dentons.com

DENTONS

Insights and Commentary from Dentons

On March 31, 2013, three pre-eminent law firms—Salans, Fraser Milner Casgrain, and SNR Denton—combined to form Dentons, a Top 10 global law firm with more than 2,500 lawyers and professionals worldwide.

This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

DEVELOPMENT AGREEMENTS – A SHIELD OR A SWORD*

Prepared For: Alberta Municipal Legal Advisors
2011 Conference

*Note to reader:

This discussion paper was written prior to the Alberta Court of Appeal decisions in *Prairie Communities Development Corp. v. Okotoks (Town)*, 2011 ABCA 315 and *A.R.W. Development Corp. v. Beaumont (Town)*, [2012] 3 W.W.R. 1, 2011 CarswellAlta 2167, 2011 ABCA 382

Reliance upon these materials is at readers risk.

Prepared By:
F. Richard Haldane, Q.C.
Fraser Milner Casgrain LLP
Edmonton, Alberta
- and -
Jamie Johnson
City of Edmonton, Law Branch
Edmonton, Alberta

For Presentation In:
Red Deer – June 2nd and 3rd, 2011

INTRODUCTION

Shelter for all purposes, whether commercial, industrial or residential is the most basic of needs and it is through the cooperation of municipalities and developers that this need is satisfied. Municipalities, together with developers, have a shared responsibility to provide to the residents of the municipality accommodation to meet their needs. This need is met through a cooperative effort by the municipality exercising its rights as a regulatory authority and as the operator and ultimately the owner of the municipal infrastructure that services all accommodation. It is provided by the developer bringing forward its lands and its capital. Neither developers nor municipalities alone can provide functional accommodation without the other.

In the Beginning

Few amongst us recall when all municipal services were installed by the municipality and the entire cost of the municipal infrastructure was recovered by way of local improvement charges. Ultimately, municipalities yielded to pressure from the development community to allow it to construct and install municipal services for which ultimately the municipality would assume responsibility. Commencing in the early 1970's, the cost of construction of the services and the burden and risk associated with their installation was assumed by the private sector. It is a system ultimately which has proven beneficial to municipalities, developers and prospective home purchasers. To the municipality it moves the burden and risk of debt required to fund infrastructure from the public sector to the private sector. Developers are rewarded for initiative in bringing their development forward. To the home purchasers, it ensures a competitive market place, a variety of accommodation and a supply of lots limited only by the willingness of the developers to risk capital to develop additional lots.

For the private sector to complete the installation of the municipal infrastructure in new subdivisions, developers require access to bank financing. Access to bank financing would is only if the lender is satisfied with the security provided, namely a registered plan of subdivision. Therefore, to ensure in the final analysis the completion of that subdivision to the municipal standards, the developer would be required to enter into a development agreement. Thus, the development agreement was born.

There have been a number of significant changes in the development landscape since the early 1970's.

1. In the 1970's when development agreements were first utilized, the courts generally accepted a narrow interpretation of the authority of municipalities, following a principal set forth in *Ottawa Electric Light Company v. Ottawa* [1906] 12OL R290

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted and express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared object and purposes of the corporation not simply convenient but indispensible. Any fair reasonable doubt concerning the existence of powers as resolved by the Courts against the corporation and the power is denied."

In 1995, this jurisprudence was replaced with the broad purposive approach to interpreting legislation and municipalities were given much deference, both legislatively and administratively.

2. Where municipalities in the 1970's were satisfied to install basic infrastructure, such as roads, curbs, gutters and street lights., today, municipalities face significant pressure to provide more infrastructure in new neighbourhoods. Effectively, municipalities and residents are no longer satisfied to wait for development of recreation facilities, schools, transit service, etc. Demands continue to grow well beyond basic infrastructure needs. This demand for new infrastructure has been accompanied by a significant decline in the amount of provincial funding to pay for regional infrastructure.

THE SCOPE OF THE AUTHORITY OF SECTION 655 - APPLYING A BROAD PURPOSIVE APPROACH

Purpose of Development Agreements

Sections 655, 650 and 651 essentially provide the full scope of the authority of municipalities through development agreements to compel the provision of municipal improvements in the context of a subdivision approvals or development permits. These sections are reproduced in Appendix 1. Section 650 enables a municipality to require as a condition of a development permit that the applicant enter into a development agreement for the installation of roadways and utilities necessary to the development. Section 655 provides the identical right to impose the obligations to enter into a development agreement as a condition of subdivision approval. Section 651 of the Act enables to the municipality to require an applicant to install oversized improvements to accommodate upstream development and makes provision for the recovery of oversizing costs.

