CITY OF SURREY
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CORPORATE REPORT

NO: R187 COUNCIL DATE: SEPTEMBER 23, 2013

REGULAR COUNCIL

TO: **Mayor & Council** DATE: **September 19, 2013**

FROM: **City Solicitor** FILE: **0250-07/#5**

SUBJECT: **Comments on Draft Federal Policy on Additions-to-Reserves**

RECOMMENDATION

The Legal Services Division recommends that Council:

1. Receive this report as information; and

2. Authorize staff to forward a copy of this report and Council's resolution related to this report to Aboriginal Affairs and Northern Development Canada and to the Union of British Columbia Municipalities as the City's comments on the draft federal policy on Additions-to-Reserve/Reserve Creation ("ATR").

INTENT

The purpose of this report is to provide an overview of the draft federal policy on Additions-to-Reserve/Reserve Creation (the "Draft Policy") and to discuss potential ramifications of the Draft Policy to the City of Surrey.

BACKGROUND

The ATR process was developed by the federal government in 1972 to allow First Nations to add land to existing reserves or to create new reserves. The policy was revised in 1991 and then again in 2001. Since 2006, a total of 339,982 hectares have been added to reserves, representing a 10% increase in the First Nations land base in the last seven (7) years.

In 2010, Aboriginal Affairs and Northern Development Canada ("AANDC") invited lower mainland regional and municipal governments to participate in an evaluation of the 2001 ATR policy by providing comments and recommendations from a local government perspective. Subsequent to this consultation, the Standing Senate Committee on Aboriginal Peoples (the "Committee"), after hearing from more than 28 presentations, tabled a report on November 1, 2012 entitled *Additions to Reserve: Expediting the Process*. This report identified a number of key challenges and potential areas for improvement in relation to ATR; the Draft Policy is generally consistent with the Committee's recommendations.

The Draft Policy has been analyzed by Metro Vancouver in relation to local government interests on ATR with comments contained in the following reports that have been prepared by MV staff:

1. "**Comments on LMTAC Discussion Paper: Local Government Issues and Interests on the Federal Additions-to-Reserve Process**"[1] **(February 18, 2011);**
   - This discussion paper is intended to raise awareness of potential implications for local governments. It identifies local governments' issues and interests with ATR based on a series of criteria: communication; process; local government engagement and transparency; intergovernmental coordination; servicing and land use; and financial impacts.

2. "**A Metro Vancouver Position Paper on the Federal Additions-to-Reserve (ATR) Process and the First Nations Commercial and Industrial Development Act (FNCIDA)**"[2] **(March 20, 2012);**
   - The position paper identifies key issues with respect to ATR and FNCIDA, proposes recommendations to senior governments that reflect regional and local interests, and identifies a process for ongoing, constructive dialogue and debate on these matters with senior governments.
   - This position paper was prepared at the direction of the Metro Vancouver Board of Directors in early 2011 and received by the Intergovernmental Committee (July 20, 2011) but deferred until such time as Metro Vancouver and the Province had the opportunity to further discuss regional utility interests, and identify key local government issues for both ATR and FNCIDA.
   - On May 9th, 2011, Surrey Council supported this position paper as a mechanism to initiate further dialogue with the federal government, the provincial government, and First Nations regarding the implementation of the provisions of these two pieces of Federal Legislation in BC.
   - A copy of the May 9th, 2011 Corporate Report CR2011 R071 titled "Lower Mainland Treaty Advisory Committee Discussion Paper on the Federal First Nations Commercial and Industrial Development Act and the Federal First Nations Certainty of Land Title Act" is attached to this report as Appendix "A".

[1] http://www.metrovancouver.org/boards/Mayors Committee/Mayors_Committee-March_16_2011-Agenda.pdf#page=35
[2] http://www.metrovancouver.org/boards/GVRD Board/GVRD_Board-March_30_2012-Agenda.pdf#page=37

3. "**An Analysis of the Report of the Standing Senate Committee on Aboriginal Peoples on the Additions to Reserve Process in Relation to Local Government Interests**"[3] **(April 23, 2013).**
    - The Standing Senate Committee publication identifies a number of deficiencies in the management of the ATR process and challenges in dealing with municipal and third-party interests. Local government interests with respect to the ATR policy have been articulated in Metro Vancouver's position paper on ATR. Local government, however, has not been afforded an opportunity to present its views on ATR directly to the Standing Senate Committee, which has resulted in some gaps in the Senate's publication.

DISCUSSION

Staff has concluded after a review of the Draft Policy that it fails to adequately address a number of local government concerns. Some of these concerns are articulated in the above-referenced reports. Others are discussed in the following sections of this report:

Economic Development on Reserves

Local governments face multiple barriers in terms of providing engineering/utility services to Indian Reserves, including legal, physical and fiscal barriers. Regional and municipal interests need to be recognized in the ATR approval process so that the interests of First Nations and of local governments are properly protected where utility services are provided by local governments to First Nation lands.

Servicing Agreements/Financial Impacts/Land Use Planning

Departing from the 2001 policy, the requirements to negotiate agreements related to joint land use planning/bylaw harmonization, tax considerations, utility service provision and dispute resolution do not appear in the Draft Policy. Instead, the Draft Policy anticipates that First Nations and local governments will negotiate to resolve these issues, but leaves open the possibility that the Regional Director General ("RDG") will either approve or withdraw support for an ATR proposal based on the RDG's assessment of the parties' demonstrated willingness to act in good faith during negotiations. Accordingly, the potential exists for ATRs to be approved even in the absence of an agreement between the parties relating to provision of (and funding for) engineering and other services for/to the ATR land.

Another significant aspect of the Draft Policy is that ATR proposals are not required to be contiguous to a First Nation's existing Reserve lands. As a consequence, a First Nation with traditional territory located anywhere in British Columbia could conceivably purchase property within a lower mainland municipality and submit an ATR application in relation to said property. If such a proposal were approved, that property would then be removed from the municipality's tax roll with no municipal entitlement to compensation for its gross level of lost tax revenues. This would also have serious implications on the land use and infrastructure planning for the affected municipality and could create significant

[3] http://www.metrovancouver.org/boards/Aboriginal Relations Committee/Aboriginal_Relations_Committee-May_1_2013-Agenda.pdf#page=19

complications with respect to management of existing servicing infrastructure on said property and its relationship with servicing beyond said property.

Moreover, the Draft Policy does not guarantee local governments will be able to recover the full costs of all local services, including the costs of regional services from the First Nation for any ATR. There are no recommended funding formulas or any sort of minimum baseline in the Draft Policy that would give local governments' clear guidance as to what a "reasonable" agreement would contain. Local and regional servicing issues, including the collection and remittance of all requisite fees, charges and taxes clearly need to be addressed before the Draft Policy is finalized.

Consultation Timeline

The Draft Policy does not include the 90-day review period that was part of the 2001 policy; instead, the applicant First Nation is required to notify the affected local government in writing of the Reserve Creation Proposal to give the local government an opportunity to assess any potential impacts of the Proposal on their existing land use plans and related delivery of services. Local governments must have sufficient time to consider an ATR proposal including a reasonable opportunity to assess any potential impacts on existing land use plans and related delivery of local government services.

Local Government Approval/Dispute Resolution

Under the Draft Policy, local governments have no general or unilateral veto with respect to an ATR/Reserve Creation. Despite this circumstance, local governments need to be consulted and engaged in the ATR process to ensure that the potential impacts of any ATR proposal on existing land use plans and service delivery are properly addressed before the approval of the ATR.

Accordingly, dispute resolution mechanisms need to be included in the finalized ATR policy to assist First Nations and local governments in resolving disputes that may arise related to ATRs.

CONCLUSION

Based on the above discussion, it is recommended that Council authorize staff to forward a copy of this report and Council's resolution related to this report to Aboriginal Affairs and Northern Development Canada and to the Union of British Columbia Municipalities as the City's comments on the draft federal policy on Additions-to-Reserve/Reserve Creation ("ATR").

CRAIG MacFARLANE
City Solicitor

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Appendix "A": Corporate Report R071; May 9, 2011

APPENDIX "A"

CITY OF SURREY
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CORPORATE REPORT

NO: R071 COUNCIL DATE: May 9, 2011

REGULAR COUNCIL

TO: **Mayor & Council** DATE: **May 4, 2011**

FROM: **General Manager, Engineering** FILE: **0450-20 (LMTAC)**
0440-01 (First Nations)

SUBJECT: **Lower Mainland Treaty Advisory Committee Discussion Paper on the Federal First Nations Commercial and Industrial Development Act and the Federal First Nations Certainty of Land Title Act**

RECOMMENDATIONS

The Engineering Department recommends that Council:

1. Endorse the LMTAC discussion paper dated December 10, 2010 and titled, *"Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)"* as a mechanism to initiate further dialogue with the federal government, the provincial government, and First Nations regarding the implementation of the provisions of these two pieces of Federal Legislation in BC; and

2. Authorize the City Clerk to forward a copy of this report complete with the attachments to each of the Honourable John Duncan, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians; the Members of Parliament for Surrey; the Honourable Mary Polak, Minister of Aboriginal Relations and Reconciliation (MARR); the Members of the Legislative Assembly for Surrey; and Agnes Rosicki, Managing Director, Lower Mainland Treaty Advisory Committee (LMTAC).

INTENT

The purpose of this report is to provide information on the local government issues and interests related to recent federal legislation; namely, the *First Nations Commercial and Industrial Development Act* (FNCIDA) and the *First Nations Certainty of Land Title Act* (FNCLTA), as discussed in the above-referenced Lower Mainland Treaty Advisory Committee (LMTAC) discussion paper and to recommend a course of action for consideration by Council in relation to this matter.

DISCUSSION

FNCIDA came into force on April 1, 2006 and provides the federal government with the authority to make regulations for particular projects on reserve lands that replicate provincial regulations using an approach called incorporation by reference. FNCIDA fills a regulatory gap that stems from the fact that property and real estate regulations and legislation are under provincial

jurisdiction while Indian Reserves are under federal authority. FNCIDA addresses this gap by allowing provincial regulations to be mirrored on reserves.

FNCIDA was limited in its effectiveness until FNCLTA came into force on June 30, 2010. FNCLTA was designed to narrow the differences between the property rights for commercial properties off-reserve and on-reserve. FNCLTA supports the development of commercial real estate on reserves by permitting the registration of project lands in a system that would replicate the provincial land title system.

