THE LOCAL GOVERNMENT ACT AND BRITISH COLUMBIA'S HOUSING SUPPLY PROBLEM

A legal commentary:
How the statute has contributed to the problem,
and the Province's amendments that seek to address it

Kenward Development Law Corporation
www.kenwarddevelopmentlaw.com

The Province has enacted a series of Bills over the past year and a half to address issues with the housing supply in British Columbia, including:

- Bill 43 - 2022, *The Housing Supply Act*;
- Bill 44 - 2023, *The Housing Statutes (Residential Development) Amendment Act*;
- Bill 46 - 2023, *The Housing Statutes (Development Financing) Amendment Act*; and
- Bill 47 - 2023, the *Housing Statutes (Transit Oriented Areas) Amendment Act.*

The first of those received Royal Assent on November 24, 2022, and the latter three received Royal Assent on November 30, 2023. We will refer to the four Bills collectively as the "**Housing Statutes**". (This Commentary does not address the Province's other accommodation related statutes such as Bill 35 – 2023, the Short-Term Rental Accommodations Act.)

Local government elected officials, land use planners, academics and others have begun to weigh in with their perspective on the Housing Statutes. The objective of this Commentary is to add a legal perspective.

A. Introduction

1. The magnitude of the housing supply problem in British Columbia

The extent to which housing supply and affordability has become a problem is widely recognized. Given that the lack of an affordable housing supply brings about a variety of social problems and compromises the functioning of the urban economies (for example by compromising the ability of potential employees to find housing in proximity to an employer), the Globe & Mail characterized the situation as Canada's "metastasizing housing crisis". On a more macro level, the Bank of Canada commented on October 25, 2023 that the higher interest rates it had put in place had not resulted in home prices dropping as much as expected, because the shortage of homes in the country is keeping values elevated.

The scale of the housing supply and affordability problem is particularly acute in British Columbia. As noted for example in the RBC website tracking "Housing Affordability" at https://thoughtleadership.rbc.com/high-rates-and-prices-make-it-less-affordable-to-own-a-home-in-canada/ the ratio of 'home ownership costs' to 'median household income' in the third quarter of 2023 was 62.5% for Canada generally, but an unachievable 102.6% for British Columbia. The RBC data further indicated that:

- only 10% of British Columbia households have sufficient income to be able own a single family home,

- only 32.8% of British Columbia households have sufficient income to be able to fund a condominium; and

- those percentages are easily the lowest of any Province.

Looked at on an international basis, the 2023 issue of "Demographia International Housing Affordability" http://www.demographia.com/dhi.pdf indicates that Vancouver now has the third worst housing affordability of any City in the world, as measured by median housing price divided by median household income.

The same result is shown in other surveys, such as https://storeys.com/vancouver-least-affordable-city-oxford-economics/, which headlines Vancouver as "Far and away the least Affordable City in North America".

The housing supply and affordability problem has also been worsening for years, not improving. Despite numerous steps, including a variety of empty homes taxes and other initiatives, the ratio of home ownership costs to median household income on the RBC time chart shows a significant worsening since 2017. Demographia similar records the ratio of median housing price divided by median household income as having risen from 9 to 1 to 2010, to 12 to 1 in its most recent survey.

It is also apparent that without significant measures, the problem is going to escalate further, noting that:

- the Regional Growth Strategy (Metro 2050) approved by the Metro Vancouver Board in 2023 projects that the population of the region will increase by approximately 1 million people between now and 2050. It further anticipates that absorbing that increase will require 500,000 new homes; and

- efforts to find room for those added homes are constrained in Metro Vancouver by the unique features of its land base, with the US border to the south, an ocean to the west, mountains to the north, and an Agricultural Land Reserve that runs through many of the region's municipalities.

As a result, improvements in housing supply will inevitably need to include significant increases in existing neighbourhoods and along transit lines.

2. The focus of this Commentary

This purpose of this Commentary is to examine:

- the interplay between the legal regime for regulating land use and development at the municipal level and the housing supply and affordability problem in British Columbia; and

- the impact the Housing Statutes can be expected to have in that context.

One of the features of the legal regime in British Columbia is a 'many relatively small municipalities' structure, including in Metro Vancouver, whereby decision-making regarding such land use and development matters as zoning, subdivision, development permits and building permits are made by 21 distinct municipalities.

One of the attributes of that structure is that the motivated residents of a neighbourhood can significantly impact who is voted onto, and off of, a Council, resulting in Councillors being very sensitive to the concerns of those in existing neighbourhoods. Voter turnout in the 2020 municipal elections in BC averaged 29.2% in BC, as compared to 75% for the 2021 federal election and 54.5% for the 2020 Provincial election, per https://www.cbc.ca/news/canada/british-columbia/bc-2022-local-election-turnout-analysis-1.6618678, and in many cases the last few Councillors elected were elected by small margins.

The observation that Councillors are sensitive to the concerns of existing neighbourhoods is not intended to be disparaging. The quality of life people have in their neighbourhoods can be very important to them, and it is legitimate for people to strive to avoid changes that they see as not being in their interest. Nor is it suggested that Councillors do not spend a great deal of effort grappling in good faith with the question of what is best for the communities they represent.

Nonetheless, the design of a regulatory regime will inevitably impact the considerations it emphasizes and the outcomes it produces. It is therefore important to consider how that might be playing out here, and what it means for possible changes to the regime.

The topics the Commentary reviews in that regard are as follows:

- various core features of the *Local Government Act* regime under which municipal decisions impacting housing supply take place, and, given the 'housing supply' focus of the Commentary, a few cases that show the Courts have responded when those decisions relate to conflicts between new housing developments and the response of local neighbourhoods to them (Part B)*;*

- the impact of a fundamental change that has taken place since the late 2000s in how the Courts review municipal decisions, including a description of the nature of the change and how it has impacted the outcome of disputes regarding municipal decisions related to new development (Part C),

- the changes the Province has made to the *Local Government Act* through the Housing Statutes, including a description of the changes, and other potential options, and an analysis of whether each of the options in terms of how it fits with the current regime and the objective of addressing housing supply and affordability (Part D); and

- other changes to the *Local Government Act* regime that should be considered as part of the solution (Part E).

B. The *Local Government Act*

Development projects that increase housing supply typically involve:

- infill development, such as laneway housing,

- the replacing of one or a few individual existing buildings with larger and denser buildings, all proceeding together; or

- multi-building multi-phase developments.

In many cases, multi-building developments involve significant and expensive upfront services or amenities the cost of which is only viable where the developer can be given a reasonable degree of certainty that the costs it will have to incur can be recovered during the later phases of the development.

Where phased development occurs, the *Local Government Act's* 'grandparenting' and cost charge provisions are critical because of their impact on whether future phases can in fact be built as contemplated when the upfront servicing and amenity costs were incurred.

The writer of this Commentary has been acting in respect of land use and development issues since being called to the bar in 1982, acting first largely for municipalities, and subsequently mostly for the private sector. During that time, there have been numerous situations where developers and municipalities have a strong interest in a substantial new development that both see as providing overwhelming benefits to the community, but that ultimately have not been able to get off the ground because the tools available under the *Local Government Act* are not adequate to managing the risk involved.

In other situations, the fit between the context and the tools has been such that a solution can be found. The structure of the regime has a substantial impact on the outcomes the regime produces.

1. Context from the 1980s through the late 2000s

For the first two decades after 1982, the legal regime was one under which:

- the Province enacted statutes that set out the scope and limits of municipal powers,

- municipalities enacted bylaws to exercise those powers, and

- the Courts had the final say on the meaning of the text of both the statutes and the bylaws.

As recently as 2004, the Supreme Court of Canada confirmed that role for the Courts, declaring that

> "Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness."
>
> (*United Taxi Drivers Fellowship of Alberta v Calgary (City),* https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2131/index.do)

The Court would look to context, including both the wording of the specific provisions in the statute and the bylaw, and how the various provision fit with the balance of the provisions of the statute and bylaw. On occasion, Hansard and other such background materials would be canvassed to determine how the provisions were intended to work.

A private party who was contemplating proceeding with a project was able to look to the words of the statute and bylaw in question, and to draw from them a sufficient degree of predictability as to what the outcome would be if there was a disagreement. Court cases generally only arose where the wording was unclear, or the political or economic implications of a difference of opinion were such that it was worth putting the matter before a Court.

