has three significant features:

- Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes. Lands held pursuant to Aboriginal title can be used for a broad variety or purposes including, but not limited to, traditional practices or customs and to meet present day needs of the community that holds title and can be mined, harvested, and otherwise exploited.

- Titled lands cannot be used in a manner that is irreconcilable with the nature of the title holder's attachment to the lands. To put it another way, the lands cannot be used or alienated in a way that deprives future generations of the control and benefit of the land.

- Land held pursuant to Aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown.

For over a century, the Haida people have claimed title to Haida Gwaii – a group of over 200 islands, large and small, west of the northern coast of British Columbia, totaling approximately one million hectares – and the waters surrounding it. The Nation asserted its claim to title through the courts and tribunals through the 1980s and 1990s, notably entering into the *Gwaii Haanas Agreement* with the Canadian federal government in 1993, which provided a cooperative management approach to conservation over contested territory.

For over a century, the Haida people have claimed title to Haida Gwaii.

In 2002, the Nation launched a civil claim against the Province and Canada seeking a declaration of Aboriginal title over Haida Gwaii. In 2004, the Supreme Court of Canada issued the landmark decision *Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73, ("*Haida*") which held that the honour of the Crown imposed a duty on the Crown consult and accommodate Aboriginal interests even where Aboriginal title has not been proven, and set out the spectrum of required consultation depending on the nature of the claim. Although *Haida* did not recognize the Nation's title to Haida Gwaii, the Court noted the strength of the Nation's claim to title, stating that "the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation" (*Haida* at 69), and strongly suggested the Province should negotiate with the Nation towards reconciliation.

The title claim was placed in abeyance by agreement in 2008, to allow for negotiations between the Province and the Haida Nation. As these negotiations ultimately proved unsuccessful, the Haida's litigation resumed in 2012, with the first phase of the claim slated to go to trial in May 2026. While this litigation remains pending, negotiations and agreements between the Province and the Nation continued. In 2021, the Nation, the Province and the federal government entered into the *GayGahlda "Changing Tide" Framework for Reconciliation*, which set out an incremental approach for negotiating reconciliation agreements. This framework led to the three parties entering into the Nang K'uula • *Nang K'úulaas "Recognition Agreement"* in April 2023, and the passage of the *Haida Nation Recognition Act* in May 2023, which together recognized the Nation's inherent rights of governance and self-determination.

The Agreement and the Act

The Province and the Nation entered into the Agreement on April 14, 2024. Going beyond the recognition of the Nation's rights of governance and self-determination seen in the *Haida Nation*

Recognition Act, the Act explicitly recognizes that the Nation holds Aboriginal title to Haida Gwaii. The Agreement's stated purpose is twofold:

- to recognize and affirm Haida Aboriginal title to Haida Gwaii
- to set out an orderly process for reconciliation of jurisdiction and laws on Haida Gwaii

The Agreement also clarifies three things it does not purport to alter. First, the Agreement provides that fee simple interests in land on Haida Gwaii will continue to be recognized, meaning that private property rights on Haida Gwaii will continue to exist. However, any fee simple lands that would otherwise escheat back to the Province will be transferred to the Nation. Second, local government and village councils will continue to exercise their jurisdiction. The Agreement notes that local governments and the Nation are still entitled to enter into agreements on matters of mutual interest. Third, the delivery of public services on Haida Gwaii will remain unaltered. Nothing in the Agreement affects ongoing provision of public services provided by either the Province or local governments with respect to Haida Gwaii.

The Agreement acknowledges overlapping jurisdiction held by both the Nation and the Province over Haida Gwaii, and states that the exercise of these jurisdictions will be reconciled through a transition process, described in an appendix to the Agreement. The Agreement (perhaps somewhat optimistically) estimates this process to take two years, with initial focus being on land and resource decision-making on Haida Gwaii.

The Agreement provides that the Nation or the Province may provide written notice of readiness to negotiate on a specific subject matter, which may be included as a future schedule to the Agreement. The parties are then required to seek and reach agreement on this subject matter within 12 months of the notice. This 12-month period can be varied by agreement by the parties, and in the event that an agreement cannot be reached, the parties are required to enter into a two-month dispute resolution process. Notably for local governments, the Agreement states that the Nation and the Province will work with local governments to "review Local Government boundaries during the Transition Process and will identify options and approaches consistent with the recognition of Haida Aboriginal Title".