These two pieces of legislation should be viewed as complementary tools – FNCLTA providing a more certain torrens-based land title system and FNCIDA providing the supporting regulatory framework. In combination, the two Acts increase certainty for investors and purchasers and have the potential to address the regulatory gap on commercial, industrial and residential market developments (multi-unit long-term leases) on reserve lands.

As no FNCIDA/FNCLTA projects have been approved to date in British Columbia (BC), local governments have an opportunity to forward comments and concerns to the federal government and the provincial government to assist in shaping how FNCIDA/FNCLTA will be implemented in the province of BC.

Recent Lower Mainland Treaty Advisory Committee (LMTAC) Discussions

On December 10, 2010, the *Lower Mainland Treaty Advisory Committee* (LMTAC) circulated a copy of the LMTAC draft discussion paper titled, *"Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)"* to each of its 26 local government jurisdictions (including three regional districts). This discussion paper was recently updated and endorsed at the March 23rd, 2011 LMTAC meeting. A copy of the March 23rd 2011 final version of the discussion paper is attached as Appendix I.

The purpose of LMTAC's discussion paper is to ensure that both the provincial and the federal governments understand and consider the complexities and potential impacts that FNCIDA projects could have on local governments and to emphasize the need for the development of a comprehensive implementation strategy that addresses the issues and concerns, which are discussed in the draft discussion paper.

Detailed information regarding the following is attached as Appendix II:

- Indian Reserve lands, FNCIDA and FNCLTA;
- Perspectives of the federal government, the provincial government, First Nations, and local government on FNCIDA and FNCLTA; and
- Issues and Surrey staff comments on FNCIDA and FNCLTA.

CONCLUSION

Based on the above, it is recommended that Council:

- Endorse the LMTAC discussion paper dated December 10, 2010 and titled, *"Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)"* as a mechanism to initiate further dialogue with the federal government, the provincial government, and First Nations regarding the implementation of the provisions of these two pieces of Federal Legislation in BC; and

- Authorize the City Clerk to forward a copy of this report complete with the attachments to each of the Honourable John Duncan, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians; the Members of Parliament for Surrey; the Honourable Mary Polak, Minister of Aboriginal Relations and Reconciliation (MARR); the Members of the Legislative Assembly for Surrey; and Agnes Rosicki, Managing Director, Lower Mainland Treaty Advisory Committee (LMTAC).

Vincent Lalonde, P.Eng.
General Manager, Engineering

VL/RAC/brb

Appendix I: Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)

Appendix II: Detailed Background Information

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APPENDIX I

March 23, 2011

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LMTAC Discussion Paper: Local Government Issues and Interests on the *First Nations Commercial and Industrial Development Act* and the *First Nations Certainty of Land Title Act*

Executive Summary

The *Lower Mainland Treaty Advisory Committee* (LMTAC) has been monitoring the development of the *First Nations Commercial and Industrial Development Act* (FNCIDA) and the *First Nations Certainty of Land Title Act* (FNCLTA) since the latter received Royal Assent in the summer of 2010.

The purpose of the two acts is to reduce the regulatory gap on commercial, industrial and residential market developments on Indian Reserve lands. As there has yet to be a project completed in British Columbia using FNCIDA and FNCLTA, there is a large amount of uncertainty regarding how the Province will implement projects and what the effect will be on local government.

LMTAC supports the potential for FNCIDA and FNCLTA to encourage socio-economic development on Indian Reserves and recognizes the potential for market development on Indian Reserves to be mutually beneficial for First Nations and neighbouring local governments.

The purpose of this paper is to ensure that both the provincial and federal governments understand and consider the complex nature of the impacts that FNCIDA projects will have on local government, and emphasise the need for developing a comprehensive implementation strategy that addresses the issues and concerns identified herein, and supports the BC treaty process

The paper discusses the following issues:

LMTAC Criteria	Local Government Issues	Local Government Interests
1. Implementation and Administration of FNCIDA Agreements	• Province needs to clarify how it will implement and administer FNCIDA projects in terms of property assessment system, application of construction and standards, taxation	• Early involvement of local governments needed, including consultation
2. The Implementation of an Assessment System Equivalent to BC Assessment (BCA)	• A comprehensive and accurate property assessment roll system is needed	• BCA or equivalent system needed • Property values on reserve lands must be calculated in a manner comparable to those located off-reserve
3. The Effect of Growing Non-Aboriginal Populations on Reserves	• "taxation without representation"	• Transparency, fair representation and property tax treatment
4. Impact on Existing Service Agreements between Local Governments and First Nations	• Local governments' role in FNCIDA is unclear	• Meaningful consultation with local government is is needed, particularly with respect to DCCs, service agreements, bylaws, taxation, etc.
5. An Increase in Additions-to-Reserve (ATR) Applications	• Gap exists in land use monitoring (i.e. lands designated ATR becoming FNCIDA-designated projects)	• Federal legal mechanisms needed to clarify the use of ATR lands
6. Cross-Boundary Impact of Large-Scale Development	• Servicing in relation to FNCIDA projects • Municipal and regional plans	• Senior government consultation with local governments needed on issues related to compensation, consistency with municipal and regional plans, etc.)
7. Impact on the BC Treaty Process	• Status of FNCIDA projects unclear if there is a treaty • FNCIDA may discourage treaty negotiations	• Comprehensive implementation strategy needed to support treaties and overcome issues

Introduction

The *First Nations Commercial and Industrial Development Act* (FNCIDA) process of *Indian and Northern Affairs Canada* (INAC) and its implications for municipalities and regional districts[1] have gained increased profile with Lower Mainland[2] local governments. Reasons for heightened local government interest in FNCIDA include:

- Bill C-24: the *First Nations Certainty of Land Title Act* (FNCLTA), that provides amendments to FNCIDA, received Royal Assent on June 30th, 2010;
- The *Squamish Nation*, a key proponent of Bill C-24 and one of the five First Nations in Canada promoting the original FNCIDA initiative, has publicized its intention to construct large-scale commercial and condominium developments on its Indian Reserves located in Vancouver and in West Vancouver/North Vancouver, where more than 25,000 additional residents could reside over the next 20 years. Some of these projects are to be developed under FNCIDA and FNCLTA; and
- Potential linkages between the *Additions-to-Reserve* (ATR) process and FNCIDA exist. A number of local government concerns have been recently identified around the ATR process in LMTAC's discussion paper *"Local Government Issues and Interests on the Federal Additions-to-Reserve Process,"* some of which brought-up the need for further discussion on FNCIDA and its impacts on local governments.

Background on Federal FNCIDA and FNCLTA Legislation

FNCIDA is a federal legislative initiative that went into force in 2006. It was developed as a cooperative effort between the *Government of Canada* and five First Nations, including the *Squamish Nation*. Its purpose is to increase the competitiveness of commercial and industrial development on Indian Reserves[3] by allowing for the replication of relevant provincial regulations, on a project-by-project basis. FNCIDA provides a way to tap into the appropriate parts of a well-developed provincial system for large-scale and/or complex projects.

Potential residential developments have always been at the forefront of FNCIDA as the original five partnering First Nations were each looking at specific projects that they could develop. The *Squamish Nation* is the only one of them that has proposed commercial market housing development through FNCIDA. The restriction of FNCIDA to "commercial and industrial undertakings" is very flexible as the Governor in Council can enlarge the meaning or approve projects that are not necessarily commercial in nature.

FNCLTA

Effectiveness of FNCIDA has been limited by its inability to allow for the duplication of provincial land title registration systems. Land interests on Indian Reserves are registered under the federal *Indian Lands Registry System* (ILRS), which contains two registration systems: the

[1] Regional districts were created in British Columbia by legislation from 1965. Regional districts provide a means to deliver services to areas outside of municipalities and a way for combinations of municipalities and electoral areas to jointly fund services which are of benefit to the region. It is important to note that regional districts are each unique, and issues that apply to one may not necessarily apply to another in the exact same manner.

[2] The Lower Mainland refers to the area in British Columbia surround Vancouver.

[3] An Indian Reserve can be described as the area of land that is held in trust by the Federal Crown for the use and benefit of an Indian Band (First Nation). As Federal land held under section 91(24) of the *Constitution Act, 1867,* local government bylaws and provincial land use legislation are of no effect on Indian Reserves.

Reserve Land Register (RLR) and the *Surrendered and Designated Lands Register* (SDLR). Both the RLR and SDLR are deeds-based systems that do not guarantee legal protection to the same level as the provincial Torrens-based system.[4] Under deeds-based system, it is difficult to obtain information in an efficient manner and there is a lack of certainty around the validity of registered documents. The FNCLTA was proposed to address this shortcoming by allowing participating First Nations to request the establishment of a regulatory system equivalent to the provincial land title system, including an assurance fund. The stronger certainty provided by a system equivalent to the provincial land title registration system will further contribute to increasing the attractiveness of reserves for large-scale development.

The FNCIDA Process

FNCIDA projects can be initiated by any First Nation, on a voluntary basis. The applicant First Nation submits a proposal which will be reviewed for eligibility by the federal government. In demonstrating eligibility, the land to be used must be confirmed as Indian Reserve land or currently proposed as Indian Reserve land through the *Additions-to-Reserve* (ATR) policy.

The applicant First Nation must demonstrate that the lack of existing regulations is an impediment for proceeding with the development project, and that no other regulatory regime can be used to effectively implement it. The Province must be supportive of the project and agree to administer, monitor, and enforce the regulations developed. The First Nation is responsible for covering all the costs involved in drafting the proposed legislation.

A detailed list of the steps involved in the FNCIDA process, taken from the INAC website, is presented below:[5]

1. Project Identification and Proposal
    a. The First Nation develops a formal written proposal describing the project and requested regulations;
    b. The First Nation, the INAC Regional Office, and key stakeholders hold exploratory discussions to determine project eligibility; and
    c. The First Nation passes a Band Council Resolution requesting the development of regulations under FNCIDA.
2. Project Review and Selection
    a. The First Nation works with INAC to perform a legal risk assessment and cost-benefit analysis;
    b. INAC undertakes a detailed evaluation of the proposed project to determine its feasibility and eligibility. In order for a project to qualify under FNCIDA, a positive answer must be given to the following five questions:
        i. Do the lands involved in the project meet all the requirements (legal, policy, etc.) so that INAC is able to issue land tenure?
        ii. Is there currently a lack of regulations to deal with environmental or health and safety issues, regardless of the degree of possible impact?
        iii. If there is a lack of existing regulations, and, if so, is it preventing economic development and is there no other regulatory regime that could be used to implement the project?