The Legislature also set the terms of the scope of municipal powers, and the limits on those powers, with the expectation that the Courts would apply the words chosen in an objective fashion, consistent with the scheme of the legislation. The Legislature could therefore set the balance between municipal powers, private sector interests and other societal interests in a fairly sophisticated fashion.

The Legislature did so through provisions related to:

- the scope of local government powers;
- the 'grandparenting' of development applications and development projects once they met the test set by the legislation; and
- the parameters it set as to what local governments could and could not impose cost charges for.

2. The 'grandparenting' provisions related to building permits, development permits, subdivision, and use

The 'grandparenting' provisions of the *Local Government Act* include what is now:

- section 463, which gives a limited right to municipalities to withhold a building permit in situations where the local government has, by resolution at least 7 days before the building permit application, begun the preparation of a plan or bylaw that is in conflict with the permit application ["**Building Permit Grandparenting**"],

- section 501, which provides that an issued land use permit (which includes a development permit) is binding on the local government [“**Development Permit Grandparenting**”],

- section 511, which establishes, where a subdivision application has been submitted to the local government for processing, that that application has 12 months of grandparenting relative to a subsequently enacted bylaw that would otherwise negatively impact the subdivision [“**Subdivision Grandparenting**”], and

- section 528, which recognizes a right to continue with a use of land, or use of a building, that is established before a land use regulation bylaw is changed in a way that precludes or limits that use, which protection also applies to a building that is lawfully under construction at the time the land use regulation bylaw is changed [“**Use Grandparenting**”].

A substantial body of law developed as the Courts interpreted the above provisions, which has given guidance to private sector participants and local governments alike, and which assisted subsequent Court interpretations.

Insofar as Use Grandparenting is concerned, for example, the case law developed a principle called 'commitment to use', further to which the ‘commencement of construction’ that is critical to the ‘non-conforming use’ protection established both by section 528 and the common law, was recognized as applying whenever physical work had been done on the ground (such as excavation, or the installation of services) even if construction of the building structure itself had not yet started.

3. Development Cost Charge parameters

Two examples of the statutory limits on municipal charges are the long-standing constraints on the imposition of ‘Development Cost Charges’ (“**DCCs**”) such that:

- they can only be imposed at subdivision and building permit, and only to assist paying the capital cost of works that service the development for which the charge is imposed, and

- the monies collected have to be accounted for in separated reserve funds for each of the categories of infrastructure works for which they are imposed, which monies have to be spent on capital costs that relate ‘directly or indirectly’ to the development in respect of which the charge is collected.

4. The addition of provisions to facilitate phased development

(a) The Court decisions in *PNI* and *CMHC*

As municipalities evolved through the 1980s and 1990s, various trends emerged. The constraints on land availability began to result in:

- the opening up of new areas of land for development, and

- an emerging interest in denser multi-unit and multi-building developments, especially in proximity to urban amenities, parkland or the waterfront.

As projects were advanced in keeping with those trends, it became clear that the 'grandparenting' regime as it had stood at that point was inadequate to the task of facilitating multi-building phased development, especially where such development was contingent on extensive upfront amenities and services.

Two Court decisions from the year 2000 brought those deficiencies to the fore, being the decisions of:

- the Supreme Court of Canada in *Pacific National Investments Ltd v Victoria (City)* https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1829/index.do and

- the BC Court of Appeal in *CMHC v. North Vancouver (District),* 2000 BCCA 142 (bccourts.ca)

(i) PNI

The PNI case commenced with the entering into of a "Master Agreement" between the City of Victoria and a Crown corporation for the redevelopment of an area of land around Victoria harbour. The agreement contemplated that the Crown Corporation would develop Phase 1 itself and sell Phase 2 to others to develop. The Master Agreement was authorized by City Council and was registered as a restrictive covenant under section 215 of the *Land Title Act*.

A developer (PNI) then entered into an agreement to purchase the Phase 2 area, which agreement became binding when the City approved the subdivision of the PNI lands and passed the requisite zoning. PNI then filed the subdivision plan at the Land Title Office, created parkland and other amenities as it had agreed to do, and developed and sold three lots.

At that point though, a new City Council was elected. While the parkland had already been provided, the new Council decided that it now didn't want the three-storey buildings, restaurants and other commercial establishments that were contemplated for the two water lots. The City accordingly downzoned the water lots to prevent additional residential development and restrict the height of the buildings.

PNI responded by claiming breach of contract, maintaining that the City had taken on an implied obligation under the Master Agreement to not downzone while the development was proceeding. In the alternative, PNI claimed restitution for unjust enrichment, for the parks and amenities that it had constructed and from which the City would benefit.

The Supreme Court of Canada rejected PNI's breach of contract claim on a 4 to 3 vote, holding that the City did not have the power to agree to keep the zoning in place or to pay damages if it modified it. The majority concluded that, while a municipality had the power to enter into business and proprietary contracts, it could not agree to fetter its legislative power in the absence of a statutory provision that

permitted it to do so, which there was not. The Court added that section 501 [Development Permit Grandparenting] was of no assistance because a development permit had not issued for the water lots.

The three dissenting judges indicated that they would have taken a different approach, holding that the Master Agreement contained an implied term that, in consideration of PNI's initial investment, a change in zoning must be offset by compensation. The dissenting Justices concluded that it would be contrary to business sense and all obligations of fairness to hold that the condition precedent regarding zoning had to be met but was not protected in any way from unilateral retraction.

In 2004, the unjust enrichment aspect of the case worked its way up to the Supreme Court of Canada, which held unanimously in favour of PNI in its claim for $1.08 million for unjust enrichment (Pacific National Investments Ltd. v. Victoria (City) - SCC Cases (scc-csc.ca)

(ii) CMHC

The genesis of the *CMHC* decision was an Official Community Plan bylaw adopted by the District of North Vancouver in 1990 that contemplated the construction of 2,150 homes on approximately 600 of the 980 acres of CMHC lands on Seymour Mountain. The balance of the lands were designated under the Official Community Plan as "Parks, Recreation and Wilderness". Both sets of lands were zoned "residential".

A decade and a half later, in 2005 and 2007, as the development of CMHC's lands became more imminent, Council received 'not in my back yard' pressures from neighbours in the area, and responded by downzoning the lands to a very limited set of private uses (fish farming; the keeping and training of dogs; the operation of botanical gardens; etc).

CMHC unsuccessfully challenged the downzoning, with the Court holding that the scope of the downzoning, while substantial, did not fall outside of the broad scope of the zoning discretion provided to Council by the *Local Government Act.* That statute, through what is now section 458(2) of the *Local Government Act*, specifically provides that compensation is only payable as regards a zoning bylaw where it "restricts the use of land to a public use".

(b) The statutory provisions enacted in response

The Province, and local governments generally, recognized the negative impact that those Court decisions had for the forms of development that limited land availability had made necessary and desirable, by reducing:

- the willingness of proponents and investors to bear the upfront costs of amenities and services, and therefore

- the ability of municipalities to obtain upfront amenities and services where required for the development to take place.

The Province therefore entered into an extensive consultations with representatives of municipalities and the development and business community, and added the Phased Development Agreement regime to the *Local Government Act* in 2007. The provisions related to PDAs subsequently underwent a few rounds of amendments to add various features and clarifications, and now exist as section 515 to 522 of the *Local Government Act ["***Phased Development Agreement Grandparenting***"].* (The writer presented the legal submissions of the leading representative organizations for the development and business community.)

The new statutory provisions authorized Phased Development Agreements to contain terms that go well beyond those authorized for covenants under section 219 of the *Land Title Act* (which are structured to contain covenants that bind the property owner and are registered in favour of the municipality). Many traditional Development Agreements prior to that time took the form of section 219 Covenants and, where they contained provisions in favour of the private party, they entailed the risk that a Court might hold that such provisions went beyond what section 219 authorizes, and therefore were unenforceable (or in an extreme case, that the covenant or the development itself might be held unlawful).

Under the legislation, Phased Development Agreements do not *preclude* rezonings per se, but rather provide that changes to the Zoning Bylaw provisions specified in the agreement will only apply to the development as provided for in the agreement (which can preclude their application for the term of the agreement) or as the parties may agree.

