TREATY NEGOTIATIONS
AND LOCAL GOVERNMENT INTERESTS IN LAND

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One of the provincial mandates for negotiating treaties is that private land held in fee simple is not on the table. This includes fee simple land owned by municipalities. It is therefore important to clearly identify municipally owned property. It is important to identify fee simple interests as well as types of interests that may not be "fee simple", and in both cases ensure that they are excluded from land selection in treaty negotiations.

A number of TACs, most notably the Lower Mainland TAC, have prepared guidelines for use by member local governments in producing inventories of local government interests in treaty negotiations. The purpose of this memo is to provide an inventory of the various types of legal interests and tenures that local government's own in land. UBCM hopes that this will assist and complement the work being done by TACs.

We have identified 6 categories of interests:

1. fee simple ownership;
2. future interests in land;
3. joint ownership pursuant to a public/private partnership;
4. interests in land less than fee simple ownership;
5. mineral rights; and
6. water or riparian rights.

Each of these categories contains many variations. We have listed what we believe to be some of the more important of these variations, although it's difficult to generalize on such matters, and there may be special circumstances where a unique type of asset not listed here is very important to a particular local government.

1. Fee Simple Ownership

Local government's have fee simple interests in the following**:**

a. land (includes buildings in this memo) within the geographical boundaries of the local government which is not reserved or dedicated for any particular purpose and is not subject to any other restrictions on title. In other words, unencumbered land (e.g. usually the city hall, fire halls, recreation centres, etc.);

b. unencumbered land outside the boundaries of the local government;

c. land within the boundaries of the local government and reserved by it under the *Municipal Act* for a public purpose (e.g. for parks, roads, etc.).Use of the land must be consistent with the public purpose. It can't be sold without removing the reservation, which requires an affirmative vote of 2/3 of council members. Fee simple title to the land remains registered in the name of the local government at the Land Title Office (LTO) subject to the reservation bylaw;

d. land within the boundaries of the local government and dedicated by it under the *Municipal Act* for a municipal or other public purpose (e.g. parks). Use of the land must be consistent with the designation. The land can't be sold without revoking the dedication, which usually

requires the assent of the electors. Fee simple title to the land remains registered in the name of the local government at the LTO subject to the dedication bylaw;

[Note: Local government land can also be dedicated as a highway, park or public square in a subdivision, reference or explanatory plan under the *Land Title Act*. The effect of a dedication by deposit of a subdivision plan is to vest title to the land in the Crown for park or other public purpose with the municipality entitled to possession and control of the land for that purpose. The land ceases to be local government fee simple land, and it is not registered at the LTO. Once title has passed to the Crown the local government's ability to deal with it is much more limited than its ability to deal with land owned by the local government and dedicated or reserved by it under the *Municipal Act*. As a result, at least in respect of municipal parks, dedication under the *Municipal Act* is sometimes preferred. For dedication of highways, see no. 4(a) below.]

e. land which is not reserved or dedicated for any particular purpose, but which is subject to other interests. The following list is illustrative of the sorts of things which can encumber Local Government fee simple land both inside and outside its boundaries. The list is not exhaustive.

1. a ground lease to a third party (often pre-paid) for:
   - residential stratas;
   - non-profit rental housing;
   - commercial, industrial, or mixed-use development;
   - public or private utilities.
2. a lease of premises to a third party (often monthly or annual rent, usually for a fixed term);
3. a licence-to-occupy to a third party (usually revocable by local government upon giving specified notice);
4. "s. 219 covenants" in favour of the provincial Crown or a neighbouring local government;
5. statutory rights of way in favour of the provincial Crown, a Crown corporation, or another local government;
6. a trust deed (e.g. Beacon Hill Park in Victoria, Hastings Park in Vancouver) - local governments are not free to sell land subject to trusts;
7. a reservation in the Crown grant often relating to restrictions on use;
8 a right to purchase in favour of a third party;
9. easements (for encroachments, access, etc.) in favour of third parties;
10. restrictive covenants in favour of a neighbouring property owner;
11. a protected heritage designation;
12. a municipal forest reserve designation; and
13. operating or trust agreements with other local governments, B.C., or Canada.

