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EXPROPRIATION OF RESTRICTIVE COVENANTS

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Background

Since 2005, Edmonton city council has been debating the issue of restrictive covenants placed on the site of former grocery stores, prohibiting their use as grocery stores. The City of Edmonton has six such sites for which the nearest grocery store is at least 800 meters away.

Council has been attempting to find a method of removing these restrictive covenants, and has examined its options under the *Land Titles Act*, which gives a person the right to apply to the courts to remove or modify a restrictive covenant where the covenant conflicts with the provisions of a land use bylaw or area plan under the *Municipal Government Act ("MGA")* and where the modification or discharges is in the public interest (s. 48(4)).

In previous court cases, however, municipalities have failed to have restrictive covenants removed on the basis of this provision of the *Land Titles Act* because the municipality will need to prove a significant and serious conflict between the covenant and the city's plans for the area. Accordingly, Edmonton has not attempted to have the covenants removed pursuant to this section.

In late January 2012, city administration released a new report to the Executive Committee of council. This report suggested an alternative approach to dealing with these types of covenants; it recommended that the City consider expropriating just the restrictive covenant, but not the land benefitted by the restrictive covenant.

Expropriating Restrictive Covenants

The *MGA* provides the City with the authority to expropriate any interest in land pursuant to the provisions of the *Expropriation Act* (s. 14(2)). The *Expropriation Act* provides that, unless an act authorizing expropriation provides otherwise, the party expropriating an interest can acquire any estate in the land, including any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land (s. 3).

A restrictive covenant is an interest in land which benefits one parcel of land and places restrictions on another parcel of land. It would seem, therefore, that the definition of the interest that may be acquired by the City in both the *MGA* and the *Expropriation Act* is wide enough to encompass a restrictive covenant.

In order to expropriate land, the City must also demonstrate that the expropriation falls within one of the purposes contemplated in the *MGA*, which includes carrying out an area redevelopment plan or any other municipal purpose (s. 14(2)).

In creating an area redevelopment plan, council may designate an area of the municipality as a redevelopment area in order to improve or relocate services in the area, and to facilitate other development in the area (s. 634). Assuming the area redevelopment plan is appropriately drafted such that the terms of the restrictive covenant clearly conflict with plan, and would inhibit the City's ability to carry out the plan, the City would be able to place the expropriation of the restrictive covenant within one of the purposes required by the *MGA*.

Once the City determined that expropriation of a restrictive covenant was necessary to achieve its purpose, the process for expropriating the interest would be governed by the *Expropriation Act.*

The City would be required to pay compensation for the expropriation of the interest. In general, the *Expropriation Act* operates on the basis of compensation based on the market value of the property. However, in a situation such as this, where there is no open market for the interest expropriated, the determination of compensation would be a difficult process.

In situations where municipalities have expropriated only partial interests from landowners, one method of compensation adopted by the courts has been to determine the market value of the property prior to the taking, and then determine the market value of the property after the taking and compensate based on the difference between the two.

While this approach has not generally been used in Alberta, the Court of Appeal has indicated that, in the appropriate circumstances, this methodology could be used. Similarly, the Land Compensation Board has indicated that, where it is difficult or impossible to calculate the market value of the interest taken, a before and after approach to valuation might be appropriate.

Effect of Expropriation

The effect of the City's expropriation of the restrictive covenant is not clear. Pursuant to the *Land Titles Act,* only the registered owner of the dominant

tenement is entitled to request discharge of the restrictive covenant (s. 73(1)).

However, the City would likely be entitled to request a discharge pursuant to s. 48(4) of the *Land Titles Act* which provides for the modification or discharge of a covenant where the person can demonstrate that the modification will be beneficial to the persons principally interested in the enforcement of the condition. As owner of the restrictive covenant, the City would clearly fall within this category.

However, there is some question as to whether the restrictive covenant could even continue to exist in law following the transfer of the covenant, without the dominant tenement, to the City. A restrictive covenant which, on its terms, is clearly intended to pass the benefit of the covenant to successors in title, generally passes to subsequent owners of the dominant tenement on transfer.

There are other methods of transfer. A restrictive covenant can be assigned to another party, but English courts have held that, in order for the assignment to enable the transferee to pursue any owner of the servient lands, the assignment must occur contemporaneously with the transfer of the dominant lands. In this case, the restrictive covenant would be assigned without transfer of the dominant lands. Accordingly, it would appear that the restrictive covenant itself may cease to exist on transfer of the restrictive covenant to the City.

Furthermore, one of the requirements of a restrictive covenant is that there must be an identified dominant tenement in order for the covenant to exist. While this issue has not been directly considered by the Courts, in a case where the owner of the restrictive covenant and the owner of the dominant tenement are not the same, a court might well conclude that the requirement that there be a dominant tenement to which the covenant is intended to apply has not been met.

