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# DEALING WITH DEVELOPERS

**Kelsey Becker Brookes**

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## Developers

“An ounce of prevention is worth a pound of cure.”

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## Developers

- Imposing obligations on developers is only the first step
- Making sure those obligations are clear and enforceable is key
- Powers of enforcement can mitigate risk, even when not exercised
- Communication of expectations and consequences

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## Developer Obligations

- Financial obligations
- Municipal infrastructure and servicing
- Compliance with subdivision approvals, development permits, and planning regulations

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## Conditioning

- Subdivision Approval
  - Land suitable for the purpose for which the subdivision is intended
  - Section 655
    - Conditions to ensure MGA, statutory plans and LUB are complied with
    - Conditions permitted to be imposed by the Subdivision and Development Regulation
    - Enter into a Development Agreement

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## Conditioning

- Development Permit
  - Generally, the MGA does not confer direct power on a development authority to impose conditions, rather, contemplates the LUB will give authority to impose conditions
  - LUBs usually delegate broader power to attach conditions to permits for discretionary uses than for permitted uses

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### Funding of Infrastructure for New Development and Subdivisions

- Threshold decision of who pays
- Developer or general taxpayer
- Infrastructure necessary for particular development/subdivision
- New and expanded infrastructure outside area of development

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### Development Agreements

- Ss. 650 and 655 allow a municipality to require a developer to either construct or pay for required municipal improvements necessary to service the development area
- Details of required municipal improvements set out in development agreement

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### When can Development Agreements be Required?

- As a condition of subdivision approval
- As a condition of development permit

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### Why Should a Development Agreement be Required?

- Creating new parcels or new development
- Need to ensure those parcels or development have road access and other services
- Directs how services will be constructed
- Directs where services will be constructed
- Directs who will pay for those services
- Payment of off-site levies

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### Authority Under S. 650

- S. 650 states: "A council may in a land use bylaw require that, as a condition of development permits being issued, the applicant enter into an agreement with the municipality..."
- However, the section is limited to roads, pedestrian walkways, public utilities, parking, or payment of off-site levies or security

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### Authority Under S. 650

- Courts have widened the ambit of the section to include those things reasonably ancillary to the things expressly stated in the section

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## Authority Under S. 655

- S. 655 states: “A subdivision authority may impose the following conditions ... on a subdivision approval ... a condition the applicant enter into an agreement with the municipality”
- Limited to roads required to give access, pedestrian walkways, public utilities, parking, payment of off-site levies, or security

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## Overview of Elements of Development Agreements

- Must be built to municipal standards because is turned over to the municipality upon completion
- Timing of construction
- Provide for security, CCCs, FACs
- Warranty periods
- Registered on title by way of caveat
- Can enforce breach of development agreement

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## Municipal Improvements

- Need to identify clearly what municipal improvements are required and to what standard they must be built
- Design and plans are necessary to have clarity on what is to be constructed, where and then to confirm if work has been completed as approved

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## Municipal Improvements

- Can retain discretion regarding required amendments
- Build in time frames for commencement and completion; important regarding obtaining compliance and enforcement

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## Design Standards

- Attach to agreement
- Refer to policy

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## Mechanism to Ensure that the Facilities Required are Properly Constructed

- Inspections during construction
- Construction Completion Certificate
- Warranty Period
- Final Acceptance

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## Security

- Development agreements normally require the developer to provide, at his expense, security to the municipality to guard against the developer's failure to ensure the timely and proper performance of the developer's obligations under the agreement

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## Security

- Including a security requirement in development agreements and insisting on the security being provided to the municipality in an acceptable form is recommended in almost all situations

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## Security

- Things to consider:
  - Security provides some assurance to the municipality of full compliance by the developer with the terms, covenants and conditions of the agreement
  - How to determine appropriate amount