f. land within the boundaries of the local government and obtained by expropriation for a public purpose. In some circumstances the owner from whom the property is taken may have some residual rights in the land, such as, in rare cases, a right of first refusal to repurchase at fair market value if the land becomes surplus to the local government's needs. Expropriated landcan't be used by a local government for a purpose inconsistent with that for which it was expropriated, unless the local government has expressly determined that the land is no longer needed for that purpose.

g. There are instances where a local government has obtained a Crown grant, has filed the grant at the LTO, but has never actually raised the title. In these circumstance the local government owns the land but doesn't enjoy the protection of the *Land Title Act*. Although this is rare it

does occur with respect to property owned by local governments both inside and outside municipal boundaries. A similar problem exists with old Crown grants filed in the Absolute Fee book at the LTO. These grants can be registered upon application of the local government, as owner of the absolute fee, but in some cases local governments (or other owners) have failed to take this step. Again, these unregistered interests don't have the protection of the *Land Title Act* (LTA). It would be a good idea for all local governments to check their land inventories to ensure that title is raised on all their real property interests.

2. Future Interests in Land

Local governments can have a number of different types of future interests in land. Some of the more important types are remainder, reversionary and determinable interests.

Local governments sometimes own remainder interests in properties which will vest absolutely after the death of the owner of a life estate. Similarly, local governments may own a reversionary interest in land where they have transferred an interest to a third party and have stipulated that the interest will revert back to the local government upon the happening of a specified future event. An example which comes to mind is property which a local government requires for a planned park or a sea-wall, but which is owned and occupied by a senior. The local government may purchase the land and grant back a life estate to the senior. These arrangements are more commonly effected by purchase and leaseback.

Just as local governments may own remainder or reversionary interests which will vest absolutely upon the happening of a future event, they may also own determinable interests, which will revert to another owner upon the happening of a future event. For example, a Crown grant may contain a clause that the title determines and reverts to the Crown it the land ceases to be used as set out in the grant.

Local governments also have future interests in lands to which they have no property rights, but which are identified for purchase for a public purpose in a Community Plan and/or a capital plan, or are designated for a public purpose in the OCP.

3. Joint Ownership Pursuant to a Public/Private Partnership

Local governments may own land jointly with private third parties pursuant to partnering agreements.

4. Interests in Land less than Fee Simple Ownership

a. **Highways.** Local governments have an interest in most highways within municipal boundaries. Local governments create highways in two basic ways: by reservation or dedication under the *Municipal Act* or by dedication under the *Land Title Act* (*LTA*.) Title to roads created by a reservation or dedication bylaw under the *Municipal Act* remain registered at the Land Title Office in the name of the local government. Public roads created under the *LTA*, on the other hand, vest in the provincial Crown, even where the land was originally owned by the local government (see No.s 1(c) and 1(d) above).

Many local governments typically create public roads under the LTA, particularly as part of a subdivision, rather than under the *Municipal Act*.

Under the *Highway Act*, a highway includes all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings, and approaches, and any other public way. There is a

similar definition in the *Municipal Act*. Unopened road allowances are also highways if created by designation.

Although ownership usually vests in the province, local governments retain possession of, regulatory authority over, and maintenance responsibilities for most public roads within their jurisdiction. The most significant exceptions to this are "Gazetted" highways and freeways, which effectively are beyond the jurisdiction of local governments for most purposes.

Local governments have the power to stop up and close to traffic a public road or portion of road. A stopped up and closed public road can be re-dedicated by a local government as a park or public square. This is a relatively new power. It is an exception to the general rule that requires approval of the Minister of Highways to the abandonment of a highway. My understanding is that the Registrar of Land Titles does not look favourably on the exercise of this highway rededication power. To date, it has rarely been used by local governments.

There are also special rules for plans cancellations respecting road ends. Local governments are also authorized to undertake highway exchanges whereby a portion of highway is exchanged for land necessary to improve or widen the highway. Local governments also use highways as corridors for their services, such as water and sewer. None of these powers extend to Gazetted highways.

Local governments can grant licences to occupy public roads within their jurisdiction. For example, private utilities, such as cable or fibre-optic companies, use roads within municipalities as corridors for their services. Restaurants and cafes may want to use sidewalks in the road allowance as seating areas. These sorts of arrangements are negotiated with local governments, and therefore represent another local government interest in highways within their boundaries. However, generally speaking, local government possession of municipal public roads is only for highway purposes.