[4] Registration under a Torrens System provides indefeasible title.
[5] *Indian and Northern Affairs Canada*, "FNCIDA Process, Roles and Responsibilities," http://www.ainc-inac.gc.ca/ecd/cid/prr-eng.asp

iv. Have all other alternatives for regulating the project, including the *Indian Act*, been considered and ruled out, and is use of FNCIDA the only possible approach?
v. Is the province supportive in-principle of the project, and will the province be willing to play a role in the administration and enforcement of the regulations that would be developed under FNCIDA?

3. Negotiation and Drafting Stage
    a. The following project work plans are developed:
        i. Resources required for project implementation;
        ii. List of key milestones;
        iii. Stakeholder engagement plans;
        iv. Risk management strategies; and
        v. Timelines.
    b. Close consultation between the *Government of Canada*, the First Nation, and the Province occurs in order to develop the following three documents:
        i. The Regulations;
        ii. The Tripartite Agreement; and
        iii. The Land Tenure Instruments.
4. Administration, Monitoring, and Enforcement
    a. Construction and operation of the project begins;
    b. The Province administers, monitors, and enforces the regulations as agreed to in the *Tripartite Agreement*; and
    c. Administration, monitoring, and enforcement are ongoing until the conclusion of the project.

FNCIDA Implementation – Provincial Regulations

FNCIDA is unusual in that although it is federal legislation, once a tripartite (federal, provincial, First Nation) agreement is signed, it is implemented and administered by the provincial government. Within FNCIDA, the suggested hierarchy of legislative order follows – federal laws (e.g., the Criminal Code of Canada) remain paramount, then the FNCIDA regulations, and finally the laws and by-laws of the First Nation.

To date, only one set of regulations have been developed under FNCIDA – those passed for the Fort McKay First Nation utilize nine provincial acts of legislation (in whole or in part) from the Government of Alberta. Part of the reason these regulations were successfully passed was the Fort McKay project had tremendous support from the Government of Alberta, including inter-ministry coordination.

Drawbacks of FNCIDA

The FNCIDA process is expected to be resource intensive and very time-consuming. As a result, it is anticipated the pool of potential projects will be significantly narrowed to projects which offer significant financial return for those First Nations with adequate institutional capacity to manage, finance and complete the process. However, there is no requirement relating to the size of eligible projects and it is ultimately up to the proponent First Nation to decide which projects it deems worthy of the costs involved.

Benefits for First Nations

Each of the five proponent First Nations were examining large-scale commercial, industrial and market residential projects. While other projects have been completed on Indian Reserves under the environment of the Indian Act, the First Nations found that investors were reluctant to fund large-scale projects due to the uncertainty of the regulatory gap found on Indian Reserves. The regulatory gap exists due to the fact that Indian Reserves are under federal jurisdiction while regulations regarding real estate and property are under provincial jurisdiction. The First Nations also found that there was significant difference in market reaction to projects on Indian Reserves, due to the perception of risks associated with on-reserve projects. FNCIDA was proposed as a means to address these issues by mirroring provincial regulations on Indian Reserves in an effort to make Indian Reserves more attractive to large-scale projects.

Role of Local Government

There is no defined role for local government participation within the process. Stakeholder consultation is required while the regulations are drafted, but local governments are not explicitly referenced. It is understood that the Province will require First Nations to negotiate service agreements with neighbouring local governments to service any FNCIDA project. At this time, negotiation of service agreements appears to be the only mechanism for local government involvement in the FNCIDA process.

Identification of Local Government Issues and Concerns

FNCIDA legislation and FNCLTA amendments appear to be excellent tools for First Nations to attract residential, commercial and industrial development to their communities in support of socio-economic development. The goals of FNCIDA and FNCLTA deserve to be supported.

However, as with any new program or legislation, it is a prudent practice to analyze FNCIDA and FNCLTA to identify any potential issues that might arise during the implementation process. Based on a review of the FNCIDA and FNCLTA legislation, and feedback received from several Lower Mainland local government jurisdictions, including those that might be directly affected by potential FNCIDA projects, the following issues and concerns have been identified:

<u>**Concern #1:** Implementation and Administration of FNCIDA Agreements</u>

- FINCIDA is federal legislation but, as part of the tripartite agreement signed in Stage 4 of the FNCIDA process, it is implemented and administered by the participating provincial government. The Province determines how it will approach the implementation and administration of any FNCIDA agreement. As no FNCIDA agreements have been completed thus far, it is uncertain how the Province will implement future FNCIDA projects undertaken in British Columbia.
- As regulations for FNCIDA projects need to be developed on a project-by-project basis, the FNCIDA process is one that will be time consuming and expensive. As such, it is important that the Province clarify how it will implement and administer FNCIDA projects in BC. Specifically, clarity is needed regarding the following issues:

- Which provincial body will be responsible for FNCIDA agreements? Will the Province designate a specific body for all future agreements, or will it vary on a project-to-project basis?
- How will the Province ensure that new residential, commercial, and industrial development on reserve lands is planned in consultation and coordination with neighbouring municipalities and regional districts?
- How will the Province ensure application of construction (BC Building Code), workplace (WorkSafeBC), and environmental standards for FNCIDA projects?
- How will the Province ensure implementation of a property assessment system equivalent to *BC Assessment* (BCA) for FNCIDA projects? and
- How will the Province ensure that developments on reserve lands, particularly non-aboriginal market housing, pay appropriate taxes including hospital (TransLink), school, and regional district taxes.

Concern #2: The Implementation of an Assessment System Equivalent to the BCA

- An accurate property assessment roll system is a necessary prerequisite for FNCIDA projects as it will be used to determine costs of services when negotiating future service agreements/contracts with the applicant First Nation (FN), as well as appropriate taxation levels on any new industrial, commercial or residential development.

- Under provincial legislation — the *Indian Self Government Enabling Act* (RSBC 1996) — all First Nations in BC have opted to implement independent taxation systems. Independent taxation authority has removed provincial taxes from reserves, allowing First Nations to implement their own taxation and property assessment bylaws. First Nations taxation bylaw systems are developed under one of two federal legislation options and are subject to approval by the federal government or the *First Nations Tax Commission* (FNTC), depending on which legislation is used. For property assessment services, First Nations have three options: contract with *BC Assessment* (BCA), hire a tax agent to prepare the assessment roll, or prepare the assessment roll on their own. Most First Nations (61%), including the *Squamish Nation*[6], have opted to contract with BCA for maintaining their property assessment rolls.

- Assessments of properties on Indian Reserves are governed by the Indian Band's Assessment and Taxation By-Laws. The language in these laws generally has a lot of similarities to the *BC Assessment Act*. The BCA has indicated that it completes assessments on Indian Reserves in a manner that results in values similar to comparable off-reserve properties. Notwithstanding, the experience of several Lower Mainland local governments is that the accuracy of First Nation assessment rolls have been an issue when negotiating servicing agreements with First Nations. If assessments completed on reserves are not accurate, it is difficult for local governments to ensure that they are being fully compensated in service agreements.

- **How will FNCIDA projects utilize either the BCA system or an equivalent system for property assessment rolls?** The purpose of FNCLTA amendments is to allow FNCIDA projects to be registered under regulations equivalent to the rest of the province.

[6] Other Lower Mainland First Nations that utilized BCA services in 2009 include: Tsawwassen, Musqueam, Tsleil-Waututh, Sechelt, and Matsqui (BCA 2009 Annual Report)

However, there are no measures contained within FNCLTA to ensure that an equivalent property assessment roll process is used. A comprehensive and accurate property assessment roll, equivalent to that of the BCA, is necessary to ensure that the appropriate amount of taxes are levied on FNCIDA projects. The Province must ensure that an acceptable property assessment system will be implemented for FNCIDA projects.

Concern #3: The Effect of Growing Non-Aboriginal Populations on Reserves

- FNCIDA and FNCLTA legislation will increase new industrial, commercial and residential development on reserve lands. Many of the new developments, such as residential market housing, will be occupied by non-aboriginals. In the Lower Mainland and Sunshine Coast, for instance, non-aboriginals accounted for an estimated 46% of reserve populations, or approximately 3,800 out of an estimated 8,200 total reserve population, in 2006.[7] Squamish and Tsleil-Waututh reserve land is home to the largest non-aboriginal populations, each with nearly 1,200 non-member residents amounting to over 80% of the reserve population in the case of Tsleil-Waututh and over 30% in the case of Squamish.

- As the non-aboriginal population living on reserves is likely to grow as a result of FNCIDA projects, it is necessary to reiterate local government concerns regarding the representation and taxation of non-members residing in First Nations jurisdictions. Local government concerns are as follows:
    - Populations living on reserve lands do not pay school, hospital (TransLink), and regional district taxes. Non-aboriginal populations living on reserve lands do access services provided by neighbouring municipalities and regional districts. As a consequence, non-aboriginal residential populations living on reserve lands are being "subsidized" by their neighbouring municipal tax payers.
    - Current practice in Metro Vancouver is that Indian Bands levy property taxes on non-aboriginal residents living on-Reserve equal to the taxes levied by the neighbouring municipality, but the Indian Bands do not remit these taxes to Metro Vancouver, TransLink, or the school district (Province). As a consequence, the property tax payers of Metro Vancouver are effectively subsidizing the non-aboriginal on-Reserve populations in that they must 'cover-off' the taxes not remitted by the Indian Bands. (Band-members living on-Reserve do not pay property taxes to the Indian Bands.)
    - Non-member residents living on reserve land do not have the right to vote in elections for First Nation governments, but will be subjected to the laws and taxes established by those First Nation governments.[8] In other words, there is no accountability to non-member residents living on reserve who pay taxes.
    - There needs to be full fiscal transparency regarding taxes, fees and charges assessed to residents living on reserve land to prevent "hidden" charges being levied as taxes. Furthermore, residents have a right to understand how their tax dollars are being used.

[7] Population was estimated using 2006 Community Profiles Census Data and INAC 2006 First Nations Profiles
[8] Kesselman, Jonathan R. "Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy," *Canadian Tax Journal* (2000): Vol. 58, No. 5.

