

Basic Consideration and Risks with Development Agreements – No Right or Wrong Approach

Manitoba Bar Association Mid-Winter Real Property Section

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What is a Development Agreement?

- A development agreement is a legal document generally between a municipality and owner/developer of land which sets out the responsibilities of each party as to a particular development.
- Development agreements are normally associated with subdivisions. However, they are also part of a zoning amendment, a variance, a conditional use and in livestock operations.
- Most common development agreements relate to residential development, and while there is not a standard template agreement – there is much standardization.

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- In addition, there are development agreements that also deal with commercial or industrial developments, except those developments are more specialized in nature.
- Why needed? Aim for a development agreement is to clearly identify the responsibilities of each party and to ensure that the proposed development is compatible with surrounding land uses, a benefit to the community and generally consistent with the intent of the applicable development plan.

The Planning Act (Manitoba) – the Authority

- The Act allows a board, council or planning commission to require a development agreement as a condition of amending a zoning by-law, making a variance order, approving a conditional use, or in a subdivision approval.
- Authority to require an owner of an affected property & any contiguous land owned or leased by the owner to enter into a development agreement are found at Sections 12.13, 81, 98(1)(b), 106(2)(b), 107(1)(c), 116(2)(d) & 135 of the Act. Matters that may be dealt with in a development agreement are set forth at Section 150 of the Act.

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- Section 81 allows a board or council to require the owner of an affected property to enter into a development agreement, as a condition of amending a zoning by-law. Aim being that costs associated with a specific development proposal are not to fall disproportionately on the municipality.
- Such development agreements generally deal with the use of land or buildings, the timing of construction, the location and design of the building, traffic considerations, parking control, landscaping, the construction of roads, sewage, water etc. (or money in lieu of) and in certain instances the dedication of land.

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- When dealing with conditional use of land/variance - Sections 98(1)(b) and 106(2)(b) of the Act allows a planning district or municipality to require the owner of the property to enter into a development agreement.
- The development agreement in such cases deals with matters related to servicing requirements, the payment of money to connect onto municipal services and compliance with municipal specifications.

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- Section 107(1)(c) dealing with small livestock operations provides that an owner of an affected property enter into a development agreement dealing with the affected property and any contiguous land owned or leased by the owner on those matters identified in the subsection.
- Similarly, Section 116(2)(d) dealing with large-scale livestock operations grants authority for entering into development agreements.
- Section 135 dealing with subdivision approvals provides as a condition of approval that the applicant enter into a development agreement as required by council.



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- Development agreements with subdivision of land usually set out specifications and requirements dealing with water mains, storm and sanitary sewers, drainage, street lighting, roadway requirements and lot grading.
- In addition, the development agreement with subdivision can deal with the dedication of land for roadways, municipal service systems and undevelopable building areas.

Section 150 of the Act

- The authority for what a development agreement can deal with is set out at Section 150 of the Act, which provides that a development agreement may deal with one or more of the following matters:
 - the use of the land and any existing or proposed building;
 - the timing of construction of any proposed building;
 - the siting and design, including exterior materials, of any proposed building;
 - the provision of parking;
 - landscaping, the provision of open space or the grading of land and fencing;
 - the construction or maintenance, at the owner's expenses (including part) of works, including but not limited to sewer and water, waste removal, drainage, public roads, connecting streets, street lighting, sidewalks, traffic control, access and connections to existing services;

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- the payment of a sum of money to the planning district or municipality in lieu of the above items to be used for any of those purposes;
- the dedication of land or payment of money in lieu of land, where the application is for an amendment to a zoning by-law to permit a residential use, use for a mobile home park or an increase in residential density.

Section 151 of the Act

- A development agreement may provide that it runs with the land. When a caveat with a copy of the development agreement is filed in the appropriate land titles office, the development agreement binds the owner of the land affected by it, and the owner's heirs, executors, administrators, successors and assigns (Section 151(1)).
- Note: A development agreement can be entered into before an order, approval or amendment to a by-law is made, but the development agreement is not binding until the amendment has passed or the order or approval has been made (Section 151(2)).

General Considerations when approaching a DA

- There is no right way in approaching a development agreement. However, from a municipality's perspective in addressing what is in its best interests and those of its residents and the criteria set forth in the Act, there are some common considerations.
- Remember, as municipality you are looking to set forth in a clear and concise manner the obligations that bind the owner/developer, and minimize the municipality's risks. What are the benefits to the agreement that run to the municipality?

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- The benefit to the owner/developer is that provided there is compliance with all of the covenants set out in the development agreement, both affirmative and restrictive, the owner/developer may then continue with the land use.
- To the greatest extent possible, the owner/developer should bear the costs and risks of the proposed development. Reason being is that the municipality does not share in the ultimate profits – those profits rest with the owner/developer.