Local governments may also have interests in highways and service corridors outside their boundaries, but that is a separate issue - see 4(c) below: Interests in Provincial Crown Land.

b. **Subordinate Interests in Private Land.** Local governments own a wide variety of interests which are subordinate to (i.e. dependent on) the fee simple ownership of private third parties (or other local governments). Some of the more common of these subordinate interests are listed below. The list is not exhaustive. I have marked with an asterisk the local government interest which would typically exist only within the subject local government's boundaries.

- leases registered at LTO (with terms exceeding three years) for a wide variety of purposes;
- leases not registered at LTO (rare - usually month-to-month tenancies);
- statutory rights of way for service corridors, waterworks, sewer lines, access roads, fire lanes, etc.;
- easement agreements;
- ***** "s.219 covenants", for example, land use covenants to secure the obligations of a property owner relating to regulatory site development requirements;
- ***** statutory building schemes;
- ***** land use contracts entered into before the relevant empowering provision in the *Municipal Act* was repealed;
- a right of first refusal or an option to purchase (a local government can't normally grant an option over its land because its land normally has to be made available to the public when being sold - s.186 Municipal Act - but an option in favour of a local government respecting private property is allowed);

- ***** housing agreements;
- ***** latecomer agreements;
- operating or trust agreements with private owners other local government land owners (these may also relate to Crown land in rare cases);
- ***** a special charge for unpaid property taxes (takes priority over all other charges of any other person other than the Crown).

Local governments also have a regulatory stake in private land within their jurisdiction, but they can't use their regulatory powers to create indirect beneficial interests in private land (without paying compensation). They can't, for instance, zone private land so as to completely sterilize it, or so as to restrict its use to a public use, although the extent of permitted non-compensable down-zoning is expansive. This is a grey area of law, and over the years there have been a considerable number of court decisions which have dealt with it.

c. **Interests in Provincial Crown Land**. Local governments also own a wide variety of interests in provincial Crown land. There is a good discussion of the issues involved here in the GVRD's 1997 document *Treaty Negotiations and Identification of Corporate Interests*. Most of these interests can exist both inside and outside municipal boundaries. The following list is not exhaustive:

- leases registered at the provincial Crown land registry (and not at the LTO) for a variety of purposes (e.g. GVRD's watersheds and GVWD's Cleveland and Seymour Dams);
- rights of way for service corridors, waterworks, sewer systems, access roads, fire lanes, etc.;
- easement agreements;
- a variety of licences and permits issued by various ministries (e.g. woodlot licences, licences of occupation for communication sites, roads, utilities, waterworks, mineral claims);
- community forest tenures;
- a notice of delinquent property taxes (where the province has agreed to sell Crown land under an agreement to purchase).

Local governments also have a vital interest in transportation and service corridors across Crown land inside and outside their boundaries to which they have no recognized property rights.

d. **Interests in Federal Crown Land.** Local governments own similar but much less extensive interests in federal Crown land.

e. **Interests owned jointly with the Province or Canada.** An associated issue relates to land owned or managed jointly with the Province, or, much more rarely, with Canada. It may be that the joint interests can't be severed. For example, the Seymour Demonstration Forest in the District of North Vancouver is 30% provincial Crown land and 70% GVWD land. The integrity of the GVWD's interest might be impacted or destroyed without the province's 30%.

f. **Interests in Indian Reserve Land.** Local governments own interests in lands located on Indian reserves. Provincial policy appears to be that these interests, which are created under the *Indian Act*, must be converted into replacement interests in treaties, and must continue according to their terms and conditions, or terms and conditions which are substantially the same.

There are only two methods by which a non-band member, such as a local government, can obtain a binding contract of any kind to occupy or use reserve lands without changing its reserve status. These two methods are:

- permits under s. 28 of the *Indian Act*. Typically, these are small-scale non-assignable rights of occupancy or use of reserve land for a specified period of years. They include rights of way (e.g. for watermains, sewers, access roads, etc.) and licences to use. They sometimes are in the form of a lease, but again they are not assignable. An example is the GVRD's right of way for two Capilano water mains across Capilano and Seymour Reserves. Unlike statutory rights of way under the *Land Title Act*, these interest can't be granted in perpetuity. Also, they require the concurrence of the Minister of Indian Affairs. The status of these permits will have to be converted in treaty settlements.