The Province appears to be attempting to strike a delicate balance by both recognizing and affirming the Haida's Aboriginal title over Haida Gwaii while also allowing private land ownership on the island to continue.

Although the federal government is not party to the Agreement, the Agreement does recognize the ongoing role and responsibility that the federal government has in relation to select matters, such as income tax and marine matters. The Agreement also does not address or seek to alter the federal government's interests on Haida Gwaii.

Takeaways

The Province appears to be attempting to strike a delicate balance by both recognizing and affirming the Haida's Aboriginal title over Haida Gwaii while also allowing private land

ownership on the island to continue. As noted, Aboriginal title provides the titleholder with the right to exclusive use and occupation of the titled land. However, private landowners also have exclusive use and possession of the land they own. The Agreement attempts to addresses this potential conflict by indicating that the Nation will honour private ownership and that the Nation consents to such ownership "continuing under British Columbia jurisdiction". While this appears to indicate that private ownership will continue as usual on Haida Gwaii, it remains to be seen if the Nation will have the jurisdiction to regulate the use of private property.

It bears mentioning that the idea of Aboriginal title as conferring regulatory jurisdiction on the Haida Nation, rather than proprietary rights, is a novel legal concept that appears to go beyond what Canadian courts have said on the issue. The potential for conflict between the Haida and Provincial laws appears to be contemplated, with the Agreement specifying that each entity will exercise its jurisdiction in accordance with their own laws, and that the exercise of such jurisdiction will be reconciled through the transition process.

The Agreement also provides that existing local governments will continue to exercise jurisdiction under provincial laws and that the Nation and the Provincial government will work with the local governments to identify options and approaches consistent with the recognition of Haida Aboriginal Title. The Agreement identifies "Haida Title" as "the collective inherent right and responsibility of the Haida Nation to maintain, caretake, protect, restore and renew Haida Gwaii and the realms of interconnected existence that are reflected in Haida culture, the hereditary clan system, and the *Constitution of the Haida Nation*." Given the broad and general nature of this definition, it is difficult to determine what the Nation's exercise of its jurisdiction will look like in a practical sense. Neither the Act or the Agreement offer much in the way of specifics in this regard, so we are left to speculate as to what the Nation's jurisdiction will be and the extent to which such jurisdiction will overlap with the jurisdiction of the Province and local governments.

As the Province moves toward its project to "take all necessary measures to ensure that the laws of British Columbia are consistent" with the United Nations Declaration on the Rights of Indigenous Peoples, as set out at section 3 of the *Declaration on the Rights of Indigenous Peoples Act*, we will no doubt see more agreements like this one.



Jordan Adam, Nick Falzon & James Barth

Refresher on Bylaw Enforcement Options

Bylaws serve an indispensable role in organizing and administering our communities. It follows that their enforcement and the penalties that can be attached to them provide a portion of that value – a $350 bylaw notice may not be an eye-popping amount, but it's generally sufficient to

signal to a property owner that they are in violation of a zoning bylaw or that their car is parked improperly in the street. Of course, there are those for whom a simple bylaw notice does not serve to obtain compliance, in which case local governments can resort to bigger (and costlier) sticks. The purpose of this article is to review the enforcement tools that are available to local governments in BC and survey a handful of the pros and cons associated with each one, so when you're looking to tidy up the bylaw violations in your community, keep this article in mind.

Tickets: Bylaw Notices and MTIs

The first two options are the bylaw notice and the municipal ticket information ("MTI") powers, and while they share some similarities, they do differ on three important points. The first is the fine that can be imposed. For a bylaw notice, the maximum fine is $500, whereas MTIs can impose fines up to $3000. The second distinction lies in the dispute resolution process.

Bylaw notices are governed by a simplified and streamlined adjudicative system, marked by more lenient rules of evidence. In almost every case an adjudicative proceeding leads to one of two outcomes: either the adjudicator validates the contravention, thus upholding the penalty, or they determine no contravention occurred, resulting in the cancellation of the bylaw notice. As was recently seen in *Peace River (Regional District) v. Pringle*, 2023 BCSC 1172, adjudicators have very little discretion in terms of the penalty that is imposed upon hearing a dispute – in that case, the Regional District issued a bylaw notice to the respondents for failing to comply with their zoning bylaw. The adjudicator noted that the respondents were doing the "best they can" to comply with the zoning bylaw, and so, despite finding that there was a contravention, cancelled the bylaw notice. On judicial review, the court struck down the adjudicator's decision for exceeding her jurisdiction under the *Local Government Bylaw Notice Enforcement Act*. If an adjudicator finds that there was a contravention, they must uphold the penalty.

