

# **ACQUISITIONS - DISPOSITIONS - PRIVATE USE OF MUNICIPAL LAND**

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## **1. INTRODUCTION**

Everyone who works in the municipal field has heard the old adage “municipal corporations are creatures of statute”. This statement is still true today even though there have been major changes made in the Municipal Act, 2001 and the 2006 amendment. The difference however is in the approach. Before, one had to search for a specific authority. Now the powers are very broad and you need only check to determine whether there are some specific restrictions on their use.

While legislation is the key to defining municipal powers, there are many practical considerations when deciding how they are exercised. This paper will examine some of those considerations in the context of land transactions by Agreement of Purchase and Sale.

## **2. REFERENCES OLD ACT - NEW ACT**

For reference purposes the Municipal Act prior to 2001 will be referred to as the “Old Act” and the Municipal Act, 2001, including the significant amendments made in 2006, will be referred to as the “New Act”.

## **3. LAND SEVERANCES**

### **(a) Planning Act Restrictions**

When acquiring or disposing of land a person must ensure that the conveyance does not offend Section 50 of the Planning Act. This section prohibits the transfer of part of a parcel of land or an interest (such as an easement) in the part unless the conveyance falls within a list of exemptions or a consent to the transfer has been obtained from the appropriate authority. This subdivision control was first introduced in the 1960's and continues today to ensure orderly development of property.

### **(b) Exemptions**

Municipalities are one of those listed exemptions from subdivision control and they can therefore acquire part of a parcel of land or dispose of land while retaining abutting property without the need to obtain consents. This simplifies the conveyancing process but a cautionary note; municipalities should not use this privilege to circumvent the usual considerations, such as good planning, that come into play when property is being subdivided.

#### 4. **CONTRACTS 101**

In order to consider the procedures that a municipality might follow in acquiring or disposing of land by Agreement of Purchase and Sale it may be helpful to review some basic aspects of contract law.

##### (a) **Contract**

In order for a contract to exist there must be an offer and acceptance. When land is involved this could be an offer to buy from a purchaser (the offeror) and an acceptance by the vendor (the offeree). Alternatively, there could be an offer to sell by the vendor and an acceptance by the purchaser. In either situation acceptance must be communicated to the offeror.

##### (b) **Irrevocable Date**

Offers respecting land should contain an irrevocable date. This date prescribes the period of time during which the offer is open for acceptance. Therefore, if Smith Township offers to buy a property from Mr. X and the irrevocable date is 4:30 p.m. on April 30, 2009 then Mr. X has until that time to accept the offer. If he does not do so then the offer is revoked. It is also prudent to ensure that if an offer is accepted before the irrevocable date that the acceptance is communicated before the time expires.

##### (c) **Counter-Offer**

When an offer is made and the other party changes the offer it becomes a counter-offer. The legal effect of a counter-offer is that it is a rejection of the first offer and the counter-offer is then open for the original offeror to accept or reject. Every counter-offer should also have an irrevocable date.

(d) **Conditional Date**

Often Agreements of Purchase and Sale are subject to conditions. Generally, if any of these conditions are not satisfied or waived then the Agreement automatically becomes void. Conditions have a time period within which they must be either satisfied or waived. This time period expires on a specified conditional date.

(e) **Requisition Date**

The requisition date is the time period within which a purchaser may raise issues respecting the title to the property or off-title deficiencies such as zoning non-compliance or Building Code infractions.

(f) **Closing Date**

This is the date when the Agreement is to be completed and the Transfer and money exchanged.

All of the dates set out in an Agreement must be harmonized. For example, a conditional date should generally precede a requisition date and as offers go back and forth by counter-offers, these dates need to be changed.

**5. LAND ACQUISITIONS**

(a) **General**

There are numerous ways that municipalities can acquire lands. Some of those most frequently used are:

- (i) Agreements of Purchase and Sale;
- (ii) Expropriation;
- (iii) Vesting following unsuccessful tax sales;
- (iv) Through the Planning Act development process.

The process for land acquisition is often clearly set out in legislation; sometimes even including the price to be paid or the means of calculation of the price. That is not the case with Agreements of Purchase and Sale and this paper will therefore focus on some of the issues which present themselves when this method is used.

