MUNICIPAL DEALINGS IN PROPERTY

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I. Introduction

The *Community Charter*, S.B.C. 2003, c. 26 (the *"Charter"*) reversed the reasoning process to be applied when determining whether a municipality has certain powers in relation to dealings in property. Before the *Charter* came into force, the departing premise was that municipalities had no powers in relation to dealings in property, unless those powers were expressly mentioned in the legislation. By contrast, under the *Charter*, there is a presumption that municipalities have the capacity, rights, powers and privileges of a natural person of full capacity,[1] unless those powers are limited by the legislation. In other words, under the *Charter*, municipalities have all the powers to deal in property that persons of full capacity have, unless the legislation imposes limits on those powers.

[1] *Charter*, s. 8(1).

Another change introduced by the *Charter* that has an impact on municipal dealings in property is the vesting of the title to highways in the municipalities they are located in, subject to certain exceptions.[2] The *Charter* also eliminated the requirement that municipalities formerly had to make the lands or improvements they intended to dispose of available to the public for acquisition. Addressing the topic of municipal dealings in property under the *Charter*, this paper commences with an outline and discussion of the general requirements in connection with dispositions of municipal property. The paper continues with the specific rules on and issues arising out of dealings in highways. The paper concludes with an outline of the municipal powers and duties in relation to land exchanges and dealings in parks.

II. Property Dispositions

A. Dispositions of Land and Improvements

The *Charter* changed some of the requirements imposed on a municipality in relation to property dispositions. Before the *Charter* came into force, subject to certain exceptions, municipalities had to make the lands or improvements available to the public for acquisition if they intended to dispose of such lands or improvements. In addition, municipalities had to give notice of proposed dispositions. These requirements are still applicable to regional district boards under sections 186 *[disposition of land and improvements]* and 187 *[notice of proposed disposition]* of the *Local Government Act*, R.S.B.C. 1996, c. 323 (the *"Local Government Act"*). The *Charter* eliminated the requirement that municipalities make the lands or improvements available to the public for acquisition, but maintained the public notice requirement.

Specifically, section 26 of the *Charter* currently requires that before a council disposes of land or improvements, it publish notice of the proposed disposition in accordance with section 94 *[public notice]*. In other words, there are two preconditions to the notice requirement. First, there must be a disposition. Second, the object of the disposition must be land or improvements. The first issue that arises is what constitutes a disposition. Under section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 (the *"Interpretation Act"*), the term "dispose" has a broad and inclusive definition:

> **"dispose"** means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things.

It is unclear whether a municipality disposes of land when it grants a licence to use its land. The better view is that granting a licence to use does not constitute a disposition of land, and as a result does not trigger the section 26 notice requirements.

With respect to the object of the disposition, the *Charter* adopts the definition of land from the *Assessment Act* for the purposes of assessment and taxation. Under the *Assessment Act*, R.S.B.C.

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[2] *Charter*, s. 35.

1996, c. 20 (*"Assessment Act"*) land includes land covered by water, quarries, sand and gravel, but excludes coal or other minerals. For other purposes, the *Charter* defines "land" to include the surface of water, but to exclude improvements, mines or minerals belonging to the Crown, or mines or minerals for which title in fee simple has been registered in the land title office. As neither the *Charter* nor the *Assessment Act* specifies whether "land" includes an interest in land, the definition of "land" in the *Interpretation Act* must be resorted to. Section 29 of the *Interpretation Act* defines "land" to include "any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning." In other words, if a municipality grants an easement, a statutory right-of-way or other interests in land short of fee simple title, the notice requirements in section 26 of the *Charter* apply, which incorporate the requirements of section 94 by reference.

Pursuant to section 94 of the *Charter*, the notice must be posted in the public notice posting places at municipal halls or regional district offices. The notice must also be published in a newspaper that is distributed at least weekly in the area affected by the subject matter of the notice. If the area affected is not in the municipality, the publication must also be in a newspaper that is distributed at least weekly in the municipality. Unless otherwise provided, the notice must be published once each week for two consecutive weeks before the disposition occurs.

If publication in a newspaper is not practicable, the notice may be given in the areas by alternative means as long as three conditions are met. First, the notice must be given within the same time period as required for publication. Second, the notice must be given with the same frequency as required for publication. However, this second requirement does not apply in relation to an area if the alternative means is by individual distribution to the persons resident in the area. Third, the notice must provide notice that the council considers is reasonably equivalent to that which would be provided by newspaper publication if it were practicable.