Section 651 first appeared in the Planning Act in 1984 to validate the formula used by Edmonton to recover the costs of such improvements. Section 651(3) commences "If a municipality has at any time, either before or after this section comes into force, or before or after Section 77.1 of the Planning

Act was deemed to come in force, entered into an agreement providing for reimbursement for payments made or costs incurred…" The section was effectively designed to bring to a conclusion litigation contesting the validity of the City's practices and to protect the City in respect of both historical and future agreements utilizing the formula applied by the City of Edmonton to fund municipal trunk services.

Whenever a subdivision is approved which requires the installation of municipal improvements, Section 655 will apply, and it is likely Section 651 will also come into play.

Judicially Stated Purpose of Development Agreements

In Starland Municipal District No. 47 v. Hutterian Brethren Church of Starland, (1996) 2 MPOR 2nd 15 1996 182 AR 373 QB, Justice Clark held that:

> "It is not the purpose of a development agreement to allow the municipality to impose conditions not required as a condition of development (or subdivision) approval. The municipality cannot take unto itself the discretion and authority to enforce standards imposed by non-planning bodies and cannot unilaterally create enforcement mechanisms not otherwise available to it through the Municipal Government Act."

This is an overly narrow view of the authority of municipalities relating to development agreements and is not consistent with the practice. It must be understood that entering into the development agreement enables registration of the subdivision plan. The registration of the subdivision plan enables the issuance of development permits for site specific properties. It enables developers to sell the lots to prospective home builders, who market the opportunity to home buyers. The development agreement is a vehicle by which municipalities are able to enforce what in effect are conditions subsequent to approval and the remedies that are provided in the legislation, such as a stop order are inadequate to meet the municipality's needs. Most municipalities today assume additional responsibilities to ensure compliance with the development agreement and require additional remedies to ensure the publics' interest is best served.

In the case of a development permit, many conditions imposed under the permit come directly from the wording of the municipal land use bylaw. The Municipal Government Act specifically requires conditions that are to be applied on permits (see MGA section 640(2)(iv)) be expressly stated in the

bylaw. Under this premise, it is arguable that any authorized condition imposed on the development permit may also be reflected and enforced through the subsequent development agreement.

Oversizing and Cost Recoveries

It would be inefficient that services or roadways are installed with capacity to service only the subdivision. In order to create orderly development, it is necessary to also accommodate upstream growth. The Act therefore expressly provides for the installation of improvements with excess capacity.

> 651(1) An agreement under s.655 … may require the applicant for subdivision approval to construct or pay for the construction of an improvement with excess capacity.
>
> 651(5) "excess capacity" means any capacity in excess of that required for a proposed development or subdivision.

Every municipality which now enters into a development agreement will require the applicant for subdivision to provide excess capacity in the infrastructure which it provides for the benefit of upstream lands dependent upon such capacity for services.

Inevitably, the provision of excess capacity results in additional costs. Provision has been made in Section 651(2) of the Act to provide for reimbursement of that cost.

> (2) An agreement referred to in subsection(1)(b) that obliges an applicant for a…subdivision approval to construct or pay for an improvement with an excess capacity may also provide for the reimbursement of the cost incurred… (emphasis added)

It is respectively submitted that the word "may" while normally conferring discretion must be read as mandatory in the context of this section.

> In the absence of evidence to the contrary, powers conferred by "may" are presumed to be discretionary. But where the failure to exercise the power would tend to defeat the purpose of the legislation, undermine the legislative scheme, create a contextual anomaly, or otherwise produce unacceptable consequences, the courts readily conclude that power was meant to be exercised but it is the power coupled with the duty. (*Statutory interpretation by Sullivan*, Toronto, Irwin Law 1997 at page 85)

The Alberta Court of Appeal in *Re Buzinas*, [1975] 1 W.W.R. 233 in holding that "may" be construed as "shall" stated: if "the purpose for which a power is conferred is such as to lead to the

inference that its exercise was not intended to be at the discretion of the donee, the provision will be construed as obligatory notwithstanding that the language is of a permissive character". The word "may" in s.651(2) of the Act is used advisedly. If no excess capacity is required to be provided by the first developer, then clearly there is no entitlement to recover any portion of the cost of such infrastructure. The legislative draftsman was precluded from using the word "shall". On the other hand, where the first developer is required to install infrastructure that has excess capacity, then it is reasonable that the persons that utilize that capacity pay for the benefit. It would be appropriate for the first developer to refuse to provide the excess capacity unless appropriately compensated. This interpretation of subsection (2) is supported by subsection (3) of section 651, which reads:

> (3) If a municipality has at any time…entered into an agreement providing for reimbursement of payments made or costs incurred in respect of the Excess Capacity of an improvement by an applicant for a development permit or subdivision approval, the municipality must, when other land that benefits from the improvement is developed or subdivided, enter into an agreement with the applicant for a development permit or subdivision approval for the other land, and that agreement may require the applicant to pay an amount in respect of the improvement as determined by the municipality…

The municipality is vested both with the authority and the responsibility to require that the excess capacity be constructed, and to require those who benefit from the excess capacity contribute to or reimburse the first developer for its costs.