As importantly, section 516(3) broadly authorizes Phased Development Agreements to include

> "*additional terms and conditions agreed to by the local government and the developer*, *including but not limited to* terms and conditions respecting one or more of the following:
>
> (a) the inclusion of specific features in the development;
> (b) the provision of amenities;
> (c) the phasing and timing of the development and of other matters covered by the agreement".

The legislation also speaks to the impact on subdivision approval, at section 520.

The legislation set the allowable term of a Phased Development Agreement at 10 years (or 20 years if a Provincial approval was in place). The Province's webpage related to Phased Development Agreements at https://www2.gov.bc.ca/gov/content/governments/local-governments/planning-land-use/land-use-regulation/land-use-agreements includes a Provincial process guide for obtaining approval of a 20 year term.

Numerous Phased Development Agreements have since been entered into with municipalities across British Columbia, including in:

- urban settings (Squamish, Delta, Burnaby, West Vancouver, Langford) and

- more rural areas (Fairwinds near Parksville, and Lantzville near Nanaimo).

Phased Development Agreement Grandparenting only arises where such an agreement has been entered into and the related public processes have been complied with.

C. The change in the Court's approach to judicial review (late 2000s)

1. Overview

Another important consideration in any analysis of the current *Local Government Act* regime is that, by the late 2000s, judges were being faced with making decisions in fields of ever-increasing complexity, involving increasingly complex statutory regimes.

Presumably at least in part in recognition of such concerns, the Supreme Court of Canada led a series of changes in how the Courts reviewed statute and bylaw decisions, and all manner of administrative decisions. This shift in the Court's approach to judicial review evolved through such decisions such as

- *Dunsmuir v New Brunswick* in 2008, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2408/index.do

- *Canada (Minister of Citizenship and Immigration) v Vavilov* in 2019 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18078/index.do ; and

- *Mason v Canada (Citizenship and Immigration)* in 2023 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/20081/index.do

The result is that the Courts now generally undertake judicial review of decisions made by local governments under the authority of their enabling statutes from the perspective of 'deference' using a "reasonableness' test. This revised approach proceeds on the basis that:

- there will typically be a range of possible 'reasonable' interpretations and decisions as regards a matter,

- the choice among those interpretations and decisions is best left to the body that the Legislature has assigned to make the decision (such as the municipal Council, or Approving Officer), and

- the Court will not step in where it might have decided a matter or interpretation differently, but rather only where the decision or interpretation is outside of range of decisions that the language and other pertinent considerations reasonably allows.

Thus, the question of what a *Local Government Act* or local government bylaw provision means is no longer decided by the Court, but rather by the local government (or Approving Officer), so long as the interpretation is within what the Court says is the 'reasonable range'.

In terms of how the "reasonable range' is to be assessed, the Court in *Vavilov* added that:

> "a number of elements … will generally be relevant in evaluating whether a given decision is reasonable, namely:
>
> > the governing statutory scheme;
> >
> > other relevant statutory or common law;
> >
> > the principles of statutory interpretation;
> >
> > the evidence before the decision maker and facts of which the decision maker may take notice;
> >
> > the submissions of the parties;
> >
> > the past practices and decisions of the administrative body; and
> >
> > the potential impact of the decision on the individual to whom it applies.
>
> These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached."

Subsequent case law has focused on such things as:

- further developing the principles that guide how the bounds of 'the reasonable range' are to be determined, and applying those principles in specific instances, and
- how that approach applies to situations where there are multiple statutory decision makers (such as where there is a dispute between a municipality and a Regional District under the *Local Government Act's* provisions for regional growth management).

As with any fundamental change in approach, the evolution in judicial review has not been linear, but rather is emerging in a series of stages as the implications are thought through. [See Context, Reasonableness Review and Statutory Interpretation: Mason v. Canada (Citizenship and Immigration), 2023 SCC 21 | Paul Daly (administrativelawmatters.com)]

2. Recent case law pertinent to the grandparenting provisions

Given the focus of this Commentary on the *Local Government Act* regime, that brings us to the question of how this change in the Court's approach to judicial review has impacted local government decisions related to land use and development.

This Commentary will next review three recent BC Court of Appeal decisions to illustrate how disputes between local governments and the private sector regarding 'grandparenting' and multi-building development now play out, given this altered approach to judicial review.

(a) North Cowichan (Municipality) v 1909988 Ontario Limited

The first decision relates to a situation where a municipality changed its interpretation of whether a specific use was permitted by the municipality's Zoning Bylaw, and did so after the first phase of a two phase development had been built. That is the *North Cowichan* case, which can be found at 2021 BCCA 414 North Cowichan (Municipality) v. 1909988 Ontario Limited (bccourts.ca) (November 2021)

Facts

The development in question was a vehicle testing and driver training facility, which featured a motor vehicle driving track and clubhouse. That use was not one of the specific uses listed in the 'light industrial' zone that applied to the property, and hence the question that arose was whether the use fit:

- with the specific uses that were listed as permitted, such as to be allowed, or

- with the specific uses that were permitted in other zones, such as to not be allowed in this one.

During the period between 2013 and 2018 the municipality took the position that the applicant's use was a permitted use. When phase 2 came along in 2018 and the project faced some public opposition, the municipality reversed itself and gave the opposite interpretation (ie – that the use was not permitted in the zone).

The specific timeline was as follows:

- between 2013 and 2016, the applicant:

    - contacted the municipality and explained its proposed use, and was told that the municipality's view was that the use was allowed,

    - purchased the first block of property, and applied for a development permit to authorize the construction of the first phase of its facility on that property,

    - purchased an additional property for a second phase, and received the development permit for the first phase, and

    - constructed and began operation of the first phase;

- in 2017, neighbouring property owners challenged the approval of the first phase in Court on the basis that the use was contrary to the zoning bylaw. The municipality took the position that the private party's use was lawful, and the claim against the municipality was stricken;

- in 2018, the private party applied for a development permit for the second phase, and, at the request of the municipality, also applied for a clarifying amendment to the zone so that it

specifically authorized the private party's use. That bylaw proceeded to public hearing, and after public submissions, was rejected by the municipality; and

- the municipality then took the position that the private party's use was *not* permitted by the zoning, and rejected the development permit for the second phase. Council did however rezone the first phase to specifically allow the use on that property.

Judicial Review

The private party then proceeded to Court for judicial review of the rejection of the development permit for the second phase. Its arguments included that the municipality's second interpretation was not 'reasonable' because it was contrary to the precedent established by the municipality's decisions between 2013 and 2018.

In conducting its review, the Court described the applicable interpretive principles as follows:

- the 'reasonableness' review is concerned with both:
    - the process of arriving at the decision, and
    - the outcome;
- the party seeking judicial review has the burden to demonstrate that the decision is unreasonable;
- in circumstances where procedural fairness does not require reasons be provided, the Court should review the record to attempt to discern the rationale for the decision. If it is possible to determine the rationale, then the reviewing Court should consider, among other potentially relevant factors, whether the *reasoning* is internally rational and whether it is justifiable in light of the relevant factual and legal constraints. If it is not possible to determine the rationale for the decision from the record, then the reviewing Court should consider whether the *outcome* of the decision is defensible in light of the facts and the law; and
- for questions of statutory interpretation, the Court should consider whether the decision maker's interpretation is reasonable in light of the words of the provision in their context, the scheme and object of the enactment, and the intention of the legislative body. The Court should not give its own interpretation and then measure the decision maker's interpretation against it, but rather should limit itself to considering whether the decision maker's interpretation has been shown to be unreasonable.

On the facts of the case, the Court concluded that:

- *both* of the municipality's interpretations (the one given up to 2018, and the one given after) were defensible as reasonable interpretations of the language of the zoning bylaw, and

- the Court would therefore not overturn the rejection of the development permit for the second phase.

As far as the argument regarding the 'prior interpretation' precedent was concerned, the Court concluded that the past practice in the present situation was not enough to establish a binding practice. In terms of how much of a past practice was required to be established, the Court demurred, commenting that:

> 'the question is reminiscent of Aristotle's consideration of the number of swallows that make a summer'.

