

Resort Development On First Nations Lands

I. Introduction

Some of the prime undeveloped parcels throughout British Columbia available for resort development are located on First Nations lands. This creates an unprecedented demand for development on First Nations lands. First Nations lands present some additional considerations for resort development. The development requirements and actual procedures can differ considerably from First Nation to First Nation.

The lands of some First Nations are still managed entirely through the Department of Indian & Northern Affairs Canada ("INAC"), some First Nations have Section 53/60 powers under the *Indian Act* which give them the ability to manage their own lands as agent for INAC, and other First Nations have their own Land Codes or Constitutions under the *First Nations Land Management Act* which set up their own land management regimes.

This increases the complexity of dealing on First Nations lands and there are some disadvantages, such as dealing with leasehold interests and the delays that can come through dealing with government departments and INAC and Department of Justice. However, there are also the advantages of a potentially reduced development approval bureaucracy, savings of Property Transfer Tax and, in some cases, greatly reduced or no development cost charges.

II. Due Diligence for First Nations Lands

The interest in land available to a developer of First Nations lands is a long term lease. First Nations cannot sell or transfer a fee simple interest in First Nations lands for development. Due diligence required on First Nations lands for resort development will vary depending on whether the lands are held by the First Nation for the use and benefit of its peoples or whether they have been allocated to a First Nation member pursuant to a Certificate of Possession.

For those First Nations without land management powers, an interest in First Nations lands is acquired by way of a lease from Her Majesty represented by INAC.

For First Nations having their own Constitution, an interest in First Nations lands is acquired directly from the First Nation, in the case of designated lands, or from the locatee, the First Nation member holding the Certificate of Possession, in cases where lands have been allotted.

Typically, the terms of the Head Lease will be 49 or 99 years. For marketability and financeability purposes, a 99 year lease is a more attractive vehicle. Generally, leases in excess of 99 years are not available as they are considered to be an alienation of the First Nation's interest in First Nations land, which is not permitted under either the *Indian Act* or under the First Nations' Constitutions.

A. Indian Land Registry

For an excellent overview of the operations of the Indian Lands Registry, please refer to the paper prepared for an April, 2000 CLE Course on *Indian Act* Conveyancing by Josee Guest, the Registrar of the Indian Land Registry.

All First Nations lands are registered in the Indian Lands Registry in Ottawa. In a very small number of cases, some projects were also registered in the provincial Land Title System in the 1970s (Tsawwassen, Musqueam and Westbank). In the past three decades or so the provincial government was not registering any new interests in First Nations lands in the Land Title System. However, Part 24 of the *Land Title Act* contemplates the process required and some First Nations are now working on the required federal and First Nation legislation required to have interests in First Nations lands registered in the provincial system.

A review of the Parcel Abstract Report and registered charges for the target parcel, together with any parent parcels from which it was created, will be required in any due diligence. The Indian Lands Registry is now online and can be accessed at <http://pse3-esd3.ainc-inac.gc.ca/ILRS/>.

B. Due Diligence on Designated Lands

Lands held by a First Nation for the use and benefit of the First Nation must be designated for leasing purposes under Sections 37 to 41 of the *Indian Act* by a First Nation vote prior to being leased to a Non-First Nation member.

1. Review of Designation

Part of the due diligence relating to designated lands will be to review the designation itself to be satisfied that the designation permits the leasehold interest being granted, the area leased and the uses contemplated, and that it was carried out in compliance with the *Indian Act*.

2. Review of Head Lease

The next step in due diligence for designated lands will be a review of the head lease or a negotiation of the head lease to confirm the term, that the use contemplates all possible uses required for the development, including alternate uses in the event the project changes over the 99 year term and the following:

(a) Rent Provisions

The rent provisions, which can either be fully prepaid at the time the Lease is registered or could be paid in part at the time each sublease is registered. Leases which have rent amounts which are adjusted every five years to their current market value are generally not acceptable for resort projects due to problems with financeability and marketability.

(b) Mortgages

The lease must permit mortgaging and must provide for notice to lenders, opportunities to cure and must permit assignment on realization.