In addition to the requirements in section 94, there are further requirements depending on whether or not the property is available to the public for acquisition. In the case of property that is available to the public for acquisition, section 26 of the *Charter* requires the notice to include a description of the land or improvements, the nature and, if applicable, the term of the proposed disposition, and the process by which the land or improvements may be acquired. In the case of property that is not available to the public for acquisition, the notice must include a description of the land or improvements, the person or public authority who is to acquire the property under the proposed disposition, the nature and, if applicable, the term of the proposed disposition, and the consideration to be received by the municipality for the disposition.

Section 26 of the Community Charter for municipalities and section 187 of the Local Government Act for Regional Districts requires that notice be given prior to the disposition.

For a municipality, the form of the notice will depend on whether a deal has already been made or whether the municipality is making the lands available to the public. If a deal done, the notice must identify the land, the buyer, the nature of the disposition and the price. For a regional district or a municipality where no deal has been struck, the notice must identify the land, the nature of the disposition, and the process by which it may be acquired.

Where land is being offered or sold for less than market value to a person or organization (other than a business), then notice must also be given of the municipalities or regional districts intention to grant assistance. See either section 24 of the Community Charter or section 185 of the Local Government Act. (See *Coalition for Safer Stronger Inner City Kelowna v. Kelowna (City)* 32MPLR (4th) p 313).

The process by which the land or improvements may be acquired by the public might be a tendering process. Pursuant to the common law in relation to tendering, a municipality owes a duty of fairness to the bidders. In this regard, the British Columbia Court of Appeal in *Graham Industrial Services Ltd.* v. *Greater Vancouver Water District*, 2004 BCCA 5 (*"Graham Industrial"*) noted that since *Ontario* v. *Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (*"Ron Engineering"*), the focus of the Supreme Court's jurisprudence in this area has been protection of the integrity of the tendering process and ensuring that owners observe their duty to treat bidders fairly and equally. This duty was imposed by the Supreme Court of Canada in *Ron Engineering*[3] and *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (*"M.J.B. Enterprises"*).[4]

Of interest is the contrast between the recent case law and *Allard Contractors Ltd.* v. *Coquitlam (District)*, 54 B.C.L.R. 18 (1983, BCSC) (*"Allard Contractors"*), where the British Columbia Court of Appeal held 23 years ago that a municipality did not owe a duty of fairness to the potential buyers of a gravel pit.

In, *Allard Contractors*, the respondent municipality gave public notice of its intention to sell a certain gravel pit, as was required under the legislation at that time. The notice specified a minimum price and that any sale would be conditional upon the purchaser effecting mining systems and land reclamation plans approved by a committee of government agencies appointed to ensure that operation of the pit would not have adverse effects on the environment. The respondent J.C. Ltd. had been working the gravel pit in question under licence for a period of five years, and had prepared a mining plan for approval by the committee. Both J.C. Ltd. and Allard Contractors Ltd. bid on the purchase of the pit. At an in-camera meeting of the municipal council, the two offers were discussed and a representative of the Ministry of the Environment pointed out that only J.C. Ltd. was in a position to ensure that no environmental damage would take place, that the other bids would require a delay of months, and that if the municipality did not ensure against environmental damage it would be held responsible. The council resolved to sell to J.C. Ltd. Allard Contractors Ltd. applied under the *Judicial Review Procedure Act* to quash the decision alleging that it was illegal in that it discriminated in favour of J.C. Ltd. and against all other potential purchasers. In addition, the petitioner argued that the municipality had breached its duty of fairness, particularly in failing to give the petitioner an opportunity to reply to the adverse evidence of the Ministry of the Environment representative.

The court dismissed the petition, holding that the municipality's offer to sell did not discriminate in fact. All parties knew that they had to abide by the *Mining Act* and address the environmental

[3] *Ron Engineering* at 121.
[4] *M.J.B. Enterprises* at ¶41.

concerns. It happened that J.C. Ltd. was in a better position to do this at an early date, but that did not make the other bids incapable of acceptance as it was not stated that the mining plan had to be done immediately, only that it had to be done. There was no evidence that the respondent acted with the improper motive of favouring one individual without regard to the public interest. The court held that the council acted in good faith in what it thought to be the best interests of the municipality. The municipality did not have to comply with the rules of natural justice or fairness in making its decision. The court held that a sale of unwanted municipal land did not require application of the rules of fairness.

In light of *Graham Industrial*, *M.J.B. Enterprises* and *Ron Engineering*, a court would probably render a different decision today if it were to be faced with the facts in *Allard Contractors*.