(b) G.S.R. Capital Group Inc. v. White Rock (City)

The second decision relates to a downzoning that proceeded after the issuance of a development permit authorizing the construction of a 30 unit 12 storey building. That is the *White Rock* case, which can be found at 2022 BCCA 46 G.S.R. Capital Group Inc. v. White Rock (City) (bccourts.ca) (February 2022)

Facts

The situation began when applications were made by various developers for bylaws amendments pertaining to the Lower Town Centre area of the City, which applications ultimately led to the amendment of White Rock's Official Community Plan bylaw and Zoning Bylaw in September 2017. The amendments in question did not increase the density of the area, but rather allowed changes in the form (height) of the development to allow for the construction of twelve-storey buildings.

The Official Community Plan Bylaw provided that a development permit was required in the Lower Town Centre area as a prerequisite to development, and so, in January 2018, one of the developers, G.S.R., in preparation for its application for a development permit, registered restrictive covenants against its property, precluding an application for a building permit in respect of the property until it had made an amenity contribution of $1.59 million to the City.

In June 2018, White Rock Council approved the issuance of a development permit to G.S.R to authorize the development of a 30-unit, 12-storey residential building. The development permit issued in July 2018.

In October 2018, a new Council was elected, which Council did not favour the scale of development in that G.S.R. was proceeding with, and Council accordingly downzoned various properties, including G.S.R.'s.

G.S.R. responded by applying for a building permit in January 2019, which the City rejected.

Judicial Review

G.S.R then proceeded to Court to:

- challenge the downzoning bylaw; and

- compel issuance of the built permit.

It submitted:

- citing section 501 and section 463, that Development Permit Grandparenting preserved its position under the former zoning for the two year period of the development permit;

- that the City's right to withhold building permit issuance under section 463 [Building Permit Grandparenting} applied only to new proposals, not to developments that had been approved by development permit; and

- that it was entitled to build its building based on Use Grandparenting, further to section 528 and the 'commitment to use' doctrine.

The Court rejected those submissions, holding that:

- the City's interpretation of the grandparenting provisions of the *Local Government Act* met the 'reasonableness' test, and that Council was entitled to deference in respect of those interpretations, and

- as far as section 528 and non-conforming use is concerned, the question of whether a particular lawful non-conforming use is established is primarily a matter of fact. While "physical alteration of the land to unequivocally devote it to a particular use will generally suffice, even if every aspect of a planned use has not yet been implemented", a mere intention to use land for a particular use was insufficient to establish a lawful non-conforming use. Because G.S.R had not commenced any such physical alteration, it could not succeed.

(c) Onni Wyndansea Holdings Ltd v Ucluelet (District)

The third decision relates to a downzoning of the lands in a subdivision after:

- subdivision services (road, sewers, water etc) have been installed,

- the lands have been subdivided, and

- there has been a sale of the subdivided lots.

That is the *Ucluelet* case, which can be found at 2023 BCCA 342 Onni Wyndansea Holdings Ltd. v. Ucluelet (District) (bccourts.ca) (August 2023)

Facts

The factual context for the Court decision was as follows:

- in 2004, the landowner (Marine) made application for a comprehensive development that included a Jack Nicklaus designed golf course, two hotels, high end homes and some multi-family housing. As part of its application, Marine entered into a Master Development Agreement (MDA) that set out the conditions of development, and provided that the landowner would gift various lands and public trails and make cash contributions should the pertinent Official Community Plan bylaw and Zoning bylaw amendments be enacted;

- in 2005, following the registration of the MDA against title as a section 219 covenant, the municipality enacted the bylaw amendments, such that 376 acres of undeveloped land were rezoned to allow the development;

- in 2008, a portion of the land was subdivided into four lots, and the newly created Lot 4 was further subdivided into 30 strata lots by the deposit of a bare land strata plan at the Land Title Office. As part of that subdivision approval, Marine installed the water, sewer and road infrastructure for the subdivision, and dedicated same to the municipality. One of the 30 lots was then sold to a third party;

- the development subsequently stalled for a period;

- in 2012, given that homes had not yet been built on the 30 strata lots, the municipality decommissioned the services for the subdivision, and closed the subdivision road to vehicular access;

- at some point between 2012 and 2014, Marine, which was experiencing financial difficulties, began negotiations with Onni. Onni made inquiries of the municipality, which took the position that, while various items of the MDA had not yet been completed, they were not considered a 'deficiency' because:

    - the requirements for the subdivision itself had been met, and

    - the incomplete items related to other parts of the lands;

- Onni then purchased Marine, and thereby became owner of the lands (apart from the strata lot that had been sold), with the intention to, among other things, proceed to build out the 29 strata lots it now owned;

- in 2018, Onni held an open house to present a concept for the larger MDA land area, which included material that suggested that

    - the golf course, hotel and retail uses would not proceed, and

    - the MDA lands would instead be developed for residential and short-term rental use with a network of open spaces, parks and trails;

- in March 2021, Onni requested recommissioning of the water and sewage infrastructure and the re-opening of the subdivision road to the 30 lot subdivision;

- in April 2021, staff took the position before Council that the zoning applicable to the subdivision had come about in the context of the surrounding golf course and hotel development and public amenities including public access to the shoreline that had not been delivered in connection with that development;

- in May 2021, Council gave first reading to a new Official Community Plan amendment bylaw and Zoning Bylaw which contained provisions that were collectively more restrictive than the zoning that was in place before the 1985 zoning. Those proposed changes:

    - reduced the number of dwellings on each strata lot from three to one,

    - reduced the allowable floor area of the building,

    - eliminated ancillary tourist accommodation use, and

    - increased the required setback from the shoreline;

- in July 2021, Onni submitted 29 building permit applications, to allow the construction of a single-family dwelling on each lot, in keeping with the 2005 zoning that was still in place, but that was not in keeping with the zoning amendment bylaw that had received first reading;

- in August 2021, the municipality passed a motion under section 463 [Building Permit Grandparenting] to defer processing of the building permit applications pending enactment of the zoning amendment; and

- in September 2021, the municipality:

    - adopted the Official Community Plan bylaw amendment,

    - adopted the Zoning Bylaw amendment, and

    - rejected the building permit applications based on the new bylaws.

Judicial review

Onni then filed proceedings to challenge the Official Community Plan and Zoning Bylaw amendments and to compel issuance of the building permits. Onni's challenge was rooted in the proposition that it was 'unreasonable', and indeed bad faith, for Council to:

- accept the dedication of municipal services and significant cash contributions, and then

- enact a zoning amendment prohibiting the same project.

While the theme of Onni's submission was in that regard reminiscent of the Supreme Court of Canada's comments in the two PNI decisions, the Court of Appeal rejected the submission, and held that Council had a rationale that met the 'reasonableness' test, on the basis that it was transparent, intelligible and justified in that:

- Council saw Onni's plan for the subdivision as not being in the interests of the community, and as having become divorced from the original comprehensive development plan made in 2005 which had never been realized, and which Onni had itself acknowledged in 2018 would not be realized, given the dropping of the golf course, hotel and retail uses,

- it was reasonable for Council not to want to proceed with a development plan agreed to in 2005 which Onni planned to amend, and

- there was nothing in the MDA under which Council fettered the discretion of a future Council to consider the rezoning of the lands [nor could there be, noting that the Phased Development Agreement legislation was not yet in existence].

The Court also rejected Onni's application to compel issuance of the building permits, on that basis that the law related to 'Use Grandparenting' did not apply because:

- no residential buildings had been constructed in the subdivision, nor had steps been taken to prepare the *individual strata lots* for such construction; and

- while the subdivision works had been constructed, that was 'almost a decade before' the amending bylaws, and the owner's intent in constructing those services was 'properly viewed' from the perspective of its broader commitment to develop the subdivision in conjunction with its comprehensive plan.

The Court also held open the possibility that the decision as to whether Use Grandparenting applied was really one for the Building Inspector to make, in which case the Court's role would be limited to reviewing that decision based on 'reasonableness'. The Court held however that the matter need not be decided because the Building Inspector had not made a decision on that aspect of things, and Ucluelet had argued the point for the first time on appeal.