On the basis of the law in respect of restrictive covenants, it would seem that, on transfer of the restrictive covenant to the City, the covenant itself might cease to exist. In any event, the City would be entitled to apply for removal of the covenant pursuant to s. 48(4) of the *Land Titles Act* on the basis that the modification will be beneficial to the persons principally interested in its enforcement, that is, the owner of the restrictive covenant. ▲

CHANGES PASSED TO CONTROVERSIAL LAND USE LEGISLATION

Written by: Teresa Tomkinson and Susan Hallick

The Land Assembly Project Area Act (the "*Act*") was passed on May 26th, 2009. It gives the provincial government the power to acquire, and/or regulate the use of, privately-owned land which falls within an area it has identified as the potential future site of a public project related to transportation and utility corridors or water conservation and management.

The *Act* provides that, following public disclosure and consultation with affected landowners, the government may designate an area of land as a "Project Area." Once a Project Area has been designated, private land which falls within it is subject to a potentially significant degree of governmental control. Along with a number of specific regulations the government may choose from, such as prohibiting future development or use of the land and ordering the removal of buildings and animals from the land, the Act gives the government the broad general ability to order any other matter or thing it considers necessary respecting the land.

The Project Area Order and Regulations will be registered as an encumbrance on title to the land, putting potential purchasers and financial institutions on notice of the restrictions. They will also be provided to the local municipality, ensuring no development permits will be issued for the land. The land will remain burdened by the Order and Regulations until the landowner chooses to sell the land to the government, the government decides to acquire the land, or the government decides that the land will not actually be needed.

The *Act* was met with concerns and confusion regarding landowner rights and compensation. In response, the *Land Assembly Project Area Amendment Act* (the "*Amendment*") came into force on December 8th, 2011. The *Amendment* clarifies a number of grey areas and makes some significant changes to the Act's enforcement provisions.

The *Amendment* adds a preamble which describes the general purpose of the *Act,* emphasizes the public interest in the orderly planning and construction of major infrastructure projects, stresses the importance of public consultation in advance of major infrastructure projects and highlights landowner compensation and recourse to the Land Compensation Board and Courts.

The *Amendment* narrows the scope of government projects which fall within the *Act*. Prior to the *Amendment*, the government could designate any area of land as a Project Area as long as it merely believed the land would be required in the future for a public project related to transportation and utility corridors, or water conservation and management, and it intended to acquire the land over a period of time. The duration or size of the project were not factors to be taken into consideration. Now, the *Act* sets maximum projected completion dates of 15 years in the case of transportation and utility corridors and 5 years in the case of water management and a minimum land area requirement of 1000 hectares. In addition, the *Amendment* clarifies that standalone utility or pipeline projects do not fall within the scope of the *Act.*

The *Amendment* makes clear that landowners have access to all of the rights and compensation provided by the *Expropriation Act.* Prior to the *Amendment,* the *Act* was silent as to the landowner's right to trigger expropriation or to seek compensation through the *Expropriation Act.* In contrast, it explicitly affirmed the government's right to expropriate land within a Project Area. The only option for the landowner seemed to be to sell its land to the government for fair market value, and nothing more. The *Act* now explicitly

states that the landowner may trigger expropriation at any time it chooses and that the landowner has the right to the full range of compensation provided by the *Expropriation Act,* in addition to fair market value.

The *Amendment* makes clear that landowners have full resource to the Courts. Prior to the Amendment, the *Act* provided for resource to the courts only in the event of disagreement between the landowner and government in determining market value. In addition, the only venue for appeals of enforcement orders made under the *Act* was an appeal body set out in the regulations. The *Act* now stresses that in addition to having the Court determine market value, the landowner may elect to have the Court determine full compensation payable under the *Expropriation Act* and makes provision for appeals of enforcement orders to the Court if the landowner so chooses.

The *Amendment* recognizes that an affected landowner may wish to divest itself of ownership, but remain in possession of the land, and imposes requirements on the government when notified of such a wish. Prior to the *Amendment*, the *Act* seemed to anticipate only two choices a landowner may make: sell the property and move on, or retain ownership until the government decided to acquire the land. Now, the *Act* states that if a landowner expresses their desire to sell their property, but remain in possession until any date prior to the time the land is needed for the public project, the government must negotiate in good faith to lease with the landowner before negotiating with any other person.

Lastly, the *Amendment* makes some changes to the provisions dealing with enforcement of the *Act*. First, it removes imprisonment as a potential consequence for breach of an enforcement order made under the *Act,* along with the ability of the government to enforce an enforcement order as if it were a judgment of the Court. Second, the *Act* now provides that the appeal body or Court hearing an appeal of an enforcement order can order costs of the appeal. Prior to the *Amendment,* the *Act* made no mention of costs of an appeal. Finally, the *Amendment* narrows the ability of the government to apply for an injunction. Prior to the *Amendment,* the government could apply to the court for an injunction if it merely thought a person was "about to do something" which contravened the Act. Now, a person must have actually done, or be in the process of doing, something which is an offence under the *Act* in order for the government to obtain an injunction. ▲

SOCIAL MEDIA BACKGROUND CHECKS: EMPLOYERS BEWARE

Written by: Teresa Tomkinson

Social media is a relatively new communication medium and it is in its infancy in terms of its legal and policy implications. Like a credit or criminal background check, many employers, volunteer agencies and other organizations are now conducting social media background checks on prospective employees and volunteers. They are conducting these checks with and without the knowledge of the individuals they are checking. Currently, there is little guidance from administrative tribunals or from courts about this issue. The Office of the Information and Privacy Commissioner for British Columbia has developed some guidelines to help organizations and public bodies on what to consider when deciding whether to perform a social media background check and this issue is currently on the horizon for the Office of the Information and Privacy Commissioner for Alberta.

