REGULATION OF HIGHWAYS AND PARKS

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Municipalities have the unique position of being custodians of important community property resources: the network of highways, parks, and public squares. This paper will set out how highways, parks and public squares are established and regulated under the *Community Charter*. In addition to being a primer on the basics of these kinds of property, this paper will also deal with new regulation of low-emission low-speed vehicles and the recent controversial decision regarding the right of the homeless to erect temporary shelters in parks.

I. MUNICIPAL OWNERSHIP AND REGULATION OF HIGHWAYS

The law relating to highways has a long and fascinating history which reflects the changing needs of the public served by those highways. Originally, highways were no more than a strip of land over which the public had a right of passage. Over time, the law has changed to allow other ancillary public uses over highways, culminating today in the installation of wires and utility pipes delivering services over and under highways. While our law of highways is rooted in English case law, our current law is heavily based on statute. The position in British Columbia can be contrasted with the situation in England where many of the highways were the result of dedication by private owners, who remained the owners of the soil subject to the public right of easement. In British Columbia, the soil and freehold of a highway (including the air above and the soil below) is vested in the Province or the municipality in which the highway is located, depending on the governing statute.

A. Establishment of Highways

There are a number of ways that highways are legally established in British Columbia. The most common method is for a survey plan to be filed in the Land Title Office under section 107 of the *Land Title Act.* Section 107 provides that when a subdivision plan, reference plan or explanatory plan showing a portion of land marked as "highway" or "road" is deposited at the Land Title Office, that plan acts as an immediate and conclusive dedication by the owner to the public of the land as a highway. Title to the highway, by the operation of the statute, vests either in the Province or in the municipality where the highway is located, which will be discussed below. Because dedication under s.107 erases the title and extinguishes the owner's interest in the land, a s.107 plan must be signed by the owner and all chargeholders of the land from which the highway will be made.

Other methods for legally establishing highway are as follows:

- Dedication by the way of a public notice published in the British Columbia Gazette by the Ministry of Transportation.
- An exemption from a Crown Grant showing an area as road that is coloured, outlined or designated in a colour other than red (sections 13 and 57 of the *Land Act*).

- Section 42 of the *Transportation Act* states that "if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway" subject to certain exceptions in regulation (such as recreational trails, railway rights of way, or expenditures relating to snow removal only). Please note that a court order will be required in order to prove to the Land Title Office that a particular area has been deemed to be highway by the operation of this section.

- Common law dedication as highway by an owner, whether a private owner or the Crown, the main two elements of which are (1) intention on the part of the owner to dedicate the road to the public for the purpose of a highway, and (2) acceptance by the public of the road as a highway [*Bailey v. Victoria* (1920), 60 S.C.R. 38, *Brady v. Zirnhelt* [1988] BCJ 2083 (BCCA)]. As above, a court order will be required in order to prove to the Land Title Office that a particular area has been found to be highway by a Supreme Court judge.

B. Highways under the Community Charter

By section 35(1) of the *Community Charter*, all highways physically located in a municipality are vested in that municipality, except for those highways listed as exceptions in subsection 35(2), being Provincial arterial highways and other forms of highway owned by the Province, federal highways, and highways located on Indian reserves. The definition of 'highways' under the *Charter* is notably wide: the term highway "includes a street, road, lane, bridge, viaduct and any other way open to public use, other than a private right of way on private property."

The fact that highways are 'vested' in the municipality in which they are located means that the municipality has ownership and possession of the highways (the "soil and freehold"), but because there is ordinarily no title to highways, the legal establishment of the highway is not shown by a title search print from the Land Title Office, but by plan instead. The vesting includes all drainage rights of way and easements that were held by the Province before the *Charter* came into effect (s. 35(5)). The vesting of the freehold of highways under this section is subject to the provincial right to resume the highway in subsection 35(8). This means that by regulation or by order-in-council, the Province can cancel the vesting of a particular highway in a municipality and resume ownership and control of that highway.

