SURREY
CITY OF PARKS

Corporate Report

NO: C010

COUNCIL DATE: May 14, 2007

COUNCIL-IN-COMMITTEE

TO:	**Mayor & Council**	DATE:	**May 9, 2007**
FROM:	**City Solicitor**	FILE:	**7999-0066-00**
SUBJECT:	**Compliance Deposits and New Phased Development Agreement Bylaw Powers for Local Government**		

RECOMMENDATION

That this report be received as information.

INTENT

This report discusses how the *Community Services Statutes Amendment Act*, 2007 ("Bill 11"), phased development agreement bylaw authority ("PDA"), will allow municipalities to include compliance deposits in development agreements for all types of development in addition to setting the terms and conditions for the phasing, timing, amenity contributions and land use. The report also briefly discusses the City's use of a "compliance deposit" for a proposed hotel development on 75A Avenue in Newton.

BACKGROUND

At the Regular Council meeting of February 26, 2007, Council passed the following motion:

> *"That staff prepare a legal opinion on how compliance deposits can be used, and reference as a case study the hotel development by Popular Investments Ltd. on 75A Avenue, east of Scott Road."*

Proposed Hotel Development – 75A Avenue

In 1999, Popular Group Investments Ltd., the developer, voluntarily agreed to provide a letter of credit in the amount of $150,000 in favour of the City as security to ensure that the developer would obtain a building permit within 15 months for the construction of a hotel on property located on the south side of 75A Avenue east of Scott Road (120 Street). The hotel development was a component of a commercial rezoning

application. The hotel component was included by the developer to enhance the chances of approval of the development by the City.

The terms and conditions related to the compliance deposit were attached to the title of the property by way of a restrictive covenant, which was registered prior to Council giving final adoption to the rezoning by-law that permitted the proposed hotel and other commercial development on the subject lot. Since that time the commercial complex has been constructed by the developer without the hotel component and the developer has applied to the City to rezone the portion of the site on which the hotel was to be located to allow for a mixed-use commercial/residential development in place of the hotel. As part of that new application, the developer agreed that the $150,000 security originally submitted to the City for the hotel use would be retained by the City as a condition of the current rezoning.

DISCUSSION

For the purpose of this report a compliance deposit is a security taken by the City (e.g., letter of credit) to motivate an owner of property being rezoned to proceed to construct a proposed development on the property after Council adopts a rezoning by-law that allows the use on the property.

Most municipalities, including Surrey, use security deposits as a means to ensure the performance by a developer of obligations in relation to a development site. Typically, the City requires that the developer post a security deposit of 100% or more of the cost of the work being secured to ensure the completion of certain works associated with the development. For example, cash or a letter of credit are standard requirements to secure engineering servicing agreements and landscaping requirements.

However, the lack of clear cut legislative authority to require that a developer post a compliance deposit to assist in ensuring that the developer proceeds to construct a particular development and land use, has prompted the recent enactment of Bill 11 that amends the *Local Government Act* to provide new legal tools for municipalities to encourage developers to comply with development goals that are agreed upon through a rezoning process.

In the case of the above-noted hotel proposal, the new legislation would allow the City to enter into an agreement with the developer to provide a compliance deposit, register a restrictive covenant and repeal the underlying zoning if the specific land use did not materialize within an agreed upon time frame.

New Phased Development Agreement Bylaw Powers for Local Government

(i) Legislative Background

Bill 11 enacted March 29, 2007, amends the Planning and Land Use Management part of the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "*Local Government Act*") with broad new powers to regulate the phasing and timing of development, including requiring specific features and amenities in the development and other terms and conditions agreed to by the municipality and the developer. Legal Services is advised that the new s. 905 of the *Local Government Act* will be proclaimed in force by regulation late in May 2007.

Several lower mainland municipalities are in the process of negotiating their first PDA with developers.

The impetus for the PDA legislation came from the Urban Development Institute where some developer members had experienced or were concerned about a municipality down zoning the final phases of a multi-phased development after the original phases were constructed.

The legislation provides that in exchange for an agreed to term of zoning security, a developer may be required to provide a wide range of amenities, design and performance standards, services and environmental considerations. Specific land uses may be required in holding zones. Subject to the PDA being drafted appropriately, the failure by the developer to develop an agreed to use within a given time frame can result in a repeal of the zoning and/or forfeiture of a compliance deposit under the terms of a PDA.

