



CITY OF VANCOUVER

MEMORANDUM

August 20, 2004

TO: Mayor Campbell and Councillors

COPY TO: J. Rogers, City Manager
L. Beasley, Director of Current Planning
R. Whitlock, Senior Planner, Housing Centre
T. Timm, Deputy Approving Officer
D. Rudberg, General Manager of Engineering Services
S. Baxter, City Clerk

FROM: R. Scobie, Approving Officer

SUBJECT: Adjourned Public Hearing - 2876 West 33rd Avenue

I will be out of the country when this adjourned Public Hearing is reconvened in September. The following context is provided to clarify the rowhouse tenure being advanced under the Neighbourhood Housing Demonstration Program, as distinct from other tenures that might accompany a rowhouse building form.

There are presently no townhouse or rowhouse developments in the Mackenzie Heights neighbourhood. Both Planning and Housing Centre staff are supporting the rezoning application as a means of demonstrating a small rowhouse development in this neighbourhood. However, the principal reason for staff support is to demonstrate an alternate form of tenure for a rowhouse form of development. Tenure is principally a function of how a legal parcel is divided up (subdivided) and what particular legal rights are made available to the individual purchaser.

Real estate ownership can take several different forms in British Columbia. The forms vary in terms of what an individual actually purchases and takes title to. The three most common forms involve purchase/ownership of either a conventional legal parcel, a 'conventional' strata lot, or a bare land strata lot. Private or market co-ops, co-ownership arrangements and other forms of shared ownership of the total property and building assets do exist in Vancouver, but are rather rare, complex, less marketable and more confusing than beneficial to the explanation of what a "fee simple" rowhouse development would demonstrate in Vancouver.

The staff report contains various references to "fee simple" ownership of the individual rowhouses proposed. To the extent one can be a fee simple owner of a conventional legal parcel, a 'conventional' strata lot or a bare land strata lot, "fee simple" ownership in the report is understood to mean ownership of a rowhouse situated on its own conventional legal parcel. This is consistent with the companion Subdivision By-law amendment proposed, which would allow future subdivision of the site to create a separate, smaller, conventional legal parcel for each of the three rowhouses proposed.

Conventional Legal Parcel Subdivision

With ownership of a conventional legal parcel, every square metre of the area within the parcel boundaries is under one's ownership. Likewise, this ownership extends to the centre of the earth and up to the heavens. The owner of a conventional legal parcel has control of the entire property, subject only to federal/provincial legislation and municipal by-laws, any rights expressly excluded via charges legally registered against the title of the property, and some limitations flowing from common law. The result is certainly not total and absolute control, but it provides the greatest individual degree of control to the owner.

'Conventional' Strata Lot Subdivision

Since the 1970s, separate ownership of individual dwellings located in a building with two or more units has most commonly taken the form of 'conventional' strata lots, where the legal parcel or lot has been "stratified" under provincial legislation created specifically for this purpose. Each strata lot or condominium is a three-dimensional volume legally created and defined by planes through the centre of walls, floors and ceilings. On the exterior of the building, the outer one-half of the walls and roof are not within any strata lot but are owned collectively by all strata lot owners, and held as common property. Likewise, any shared interior hallways, lobbies, amenities and parking, and all outdoor open space within the boundaries of the original legal property are all common property.

Each strata lot owner is entirely responsible for the area within their strata lot. It is the maintenance, replacement and regulation of the common property assets of the strata lot owners that requires the creation of a strata corporation. Some elements of the common property may be assigned to individual strata lot owners, for either their exclusive or limited use (e.g., parking spaces, balconies/patios) but the rights and responsibilities of ownership remain with the strata corporation. All strata lot owners are members of the strata corporation and it is the business affairs of the strata corporation that bind all strata lot owners, with both positive and negative effects. For some, strata lot ownership is unacceptable due to the legal responsibilities, limitations and relationships between strata lot owners and the strata corporation.

Bare Land Strata Lot Subdivision

In some cases, a bare land strata configuration is possible. In Vancouver, bare land strata subdivision plans were approved (late 1970s to early 1980s) for a number of townhouse developments in the Champlain Heights neighbourhood where developers felt this type of strata lot was more advantageous in the marketplace compared to 'conventional' strata lots. By its very nature, a precondition of bare land strata is that no portion of any townhouse unit or common property can be located above/below another unit. This particular configuration of townhouse form has come to be called "rowhouse".