- Most First Nations do not tax their aboriginal members while at the same time imposing property taxes on non-aboriginal residents on reserve. This creates a situation of "representation without taxation" for aboriginal members living on reserve while simultaneously subjecting the non-aboriginals residents on reserve to "taxation without representation". This concern has been addressed more in-depth in a discussion paper prepared by LMTAC in 2003.[9]
- Local governments are concerned that aboriginal and non-aboriginal residents living on First Nation reserve land are permitted to participate in local government elections of their neighbouring municipality or regional district; in other words, "representation without taxation".
- With regard to those living on reserve, the *BC Voters' Guide*[10] states the following:
  "If the reserve is within a municipality and you are otherwise eligible to vote, you can vote in the municipal election. If the reserve is not within a municipality but within a regional district and you are otherwise eligible to vote, you can vote for the electoral area director in the election held by the regional district. ***This applies to non-aboriginal leaseholders as well.***"

Concern #4: Impact on Existing Service Agreements between Local Governments and First Nations

- Increased residential, commercial and industrial development on reserves may result in the applicant First Nation desiring changes to existing service agreements with local governments. In 2008, for instance, the *Squamish Nation* expressed an interest to enter into more comprehensive service agreements. Meanwhile, the Province declared it would undertake a consultation process with those municipalities affected by the *Squamish Nation's* desire for a change in service agreements, as well as with *Metro Vancouver* and *TransLink*.

- The *Squamish Nation* envisions replicating municipal bylaws, as part of its service agreements, using municipal officials to enforce the bylaws on a fee-for-service basis.[11] The Province, unaware of existing agreements containing similar provisions, has been unable to identify potential implications for the participating municipalities. The Province again declared that it would consult with the affected municipalities to identify any potential issues regarding the matter.

- As regulations are developed for FNCIDA projects on an individual basis, various issues, such as the *Squamish Nation's* desire to replicate municipal bylaws, will arise for different projects. The Province needs to develop an approach to deal with such issues in an efficient manner, one that incorporates the input of affected parties, including local governments, in the case of the *Squamish Nation* proposal.

- FNCIDA does not contemplate a role for local government as regulator. However, certain utility services (e.g. sewerage) require approval from local government authorities such

[9] LMTAC, "*Democracy and First Nation Self-Government: Considering Rights of Representation for Non-member Residents in First Nations Jurisdictions*," March 2003.
[10] "BC Voters' Guide," http://www.municipalelections.com/faq_elections.html#fnv
[11] The District of West Vancouver currently processes building permits for the Squamish Nation for developments on Squamish Nation lands, but the District does not use West Vancouver's building permit process/system — the District only processes the paperwork.

as the *Greater Vancouver Sewerage and Drainage District*[12] (GVS&DD) board.[13] As FNCIDA projects will take place on federal lands,[14] there is an issue regarding how local government will regulate sewerage from federal lands through the municipal system that ends up in the GVS&DD system. Currently, there is no way to regulate such sewerage. Furthermore, corresponding bylaws for servicing also apply regarding air quality and liquid waste control under the provincially-mandated *Liquid Waste Management Plan* and *Air Quality Management Plan,* both of which are predicated on municipal *Official Community Plans* and the *Regional Growth Strategy*, and both of which preclude servicing of developments not contemplated within the plans.

- Regional districts, such as *Metro Vancouver,* undertake permitting, regulation and enforcement for air quality and liquid waste source control,[15] while regional district staff works with the developer/operator on the site, not the landowner. This practice should not be any different for potential FNCIDA projects. It is unclear how relevant municipal and regional district authorities will be able to undertake permitting, regulation, and enforcement related to FNCIDA projects.

- While service agreements provide a "fee-for-service" setup, there are other, significant costs that need to be addressed within agreements. For example, as more services are provided, the infrastructure delivering the service will undergo more strain and be more likely to require maintenance and updates. These are sunk costs that are not covered under "fee-for-service" setups. As a consequence, full cost recovery for services including provision for future infrastructure repair and replacement, now required by the *Public Sector Accounting Board* (PSAB), must be a fundamental principle of servicing agreement negotiations.

Concern #5: An Increase in Additions-to-Reserve (ATR) Applications

- ATR applications are designed to allow First Nations to add land to their reserves mainly to accommodate community growth as well as meet social and commercial needs. While land acquired under the ATR process is not intended to be used for market development, there are no mechanisms in place to monitor the use of ATR lands once the application has been approved.[16] Therefore, it is possible that land acquired under ATR could be used for commercial and industrial development under FNCIDA, including residential market housing, contrary to the original purpose of the ATR policy.

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[12] The GVS&DD Act authorizes the GVS&DD to "by by-law, impose development cost charges on every person who obtains from a member municipality (a) approval of a subdivision, or (b) a building permit authorizing the construction, alteration, or extension of a building or structure" (GVS&DD Act).

[13] *Metro Vancouver* is used as an example. It is important to note that different regional districts will have different experiences. In some cases, municipalities provide sewerage services.

[14] As a matter of Constitutional law, certain lands and undertakings — such as "Indians and Lands reserved for Indians," as well as airports, ports, federal government buildings, and other federal lands — are within the federal government's jurisdiction. For the most part, municipalities do not, and are legally barred from, regulating land use and building construction on such lands.

[15] *Metro Vancouver* treats operators on federal properties the same way as it would any other operator on non-federal lands regarding both air quality and liquid waste. For example, *Metro Vancouver* has air quality permits for non-port activities that take place on federal port lands, particularly if such operations involve diesel fuel.

[16] LMTAC, "Local Government Issues and Concerns on the Federal *Additions-to-Reserve* Process," 2010.

- On the INAC website, under the "Process, Roles and Responsibilities" section of the FNCIDA Process, the following appears under the information required in the project proposal to be submitted in Step 1 – Project Identification and Proposal: ***"Confirmation that the land is reserve land, or that it is proposed as an addition to reserve (ATR) with an indication of the current stage of the approval process."***

- The existing link between land acquired under ATR and land available for FNCIDA projects contradicts the intrinsic purpose of the ATR policy to address land constraint issues such as expansion for band member housing. INAC must clarify this inconsistency as the ability to use ATR land for market development activities may lead to an increase in ATR applications driven by a desire to further capitalize on market development opportunities. Furthermore, a misuse of land acquired under the ATR process may lead to problems in the future when actual land constraints are being experienced, and there is far less crown land available to be added to reserves.

Concern #6: Cross Boundary Impact of Large-Scale Development

- As First Nations begin using FNCIDA to develop large, market housing projects, significant increases of non-aboriginal populations living on Indian Reserves will ensue. If not managed properly, the increased demand for "hard" and "soft" services could have substantial negative impacts on both cost-recovery and service capacity of neighbouring municipalities and regional districts.

- Large-scale developments lead to an increased demand for services such as water, sewer, drainage, solid waste, policing, fire protection, library, recreation, parks, roads and transit. Municipalities and regional districts impose *Development Cost Charges* (DCCs) on developers as one-time fees to offset the costs related to providing these services,[17] and DCCs are imposed by municipalities and regional districts on every new residential, commercial, industrial, and institutional development.

- It needs to be clarified how, and by whom, such DCCs (or some reasonable facsimile thereof), including the provincially-mandated *TransLink* benefiting area cost charges, will be collected from FNCIDA projects in order to avoid FNCIDA projects being "subsidized" by neighbouring municipal taxpayers.[18] This issue has heightened importance given the large and very costly sewer, water and transit infrastructure projects anticipated within *Metro Vancouver* over the next two decades.

- In addition to DCCs, local governments collect *School Site Acquisition Charges* (SSACs) from developments, which are remitted to School Districts in order to help fund the purchase of new school sites. These charges are applied to residential developments and vary by density. In the case of light density developments, the charges can be as high as $1000 per unit. These charges are significant funding sources towards school developments.

[17] BC Ministry of Community and Rural Development, Local Government Department

[18] There is no way for the *District of West Vancouver* to collect DCC's because West Vancouver has no authority for the lands upon which the development takes place.

- Local governments do not have an unlimited capacity to provide services. *Official Community Plans*, *Regional Growth Strategies* and strategic transportation plans are used to plan and manage future growth as well as to ensure that land use and development are coordinated in an appropriate manner that follow best practices and maximize the value and utility of the specific land being developed and the surrounding region as a whole.

- While Indian Reserves may be legally separate from neighbouring municipalities and regional districts, the geographical connection cannot be ignored, particularly when it comes to residential, commercial and industrial market development. Therefore, FNCIDA projects need to take into account community and regional growth and servicing plans, to the benefit of both neighbouring jurisdictions and the Indian Reserves. Measures must be put in place to ensure that FNCIDA projects are implemented in a manner that is consistent with municipal *Official Community Plans* and *Regional Growth Strategies* of the neighbouring jurisdictions.

Concern #7: Impact on the BC Treaty Process

- Considering the potential benefits of FNCIDA legislation, First Nations may find that they lack incentive to pursue treaty negotiations. In other words, FNCIDA may actively discourage some First Nations from pursuing a treaty. As treaty negotiations require a substantial financial commitment on the part of participating First Nations, some may view the economic gains from residential, commercial and industrial development on reserve to outweigh the benefits of completing a treaty, especially when the costs of treaty negotiations are considered.

- The potential abandonment of treaty negotiations by First Nations is a concern for many reasons. Finalized treaties provide certainty regarding asserted rights and title, land claims and other aboriginal interests. This certainty resolves numerous issues regarding the interaction between First Nations and various government bodies. The requirement to consult with First Nations, tribal councils, and territory groups/associations regarding activities taking place within their traditional territories is just one example of the uncertainties arising in the absence of treaties.

- It is unclear what the implications will be of concluding a treaty after a FNCIDA project is completed. The FNCIDA legislation is clear that the project must be on reserve land to be eligible for implementing the regulatory systems provided by both FNCIDA and FNCLTA. There needs to be clarity as to what will happen to those regulatory systems if a treaty is concluded and the land used by FNCIDA projects become *treaty settlement land* rather than reserve land.

Local Government Issues and Interests

LMTAC recommends that the local government issues and concerns outlined above be addressed in the FNCIDA process through consideration of the following interests:

Concern #1: Implementation and Administration of FNCIDA Agreements

- All levels of government need to take a consistent approach toward the implementation of FNCIDA and FNCLTA legislation in British Columbia. Even though the *Squamish Nation* is currently the only First Nation moving towards a FNCIDA agreement in this

province, other First Nations may follow suit in the near future. Early involvement of local governments in the FNCIDA implementation process provides an excellent opportunity to shape how future FNCIDA agreements may be implemented and administered.

- As such, it is imperative that the Province undertake extensive consultation with local governments throughout the implementation process, so that issues that are likely to resurface during future FINCDA projects can be identified and mitigated as early as possible. At this time, the negotiation of service agreements appears to be the only mechanism for local government involvement in the FNCIDA process.

Concern #2: The Implementation of an Assessment System Equivalent to the BCA

- An accurate property assessment roll system is a necessary prerequisite for FNCIDA projects as it will be used to determine the cost of services when negotiating future service agreements/contracts with the First Nation applicant, as well as appropriate taxation levels on any new industrial, commercial or residential development.