If a municipality has purchased a property in fee simple and built a highway upon that property, the vesting provisions of the *Charter* do not apply to that highway. It is very likely, however, that the public's common law right to pass and repass over that highway is the same as an ordinarily dedicated highway.

Unopened road allowances are strips of land dedicated as highway but not yet formally improved. Absent a bylaw to the contrary, the public has the right to travel over the unopened road allowance and a right to use it in a manner that is not inconsistent with its character as a public highway until it is closed. However, no member of the public can improve or construct road works upon a road allowance except with the consent of the municipality. A municipality is not under any duty to open to vehicular traffic at the behest of a private individual a road

allowance that has never been opened except to pedestrian traffic. The general authority to construct roads is contained in the general service power in section 8(2) of the *Charter* which states that Council may by bylaw establish and operate any service that the Council considers necessary or desirable; the Council therefore has complete discretion whether or not to establish and operate any particular service, including whether or not to build any particular highway.

Under the *Transportation Act,* the Provincial Cabinet can designate and declare certain highways and road improvements to be 'arterial highways'. Once a highway is declared to be an arterial highway ownership of that highway vests in the Province and the Province assumes all of the "rights, powers and advantages that the affected municipality had, before the arterial highway was designated as such, to plan, design, acquire, hold, construct, use, operate, upgrade, alter, expand, extend, maintain, repair, rehabilitate, protect, remove, discontinue, close and dispose of the highway" (s. 47). This designation has been made for the vast majority of the major numbered highways in British Columbia. If you are unsure about the status of a particular highway, you can always call your local Ministry of Transportation and Infrastructure office to find out whether it has been designated as an arterial highway. Before Cabinet can declare a new designation of an arterial highway, it must consult with the affected municipality.

C. Public Right of Passage at Common law

A municipality's jurisdiction over highways and the use of airspace above and the sub-soil beneath is not absolute. The main public purpose of a highway is for travel and transportation. At common law, the public has an absolute right to use a highway for passage, and reasonable and usual modes of use that are part of passage, subject to local regulation [*Chubaty and King v. McCulloch* (1995), 17 W.W.R. 1 (BCCA)]. Some court decisions have said, in a broad sense, a municipality is the trustee of the road network for the benefit of residents in the area and the community at large.

In this sense, the vesting of highways in the municipality does not give absolute ownership powers to that municipality. In 1932, the Supreme Court of Canada discussed the implications of the fact that the City of Vancouver is vested with fee simple title to highways under the *Vancouver Charter*, as follows:

> Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The landowner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee of the public. The streets remain subject to the right of the public to "pass and repass" and that character, of course, is of the very essence of a street. So that the municipality, in respect of its streets, does not stand in the

> same position as a land-owner with regard to his property. [*Vancouver v. Burchill*, [1932] 4 D.L.R. 200]

Accordingly, municipalities remain restricted in the manner in which they regulate and use highways, in light of the common law nature of highways.

D. Municipal Authority to Regulate Highways

The public's right to use highway for public passage without obstruction cannot be infringed except with specific statutory authority. Section 36 of the *Community Charter* grants that express authority: a municipal council may regulate and prohibit in relation to all uses of or involving a highway or part of a highway by bylaw. This authority includes the related power to restrict the common law right of passage by the public over a highway that is vested in the municipality, if this restriction is necessary to the exercise of the authority (s. 36(3)). The section 36 power is in addition to municipality's general authority to operate a system of highways as a municipal service.

The general power to regulate and prohibit in relation to uses of a highway are subject to the following exceptions contained in s. 36(2):

(a) traffic and parking on highways may only be regulated or prohibited in accordance with the *Motor Vehicle Act*, except as expressly provided in the *Charter*;

(b) authority in relation to traffic on Provincial arterial highways is subject to section 124(13) of the *Motor Vehicle Act*;

(c) extraordinary traffic on Provincial arterial highways may only be regulated or prohibited by bylaw adopted with the approval of the minister responsible for the *Transportation Act*;

(d) the restrictions established by the *South Coast British Columbia Transportation Authority Act*;

(e) authority in relation to all electrical transmission and distribution facilities and works that are on, over, under, along or across a highway is subject to the *Utilities Commission Act* and to all orders, certificates and approvals issued, granted or given under that Act.

