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LEGISLATIVE POWERS FETTERING AGREEMENTS* –THE NEW KID ON THE BLOCK

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***A.K.A. PHASED DEVELOPMENT AGREEMENTS**

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> Municipal legislative powers are an integral part of governance that municipalities cannot give up. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.
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> An implication of this is that in the absence of provincial legislation implementing a different public policy, municipalities cannot sell zoning: D. P. Jones and A. S. de Villars, Principles of Administrative Law (3rd ed. 1999), at p. 181; Vancouver v. Registrar Vancouver Land Registration District, supra; Ingledew's Ltd. v. City of Vancouver, supra. They cannot agree to change zoning in return for particular consideration, and they cannot agree to keep zoning unchanged in return for particular consideration.
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> Since 1993, British Columbia has permitted municipalities to request amenities in exchange for zoning. With the Municipal Affairs, Recreation and Housing Statutes Amendment Act, 1993, S.B.C. 1993, c. 58, s. 4, the zoning power of s. 963 of the Municipal Act is replaced so as to include the possibility of the municipal council imposing conditions under which an owner is entitled to a higher-density zoning (see s. 963.1(2) of the amended legislation). The basic position in Canadian law is that municipalities cannot zone in exchange for amenities without some specific statutory authority for such arrangements: Re Walmar Investments Ltd. and City of North Bay, *[1970] 1 O.R. 109* (C.A.), additional reasons at *[1970] 3 O.R. 492* (C.A.). The post-1993 scheme provides such specific statutory authority. As a point of comparison, it thus highlights the fact that the pre-1993 scheme simply did not provide the requisite specific statutory authority.

Pacific National Investments Ltd. v. Victoria (City), [2000] S.C.J. No. 64 (Supreme Court of Canada)

I. INTRODUCTION

The Supreme Court of Canada's observation that municipalities cannot "sell zoning" in the absence of provincial legislation implementing a different public policy, must in British Columbia be understood in the context of s. 904 of the *Local Government Act* (previously s. 963.1), the amenity zoning power mentioned in the notorious *Pacific National Investments* case. Section 904 enables municipalities to exchange density under a zoning scheme for affordable housing, for amenities, or for both. While the legislation clearly allows, and was probably intended to allow, the inclusion of density bonus provisions applying throughout existing zones or portions of zones, it has for more than 15 years been used almost exclusively on a site-specific basis to accommodate exchanges of affordable housing and/or community amenities for land use approval, the "comprehensive development" zone providing for a nominal base density "generally applicable for the zone" and another representing the actual intention of both the owner and the local government for the affected land. The statutory authority for bonus zoning covers off the Supreme Court's observation about municipalities not otherwise being able to "change zoning in return for particular consideration".

What about agreeing to "keep zoning unchanged in return for particular consideration"? In relation to large, multiple-phase developments such as the one that was the subject of the *Pacific National Investments* case, in which the City of Victoria withdrew the developer's zoning for the final phase of the development in response to some neighbourhood opposition, the Province in 2007 appeared to respond to appeals from the development industry for a mechanism that would establish zoning certainty. It seems that lenders are prepared to extend more favourable financing terms for developers whose projects are immune from potential local government land use policy changes, as the development industry successfully lobbied the Province to enact provisions in Part 26 authorizing "phased development agreements". The new provisions were modified in 2010 to expand the potential scope of the agreements to fetter the legislative powers of future councils and regional boards, and to add an important Land Title Office notice requirement to make the agreements "run with the land" to which they apply. For local governments, phased development agreements are potentially attractive because they may contain a broad range of terms and conditions for land development, for which there is no other suitable mechanism.

As regards the development financing rationale for phased development agreements, there may or may not be widespread fear in the financial industry of volatility in B.C. local government land use policy *vis a vis* multi-phase developments; actual examples of "downzoning" of the *Pacific National Investments* variety are difficult to find. Most local elected officials seem instinctively to perceive as unfair, sudden changes in land use policy direction affecting a particular development project. However, once the availability of zoning certainty via PDA becomes widely known, the financial industry's hyper-sensitivity to risks of all kinds can be expected to result in routine requirements that borrowing developers engaged in multi-phase developments enter into a PDA with their local government for the maximum available

term. If that is the case, then the use of these agreements will become very common, if not universal.