- The Province must ensure that FNCIDA projects utilize either the BCA system or an equivalent system for preparing property assessment rolls, and that the First Nation's assessment roll is maintained and up-dated on an on-going basis.

- **Assessment of property values on-reserve lands must be calculated in a manner comparable to those located off-reserve.** The value of the actual land should not be excluded from the assessment roll due to its federal ownership. Calculating only the value of the physical property results in an underestimation of the actual property value leading to discrepancies of value between comparable on-reserve and off-reserve properties.

- BCA has indicated that such a "full-value" assessment is performed of properties on Indian Reserves and values are assessed at rates comparable to similar properties off-reserve. However, in the experience of local governments, inconsistencies appear to remain. If assessments on Indian Reserves are significantly discounted, there will not be an equitable system that allows local governments to recover the appropriate amount of costs for services.

Concern #3: The Affect of an Increasing Non-Aboriginal Population on Reserves

- The non-aboriginal population living on reserve lands must pay school, hospital (TransLink), and regional district taxes to ensure equity and fairness with their neighbours and avoid being "subsidized" by their neighbouring municipal tax payers. It should be a priority of all levels of government to ensure that the inherent rights of all Canadian citizens are protected. The full value of these taxes must be remitted to the relevant authorities.

- As a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant should consent to any FNCIDA development paying school, TransLink, hospital, and regional district taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.

- In the case of market housing developments pursued under FNCIDA, the Federal/Provincial/ First Nation tripartite agreement should require the First Nation to enter into a Local Education Agreement[19] (LEA) with the School District to remit the school taxes of all non-members living on the reserve lands and to collect and remit *School Site Acquisition Charges* to the School District. Accordingly, the Provincial FNCIDA implementation (enabling) legislation should include the *School Act*, the *Education Statutes Act*, and the *School Site Acquisition Regulation* of the *Local Government Act*.

- Regarding non-member representation on reserves, the position of Lower Mainland local governments is expressed in LMTAC First Principle #27, as follows:

  27. Treaties must uphold the principle of "no taxation without representation" for all persons residing on treaty settlement lands. Mechanisms need to be developed to ensure that all persons who are living on treaty settlement lands and who are paying taxes or levies to the First Nation have access and a voice in First Nation governance systems.

  LMTAC's discussion paper titled "*Democracy and First Nation Self-Government: Considering Rights of Representation for Non-Member Residents in First Nations Jurisdictions*", completed in 2003, provides further background information on the issues of representation and taxation regarding non-members living on reserve lands.

- While the above First Principle was created to address scenarios in the *BC Treaty Process*, the same underlying interest applies in the FNCIDA context, where an increase in the non-aboriginal population living on reserve land and potential *treaty settlement land* is expected.

- Both the provincial and federal governments must ensure that First Nations provide fair and equitable representation and property tax treatment of both aboriginal and non-aboriginal residents living on reserves to avoid situations of "taxation without representation" for non-aboriginals while maintaining "representation without taxation" for aboriginals.

- As a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant for FNCIDA development should agree to implement a system for non-member representation on all matters related to services and taxation to ensure some degree of fiscal accountability.

- As a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant for FNCIDA development should agree to implement a system for ensuring fiscal transparency regarding taxes, fees and charges assessed to non-aboriginal residents living on reserve land.

- As a prerequisite to provincial support for implementing FNCIDA projects, the Province needs to replicate relevant provincial legislation such as the *Freedom of Information and Protection of Privacy Act* to ensure transparency and accountability for FNCIDA developments. The federal government also must enact appropriate legislation to ensure transparency and accountability on Indian Reserves.

[19] Local Education Agreements (LEA) are often used between Indian Bands and School Districts to provide compensation for status Aboriginals attending off-reserve provincial schools, as they do not pay school taxes (the money remitted is provided by the federal government). Similar, such agreements could be used in order to remit the school taxes portion of property taxes collected by Indian Bands from non-members living on reserve lands.

- If the contemplated FNCIDA development proposal is a residential condominium project or multi-unit commercial development, then the Province needs to replicate relevant provincial legislation such as the *Strata Property Act*. While the *Strata Property Act* usually allows purchasers to hold fee simple title to their holdings, along with a proportional fee simple holding in the common building,[20] non-aboriginals cannot hold such title on reserve lands.

- However, the *Strata Property Act* allows for leasehold title in cases where the freehold owner is a public authority.[21] As FNCIDA projects will remain part of reserves, the federal government should be able to act as the freehold owner of FNCIDA projects, allowing for leasehold interest to be applied to FNCIDA developments. The FNCLTA amendments should allow for the required land title registration and assurance funds needed to implement the *Strata Property Act*.

- If the FNCIDA development proposal is a multi-unit residential rental project, as contemplated by the *Squamish Nation* for their reserve lands in the *City of Vancouver*, then the Province needs to replicate relevant provincial legislation such as the *Residential Tenancy Act* to ensure that the rights (and obligations) of renters are protected in a manner equivalent to renters not living on reserve lands.

- The Province must ensure that both aboriginal and non-aboriginal residents living on reserve not be allowed to participate in neighbouring local government elections unless those residents living on reserve pay full municipal, regional district, school, and hospital (TransLink), taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.

Concern #4: Impact on Service Agreements between Local Governments and First Nations

- Local governments must be consulted during the FNCIDA proposal process regarding the potential impact on existing service agreements and/or the requirement for new service agreements. This consultation should take place at the earliest possible opportunity in order to identify any technical or policy issues resulting from proposed FNCIDA projects. Issues regarding service agreements are particularly important due to the fact that multiple service agreements are currently being negotiated in the Lower Mainland.

- The Province must determine the potential legal implications for municipalities regarding enforcement of bylaws and regulations on reserve lands as part service agreements with First Nations. Similarly, the Province must determine the legal implications for regional districts regarding permitting, regulation and enforcement of regional district regulations on Indian Reserves; for example, sewer district regulations, water district regulations, and air quality regulations. Operations on federal lands (in this case reserves) should be treated the same as they would be off-federal lands.

- The Province stated that it intended to consult with local governments and relevant agencies regarding issues surrounding preliminary discussions on *Squamish Nation* development proposals. This inclusion of local governments in the FNCIDA process also must be

[20] Mangan, Mike "The Condominium Manual: A Comprehensive Guide to the Strata Property Act," 2nd Ed. (Vancouver: British Columbia Real Estate Association, 2004).
[21] *Strata Property Act*, S.B.C., 1998.

continued as part of the process after the *Squamish Nation* submits an official FNCIDA proposal; as well as being part of any future FNCIDA projects.

- Considering the capacity and legislative constraints for the provision of water and sewer services, future servicing of Indian Reserve lands may necessitate tripartite agreements involving the First Nation, municipality, and the regional district. In the case of *Metro Vancouver*, for example, the new RGS and *Liquid Waste Management Plan* may require the regional district to be a direct signatory to service agreements and may necessitate amendments to the respective *Greater Vancouver Sewerage and Drainage District* (GVS&DD) Act and *Greater Vancouver Water District* (GVWD) Act.

- Lower Mainland local governments support an all-in approach, or 100% cost-recovery model of service provision to First Nations that include *Development Cost Charges* (DCCs) and sinking funds for future infrastructure repair and replacement, as now required by the *Public Sector Accounting Board* (PSAB). Lower Mainland local governments welcome an opportunity to renegotiate service agreements to this level with participating First Nations.

- As FNICDA projects will be implemented on a project-by-project basis, the process of negotiating service agreements for every FNCIDA project will be both costly and time consuming for local governments. Many smaller local governments do not have the capacity, financial or otherwise, to engage in multiple negotiations at one time.

- As such, service agreements should be negotiated following the all-in approach requiring only an increase in levels of service delivery for additional developments under FNCIDA, rather than an increase in types of services. Furthermore, the all-in approach is needed because local governments set their budgets based on the costs of all services within municipal boundaries. Municipal residents, for example, do not get to choose which services they pay for. Taxes are collected to pay for all services.

- Provincial and federal legislation to allow municipal and regional district authorities to implement relevant bylaws and regulations for services provided on First Nation reserve lands must be included in the Province's plan to administer FNCIDA projects.

- As a prerequisite to local governments entering into servicing agreements for FNCIDA projects, particularly residential market housing, the First Nation should agree to the application of municipal and regional district *Development Cost Charges* on FNCIDA projects, as well as the provincially-mandated *TransLink* real estate / density / land lift development charges, and also agree that the FNCIDA development will pay school, hospital (TransLink), and regional district taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.

- All service agreements must include a mechanism that has the First Nation contributing to "sunk costs" such as infrastructure repair and replacement funds. Without such contributions, local governments will see a diminishing return in the payments for services received from First Nations. This will lead to further strain the ability for local governments to continue providing services to First Nations, as well as their own constituents.

Concern #5: An Increase in Additions-to-Reserve (ATR) Applications

- There are currently no legal mechanisms in place to prevent First Nations from using land acquired under the ATR process for market development instead of addressing land constraints regarding community use, band member housing, etc. This gap in land use monitoring needs to be addressed to ensure that ATR applications are not submitted with the intent of using ATR land for residential, commercial and industrial market development to capitalize on the opportunities provided by FNCIDA and FNCLTA.

- The federal government needs to implement a legal mechanism to ensure that First Nations do not submit an ATR application for acceptable land constraint issues, such as band member housing, only to use it for market development after the application is approved. This is particularly important due to the opportunities for residential market housing on reserve lands provided by FNCIDA and FNCLTA.

- The federal government needs to clarify the allowance of land acquired under the ATR process to be used for FNCIDA projects as ATR is supposed to be used for land constraint issues, not market development such as contemplated for FNCIDA projects.

Concern #6: Cross Boundary Impact of Large-Scale Development

- Issues regarding large-scale developments affecting multiple jurisdictions are challenges that already exist between neighbouring municipalities, and are likely to exist in regard to residential, commercial and industrial development on First Nation reserves. The Province must consult with the affected local government jurisdictions to minimize potential conflicts and issues.

- *Development Cost Charges*, including relevant *TransLink* benefiting area cost charges, need to be imposed on FNCIDA projects in order to prevent a fee-exempt environment being used to provide extra incentive for developers to construct their projects on reserve land. Neighbouring municipalities and regional districts need to be compensated in order to offset the extra costs incurred when providing services to the new development.