In *Bushell* v. *Richard*, 28 M.P.L.R. 219 (1985, Nova Scotia Supreme Court, Trial Division) (*"Bushell"*), a decision that was rendered four years after *Ron Engineering*, the court upheld a sale of municipal land to a person whose tender was not the highest bid. The court did not refer to *Ron Engineering* in its judgement. Of importance was that when inviting tenders from the public at large, the municipality included the words "the highest or lowest tender will not necessarily be accepted" as a condition relating to the sale. The court in *Bushell* noted that no statutory procedures were prescribed concerning the manner to be followed in the disposition of real property which was no longer required for the uses or purposes of the municipality. The court held that the councillors did not act in bad faith in accepting the lower offer as this was within their power. Further, the court found that the councillors were not moved by ulterior motives, and that the exercise of their judgement could be considered at the ballot box, but not in court.

One way of ensuring that a municipality is not obligated to sell its property to the highest bidder is for the municipality to include conditions in its notice of sale. For example, if the municipality wishes the land to be sold to be used for a specific development or investment, the municipality may make the according specifications in the notice.

B. Dispositions of Water Systems, Sewage Systems and Other Utilities

The requirements under the *Charter* with respect to the disposition of utilities are substantially the same as the pre-*Charter* requirements found in section 190 of the *Local Government Act*. Currently, section 28 of the *Charter* imposes requirements with respect to the following utilities:

1. works for the supply, treatment, conveyance, storage and distribution of water;

2. works for the collection, conveyance, treatment and disposal of sewage;

3. works for the supply and distribution of gas or electrical energy;

4. works for a transportation system; and

5. works for a telephone system, closed circuit television system or television rebroadcasting system.

Section 28(2) provides that a municipal council has unrestricted authority to dispose of all of the works listed above, subject to one of the following two requirements. First, the works must no longer be required for the above-described purposes. Second, the works must be disposed of to another municipality in the same regional district or to the regional district. If none of these two requirements is met, council needs the approval of the electors in order to dispose of the works.

Section 28(3) provides that in the case of works used by a municipality to provide a water or sewer service, the council may only dispose of the works if two conditions are complied with. First, an agreement under which the water or sewer service will continue for a period specified in the agreement must be in effect. Second, the intended disposition and agreement must receive the assent of the electors. The language of section 28(3) of the *Charter* may give rise to different interpretations, due to the inconsistency between sections 28(2) and 28(3) with respect to water and sewer works. It is unclear, for example, if a municipality has unrestricted authority to dispose of water and sewer works if one of the two requirements in section 28(2) is met. Alternatively, it is unclear if section 28(3) overrides section 28(2) with respect to water and sewer works due to the use of the word "only." There has also been some debate with respect to whether the conjunctive "and" in connection with the two requirements in section 28(3) should be read as a disjunctive "or."

Municipalities can dispose of these systems to private operators in the context of public-private partnerships.

C. Dispositions of Property in Police Possession

The rules regarding the disposition of property in police possession are no longer in the *Local Government Act*, but in the *Charter* and a regulation thereunder. Section 67 of the *Charter* permits the municipal police to dispose of property that has come into its custody and possession, subject to two conditions. First, the owner of the property must not have been identified after reasonable effort. Second, a court must not have made an order in respect of the property. Section 67 also provides immunity from liability to the municipality, a council member, the person in lawful custody of the property, and any municipal officer, employee or agent for any claim that may arise in respect of the property, as long as the property was disposed of in accordance with section 67. The *Disposal of Property in Police Possession Regulation*, B.C. Reg. 366/2003, imposes requirements with respect to who may dispose of the property, the length of time for which the property must be held before disposal, the notice of the proposed disposal of the property, and the proceeds of sale of the property.

D. Delegation of Right to Dispose of Interest in Land

A question that frequently arises is whether council's power to dispose of an interest in land can be delegated. Generally, where a statute requires council to adopt a bylaw or other procedure to deal with land, this power may not be delegated.[5] An example is found in section 27 of the *Charter* with respect to an exchange or disposal of park land. Section 154 does not specifically prohibit delegation of the power to deal with land interests where a bylaw is not required to do so.

