March 30, 2011

Re: Community-Initiated Rezoning and Development Moratoria

Local government-initiated rezoning, whether increasing or decreasing densities, is legally a well-accepted practice for local governments who want to bring zoning into compliance with plans. If existing zoning allows inappropriately intense development, local governments can rezone to decrease the density or intensity of use to reflect the public interest, as expressed in planning documents. The exception to this authority is where a landowner has vested the ability to develop, usually by submitting an application based on existing zoning.

Local governments do not have to compensate landowners for any reduction in the value of land or for any loss of damage that results from adopting an OCP or zoning bylaw.[1] This includes a reduction in land value where a local government denies an application for a rezoning or change to the OCP. Changing zoning for legitimate community purposes will not attract any liability as long as the zoning does not restrict the property to a public use only, e.g. for parkland.

Canadian courts continue to reinforce this principle, noting that local governments may change zoning, up or down, to realize legitimate public interests without attracting liability to compensate landowners for changes in property values: [2]

> In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation.[3]

This is equally true for environmental protection, where stringent land use controls are the norm in Canada, and such regulation is almost never found to require compensation.[4] Curtailing development on environmentally sensitive lands is not extinguishment of all interest in property, and the freezing of development does not transfer an interest in property to the Crown.[5]

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[1] Section 914 *Local Government Act*, R.S.B.C. 1996 c.323.

[2] *British Columbia v. Tener*, [1985] 1 S.C.R. 533, 17 D.L.R. (4th) 1, 28 B.C.L.R. (2d) 241, 32 L.C.R. 340, 36 R.P.R. 291, [1985] 3 W.W.R. 673, 31 A.C.W.S. (2d) 47, 59 N.R. 82 at 557; Per Cory J. in *Toronto Area Transit Operating Authority* v. *Dell Holdings*, [1992] 1 S.C.R. 32 at 51-52.

[3] *Mariner Real Estate Ltd.* v. *Nova Scotia (Attorney General)*, (1999) 177 D.L.R. (4th) 696, 68 L.C.R. 1, 90 A.C.W.S. (3d) 589, 178 N.S.R. (2d) 294, (N.S.C.A.).

[4] *Ibid.*

[5] A well-cited case in this area is *Steer Holdings Ltd. v. Manitoba*, (1992) 47 L.C.R. 17, 8 M.P.L.R. (2d) 235, 21 R.P.R. (2d) 298, [1992] 2 W.W.R. 558 (Man. C.A.). The claimant was prevented from building across a stream on its commercial property by an amendment to the City of Winnipeg Act. The Court of Appeal held that the law was general in nature and, even though the Province had purchased property upstream for parkland, no evidence suggested that the public would be encouraged to move from the park

The duty to compensate does not arise when municipalities deny subdivision or rezoning applications, or use other growth management mechanisms. This holds true even where development is limited in anticipation of future acquisition for public purposes.[6] Courts are clear that devaluation of land does not equal the loss of an interest in land for which compensation should be paid.[7]

Several local governments, e.g. the Islands Trust (Denman Island and Salt Spring Island), the District of Highlands, and the District of Saanich have all downzoned properties or areas in the past decade to correct zoning that was inappropriate for the location. This included both commercial and residential development.

Likewise, landowners affected by development freezes do not have a right to compensation, in part because such moratoria do not confer a property right on the government.[8] Absent bad faith, a development freeze pursuant to the enactment of an official plan and zoning by-law is lawful.[9] A local government may freeze development when the policy it pursues is clear and within its regulatory authority.[10] While section 895(2)(a) of the *Local Government Act* requires a local government to consider all applications for amendments to plans (such as an Official Community Plan) that come before it, courts have found policies to not approve any changes to a plan or zoning while a community process is underway to be valid.

For example, the Resort Municipality of Whistler adopted a bed limit over fifteen years ago. The purpose was to allow time for development under current zoning to be built out to assess its impact on the community before entertaining zoning changes that allow additional tourist and residential bed capacity.[11] The bed limit does not change existing development rights, but clearly sends a message that no new capacity will be created until all the existing zoning is built out and its effect is assessed.

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onto the claimant's land. The Court of Appeal agreed that there had been a "taking away" in that the claimant's use of the land was limited, but there was no corresponding benefit to the Province of Manitoba.

[6] *Vancouver* v. *Simpson* [1977] 1 S.C.R. 71, 65 D.L.R. (3d) 669, [1976] 3 W.W.R. 97 (S.C.C.); *Sanbay Development Ltd.* v. *London (City)* [1975] 1 S.C.R. 485, 45 D.L.R. (3d) 403; *Calgary (City)* v. *Hartel Holdings*, [1984] 1 S.C.R. 337, 53 N.R. 149, 31 Alta. L.R. (2d) 97, [1984] 4 W.W.R. 193, 53 A.R. 175, 8 D.L.R. (4th) 321, 25 M.P.L.R. 245, 8 Admin. L.R. 231.

[7] In both *Tener*, and *Manitoba Fisheries Ltd.* v. *R.*, [1979] 1 S.C.R. 101, [1979] 1 R.C.S. 101, 88 D.L.R. (3d) 462, [1978] 6 W.W.R. 496, [1978] 3 A.C.W.S. 183, 23 N.R. 159 it was the loss of an interest in property that triggered compensation, not the devaluation of the property. See also Kroft J.'s discussion in *Steer Holdings Ltd. v. Manitoba, supra* note 5 and *Calgary (City)* v. *Hartel Holdings*, *supra* note 6..

[8] *Calgary* v. *Nilsson*, [1999] A.J. No 645.

[9] Per Laskin, C.J. in *Soo Mill & Lumber Co.* v. *Sault Ste. Marie (City)* [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1.

[10] Per Laskin, C.J. in *Sanbay Developments*, *supra* note 6. See also *Nilsson ibid*, *Dalhousie Station Ltd. v. Calgary* (1991) 7 M.P.L.R. (2d) 117 (Alta. Q.B.) (Alberta cities are empowered under the Planning Act to freeze land).

[11] This bed cap has never been challenged as a de facto expropriation. Ken Melamed, Council Member. Resort Municipality of Whistler, personal communication via e-mail on file with author. March 25, 2002.

Courts draw a clear distinction between the exercise of land use jurisdiction and other governmental regulation to the extent that landowners "whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay."[12]

[12] Per Cory J., *Dell Holdings*, supra note 2 at 52.