- This compensation mechanism could involve collecting DCCs from developers of FNCIDA projects. However, municipalities and regional districts will be unable to directly collect DCCs from FNCIDA projects as they will take place on federal land, which is outside the local government jurisdiction. In order to ensure that local governments are not "subsidizing" developments on federal lands, service agreements must allow for collecting fees equivalent to DCCs.[22]

- As a prerequisite to provincial support for implementing FNCIDA projects, the First Nation applicant should consent to DCCs, or equivalent fees, being accounted for in service agreements, including relevant *TransLink* benefiting area cost charges, being assessed against FNCIDA development projects in order to avoid FNCIDA projects being "subsidized" by neighbouring municipal tax payers.

[22] An example of an agreement between local government and a federal agency is the "*Accord between the City of Richmond and the Vancouver International Airport Authority*" signed in 1994. The agreement specifically refers to the collection of DCCs. The accord stipulates that the parties agree to the principle whereby tenants and sub-tenants are subject to the same rules, regulations, and charges as if they were occupying other than federal property within the municipality.

- Residential developments under FNCIDA must remit *School Site Acquisition Charges* (SSACs) to local governments. These charges play an essential role in providing sufficient school services to the local communities, including non-aboriginal populations living on Indian Reserves.

- FNCIDA projects must be consistent with municipal *Official Community Plans* (OCPs) and also must be incorporated into *Regional Growth Strategies* (RGSs). This would enable FNCIDA projects to be incorporated into the regional district's *Liquid Waste Management Plan* (LWMP) and *Air Quality Management Plan* (AQMP) to thereby legally permit servicing and facilitate proper regulatory management. This must be accomplished during the FNCIDA proposal review process by consulting with the relevant municipal and regional authorities.

- Furthermore, there should be a "sunset clause"[23] on proposed FNCIDA projects that ensures that they are completed in a reasonable timeframe. If development plans are delayed for a long period of time, it becomes difficult for neighbouring municipalities to consider the impact of the proposed projects on OCPs and subsequently meet their own development objectives and needs.

Concern #7: Impact on the BC Treaty Process

- LMTAC First Principle #7 declares the support of local governments for the *BC Treaty Process*, as follows:

  7. Local governments strongly support the need for final treaty settlements to provide certainty with respect to Aboriginal rights and title.

- Economic development initiatives under the auspices of FNCIDA and FNCLTA legislation should not be viewed as an alternative to the treaty process. While the legislation provides economic opportunities previously not available to First Nations, the treaty process addresses issues far beyond economic development. It is in the best interests of all parties involved to continue moving towards finalized treaties.

- The Province must ensure that residential populations living on reserve as a result of market housing developments, along with commercial and industrial business projects, pay full regional district, school and hospital (TransLink) taxes to avoid developments implemented under FNCIDA legislation being an economic disincentive to First Nations pursuing treaties in BC. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.

- Both the provincial and federal governments must develop a means for ensuring a seamless transition of the regulations governing developments under FNCIDA to an autonomous *Treaty First Nation*, where treaties are completed after FNCIDA projects have already been approved. Not having a strategy in place to deal with this possibility could result in uncertainty for developers that might become an obstacle to the pursuit of future projects under the FNCIDA and FNCLTA legislation.

[23] A "sunset clause" is part of an agreement that is used to repeal the agreement if certain conditions are not met within a specified period of time.

- All of the issues and concerns identified in this discussion paper are addressed by treaties such as the one concluded with the *Tsawwassen First Nation*. However, facilitation of FNCIDA developments without addressing the issues and concerns identified herein would be an ill-conceived half-measure that perpetuates problems and inequities, and undermines the treaty process.

- The federal and provincial governments need to give careful consideration to developing a comprehensive implementation strategy that addresses these issues and concerns, and supports the treaty process.

Next Steps

This discussion paper is intended to identify the general issues and interests of Lower Mainland local governments with respect to FNCIDA and FNCLTA legislation.

Individual local governments will have additional issues and interests that reflect the unique nature, needs, perspectives, and circumstances of their communities in relation to the specifics of proposed development plans under FNCIDA.

Furthermore, while the overall concept of FNCIDA (to close the regulatory gap on reserve) has its merits, the biggest drawback for FNCIDA is that it is, as yet, untested and unproven. Potential alternatives to FNCIDA should be explored if the obstacles of the single-application approach for each development/project prove to be too cumbersome. For example, under the *Indian Act*, section 4(2), the Governor-in-Council can declare the *Indian Act* inapplicable to all or a portion of any Indian Reserve lands. Pursuing such an alternative could prove to be more manageable.

Next steps should include establishing a dialogue with provincial, federal and First Nation governments regarding the concerns expressed in this paper, and agreeing on a mechanism to keep local governments informed and involved in the FNCIDA process, and individual development projects that arise from this process, especially the *Squamish Nation* projects, as those projects will likely have a significant impact on how future FNCIDA projects are managed in BC.

APPENDIX II

Detailed background information pertaining to the Lower Mainland Treaty Advisory Committee, Reserve Lands, FNCIDA and FNCLTA

Lower Mainland Treaty Advisory Committee (LMTAC)

LMTAC was created with the signing of a *Memorandum of Understanding* (MOU) between the Province of British Columbia and the Union of British Columbia Municipalities (UBCM) on March 22, 1993. LMTAC is comprised of 26 local government jurisdictions (including three regional districts) and has as its mandate:

> *"Coordinating and representing the collective interests of local government, and through them their constituents, in defining and building relationships between First Nations and other orders of government."*

Local government interests in treaty negotiations are communicated to the provincial government through the UBCM (which provides a province-wide local government perspective) and individual treaty advisory committees, like LMTAC (which provide a region-specific local government perspective). Although local governments are not one of the three negotiating parties in the BC Treaty Process, LMTAC is a full member of the provincial negotiating team and provides advice and guidance to provincial negotiators and its member local governments on treaty and Aboriginal issues from a local government perspective.

On September 22, 2008, the MOU between the Province and UBCM which covers the 19 Technical Advisory Committees in the Province (including LMTAC) was renewed and significantly expanded to consider New Relationship and other Aboriginal issues and interests as part of their mandate. Issues related to *the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)* fall under this renewed mandate.

Reserve Lands

The title or ownership for all reserve lands remains with the federal government under the terms defined by Section 18 of the *Indian Act*. A previous LMTAC draft discussion paper on the federal Additions-to-Reserve (ATR) policy describes a "reserve" as an area of land that is held in trust by the federal Crown for the use and benefit of an Indian Band (First Nation). As such, reserve lands are federal lands which are provided for the exclusive use of Indian Bands. These lands are managed as common property by the Indian Band – the Indian Band has exclusive use of the property, but it does not own the property itself. Although the Indian Band manages the common property, the Minister responsible for Indian and Northern Affairs Canada (INAC) retains the power to veto land use decisions made by the Indian Band.

Under Section 91(24) of the *Constitution Act, 1867*, the normal federal-provincial division of legislative powers is altered and the Federal Parliament is made fully responsible for Indians and lands reserved for Indians. As a result, all federal lands held as reserves are exempt from provincial land use legislation. Provincial legislation and jurisdiction can be introduced if an

Indian Band enters into a voluntary agreement. However, this results in an uneven application of provincial legislation and jurisdiction as it varies from Indian Band to Indian Band.

Reserve lands are also outside of municipal boundaries and are not subject to local government by-laws. As a result, the Indian Band is responsible for providing the local services that a municipality and/or regional district would otherwise provide. Regional district policies and regulations also do not apply to reserves.

First Nations Commercial and Industrial Development Act (FNCIDA)

FNCIDA is a federal legislative initiative led by five First Nations[1] across Canada (including the Squamish Nation). The initiative provides for the potential development of large-scale on-reserve residential, commercial and industrial projects. Example projects contemplated by the initiating First Nations included a commercial market housing development, a deep sea port facility, an oil sands project, a sawmill, and other retail/commercial/light industrial projects.

FNCIDA came into force on April 1, 2006, and provides the federal government with the authority to make regulations, for particular projects on reserve lands, that replicate provincial regulations using an approach called incorporation by reference. This ensures that on-reserve developments are covered by these provincial regulations. INAC has stated that this approach creates a way to tap into the appropriate parts of a well-developed provincial system for the regulation of large-scale and/or complex projects.

Potential residential developments have always been at the forefront of FNCIDA as the original five First Nations that participated in the development of FNCIDA were each looking at specific projects that they could develop (with Squamish Nation proposing a commercial market housing development). The definition in FNCIDA to "commercial and industrial undertakings" is very flexible as the Governor in Council can enlarge the meaning or approve projects that are not necessarily commercial in nature. This flexibility creates a tremendously wide variety of projects which could find application under FNCIDA.

FNCIDA Project Review Process

Development of a project under FNCIDA is triggered by a request from the First Nation. The applicant First Nation submits a proposal which will be reviewed for eligibility by the federal government. In demonstrating eligibility, the land to be used must be confirmed as reserve land or currently proposed as reserve land through the federal ATR policy. The applicant First Nation must demonstrate that the lack of existing regulations is an impediment for proceeding with the development project, and that no other regulatory regime can be used to effectively implement it. The provincial government must be supportive of the project and agree to administer, monitor and enforce the regulations developed for the project. The regulations are then developed and a tripartite agreement is signed between the federal government, the provincial government, and the First Nation.

[1]Squamish Nation (BC), Fort Mckay Nation (Alberta), TsuuT'ina Nation (Alberta,) Carry Kettle Nation (Saskatchewan), and Fort Williams Nation (Ontario).

FNCIDA Implementation – Provincial Regulations

FNCIDA is unusual in that although it is federal legislation, once a tripartite (federal, provincial, First Nation) agreement is signed, it is implemented and administered by the provincial government. It is also important to note the hierarchy of legislative order suggested by FNCIDA – federal laws (e.g., the Criminal Code of Canada) remain paramount (unless otherwise expressed in the project specific FNCIDA regulations), then the FNCIDA regulations, and finally the laws and by-laws of the First Nation.

As the process of implementing FNCIDA is done on a case-by-case basis (due in part to the large and varied range of projects that it covers – residential, commercial and industrial) it is anticipated that the FNCIDA process will be time consuming and expensive. As a result, it is anticipated that the pool of potential projects will be significantly narrowed to projects which offer significant financial return for those First Nations with adequate institutional capacity to manage, finance and complete the process.