The phased development agreement, unlike amenity bonus zoning, is a tool that is designed to be used on a one-off basis to deal with a specific development proposal. In this respect, it is the closest thing to a land use contract that has been available to B.C. local governments since the use of those instruments was abolished 30 years ago. (The effect of a land use contract is, generally, that the zoning provisions written into the contract apply to the land notwithstanding any provision of the applicable zoning bylaw, for as long as the land use contract is in effect. Unfortunately, most land use contracts have no termination date.) The Province flirted with the idea of "comprehensive development agreements" in 1989 (see the *Municipal Amendment Act (No. 3), 1989*) but the legislation did not receive third reading, though publications of the ministry responsible for local government have since that time implied that agreements to provide community benefits, negotiated in connection with development approvals, are lawful in British Columbia. PDAs clearly improve on the land use contract mechanism in one important respect: they are limited to a finite term. They improve on the ubiquitous "development agreement" and misnamed "gifting agreement" in another important respect: they have express statutory authority, the significance of which should be apparent from the opening quotation from *the Pacific National Investments* case.

II. SCOPE OF PHASED DEVELOPMENT AGREEMENTS

A phased development agreement is a contract, and the basic rule of contract law is that there is no contract unless each of the parties has provided to the other some sort of "consideration": something of value that is being provided in exchange for the consideration provided by the other party. The consideration that a local government provides under a phased development agreement is established directly in s. 905.1(5) of the *Local Government Act*: once zoning or subdivision bylaw provisions are specified in a duly authorized and executed PDA, any amendment or repeal of those bylaw provisions occurring during the term of the PDA has no effect on the land that is the subject of the PDA unless the owner of the land agrees that they should apply. (The fact that this effect of a PDA is prescribed by the statute means that it need not be spelled out in the PDA, though most developer's legal counsel will likely prefer that s. 905.1(5) be repeated in the agreement.) That is to say, entering into a PDA fetters the elected council or regional board's legislative powers with respect to the land in question, throughout the term of the agreement. Because bylaw changes do not apply to the land, it would be unlawful for the local government to cease processing development and building permit applications for development permitted under the "frozen" bylaw provisions on the grounds that they are not approvable under subsequently adopted amendments to which the owner has not agreed.

Thus the core provisions of a PDA are the identification of the lands to which the agreement applies, the zoning or servicing bylaw provisions that will be subject to s. 905.1(5), and the term of the agreement. Local governments do not have authority to identify other types of bylaws,

such as development cost charge bylaws, whose amendment will not affect land that is subject to a PDA during its term; any further increases in the scope of these agreements in that regard will require further legislative amendments. It should be noted that Part 26 regulations dealing with parking and loading, runoff control, signs, landscaping and screening are enacted under ss. 906 through 909 of the *Local Government Act*, are therefore not provisions of a "zoning bylaw" which is defined in s. 5 of the *Local Government Act* as a bylaw enacted under s. 903, and accordingly cannot be specified in a phased development agreement. Amendments to bylaw provisions enacted under these authorities are fully applicable to land that is subject to a PDA, notwithstanding that such provisions may be included within the bylaw that contains zoning regulations that are subject to a PDA.

A. Zoning regulations

To date, all PDAs with which we have dealt apply to land that is the subject of a rezoning application (and often an official plan amendment) that is being considered concurrently with the developer's proposal for a PDA. However, there is no reason that a PDA cannot be negotiated in relation to existing zoning regulations, where the owner simply wishes to have some certainty that the regulations will remain applicable to their land for a negotiated period of time, to allow build-out of a planned development.

Careful thought needs to be given to what zoning regulations will be specified in the agreement, since the zoning regime for particular land under a typical zoning or land use bylaw consists of zone-specific regulations, general regulations applicable to all zones, and interpretation provisions such as definitions of terms that apply throughout the bylaw.

B. Servicing standards

One of the reasons for the 2010 changes to the Part 26 provisions dealing with PDAs was the development industry's desire for certainty in relation to a broader range of bylaws affecting the cost of development. Beginning this year, a PDA can specify provisions of a works and services bylaw enacted under s. 938, in addition to zoning bylaw provisions. Changes to such a bylaw during the term of the agreement will not apply to the land subject to the PDA without the owner's consent. To the extent that many local governments are reviewing works and services standards in relation to environmental impact and housing affordability and <u>reducing</u> the bylaw standards rather than making them more onerous, developers are more likely to be agreeing to the application of works and services bylaw amendments to their land during the term of a PDA than they are in relation to changes in zoning regulations. In relation to these bylaws, it is more likely that the PDA will be locking in existing bylaw provisions, rather than provisions that are being changed at the same time as the PDA is being negotiated.

As to the breadth of the "specification" of bylaw provisions in a PDA, note the comments later in this paper on the matter of variances.

C. Parkland dedication

Beginning in 2010, local governments can negotiate for expedited dedication of parkland in multi-phase developments. A PDA can require a developer to dedicate more than 5% of the land comprising the parent parcel or parcels of a subdivision, as long as the total amount of land that is being dedicated over the term of a phased development agreement from the land that is subject to the agreement does not exceed 5% of that land. Arrangements of this nature have sometimes been implemented by way of s. 219 covenants, but there was always uncertainty as to whether the essential limit on requiring 5% dedication in later phases was binding on future municipal councils or regional boards.