(b) **Authority**

The Old Act empowered municipalities to acquire land “required for the purposes of the corporation”. It was a compendium of numerous amendments made over many years without any rational organization into appropriate headings and subject matters. Corporate purposes were scattered throughout and one had to make a diligent search to find specific authority.

By contrast the New Act confers broad authority on a municipality. Part II sets out General Municipal Powers:

“to enable a municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues”.

A municipality is also given the capacity, rights, powers and privileges of a natural person for the purposes of exercising its authority. Sections 10 and 11 of the New Act set out matters which are within the jurisdiction of a single-tier municipality and spheres of jurisdiction for lower-tier and upper-tier municipalities. Interestingly, the new legislation does not refer specifically to the power to acquire land as the Old Act did. Instead, as a natural person would enjoy the power to acquire land then so also does a municipal corporation.

The New Act by conferring broad authority has not completely eliminated the need to identify a proper municipal purpose. However, it has certainly made it much easier.

(c) **The Purchase Process**

(i) **By-law** - Section 5 of the New Act requires a municipal power to be exercised by by-law unless the municipality is specifically authorized to do otherwise. This has always been a basic principle of municipal law, but it can make the negotiation process for land purchase or sale cumbersome as the municipality may be unable to respond quickly due to the necessity of Council approval.

The by-law should state the authority for acquiring a property. Usually there are recitals which refer to the general authority pursuant to sections 8 and 9 of the New Act with additional reference to one of the specific matters set out in section 10 for single-tier municipalities or a sphere of jurisdiction set out in section 11 for lower-tier and upper-tier municipalities.

- (ii) Land Value - When a municipality decides it is interested in acquiring a piece of land one of the first questions to be asked is “what is it worth?”. If a property is listed for sale with a real estate broker, a prospective purchaser will have some idea of what the vendor expects based on the listing price. However, in many cases a municipality may be interested in property that is not listed for sale. In either situation it is prudent to obtain some third party independent information about its “fair market value”.
- (iii) Appraisal - The fastest and least expensive place to look is the assessed value based on current value assessment. This is not particularly reliable as the information may be outdated and these assessments are, for the most part, made without any site inspections. By contrast, specific valuations can range from a full appraisal to letters of opinion and the difference in price can be from many thousands of dollars at one end to \$250.00 at the other.

Appraisals by a qualified appraiser can be broken down into several categories with different costs based upon the depth of analysis of the property and the number of comparables. An appraiser cannot give letters of opinion, but many realtors will do them. The quality of a letter of opinion will depend a lot upon the expertise of the realtor and the amount of background and research that is included. Appraisers are regulated and their valuations and reports must meet certain standards.

What should a municipality do? Obviously much will depend upon the importance of the property, its location, size and intended use. The key concern here is accountability for the expenditure of public funds.

- (iv) Meetings - Generally the acquisition process starts with a staff recommendation to Council or Council’s direction to staff. Any meetings to discuss a proposed or pending acquisition of land can take place in a closed meeting by following the procedure set out in section 239 of the New Act. This is particularly important during the negotiation process, but Council will ultimately have to pass a by-law in a meeting open to the public to authorize the transaction.
- (v) Negotiations - There are a number of different ways in which a municipality can negotiate an Agreement of Purchase and Sale. While not exhaustive, the following are some options:
  - (1) Council authorizes the acquisition of land at a specific price. Staff then submit an offer at that price. If the vendor makes a counter-offer then staff brings it back to Council. This could go back and forth several times and is demonstrably an inefficient way to finalize an Agreement. However, in smaller municipalities Council may want this level of control.

- (2) Council authorizes staff to negotiate an Agreement for a particular property and gives some parameters on price. This enables staff to negotiate directly with the vendor and the offer need not come back to Council unless it is for final approval within those parameters.
- (3) An offer to sell is received from a vendor with an irrevocable date sufficiently far into the future so that the offer can be presented to Council for acceptance. An offer to sell by a vendor could follow some preliminary negotiations with staff.
- (4) Staff can be empowered by Council to negotiate and in fact sign an Agreement conditional upon Council approval.
- (vi) Delegation - Pursuant to the delegation of powers and duties set out in Part II of the New Act it may be possible for a Council to delegate the authority to acquire land to an officer, employee or agent of the municipality. However, this is not likely to be a consideration in smaller municipalities where land is infrequently acquired. In addition, this new delegation authority is limited by section 23.2(4) of the New Act to matters "of a minor nature". This might include land acquisitions under a certain price or the purchase of easements. If delegation is being considered then Council must first adopt delegation policies pursuant to section 270 of the New Act.