- leases under s. 58(3) of the *Indian Act.* These are granted by individual band members and are contingent upon the existence of a valid Certificate of Possession over the land which is being leased in favour of the individual band member. These leases are not popular because they cease to exist if the underlying certificate of possession is cancelled, which can happen for a number of reasons beyond the control of the lease holder.

Local government interests in reserve lands are usually created by actually changing the reserve status of the land. This can be done in one of three ways.

1. **Surrender.** Local government interests in reserve lands can be created by way of an absolute surrender of the reserve land. Surrendered land is released by the Band, and it ceases to be reserve land. It is surrendered to the federal Crown who then sells it to the local government or other proposed purchaser. Partial interests in land, such as licences and easements can also be surrendered and sold. A surrender is a voluntary process requiring the assent of the majority of the Band electors.

2. **Designation.** Local government interests in reserve lands can also be created by way of a conditional surrender, or designation, of reserve land. Once the land is designated it is leased to the local government. Designated lands, unlike surrendered lands, are still considered reserve lands. However, as with a surrender, a designation is voluntary and requires the assent of the Band electors. The status of these interests would have to change in treaty settlements, probably to leases registrable in the Land Title Office (leases on designated lands are currently registered at the Surrendered and Designated Land Registry administered by the Department of Indian and Northern Affairs).

3. **Expropriation.** Finally, local government interests in reserve lands can be created by way of an expropriation by the federal Crown under s. 35 of the *Indian Act*. A recent B.C. Supreme Court case (*Osoyoos Indian Band v. The Town of Oliver*, 1997) has confirmed that land expropriated by Canada and transferred to the province or a local government for a public purpose is no longer reserve land. The Band can't therefore impose a tax on the land. It is no longer in their jurisdiction.

There is a significant qualifier respecting local government interests in reserve lands. It is difficult to determine whether a surrender, designation or expropriation, as discussed above, is in fact valid in any given circumstance due to the federal Crown's rigorous fiduciary responsibilities to Bands when selling, leasing or expropriating reserve land. If a First Nation

establishes in court that the Crown didn't meet its fiduciary obligations then the designation, surrender or expropriation might be undermined, and local government interests in the land created after the designation, surrender or expropriation would be open to litigation and subject to negotiation .

5. Mineral Rights

In B.C. all minerals, precious or base, other than coal have been reserved from Crown grants since at least 1891. However, local governments may own lands where the original Crown grant predates 1891. In this case the local government might own the mineral rights. Local governments may also own lands which originally formed part of the Railway Belt, or were granted as railway subsidy lands. In these cases also, the local government might own the mineral rights.

Local governments may also own Crown-granted mineral claims under the B.C. *Mineral Tenure Act.* They may also own an interest in minerals by way of a profit a prendre where an agreement provides for the right of entry on the lands of another for the purpose of severing and removing minerals (see, for example, the Supreme Court of Canada decision in *Tener v. The Queen,* 1985).

6. Water or Riparian Rights.

Local governments have a variety of different property interests in water, most of which are potentially impacted by treaties. This area requires great care.

There are significant legal complexities associated with water tenures and water rights, but the following basic categories of ownership can be identified as requiring protection.

1. Local governments have riparian rights attached to every parcel of waterfront property that they own. There is a right to protection against erosion and flooding; there is a right associated with land which has gradually and imperceptibly accreted to the upland through natural deposition; and, most importantly, there is a right to unimpeded access to and from the waterfront property across the foreshore and extending out into the body of water. These rights can be very important for public access and use of the waterfront, whether it be a lake, river, stream, or the ocean.

2. Local governments have tenures (leases/licences-to-occupy) granted by Canada over near-shore and foreshore waterlots in Burrard Inlet, the mouth of the Fraser River, Victoria, and other harbours under federal jurisdiction.

3. Local governments have extremely important tenures (leases/licences) granted by B.C. relating to use and flow of water in streams, rivers, lakes, and bounded coastal water, such as Georgia Straight, the Strait of Juan de Fuca and inlets. (In B.C. the Crown retains the title to lands below the upland natural boundary, except where they were Crown-granted long-ago. See 5 below.)

4. Local governments have statutory rights of way which take precedence over the riparian access rights of the upland owner.

5. In rare cases local governments have fee simple title to near shore and foreshore waterlots obtained by way of Crown grant prior to the introduction of the *Water Act*.