D. Amenities

For local governments, the principal appeal of a PDA is its use as a tool for lawfully exchanging development approval for public benefits in the nature of amenities. As with "amenities" under s. 904 density bonus schemes, the term "amenity" is not defined in the PDA legislation; it simply allows "terms and conditions respecting … the provision of amenities". Dictionary definitions equating the term "amenity" to "pleasant feature" have provided a basis for analysing the potential scope of s. 904, and seem equally applicable in the context of a PDA. Certainly civic improvements such as parkland and park development, cultural and social facilities, public art, and similar benefits would fit comfortably within the term "amenities". A requirement that the developer make cash contributions towards local government reserve funds set aside for acquiring these kinds of amenities is likely a term or condition "respecting the provision of amenities", but to that conclusion the restrictions in the *Community Charter* on the use of reserve funds are critical, and local governments should avoid transferring funds out of any such reserve funds for purposes other than the provision of amenities, regardless of whether such transfers are technically possible under the reserve fund legislation.

E. Specific features in the development

The inclusion of express authority to address "specific features in the development" in a PDA avoids one of the frequently-encountered uncertainties in the term "amenity" in s. 904: whether building features such as LEED certification, a green roof or energy self-sufficiency are eligible "amenities" in a density bonus scheme. Clearly these would qualify as "specific features in the development " for the purposes of a PDA, as would any other features exceeding Building Code requirements, building form and character requirements in areas not designated as development permit areas, and form and character requirements in designated DP areas that exceed those that can be secured via DP conditions. The provisions of a PDA are not subject to the "concurrent authority" rule in s. 9 of the *Community Charter*. Thus, a PDA could require a developer to comply with more onerous building standard than those contained in the Building Code. The parties should ensure, of course, that any building standards being incorporated into such an agreement are compatible with the Building Code, such that the developer can comply with both sets of standards.

F. Phasing and timing of development

The authority to deal in a PDA with the phasing and timing of the development and of other matters covered by the agreement, suggests terms addressing the sequencing of development activity on the land, such as the construction of neighbourhood convenience elements like commercial space at an earlier time than the real estate market alone might dictate. It also suggests terms addressing the phasing of the development in relation to the timing of provision of public benefits and amenities and the upgrading of infrastructure.

Where the development in question is being subdivided under the *Strata Property Act*, there will likely be a Phased Strata Plan Declaration (Form P); these are usually deposited in the Land Title Office concurrently with the first strata plan. Obviously any phasing that is prescribed by the PDA should be reflected in the Form P document.

Any discussion of phasing invites consideration of a fundamental question: is a phased development agreement possible where a development consists, essentially, of only one phase? The wording of the legislation does not provide a clear answer. While these powers were clearly intended for application in multi-phase situations, there are benefits around zoning certainty even in a single-phase development, including the inapplicability of zoning bylaw changes undertaken during construction of the project (for example, immediately following a civic election in which the development project in question was an issue) which, while not preventing completion of buildings under construction, would render the development lawfully non-conforming and potentially impair its value. Single-phase developments may also involve valuable development rights that are not exhausted at the outset, such as the possibility of adding a secondary suite or other type of second dwelling, in relation to which the original developer might like to offer zoning certainty to the purchasers of units in the development. There seems little reason to “read down” these provisions to apply only to developments involving more than one phase.

G. Section 219 covenants

The fact that PDAs are of limited duration raises the problem that, where the local government is bargaining for “specific features in the development”, the agreement cannot ensure that such features will remain in place after the term of the agreement expires. The legislation expressly contemplates that a PDA may require the owner to grant covenants under s. 219, which can be used to oblige owners of land in the development to maintain the specific features in perpetuity. Such a term would also be useful in securing environmental protection covenants over areas that have not been precisely identified as of the date of execution of the agreement but will be identified with more certainty during the development process. When establishing such conditions, the parties are well-advised to settle the essential terms of the covenant that will ultimately be granted while negotiating the PDA, instead of deferring that item to be battled over at some unspecified future time. The form of covenant that has been negotiated should be appended to the agreement.