(d) Implications

The foregoing cases indicate that:

- there is no longer a single interpretation of what a local government bylaw provision means, but rather a menu of interpretations that a Council can choose from, which interpretation the local government can change over time, even as between phases of the same development (*North Cowichan*);

- there similarly is no longer a single interpretation of the meaning of the *Local Government Act's* grandparenting provisions that a developer can rely on (*White Rock*);

- the obtaining of a development permit after a lengthy process, with pages of three dimensional plans that set out in detail what can be built, is not enough to grandparent the construction of the building for which the development permit issued. Rather the construction of the building can be defeated by nothing more than the commencement of the preparation of a bylaw (*White Rock*); and

- completing and registering a residential subdivision, with roads, water and sewer services, and the sale of lots within that subdivision, does not amount to a 'commitment to use' sufficient to protect the residential subdivision from downzoning (*Ucluelet*).

In terms of the subject matter of this Commentary, being the interplay between the *Local Government Act* and the housing supply, it follows that the change in the Court's approach to judicial review has expanded the opportunity for local governments in British Columbia to prioritize the interests of those in existing neighbourhoods over the broader societal interest in a greater housing supply.

D. The Housing Statutes

It is in the above context that the Province has chosen to enact the Housing Statutes.

This Commentary will next:

- review the four Housing Statutes that the Province has enacted, and

- comment on the approach taken by the Housing Statutes, as compared to other possible approaches.

1. Bill 43 – 2022, *The Housing Supply Act*

Bill 43 – 2022 enabled the Province to:

- set housing targets and performance indicators for selected municipalities, and require progress reports, and

- take various actions if those targets are not met, such as:

    - the appointment of an advisor who can inspect records and create recommendations for meeting housing targets, and

    - issuing a directive that requires a municipality to enact or amend a land use bylaw or issue or refuse a permit.

The Province subsequently decided, further to Bill 43, to set targets for ten of the largest municipalities in the province to build more than 60,000 new units of housing over the next five years, a number that the Province characterized as a 38% increase over what was historically projected in those municipalities.

2. Bill 44 – 2023, *The Housing Statutes (Residential Development) Amendment Act*

(a) Changes to proactively plan for additional housing

Bill 44 – 2023 moved away from the Province's longstanding approach of:

- *empowering l*ocal governments to establish land use and development rules for their local governments, by

- imposing specific requirements, and prohibitions, regarding how such local government powers are to be exercised, which requirements and prohibitions the Province can supplement by regulation.

Some of the features the legislation include:

- requiring local governments to have their official community plan bylaws speak to the approximate location, amount, type and density of residential development required to meet anticipated housing needs over a period of at least 20 years, and to do so in a manner consistent with the local government "Housing Needs Reports" provided for by Bill 43,

- requiring municipalities to use their zoning powers to permit the use and density necessary to accommodate at least the 20 year total number of housing units included in their most recent Housing Needs Report, without relying on density bonuses,

- requiring local governments allow additional housing units on most land zoned for detached and duplex dwellings, again without relying on density bonuses,

- prohibiting the use of specified land use management powers (such as development permits) in a manner that unreasonably prohibits or restricts the use or density of use that the Province requires to be permitted,

- authorizing the Province to make regulations relating to siting, size and dimensions and the location or type of housing units, and

- removing the requirement for consistency with official community plan bylaws, and prohibiting public hearings, as regards zoning bylaws that are necessary to comply with the new requirements.

(b) Small scale multi-unit housing

The Bill also includes provisions for small-scale, multi-unit housing, under which local governments are obligated to amend their zoning bylaws by June 30, 2024 to permit additional development on parcels that are currently limited to a single dwelling unit, apart from parcels that are protected by heritage designation bylaws, that are not connected to municipal water or sewer, or that meet other specified criteria. In municipalities with more than 5000 people and in urban containment areas:

- 3 or 4 units are to be permitted on lots currently zoned for single family or duplex use, while

- 6 units are to be permitted on such lots, where the lot is within a prescribed distance to transit stops with frequent service, and is are larger than 280 square metres.

(c) Provincial webpage regarding proactive planning

There is a provincial webpage related to the "proactive planning" aspect of Bill 44 at https://www2.gov.bc.ca/gov/content/housing-tenancy/local-governments-and-housing/housing-initiatives/pro-active-planning

It provides a summary and elaboration regarding:

- Housing Needs Reports,
- Official community plans
- Zoning bylaws, and
- Public hearings,

with the following timeline:

- early 2024: Housing Needs Report guidance provided to local governments;

- June/July 2024**:** Guidance provided to municipalities to update Official Community Plans and zoning bylaws;

- January 1, 2025: Local governments must have completed their interim Housing Needs Report; and

- December 31, 2025: Municipalities must have completed their first review and update of their Official Community Plans and zoning bylaws (based on the interim Housing Needs Report).

(d) Provincial webpage regarding small scale multi-unit housing

There is a provincial webpage related to small scale multi-unit housing aspect of Bill 44 at https://www2.gov.bc.ca/gov/content/housing-tenancy/local-governments-and-housing/housing-initiatives/smale-scale-multi-unit-housing which is to be updated from time to time, and which sets out the current

- Regulations, and

- Provincial Policy Manual and Site Standards.

3. Bill 46 - 2023, *The Housing Statutes (Development Financing) Amendment Act*

One of the initial objections to Bill 44 was that it's mandatory zoning requirements reduced the scope for municipalities to require amenities and amenity contributions as part of the zoning process.

Bill 46 seeks to address that issue in two ways, being by:

- expanding the scope for development cost charges; and

- creating a new legislated mechanism for what are called 'Amenity Cost Charges' (or "**ACCs**").

(a) Development Cost Charges

As far as DCC bylaws are concerned, the categories of facilities for which such charges can be imposed was expanded to include charges for:

- fire protection facilities,

- police facilities, and

- solid waste and recycling facilities, as well as

- provincial highway infrastructure projects under certain specified conditions.

DCC bylaws continue to require the approval of a Provincial officer (the Inspector of Municipalities) as has been the case since such charges were first authorized to be imposed.

(b) Amenity Cost Charges

The rules for ACCs are somewhat similar to the DCC regime in that they:

- proceed by bylaw, and are to assist the capital cost of providing listed amenities as defined by Bill 46,

- are imposed at subdivision and building permit issuance, and

- require the establishment of reserve funds.

On the other hand:

- DCCs can only be imposed to provide funds to assist the local government to pay the capital cost of works to service the development for which the charge is being imposed, while

- ACCs can be imposed to provide funds to assist the local government to pay the capital cost of providing amenities to benefit both the development and the increased population of residents and workers that results from the development.

Bill 46 defines an amenity as:

> *A facility or feature that provides social, cultural, heritage, recreational or environmental benefits to a community, including, without limitation,*
> *(a) a community, youth or seniors' centre,*
> *(b) a recreational or athletic facility,*
> *(c) a library,*
> *(d) a daycare facility, and*
> *(e) a public square,*
> *but does not include a facility or feature within a class of facilities or features that are prescribed by regulation not to be amenities,*

which amenity must be owned by the local government or owned and operated by a person who has entered into a partnering agreement with the local government as regards the amenity.

The bylaw must:

- specify the areas that will be subject to ACCs, and

- identify the amenities that will receive ACC funding,

and the ACCs must:

- be set on a per lot or per unit basis or based on floor area, and

- be similar for "all developments that are expected to result in similar increases in the population of residents and workers".

Inspector approval is not required for ACC bylaws, although the Inspector can require a report on the funds collected.

(c) Provincial webpage regarding development finance

The Province has established a webpage which is to be updated from time to time https://www2.gov.bc.ca/gov/content/housing-tenancy/local-governments-and-housing/housing-initiatives/development-finance with additional guidance and resources.

4. Bill 47 - 2023, the *Housing Statutes (Transit Oriented Areas) Amendment Act*

(a) Overview

The focus of Bill 47 is to allow the Province to establish minimum allowable heights and densities for Transit Oriented Development ("**TOD**") areas, which are defined as land within 800 metres of a rapid transit station (e.g., SkyTrain station), and within 400 metres of a bus exchange where passengers transfer from one route to another.

In such areas, local governments are required to ensure that minimum levels of density, size, and dimension established by the Province in regulations are allowed. The applicable provisions vary by municipality and may vary within the TOD area. Local governments can approve densities that exceed the provincial regulations at their discretion.