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## Security

- Ideally security will be in one of two (liquid) forms:
  - i. letter of credit, or
  - ii. cash
- And should be delivered to the municipality ideally upon the execution of the agreement but not any later than endorsement of subdivision approval or issuing of CCCs if that occurs prior to the plan being registered

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## Security

- The amount of security is entirely discretionary
- It will sometimes be a percentage of the estimated cost of constructing and installing all of the Municipal Improvements (i.e. from 25% to 100%, or more)
- It will sometimes be a lump sum

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## Security

- The goal is to find a number which provides the municipality with sufficient funds to perform the obligations of the developer in the event they do not

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## Security

- Letter of credit should be an Irrevocable Letter of Credit issued by a chartered bank or a treasury branch, with a covenant by the issuer that if the issuer has not received a release from the municipality a certain number of days prior to the expiry date of the security, then the security shall automatically be renewed, upon the same terms and conditions, for a further...

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## Security

...period of time or a right on the part of the municipality to draw upon the full amount of the Irrevocable Letter of Credit in the event that the municipality has not received a replacement letter, or confirmation of an extension or renewal of the existing letter, a certain number of days prior to the expiry of the security

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## Security

- Other forms of security could be a first charge on land or a registrable transfer of land
- These are less liquid forms of security and require the municipality to take steps (possibly legal action) to convert to funds

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## Security

- Include a provision allowing the municipality to increase or decrease the required security upon written notice to the developer at any time during the currency of the agreement if it appears to the municipality in its discretion that the security is excessive or insufficient (i.e. the municipality may require an increase in security if the developer has failed to comply with the construction timetable or has been issued a notice of default)

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## Security

- The amount of security may, in the discretion of the municipality, be reduced in certain circumstances on application by the developer (i.e. upon the developer having received a CCC or FAC for the Municipal Improvements)

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## Security

- Agreement should provide the municipality may make demands as payee and beneficiary under the security provided by the developer to the municipality in the event a default by the developer has not been rectified by the developer, emergency repair work has been done to Municipal Improvements by...

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## Security

...municipality in accordance with the provisions of the agreement and the developer fails to pay the costs and expenses of such repair work or the developer is otherwise in default of any term, condition or covenant of the agreement

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## Security

- Are bonds a good form of security?

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## Off-Site Levies

- Off-Site Levy Bylaw in order to impose and collect
- S. 648: to pay for all or part of capital costs of water, sanitary sewage, storm sewer, roads
- Calculation of levy
- Timing of payment

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## Off-Site Levies

- Community Recreation Facilities
- Firehalls and police stations
- Libraries
- Connection to provincial highways

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## Insurance

- Why necessary?
- Amount
- Municipality as additional insured
- *Occupational Health & Safety Act* – prime contractor

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## Indemnity

- Protect the municipality when developer is performing the work
- Solicitor and his own client costs

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## Timing of Registration of Plan of Subdivision

- Two Options
  1. Allow registration of plan prior to servicing being completed
    - Pros
    - Cons

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## Timing of Registration of Plan of Subdivision

2. Require servicing to be completed prior to registration of Subdivision Plan
  - Pros
  - Cons

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## Timing of Registration of Plan of Subdivision

- Effect on security
- Cash flow consequences
- Enforcement consequences

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## Utility Easements

**661** The owner of a parcel of land that is the subject of a proposed subdivision must provide, without compensation,

- (a) to the Crown in right of Alberta or a municipality, land for roads and public utilities,
- (a.1) subject to section 663, to the Crown in right of Alberta or a municipality, land for environmental reserve, and
- (b) subject to section 663, to the Crown in right of Alberta, a municipality, one or more school boards or a municipality and one or more school boards, land for municipal reserve, school reserve, municipal and school reserve, money in place of any or all of those reserves or a combination of reserves and money, as required by the subdivision authority pursuant to this Division.

as required by the subdivision authority pursuant to this Division.