H. Other terms and conditions

It should be noted that s. 905.1(4) says that a PDA can include, in addition to identifying the land and the bylaw provisions that will be "frozen", "additional terms and conditions agreed to by the local government and the developer, including but not limited to" the terms and conditions described in the foregoing paragraphs. That is to say, the parties are not limited to dealing with those matters that have been listed in the statute. This raises the obvious question as to whether there are other limits on what these agreements may contain. The answer to that question would involve consideration of the fact that s. 905.1 is contained within Part 26 of the *Local Government Act*, which deals with "Planning and Land Use Management". Without doubt, a court reviewing an allegedly improper use of these powers would attach some significance to that fact, and would expect to see a connection of some kind between the term or condition of the PDA to which objection is being made and the planning and land use management regime that the local government has established under Part 26. To mention one example, while a local government likely has some scope for promoting local employment opportunities, a PDA term requiring the developer to employ only local workers in the construction of the development would probably be considered to lie outside the purposes for which the PDA power was given, which have to do with planning and land use management.

III. TERM OF PDAS

The maximum term of a phased development agreement is 10 years, or 20 years with the approval of the Inspector of Municipalities, who has, to date, not issued any guidelines or directives as to what criteria would apply to any such approval (though at least one 20-year agreement has been approved). The legislation allows a PDA to be renewed or extended within the applicable 10- or 20-year period. The term "renew" and "extend" should be understood to refer to a renewal or extension on the same terms, and in that context there may rarely be any point in providing within the agreement for a renewal or extension rather than agreeing to the maximum term at the outset. A provision allowing the parties to prolong the basic effect of an agreement with less than the maximum term but on different terms is not necessary; that would be a fresh agreement, and there is no reason that the parties cannot, with fresh consideration and in compliance with the requirements for a bylaw and a public hearing, enter into sequential maximum-term PDAs in respect of the same land and the same bylaw provisions.

IV. THE EFFECT OF A PDA

A. Bylaw changes

The principal effect of a PDA is achieved through ss. 905.1(5); amendment or repeal of zoning or servicing bylaw provisions that are specified in a PDA do not apply to the land dealt with in the agreement unless the owner of the land agrees in writing. The legislation does not prohibit

the local government from enacting such amendments or repeals; it simply makes them inapplicable to the land for the term of the PDA. There are some minor exceptions:

- Bylaw changes that are required to comply with a provincial or federal law;
- Bylaw changes that are required to comply with a court order, arbitration award or other directive the local government has to obey; and
- Bylaw changes (such as building siting rules) that are necessary to address a hazardous condition that has only come to the attention of the local government since the PDA came into force.

B. Development permits

Companion provisions in s. 905.1(7) prevent local governments from doing an end-run around the PDA by imposing development permit conditions that deal with matters that are addressed in the PDA. DP conditions dealing with the siting, size or dimensions of structures or uses don't apply to the land that is subject to the PDA unless the owner agrees in writing or, in the case of certain kinds of DP areas, the Inspector of Municipalities has approved the permit. Such DP provisions are totally ruled out in the case of "form and character" DP areas, but are possible in the case of DP areas for environmental protection and protection from hazardous conditions.

C. Approving officer discretion

Amendments to the PDA legislation in 2010 expanded the effect of the agreements to include some encroachment into approving officer discretion under the *Land Title Act*. These changes acknowledge the possibility that, while certain bylaw amendments may be inapplicable to the land as a result of the PDA, they may nonetheless constitute an expression of the public interest such that the approving officer may properly take account of them in determining whether the deposit of a subdivision plan might be against the public interest. This might particularly be the case where the PDA may have been entered into many years previously (up to 20 in the case of agreements with special approval from the Inspector of Municipalities). Section 905.1(10) requires the approving officer to take account of the PDA in considering the matter of public interest, and prohibits the approving officer from considering bylaw changes to which the developer has not agreed. The approving officer must also disregard any resolution that the local government may have passed for the purpose of assisting the approving officer with the question of public interest, if it deals with the same subject matter as a bylaw change that is inapplicable to the subdivision by reason of the PDA and s. 905.1(5).

In municipalities, these provisions are not likely to cause difficulty to the extent that the subdivision approval function of the approving officer is usually well integrated into the local land use management regime, and an approving officer would be considering the refusal of a subdivision application that is consistent with zoning and subdivision servicing regulations specified in a PDA only where the circumstances have significantly changed since the PDA was

negotiated. In regional districts however, the provincial Ministry of Transportation holds the subdivision approval function, and there may be less integration with regional district land use policy. The requirement for the approving officer to “take account” of a PDA in considering a subdivision application that the approving officer might otherwise be inclined to refuse, might be interpreted as leaving more room for discretion where there is a separate authority, not answerable to the elected body that authorized the PDA, exercising the subdivision approval power. This might particularly be the case where the public interest issue that engages the approving officer’s concern is highway access and impact on provincially maintained highways, a matter that lies outside the regional board’s jurisdiction.