When an MTI is disputed, the matter is instead heard in provincial court. Judges may relax the rules of evidence or adopt procedures to expedite the hearing at their discretion, but otherwise the rules of evidence apply. More importantly, a provincial court justice will have more discretion in terms of the remedies that they can impose than an adjudicator, because they are not subject to the *Local Government Bylaw Notice Enforcement Act*. As such, while MTIs can be used to impose a higher fine, the enforcement proceedings may be significantly more onerous if an MTI is disputed.

The third distinction between bylaw notices and MTIs is that local governments have the option to adopt a screening officer for the bylaw notice system. The screening officer reviews bylaw notices that are disputed, and is enabled to cancel or reduce fines, or create a compliance agreement with the recipient. Compliance agreements can serve to form a collaborative relationship with the recipient of the bylaw notice to remedy the circumstances that led to the contravention, as opposed to the adversarial circumstances that can arise when there is a dispute over a bylaw notice.

Court Remedies: Injunctions and Provincial Court Prosecutions

Where a bylaw notice or MTI is insufficient to obtain compliance, local governments are entitled to seek injunctive relief from the BC Supreme Court. Many of these proceedings can be commenced by petition, on the basis

of affidavit evidence without the need for live evidence or extensive discovery. The local government must show a clear breach of a bylaw, after which injunctive relief will typically be granted, except in "exceptional circumstances". Where Charter of Rights and Freedoms issues are raised, for example in many homeless encampment injunction cases, obtaining the order will be more difficult since the local government must show that the balance of convenience in the interim lies in favour of enforcement of the challenged law. Such cases will also often be converted to full trials, which are more time-consuming and expensive than summary petition proceedings.

Supreme Court proceedings are typically more expensive than a bylaw notice or unchallenged MTI, but obtaining an injunction is often taken more seriously by the offender and also allows a municipality to pursue further and more substantial penalties through contempt of court proceedings if necessary (although such fines are payable to the Province, not the local government itself).

Bylaw notices, MTIs, and injunctions are the most readily available enforcement tools, but local governments can also prosecute the contravention of a bylaw using a long-form information under the *Offence Act*. These proceedings take the form of a Provincial Court prosecution, as a full trial with live witness evidence and fulsome disclosure, with a burden of proof beyond a reasonable doubt. Penalties may take the form of fines up to $50,000 or imprisonment for a period of up to six months (almost never seen in practice). Upon convicting an individual, ancillary orders under section 263.1 of the *Community Charter* are also available. Usually, all parties involved in these proceedings are represented by legal counsel, and because of the time and expense associated with a long-form information proceedings, they often are not the preferred tool. Nevertheless, they remain valuable in certain cases.

Remedial Action Requirements

One additional tool that local governments may use to obtain compliance with their bylaws should be mentioned: the remedial action requirement ("RARs") under the *Community Charter*. For a property that a council considers to be hazardous or a source of nuisance, for example, the local government is empowered to issue an RAR against the owner or occupier of that property, in the form of an order which directs certain steps to be taken to remove or remediate the hazard or nuisance. If the owner or occupier fails to comply, section 17 of the *Community Charter* further provides that a local government may fulfill the requirement at the expense of the person against whom the RAR was issued, so long as council authorizes such default steps as a term of the RAR. This procedure may be attractive in that it allows orders to be made by council without the need to attend court, and may provide an avenue for local governments to take direct action. However, relying on the section 17 authority to carry out the requirement in default should be undertaken cautiously, as local governments can be held liable for any damage not authorized by the RAR that occurs as a result of entering onto a property and performing the work.

There are pros and cons to any enforcement mechanism, and a prudent local government will be prepared to use any of them depending on the circumstances. Bylaw notices or MTIs are often sufficient, and are the most cost-effective means of enforcement. However, where a bylaw notice or MTI is insufficient, an injunction, a long form prosecution, or an RAR may be employed.