What does a Social Media Background Check mean?
A social media background check can mean many things. It can be as simple as checking out a Facebook profile, or as complicated as hiring someone to search every bit of social media about an individual.

For many the concepts of "privacy" and "social media" are at odds, since most individuals who post information online about themselves do so because they want other people to see it; it is intended to be public information. Therefore how does the issue of privacy even come into play? What some people may not realize is that when organizations and public bodies search for information about an individual, the collection, use and disclosure of that personal information is subject to provincial and possibly federal privacy provisions (Freedom of Information and Protection of Privacy Act (FOIP) and Personal Information Protection Act of Alberta (PIPA)).

Risks associated with social media background checks:

1. **Accuracy**. The information gathered from social media may be prone to errors. The individuals or others could post inaccurate information to for example their Facebook pages. It is very easy for an individual to link images and information that has been collected from social media to a name so an organization might be guessing at what social media account actually matches the name on the Resume. In some cases people set up social media accounts as an imposter. Other factors that can compromise the accuracy of social media include mislabeled photographs and just plain out of date information. Accuracy is important because privacy laws require public bodies and organizations to take steps to ensure that the information they collect is accurate.

2. **Collecting Irrelevant Information, Collecting Too Much Information.** Since there is such a plethora of information on social media, social media background checks can collect much more than what was intended. Furthermore, much of the information might just simply be irrelevant. Under privacy laws, organizations can only collect personal information that a reasonable person would consider appropriate or reasonable in the circumstances. So, a lot of the information gathered from social media is likely not reasonable or appropriate in the context of a "job interview". For example, an employer would normally ask for references about a job candidate's work habits but not about their marital status. However, if one conducts a Facebook check a person's status is an integral part of the Facebook page. In the public sector the test is even higher. Public bodies can only

collect information about an individual if that information relates directly to and is necessary for an operating program or activity of the public body or if it is otherwise authorized.

3. **Over-Reliance on Consent.** Under private sector privacy laws, organizations can ask an individual for consent to access their social media content. However, privacy laws usually permit them to withdraw their consent at any time. If they withdraw it then the organization must not use that information to make a decision about that individual.

Even if an individual gives consent for an employer to access their social media content, the collection must still be reasonable. For example, if a job applicant gives an employer permission to access their online dating profile this would likely still contravene private sector privacy laws because collecting that information would not be reasonable in most circumstances. Most information on social media sites is not about an individual's employment.

Another problem is the inadvertent collection of third party personal information. If an organization obtains consent from an employee to retrieve information off their Facebook page, there may well be information on that page that relates to a third party who has not provided their consent to the organization.

Considerations when deciding whether to perform a social media background check:

1. Recognize that any information collected is personal employee information and is subject to privacy laws, whether or not that information is publicly available online or whether it is online but subject to limited access as a result of a privacy setting.

2. Conduct a privacy impact assessment including an assessment of the risks associated with your use of social media as a component of background checks. Public bodies and organizations should:
   a) Find out what privacy laws apply and revie them ensuring there is authority to collect and use personal information;
   b) Identify the purpose for using social media to collect the personal information;
   c) Determine whether the identified purpose for the collection and use are authorized (there are certain circumstances in the legislation where collection and use are permitted);
   d) Consider and assess other less intrusive measures that meet the same purposes;
   e) Identify the types and amounts of personal information likely to be collected including collateral personal information about other people that may be inadvertently collected as a result of the social media background check;
   f) Identify the risks associated with collection and use of this personal information including risks resulting from actions that are taken based on inaccurate information;
   g) Ensure that the appropriate policies, procedures and controls are in place to address the risks related to the collection, use, disclosure, retention, accuracy and protection of personal information;
   h) If collection is authorized (i.e. by the statute), notify the individual that you will be performing a social media background check and tell them what you will be checking and what the legal authority is for checking it; and
   i) Be prepared to provide access to the information you've collected and used to make a decision about an employee or volunteer.

What to avoid:

Public bodies and organizations should NOT do the following when deciding whether or not to perform a social media background check:

1. Wait until after they conduct the social media background check to evaluate compliance with privacy legislation;
2. Assume in advance that a social media background check will only retrieve information about one individual and not multiple individuals;
3. Perform a social media background check from a personal account in an attempt to avoid privacy laws;
4. Attempt to avoid privacy obligations by contracting a third party to carry out background checks;
5. Perform a social media background check under the assumption that individuals will never be able to find out about it. For example, people can use web analytics to try to determine what IP address accessed their personal information.

If an individual suspects that their personal information was improperly collected they have a right to complain to the Information and Privacy Commissioner. ▲

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