The outstanding question then becomes one of timing and how interest, as contemplated by these above cited section, enters this discussion. How long must a municipality hold this obligation to recover from subsequent developers? If this obligation continues into perpetuity, then eventually the recoverable costs will either carry such enormous interest that subsequent development is not economically viable or, alternatively, interest is not attached and the time lag will diminish the value of those initial costs to the point where reimbursement does not amount to recovery.

(For additional authorities relative to the imperative nature of the "may", see also *Allen v. Judicial Council of Manitoba*, [1991] 2 WWR 337 and *Court v. Insurance Corporation of B.C.* (1995), 5 BCLR (3d) 321 (S.C.).)

Guaranty Properties Ltd. v. The City of Edmonton (1998) 45 MPLR 2nd 266 deals with the responsibility of the municipality to recover oversizing costs installed by the developer. In that case, the

City implemented a cost recovery scheme that contemplated that all of the costs of the storm trunk system would be prorated over the drainage basin. As expected, not all parts of the storm drainage system provided benefit to all other lands in the basin. The last developer from whom recovery was to be made did not directly benefit from excess capacity installed by Guaranty Properties and protested its obligation to make the requested contribution. The City acceded to such argument. When the matter proceeded to court, the City argued that it had no authority to recover the cost of municipal improvements installed by Guaranty Properties from the applicant for subdivision as they did not benefit from infrastructure installed by Guaranty Properties. The Court accepted the City's argument that the obligation to recover the cost was *ultra vires* and therefore the City was not bound by its obligation to recover such cost from the applicant. The Court, however, did conclude that to require Guaranty Properties construct oversized infrastructure which ultimately vested in the municipality with no recovery unjustly enriched the City. The City was accordingly obliged to pay Guaranty Properties the oversizing costs.

The practice as it relates to requiring the installation of oversizing is consistent. The practice as it relates to the recovery of oversizing costs varies from one municipality to the next. Some municipalities simply require that the applicant enter into an agreement with the party who previously installed the oversizing to compensate him for such oversizing costs. Some municipalities take a more proactive role requiring the contribution be made to the municipality at the time the agreement is signed pursuant to s.655. While the practice relative to facilitating recovery is widely varied from municipality to municipality, virtually all municipalities agree only to use "reasonable efforts" to facilitate the recovery and assume no liability for failure to recover the oversizing costs. The failure of the municipality to recover the excess costs of construction could undermine the legislative scheme that is in effect and thereby hinder orderly development.

Regulating the Regulators

The following judicial statements provide insight into the development agreement process:

1. "My view is generally that a municipality should not be able to demand as a condition of the execution of a development agreement arising out of a subdivision approval granted by an appeal body the inclusion of terms therein that are beyond the express statutory provisions. It is hard to conceive of more fertile ground for the abuse and oppression of

> the citizen by the state than to allow that situation to exist where the bargaining positions of the parties are so disparate."

1992 Bristol Developments Alberta Ltd. v. Municipal District of Sturgeon County No. 90 (The), [March 1992] Unreported.

Justice Cooke so stated in relieving a developer of obligations to pay legal and engineering fees which were not determined to be within the purview of the Act. Justice Cooke did so notwithstanding that the development agreement had been executed.

2. "While a municipality has the capacity due to natural person powers conferred upon it upon Section 6 of the Act to enter into a contract to provide for almost anything, in a servicing agreement, it does not have the power to compel a developer to sign a contract to do anything more than expressly set out in Sections 650, 651 and 655. Natural person power does not enlarge a municipalities powers. Nor does it enable a municipality to impose conditions in the agreement that either conflict with or are not contemplated in the approval."

It should be noted that the natural person powers are subject to the express limitation and reads as follows:

> **"6** A municipality has natural person powers, **except to the extent that they are limited by this or any other enactment**."

