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Section 219 Covenants and Statutory Building Schemes on Upzoned Properties

When a local government "zones" property, they are, by bylaw, regulating the use, density and size of land and buildings within an area (or a "zone"), as permitted and in accordance with the *Local Government Act*.[1] And for decades, the province has done little to interfere with the relatively free rein local governments have had in determining how properties are zoned.

Over the last year, however, a major shift has occurred in zoning throughout the entire province. On November 30, 2023, the *Housing Statutes (Residential Development) Amendment Act, 2023*[2] (the "**SSMUH legislation**") achieved royal assent, and on December 7, 2023, a majority of its provisions came into force, significantly amending the zoning provisions in the *Local Government Act*. One of these amendments compelled local governments to update their zoning bylaws to permit "small-scale multi-family housing" in zones previously restricted to single-family dwellings or duplexes by June 1, 2024.[3] For many zones, this meant permitting three-plexes or four-plexes,[4] whereas for zones close to frequently serviced bus stops, this meant permitting up to six-plexes.[5]

The broad upzoning required by the SSMUH legislation often included land with a Section 219 Covenant[6] or Statutory Building Scheme[7] ("**SBS**") on title. This may result in some confusion as to what density is permitted on a piece of property.

Section 219 Covenants are covenants registrable in the Land Title Office in favour of certain entities (such as municipalities) that affect the use of land or buildings on that land and may be positive (i.e., require a positive act) or negative (i.e., restrict an act).[8] These covenants can range from restricting development by a stream to ensure that the development complies with provincial legislation, or prohibiting the discharge of certain substances to prevent contamination, to restricting the density of a development or size of a building.

An SBS is a scheme of development, the declaration of which is registrable in the Land Title Office,[9] that the seller or lessor of two or more properties imposes on those properties.[10] These schemes are similar to restrictive covenants between private parties and are used to also restrict properties in varying manners such as by restricting building styles and sizes. The restrictions in an SBS are reciprocal and apply to all current and future owners or lessees of the affected properties.[11] An SBS is only enforceable by another owner subject to the same SBS.

Questions for property owners or prospective owners may arise where a Section 219 Covenant or an SBS limits density below what is permitted by zoning. The Ministry of Housing has taken the position that Section 219 Covenants and SBS' supersede zoning bylaws and SSMUH. In the Ministry's Provincial Policy Manual for SSMUHs,[12] they state, "[c]ovenants registered against the title of a property could affect the ability to achieve the densities prescribed under the SSMUH legislation," "[e]xisting section 219 covenants are not affected by the SSMUH legislation" and "an existing statutory building scheme registered on title that limits the use of a property to one dwelling unit will take precedence over the unit densities prescribed through zoning updates...."

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This position has found support in court decisions as well. In *Natura Developments Ltd v Ladysmith (Town)*,[13] the court held that density requirements in zoning bylaws do not override Section 219 Covenants limiting a property's density. In *Marshall v Rosas*,[14] the court held that where SBS' regulate the same things as zoning bylaws and provincial building codes, the SBS is not rendered obsolete. However, as both decisions preceded the enactment of the SSMUH legislation, it is uncertain whether a court will reach the same conclusion where the zoning bylaw is intended to comply with minimum requirements set by provincial legislation, though the outcome of litigation currently making its way through the Supreme Court of British Columbia will likely provide some clarity.

An example of the impact of an SBS on upzoned property is in *Pon v City of Burnaby*. In July 2024, an owner of a single-family property in the City of Burnaby agreed to sell their property to a purchaser. In the 70s, the original developer of that property and neighbouring properties had registered an SBS on title to each of those properties limiting the manner in which each property could be developed. As a condition of the purchase of the property, the purchaser required the owners to discharge the SBS on title to their property.

An SBS can be discharged with the consent of all owners of property affected under the SBS[15] or by applying to the court to discharge the SBS under Section 35 of the *Property Law Act*.[16]

In this case, the owner opted for the latter—in August 2024, the owner filed a Petition to the Court under which they argued that the SBS is obsolete and impedes the reasonable use of the land. In respect of the former, the owner, in part, argued that the SSMUH legislation "effectively [eliminated] all single family housing zoning… [and] rendered the SBS obsolete…." In respect of the latter, the owner argued that using the property to develop a multiplex in accordance with the City of Burnaby's Zoning Bylaw is a reasonable use and consistent with both "legislative and bylaw changes and consistent with the policy of creating more housing supply to address the ongoing housing crisis."

Given the court's decisions in *Natura Developments Ltd v Ladysmith (Town)* and *Marshall v Rosas*, the owners appear to be facing an uphill battle; however, as mentioned above, both decisions preceded the SSMUH legislation, and the court may, in this case, be persuaded to discharge the SBS.

Ultimately, the foregoing litigation exemplifies the potential challenges that may arise for owners or developers seeking to take advantage of SSMUH legislation to construct higher density buildings—if the property is encumbered in a manner that may limit density, which can include by way of a Section 219 Covenant or SBS, the encumbrance must be reviewed carefully to ensure that the intended development is not restricted by that encumbrance. And where the encumbrance must be discharged in order for a development or purchase and sale to proceed, parties should be aware of the methods of discharging the encumbrance and the likelihood of being able to obtain a discharge—in some cases, this may be a straightforward process of filing forms executed by the holder(s) of the Section 219 Covenant or SBS in the Land Title Office, while in others, this may mean petitioning the court under Section 35 of the *Property Law Act*. Where a Section 219 Covenant is in favour of a municipality that has upzoned the same property, the municipality may be willing to discharge the covenant. For an SBS that is used to preserve the aesthetics of a neighbourhood, however, neighbours may be less willing to collectively consent to permit the discharge of the SBS. As such, while the SSMUH legislation has certainly increased the permitted density of properties throughout the province, encumbrances potentially registered on title to property means that the impact of the SSMUH legislation will likely differ on property-by-property basis.

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1 RSBC 2015, c 1.

2 SBC 2003, c 45.

3 See *Local Government Act*, s 786(2)(b) (exceptions due to extraordinary circumstances).

4 See OIC 673-2023, s 2.

5 Zones in transit-oriented areas are subject to the *Housing Statutes (Transit-Oriented Areas) Amendment Act, 2023;* SBC 2023 c 48.

6 See *Land Title Act*, RSBC 1996, c 250, s 219.

7 See *ibid,* s 220.

8 See *ibid,* ss 219(1)-219(4).

9 See *ibid,* s 220(1).

10 See *ibid.*

11 See *ibid,* s 220(3).

12 British Columbia, Ministry of Housing, *Provincial Policy Manual & Site Standards: Small-Scale, Multi-Unit Housing*, rev 2 (Victoria: Ministry of Housing, 2023).

13 2015 BCSC 1673.

14 2017 BCSC 1860.

15 *Land Title Act,* s 220(4).

16 RSBC 1996, c 377.

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Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia, articled with a provincial organization, and was called to the Bar of British Columbia in May 2022. Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from The University of British Columbia. Upon graduating, he was employed as a Process Improvement Specialist at an architectural glass fabrication company for several years, where he designed and implemented a new laminated glass line as well as numerous mechanical and organizational process improvements.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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