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## Development permits – possibilities and limitations

*Development permits are powerful development control instruments for a local government to use, but they do have limitations.*

If an Official Community Plan designates development permit areas, then unless an exemption under section 919.1(4) of the *Local Government Act* applies, an owner must obtain a development permit under section 920 before undertaking certain activities on their land. In some circumstances, a DP is required before land or a building can be altered. A DP is always required before construction of a building is started. What is often forgotten is that a DP is also required before land in a development permit area can be subdivided. If a DP application is not needed at this step in the development process, the OCP or the zoning bylaw should provide an exception from the DP requirement for subdivision.

Although a DP may vary or supplement a bylaw under Division 7 or 11 of Part 26, a DP cannot vary the use or density of the land from that permitted in the zoning bylaw (except in relation to hazard lands). This means that a DP could, for example, vary a subdivision servicing bylaw and allow a developer to install one lift of paving even though the bylaw requires two. However, the DP could not allow a parcel to be used for 200 housing units if the zoning bylaw limited density to 150 housing units.

The local government may, within the DP, impose conditions on the sequence and timing

of the construction. Depending on the purpose of the DP area designation, the local government may also, within the DP, impose requirements and conditions and set standards for the development. However, that power must be exercised in accordance with guidelines specified in the zoning bylaw or OCP. Many basic development parameters such as the siting and height of buildings and the protection of “no-build” areas, that local governments frequently rely on s. 219 covenants to ensure, can readily be incorporated into development permits – which are in many ways a more reliable form of control.

As well, that power is limited by subsections (7) to (10.2) of section 920. For example, if the land was designated under section 919.1(f) – establishment of objectives for the form and character of commercial, industrial or multi-family residential development – then the DP may not include requirements as to the particulars of landscaping, the particulars of exterior building design, or the particulars of building finishes. The use of development permit conditions in relation to land that is subject to a phased development agreement is also limited by s. 905.1(7) of the *Local Government Act*.

It is important to remember that Council may not, within a DP, impose off-site requirements. In *Imperial Oil Ltd. v. McAfee*, the B.C. Court

of Appeal in 2005 considered the appeal of DP conditions by Imperial Oil against the City of Vancouver's Co-Directors of Planning. Imperial had previously operated a service station on the site and in 1986 a substantial gasoline spill occurred that, despite remediation, spread to adjacent property. In 2000 Imperial Oil decommissioned the site and applied for a DP for construction of a new gas station. The City refused to issue the DP unless Imperial Oil agreed to a remediation program. The Court held that under the *Vancouver Charter*, the City had no power to impose conditions within a DP related to off-site contamination. Similarly, in *Rogers Wireless Inc. v. Bighorn (Municipal District No. 8)*, the Alberta Court of Appeal held in 2006 that conditions in a DP must relate to the development under consideration, and that the power to impose conditions does not extend to regulating other developments, even if they are owned by the same ap-

plicant. Local governments should avoid using the resolution setting DP conditions as an "all-in" statement of its requirements for the development, including security requirements, arising under the works and services bylaw, related amenity zoning provisions and DP guidelines; rather, separate resolutions should be used for requirements arising under separate regulatory schemes.

In every case, before the local government proposes to issue a DP with conditions, requirements or standards, section 920 should be reviewed to confirm all the proposed requirements are authorized. A developer and subsequent owners of the land would not be legally bound to comply with unauthorized requirements, even though notice of the permit has been filed in the Land Title Office. It may even be that a court would invalidate the entire DP, depending on the extent of the unauthorized requirements or the degree of their connection to otherwise authorized requirements.

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It is not possible for a local government to delay imposition of a DP condition (such as provision of security) until building permit or any later stage. A court may well interpret that attempt as a waiver by the local government of the DP condition. Furthermore, the law is clear that a building permit must be issued if the requirements of the Building Bylaw, Building Code and other applicable enactments are met.

Of course, a DP would not be valid, nor would any amendment to the DP, unless the DP or the amendment was issued by Council or the Board, or by a person to whom Council or the Board had lawfully delegated the power to issue DPs. As well, in order for the subsequent owners to be legally bound by the DP, or any amendment of it, it is essential that the local government file a notice of the DP in the Land Title Office, as required by section 927. Only once the notice is filed does the DP become

binding on future owners.

Although DPs are not agreements or contracts, they need the same degree of certainty. For example, unless a building is constructed with a relatively flat roof, a local government might not be able to enforce a DP against an owner if the requirement in the DP was that "the roof be sloped to the greatest extent possible to prevent excessive snow loads". Most local governments find it useful to incorporate into the terms of a permit, references to particular site plans and building drawings that illustrate building siting, height, parking arrangements and landscaping features, authorized signage, and the form and character of the buildings.

Another potential source of uncertainty is the issuance of several DPs for the same property, but with conflicting standards. For example, a 1978 DP may require "siting of the building at least 10 feet from the creek", but a 2008 DP may require siting "at least 30 feet from the creek"; the later permit would not necessarily be interpreted to overrule the earlier permit. When issuing a DP, it is important that the local government review the title to the land and its own records of current DPs, and that inapplicable DPs be cancelled and notice of cancellation be filed in the Land Title Office. In order for a DP to be cancelled, the Council or the Board should pass a resolution, since section 920 does not allow a local government to delegate the power to cancel DPs.

As mentioned, even though a DP may be signed by the owner, the DP is not an agreement or contract. This means a DP cannot be used to amend a covenant or other agreement or contract, nor can it be used to vary a requirement within an agreement or contract.

Finally, section 925 of the *Local Government Act* addresses the subject of security required for a DP. If a local government considers that:

- a condition in a permit respect landscaping

has not been satisfied, or

- an unsafe condition or damage to the natural environment has resulted as a consequence of contravention of a condition in a permit;

then the local government may undertake work at the expense of the permit holder and apply security; thus the authority to require security may be exercised only where such circumstances might arise – clearly, only in circumstances where the DP is being issued in a "natural environment" or "hazardous conditions" DP area or where a permit includes landscaping conditions. The reference to "local government" means the Council or the Board, acting by resolution, and any duly designated delegate of the Council or Board.

The security must be in the amount stated in the permit, and must be in the form of an irrevocable letter of credit or other form satisfactory to the local government. Again, the reference to "local government" means the Council or the Board, acting by resolution. Although there is a discretion for the local government to accept a form of security other than a letter of credit, what is accepted must be some form of security - that is, an instrument that can be converted to cash. A *Land Title Act* section 219 covenant is not a form of security. Section 925 also addresses interest on the security and possible return of the security. The terms of a DP must not contradict section 925 in these respects.

Since the DP is such a powerful instrument, local governments will want to ensure their DPs are enforceable and in particular that they are clear, certain and contain only authorized terms.

Patricia Kendall