The Supreme Court of British Columbia upheld the delegation by the District of Surrey of its power to dispose of municipal property to the District's land agent. (*DBC Development Corp.* v. *Surrey (District)*, (1989) 43 M.P.L.R. 311 (*"DBC* v. *Surrey"*). In *DBC* v. *Surrey*, the defendant municipality approved a recommendation from its land agent that surplus municipal properties be posted, advertised and then sold under "open" public listings. Council resolved to adopt the recommendation of the closed finance committee. The content of these recommendations was that council approve in advance for a period of 6 months the stated selling prices of certain surplus residential lands owned by the corporation. Further, the land agent stated in his report adopted by the finance committee and subsequently by municipal council that "[a]ny offers at or above those 'recommended selling prices' would not need further reference to council or the municipal manager." [Emphasis added.] Subsequently, certain lands were advertised and offers were made by the plaintiffs. The plaintiffs signed and delivered interim agreements of purchase and sale to the defendant municipality. The land agent signed acceptances of these agreements on behalf of the municipality and deposits were received from the plaintiffs. Municipal council subsequently held a regular special meeting and proceeded to pass a resolution that all the sales of lands be cancelled and that the lands be sold by tender. The land agent for the municipality advised the plaintiffs that because of irregularities in some of the advertisements, the offers as advertised led to false and misleading information and, therefore, the offers would be rescinded and the deposits would be returned. The plaintiffs notified that they would not accept the rescission. The plaintiffs each brought actions seeking specific performance of their respective agreements of purchase and sale.

The court found the land sales to be valid, on the ground that the interim agreements were duly signed on behalf of the municipality by its property manager. The court reasoned as follows. Section 223 of the *Municipal Act* expressly provided that all powers of municipal council could be exercised by by-law or resolution. Approval by resolution that the surplus properties be sold under open listings was given by council. There was no requirement under the *Municipal Act* that such contracts return back to council for approval or ratification. In fact, there was an express statement in the recommendations adopted by council that the recommended selling prices would not need further reference to council or the municipal manager. The court awarded specific performance to the plaintiffs.

Despite *DBC* v. *Surrey*, even when there appears to be no specific statutory condition or restriction against delegating the power to dispose of an interest in land, it is advisable that

[5] *Charter*, s. 154(2).

municipalities not delegate their power to dispose of land interests, particularly with respect to leaseholdings and more significant real property assets such as parcels held in fee simple. While the *Charter* does not expressly prohibit delegation of many land transactions, a regular practice of having council approve each and every disposal, and the instruments being executed under the municipality's seal by the mayor and clerk, promotes certainty as to the validity of property transactions, both under the common law and Part 5 of the *Land Title Act*, R.S.B.C. 1996, c. 250 (the *"Land Title Act"*). Such a practice would also be in accord with the section 26 notice requirements.

1. Common Law

At common law, municipal corporations are viewed as trustees of the residents in relation to public assets, so that alienation of those assets is viewed (perhaps indirectly) as a matter of policy rather than mere administration. The courts are likely to scrutinize a delegation of power to deal with interests in land even more strictly than they do when scrutinizing regular contracts, since the land belongs to the residents of the City as a corporation. (*Stewart (District)* v. *Stewart Harbour Authority* 2004 BCSC 8 (*"Stewart"*))

In *Stewart*, for example, the District of Stewart sought to set aside an agreement that it entered into with the Stewart Harbour Authority on the grounds that, among other things, the District lacked statutory authority to enter into the agreement. The agreement placed virtually all of the District's potentially revenue-producing assets in the hands of the Harbour Authority to manage according to its view of appropriate economic development for the District. The only substantial revenues left for the District were its tax base, and rates for water and sewage. Nonetheless, the District was left with substantial responsibilities for funding the District assets.

The court held that the agreement amounted to a delegation of the municipality's functions under section 176(1)(d) of the *Local Government Act*. The *Local Government Act* did not appear to authorize such a delegation to a body such as the Harbour Authority. The court held that even if such a delegation were made to a body contemplated by section 176(1)(e) of the *Local Government Act*, it could have only been by way of a bylaw complying with section 192. The court held further that the delegation to the Harbour Authority was not a mere incidental or formal provision, but that it was fundamental to the agreement. As it was outside the power of the District to agree to that clause, the court declared the agreement to be void. The court concluded with the following remarks:

> Before leaving this issue, I should express doubt as to whether an open-ended agreement such as the HA Agreement, even without the power to dispose of interests in land, is properly within the phrase "management agreement" in section 176(1)(a)(iii) of the *Local Government Act*. That section appears to contemplate a municipality entering into agreements with private parties for the provision of management services, to carry into effect programs and schemes under the direction of the municipality. I have serious doubts as to whether it enables a municipality to turn over to third parties, without oversight, the broad

> policy-formulation functions that form the heart of municipal control over its assets. (*Stewart* at ¶ 46) [Emphasis added.]