(d) **Title Insurance**

In recent years title insurance has become a widely used alternative to a lawyer's opinion on the state of a property being purchased. The latter is based upon a number of searches that the lawyer would make to ensure that the client is obtaining good title to the property and that it is clear of any off-title defects such as zoning contraventions, building infractions or work orders.

With title insurance the purchaser pays a premium for a policy that will reimburse the purchaser for problems, or correct them, if they surface at a later date. For example, it covers deficiencies that would be identified by an up-to-date survey such as building or fence encroachments. The premium for title insurance starts at about \$250.00 and rises depending on the use and value of the property. It is only paid once and covers the buyer for the entire period of ownership. Title insurance does not apply to environmental contamination.

Should a municipality consider title insurance as an alternative to a lawyer's opinion when buying property? Generally speaking the answer would be no, although it may be considered as complementary. A municipality often buys property for a specific purpose which is different from its existing use and therefore it is important to know exactly what the size is, what the boundaries are and what limitations might be imposed on future use. The municipality does not want to rely on a claim under an insurance policy in these cases. However, title insurance still has the following additional benefits that could be considered:

- (i) fraud coverage;
- (ii) legal services coverage (i.e. errors in drafting the Agreement of Purchase and Sale, search response errors and errors in taking title);
- (iii) the availability (at an additional cost) of a future use endorsement; and
- (iv) the insured's direct claim against the title insurer as opposed to a claim against a lawyer who has errors and omissions insurance.

(e) **Toxic Real Estate**

- (i) Liability - Toxic real estate over the past few years has become a serious environmental problem and municipalities must take great care to avoid acquiring contaminated property or to at least know what the consequences will be of owning land containing hazardous substances. Under the Environmental Protection Act a landowner is exposed to liability for contaminated property even though that person did not cause or contribute to the contamination. In addition to clean up costs, there is also civil exposure if adjacent lands are affected by the contamination.
- (ii) Record of Site Condition - The Act prohibits the change of use of a property from industrial or commercial to residential, parkland, institutional or agricultural without the filing of a Record of Site Condition ("RSC") in the Environmental Site Registry maintained by the Ministry of Environment. The RSC is a document containing certain information about a property including its description, the type of property use existing and proposed; the remedial work carried out at the property and the levels of each contaminant remaining at the property. The RSC will include a certification from a "qualified person" that the property meets certain environmental standards for its intended use. In the event that there are contaminants that do not meet these standards then the qualified person must state that a Risk Assessment was prepared and accepted by the Ministry of

Environment and the property meets the standards set out in the Risk Assessment.

When the certification given in the RSC relies on a Risk Assessment the Ministry may issue a Certificate of Property Use which requires the property owner to take certain specified actions, such as monitoring and reporting, or to refrain from using the property for certain uses or construction activities.

All of these regulatory requirements can result in considerable costs to the municipality which may make a change to a future intended use prohibitive.

(iii) Steps to Protect - There are a number of ways in which a municipality can protect itself before acquiring land:

- (1) Require the vendor to file an RSC, without a Risk Assessment, certifying that the property can be used for its intended purpose. Alternatively, if the RSC is filed with a Risk Assessment then the municipality should have the option of deciding whether any conditions imposed by a Certificate of Property Use are acceptable. This would be a condition of completing the Agreement of Purchase and Sale.
- (2) Allow the municipality a “due diligence period” in the Agreement to inspect the property with a provision that if it is not satisfied with the results of any investigations the Agreement can be terminated.
- (3) Require full disclosure by the vendor of any information or reports which are in the vendor’s possession.
- (4) Require representations and warranties from the vendor.

(f) **Special Conditions**

Often an Agreement of Purchase and Sale will contain special conditions dealing with the intended use of the property by the municipality. Apart from any environmental concerns, there may be other constraints on the intended use such as zoning or the requirement of governmental approvals. Obtaining these approvals should be conditions to be satisfied prior to the completion of the transaction, or alternatively, the Agreement should at least give the municipality sufficient time to satisfy itself that it can obtain them, failing which it could be terminated.