The most important of these exceptions for drafters of highway bylaws is section 124 of the *Motor Vehicle Act.* That section gives municipalities a wide range of specific powers to regulate, and in some cases, control and prohibit, in respect of vehicle, pedestrian and other traffic, parking, vehicle sizes and loads and various other matters. A municipality cannot use its highway-regulating power in a manner that would exceed any limits on its specific powers under the *Motor Vehicle Act* or that would contradict anything in that Act. The *Motor Vehicle Act*

powers are directed mainly at regulating the public's common law right to travel on highways. Municipal bylaws must be approved by the Minister of Transportation before they can apply of their own force to Provincial arterial highways.

In July of this year, the Province enacted several new provisions in the *Motor Vehicle Act Regulations* for neighbourhood zero emission vehicles (NZEVs), which are low-speed electrical vehicles that have low or no tailpipe emissions. Because of their lightweight construction and reduced safety requirements, Transport Canada has required NZEVs to be built in a manner that their engines cannot exceed 40 km/h. Under the *Regulations,* NZEVs are permitted on roads that have a speed limit of 40 km/h or less, and municipalities may pass specific bylaws allowing NZEVs to travel on all roads that have speed limits of no more than 50 km/h within its boundaries. We understand that a model bylaw is being reviewed by the Capital Regional District and associated municipalities so that there will be common regulation on south Vancouver Island. The intention is that drivers of these slower-moving vehicles will not have to navigate around the boundaries of those municipalities that have not enacted bylaws to allow NZEVs on their roads.

Even where a municipality has the statutory authority to regulate a use, a regulation may be struck down where it infringes on the right to freedom of expression under the *Charter of Rights and Freedoms*. The Courts have considered the ability of governments to restrict the exercise of the expressive rights in public places. The public has a general right to use highways for the purpose of communication and any restrictions in that regard have to be justified. In ***Ramsden v. Peterborough***, [1993] 2 S.C.R. 1084, the Supreme Court of Canada struck down a municipal bylaw that prohibited the placing of posters on any public property within the municipality. The plaintiff was a musician who advertised performances by postering on utility poles on municipal property. The Court concluded that the right to freedom of expression extended to most public places. In this case, the Court found the total ban to be problematic. If the bylaw had allowed for postering in certain designated places, the bylaw would not have been struck down.

A municipality may also close a highway vested in the municipality to certain types of traffic, or to all traffic by bylaw under section 40 of the *Charter*, and may reopen such highway as has been closed by bylaw. Before adopting such a bylaw, Council must give public notice of its intentions under the public notice provisions of the *Charter*, give the citizens an opportunity to make representations regarding the bylaw, and give notice to any utility operators whose works are located in the subject highway or who may be negatively affected by the bylaw.

To permanently close highway and use the land for another purpose, a municipal council needs to have closed the highway to all types of traffic, as outlined above, and remove that highway's dedication as highway. This is usually done in the same bylaw. The bylaw(s) dealing with both steps must be filed at the Land Title Office in accordance with section 120 of the *Land Title Act* and, on filing, the property subject to the bylaw ceases to be a highway, its dedication as a highway is cancelled and title to the property is registered in the name of the municipality. The new title to the former highway will show a charge for the Province's right of resumption under

section 35(8), unless the property will be consolidated with an adjoining property and the steps in the *Resumption of Highways Regulation* are followed.

Under the *Charter,* a municipal council also has the authority to allow some non-highway uses of a highway. Specifically, Council has the express ability to grant a license of occupation or an easement to a third party over a highway vested in the municipality (s. 35(12)). This section confirms a municipality's ability to enter into written agreements with neighbouring landowners to allow building overhangs, patios on sidewalk, and so on, as well as allowing construction and use of specific improvements such as pedestrian walkways above or below busy roads. Recent practice changes at the Land Title Office have now made it possible to create a provisional title to a portion of highway so that the easement may be registered over the highway, and grant to the recipient of the easement some security in knowing their easement is fully registered and enforceable.