D. Variances

As noted earlier, s. 905.1(3) requires a PDA to “specify the provisions of a zoning bylaw … to which subsection (5) applies while the agreement is in effect”, subsection (5) being the provision that makes amendment and repeal of such provisions inapplicable to the development without the developer’s written agreement. While the developer may be tempted to cast this net very broadly, to encompass all of the zone-specific provisions applying to their land as well as directly related bylaw provisions such as definitions of permitted uses, the parties to the agreement should be mindful of the effect of specifying bylaw provisions in relation to variance powers. Sections 901(3)(b.1) prohibits board of variance orders that “deal with a matter that is covered by a phased development agreement” and 922(2)(c) says that a DVP “must not vary … a phased development agreement”.

In relation to board of variance orders, this probably means that the board has no jurisdiction with respect to such ordinary variance matters as building siting and height where the land is subject to a PDA, if the building siting and height regulations have been specified in the PDA. As a result, any such variance would have to be effected by means of a bylaw amendment to which the developer has agreed. To the extent that the principal bylaw parameters whose amendment or repeal might be of concern to a developer and their lenders during the build-out of the development are those dealing with permitted use and density, developers might prefer specifying only those parameters in the PDA, so that the builders and owners in the development may still have recourse to the board of variance in relation to minor matters.

The prohibition in s. 922 is more difficult to deal with. Section 922 generally allows a local government to vary, on application by an owner, the provisions of a bylaw under Division 7 of Part 26, which includes the PDA enabling provisions. If s. 922 had not been amended in connection with the enactment of those provisions, the local government could, on the developer’s application, use a DVP to vary the provisions of an agreement authorized by bylaw under s. 905.1. Section 922(2)(c) makes it clear that a local government cannot do that, but its wording raises the question of whether the local government may still, on the developer’s application, vary the provisions of a zoning or subdivision servicing bylaw that are specified in a PDA. This is an important question in relation to minor matters such as building siting and height that are otherwise within the local government’s DVP jurisdiction, given the clear

prohibition in s. 901 on board of variance orders dealing with such matters and the fact that, if a DVP cannot be used, the owner has no recourse but to apply for a site-specific zoning amendment. If there is a legislative purpose in the difference in the wording of these two provisions, perhaps having to do with the direct involvement of the municipal council or regional board in approving a site-specific PDA, then s. 922 can probably be used to vary the bylaw provisions specified in a PDA in relation to a particular site, on the reasoning that such a variance does not amount to a variance of the PDA itself.

E. Lawful non-conforming uses

Section 911(8) of the *Local Government Act* prohibits the repair or reconstruction of a building containing a use that does not comply with a zoning bylaw, if the building has been extensively damaged (the 75% rule). Because a use on land that is subject to a phased development agreement may not be in conformity with a zoning regulation that was adopted after the PDA was entered into and is in law inapplicable to the building, s. 911 has been amended to make it clear that the 75% rule does not apply to a building whose use is governed by a PDA. The rule does apply if the owner agreed in writing that the new zoning regulation will apply.

F. Related latecomer agreements

A minor amendment to s. 930, which came into force on June 3, 2010, permits the recovery of latecomer charges for a developer who has installed excess or extended services for a period in excess of 15 years in the case of a PDA that is directly related to the construction and installation of such services; the generally applicable rules for latecomer agreements limit recovery to 15 years. The amendment is obviously of significance only in the case of a PDA whose term is more than 15 years. It permits the local government and the front-ender to negotiate a latecomer agreement extending to the end of the term of the PDA, thus allowing up to five additional years of latecomer charges, plus interest, to accrue to the developer.

V. PDA PROCEDURES

A. Public information

According to s. 905.5 of the *Local Government Act*, every phased development agreement and amendments to the agreement must be made available for public inspection at the local government offices during regular business hours. This is the same requirement as applies to municipal bylaws, Council minutes, and similar records of the local government. Any collateral agreements, permits, plans and other documents that are incorporated into a PDA by reference or directly must be similarly available for public inspection. Original signed copies of PDAs and amendments should be handled in the same way as bylaws, that is, kept in a fireproof vault.

B. Authorizing Bylaw

A bylaw is needed to authorize the execution of a phased development agreement. A single bylaw could be used to amend a zoning bylaw to permit a phased development, and to authorize a related PDA. The bylaw requires a public hearing, so the one-day rule that prevents adopting the bylaw at the same meeting as giving third reading to the bylaw, does not apply. Generally, a PDA authorization bylaw will be a one-sentence bylaw authorizing the local government's authorized signatories to execute an agreement in the form attached to the bylaw. Ideally, at the time of enacting such a bylaw, the local government will be in possession of a copy of the agreement executed by the developer's signatories; this would minimize the chance of last-minute requests for changes in the agreement by the developer.