## 6. **LAND DISPOSITIONS**

### (a) **General**

Municipalities may want to dispose of land to generate revenue or to implement policies which they have adopted dealing with such matters as affordable housing and economic development. The method of sale will differ depending upon the type of land being sold and the reason for sale. Some of the most common methods are as follows:

- (i) request for tenders;
- (ii) request for offers;
- (iii) listing with a real estate broker; and
- (iv) direct negotiation.

In all of these cases, some form of Agreement of Purchase and Sale is required.

### (b) **Authority**

Section 191 of the Old Act gave municipalities the specific power to sell or otherwise dispose of land when no longer required for the purposes of the corporation. The New Act contains no similar wording but does give a municipality the capacity, rights, powers and privileges of a natural person and states that municipal powers shall be interpreted so as to confer broad authority on a municipality to enable it to govern its affairs as it considers appropriate. Any ambiguities in the New Act regarding municipal authority are to be interpreted so as to include, rather than exclude, powers the municipality had under the Old Act, such as the power to dispose.

### (c) **Property Disposal By-laws**

Both the Old Act and the New Act (prior to the 2006 amendment), required every municipality to pass a by-law establishing procedures for the sale or other disposition of real property. At a minimum, and subject to a number of listed exemptions, the by-law had to contain three important pre-conditions of sale.

- (i) the property had to be declared surplus by by-law or resolution;
- (ii) at least one appraisal of the fair market value of the property had to be obtained;

(iii) notice of the proposed sale had to be given to the public.

(d) **Property Disposal Policy**

The amendments in 2006 eliminated the requirement of a property disposal by-law, but in its place section 270 now requires every municipality to adopt and maintain policies with respect to the sale and other disposition of land. In addition, a municipality must establish general policies setting out the circumstances in which notice to the public is to be given and the manner in which it will try to ensure that it is accountable to the public. As Councils can only act by by-law the adoption of any policy would require this legislative act and the result may not be that different than the previous regime. However there is now much more flexibility in establishing a policy than before. The New Act sets no minimum standards nor specific exemptions and it is now open for the municipality to simplify the disposition process. For example, previously the transfer of an easement required surplusing, notice and in some cases an appraisal. Now a sale policy could exempt easements or at least make the process less onerous and expensive.

Despite section 270 some municipalities have not established a policy for land disposition and continue to operate under their old property disposal by-laws. It can be argued that these old by-laws are now the “policy” that has been adopted. However, municipalities should take advantage of the opportunity to streamline procedures so that dispositions can be more timely and cost effective.

(e) **The Sale Process**

The process for the sale of municipal property will be guided by the policies that Council establishes under section 270 of the New Act. While a sale policy is mandatory there is no reason why Council could not also establish policies for land acquisition.

(i) By-law - Similar to land acquisition, a by-law is required to authorize a sale, but Council’s discussion regarding the negotiation of an Agreement can take place in a meeting closed to the public pursuant to section 239 of the New Act.

(ii) Tendering - A request for tenders is the most structured process for disposing of property and it has both advantages and disadvantages. On the one hand it is competitive, transparent and fair, but on the other it is also the process most often litigated. Strict compliance is required and not infrequently disputes arise between competing tenderers or between a tenderer and the municipality. Great care must be taken by municipal staff to ensure that whatever rules the municipality establishes are precisely followed.

- (iii) Negotiations - Sales through a real estate agent or by direct negotiation, and to some extent also a request for offers, are much less structured and many of the same procedural considerations will come into play here that were discussed earlier under Land Acquisitions. [see Section 5(c)]

(f) **Environmental Concerns**

When municipalities are disposing of land they must take steps to limit their exposure to potential liability for environmental contamination which may exist whether or not the municipality caused or contributed to such contamination.

- (i) Disclosure - The courts have generally taken the view that a vendor of property has an obligation to disclose any knowledge of environmental contamination which a purchaser could not reasonably detect by actual inspection. Complete honesty relating to known or suspected environmental problems and to any actual or potential claims is the recommended course of action.
- (ii) Representations and Warranties - Purchasers will often require representations and warranties from a vendor regarding the state of a property and the municipality, as a corporate owner, should be careful in making any unqualified statements. A municipal government consists of a number of different departments with many employees and when it states that it is not aware of any environmental contamination on land it is speaking collectively. While a municipality must give full disclosure, it should make as few representations and warranties as possible respecting the environmental condition of land which it is selling. The Agreement should contain the following:
  - (1) a comprehensive “as is/where is” clause;
  - (2) the right of the purchaser to carry out “due diligence” inspections;
  - (3) a release of the municipality by the purchaser for any liability relating to environmental contamination, however caused, and an indemnification from any claims brought by third parties with respect to the lands or adjacent property, which may have become contaminated as a result of migrating substances.