II. OWNERSHIP AND REGULATION OF PARKS AND PUBLIC SQUARES

A. CREATING AND DISPOSING OF PARKS AND PUBLIC SQUARES

There are four ways in which parks and public squares can be created in British Columbia. First, section 107 of the *Land Title Act* provides that the deposit of a subdivision, reference or explanatory plan showing a portion of the land as a park or public square operates as an immediate and conclusive dedication by the owner to the public of that portion of land shown as a park or public square. Section 29 of the *Community Charter* then provides that land in a municipality that is dedicated to the public for the purpose of a park or public square by deposit of a subdivision plan, explanatory plan or reference plan is vested in the municipality for that purpose. Therefore, where a deposited subdivision, reference or explanatory plan shows a portion of land in a municipality as a park or public square, that portion of land immediately vests in the municipality and is dedicated as a park or public square. Land that is dedicated as park and vested in a municipality by way of a subdivision, reference or explanatory plan does not have title, nor does it have any parcel identification number. Therefore, the title to this type of park land cannot be searched in the Land Title Office.

The only way in which a municipality can dispose of land that has been dedicated as a park or public square and vested in the municipality by way of a subdivision, reference or explanatory plan is to adopt a bylaw with the approval of the electors, in accordance with section 27 of the *Charter*, to dispose of all or part of the land in exchange for other land suitable for a park or public square. Land taken by the municipality by way of such an exchange is dedicated for the purpose of a park or public square, and title to it vests in the municipality. When a municipality exchanges or disposes of land that has been dedicated as a park or public square in accordance with section 27 of the *Charter*, the Land Title Office will raise title to the land and it will be transferred free of its previous dedication to the public for park or public square purposes. Alternatively, the municipality could adopt a bylaw with the approval of the electors to dispose of the land, provided that the proceeds of the disposal are placed in a reserve fund.

The second way in which a park or public square may be created is by way of a bylaw adopted in accordance with section 30 of the *Charter*. Section 30 provides that a council may, by bylaw adopted by an affirmative vote of at least 2/3 of all the members of council, reserve or dedicate real property owned by the municipality as a park or public square. A dedication of real property as a park or public square means that the land becomes a park or public square immediately upon adoption of the bylaw, while the reservation of land as a park or public square means that the land will become a park or public square at a later time. Section 30 goes on to provide that any bylaw adopted or work undertaken by council that directly affects the land reserved or dedicated as a park or public square must be consistent with the purpose of a park or public square.

In order to cease using land reserved or dedicated as a park or public square by bylaw, a municipality must remove the reservation or dedication by bylaw. Such a bylaw requires the approval of the electors. Further, section 120 of the *Land Title Act* requires that a bylaw cancelling the dedication of all or part of a public square must be filed in the Land Title Office.

The third way in which a park or public square can be created in BC is by way of a fee simple trust. This was the situation described in *Save Our Waterfront Parks Society v. Vancouver (City)* [2004] B.C.J. No. 606. In that case, the City of Vancouver had purchased the Kitsilano Beach Park from Canadian Pacific Railway on October 18, 1919, and wished to build and operate a multi-use facility, including a licensed sit-down restaurant. The transfer deed stated that the land was given to the City for so long as the land was used for the purposes of a public park, and the City would not at any time use the land for any purpose other than that of a public park. The court determined that, although the express words "in trust" were not used, the parties did, in fact, intend to establish a trust. The land was to be held in trust by the City for the purposes of a public park, and the City could not use the land for any other purpose. Therefore, in effect, the land became park upon the disposition to the City, as it could only be used for park purposes. Further, the court in *Save Our Waterfronts* concluded that usage of land for a public park is a suitable purpose that falls within the meaning of a public purpose or charitable trust, and the trust may exist in perpetuity. Land that is transferred to a municipality subject to the terms of a trust may only be used and disposed of in accordance with the terms of that trust.