Nate Ruston

(Es)cheating has Consequences: Escheat and its Implications for Local Governments

One somewhat arcane property law concept that can be relevant to local governments from time to time is the law of escheat. While the Latin roots of the word, and its roots in the allodial title system in England after the Norman Conquest, are beyond the scope of this newsletter article, for our purposes it is sufficient to note that an escheat is the reversion of property to the government. An escheat may occur, for example, when an individual dies without lawful heirs, or when a company or society is dissolved. The result of an escheat may therefore be that the government takes a sort of ownership of land or other assets owned by the individual at the time of death or other legal entity at the time the entity is dissolved.

The British Columbia Escheat Act deals with certain rights and powers of the government relating to escheats. Some of these powers were considered in the Court of Appeal's recent decision in *Mowatt v. British Columbia (Attorney General)*, 2024 BCCA 157 ("*Mowatt*").

Mowatt was an appeal by Mr. and Mrs. Mowatt from judicial review of the Deputy Attorney General's ("DAG") decision rejecting the Mowatts' claims for transfer of a property (the "East Lot") to them and ordering a blind auction to occur between the Mowatts and the Corporation of the City of Nelson. In 1992, the Mowatts had purchased a parcel adjacent to the East Lot (the "West Lot"), and over time had used both the West Lot and the East Lot for residential purposes. Ownership of the East Lot was the subject of litigation, and in 2017 the Supreme Court of Canada held that the East Lot had escheated to the Crown in 1930 or 1931.

Under the *Escheat Act*, the Attorney General may restore escheated land to a person; to transfer land to a person who has a legal or moral claim on the person to whom it had belonged; or to transfer land to reward a person who discovers the escheat or forfeiture. The *Escheat Act* also permits the Attorney General to give a preference, in making a sale of escheated land, to a person who has a legal or moral claim on the person to whom the land belonged.

The Court of Appeal allowed the Mowatts' appeal, holding that the DAG's decision did not bear the "hallmarks of reasonableness" – justification, transparency and intelligibility – which the parties were entitled to expect. The Court of Appeal stated that the DAG failed to address the Mowatts' moral claim in light of the constraints imposed by the entire legal and factual context; failed to state a conclusion on whether such a claim was shown; failed to find whether the Mowatts had discovered

the escheat; and, assuming they had, failed to explain why discovery alone was insufficient to merit transfer to the Mowatts.

While the *Mowatt* case represents just one example of potential implications of an escheat, a broader takeaway for local governments when considering escheat is the importance of conducting searches of the entities that a local government intends to contract with, not only when dealing with land but for all agreements.

The British Columbia *Business Corporations Act* provides that if when a company is dissolved, the company has an asset that has not yet been distributed, that asset vests in the government unless (a) the asset is one in which the company is a joint tenant, in which case the asset vests in the other joint tenant, or (b) the asset is land located in British Columbia, in which case the asset is (subject to paragraph (a)) deemed to escheat to the government under section 4 of the *Escheat Act*. With application to BC societies, the British Columbia *Societies Act* includes similar provisions to the aforementioned provisions of the *Business Corporations Act*.

In seeking to avoid the potential consequences of dissolution (including escheat), it is prudent that local governments always conduct searches of the entity they are contracting with prior to entering into the contract.

Dissolved BC companies and societies have no legal status to enter into contracts, and accordingly, dissolution of those entities may affect not only the status of assets that are subject to an agreement with a local government, but also the legal status of the agreement itself. That being the case, in seeking to avoid the potential consequences of dissolution (including escheat), it is prudent that local governments always conduct searches of the entity they are contracting with prior to entering into the contract.

One example of when such a search may have proved useful was in the case of *Saini v. Grand Forks (City)*, 2011 BCSC 320. In that case, the City auctioned a property at the 2008 tax sale and the Sainis were the successful purchasers. Approximately one month after expiry of the tax sale redemption period, the City learned that the company had been dissolved shortly before the tax sale for failing to file the required annual corporate reports. The City took the position that the property had escheated to the Crown prior to the tax sale, and therefore the tax sale was nullified. However, the Court noted that dissolved corporations are routinely revived, and that a company that is restored is deemed by the *Business Corporations Act* to have continued in existence as if it had not been dissolved. The Court held that the temporary escheat at the time of the tax sale did not nullify the sale, and ordered the City to complete the sale to the Sainis.

Had the City been aware prior to the tax sale that the company that owned the property had been dissolved, the City may have conducted their affairs differently and that case may have never come before the courts.