Another common law principle relevant to a municipality's delegation of its power to dispose of an interest in land is the indoor management rule, and in particular the recent developments with respect to its application to municipalities. Traditionally, the courts have held that the indoor management rule does not apply to municipalities. In other words, unlike the case with private corporations, municipal corporations are not bound by the rule of "apparent authority" that applies to corporate contracts. As a result, third parties contemplating a contract with a municipality could not rely on a person who only apparently represented the municipality to have the authority to bind the municipality to a contract. (*Silver's Garage* v. *Bridgewater (Town)* [1971] S.C.R. 577)

Recently, however, in *Canada Safeway Ltd.* v. *Surrey (City)* 2004 BCCA 499 (*"Canada Safeway"*), appeal to Supreme Court of Canada dismissed [2004] S.C.C.A. 577, our Court of Appeal modified to some extent the rule against "apparent authority." The court in *Canada Safeway* held that when the mayor and clerk execute a contract and apply the corporate seal, a "presumption of regularity" is established that council had approved the transaction. The court held that "[u]nder the common law presumption of regularity, an *evidentiary* presumption arises from such execution, placing an onus on the municipality to show that in fact the document was signed and sealed without authority." (*Canada Safeway* at ¶24) In reaching this decision, the court implicitly took into account the immediate knowledge that a clerk and mayor have of council proceedings and the expectation that they act in accordance with the decisions of council. Because the mayor is the chief executive officer of the municipality and is charged with reflecting the will of council and carrying out duties on behalf of council under the section 116 of the *Charter*, the mayor's signature together with the clerk's is probably the best evidence that council has formally approved the disposal.

2. Part 5 of the *Land Title Act*

Part 5 of the *Land Title Act* contains requirements for execution of instruments that transfer, charge or otherwise deal with or affect land. While making no particular reference to municipal corporations, section 44(2) provides that "a corporation must execute an instrument by its authorized signatory who must, on behalf of the corporation, sign his or her name to the instrument." Section 48(2) provides that where an instrument is under a corporate seal, the signature of the officer witnessing the execution certifies that the individual who signed the instrument and affixed the seal was properly authorized to do so.

3. Section 26 Notice Requirements

In addition to the common law and the requirements under the *Land Title Act* with respect to an instrument evidencing a disposal of municipal property, section 26 of the *Charter* constitutes another reason for the desirability of Council approval of such dispositions. A resident of the City receiving notice of the proposed transfer and wanting to question the disposal is likely to

direct his or her query to an elected representative. As a result, the statutory notice requirement suggests that council members are expected to be aware of the intended transfer.

4. Delegation of the Right to Enter into Lease Agreements for the Use of Municipal Lands and Buildings

A lease is a form of disposition. In light of the above discussion, it is advisable that council retain its power to approve leases for the use of municipal property and any amendments thereto or termination or renewal thereof. If this seems too onerous during periods of high activity, it is advisable that, at the least, council retain its control by reserving the power to approve or reject any action that would materially affect the municipality's interest in the lease.

5. Delegation of the Right to Dispose of Statutory Rights-of-Way and Easements

Statutory rights-of-way and easements also represent interests in land, albeit of a lesser nature than fee simple ownership. Their value can amount to half of the market value of the land, or more, depending on the circumstances. Their disposal requires advance public notice.[6] While delegated officers and employees may, of course, influence a decision to dispose of a statutory right-of-way or easement through recommendations, as a matter of best practice, the final decision should remain with council rather than a delegate, for the reasons explained above.

If council wants to delegate this power, it is advisable that a maximum value and perhaps a list of circumstances be established in the delegating bylaw, beyond which approval by council must be obtained. This may help avoid an attack on the validity of a transaction on the basis that the decision impacts public policy and therefore should properly be retained by council.

6. Delegation of Right to Enter into Other Real Property Arrangements

Where real property arrangements do not amount to a disposal of an interest in land, a municipal council can, by bylaw, delegate its power to dispose of real property to an official. This official may then enter such contracts on behalf of the municipality, subject to any limits set out in the bylaw. An example of this kind of delegation in relation to real property would likely be a licence to use land or a building where use or occupation is not exclusive to the licensee.

III. Highways and Closures

A. Title to Highways

[6] *Charter*, s. 26.