(b) Provincial webpage re Transit Oriented Development, and Regulations and Policy Manual

There is a Provincial webpage at https://www2.gov.bc.ca/gov/content/housing-tenancy/local-governments-and-housing/housing-initiatives/transit-oriented-development-areas , which is to be updated from time to time, and which references the TOD regulations and the TOD Policy Manual as follows.

The Regulation:

- designates 52 TOD Areas that take immediate effect, including provision for the minimum allowable level of density, the consideration of the provincial Policy Manual, and the 'no minimum parking requirements' for off-street residential;

- lists the transit stations around which local governments must designate TOD areas by June 30, 2024; and

- sets out such details as the minimum allowable density and applicable distance from the stations.

The Policy, available on the webpage, establishes Provincial expectations for local governments as they implement the requirements, such as when they designate TOD Areas by bylaw, make zoning decisions, and update parking bylaws.

5. Implementation and Training

The Province is also hosting a series of webinars for local government staff to support the implementation of Bill 44, Bill 46 and Bill 47, with an opportunity to "ask questions of subject matter experts". The particulars can be found on the Union of BC Municipalities website at https://www.ubcm.ca/about-ubcm/latest-news/provincial-housing-webinars-local-government-staff

6. The approach taken by the Housing Statutes, as compared to other possible approaches

(a) The context within which the Housing Statutes have been enacted

Per the above review, the *Local Government Act* regime has for years entailed a high level of responsiveness to pressures from voters in a specific neighbourhood, given:

- the 'many small municipalities" structure that has evolved in British Columbia, and

- the impact the motivated voters in a neighbourhood can have given the relatively limited size of each municipality and the relatively low level of voter turnout in local government elections.

While the design of the *Local Government Act* regime has been particularly positive from the perspective of supporting the quality of life of those in existing neighbourhoods, it can both:

- elevate the significance of the concerns expressed by those in existing neighbourhoods relative to other important public interest considerations such as supplying housing to meet the needs of residents and workers who could otherwise locate in a community; and

- promote the allocation of the cost of utility services to:

- new development (through amenity contributions and development cost charges), rather than

- existing homes and business (through property tax increases, which also tend to offend existing local government voters),

thereby increasing the costs that are borne by:

- housing being approved to be built, relative to

- existing housing.

Turning to the Courts, there is nothing in the cases that have been reviewed that suggests that the Courts, when reviewing issues related to the interpretation of local government powers and grandparenting provisions, have focused on the difference between

- the interests and desires *of the municipality* making a decision under the statute on the one hand, and

- the *broader* public interest that has now led the Province to enact the Housing Statutes.

The Courts are not evaluating the public interest per se, as compared to applying a 'reasonableness' test to the decisions of the party the Legislature has assigned a decision to.

(b) Option #1: Changing the wording of local government powers

One option the Province had was to limit itself to amending the language used in specific *Local Government Act* provisions that empower municipalities.

The scope for such an approach to be successful would seem to be relatively limited however, given that:

- the scope for re-wording the provisions of statutes and regulations to make them more specific to the outcomes the Legislature desires is limited by the fact there are too many contexts to which the words might apply for the Province to be able to definitively address the desired outcome for all of them, such that an interpretation would still need to be made by the local government;

- the "many small municipalities" and 'low voter turnout' considerations would continue unchanged; and

- the Courts would continue to conduct their review on the basis that the local government is the party best placed to decide how the *Local Government Act* regime is intended to operate, and would continue to apply the 'reasonableness' standard that:

- does not treat the specific wording used in the *Local Government Act,* or in the bylaws a municipality has enacted, as being directly binding on the municipality, but rather

- gives local governments leeway to give whatever 'reasonable' interpretation they might choose to give to that language, and to vary those interpretations (including as we have seen, from one phase of a development to another).

As has been noted, the change in the Court's approach to judicial review has, if anything, amplified the scope for the decisions made under the *Local Government Act* to favour the public interest as expressed by those in existing neighbourhoods as compared to the broader public interest in increasing the supply of housing. That is the case as regards both:

- the scope of development that will be allowed in an existing neighbourhood, and

- how the recovery of servicing costs will be allocated as between new housing and existing housing.

(c) Option #2: the Housing Statutes

A second option was for the Province to take on a direct role in directing the supply of housing, given:

- the extent to which the structure of the *Local Government Act* regime, amplified by the Court's approach on judicial review, tends to prioritize the interests of those in existing neighbourhoods relative to the broader public interest in an increased housing supply; and

- the importance to broader public interest of increasing the housing supply and housing affordability.

By amending the *Local Government Act* to give *itself* its own broad powers to address the housing supply issue, the changes allow the Province to act directly, through the requirements, prohibitions and regulations it establishes, to ensure that local governments act in keeping with the broader public interest to address the housing supply.

Further, the scope for those in existing neighbourhoods to exert pressure to limit or block changes in their neighbourhoods that increase housing supply will be reduced to the extent that the local government can now respond that it has a reduced role in the matter and will redirect those who are concerned to the Province.

Having said that, the impact the changes will have on the ground will turn on:

- whatever 'work arounds' local governments put in place, should they choose to do so; and

- how the Province uses the powers it has provided to itself.

A local government that is sufficiently motivated by the existing residents of a neighbourhood can be expected to explore its options for adjusting the scope for new development to something that will be more palatable to those residents. A motivated local government could for example explore:

- the scope for impacting outcomes where a development requires subdivision, given the discretion that section 85(3) of the *Land Title Act* gives to the municipality's Approving Officer to decide the application based on his or her view of the 'public interest';

- imposing more stringent development permit requirements on development in the neighbourhood, supported by one or another defensible public interest concern; and / or

- imposing Development Cost Charges and Amenity Cost Charges the terms of which limit the amount of, or impact the nature of, development that will take place.

Where that occurs, it will then be up to the Province to respond using the power Bill 46 gives it to pass regulations adjusting or limiting Amenity Cost Charges, etc.

The best indicator of the Province's present intentions as regards how it plans to manage matters going forward arise from the Province's statements that it sees its initiatives as producing:

- 250,000 additional new units over the next decade, and

- a price drop of 6% to 12% over the next 5 years,

relative to what would be the case without the changes (per https://www.nationalobserver.com/2023/12/08/news/bc-housing-plan-293000-new-units-decade-report).

(d) Other Options: Amalgamation, more directive regional governance, or a Municipal Board

Various other options existed, including for example:

- reducing the number and increasing the size of municipalities, through amalgamations,

- changing the role of regional governments relative to municipal governments, for example by way of a more directive regional plan structure; or

- establishing some form of Municipal Board regime, to which decisions local government planning or charging decisions could be appealed if they did not adequately reflecting provincial policy.

There are numerous such board regimes in place in Canada, including, the Ontario Land Tribunal per https://olt.gov.on.ca/faqs/, the Manitoba Municipal Board per https://www.gov.mb.ca/mr/municipal_board/, the Saskatchewan Municipal Board per

https://www.saskatchewan.ca/government/municipal-administration/appealing-decisions-made-by-municipalities/file-a-planning-appeal , and the Nova Scotia Utility and Review Board per https://nsuarb.novascotia.ca/mandates/planning.

One suspects that those approaches were seen by the Province as being:

- much more time consuming to implement,
- more invasive for existing local governments and their citizens, and
- much less targeted to addressing housing supply and affordability,

than the path that the Province chose, which

- works with existing local governments,
- works largely within the existing *Local Government Act* structure, and
- specifically targets housing, in a relative limited but focused way (by way of Housing Needs Reports, and changes regarding small scale multi-unit housing and Transit Oriented Development).

(e) Conclusion as to the fit between the Housing Statutes, the current regime and the objective of addressing housing supply and affordability

The Housing Statutes make fundamental changes to a long-standing regime and will therefore inevitably be controversial.

They alter existing power structures and existing community plans, and hence it is inevitable that they will draw criticisms from those affected, as they have.

Merely as an example, arguments are made that the Housing Statutes are flawed because existing Community Amenity Contribution ("**CAC**") policies will no longer be available to municipalities to raise funds in connection with the upzonings that the Bills directs happen.

The Province has responded that it has created the ACC mechanism to address that issue, and the ACC mechanism appears on its face to be quite open ended.