C. Notice and public hearing

A phased development agreement and an amendment to such an agreement require a public hearing, to which the general rules applicable to public hearings on OCP and zoning amendment bylaws apply. The notice must identify the developer, give a general description of any zoning bylaw provisions that are specified in the agreement, specify the term of the agreement, generally describe the development, and indicate the conditions under which the agreement may be assigned. The notice may be combined with a notice of public hearing for related zoning amendments, and in that event should clearly indicate that the notice has two distinct purposes. The public hearings may also be combined, in which case the person presiding should clearly announce at the beginning of the hearing that it is being held for two distinct purposes, and should indicate any special procedural rules arising from that fact including whether members of the public may speak to both bylaws in the same presentation, or whether the hearing will be divided into distinct phases dealing with the zoning amendment and the PDA.

D. Notice on title

On June 3, 2010 a requirement to file notice on title to land that is subject to a phased development agreement came into force. This requirement was not originally part of the PDA scheme, with the result that the developer benefits and obligations under the agreement could only be passed along to purchasers of the affected land by way of a contractual assignment of the agreement. The legislation now requires filing of the same kind of notice as is used for Part 27 permits. Under s. 927, once such a notice is filed, the terms of the agreement automatically become binding on all persons who acquire an interest in the land affected by the agreement. Thus, no contractual assignment of the agreement is required to make developer obligations under the agreement binding on the developer's successors in title. This amendment to the PDA provisions casts doubt on the need for assignment provisions in a PDA, to identify permitted assignees or classes of assignees as contemplated by s. 905.2(5).

E. Assignment of agreements

Prior to June 3, 2010, PDAs generally allowed developers to assign benefits and obligations to corporate entitles related to the developer who were acquiring an interest in the land, and to other classes of purchasers only with the approval of the local government. This perhaps anticipated the higher comfort level local governments would have with the corporate parties with which they have negotiated such agreements, in relation to the likelihood that the agreement could be implemented smoothly. Now that the benefits and obligations are automatically passed along to all purchasers by means of the notice on title required by s. 905.6, there would not appear to be any need for PDAs to contain assignment provisions. Vendors of land who have entered into PDAs will be able, in their purchase and sale agreements, to make provision for adjustment of amounts the vendor has expended to comply with “front-ended” obligations under the agreement; such arrangements need not involve the local government.

F. Amendment of agreements

The PDA legislation allows contracting parties to identify in the agreement “minor amendments” that can be made without enacting an amendment bylaw (which would otherwise be required to amend an agreement) and holding a public hearing in relation to that bylaw. Some matters are ruled out as subjects for “minor amendments”: the bylaw provisions that are locked in for the term of the agreement; the affected lands; the term of the agreement and renewal and extension provisions; the assignment provisions; and the definition of “minor amendment”. Sensible topics for treatment as “minor amendments” include the detailed descriptions of specific development features and amenities, the details of project phasing and sequencing, and the terms of s. 219 covenants and rights of way that the agreement requires the developer to grant to the local government during the term of the agreement.

VI. ISSUES FOR CONSIDERATION

A. Where to use a PDA

To summarize, B.C. local governments have authority to exchange amenities for bonus density under s. 904 of the *Local Government Act*, and apart from that have only one statutorily authorized tool for negotiating with developers over the provision of amenities: the phased development agreement. The use of the simple “development agreement” that has been employed in some form or another since the repeal of the land use contract legislation in 1979 carries with it some degree of risk, even when public benefits that are being secured by the agreement are rationally connected and proportional to the development approval being granted, because such agreements have no statutory basis.

In view of the fact that many local governments appear to be ready, if not eager, to bargain away their legislative powers in relation to multi-phase developments, given that they are

rarely if ever inclined to exercise those powers, there seems to be little reason not to use PDAs in a relatively broad range of circumstances, including the following:

- Where the local government wishes to impose requirements for the phasing and timing of development that cannot be put in place via development permit conditions, either because the DP guidelines do not address these matters adequately or because the land is not in a DP area. Examples might include timing of development in relation to the development of public infrastructure such as water and sewer works and public schools, and the sequence in which particular aspects of the development will be constructed.
- Where there is a site-specific arrangement for the provision of specific development features such as building energy-efficiency or LEED certification that cannot confidently be characterized as “amenities” for the purposes of an amenity bonus bylaw.
- Where there is a site-specific arrangement for the provision of amenities and the local government does not wish to contrive a site-specific amenity bonus bylaw under s. 904.
- Where the Inspector of Municipalities is prepared to approve a 20-year term, and the local government wishes to entitle a developer providing latecomer-eligible works or services to receive latecomer charges for more than the 15-year maximum term in s. 939.