One of the major changes introduced by the *Charter* is the vesting of the title to highways in municipalities. In this regard, section 35(1)(a) of the *Charter* provides that subject to certain exceptions, "the soil and freehold of every highway in a municipality is vested in the municipality." The following ten types of highways are excluded from the section 35(1)(a) vesting:

1. Provincial arterial highways, including the intersection between a Provincial arterial highway and another highway and any interchange between a Provincial arterial highway and another highway;

2. highways referred to in section 23(1) of the *Greater Vancouver Transportation Authority Act;*

3. highways in a park, recreation area or ecological reserve established under the *Park Act,* the *Ecological Reserve Act* or the *Protected Areas of British Columbia Act* or an area to which an order under section 7(1) of the *Environment and Land Use Act* applies;

4. highways in a regional park under the *Park (Regional) Act;*

5. a regional trail under the *Park (Regional) Act,* other than a regional trail that is part of the road system regularly used by vehicle traffic;

6. land, including the improvements on it, on which Provincial works such as ferry terminals, gravel pits, weigh scales and maintenance yards are located;

7. roads referred to in section 66 of the *Forest Practices Code of British Columbia Act* that have not been declared to be public highways;

8. highways vested in the federal government;

9. in relation to a reserve as defined in the *Indian Act* (Canada), highways in the reserve or that pass through the reserve; and

10. public rights of way on private land.

Further, the section 35(1)(a) vesting is subject to the Province's right of resumption, and to its ability to grant privileges in connection with the taking of water.[7] However, the Provincial government's right of resumption may be cancelled either by order of the minister responsible for the *Transportation Act* if certain conditions are met, or automatically if certain conditions in the *Resumption of Highways Regulation*, B.C. Reg. 245/2004 (*"Resumption of Highways*

[7] *Charter*, s. 35(7).

Regulation"), under the *Charter* are met.[8] Pursuant to the *Resumption of Highways Regulation*, the Provincial government's right of resumption is cancelled if, for example, the municipality has closed the highway or has removed its dedication.

The Province also retains the right to take gravel, sand, stone, lime, timber or other material that may be required in the construction, maintenance or repair of a road, ferry, bridge or other public work. Excluded from the vesting are also all rights to geothermal resources, minerals, coal, petroleum and gas lying under the highways.[9]

B. Grant of Occupation Licences and Permission of Highway Encroachments

A right flowing from the possession and ownership of highways by municipalities is the right of municipalities to grant licenses of occupation of parts of a highway for purposes such as sidewalk cafés, and permit encroachments, such as doorsteps, verandas, porches and balconies or signs projecting over a highway. In this regard, section 35(11) of the *Charter* confirms that a council may grant a licence of occupation or an easement, or permit an encroachment, in respect of a highway that is vested in the municipality. Councils may grant such licenses or permit such encroachments by resolution.

Before the municipal legislation vested title to highways in municipalities, municipalities had no right to grant encroachments. To illustrate, in *Covucci* v. *Trail*, (1996) 36 M.P.L.R. (2d) 105 (BCSC), the petitioner's property was abutted by a 20-foot wide strip of land. When the area was originally subdivided, the land was dedicated for highway purposes with the intention that it was to be developed as a lane. The proposed development never took place. 17 years after the subdivision, the city passed a bylaw stopping up and closing the traffic in the lane allowance. 33 years after the subdivision, the city granted the neighbours on the other side of the land a revocable licence to encroach on the land and use it for landscaping and yard purposes. The petitioner applied for a declaration that the licence was invalid and of no effect.

The court found in favour of the petitioners, holding that a municipality's right of possession of a highway could only be exercised for highway purposes. When the subdivision plan regarding the land's use as a highway was originally registered, the right to possession of the land vested in the city. As such, the city had no right to grant a licence to the neighbours to use the land for landscaping and yard purposes because the arrangement was not one directed to using the land for highway purposes.

With respect to encroachments in the form of poles erected on highways, section 43 of the *Charter* permits municipalities to enter into agreements with and impose requirements on persons erecting such poles. Section 36(2)(e) of the *Charter* imposes a limitation on the municipal powers in section 43 *[Agreements respecting municipal equipment on utility poles]* of the *Charter*. Specifically, section 36(2)(e) limits the municipal authority in relation to all

[8] *Charter*, s. 35(10).
[9] Charter, s. 35(7).

electrical transmission and distribution facilities and works that are on, over, under, along or across a highway, by making it subject to the *Utilities Commission Act* and to all orders, certificates and approvals issued, granted or given under that Act.