Jacob Lewin

The Benefits of an Updated Survey Plan When Dealing with Waterfront Properties

Land abutting a public body of water is affected by the natural forces of accretion and erosion, which can alter the legal boundaries of waterfront property. Local governments dealing with waterfront property should consider obtaining an updated survey plan if the property hasn't been surveyed in many years. Doing so can help avoid some pitfalls of relying on old surveys.

In British Columbia, the owner of land abutting a public body of water – often referred to as an upland property – enjoys certain legal rights known as riparian rights. Riparian rights include the right of an upland owner to protect their land from erosion, and to access the water from their upland property. When the natural processes of accretion or erosion occur, riparian rights can also change the physical location of the boundaries of an upland property. Local governments should be particularly mindful of this possibility when dealing with upland property.

The owner of upland property owns the land up to but not beyond the "natural boundary", which is the visible high water mark of the adjacent body of water. This boundary can shift over time through the forces of accretion and erosion, either to the benefit or detriment of the upland owner.

An owner of upland property becomes the owner of any land that has naturally accreted upon their property. The key is that the accretion has to be natural – land that is gradually and imperceptibly accreted over many years through natural forces will become part of the upland property and is automatically included in the title held by the registered owner. Fill that is artificially placed by machinery does not qualify as accreted land.

The same concept works in reverse: just as an upland owner can benefit from accretion (their land gets bigger), upland owners can also lose land due to erosion. Natural forces that slowly erode the upland property and push the natural boundary inland reduce the size of an upland parcel. If an upland property has experienced accretion or erosion, the existing survey plan for that property will no longer accurately reflect the actual physical location of the property's legal boundary, because that legal boundary is defined by the natural boundary which is, by definition, an ambulatory boundary. The longer it has been since the actual location of the natural boundary was surveyed, the more likely it is that accretion or erosion will have occurred in the meantime. Parties relying on old survey plans might not have an accurate representation of the land they are dealing with.

When producing an updated survey plan of upland property, a surveyor may note where certain land has accreted and may record the present natural boundary of the property. Per sections 94-96 of the *Land Title Act*, if a surveyor notes these changes on a survey plan and that plan is deposited in the land title office, then the plan will have established that the registered owner of the upland property has "a good safe holding and marketable title in fee simple" to that accreted land. Said another way, an

updated survey plan will crystalize the changes to the land by reflecting the present boundaries of the land, and a local government can rely on it to help ensure they attain their intended goals with that land.

How might this be helpful from a practical perspective? In addition to simply having a more accurate picture of the subject land, consider an example where a local government is buying or selling an entire parcel of upland property. It's common to base the value of a parcel on a specific dollar amount per area. When an upland property has a particularly large area, accretion and erosion can have a significant effect on the value of the land. Accretion would result in a greater value for the land and erosion a lesser value. But there are also other scenarios where understanding the location of the present natural boundary can be vital.

Consider instead a scenario where a local government has a road that extends close to but not quite up to the waterfront. The local government wishes to extend their road to the natural boundary to build a boat ramp, which will necessarily mean dedicating as road a portion of a private landowner's upland property. The landowner agrees to the road dedication, and the parties also come to an agreement where the owner will perform the construction of the road. If the parties base their agreement on a decades-old survey plan that does not reflect many years of accretion, they will quickly realize that the length of the dedication will need to be greater than anticipated, and now the local government's goals are in jeopardy. In this situation, if the parties have already signed an agreement that does not contemplate an updated survey plan, they will have a conflict – either the local government is not getting a road dedication up to the natural boundary, or the landowner is giving up more of their land than anticipated. If the dedication is extended, then there's the further dispute of whether the owner is obligated to be the one to construct that extension.

These same principles can apply to various situations. Whether it's a road dedication over a portion of private property for a boat ramp, a charge such as a statutory right of way for the installation of pipes that reach the water, or any other scenario in which the location of the present natural boundary of an upland property is a crucial element for the achievement of a local government's goals, an up-to-date survey plan will help all parties ensure they have clarity as to the nature of the land they are dealing with.