The existing Community Amenity Contribution approach is one under which municipalities extract 'voluntary' contributions as a prerequisite to granting a rezoning, to provide funds for municipal projects. The CAC regime has never had specific statutory authority, and is only lost to municipalities in the sense that the municipality cannot impose a pre-condition to a rezoning that the Province is effectively requiring the municipality to do. The CAC regime will presumably continue in all other contexts as it always has.

The problem for the Province is that level of housing that municipalities are approving is substantially below the level that the Province considers necessary and appropriate in the broader public interest. The Province has therefore put mechanisms in place through the Housing Statutes under which the Province can direct the creation of additional housing (by way of its targeted small scale multi-unit housing and Transit Oriented Development provisions, and by way of the mechanisms that will eventually flow from the Housing Needs Reports).

The only way the Province could overcome this complaint about undercutting the ability of municipalities to charge CACs as a pre-condition to a rezoning that is effectively required would be to not require additional housing, which is essentially an argument that municipalities should be allowed to simply 'carry on' as before.

Further, ACC's give municipalities a new charging power that goes beyond the concern that has referenced as the justification for its creation. That is so for two reasons, first because it is available as regards developments that do not come about as a result of the Province's initiatives, and second because it is available as regards building permit applications, which CACs are not.

The focus of this Commentary is a legal perspective, not a political perspective. From that perspective, whenever a legal regime proves incapable of addressing something that is fundamental to the public interest (such as the housing supply and affordability problem that the RBC, Demographia and Oxford Economics data speaks to), some form of change to that legal regime is inevitable.

The changes the Province has made through the Housing Statutes have the attraction of:

- being specifically targeted to address the housing supply problem,

- being a good fit with the legal context in which they will operate (ie – the existing *Local Government Act*, and the Court's approach to judicial review), and

- having the potential to offset an aspect of the current regime that has significantly constrained opportunities to increase housing supply.

Hence, this legal Commentary concludes that it is the best choice from among the available options in terms of its prospects for success in meeting its stated objective.

Whether the option chosen will have the desired effect however cannot be predicted at this stage, but rather will turn on how the various stakeholders act and interact going forward, including:

- the Province itself,

- local governments,

- the development community, and

- voters.

E. Changes to the *Local Government Act's* grandparenting provisions that should be considered as part of the solution

In terms of the private sector response, it must be kept in mind that there is more to development than increasing the legal scope of what is *allowed* to be developed.

In order for development to occur where significant up front servicing or amenity costs arise for example, it is fundamental to the development proceeding that the party contemplating the development is able to satisfy itself that it will be able to complete whatever phases of development are necessary for it to recover the cost of those amenities and services. That entails a consideration of the risk that:

- the risk that the zoning or development permit provisions might change, and / or

- charging provisions will change,

in ways that compromise later phases.

If one reviews the Court cases that have been referenced in this memorandum, one sees:

- a downzoning of lands shortly after a development agreement was entered into, that substantially reduced the development rights that were relied on to fund amenities and site servicing (*Victoria*);

- the downzoning of a large swath of land by way of a zoning that allowed very little in the way of viable private uses (*North Vancouver*),

- the second phase of a development being blocked, when the development had been proceeding for 5 years, and the first phase had been built (*North Cowichan*),

- the construction of a 30 unit residential building being blocked after it had received a comprehensive development permit with a 2 year term, because the owner was unable to submit a building permit application for its building within 7 days of the commencement of the enactment of a downzoning bylaw (*White Rock*), and

- a right to construct up to 90 dwelling units in a subdivision being reduced to 30 smaller units after the road, sewer and water utilities had been installed to the standards required for the higher level of use, and after $2.5 million in amenity contributions had been paid (*Ucluelet*).

Further, as noted, it is not uncommon that a large scale development that draws a high level of interest from municipalities and developers fails to proceed, not because those parties do not want them, but because the tools that the *Local Government Act* provides are inadequate to address the risks associated with heavy upfront amenity and servicing costs.

The Housing Statutes only address that aspect of things in a limited way. While the Housing Statutes envision

- specific building rights as regards small-scale, multi-unit housing, and
- mandated requirements in Transit Oriented Areas,

such developments typically are not large phased developments. The Housing Needs Report process will eventually assist by reducing the incentive to downzone, but it does not directly address the risks faced by greenfield, brownfield or other multi-phase developments the viability of which turns on upfront service or amenity costs. If anything, the Housing Statutes could increase those risks, through the relatively broad authority it gives for imposing Amenity Cost Charges.

The *Local Government Act* for the most part, apart from the Phased Development Agreement sections, continues to deal with grandparenting as if development in 2023 has remained unchanged since 1982, despite the fact that development procedures are now vastly more complicated, expensive and time consuming to address, not only in the residential context, but generally.

All of which underscores the positive impact that statutory amendments that make the land use and development regime more predictable could have for increasing the housing supply. This Commentary will speak to that issue in the context of grandparenting related to:

- development permits and building permits;
- subdivision and use; and
- phased development.

It is important to note that the following comments do *not* purport to propose specific wording changes, but rather to note some obvious approaches. The drafting of statutory language always requires detailed consideration of the contexts to which the wording might apply, and the incorporation of exceptions to prevent unintended consequences, and the Province has not yet expressed an interest in addressing these issues.

1. Building Permit grandparenting, and Development Permit grandparenting

Most developments in 1982 involved single buildings. A much greater proportion of developments in 1982 also involved situations where plans demonstrating building code compliance could be prepared within the 7 days referenced at section 463 of the *Local Government Act.*

By contrast, most projects now require extensive processes before they get to the stage whereby a building permit application can be prepared and submitted, including in many cases a lengthy development permit process.

Given the myriad of development permit parameters set out at sections 488 to 491 of the *Local Government Act*, by the time a project reaches the development permit stage:

- the parameters of the development have been fleshed out to a very substantial degree, including by way of dimensioned plans, and

- the steps that remain largely relate to such matters as the preparation of formal materials to establish Building Code compliance, including plans and drawings signed off on by a number of registered professionals (the coordinating professional, architectural, structural, electric, etc).

The *White Rock* case interpreted the interplay between section 463 [Building Permit Grandparenting] and section 501 [Development Permit Grandparenting] such as to effectively subordinate the latter to the former. It makes little sense from the perspective of

- ensuring a viable housing supply, or

- efficient and effective development management,

that, in cases where a development permit has been issued, the ability to obtain a building permit issuance can be blocked by a local government by nothing more than commencing the preparation of an official community plan or zoning bylaw a mere 7 days before a detailed building permit application (complete with plan sign off by multiple registered professionals) can be submitted.

By contrast, the *Vancouver Charter* formulates development permit grandparenting with language that is more direct. Section 568(2) of the *Vancouver Charter* states that:

> "A building lawfully under construction at the time of coming into force of a zoning by-law shall for the purpose of that by-law be deemed to be a building existing at that time. For the purposes of this subsection, *a building shall be deemed to be lawfully under construction if a development permit has been issued and such permit remains valid.*

The *Local Government Act* should accordingly be amended such that the same development permit grandparenting applies under the *Local Government Act* as applies under the *Vancouver Charter.*

For buildings that do not require a development permit, one approach would be to increase the 7 day period under section 463 of the *Local Government Act* to 8 weeks, or whatever period further investigations indicate it takes to prepare the comprehensive building permit application package that is now required for larger buildings that are not subject to development permit requirements.

2. Subdivision grandparenting, and Use grandparenting

Section 511 [Subdivision Grandparenting] sets out a time frame for proceeding from:

- a subdivision application to the local government (which does not involve surveyed plans but rather simply begins the regulatory process) to

- the submission of final surveyed plans ready for filing at the Land Title Office.

The time that section 511 allows for that entire process is 12 months, which, given the substantial increases in processing steps and time requirements since section 511 was enacted, has resulted in the section now being of little meaningful effect. The process requirements associated with getting anything but the simplest subdivision through to the stage of filing at the Land Title Office is well beyond that allowance.

Again, an obvious approach to an update would be to increase the 12 month period to whatever period further investigations indicate it now typically takes for a subdivision to proceed from initial application to registration at the Land Title Office. There could be two or three time periods listed, depending on the number and nature of the lots being created.