C. Highway Closures and Removal of Highway Dedication

Another incident of the ownership of highways by municipalities is the ability of municipalities to, by bylaw, close the highways they own without provincial approval, as was previously required. Council may also, by bylaw, remove the dedication of a highway that has been closed or that is to be closed by the same bylaw. However, section 40 of the *Charter* provides that two requirements must be met before council adopts a bylaw closing a highway or removing a highway dedication. First, council must give notice of its intention in accordance with section 94 *[public notice]*, the provisions of which are summarized above. Second, council must provide an opportunity for persons who consider they are affected by the bylaw to make representations to council. In addition, before adopting a bylaw closing a highway, council must deliver notice of its intention to the operators of utilities whose transmission or distribution facilities or works council considers will be affected by the closure. On filing of a bylaw closing a highway or removing a highway dedication in the land title office, the property subject to the bylaw ceases to be a highway, its dedication as a highway is cancelled, and title to the property may be registered in the name of the municipality.

The municipalities' power to close highways is subject to additional limitations. The operator of a utility affected by such a closure may require the municipality to provide reasonable accommodation of the utility's affected transmission or distribution facilities or works on agreed terms.[10] If the parties fail to agree, the matters must be settled by arbitration.[11]

In addition, council may only remove the dedication of a highway that was dedicated with the consent of the owner of the parcels created by the plan deposited in the land title office when the land was dedicated, if the following three conditions apply. First, the highway must have been dedicated by the deposit of a subdivision or reference plan in the land title office. Second, the highway must not have been developed for its intended purpose. Third, the owner of the land at the time the plan was deposited must still be the owner of all of the parcels created by the plan.

Further, if the effect of a proposed highway closure will be to completely deprive an owner of the means of access to their property, section 41 of the *Charter* imposes one of the following two requirements on the municipality. First, the municipality must obtain the consent of the owner before the owner is deprived of access. Second, in addition to paying any compensation for injurious affection required under section 33(2) of the *Charter*, the municipality must ensure that the owner has another means of access that is sufficient for this purpose.

[10] *Charter*, s. 41(4).
[11] *Charter*, s. 41(5).

Another restriction on the municipalities' powers to close highways is that if the highway to be closed or part of it is within 800 metres of an arterial highway, the bylaw closing the highway may only be adopted with the approval of the minister responsible for the *Transportation Act*.[12]

The right of municipalities to close highways is restricted in the case of intermunicipal boundary highways. The *Charter* defines an "intermunicipal boundary highway" to mean "a highway that forms all or part of the boundary between 2 or more municipalities, including any part of such a highway that deviates so that it is wholly or partly inside one or more of the municipalities, but does not include all or part of an intermunicipal transecting highway." An "intermunicipal transecting highway" is "a highway that transects 2 or more municipalities and serves those municipalities." Section 37 of the *Charter* provides that in the case of an intermunicipal boundary highway, the councils of the applicable municipalities have joint jurisdiction over the highway. Unless the councils agree otherwise, the highway must be opened, maintained, kept in repair and improved by the municipalities. Further, bylaws respecting the highway must be mutually acceptable to those municipalities or be in accordance with an intermunicipal scheme under section 14 *[intermunicipal service, regulatory and other schemes]* in relation to the highway. As a result, an intermunicipal boundary highway may not be closed without the agreement of the applicable municipalities.

To exemplify, a few years ago, a dispute arose between the cities of Coquitlam and New Westminster with respect to the closure of Braid Street, which was declared to be an intermunicipal boundary highway at the location of the gates. The facts underlying *Coquitlam (City)* v. *New Westminster (City)*, 2002 BCSC 1464, upheld on appeal 2003 BCCA 638 (*"Coquitlam* v. *New Westminster"*) were that the two cities shared a common boundary and a street leading to a bridge between them. The City of Coquitlam received funding to extend the existing bridge with a new four-lane bridge, which ended at the old bridge. Coquitlam undertook the extension of the road rather than losing the funding. The 4-lane extension to the old bridge presented a concern to New Westminster for safety reasons, as statistics showed that there would be a 59-90% increase in collisions between trains and vehicles. In addition, the visibility from the bridge was limited, Braid Street was not sufficiently wide between the bridge and Canfor Avenue, the bridge was not designed for cyclists or pedestrians, Braid Street had no curbs or sidewalks along this four block stretch, and there were unprotected drop-offs on the approaches to the bridge. As a result, the City of New Westminster put up concrete barriers and closed the gate across the street, preventing traffic from Coquitlam from entering New Westminster along that route. Both cities passed by-laws declaring the bridge to be an intermunicipal bridge, although New Westminster repealed the by-law. Coquitlam brought an application for declarations respecting the street and the bridge under the *Local Government Act*, which was applicable to municipalities at that time, and to compel New Westminster to remove the barriers.