(c) New Lease

The lease should provide that in the event of a termination as a result of insolvency or change of control of the tenant that the landlord will enter into a new lease with the owner association, with the mortgagee or directly with the subtenants.

(d) Development Approvals

The lease should provide what forms of development approval will be required.

In the case of locatee leases which are fully prepaid at the beginning, you may not wish the locatee to have significant control over the development on the lands and may wish instead to rely on the development approval process of the First Nation in cases where the First Nation has its own development processes.

In cases where the First Nation does not yet have its own development approval processes, it will generally be INAC which is providing the approvals to the development plans.

(e) Landlord's Consent

The form of landlord's consent to assignments or mortgage should be in the form acceptable to lenders and potential assignees.

(f) Defaults

If dealing with an existing lease the developer will want to satisfy itself that there have been no defaults. For the purposes of this inquiry the party representing the landlord may be INAC, the First Nation, or, where the lease is granted directly by a locatee pursuant to a First Nation Constitution, the locatee.

3. Services

A review of the services available to the parcel is required. Some developed First Nations now require payment of DCCs, while others would require the developer to install the services to the lands, but do not have any further contributions to the First Nations services generally.

4. Access

Access will need to be confirmed. Is there a frontage on a public road, is an access permit required from the First Nation and is a provincial highways access permit required?

5. Zoning

Some First Nations have zoning bylaws in place, while for others, the use is determined entirely by the provisions of the lease and any development agreement between the First Nation and the developer.

6. Taxes

Certain First Nations have their own taxation authority and the developer will want to review the First Nation's taxation bylaws and satisfy itself that taxes are levied in a manner consistent with neighboring municipalities or regional districts.

7. Environmental Assessment

An environmental assessment will be required prior to commencement of the lease to establish a base line under the *Canadian Environmental Assessment Act*.

8. Archeological Assessment

An archeological assessment may be required in order to determine whether there are any heritage sites on the development parcel which may need to be preserved.

9. Park Dedications or DCCs

Because the *Local Government Act* does not apply on First Nations lands, the provisions relating to park dedications are not applicable, however the First Nation may request a contribution for park purposes. First Nations which are under the management of INAC will generally not be requesting park dedications.

C. Due Diligence on Locatee Lands

To determine that the lands have been properly allocated to the locatee, you will wish to review both the Certificate of Possession and the Band Council Resolution ("BCR") granting the interest to the First Nation member, together with a Parcel Abstract Report from the Indian Land Registry.

The other due diligence provisions will be as set out above for designated lands.

III. Structuring the Lease

A. Term

As noted above, the typical terms are 49 years or 99 years. The most marketable leases are those for which the rents have been completely prepaid for the entire 99 year term.

B. Rent

If because of the financing considerations or the scale of the project, it is not feasible to prepay the entire rent at the time of registration of the lease, provisions can be made to pay a portion of the rent at the time of registration and other portions over time as each sublease interest is registered. If the delayed payment plan is chosen, you will need to structure a safety net so that in the event the development is only partially completed and the developer defaults under the head lease, the head lease can be assigned to an owner association consisting of the owners of all the fully prepaid subleases which had been registered to date.

C. Resort Development

In a resort development, the head lease may contemplate that there will be more than one head lease so that the large resort's common facilities such as the golf course would be on a separate head lease for financing and assignability purposes. In such a case, where the portion to be divided off is being developed, the head lease is modified to exclude the development portion and a new head lease entered into for that specific portion, having the uses and terms and held by the party appropriate for that purpose. A series of head leases each commencing consequently could also be considered if land will be developed in stages over time.

D. Use

The use description in the lease can be extremely important if the First Nation does not have zoning bylaws. In such a case, the use will essentially be the permitted zoning and will dictate into the future, subject to lease modifications, the uses to which the lands can be put. Given the length of the term, a good deal of flexibility should be built into the uses description to ensure that the project does not become redundant part way into the term.

E. Consents

In order to reduce the time frame for granting subleases and having the subleases mortgaged, you may wish to provide that subleases do not require the consent of the head landlord and that mortgages of subleases do not require such consent.