The fourth way in which a public park or public square can be created in BC is simply by way of use. Even where there is no bylaw reserving or dedicating land as a park or public square, fee simple land owned by a municipality can simply be used as park or public square, and the municipality can deal with it and regulate it like any other park or public square. Some municipalities choose to establish parks by use, in order to avoid the requirements of the *Charter*. Parks and public squares that are created by use can be disposed of or used for another purpose at any time. The municipality is not required to adopt a bylaw in order to dispose of the land or use it for another purpose.

B. USING PARKS AND PUBLIC SQUARES

Section 8 of the *Community Charter* gives municipalities the power to, by bylaw, regulate, prohibit and impose requirements in relation to public places. Thus, council may prohibit certain

activities from taking place in parks and public squares, such as archery or the discharge of fireworks. So long as the regulation, prohibition or requirement is for a valid municipal purpose and does not violate the *Canadian Charter of Rights and Freedoms*, council's ability to regulate, prohibit and impose requirements in relation to parks and public squares is quite broad.

However, where a municipality has received land subject to the terms of a trust, and the trust deed requires that the land be used only for public park purposes, the municipality must be careful that it is not allowing any use of the land that is contrary to that purpose. In such a case, the question of "what is a valid park use?" often arises. For example, in the case of *Victoria (City) v. Capital Regional Festival Society* [1998] B.C.J., the City made an application to the court for a determination as to whether the park land known as Beacon Hill Park, which was transferred to the City as a trust asset, could be lawfully used for a proposed music festival. The trust upon which the property was conveyed to the City in 1882 stated that the City was to maintain and preserve the land for the use, recreation and enjoyment of the public under the provisions of the *Public Parks Act,* as it existed at the time. The park was a nature park and ornamental pleasure ground with playing fields. The court concluded that the park land could not be used for the proposed purpose, as the City had the ability to use the park only as set out in the terms of the trust. In this case, while the City had a duty to maintain and preserve the asset, and to permit the use of the asset, the City did not have a duty to provide recreation or enjoyment. The court stated that any rights or privileges of the City in connection with the notions of enjoyment and recreation must be informed by the duty to maintain and preserve. The introduction of tents, food kiosks, sounds systems, and commercial advertising were not necessary or incidental to the objectives of the trust, and use of the property for a music festival was inconsistent with the character of the park and the terms of the trust.

In the *Save Our Waterfront* case, the petitioner suggested that the proposed restaurant fell outside of the trust because it was not "necessary, incidental, necessarily incidental or consistent" with the use of Kitsilano Beach Park as a public park. In this case there was no duty on the municipality to preserve and maintain Kitsilano Beach Park. The trust deed simply stated that the land was not to be used for any purpose other than that of a public park. The court decided that the question of whether a restaurant was ancillary to the purposes of a public park was a determination to be made according to the standards of the day in 1919, when the trust was established. In this case, a restaurant would have been considered ancillary to park purposes at the time the trust was established, given that refreshment pavilions were already in existence in a number of other parks at that time. The petitioner also argued that no part of the park should be used for the general purpose of deriving profit from it. The court in this case determined that profit may be derived from park land, where it is not prohibited by the trust deed.

In the case of *Neilson v. Langley (Township)* [1982] B.C.J. No. 2313, the use of the park land in this case was not determined by a trust deed; rather, it was regulated by the Township's zoning bylaw, which prohibited commercial uses of that park property but allowed for a golf course. In this case, the municipal building inspector issued a building permit to the Fort Langley Golf and Country Club, which operated a golf course within the Township of Langley and wished to construct and operate a recreational club. The recreational club was to include a restaurant, and

the resident petitioners contended that the restaurant amounted to a commercial use of the property, which contravened the provisions of the zoning bylaw. The court decided that "golf course" was intended to have a broad meaning and that anything that could be regarded as reasonably coming within the operation of a golf course was a permitted use. Thus, the public restaurant in question did not fall within the definition of commercial use as contained in the bylaw. Rather, it fell within the definition of "golf course" and was a permitted ancillary use.