The court granted Coquitlam's application, holding that Braid Street was an intermunicipal bridge at the location of the gates pursuant to section 539 of the *Local Government Act*, which is the predecessor to section 37 of the *Charter*. While the court recognized its discretion to permit non-compliance with the mandatory language of the legislation requiring that the road be kept open, the court concluded that the public interest weighed in favour of keeping the road and

[12] *Charter*, s. 41(3).

bridge open to the public. As a result, New Westminster was ordered to open the gate and remove the concrete barriers blocking access to the street, despite the safety concerns of New Westminster.

D. Highway Dispositions

The municipalities' power to dispose of highways is also subject to certain limitations. A municipality may only dispose of a closed or partially closed highway that provides access to a body of water, if one of two conditions is met. First, the municipality must be exchanging the property for other property that the council considers will provide public access to the same body of water that is of at least equal benefit to the public. Second, the proceeds of the disposition must be paid into a reserve fund, with the money from the reserve fund used to acquire property that the council considers will provide public access to the same body of water that is of at least equal benefit to the public.[13]

A further restriction is that an intermunicipal boundary highway may not be disposed of without the agreement of the applicable municipalities.[14]

IV. Land Exchanges

A land exchange is an ordinary disposition of land where the consideration for the disposition constitutes wholly or partly of real property. As a result, municipalities may dispose of land in exchange for other land, as long as they comply with the section 26 notice requirements applicable to dispositions of land or improvements generally. The only restrictions imposed by the *Charter* are with respect to land exchanges involving municipal dispositions of parks, of public squares or of highways that provide access to a body of water. In this regard, the land received in exchange by municipalities must be suitable to perform the same public functions as the land disposed of.

Specifically, section 27 of the *Charter* allows municipalities to dispose of municipal parks in exchange for other land suitable for a park or public square. Municipalities can only dispose of these parks by bylaw adopted with the approval of the electors (formerly known as the "counter-petition" process). The land received by the municipality is dedicated for the purpose of a park or public square and the title to it vests in the municipality. Any land given in exchange by the municipality is transferred free of any dedication to the public for the purpose of a park or a public square.

Pursuant to section 41, if a municipality closes a highway that provides access to a body of water, the municipality may exchange the highway for other property that the council considers will provide public access to the same body of water that is of at least equal benefit to the public.

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[13] *Charter*, s. 41(1).
[14] *Charter*, s. 37.

V. Parks

A. Park Ownership and Acquisition

There are several ways in which a municipality can become the owner of a park. For example, municipalities may acquire park land on an application for subdivision by an owner, or as payment of a development cost charge by an owner if permitted by the development cost charge bylaw.

Pursuant to section 941 of the *Local Government Act*, an owner of land being subdivided may provide park land of an amount and in a location acceptable to the local government. In this case, the land must be shown as park on the plan of subdivision, and title to the land vests in the municipality.

Pursuant to section 936 of the *Local Government Act*, an owner may provide payment for a development cost charge for park land in the form of land if the development cost charge bylaw allows for such an arrangement. In this case, the owner must provide a registrable transfer of the land to the local government, or the owner must deposit a plan of subdivision on which the land is shown as park in the land title office.

The *Charter* vests in municipalities, for park or public square purposes, all the lands in the municipalities that have been dedicated to the public as parks or public squares by a subdivision plan, explanatory plan or reference plan deposited in the land title office.[15] Title to these parks has been vested in municipalities since the enactment of Bill 14 in 2000. Prior to Bill 14, municipalities only had possession and control of such parks.

B. Park Dispositions

Pursuant to section 27 of the *Charter*, council may only dispose of the parks mentioned above in exchange for money or in exchange for other land. There are restrictions with respect to both options. With respect to the land sale, council may only dispose of such parks by bylaw adopted with the approval of the electors and provided that the proceeds of the disposal are to be credited to a park land acquisition reserve fund. With respect to the land exchange, council may only dispose of all or part of such parks in exchange for other land suitable for a park of public square. Such land taken in exchange by a municipality is dedicated for the purpose of a park or public square, and the title to it vests in the municipality.[16]

A transfer of land by a municipality under section 27 has effect free of any dedication to the public for the purpose of a park or a public square.[17]

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[15] *Charter*, s. 29.
[16] *Charter*, s. 27(3).
[17] *Charter*, s. 27(4).

VI. Conclusion

Summing up, the *Charter* introduced significant changes in relation to municipal dealings in property. As a result of the vesting of title to highways in municipalities, municipalities will likely be involved in more property transactions. The *Charter* having come into force only two years ago, the full meaning and effect of some of the new provisions may not be clear until the courts interpret them.