Municipal Government Act (Alberta), Section 6

3. "The characterization of Section 655(1)(vii) as confiscatory and therefore subject to strict construction and is not consistent with the current approach to the interpretation of planning legislation. The traditional strict construction approach emphasized the fact that planning legislation interferes with property rights. The traditional view has evolved into a more liberal approach reflecting the general public interest and the policies underlying such legislation and its application. These policies are evident in Section 617 of the MGA"

Alberta Court of Appeal, *Stantec Consulting Ltd. v. Edmonton (City)*.

It is reasonable to conclude that a broad purposive approach will enhance the general authority provided to municipalities by Section 655 and 650 to secure completed municipal improvements. It will not, however, increase the category of facilities for which contribution can be required. The broad purposive interpretation will not allow municipalities to require provision of land or capital for such

improvements as libraries or fire halls. For example, the obligation to construct or pay for the construction of a road to give access to the development or subdivision, will enable the municipality to determine within reason what those requirements may be. Section 655 will allow the municipality to determine whether or not a pedestrian walkway system serves a subdivision, what utilities are necessary, etc.

On the issue of construction standards, Fred Laux posits that the general construction standards of the municipality are a matter within the discretion of the municipality and so long as that discretion is exercised within parameters prescribed by law, a developer has little recourse shall he be dissatisfied. The law to which Fred Laux refers is *Purdy v. Lacombe* (1977) Red Deer Alberta Trial Division in which it was the length of the roadway and not the standard to which it was constructed that was at issue. Given that the municipality will be obliged to assume full responsibility for the ongoing maintenance, repair and operation of the infrastructure installed by the developer, it would be difficult to establish that the discretion vested in the municipality to determine standards is exercised unreasonably or contrary to law.

Challenging the Content of the Development Agreement

From a practical perspective, a developer faced with the opportunity of entering into an agreement authorizing development or challenging the validity of certain provisions of the agreement will inevitably choose to execute the development agreement to meet the numerous obligations he has assumed to contractors and home builders. The opportunity to challenge the validity of the development agreement has uncertain results and inevitably leads to the general acceptance of the obligations assumed by the municipality whether or not there is legislative support for those provisions. The option of delaying development while litigation proceeds, is not an option for most. Moreover the relationship between the developer and municipality is ongoing and the developer is dependant upon the municipality not only for subdivision approval and land use/zoning approval but throughout the implementation of the development agreement. A judicial challenge to the validity of the development agreement normally impairs the creation of a happy working relationship.

Debate continues on whether or not there is any jurisdiction in the SDAB or MGB to review the terms and conditions of the development agreement. For the most part, the appeal period likely will have expired by the time the development agreement is available. A development agreement is an

agreement apparently negotiated between the municipality and the developer. It is quite likely that the SDAB would defer to the municipality in any event rather than offend the council that appointed it.

This issue arose for consideration by the MGB in Keyland Development Corporation v. Town of Cochrane (supra). In that particular case, the conditions of subdivision approval specified certain elements that were required to be addressed in the development agreement. To the extent the elements identified in the development agreement were determined to be unlawful, the MGB assumed jurisdiction to deal with them as though dealing with a condition of subdivision approval. Frequently, the condition of subdivision approval states nothing more than that the applicant enter into an agreement with the municipality pursuant to s.655 of the Act for provision of services and roadways. Absent specific terms of reference for that development agreement, it is unlikely that the SDAB or the MGB could have assumed jurisdiction. It begs the question as to whether or not the subdivision authority can prescribe the contents of the agreement at all.

Recourse is available to the Court of Queen's Bench to review the development agreement and ostensibly to require the municipality to provide the development agreement free of those provisions determined to be beyond its jurisdiction. Inevitably, debate on the content of the development agreement would require at the very least a Special Chambers application and would likely result in the loss of the construction season.

Inevitably some developers will want to challenge the validity of questionable provisions following the execution of the agreement and the registration of the subdivision plan.

> "But once a developer signs a contract containing requirements beyond those set out in the sections, it is submitted the developer cannot rely on municipal ***ultra vires*** as a defense".

Laux. ***Planning Law in Alberta*** s.14, 4(1)(b)(i).

In ***Bristol Developments*** (***supra***), Justice Cooke set aside obligations assumed by the developer under a signed development agreement. That position has generally not been embraced by the courts. The view that appears to have the weight of judicial authority is that expressed by Professor Laux.

The Manitoba Court of Queen's Bench in response the developer's right to challenge the requirements of an agreement incorporating provisions that were deemed not to be valid states:

> "All of that became academic when the plaintiff voluntarily and consciously executed the development agreement. If instead of entering into the development agreement, the plaintiff had challenged the defendant's right to insist on the development of the street access system, the plaintiff might well have been successful. That however is not the route chosen by the plaintiff. For the reasons I have discussed earlier, I find the plaintiff to be estopped from bringing forth its challenge because of its own actions."