(g) **Special Conditions**

- (i) Merger Clause - When a municipality sells land by direct negotiation it may require that it be added to and merged with the title to abutting

land. If that is the case, then the Agreement should contain a clause requiring titles to be in the same name. Parcels can now also be consolidated into one new Property Identification Number (PIN) so that there is less risk that they will be sold separately in the future.

- (ii) Restrictive Covenants/Building Schemes - Often, when municipalities develop industrial parks, they impose restrictions on the use of lots sold in order to maintain a quality product. These restrictions should be disclosed to any purchaser and included in the Agreement of Purchase and Sale. Similarly, a municipality may sell a single parcel of land and require restrictions on how that property can be used.
- (iii) Buyback Options/Rights of First Refusal - Another common condition used by municipalities when selling property for a specific purpose is to include in the Agreement a buyback option if the lands are not developed in a certain way within specified time frames. Similarly, rights of first refusal can be used to reduce the possibility that speculators will buy municipal property with no intention of developing it themselves, but simply to peddle it for profit to a third party.

## 7. PRIVATE USE OF MUNICIPAL PROPERTY

Lands owned by municipalities must be managed to facilitate their intended use and to minimize liability. The New Act governs the manner in which municipalities must maintain and repair public highways including regulated minimum maintenance standards. Similarly, the Occupiers' Liability Act ("OLA") prescribes the standard of care imposed upon a municipality for other property including unopened road allowances.

### (a) Unopened Road Allowances

Under the OLA a municipality, as the "occupier" of an unopened road allowance, owes a duty to a person using the premises:

- (i) to not create a danger with the deliberate intent of doing harm or damage to that person or the person's property; and
- (ii) to not act with reckless disregard of the presence of the person on the premises.

Subject to the above, a person entering these allowances is deemed to have willingly assumed all risks. The situation is however different if the person pays a fee to the municipality to use them for recreational purposes. In that case, the standard of care imposed is much higher.

From time to time private landowners may seek permission from a municipality to improve and use an unopened road allowance for access to their lands. While a municipality's exposure may be limited under the OLA, it is still prudent to enter into a User Agreement to clearly set out the rights and obligations of the landowner. This agreement should include a release and indemnification of the municipality from any claims and, if possible, insurance coverage naming the municipality as an additional insured. When there are several landowners involved in a proposal some municipalities require them to incorporate a not-for-profit association so that the municipality is only dealing with one body.

(b) **Encroachment/Licence Agreements**

Encroachment/Licence Agreements can be used to permit encroachments where a person has inadvertently placed a structure onto municipal property, most commonly a municipal highway, or where a person proposes to construct an encroachment such as steps, sidewalk patios or entrance ramps. As public highways are governed by Section 44 of the New Act and include the entire legal width, it is imperative that the interests of the municipality are protected through an agreement with release/indemnification and insurance provisions.

(c) **Standard Agreements**

The municipality may choose to adopt "standard" agreements for private use of municipal property, but inevitably each will have to be fine-tuned to adapt to a particular situation. As municipalities can only act by by-law any agreement will have to be approved by Council. This can be done by a specific by-law or through the delegation process.

8. **CONCLUSION - "DON'T TRY THIS AT HOME"**

This paper has touched upon some points for consideration when dealing with municipal lands. It is by no means exhaustive on any subject and there are many details and exceptions to the general principles discussed.

When dealing with property it is recommended that policies and procedures be established by Councils in consultation with staff and outside professionals. In this way there will be consistency in dealing with municipal matters and less chance of overlooking some important aspect of a transaction.

However, policies and procedures cannot replace the need for legal expertise in dealing with each specific situation. Staff may find it useful to collect legal precedents, but it is dangerous to use a document prepared for one transaction when doing another. For this reason no "sample" agreements or clauses have been provided with this paper.