B. Merits of fettering

The fettering of legislative powers in relation to multi-phase development projects should always be viewed as a significant step for a local government to take, notwithstanding that local governments have in the past had little appetite for “downzoning” to prevent the build-out of such developments. One would expect that the local government’s willingness to consider accepting such a fetter would depend on its assessment of whether the build-out of the development is likely to raise any issues in relation to which retention of the zoning power might be important. For example, if the multi-phase development is of a type that is common within the municipality or regional district, and that has been successfully built out without controversy, the local government might be more willing to fetter its legislative powers than it would if the development is of a novel type, with which it has had little or no experience in the past. If the developer is one that has successfully built out projects in the past, the local government might be more willing to enter into a PDA than if the developer is undertaking their first project in the area, or if the developer’s previous projects have gone bankrupt leaving unfinished buildings and unpaid local creditors. The members of the council or regional board must understand that they will be unable, while the PDA is in effect, to respond to complaints from citizens that the development is not meeting their expectations, that its impacts are more severe than were anticipated, that the local government has made a mistake in approving it,

and so forth, by withdrawing the zoning for future phases. In negotiations with the developer over compliance with development approval conditions, the local government will lack the ultimate bargaining chip that has sometimes been useful in focusing the developer on the importance of compliance: the prospect of having the zoning for future phases taken away.

C. What to include in the agreement

As with old-style "development agreements" entered into in connection with rezoning applications, there may be a temptation to shape a PDA as an all-in "comprehensive" or "master" development agreement, containing provisions that would otherwise be found in an off-site servicing agreement under s. 940 of the *Local Government Act*, a latecomer agreement, or a development permit. The temptation should be avoided; at most, the PDA should contain a recital referring to other, related agreements that the parties are entering into concurrently or around the same time, and should not contain an "entire agreement" clause if there are related agreements with the developer. Consolidating agreements that derive from different statutory authority, that have different termination dates, and that are supported by different security arrangements can lead to confusion in the administration of the agreements, and can ultimately compromise the local government's ability to enforce a contractual obligation.

Draft phased development agreements that we have reviewed to date exhibit a fair amount of confusion around what to include within the agreement as an executory obligation (one to be performed in the future) and what to describe in a recital to the agreement as an act that has already been performed and that has consequences for the parties in relation to the matters dealt with in the agreement. An agreement normally becomes binding on the parties at the moment when the last of the parties to execute the agreement, delivers an executed copy of the agreement to the other party. (This may be a copy that the other party has already executed, or may be a copy bearing the signatures of only one party in a case where the agreement provides that it may be executed in counterparts.) Alternatively it becomes binding at a later time specified in the agreement. That being the case, it makes no sense to set out in the agreement as an executory obligation, an obligation that one of the parties must perform "prior to the execution of this agreement". Any obligation that the local government requires the developer to perform prior to the execution of the agreement should, at most, be described in a recital to a PDA as something that has already been done; for example, a PDA might recite that the developer has furnished a specified amount of security to the local government, and then set out executory obligations on each of the parties related to the use of that security. Separate arrangements would be required to deal with such security in the event that the bylaw authorizing the PDA is never authorized, the local government cannot execute the PDA, and the developer therefore needs to have the security returned. This can be handled by placing the security with the local government's lawyer on an undertaking not to release it to the local government unless the PDA authorizing bylaw is adopted and the PDA is executed and delivered by the local government, and to return it to the developer if the authorizing bylaw Is not adopted by a date specified in the undertaking. Other more complex obligations such as the dedication of a large amount of park land could be handled in an analogous way, though local

governments should always consider whether, given the broad scope of these agreements, such obligations should not be contained within the agreement itself, to be performed within a relatively short time from the date the agreement becomes binding on the parties.

There is no need to set out in a PDA specific obligations of the developer to obtain development permits, building permits, subdivision approvals and other authorizations ordinarily required in the development of the land. No properly worded PDA would be construed as eliminating such requirements, and in fact a PDA that did purport to eliminate them would be unenforceable against the local government because such terms are beyond the scope of s. 905.1. The agreement may, however, contain provisions dealing with the timing and sequence of applications for such permits and approvals.

D. Measuring developer performance

Provisions dealing with the provision of amenities or "specific features in the development" present potential difficulties when it comes to enforcement of the terms of a PDA. With specific physical features such as a particular building, structure or building element it is possible to determine, on the date when such features are due to be provided under the agreement, whether the developer has complied. With more complex features such as LEED Platinum certification or the achievement of a particular improvement in energy-efficiency over Building Code requirements, some sort of third-party determination is usually required. A PDA should always contain provisions establishing how and by whom such determinations are to be made, rather than leaving this to the parties to sort out at some later time.