The Supreme Court of Canada in ***Eadie* v. *Township Brantford*** (1967), 63 DLR (2d) 561 in fact returned levies to the applicant for subdivision after the subdivision was registered. The Court stated:

> "If a person with knowledge of facts pays money which he is not in law bound to pay and in circumstance implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift and a transaction cannot be reopened. If a person pays money which he is not bound to pay under the compulsion of urgent and pressing necessity or of seizure actual or threatened of his goods, he can recover it as money had and received."

The Supreme Court of Canada concluded that if there was "practical compulsion" on the part of the applicant to pay the levy, such levies were recoverable.

In the ***Eadie*** case, it was the material and distressing nature of the human circumstances in which the Eadies found themselves that gave rise to the practical compulsion. The applicant's wife was confined to the hospital and severance and sale of the farmhouse was required by the applicant to enable the applicant to be closer to his wife.

Practical compulsion has been found by the courts to exist in the following circumstances:

- The plaintiff was under the belief that it had a legal obligation to pay the levy, the plaintiff being a homeowners group which had acquired the adjoining lands to maintain the integrity of their neighbourhood (***Wilkin Holdings Ltd.* v. *City of Nanaimo*** (1978), 5 R.P.R. 312).

- The inability to satisfy concurrent contractual obligations (***Conan Construction Co. Ltd. v. Burrow of Scarborough*** (1981), 32 OR (2d) 500).

- Where no benefit was derived from the payment and the plaintiff was misled by the municipality (***Re Hay* v. *Corporation of the City of Burlington*** (1981), 16 M.P.L.R. 292, 38 O.R. (2d) 476 (Ont. C.A.).

- Where there was an overhanging threat of invalid bylaws (***Elliot*** v. ***Guelph***, [1989] OJ No. 846)

In contrast to the foregoing, the following represent a series of cases in respect of which no practical compulsion was found.

- License fees were improperly imposed without threat to close the plaintiff's business and the plaintiff thought the fees were payable. (***George (Porky) Jacobs Enterprises Ltd. v. City of Regina*** (1963), 37 D.L.R. (2d) 757)

- Where the developer is motivated by commercial expediency, prior existing knowledge or suspicion that the levies are unlawful. (***Gordon Foster Developments Ltd. v. Township of Langley*** (1979), 102 D.L.R. (3d) 730) (See also ***Ronell Developments Ltd. v. Duncan*** (1980), 25 B.C.L.R. 123 and ***2984 Holdings Ltd. v. Surrey (District)*** 1994 B.C.J. No. 1831)).

- Dire financial circumstances necessitating acceptance of unlawful requirements (***J.R.S. Holdings Ltd. v. Corporation of the District of Maple Ridge***, [1981] 4 W.W.R. 632).

- The creation of urgency caused by the developer (***Winfield Developments Ltd. v. Winnipeg (City***), [1988] M.J. No. 377) the inability to proceed with development prior to payment of the levy (***Wellington Heights Development Ltd. v. Qualicum Beach (Village)***, [1982] P.C.J. No. 2319), necessity created by procrastination of the developer result in practical compulsion (***Biro v. Sudbury (City)***, [1997] O.J. No. 179).

Nor will it necessarily be of assistance if monies are paid under protest. Monies paid under protest in ***Weyerhaeuser Canada Ltd. v. Surrey***, [1986] B.C.J. No. 2433 did not establish practical compulsion or that payment was involuntarily made. In ***Glidurray Holdings Ltd. v. Village of Qualicum Beach*** (1981), 129 D.L.R. (3d) 599 (B.C.C.A.) fees were paid under protest. Whether or not the payment was voluntarily made or made under duress or coercion depends upon the circumstances of each case. In holding that there was no coercion or duress the Court of Appeal relied upon the following from ***Mason et al v. State of New South Wales*** (1959), 102 C.L.R. 108, p.143, where the court stated:

> "But there is no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled. (See ***Deacon v. Transport Regulation Board*** (1958) V.R. 458). Moreover the word "protest" is itself equivocal. It may mean the serious assertion of a right or it may mean no more than a statement that payment is grudgingly made."