F. Owner Association

If the lease is for residential units, the lease may provide for an owner association to act in the role of strata corporation and to be the entity that can take an assignment of the head lease in the event of a default by the developer. The owner association is generally a society, of which one representative of each subtenant is a member. The bylaws of the society can deal with common property issues and other issues applicable to the subtenants. As noted above, the owner association can form a type of strata corporation to deal with common property or common facility issues and eventually can take an assignment of the residual head lease once all subleases have been granted, if the developer does not wish to be involved in ongoing management of the project. In cases where the developer will be involved in ongoing management, for instance, where rental management contracts may be contemplated, the owner association may be a mechanism for collecting costs and setting rules.

IV. Dealing with Different First Nations

A. First Nations with Land Codes or Constitutions

First Nations which have proceeded under the *First Nations Lands Management Act* to create their own Land Code or subsequently even a Constitution, each have their own unique rules which set out how land interests are created, registered and can be assigned. A review of the applicable Land Code or Constitution will be required in order to undertake development work on lands of a First Nation which have instituted such documents.

A lease directly from the First Nation will not require a designation vote, but will require whatever First Nation approval processes are set out in the Land Code or Constitution.

A lease from a locatee, may not require an appraisal unless that is agreed upon between the parties, although it is a standard requirement for a lease where INAC is a party.

B. First Nations with Land Management Powers

In the cases of First Nations which have not yet moved to a Land Code or Constitution, but have their own land management powers under Sections 53 and 60 of the *Indian Act*, dealings will be generally with the First Nation and their council directly, with very little input from INAC, unless a designation is required, in which INAC will be involved. In that case, the form of lease will be as agreed between the First Nation and the developer, although because the First Nation is still acting as agent for INAC there will be certain constraints. All leases made either with a locatee or a First Nation having 53/60 powers will require both an appraisal and an environmental assessment as part of the application process.

C. First Nations without Section 53/60 Powers

For First Nations which do not yet have Section 53/60 powers, initial dealings will be with the First Nation's representative or locatee who has the rights to the land, at which point the "deal" will be made. However, the deals are always subject to approval by INAC, which can refuse to consent in its role as protector of the First Nation or locatee. In these cases, you may have worked out a business arrangement which is acceptable to both parties, but be required to change it to deal with concerns of INAC in the event they think the First Nation party is not being properly protected or remunerated. The form of lease in this case will be the form prepared by INAC subject to such provisions as can be negotiated. Neither the First Nation nor the locatee has authority to enter into leases directly in any case other than where the Land Code or Constitution so permits. In all other cases, leases require the consent of the Minister, and the landlord on the lease is shown as Her Majesty the Queen in Right of Canada.

V. Development Agreements

Dealing with development agreements with First Nations will vary from First Nation to First Nation. With highly developed First Nations, the development agreement will be more like a servicing agreement which sets out the DCCs and the various service issues applicable. The development process in such a case is much closer to that of a municipality.

For First Nations which do not yet have zoning and development approval processes, development and servicing agreements become very important to create certainty with how

development approvals will be issued and on what terms services will be available. Some of the issues that may be covered under development and servicing agreements include:

- (1) Zoning types of provisions such as density and specific uses can be dealt with under the terms of a development agreement. Uses of neighboring lands may be sought to be controlled as well, although this will only be possible if the neighboring lands are still held by the First Nation for its own benefit and if the First Nation is willing to constrain its future development plans in that manner.
- (2) A development approval process may be outlined to specify how applications for development, applications for subdivision, applications for building permits and issuance of occupancy permits are dealt with. For some First Nations, use of a registered professional is the best option as they do not yet have sufficient staff or administrative structures to permit them to give necessary approvals.
- (3) Conflicts between the terms of the development agreement and subsequent bylaws passed by the First Nation should be dealt with to provide that the development agreement will govern in the case of such conflicts.
- (4) The development agreement may deal with who is providing services, at whose cost and may deal with cost contributions for other services or with latecomer charges, similar to those under the *Local Government Act*, in the event that excess services are required of the developer for future First Nations development beyond the project.
- (5) Access issues should be dealt with, especially if any Section 28(2) Permits are required for access over lands belonging to the First Nation. Development agreements sometimes require the First Nation's assistance to ensure access in the event of a blockade either by the First Nation's members or members of other First Nations throughout the province.
- (6) If an archeological survey will be required, the costs and the extent of the archeological survey may be covered in the development agreement.
- (7) For property taxes, if the First Nation has the ability to levy its own taxes, it is possible to agree that the assessments will be done in a manner consistent with the BC Assessment Authority and that the mill rates will be comparable to mill rates in neighboring municipalities or regional districts.
- (8) Some development agreements require employment provisions for the benefit of the First Nation. As lands are a big part of the assets of the First Nation, and as employment is a big issue for many First Nations a developer will often be asked to either create jobs for the benefit of First Nation's members, give priority to First Nation's members in jobs available or in other ways create employment.
- (9) Dispute resolution mechanisms, other than the Federal Court which is what will be required if you are dealing with the old style of First Nations lease prepared by INAC, can include mediation and arbitration which is much more amenable to the First Nations' method carrying on business.

In cases where the First Nation does not have Section 53/60 powers, you may not be able to enter into a development agreement if all of the leasing matters are still under INAC.

VI. Financing Issues

In addition to all the due diligence mentioned above, further review of lease provisions and requirements for non-disturbance agreements will be applicable in taking a mortgage of leasehold interest, which is common form of security available for projects on First Nations lands.

There is still an issue among some within the legal community as to the effectiveness of security on locatee lands. Section 89(1) states:

Subject to this Act the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour of or at the instance of any person other than an Indian or a band.

Section 89(1.1) goes on to state:

Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Some lawyers take the position that Section 89(1.1) only permits realization of security on leasehold interest in designated lands, whether held by an Indian or a Non-Indian. Given that Section 89(1) does not apply to an interest in reserve lands held by a Non-Indian, to interpret Section 89(1.1), which is prefaced with "Notwithstanding subsection (1)" as applying to Non-Indian interest in reserve land, is not, in my opinion that legislative intent. However, because of the disagreement with respect to the effectiveness of mortgage security against leasehold interest on locatee lands, some institutions are still reluctant to entertain financing proposals where a leasehold interest in locatee lands is offered as security. However, title insurance is a new option available and has been used on locatee lands in the Westbank First Nation. The form of the Lease is, of course, all important and communication with the title insurer as to their requirements will be in order if you wish to pursue this avenue.

If the project involves financing for residential users, CMHC will be required as most chartered banks require CMHC insurance for any First Nations lending on subleases. It is of the utmost importance, that CMHC be involved in the leased drafting processes as early as possible in order that their input can be obtained with respect to the form of head lease prior to its finalization. In addition to the requirement that the rent be prepaid or that a safety net such as an owner association be set up, the lease will need to provide for the ability to get notice of and cure defaults, to ensure that covenants regarding bankruptcy and insolvency of the tenant or other incurable defaults do not result in termination of the subleasee's and lender's rights, requirements for application of insurance proceeds acceptable to the lender, and requirements for assignability of the head lease in the event of realization. CMHC also requires that if CMHC is realizing on its security it will not be required to cure in order to realize and a provision that insurance proceeds will not be required to be applied to rebuild the project if the CMHC mortgage is in place, but maybe used to repay the CMHC mortgage.

Even though the lease may make provisions for notice and rights to cure for lenders, the lender may also wish to have a non-disturbance agreement directly with the landlord to create privity of

contract for enforcement of those provisions. The availability of a non-disturbance agreement will depend on whether the landlord is INAC, or an individual locatee or First Nation directly. Financing for First Nations members is still curtailed both under the *Indian Act* and under any Land Codes and Constitutions by the restriction on execution against interests of an Indian in reserve lands. To overcome this hurdle, many locatees will incorporate a company to hold a leasehold interest in their land which can then grant a mortgage to a lender.

This information applies as a general rule but may change depending upon the specific circumstances of your own situation. You should consult a lawyer before acting on any of this information.

If you have any questions, please do not hesitate to contact us:

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