(ii) What a PDA may include

The development conditions and regulatory framework in a PDA is very broad in the matters that may be included in the agreement between the developer and the local government. They are:

(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;
(d) the registration of covenants under section 219 of the *Land Title Act*;
(e) subject to section 905.4(3), minor amendments to the agreement, including a definition of "minor amendment" for the purpose of the agreement;
(f) dispute resolution processes between the parties;
(g) early termination of the agreement, either automatically in the event that terms and conditions are not met or by mutual agreement.

The definition of a PDA in s. 905(1)(c) of the *Local Government Act* also allows the inclusion of "additional terms and conditions agreed to by the local government, including but not limited to". These are not defined or limited terms and conditions, but are left to the broad discretion of the local government for inclusion in a PDA. Such terms and conditions could in our opinion include compliance deposits.

To proceed with a PDA, the lands to which the PDA will apply must first be identified. What is described in legislation as a "specified zoning bylaw provision" must be defined. A "specified zoning bylaw provision" is essentially the zoning permission granted by the municipality in exchange for the benefits to a municipality under a PDA, which zoning cannot be changed while the agreement is in effect unless the developer agrees in writing. This gives the developer, subject to certain exceptions, security from down zoning over the term of the PDA. However, the intent of the legislation is to allow the municipality to down zone all or part of the property to which the PDA applies if the terms and

conditions of the PDA are not met by the developer in respect to the property or parts of the property during or at the end of the agreement's term.

A PDA may have a term of up to 10 years or up to 20 years with the approval of the Inspector of Municipalities. There is no minimum term. PDAs may be assigned to the subsequent owners of the land only if the subsequent owner is identified in the original PDA and the local government agrees to the assignment.

(iii) Process for Approval

The process for approval of a PDA includes a public hearing with a hearing notice that includes a general description of the specified zoning provisions, the term of the agreement and a general description of the nature of the development. A PDA must be adopted with a bylaw. The approval process is virtually identical to a normal rezoning application.

(iv) PDA Amendments

Amendments to or repeal of a PDA require the developer's consent. There are three exceptions to having the written consent of the developer to changes by the municipality to the "specified zoning bylaw provisions". Zoning changes that may be made by local government without developer consent include:

(a) changes to enable the local government to comply with an enactment of British Columbia or of Canada;
(b) changes to comply with the order of a court or arbitrator or another direction in respect of which the local government has a legal requirement to obey;
(c) changes that, in the opinion of the local government, are necessary to address a hazardous condition of which the local government was unaware at the time it entered into the phased development agreement.

Amendments to PDAs are allowed by agreement of both parties and if the amendments are minor, they may be approved by a Council resolution. The following are not considered minor amendments and must be the subject of a public hearing process and amending bylaw:

(a) the specified zoning bylaw provisions;
(b) provisions regarding the assignment of the agreement to a subsequent owner;
(c) the term of the agreement, unless the amendment will reduce the length of the term;
(d) renewal or extension of the agreement;
(e) the land that is the subject of the agreement;
(f) the definition of "minor amendment" for the purpose of the agreement.

(v) Development Permits and PDAs

Development permits may not vary the siting, size or dimensions of buildings or the siting, size or uses of land that are included within the "specified zoning bylaw provisions" of the PDA. However, these agreed to development controls do not apply in the case of environmental concerns, hazardous conditions or farm protection. In these three areas, the normal development permit process applies and can override the PDA.

The introduction of the phased development process will allow BC municipalities access to planning instruments long used in Ontario such as contract, conditional, amenity and bonus zoning. Interim control and holding zones may be now introduced to phase development to allow transportation and servicing infrastructure to keep pace with development. Performance standards covering technical, environmental, aesthetics, open space, urban design and development standards can be applied to phased developments on a customized basis.

CONCLUSION

The phased development agreement (PDA) provisions that will be introduced in the *Local Government Act* under Bill 11 will address much more than the timing and phasing of development and will allow municipalities and developers the use of more sophisticated tools in relation to phased developments.

In the case of the hotel use proposed by Popular Group Investments Ltd. on 75A Avenue, the new legislation would have allowed the City through a PDA the choice of using a compliance deposit and other planning instruments to secure developer performance of the development goals for the site.

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