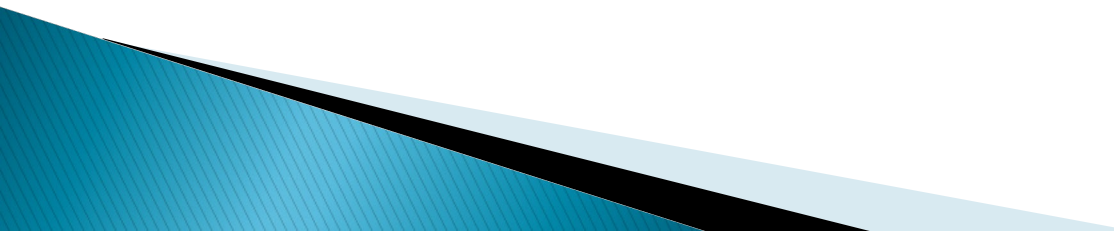


LEASING ON FIRST NATION LAND

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AND
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FIRST NATION LEASES

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1. INTRODUCTION

- Reserve land development and conveyancing represents much of my practice
- Our firm is located on the Westbank First Nation (“WFN”) Indian reserve
- Member and past chairman of WFN Economic Development Commission
 - First band in Canada with an EDC

- Been involved in dozens of significant on reserve projects including:
 - Royal Heights, a 33 lot residential subdivision in the early 90's
 - many manufactured home parks
 - Aria, 175 unit condo golf course development
 - Home Depot/Canadian Tire development
 - Superstore big box development
 - Sunrise Estates, 100 single family homes
 - Sage Creek, 270 unit modular home development

- Carrington Business Park, 8 acre business park
- Vintage View, a commercial/hotel development
- Copper Sky, 536 unit condo development
- Tesoro Arca, 85 unit townhouse development
- Snyatan, Winners/Future Shop mall
- Governor's Landing and Governor's Market in Westbank – commercial/retail (up to one million square feet of retail)
- West Harbour, 200 home lakefront development
- Cottages at Osoyoos Lake (284 homes)
- Westside Landing (commercial)
- Sears Home Centre

- Talons - duplexes
- Lakeview Lodge, 100 bed Interior Health Care facility
- The Bow (Manufactured Homes – Penticton)
- Sienna Ridge (Kamloops – 108 homes)
- Hawks Landing (82 duplexes)
- Brookside Villas (townhomes)
- Ariva (204 luxury condo development)
- Shelter Bay (108 premium waterfront townhomes)
- Iron Horse (210 residential units – Tzeachen)
- Many other developments on reserves throughout BC, in various stages of development

2. WESTBANK FIRST NATION

- Significant development on this reserve
- Tax assessed value of properties in is approximately \$2.2 billion
- Building Permits are close to \$80 million a year
- Over 4,500 residential units
- 4300 residential units
- Over 1.4 million square feet of commercial space
- Over 550 businesses located on this reserve

3. LEGAL REGIMES

A. INDIAN ACT

- Approximately 630 First Nations in Canada, about 200 in British Columbia
- Most bands in Canada are administered by Indigenous Services Canada (“ISC”) in accordance with the *Indian Act*
- For most bands, land management and development must go through ISC (Vancouver for B.C. First Nations)
- Very, very cumbersome process where it can take years to get a proper Lease and development

B. LAND CODE UNDER THE FRAMEWORK AGREEMENT

- *First Nations Land Management Act* (“FNLMA”) enacted in 1999 allows First Nations to develop a land code
- Allows the Nation to manage and develop their lands independently from ISC and opt out of *Indian Act* land provisions
- About 100 operational land code Bands in Canada and many in development
- Critically important for those Nations that want to develop their lands for residential or commercial purposes

C. SELF-GOVERNMENT

- A handful of Bands (22 in Canada as of 2015, 5 in B.C.) have achieved a form of Self-Government (usually through Treaty)
- Self-government is the ability of a First Nation to govern itself (within the framework of the Canadian Constitution)
- Usually includes the ability to manage its own land and resources at the local level

4. UNDERSTANDING LEASES

- Reserve lands are generally held in the name of Her Majesty The Queen (the “Crown”) for the benefit of the particular First Nation
- Generally no concept of “Fee Simple” or “Freehold”, most Reserve lands are not registered in any Provincial Land Title Office
- Generally there are 2 types of interests:
 1. Community lands which are general band lands not allotted to a specific Member
 2. CP or Certificate of Possession lands being lands where individual band Members have been allotted rights of possession (“Locatee Lands”)

- Generally, First Nations are prevented from freely dealing with their lands because of the Indian Act
- An allotment can only be transferred to the band or another band Member
- So generally the way a non-native obtains a development interest on reserve is through Lease

