

FIRST NATION LEASEHOLD INTERESTS

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BCREA'S COMMUNITY OF PRACTICE

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FIRST NATION LEASES

1. INTRODUCTION
2. DIFFERENT LEGAL REGIMES
3. UNDERSTANDING LEASES
4. LEASING PROCESS

1. INTRODUCTION

- Reserve land development and conveyancing represents much of our practice
- Our main office is located on the Westbank First Nation (“WFN”) Indian reserve
- Been involved in dozens of residential and commercial reserve developments throughout BC including manufactured home parks, golf course developments, shopping centers, single family, apartments, townhouses, industrial, seniors facilities, wineries, vineyards, etc.

2. LEGAL REGIMES

A. INDIAN ACT

- Approximately 630 First Nations in Canada, about 200 in BC
- Most bands in Canada are administered by Indigenous Services Canada (“ISC”) in accordance with the *Indian Act*
- Land management and development must go through ISC out of Vancouver
- Very, very cumbersome process where it can take years to get a proper Lease and development
- Conveyancing and registration is through the Indian Land Registry and can take several months
- Examples: Penticton, Osoyoos

B. LAND CODE UNDER THE FRAMEWORK AGREEMENT

- *First Nations Land Management Act* (“FNLMA”) enacted in 1999 allows First Nations to develop a land code
- Allows the Nation to manage and develop their lands independently from ISC
- About 100 operational land code Bands in Canada (41 in BC) and many in development
- Registrations are through the First Nations Land Registry and usually much quicker
- Examples: Tzeachten, Tslieil-Waututh, Musqueam, Tsawout

C. SELF-GOVERNMENT

- A handful of Bands (22 in Canada as of 2015, 5 in B.C.) have achieved a form of Self-Government (usually through Treaty)
- Self-government is the ability of a First Nation to govern itself (not just land matters)
- Usually includes the ability to manage its own land and resources at the local level
- Very quick registrations
- Examples: Westbank First Nation, Tsawwassen

3. UNDERSTANDING LEASES

- Reserve lands are generally held in the name of His Majesty The King (the “Crown”) for the benefit of the particular First Nation
- Generally no concept of “Fee Simple” or “Freehold”, most Reserve lands are not registered in any Provincial Land Title Office
- Generally there are 2 types of interests:
 1. Community lands which are general band lands not allotted to a specific Member
 2. CP or Certificate of Possession lands being lands where individual band Members have been allotted rights of possession (“Locatee Lands”)

- Generally, First Nations are prevented from freely dealing with their lands because of the Indian Act
- An allotment can only be transferred to the band or another band Member
- So generally the way a non-native obtains a development interest on reserve is through Lease

4. LEASING PROCESS ON RESERVE LANDS

- Process of a developer getting a leasehold interest is different depending on whether its an Indian Act or Land Code/ Self Governed Bands
- Can take years to get a lease on an Indian Act Band
 - Landlord is the Crown
 - Lease is formatted and dictated by ISC
 - Lease term limited to 99 years
- For Land Code/Self Governed bands Landlord is usually the Band or the individual landholder
 - Free to craft own form of lease

- Lease process begins by a developer entering into a long-term Lease with the Crown, the band or a band Member – a “Headlease”
- Most successful residential subdivisions on reserve have an underlying long-term prepaid Headlease granting the developer the rights to those lands for the term of the Lease
- The developer then, as Lessee, develops the lands, either commercially or residentially, then subleases the individual units (homes, apartments, townhouses, commercial units) to buyers (sublessees)
- Sublessee/buyer may then finance their purchase by way of mortgage of sublease

PRE-PAID LONG TERM LEASES

- The rent PRE-PAID up front is the most secure
 - all rent owing under the Headlease is fully paid so there can be no termination for failure to pay rent, or rent reviews
- Historically, a lot of Headleases on reserves (in manufactured home parks for example) where rent is not pre-paid
 - rents are a percentage of revenue and/or reviewed every 5 years
 - this model is no longer popular
- Most successful, secure residential leases are fully pre-paid for a 99-year term (125 in Westbank)

Thank You

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