In the result, since the developer knew of or should have been acquainted with the law and since there was no coercion being applied to it to pay the money, the court concluded the payment was made voluntarily and not recoverable. There is an argument that to find otherwise will hinder the ability of the two parties to negotiate what is in the overall best interest. The courts appear to be of the view that challenging the agreement is a viable alternative to developing. It is a rare exception when a

developer successfully recovers monies unlawfully required to be paid pursuant to a development agreement. Coincidentally, Ontario has adopted statutory provisions expressly authorizing recovery of levies after payment if it is determined that there has been an overpayment (***Development Charges Act***, SO 1997 s.25).

These decisions have resulted in a number of municipalities assuming a cavalier approach to the requirements of the Municipal Government Act. Some municipalities have used development agreements or contribution agreements of one description or another to obtain contributions from developers at the time of subdivision application for capital contributions towards a variety of public initiatives for which there is no liability to account, which may or may not become necessary or be constructed and for which there is no legislative authority. By way of example, the following extract appears in the Fort Saskatchewan development levies and charges report to council in February 2007:

> "The Municipal Government Act defines what a municipality may assess a new development in terms of offsite levies, conditions of development and oversize improvements. A development agreement between a municipality and developer may include other elements in its development charges such as recreation facilities, parks, pedestrian walkways, emergency and protective services and planning and infrastructure studies. If a developer is prepared to accept these in a signed development agreement, then it becomes a binding contract…"

THE NEW REGIME Kingstreet Investments Ltd. v. New Brunswick 2007 1 S.C.R. 3; 2007 SCC 1:

In *Kingstreet Investments Ltd. v. The Province of New Brunswick* (2007) S.C.R. 3 2007 S.C.C. 1, a corporate tax payer sought to recover a user charge imposed by regulations of the Province. The Court concluded that the user charge was *ultra vires* and that the right to recover such amounts should be determined on a constitutional rather than a restitutionary basis. If the charge was not constitutionally valid, the monies would be recoverable, notwithstanding that such monies were not paid under protest and notwithstanding that the burden of the levy had been passed on.

Paragraph 13

> "This case is about the consequences of the injustice created where a government attempts to retain unconstitutionally collected taxes. Because of the constitutional rule at play, the claim can be dealt with more simply than one for unjust enrichment in the private domain. Taxes were illegally collected. Taxes must be returned subject to

> limitation period or remedial legislation when such a measure is deemed appropriate."

Paragraph 15

> "When the government collects and retains taxes pursuant to ultra vires legislation, it undermines the rule of law. To permit the Crown to retain an ultra vires tax would condone a breach of this most fundamental constitutional principle."

Paragraph 40:

> "Restitution for ultra vires taxes does not fit squarely within either of the established categories of restitution. The better view is that it comprises a third category distinct from unjust enrichment. Actions for recovery of taxes collected without legal authority and actions for unjust enrichment both address concerns of restitutionary justice but these remedies developed in our legal system along separate paths for distinct purposes. The action for recovery of taxes is firmly grounded as a public law remedy in a constitutional principle stemming from the democracy's earliest attempts to circumscribe government's power within the rule of law."

Paragraph 53

> "The Crown should not be able to retain taxes that lack legal authority. It therefore matters little whether the taxpayer paid under protest. If the tax proves to be invalid then there should be no burden on the taxpayer to prove that they were paying under protest. Such a finding would be inconsistent with the nature of the cause of action in this case…
>
> Full effect can only be given to the principle that taxes should not be levied without proper authority if the return of taxes exacted under an unlawful demand can be enforced as a matter of right."

Paragraph 55

> "It is not up to the taxpayer but rather to the party that makes and administers the law to bear responsibility of ensuring the validity and applicability of the law…" and quoting Wilson J. from *Air Canada v. British Columbia* 1989 1 SCR 1161
>
> "Taxpayers are expected to be law abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from

> the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it unrealistic to expect the taxpayer to make its payments "under protest".
>
> Although made in the context of *ultra vires* legislation, it may be arguable that these comments are equally applicable to the situation where taxpayers are required to pay a levy because of the incorrect application."

The principles enunciated in the King Street case find their philosophical underpinnings in *Amax Potash Ltd. v. Government of Saskatchewan* 1977 2 SCR 576:

> "If either the Federal Parliament or a Provincial Legislature can tax beyond the limit of its powers, and by prior or ex post facto legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits and to allow monies collected under compulsion pursuant to an ultra vires statute to be retained to be tantamount to allowing the legislature to do indirectly what it could not do directly and by covert means to impose illegal burdens."

If applied to the proper situation, the decision in Kingstreet may facilitate the recovery of monies unlawfully paid pursuant to offsite levy bylaws where the validity of the bylaw or sections of the bylaw are determined to be *ultra vires*. Moreover, the duty of municipalities to operate within the legislative mandate in the context of development agreements is equally compelling and the rule of law as enunciated in Kingstreet could readily extend to obligations improperly imposed by development agreements.