5. LEASING PROCESS ON RESERVE LANDS

- Process of gaining an interest on most Reserves for development is quite a bit more complicated than freehold land off reserve
- And a huge difference between ISC Bands and Land Code/ Self Governed Bands

A. Leasing Procedure for Bands *without* Land Code

- Much of my dealings have been on CP lands but the process is similar for community lands (Band lands):
 - Lands first have to be Designated for leasing which is very time consuming
 - Require Band vote (majority of a majority now)
 - Federal Order-in-Council previously, now the Minister approves
 - Appraisal
 - Used to take one to two years just for the Designation

- As part of the application process, the applicant submits an appraisal of the property, environmental assessment, technical drawings, surveys, etc.
- ISC has standard form of lease, **very** difficult to change
 - Not as easy to get the protections that Lessee's and Lender's get off-reserve
- Band Council approves the lease by resolution
- Ultimately the lease is signed by the Developer, Band Council, Canada and the Locatee (if CP land) and submitted for registration in the Indian Lands Registry, Ottawa
- Very, very time consuming, can take years to get a lease
- "Time is money", business does not like delay or uncertainty

B. Leasing Process – Land Code (FNLMA)

- The First Nation has the power to manage and lease its lands
- Takes land management and development away from Indian Affairs
- If Land Code provides, the Headlease is directly with the CP Holder (or the Band if community lands), not Her Majesty The Queen
- No need for Designation
- No dealings with Indian Affairs
- Usually free to create your own form of Headlease (this is **very** important)
- Generally a much, much quicker process
- In Westbank we can do in weeks what can take years under ISC

SHELTER BAY



- Lease process begins by a developer entering into a long-term Lease with the band or a band Member – a “Headlease”
- Band Referendum needed only if Community Land
- The many residential and commercial subdivisions on WFN have an underlying long-term Headlease granting the developer the rights to those lands for the term of the Lease
- The developer then, as Lessee, develops the lands, either commercially or residentially, then subleases the individual units (homes, apartments, townhouses, commercial units) to buyers (sublessees)
- Sublessee/buyer may then finance their purchase by way of mortgage of sublease

PRE-PAID LONG TERM LEASES

- The rent PRE-PAID up front is the most secure
 - all rent owing under the Headlease is fully paid so there can be no termination for failure to pay rent, or rent reviews
- Historically, a lot of Headleases on reserves (in manufactured home parks for example) where rent is not pre-paid
 - rents are a percentage of revenue and/or reviewed every 5 years
 - this model is no longer popular
- Most successful, secure residential leases are fully pre-paid for a 99-year term (125 years often today)

- The Band or band Member is giving up their rights to the Land for the term of the Lease – the longer the term, the greater the value
- ISC has a policy of capping leases at 99 years, some bands (the Okanagan Band for example) cap leases at 49 years
- In Westbank the standard today is 125 years which maximizes value

6. A to A LEASES

- Most Canadians take for granted the right to sell and mortgage their land without restriction
- Difficult for First Nation landholders because of Section 89 of the *Indian Act*
- Land Codes can provide that a First Nation Member who holds an allotment of land may enter into a lease with him/herself and that lease can be mortgaged
- We have done many A to A leases and mortgages in Westbank and other Land Code Bands
- There is now provision for CMHC Coverage (can borrow up to 95% of value potentially)

7. CMHC

- In Canada, if a purchaser wants to borrow more than 80% of the purchase price of a home the buyer must obtain coverage through Canada Mortgage and Housing Corporation (CMHC) or other insurer
- CMHC has been providing coverage for residential developments on reserve in Canada for many years
- I've developed a form of lease satisfactory to CMHC which is widely used

8. TITLE INSURANCE

- Title insurance is commonly used off-reserve to protect buyers and lenders
- Historically was unavailable on reserve
- In 2005 we assisted with the Hub Centre/Home Depot development in Westbank
 - First Canadian Title (“FCT”) provided title insurance which was a first in Canada on a Reserve
- As a result title insurance is now widely available for most reserve developments

9. SECURE LAND REGISTRY

- Most bands in Canada use a system of recording in the Indian Lands Registry in Ottawa which is not secure
 - The federal Registry is generally just an “information” registry with really no priority protection
- For FNLM Land, the regulations provide that:
 - New registered interests will have priority in order of registration
 - Registered interests have priority over unregistered interests

This very, very important to lender’s, lawyers and stakeholders

SUMMARY

- Parts of Canada have seen explosive growth on reserve
- Some of the finest land in Canada for development is on First Nation land
- If you take the time to inform yourself of the process, there are incredible opportunities on reserve, for Bands, Band members, Developers and Lenders
- The Framework Agreement and FNMLA puts Land Code Bands light years ahead of other Bands in terms of opportunity for land development and economic success

Thank You

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Working for you