E. Multiple owners and multiple parcels

Multi-phase development projects will occasionally involve not only multiple parcels of land, but multiple owners as well. In such circumstances, local governments negotiating PDAs should pay attention to the consequences for administration and enforcement of the agreement. These projects often involve "comprehensive development" zoning in which land use and density regulations apply to a new zone in its entirety rather than to individual parcels of land within the zone, and the PDA presents an opportunity to secure the agreement of owners to the allocation of permitted uses and density to individual parcels within the zone. Alternatively, in the case of a single owner of multiple parcels, the PDA could require the owner to file a consolidation plan of the land within a specified period of time of adoption of the bylaw authorizing the PDA (if the owner not already placed a registrable consolidation plan in the hands of the local government's solicitor as a condition precedent to the adoption of the bylaw, to be deposited immediately following the adoption of the bylaw). The enactment of use and density provisions for an entire zone made up of separate parcels of land creates undesirable uncertainty as to the use and density permitted in respect of each parcel, which can be resolved by either consolidation of the parcels or a legal mechanism to allocate permitted use and density among the parcels involved.

The involvement of multiple owners raises issues for the local government in relation to enforcement of the agreement: which of the owners is responsible for which obligations under the agreement? Usually the owners will wish to deal with the local government as if they were a single owner, but joint ventures and similar business initiatives can fall apart, and the local government should ensure that its interests are fully protected in that scenario. The simplest and most practical approach is to have the various owners agree, in the text of the PDA, that all of their obligations under the agreement are "joint and several". The effect of this is that the local government can look to any one of the other parties to perform every developer obligation under the agreement, regardless of whether that obligation is particularly referable to that owner's land. The owners are free to make private arrangements among themselves to ensure that each provides a contribution to the benefits being provided to the local government under the agreement, that is commensurate with the benefit they obtain under the agreement, and local governments should attempt to keep themselves out of these arrangements.

F. Remedies for breach of the agreement: rezoning and commitment to use

Apart from any remedies that might be provided for in the agreement, such as the use of developer security to provide benefits to the local government that the developer has failed to provide, the usual response to a breach of contract is for the other party to serve notice on the party in breach that the agreement is at an end, and that the party serving the notice does not intend to adhere to the terms of the agreement any longer; in some circumstances the notice may also indicate that the "innocent" party intends to seek other remedies such as an award of damages . In the case of a PDA, the ultimate remedy for the local government is to amend or repeal the zoning or servicing bylaw provisions that were "frozen" by the agreement, or begin to apply bylaw amendments previously enacted, and proceed with land use management in relation to the lands as if the PDA did not exist. This would mean processing development permit and building permit applications under, presumably, more restrictive regulations than applied while the PDA was in effect.

As is the case with a bylaw amendment undertaken outside the context of a PDA, the owner may (having accepted the local government's repudiation of the agreement) take the position that the amendment does not affect them because they have a lawful non-conforming use under s. 911 of the *Local Government Act*, or perhaps a "commitment to use" equivalent to a lawful non-conforming use. Whether such a position would prevail in the context of a PDA that has been breached is not clear. Outside the PDA context, the courts have created the "commitment to use" approach out of a sense that it is unfair to the property owner to change zoning regulations after the owner has irrevocably invested funds in a development in the expectation that the zoning regulations will not change. The same equities would not seem to exist where the owner has contracted with the local government not to change the zoning, and then breached the contract. Some local governments have attempted to anticipate these scenarios by requiring the developer to agree not to assert a "commitment to use" if they breach the agreement, but such an approach begs the question of whether an agreement not

to assert a commitment to use would be enforceable against the developer if the local government has decided to terminate the entire PDA.

G. Dispute resolution

Section 905.1(4)(f) specifically authorizes the inclusion in a phased development agreement of dispute resolution procedures. The usual mechanism for dispute resolution in B.C. is arbitration under the *Commercial Arbitration Act*. In the absence of such provisions, the B.C. Supreme Court has jurisdiction to resolve disputes as to the enforcement of contractual obligations (contract claims worth up to $20,000 are within the jurisdiction of the Provincial Court) unless the parties agree, once a dispute arises, to resolve a dispute by some other means. In resolving such disputes, the court is generally inclined to give effect to the intention of the parties as expressed in their agreement, without assuming that each of the parties was motivated by purely commercial considerations. Local governments are rarely well served by mandatory dispute resolution provisions in contracts, unless the local government is involved the contract in a purely business capacity (as, for example, in a contract to purchase fuel or tires for the vehicle fleet) because arbitrators are bound to apply legal principles in the arbitration of commercial disputes, as opposed to equitable or other principles. A local government may enter into a phased development agreement for a combination of reasons, of which none may make purely commercial sense, and agreeing in advance that all disputes under the agreement will be resolved by a commercial arbitration process may be unwise. The parties are free to agree to a commercial arbitration process to resolve any particular dispute that has actually arisen and that lends itself to resolution through such a process, even if there are no dispute resolution provisions in the agreement.

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