CAN THE MUNICIPALITY CONTRACT TO AVOID KINGSTREET?

While provisions are normally incorporated within the terms of a development agreement respecting how and when levies are payable, they are levied pursuant to the bylaw. Does the execution of the development agreement change the character of the obligation, given that a development agreement is normally the requirement of a subdivision approval and given the many facets of obligations assumed under the development agreement? Can this be helped by the following provision contained in any number of development agreements in use in the province?

> "The developer acknowledges and agrees that the municipality and the developer are properly and legally entitled to make provision in this

> agreement for the purposes specified herein for the payment by the developer to the municipality of the various sums prescribed in this agreement:
>
> (a) The developer acknowledges and agrees that the agreement by the developer to pay the said sums is consideration offered by the developer to the municipality to enter into this agreement;
>
> (b) The developer acknowledges that the municipality has agreed to enter into this agreement on the representation and agreement by the developer to pay the municipality the sums specified in the agreement;
>
> (c) The developer agrees that the municipality is fully entitled in law to recover from the developer the sums specified in the agreement;
>
> (d) The developer hereby waives for itself and its successors and assigns any and all rights, defences, actions, causes of action, claims, demand, suits and proceedings of any nature or kind whatsoever which the developer has or hereafter may have against the municipality in respect of the developer's refusal to pay the sums specified in this agreement; and
>
> (e) The developer for itself hereby releases and forever discharges the municipality from all actions, claims, demands, suits and proceedings of any nature or kind whatsoever which developer has or may hereinafter have if any against the municipality in respect of any right or claim if any for the refund or repayment of any sums paid by the developer to the municipality or security applied to outstanding obligations of the developer in accordance with and is contemplated by the terms of this agreement."

Responding to paragraph (a) above, the fulfillment of statutory obligations such as processing of a development permit or subdivision application is not deemed consideration at law. The authority for a development agreement arises by virtue of sections 650 and 655 and not otherwise. In response to subparagraph (b) above, the requirement to pay unlawful charges should not bear on whether or not the subdivision approval is granted. Such a conclusion undermines the rule of law.

The acknowledgement that the municipality is entitled at law to recover sums paid (subparagraph (c)) would not be required if such sums are actually lawful.

Subparagraphs (d) and (e) fall outside the purview of the authority referred to in *Starland No. 47 v. Hutterian Brethren Church of Starland* (supra).

The Kingstreet decision was distinguished in *Sorbara v. Canada* (Attorney General), 2009 Ontario Court of Appeal; 2009 CarswellOnt 3546; 2009 ONCA 506; 2009 G.T.C. 2022; 309 DLR (4th) 162, in which the application of the principle was limited to ultra vires legislation. In that case, attempt was made to recover GST alleged to have been unlawfully recovered for services provided by financial advisers in respect of financial investments, on the basis that financial services are exempt services. The Court clearly held that the GST legislation was not invalid and the determination turned on the interpretation of the legislation and the Excise Tax Act which was not alleged to be ultra vires. This overlooks, in my view, the obligation of the authorities who make and administer the law to bear responsibility for ensuring its validity and overlooks the statement in the decision of Justice Bastarache which supports the argument that monies collected by an authority because of the incorrect application of the law are equally recoverable on a constitutional basis.

> "The rule of law refers to the regulation of the relationship between the state and individuals by pre-established and knowable laws. The state, no less than the individuals it governs, must be subject to and obey the law. The state's obligation to obey the law is central to the very existence of the rule of law. Without this obligation there would be no enforceable limit on the state's power over individuals."

Hitzig v. R 231 DLR (4th) 104 (Ont. C.A.) 2003

Misfeasance in Public Office

The tort of misfeasance in public office provides a remedy to someone who has been damaged by abuse of government authority or excess of government power. In *Odhavji Estate v. Woodhouse,* 2003 SCC 69, [2003] 3 S.C.R. 263 the Supreme Court of Canada identified two ways in which this tort can be committed. Firstly, where the conduct complained of is specifically intended to injure a person or class of persons as in *Roncarelli v, Duplessis* [1959] S.C.R. 121. Secondly, however, involves conduct where the administrator acts with knowledge that the administrator has no power to do the act complained of and acts with knowledge that the act is likely to cause harm to the plaintiff. In the second category, malice is not a requirement.