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## Oversizing/Sharing Costs

- S. 651
- Endeavor to assist
- Time limit

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## Costs/Fees

- Legal
- Engineering
- Per lot fees

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## Additional Considerations

- Parties
- Who signs development agreement
- Disputes during Construction
- Registration of caveat/other instruments
- Timing of required payments
- Checklists

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## Default/Enforcement

- How to enforce the Agreement
  - Through use of the security
  - Prosecution
  - Stop Orders
  - Breach of contract
  - Provisions re: cancellation of plan

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## Arbitration

- Who?
- What disputes?

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## Enforcement

- The objective of careful planning during growth is to create a harmonious, prosperous community with measured and thoughtful development
- However, limiting people's property rights can cause friction for a development authority
- In some instances, landowners choose to do things that are prohibited by the rules

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## Enforcement

- For a planning regime to be effective, it must provide sufficient deterrence for citizens who choose not to abide by bylaws, subdivision approvals, development permits, development agreements, or conditions because of economic forces or personal preference, or both

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## Enforcement

- How to set yourself up for success?

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## Different Means of Enforcement

- Land Use Bylaws and other municipal bylaws can be enforced by way of:
  - Prosecution, or
  - Stop Orders (orders to remedy issued pursuant to MGA)
  - Enforcement is usually complaint driven
  - Warning letters

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## Prosecutions – Things to Consider

- Prosecutions – must prove guilt to criminal standard (beyond reasonable doubt)
- Therefore harder to prove than civil standard applicable stop orders (balance probabilities)
- Will usually need to hire private lawyer to prosecute
- As fines are usually low, will not pay for costs incurred

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## Prosecutions

- Higher standard of proof can present challenges
- Punishment does not always result in compliance

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## Stop Orders

- In some cases, more action is needed to achieve compliance with a municipality's development goals and specific conditions

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## Stop Orders

- Stop Orders are authorized in the *MGA* under s. 645, which states that a development authority may issue an order requiring the offending development or use be stopped where it is of the opinion that it is not in accordance with the *Act*, the regulations, the Land Use Bylaw, a development permit, or a subdivision approval

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## Stop Orders

- A Stop Order can require the demolition, removal, or replacement of an offending development, or require such other measures to be taken as the authority considers appropriate to bring about compliance

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## Stop Orders – Drafting Thoughts

- The requirements for Stop Orders are outlined in s. 645:
  - Must be in writing
  - Must be directed at the registered owners of the land, the person in possession of the land or building, or the person responsible for the contravention, or any of all of them
  - Must specify the time within which compliance must occur

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## Stop Orders – Drafting Thoughts

- Benefits of issuing a stop order, and obtaining a court order if necessary, include:
  - Lower standard of proof than prosecution (easier to prove)
  - Means to bringing property into compliance

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## Self Help Remedy

- S. 646
  - Municipality may take action necessary to carry out the order
  - Access (s. 542)
  - Risks where significant action taken
  - Costs (s. 553)

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## Order to Remedy Contraventions

- S. 545
  - Designated officer issues
  - Where person contravening MGA, other Act municipality entitled to enforce or a bylaw
  - May overlap with s. 645

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## Order to Remedy Contraventions

- Order may:
  - Direct person to stop doing something
  - Direct person to take action or measure necessary
  - State time for compliance

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## Order to Remedy Dangers and Unsightly Property

- S. 546
  - "detrimental"
  - "unsightly condition"
  - Dangers, excavations, unsightly
  - May be bylaw as well

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## Self Help Remedy

- S. 549
- S. 550
- Access (s. 542)
- S. 551 – emergencies
- Costs (s. 553)

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## Injunction

- S. 554
  - Requires court application
  - Very broad jurisdiction given to Court of Queen's Bench
  - Protects municipality
  - Deals with municipality's powers in the event of non-compliance and costs
  - Breach is contempt of Court Order

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## Caveats

- S. 546.1
- S. 646(2)
- What is purpose and effect?

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Toll Free: 1.800.661.7673 (RMRF) <a href="http://www.rmrf.com">www.rmrf.com</a>		

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