Intended for use in recreational developments where subdivision to create conventional legal parcels may not be possible, bare land strata lots fall somewhere between conventional legal parcels and 'conventional' strata lots. To the greatest extent, a bare land strata lot is indistinguishable from a conventional legal parcel in terms of the rights associated with ownership of the legal lot. The legal boundaries of bare land strata lots commonly encompass adjacent outdoor spaces. What differs is that the bare land strata lot exists within a property comprising two or more bare land strata lots and some common property which, like in a 'conventional' strata, is jointly owned and managed by a strata corporation. The common property tends to be very limited and may be a driveway or private road and utilities, or as little as a shared location for garbage collection. Were it not for the existence of common property and the corresponding legal requirement for a strata corporation, the rights, responsibilities and limitations of bare land strata lot ownership would be largely indistinguishable from conventional legal parcel ownership.

Provincial ministry staff rightly cautioned that bare land strata was not contemplated as a form of subdivision for attached dwelling units having shared design/construction elements (e.g., roofs, walls or slabs) where effective and functional performance is dependent on the whole and frustrated by independent action or inaction by individual bare land strata lot owners. Since a strata corporation has ownership of only the common property, and elements like roofs and slabs can never be common property in a bare land strata, the potential for independent action (or inaction) by an individual bare land strata lot owner in rowhouse configurations could have significant implications for adjoining bare land strata lot owners.

Bare land strata lots have not been created for rowhouse configurations for a few decades as the interdependencies amongst and between adjoining rowhouse units necessitate complex, private legal agreements between all owners that are difficult to achieve. Provincial legislation has not addressed this to create an alternate form of subdivision and tenure for rowhouse configurations, leaving conventional legal parcel or 'conventional' strata lot subdivision as the only forms of ownership tenure viable in the marketplace.

Rowhouse Dwellings on Separate, Conventional Legal Parcels

In my capacity as Approving Officer I am supportive of a Subdivision By-law amendment that would permit the creation of conventional - albeit much narrower - legal parcels for rowhouse development as a demonstration of a new form of rowhouse ownership. In order to be supported, the rowhouse configuration would have each of the units designed and constructed to eliminate any interdependencies amongst or between units and permit individual owners to maintain their dwellings and redevelop individually in the future.

Interdependencies amongst or between units would significantly diminish the value of the proposed form of tenure as to jeopardize the merits of this demonstration project. The ownership of individual units in a building form where units are structurally and functionally interdependent has been provided for via the Strata Property Act. This Act contains provisions that ensure the interdependencies are dealt with in a comprehensive manner, with a consistency of approach providing protections to the consuming public, and with benefits in terms of understanding in the marketplace. The fundamental attributes of this Act have not changed despite its evolution from the initial Condominium Act, the later Strata Title Act, through to the current legislation.

If ownership of a rowhouse configuration having interdependencies amongst or between units is to be divided other than via strata title, numerous legal agreements will be required to essentially duplicate many of the arrangements outlined in the Strata Property Act. Such a unique experiment to re-invent and replace the responsibilities and relationships currently available in the Act presents an uncertainty of tenure I cannot recommend to Council and would have difficulty approving under a subdivision to create conventional legal parcels.

As indicated in my comments contained in the report before Council, I am supportive of the Subdivision By-law amendment to facilitate the rezoning and development proposed provided the smaller parcels "can viably support independent use and redevelopment, in perpetuity", as would be typical with conventional legal parcels elsewhere.

Conclusion

If the intent of this Neighbourhood Housing Demonstration Project is to demonstrate what is (improperly) referred to as "fee simple" rowhousing, then the resultant parcels should exhibit the fundamental attributes of conventional legal parcels. To do otherwise is to acknowledge that functional and implicit interdependencies amongst and between the owners in a row house form of development are precisely what gave rise to the Strata Property Act, and it must be questioned whether this Act's weaknesses are so substantial as to invent a unique alternative that is:

- (i) foreign in the marketplace (and therefore likely misunderstood by lenders and owners);
- (ii) not what it purports to be and would appear to be on the face of it (i.e., separate, conventional legal parcels); and
- (iii) most likely fraught with future challenges due owner disputes and the limitations of legal agreements put in place to address the practicalities of interrelationships covered by the Strata Property Act.

To maintain validity of the intended demonstration and the rationale for creating small, conventional legal parcels, the parcels must absolutely minimize any interrelationships amongst and between the proposed parcels, and correspondingly maximize their potential for independent redevelopment in the future.



F.A. (Rick) Scobie

FAS/fas

F:\33rd & Mackenzie.wpd