It is clear from a review of these cases that land established as a park may be used for any purpose that is incidental or ancillary to park purposes, unless restricted by a trust deed or by bylaw. Land that is transferred to a municipality in trust, to be used for public park purposes, must be used in accordance with the terms of that trust deed. Where the trust imposes a duty on the municipality to maintain and preserve the land, the municipality's use of the land must be consistent with that duty. However, where a trust deed simply restricts the municipality to use the land as a public park, the courts have determined that this may include any use that is ancillary or incidental to the park use. Ancillary and incidental uses may even include activities that generate profit, so long as the generation of profit is not exclusively restricted in the trust deed. Further, where a municipality regulates the use of park land by bylaw, it must be explicit, as the courts will tend to allow any use that reasonably comes within the operation of a park unless that particular use is clearly and explicitly prohibited or otherwise restricted by bylaw.

C. *VICTORIA (CITY) V. ADAMS* [2008] B.C.J. No. 1935

Perhaps the most interesting recent case with respect to the use of park land is the case of *Victoria (City) v. Adams* [2008] B.C.J. 1935. The decision in that case came down in October of this year, and many municipalities in this province are concerned with its implications.

This was an application by nine homeless people resident in the City of Victoria for an order declaring certain sections of City of Victoria's Streets and Traffic Bylaw and its Parks Regulation Bylaw of no force and effect, as they violated section 7 of the *Canadian Charter of Rights and Freedoms*. The impugned bylaws effectively prohibited persons from erecting temporary shelters, such as tents, on public property. At the same time, the City was seeking an injunction to enforce its bylaws respecting parks and public spaces in order to remove a tent city that had been established by a number of homeless people in one of the City's parks. The application was ultimately allowed and the court declared the impugned bylaws unconstitutional and of no force and effect.

The court was presented with a great deal of evidence with respect the homeless situation in the City. The evidence before the court showed that more than 1,000 homeless people were living in the City, while the City had only 104 shelter beds, which could be expanded to 326 in extreme conditions. Accordingly, the court concluded that hundreds of homeless people had no option but to sleep in public spaces throughout the City. The court then considered expert evidence, which established that exposure to the elements without adequate protection was associated with a number of significant risks to health, including the risk of hypothermia. The expert evidence also established that some form of overhead protection was necessary for adequate protection

from the elements. It was clear to the court that a significant number of people in the City had no choice but to sleep outside in the City's parks or streets, and the effect of the City's complete prohibition on the erection of temporary shelters was to impose upon homeless persons significant and potentially severe additional health risks. The prohibition contained in the bylaws constituted an interference with the life, liberty and security of homeless people. The prohibition was arbitrary and overbroad and, therefore, inconsistent with the principles of fundamental justice. The court concluded that the impact of the bylaw provisions in issue was disproportionate to the advantages, and those provisions were not justified pursuant to section 1 of the *Charter*.

The City of Victoria has appealed this decision. The City of Vancouver is also facing a similar challenge to its bylaws, and we can expect a decision on that front within the next year.

While many British Columbia municipalities are concerned that this decision will open the door for the establishment of tent cities in parks throughout the province, in fact the decision in *Victoria v. Adams* should not have such a drastic result. The courts are aware of the competing interests with respect to public parks, and the municipal interest in preserving public parks for everyone to enjoy. While a blanket prohibition on the erection of temporary shelters in public spaces is overbroad and a threat to the health and security of those homeless people unable to find a spot in a shelter, municipalities can regulate the erection of temporary shelters in a way that does not have a disproportionate impact. For example, municipalities can require the removal of all temporary shelters from public park spaces during certain hours of the day, or from certain areas. However, for so long as the number of homeless people living in a municipality far outreaches the number of available shelter beds, as it does in Victoria and Vancouver, a blanket prohibition on the erection of temporary shelters in public parks will be considered unconstitutional.