Serge Grochenkov ✍

Political Decisions Without Policies

The BC Supreme Court's recent decision in Canna Northwest Enterprise Inc. v. Salt Spring Island Local Trust Committee, *2024 BCSC 706 ("*Canna Northwest*") confirms local governments may make certain discretionary political decisions without articulating a general standard or policy to support such a decision. There are benefits to establishing policies in many contexts, but this case is a reminder that policies are not* universally *necessary or beneficial. Whether a decision may be*

made based on political considerations, without a policy or bylaw, depends in large part on the precise statutory source of the local government's authority for making the decision.

In *Canna Northwest*, a business owner sought judicial review of the Salt Spring Island Local Trust Committee's decision to refuse to support its application for a provincial licence to operate a retail cannabis store. The Liquor and Cannabis Regulation Branch cannot issue such a licence unless the relevant local government gives a recommendation that the licence be issued.

When deciding whether to recommend issuance of a retail cannabis licence, local governments are required to base their recommendation on the location of the proposed store (*Cannabis Control and Licensing Act*, section 33(3) & *Cannabis Licensing Regulation*, section 13(3)). If the issuance of the licence may affect nearby residents, the local government must gather the views of residents (*Cannabis Control and Licensing Act*, section 33(3) & *Cannabis Licensing Regulation*, section 13(4)).

In *Canna Northwest*, the Local Trust Committee declined to recommend issuance of the licence "for the following reason: the location is not appropriate due to the proximity to schools, the library and a public park". The business owner asked the BC Supreme Court to find this decision was unreasonable because, among other reasons, the Local Trust Committee "did not articulate the standard by which they were judging the location to be too proximate to schools, the park, and the library" (underlining added). The BC Supreme Court decided against the business owner and found the Local Trust Committee's decision was reasonable.

The BC Supreme Court found that the Local Trust Committee was not obligated to articulate a general standard or policy to define "too proximate" in this context. As the Court noted, the members of the Local Trust Committee "were free to exercise their discretion in a matter of political concern, and did so entirely within the framework of the legislation". The key here is that the Local Trust Committee's exercise of discretion fell within the framework of the legislation in this particular context. Local governments only have the powers they receive from Provincial statutes, and since there is a very wide variety of different enabling provisions (for perspective, the *Local Government Act* alone is the longest statute in BC, and it is only one of the relevant statutes) the scope of a local government's discretion varies significantly based on the type of decision it is making.

A takeaway from this case is that *sometimes* not having a policy may provide the legislative body of a local government with more freedom to exercise its discretion. It cannot be assumed that creating a policy will always be helpful. Sometimes, policies can create legal risks by establishing unnecessarily strict, self-imposed requirements that, if the local government does not follow, may increase the likelihood of potential challenges regarding the reasonableness or fairness of its decision. That said, there are many contexts in which creating policies significantly reduce legal risks. When deciding whether to create a policy or deciding what content to include in a policy, it is helpful to think through the practical realities that could arise while applying the policy and try to avoid making the policy overly prescriptive.

Kate Gotziaman

Look For Your Lawyers

Bill Buholzer will be speaking at the International Municipal Lawyers Association Annual Conference in Toronto on May 30, 2024, presenting a session entitled "British Columbia's Housing Supply Legislation: Reasserting Provincial Jurisdiction over Land Use Management".

Elizabeth Anderson & Chris Gallardo-Ganaban will be presenting a session entitled "Housing, Homelessness, and Bill 45" at the Local Government Compliance & Enforcement Association Conference being held in Penticton May 14-17, 2024.

Mike Quattrocchi and Timothy Luk will be presenting a session entitled "Introducing Amenity Cost Charges" at the GFOABC Conference in Kamloops from June 5-7, 2024.

We have four sessions at this year's LGMA Annual Conference: **Guy Patterson** will be presenting a session entitled "Legal Update" at the Approving Officers Workshop on June 11; **Carolyn MacEachern & Julia Tikhonova** will be presenting a session entitled "Freedom of Information & Workplace Investigations" on June 12; **Guy Patterson & Chris Gallardo-Ganaban** will be presenting a session entitled "Short Term Vacation Rentals" on June 13; and **Reece Harding & Nick Falzon** will be presenting a session entitled "The Declaration on the Rights of Indigenous Peoples Act and Local Government" on June 13.

The firm is pleased to welcome two articled students to the firm this summer. **Aishling Carson**, who completed her summer articles in 2023 will be returning after completing her third year of law school at UBC, will be joining the firm again on May 27. **Jack Wells**, who has also recently completed his third year of law school at UBC, will be joining the firm later this summer.

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