To date, only one set of regulations have been developed under FNCIDA – the oil sands regulations passed for the Fort McKay First Nation utilize nine provincial acts of legislation (in whole or in part) from the Government of Alberta. It has been noted that part of the reason these regulations were successfully passed was the Fort McKay oil sands project had tremendous support from the Government of Alberta, including inter-ministry coordination.[2]

Moreover, it was also noted that,"*...FNCIDA aims to create a seamless transition from the federal reserve regime to the provincial regime, with the effect of lowering transaction costs for investors, while providing security to First Nations.*"[3]

However, FNCIDA does not change the ownership of reserve land, ownership of resources, nor does it reduce the Government of Canada's fiduciary duty to First Nations.

The First Nations Certainty of Land Title Act (FNCLTA)

The effectiveness of FNCIDA was limited until FNCLTA came into force on 2010 June 30. Like FNCIDA, FNCLTA is also legislation that is triggered by a request from the First Nation and was designed to narrow the differences between property rights for commercial properties off-reserve and on-reserve. FNCLTA supports the development of commercial real estate on reserves by permitting the registration of project lands in a system that would replicate the provincial land titles system.

Prior to FNCLTA, leasehold interests on reserve could only be registered under a deeds system (the Indian Lands Registry).

- This deeds-based system fails to provide certainty of interests.
- There is no guarantee that registered documents are valid.
- It is extremely difficult to obtain accurate and timely information from the Registry.

Under FNCLTA, the provincial torrens system will be mirrored on reserve.

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[2]Lang Michener LLP, *"First Nations Commercial and Industrial Development Act"*
[3]Lang Michener LLP, *"First Nations Commercial and Industrial Development Act"*

- This torrens-based system provides more certainty and requires an assurance fund.
- This torrens-based system is more attractive to potential developers/purchasers.

These two pieces of legislation should be viewed as complementary tools – FNCLTA providing a more certain torrens-based land title system and FNCIDA providing the supporting regulatory framework. In combination, the two acts increase certainty for investors and purchasers and have the potential to reduce the regulatory gap on commercial, industrial and residential market developments (multi-unit long-term leases) on reserve lands.

As noted, no FNCIDA projects have been approved thus far in BC. Thus local governments have a unique opportunity to have their concerns put forward to the federal government and provincial government to assist in shaping how FNCIDA will be implemented in the province of British Columbia (BC).

PERSPECTIVES

This section of the report presents the perspectives of the federal government, the provincial government, First Nations, and local government on FNCIDA and FNCLTA.

Federal Government

From the perspective of the federal government, First Nation reserve lands have the potential to be used for large-scale commercial and industrial projects – be it oil sands, hydro-electric projects or large real estate developments. First Nations across Canada are increasingly developing plans for complex commercial and industrial development projects. These efforts are often hindered by a lack of adequate regulation for projects on reserve land. These regulatory gaps contribute to uncertainty and can discourage investment, frustrating the objective shared by First Nations and the Government of Canada of expanding economic development on reserves.

FNCIDA and FNCLTA are both optional pieces of legislation triggered by a request from the First Nation. Of the 13 activities listed by INAC as elements of the four-step FNCIDA process, seven (7), or the majority, are to be led by the First Nation. This would imply that the federal government has provided the applying First Nation the ability to control the pace of the process to a great extent. As such, the First Nation is also required to cover the financial costs involved in developing the proposed legislations.

The federal government has cited the following benefits of FNCIDA:

- creates a way to tap into the appropriate parts of a well-developed provincial regulatory system for large-scale and/or complex projects;
- more effectively balances federal economic development, environmental protection and social policy goals;
- supplies many economic development opportunities to First Nations - these economic development opportunities will lead to more jobs and contribute to the broader economy; and
- increases certainty for investors in major developments on reserve.

In 2007, INAC officials stated that due to resource requirements, they only expected to take on two projects a year, which could each take two years to complete. It is not clear if this is still the case, but when LMTAC met with INAC in early 2011, the federal representatives stated that, because of the time and costs involved, FNCIDA would likely only be pursued for large-scale projects. LMTAC has noted that it is ultimately up to the First Nation to decide which projects are worth pursuing - if the First Nation feels the FNCIDA/FNCLTA process is suitable for a small-scale project, then the option is available to pursue the project under FNCIDA/FNCLTA.

Provincial Government

The 2010 Annual Report for the BC Treaty Commission states that, *"...there are multiple paths to reconciliation, which the BC Government will pursue with willing First Nations, including incremental treaty agreements, strategic engagement agreements and reconciliation protocols... ...These agreements provide tangible benefits to communities and help to develop a cooperative working relationship between the parties. As such they are welcomed stepping stones to comprehensive agreements [treaties]."*[4]

B.C. Treaty Commission (BCTC) Chief Commissioner Sophie Pierre admitted[5] that LMTAC may have some legitimate concerns [regarding FNCIDA] but civic leaders need to recognize that urban bands with reserves in desirable locales may not opt to take the same approach as those in rural regions. *"There maybe two paths that are parallel but different,"* she said. *"These are all stepping stones toward full self-government."*

Former Minister of *Aboriginal Relations and Reconciliation* Barry Penner has recently stated[6] that, for the first time ever, FNCIDA will allow a host of provincial regulations to apply on aboriginal land (previously under the terms of the *Indian Act*, only federal regulations applied to reserves). From the provincial government's perspective:

- FNCIDA is an important step in protecting the rights of both residents and citizens at large.
- FNCIDA has given the provincial government more authority on reserves, specifically in relation to the *Builders Lien Act*, *Civil Forfeiture Act*, *Commercial Tenancy Act*, *Dike Maintenance Act*, *Environmental Management Act*, and the *Homeowner Protection Act*.

First Nations

All five of the original First Nations[7] involved in developing FNCIDA with the federal government found that, with the specific projects they were pursuing prior to FNCIDA, businesses were hesitant to make large investments on reserves due to the uncertainty of the provincial regulatory gap. The regulatory gap stems from the fact that property and real estate regulations and legislation are provincial, but Indian Reserves are under the federal authority. FNCIDA effectively addresses this concern by allowing the provincial regulations to be mirrored on reserves.

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[4] BC Treaty Commission, *"BC Treaty Commission Annual Report 2010: Recognition Honours Our Past, Creates Our Future."*, page 5.

[5] Jeff Nagel, *"Thousands to flock to homes on untaxed native land"*, BC Local News, 11 January 2011

[6] Kelly Sinoski/Jeff Lee, *"Fears of Lost Taxes Arise as Non-Aboriginals Move to Reserves"*, Vancouver Sun January 14, 2011

[7] Squamish Nation (BC), Fort Mckay Nation (Alberta), TsuuT'ina Nation (Alberta,) Carry Kettle Nation (Saskatchewan), and Fort Williams Nation (Ontario).

All five First Nations have passed band Council Resolutions in support of FNCIDA and some have advanced plans for various residential, commercial and industrial projects using FNCIDA, including a wood fibre optimization plant for Fort Williams Nation and a land title and strata property regulatory regime project for Squamish Nation.

LMTAC has reported that there is no clear answer to why some market developments have already been done on reserve land pre-FNCIDA – it essentially comes down to the risk tolerance of the developer and ultimately the purchaser. However, the *Squamish Nation* found that there were *"significant differences in market reaction to developments on reserve lands, and developments on neighbouring off-reserve lands resulting from the difference in the regulatory environment and the market's perception of the risk associated with that development."* [8] According to LMTAC, this quote seems to signify that the issue was not just about being able to attract developers, but the regulatory gap was also lowering the market value of projects that did happen.

Squamish Nation has publicized its intention to construct large-scale commercial and condominium developments on its reserves located in Vancouver and in West Vancouver/North Vancouver, where more than 25,000 additional residents could reside over the next 20 years (a population increase equivalent to the City of Port Moody[9]).

According to LMTAC, no Squamish Nation lands have been officially selected for application under FNCIDA/FNCLTA as discussions with INAC are ongoing. However, current Squamish Nation development proposals include:

- Two forty-storey luxury market rental apartment towers proposed for about 4.15 acres on the southwest corner of the Burrard Street Bridge located in Vancouver. The lessee for the project would be a Squamish Nation Company who would then sublease to an investor for a term 99 years plus construction time.[10] According to LMTAC, INAC has indicated that the Burrard Street Bridge lands being proposed for rental apartment towers would not likely be FNCIDA/FNCLTA projects. Nevertheless, it is possible that this land could also be included under FNCIDA/FNCLTA, as a final decision has yet to be made.
- Squamish Nation's 2004 Capilano Plan features variations of high-density residential development on land between Park Royal South and Ambleside Park. It designates approximately 40 per cent of the 1.7-square kilometre Capilano reserve to economic growth.[11] Market allowing, over the next 25 to 35 years, the Squamish Nation plans to build some 12,000 condominiums, townhouses and commercial units on its reserve lands near the Park Royal shopping mall in West Vancouver.[12]According to LMTAC, it is more likely that the projects proposed for development on the lands between Park Royal and Ambleside will be FNCIDA/FNCLTA projects.

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[8]Lang Michener LLP, *"First Nations Commercial and Industrial Development Act"*

[9]Port Moody's 2006 Census population was 27,512. Currently BC Stats estimates the population of Port Moody at approximately 33,000.

[10]http://www.squamish.net/files/PDF/events/Senakw_Business_Terms.pdf

[11]http://www.bclocalnews.com/greater_vancouver/northshoreoutlook/community/105377093.html?mobile=true

[12]http://www.vancouversun.com/business/First+Nation+build+condos+North+Shore+after+federal+bill/3222892/story.html

Local Government

The perspective of local governments, as represented by LMTAC recognizes:

- The potential for FNCIDA/ FNCLTA to encourage socio-economic development on reserves (including the potential for market-housing development), which could be mutually beneficial to both First Nations and neighbouring local governments.
- That the overall concept of FNCIDA (to close the regulatory gap on reserves) has merit.
- FNCIDA/FNCLTA legislation is untested and unproven as there has yet to be a project completed in BC.
- There is a large amount of uncertainty regarding how the provincial government will implement projects and what the effect will be on local government.
- There is no defined role for local government in the FNCIDA process. Stakeholder consultation is required while the provincial government drafts the regulations, but local governments are not explicitly referenced.
- It is understood that the provincial government will require First Nations to negotiate service agreements with neighbouring municipalities and regional districts to service any FNCIDA project. At this time, negotiation of service agreements appears to be the only mechanism for local government involvement in the FNCIDA process.

ISSUES AND SURREY STAFF COMMENTS

This section of the report lists responding actions proposed by the LMTAC draft discussion paper to address the issues and interests identified in the LMTAC draft discussion paper. It also notes Surrey staff comments. This information has been distilled in the interest of providing a summary. Readers wishing to gain a full understanding of the issues should refer directly to the LMTAC draft discussion paper, included in the March 11, 2011, Council Correspondence Package (as an attachment to LMTAC's letter of December 10, 2010).