It would be prudent for those who advise public officers of the risks and perils upon which they embark when imposing conditions known to lack legislative authority. There may be significant risk to the municipality that damages arising from the tort in the context of development could be considerable and may not warrant the assumption of risk given the limited rewards.

Development Agreement Caveats

Section 650 and Section 655 of the Municipal Government Act respectively provide in subsections (2) and (3) as follows:

> (2) a municipality may register a caveat under the Land Titles Act in respect of an agreement under subsection (1) against the certificate of title for the parcel of land that is the subject of the development/subdivision
>
> (3) if a municipality registers a caveat under subsection (2) the municipality must discharge the caveat when the agreement has been complied with.

It is not clear what consequence flow from the registration of the caveat and this continues to be the subject of debate since it was included in the Act. Clearly for any prospective purchaser acquiring the land prior to implementation of the subdivision, he is then aware that the municipality has entered into an agreement with the owner.

The difficulty with the caveat arises when the subdivision plan is registered and the caveat carries on to each individual lot within the subdivision. In some instances, the municipalities use the caveat as a means of securing the recovery of the offsite levies and discharge the caveat from the resultant lots upon payment of the offsite levies or charges. Other jurisdictions put the caveat on ostensibly to let prospective purchasers know that services are required to be completed under a separate agreement with the developer. It becomes a means of consumer protectionism and provides notice to the lot purchaser that such services may not be installed as of the date of acquisition of the lot.

It is not uncommon to have the obligations under a development agreement continue well beyond the date upon which most of the real estate in the subdivision has transferred. As a matter of conveyancing practice, it is difficult to determine whether or not or to what extent the caveat may impact a prospective purchaser. It appears unlikely that the municipality would enforce obligations assumed under a development agreement against the person who acquires a single family lot within the

subdivision other than at the time of transfer of the lot. Moreover, it is unlikely that the legislature intended that individual lot purchasers assume any obligations of the developer other than potentially to grade in accordance with an approved grading plan. This obligation can be enforced by Bylaw.

Could the caveat stand as security for the following:

> "The municipality and the developer agree that any amounts of money presently or hereafter owing by the developer to the municipality pursuant to the provisions of this agreement whether by way of liquidated or unliquidated claim and howsoever arising shall be a charge and encumbrance against the lands described in Schedule "A" of this agreement. The Developer does hereby mortgage, charge, and encumber the said lands as security for payment or performance of the developers obligations within this agreement and further that the municipality shall be entitled to recover any such monies owing together with all costs on a solicitor and client basis by enforcing the charge and encumbrance against the lands described in Schedule "A" of this agreement."

Justice Clark in *Starland No. 47 v. Hutterian Brethren Church of Starland* clearly states that the purpose of the development agreement is not to expand the remedies available under the legislation.

Section 655 clearly authorizes the municipality to take security for the performance of the terms of the agreement. Historically, that security has taken the form of a Letter of Credit or Letter of Guarantee from a financial institution which gives access to the municipality to remedy the non-performance. Given the broad and purposive approach to the interpretation of Sections 650 and 655, is it likely the courts will interfere with the determination as to the type of security that may be required?

Suffice it to say the burden assumed by the developer upon the homebuyer would be unduly onerous.

What are the issues that pertain to development agreements?

Of primary concern to the development sector is the absence of any regulatory or administrative tribunal or other mechanism for a timely and cost effective resolution of disputes under such agreements. When the developer is given a choice between litigation and development, notwithstanding the abuse of this authority, inevitably the opportunity to develop gains favour. As Justice Cooke has indicated, the bargaining positions of the developer and the municipality are so

disparate that it lends itself to abuse. The development sector would argue that a mechanism needs to be established which alleviates this disparity.

Municipalities should not require execution of a development agreement before putting rezoning bylaws on the agenda for council which precede consideration of the subdivision application. If they are acting according to the rule of law, this should not be required. Ultimately, the decision on rezoning must be left to the municipal council in an unfettered manner and requirement for the agreement determined at the subdivision or development permit stage.

Conclusion

There is a clear need for infrastructure to be built in an orderly manner and as part of the progressive development of a municipality. This burden should not be borne solely by the tax base of the municipality nor by the development industry. The compromise that has been achieved in Alberta under the Municipal Government Act is to create specific improvements and infrastructure obligations that can be imposed on the development industry and others which serve a wider purpose and should remain those of the municipality.

There are a number of issues that arise in the context of trying to maintain this balance. It is incumbent on municipalities to act within the broad legislative authority with which they are endowed. As municipalities step outside that authority there is a detriment which results to either the development industry or the municipality.

3952120_1|DHALDANE|EDMDOCS