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- The residents/ratepayers of the municipality ought not be contributing to the owner/developer's costs, risks, burden or bottom line.
- There may be limited situations, having considered the best interests of the municipality, where council decides that a development/project has a clear benefit to the municipality. Municipalities general exercise caution in this area.

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- Proper security to guarantee the owner/developer's obligations. Such proper security is aimed at ensuring that if something goes wrong, the municipality can attend to the work getting done without using municipal funds and/or commencing litigation against the developer.
- Typically, the development agreement will require a letter of credit in favour of the municipality on behalf of the owner/developer through a bank or credit union. Amount is generally based on the costs of the services to be constructed and the developer meeting its obligations.
- Other security (not necessarily as favourable to a municipality include performance bonds, collateral mortgages etc.

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- Development agreement must be clear to the developer, and council, and organized logically and easy for municipal staff to administer.
- Aiming for a complete development agreement – try not to defer issues to a later date. For example, work standards, plans, drawings and specifications should be confirmed and included in the development agreement (typically found as Schedules). If same cannot be finalized before the signing of the development agreement, include a mechanism for addressing and approving such plans in the future.

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- The development agreement should set out clear approval, inspection, certification and other procedures. The municipal engineer (whether internal or external) ought to be the person to determine when work by the developer and its trades is complete, and complies with the agreed upon standards in the DA.
- Depending on the nature of the development, questions to be considered include: who within the municipality is negotiating with the developer; are you dealing with a sophisticated developer; are lawyers involved; any overture of a threat against the municipality?
- Access to other signed development agreements.

Specific Considerations in a DA

- What municipal services are to form part of the development: water, sewer, storm sewer, drainage, roads, sidewalks, trails, street signage, street lighting. Remember, once completed by the owner/developer, the municipality takes over and responsible for O & M, and replacement, etc.
- Location of Services.
- Standards, plans, specifications – input from engineers.
- Timing of construction & inspection thereof by municipal engineer.
- Other works – where constructed & future role of municipality.
- Utilities.

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- Overseeing the development by the municipality:
 - consider what needs to take place before the owner/developer commences construction – certificate, ie. signing of the development agreement, does signing require resolution of council, registration of plan of subdivision, approval of plans, required easements, placement of letter of credit, insurance, and payments to be made under the development agreement;
 - any phases to the development;
 - timing of completions;
 - developer to notify of completion & municipal engineer inspection;
 - completion certificate;
 - maintenance and warranty period;

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- Unique areas to keep in mind: drainage plans and lot grading.
- Increased maintenance requirements and costs during the development – and owner/developers role and guarantee.
- Payments to be made by owner/developer (costs, capital levies, development charges). Development charges are fees collected by the municipality to offset the costs of infrastructure needed to serve an expansion, new development, redevelopment or an intensification of use of a property.



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- The fees are used to fund the construction of off-site public services (infrastructure) made necessary by development. The Act permits for such collection of development fees. In addition, council may also via By-law set the levies to be paid by owner/developer to compensate the municipality for the capital costs that may be incurred by the subdivision of land.
- Developer's Letter of Credit or alternatives.
- Insurance and Indemnity.



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- Default and enforcement and options that may be available to the municipality.
- Dispute resolution mechanism, and considerations in the nature of any clause that is drafted.
- Miscellaneous items: such as oversizing outside the development; buffer or grudge strips.

Some Insightful Cases - Litigation

- *Jacques et al. v. Alexander (Local Government District) et al.*, 1996 CanLII 17952 (MB QB)
- *Lac du Bonnet (Rural Municipality) v. Lee River Estates Ltd.*, 1999 CanLII 14224 (MB QB)
- *114957 Canada v. Hudson (Ville)* (2001), [2001 SCC 40 \(CanLII\)](#)
- *St. Clements Ratepayers Association Inc. v. St. Clements (Rural Municipality)*, 2001 MBQB 232
- *4500911 Manitoba Ltd. v. Stuartburn (Rural Municipality)* [2002] M.J. No. 417
- *Grenier v. Piney (Rural Municipality)* [2003] M.J. No. 112
- *St. Andrews (Rural Municipality) v. Penner*, 2003 MBQB 163 (CanLII)
- *Rowe v. R.M. of De Salaberry*, 2005 MBQB 112 (CanLII)
- *Nicol v. The Rural Municipality of Daly*, 2008 MBQB 174 (CanLII)
- *Samborski Garden Supplies Ltd. v. MacDonald*, 2015 MBCA 26 (CanLII)
- *6901124 Manitoba Ltd. et al. v. RM of Rosser et al.*, 2017 MBQB 58 (CanLII)

Closing

Very high level overview of key provisions in the Act;

Basic considerations and risks on both sides of the equation – and depending upon whom you are acting for;

Questions.

The End.