Concern #1: Implementation and Administration of FNCIDA Agreements

Responding Actions Proposed by LMTAC:

The provincial government:

- *Needs to clarify how it will implement and administer FNCIDA projects in BC. How will the provincial government:*
  - *Determine which provincial body will be responsible for FNCIDA agreements?*
  - *Designate a specific body for all future agreements, or will it vary on a project-to-project basis?*
  - *Ensure that new residential, commercial, and industrial development on reserve lands is planned in consultation and coordination with neighbouring municipalities and regional districts?*
  - *Ensure application of construction (BC Building Code), workplace (WorkSafeBC), and environmental standards for FNCIDA projects?*
  - *Ensure implementation of a property assessment system equivalent to BC Assessment (BCA) for FNCIDA projects?*

- *Ensure that developments on reserve lands, particularly non-aboriginal market housing, pay appropriate taxes including hospital (TransLink), school, and regional district taxes.*

- *Undertake extensive consultation with local governments throughout the implementation process, so that issues that are likely to resurface during future FNCIDA projects can be identified and mitigated as early as possible.*

Surrey staff comments:

Although FNCIDA is federal legislation, the larger challenge relates to the provincial government's role in determining the regulation(s) to implement in the application of the provisions of FNCIDA to a specific project. Moreover, as regulations for FNCIDA have to be drafted for each project on a case-by-case basis, the resulting burden on all parties involved may be a heavy one.

As FNCIDA has yet to be implemented in BC, there is a unique opportunity for the provincial government to take a measured and thoughtful approach to addressing the issues and questions raised by LMTAC in this section of the draft discussion paper. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration by the provincial government.

Concern #2: Implementation of an Assessment System Equivalent to the BCA

Responding Actions Proposed by LMTAC:

The provincial government:

- *Ensure an acceptable property assessment system will be implemented for FNCIDA projects.*
    - *Should require a comprehensive and accurate property assessment roll, equivalent to that of the BCA, to ensure that the appropriate amount of taxes are levied on FNCIDA projects.*
    - *Ensure that assessment of property values of on-reserve lands must be calculated in a manner comparable to those located off-reserve.*

Surrey staff comments:

FNCIDA had limited traction until such time as FNCLTA came into force. These two pieces of legislation should be viewed as complementary tools – FNCLTA providing a more certain torrens-based land title system and FNCIDA providing the supporting regulatory framework. In combination, the two Acts increase certainty for investors and purchasers and have the potential to reduce the regulatory gap on commercial, industrial and residential market developments (multi-unit long-term leases) on reserve lands. To ensure an acceptable property assessment system is implemented for FNCIDA projects, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration by the provincial government.

Concern #3: Effect of Growing Non-Aboriginal Populations on Reserves

Responding Actions Proposed by LMTAC:

The federal government and provincial government:

- *Must ensure that First Nations provide fair and equitable representation and property tax treatment of both aboriginal and non-aboriginal residents living on reserves to avoid situations of "taxation without representation" for non-aboriginals on reserve.*
- *Enact appropriate legislation to ensure transparency and accountability on Indian Reserves.*

The provincial government:

- *Must ensure that the non-aboriginal population living on reserve lands must pay school, hospital (TransLink), and regional district taxes to ensure equity and fairness with their neighbours and avoid being "subsidized" by their neighbouring municipal tax payers.*
- *Ensure that both aboriginal and non-aboriginal residents living on reserve lands not be allowed to participate in neighbouring local government elections unless those residents living on reserve pay full municipal, regional district, school and hospital (TransLink) taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*
- *Ensure a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant for FNCIDA development should agree to:*
    - *Consent to any FNCIDA development paying school, TransLink, hospital, and regional district taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*
    - *Implement a system for non-member representation on all matters related to services and taxation to ensure some degree of fiscal accountability.*
    - *Replicate relevant provincial legislation such as the Freedom of Information and Protection of Privacy Act to ensure transparency and accountability for FNCIDA developments.*
    - *Replicate relevant provincial legislation such as the Residential Tenancy Act to ensure that the rights (and obligations) of renters are protected in a manner equivalent to renters not living on reserve lands.*
    - *Replicate relevant provincial legislation such as the Strata Property Act as the Strata Property Act allows for leasehold title in cases where the freehold owner is a public authority.*

Surrey staff comments:

Ensuring equitable representation for and equitable property tax treatment of both aboriginal and non-aboriginal residents living on-reserves and off-reserves is essential to ensuring an equitable and transparent long-term delivery of services within the broader community. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government and the provincial government.

Concern #4: Impact on Existing Service Agreements

Responding Actions Proposed by LMTAC:

The federal government and provincial government:

- *Consider introducing legislation to allow municipal and regional district authorities to implement relevant by-laws and regulations for services provided on reserve.*

The provincial government:

- *Determine the potential legal implications for municipalities and regional districts regarding permitting, enforcement of by-laws and regulations on reserve lands as part of service agreements with First Nations.*

- *Needs to develop an approach to deal with such issues in an efficient manner, one that incorporates the input of affected parties, including local governments.*
    - *Consult regarding the potential impact on existing service agreements and/or the requirement for new service agreements.*
    - *The inclusion of local governments in the FNCIDA process also must be continued as part of the process after the Squamish Nation submits an official FNCIDA proposal; as well as being part of any future FNCIDA projects.*
- *Recognize that the Lower Mainland local governments support an all-in approach, or 100% cost-recovery model of service provision to First Nations that includes Development Cost Charges (DCCs) and sinking funds for future infrastructure replacement.*
- *Support the negotiation of service agreements following the all-in approach (both hard and soft services) for service delivery to FNCIDA developments, rather than selecting only certain types of services.*

First Nations:

- *Should agree to the application of municipal and regional district Development Cost Charges on FNCIDA projects, as well as the provincially-mandated TransLink real estate / density / land lift development charges, school, hospital (TransLink), and regional district taxes.*
    - *Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*

Surrey staff comments:

An effective approach must be developed to deal with the approval, delivery and enforcement of servicing agreements related to on reserve developments by local governments and regional districts. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government, the provincial government, and First Nations.

Concern #5: Increase in Additions-to-Reserve (ATR) Applications

Responding Actions Proposed by LMTAC:

The federal government:

- *Review the inconsistency in the ability to use ATR land for market development activities (Step 1 – Project Identification and Proposal under FNCIDA) as it may lead to an increase in ATR applications driven by a desire to further capitalize on market development opportunities.*
    - *Needs to implement a legal mechanism to ensure that First Nations do not submit an ATR application for acceptable land constraint issues, such as band member housing, only to use it for market development after the application is approved.*
    - *Needs to clarify the allowance of land acquired under the ATR process to be used for FNCIDA projects as ATR is supposed to be used for land constraint issues, not market development such as contemplated for FNCIDA projects.*

Surrey staff comments:

As LMTAC has noted, the existing link between land acquired under ATR and land available for FNCIDA projects (Step 1 – Project Identification and Proposal under FNCIDA) contradicts the intrinsic purpose of the ATR policy to address land constraint issues such as expansion for band member housing. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government.

Concern #6: Cross Boundary Impact of Large-Scale Development

Responding Actions Proposed by LMTAC:

The provincial government:

- *Needs to clarify how, and by whom, such Development Cost Charges (DCC's) in the broadest sense, will be collected from FNCIDA projects.*
    - *Should ensure neighbouring municipalities and regional districts are compensated to offset the extra costs incurred when providing services to the new development to avoid FNCIDA projects being "subsidized" by neighbouring municipal taxpayers.*[13]
    - *Should develop a mechanism to collect DCC's from federal reserve land that needs to be imposed on FNCIDA projects.*
    - *Should ensure that as a prerequisite to provincial support for implementing FNCIDA projects, the First Nation applicant should consent to DCCs, or equivalent fees, be accounted for in service agreements.*
- *Ensure that FNCIDA projects need to take into account and be consistent with municipal Official Community Plans, Regional Growth Strategies, and servicing plans, to the benefit of both neighbouring jurisdictions and the reserves, during the FNCIDA review process.*
    - *Should enable FNCIDA projects to be incorporated into the regional district's Liquid*

[13]This issue has heightened importance given the large and very costly sewer, water and transit infrastructure projects anticipated within Metro Vancouver over the next two decades.

Waste Management Plan (LWMP) and Air Quality Management Plan (AQMP) to thereby legally permit servicing and facilitate proper regulatory management.

- *Include a "sunset clause"[14] on proposed FNCIDA projects that ensures that they are completed in a reasonable timeframe.*

Surrey staff comments:

Large scale development on reserves has the potential to increase demand for the provision of services, strain the existing systems which provide these services, challenge local governments' ability to pay for these services and meet future planned demand in the local government area of jurisdiction while reallocating capacity to on-reserve development that had previously been allocated to other areas. To address these issues, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the provincial government.

Concern #7: Impact on the BC Treaty Process

Responding Actions Proposed by LMTAC:

The federal government and provincial government:

- *Need to give careful consideration to developing a comprehensive implementation strategy that addresses these issues and concerns, and supports the treaty process.*
- *Must develop a means for ensuring a seamless transition of the regulations governing developments under FNCIDA to an autonomous Treaty First Nation, where treaties are completed after FNCIDA projects have already been approved.*

The provincial government:

- *Needs to clarify what will happen to FNCIDA regulations if a treaty is concluded and the land used by FNCIDA projects become treaty settlement land rather than reserve land.*
- *Must ensure that economic development initiatives under the auspices of the FNCIDA/FNCLTA legislation should not be viewed as an alternative to the treaty process.*
    - *Must ensure developments on reserve pay full regional district, school and hospital (TransLink) taxes to avoid developments implemented under FNCIDA legislation being an economic disincentive to First Nations pursuing treaties in BC.*
    - *Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*

Surrey staff comments:

There are two differing perspectives on this issue – one that FNCIDA has the potential to undermine the attractiveness of the BC Treaty Process and the second that FNCIDA is a stepping stone that will allow First Nations to build capacity that will eventually let them work toward realizing self-determination. The responding actions put forward in this section of the discussion paper for the consideration of the federal government and the provincial government help to address the concerns associated with the first view while not introducing anything that would

[14] A "sunset clause" is part of an agreement that is used to repeal the agreement if certain conditions are not met within a specified period of time.

undermine the second view. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government and the provincial government.

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