Second, where land is downzoned, subdivision will be meaningless unless non-conforming use protection also applies. It does not matter if 100 lots are created, if the only use permitted on those lots is fish farming and the training of dogs. A less extreme downzoning that undercuts the service capacity for which a subdivision was designed can similarly make cost recovery impossible. (In the *White Rock* case, for example, the construction of 60 of 90 dwelling units was precluded, after road, sewer and water services based on the greater amount of housing had been built, the Approving Officer had signed the subdivision plan, the subdivision had been registered on title, a lot had been sold, and a $2.5 million amenity contribution had been paid.)

At least two things are presently unclear from the *Ucluelet* case. One is whether the same 'reasonableness' conclusion would have resulted if the subdivision was a relatively recent stand alone subdivision involving amenity gives that balanced public interests with the scale of private rights obtained (public trails across the lots etc), rather than being a subdivision that was part of a larger comprehensive development that subsequently did not proceed, many of the works for which had been decommissioned. The second is the breadth of deference, if any, that would apply if a Building Inspector purported to make a decision regarding use grandparenting (noting the common law aspect of non-conforming use protection, the long history of judicial rulings, and the fact that the focus and training of Building Inspectors tends to be on technical matters such as building code compliance and safety).

One option for the Province to simplify matters and reduce uncertainty and risk in the housing context would be to gather input on the length of time it typically takes for a subdivision to proceed from registration at the Land Title Office to the build out of the last few homes in the subdivision, again for different sizes and types of residential subdivision. Then, it could supplement section 528 of the *Local Government Act* [Use Grandparenting] with a provision to the effect that:

> where a subdivision plan that allows residential uses has been registered against title,

- all residential uses allowed on the subdivided parcels allowed by the local government's land use regulation bylaws at the time of the registration of the subdivision, and

- any residential building that the land use regulation bylaws allowed to be constructed on the subdivided parcels at the time of the registration of the subdivision,

shall, for a period of [X years] after the registration of the subdivision plan, be deemed to have been established before the land use regulation bylaw is changed in a way that precludes that use or construction.

Again, the provision could list two or three time periods, depending on the number and nature of the lots being created.

3. Phased Development Agreement Grandparenting

As noted earlier, the *Local Government Act* was amended in 2007 to include the Phased Development Agreement regime, to add a level of negotiated certainty as regards zoning, subdivision and development permit issuance, in light of Court decisions such as *PNI* and *CMHC*.

There are a range of options that can be incorporated into a bylaw package that includes a Zoning Bylaw and a Phased Development Agreement that:

- can be tailored to produce both

    - flexibility (by providing for example, a variety of building options, in a variety of specified areas), and

    - certainty (by providing that that range of building options will continue to be available in those areas)

  to meet the needs of the development; and

- include other agreement terms that are both acceptable to and binding on both parties.

The Phased Development Agreement can also be combined with other bylaws and instruments to provide additional avenues for the recovery of the upfront costs of services and amenities.

Given the variety of scenarios that can play out over time, care is always required in the drafting of Phased Development Agreements, but statutory provisions that needless add to the complexity only undermine the prospects for addressing British Columbia's housing supply and housing affordability problem. This Commentary will provide two examples.

The first relates to the interplay between section 521 and sections 503 and 501 of the *Local Government Act.* Section 521 provides that:

> (1) If a phased development agreement is entered into under section 516, a notice that the land described in the notice is subject to the phased development agreement must be filed with the registrar of land titles in the same manner as a notice of a permit may be filed.
>
> (2) Section 503 *[notice of permit on land title]* applies to a notice under subsection (1) of this section…,

while section 503 (which does not mention Phased Development Agreements directly) provides that

> (1) If a local government issues any of the following, it must file in the land title office a notice that the land described in the notice is subject to the permit:
>
> (a) a development permit;
> (b) a temporary use permit;
> (c) a development variance permit.
>
> (2) On filing of a notice under subsection (1), the registrar of land titles must make a note of the filing against the title to the land affected….
>
> (4) If a notice is filed under subsection (1) or (3), the terms of the permit or any amendment to it are binding on all persons who acquire an interest in the land affected by the permit.. .

As we have seen, section 501, another section in the package of *Local Government Act* provisions that relates to "land use permits', provides at subsection (3), that:

> (3) A land use permit is binding on the local government as well as on the holder of the permit.

An obvious reading of those provisions collectively, given the nature and purpose of a Phased Development Agreement, is that, where a transfer occurs, the Phased Development Agreement is binding *not only on* the local government who signed the PDA, but also on the party who has acquired the land. The purchaser knew of the PDA because of the notice on title, and the municipality knows of the PDA because it entered into the agreement after an extensive public process. It would also make little sense for a party to be bound by the provisions of an agreement while at the same time being denied the benefits of the agreement to which its obligations relate.

We have nonetheless heard it speculated at the municipal level that a PDA would not be binding on the municipality in such a scenario unless the PDA provides that the municipality's consent is not required, and the change in the Court's approach to judicial review might lead a local government, when pressed by neighbours concerned about the PDA development, to advance that interpretation.

As noted earlier, Phased Development Agreements do not prevent downzonings, but rather only delay zoning changes having effect during the term of the Phased Development Agreement. If a municipal Building Inspector was to take the position noted above, the purchaser of a residential lot created under a Phased Development Agreement could conceivably be told, when he or she submits the building permit application for their house, that a downzoning has resulted in a situation where he or she cannot

actually build on the residential lot he or she has purchased, even though the term of the PDA has not yet expired.

Given that the purpose of Phased Development Agreements is to alleviate risk so that multi-phased development can be viable, the legislative provisions related to them should not needlessly leave such a risk as a possibility.

A second example arises from a situation where, within four years after the municipality entered into a Phased Development Agreement for a comprehensive residential development, a new municipal Council amended its Official Community Plan bylaw to:

- redefine it's the Urban Containment Boundary such that a sizable portion of the Phased Development Agreement lands were no longer within it, and

- change the land use designation of those lands to a Resource designation.

Again, multi-phased developments by definition play out over periods of years, and parties who enter into PDAs should not have to be concerned about the risk that, when they complete a development phase, the purchaser of a residential lot might not be able to build on a lot that has been created.

In order to enable the Phased Development Agreement regime to serve its intended purpose, the PDA time limits should accordingly also be amended to allow municipalities and developers to negotiate 15 or 20 year terms if it suits the time frame of the project and the cost of the amenities and services the project requires in order to proceed, without the need for a separate Provincial approval.

4. Conclusion

The magnitude of the housing supply and affordability problem that BC faces, as outlined by the RBC, Demographia and Oxford Economics data, is both real and sobering, and raises obvious issues as to how the desire that those in an existing neighbourhood, or on a newly elected Council, might have to block:

- the construction of a residential tower that has already been approved by way of an issued development permit,

- the build out of homes in a subdivision that has been registered against title, and has the benefit of already constructed road, sewer and water works, or

- the housing developments that are the subject of a Phased Development Agreement,

should be balanced against the broader public interest in the housing supply increases that such development permits, subdivision approvals and Phased Development Agreements already provide for.

Given the Province's recognition of the importance of the broader public interest in increasing the housing supply, by way of the provisions of the Housing Statutes, as regards *future* housing developments, it would seem obvious that the same broader public interest should lead to the enactment of provisions that protect the housing supply increases provided for in already approved developments.

Peter Kenward
Kenward Development Law Corporation
North Vancouver, British Columbia
pkenward@kenwarddevelopmentlaw.com
604-374-7962

Peter Kenward, of Kenward Development Law Corporation, acts on a broad range of land use and other regulatory issues, primarily for property owners. He is a Past Chair of the Municipal Law Section of the Canadian Bar Association, both nationally and in BC, was a member of the Board of Directors of the Urban Development Institute Pacific Region from 2002 to 2012, and has represented UDI, the Business Council of British Columbia and the BC Chamber of Commerce in various submissions on a range of municipal matters, including the Community Charter and Regional Growth Strategy matters, as well as having made presentations on a variety of occasions to the Union of BC Municipalities and the Local Government Management Association. Peter has appeared numerous times in the Canadian Legal Lexpert Directory, a guide to the leading law firms and practitioners in Canada, as a leading lawyer in the area of property development.

This document is not intended as legal advice to any individual or organization regarding any specific circumstance, and must not be relied on as such.