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July 19, 2010

City of Salmon Arm  
Box 40  
500- 2 Avenue NE  
Salmon Arm, B.C. V1E 4N2

**\*\*\* BY FAX @ 250.803.4041 AND MAIL \*\*\***

Dear Sirs/Mesdames:

**Re: Phased Development Agreements  
SmartCentres Development**

In 2007 the government of BC amended the Local Government to create Phased Development Agreements (PDAs) – a long term agreement between a local government and a developer regarding zoning. I understand that SmartCentres has submitted a zoning and Official Community Plan amendment request that includes a proposal for a PDA.

We have been asked by the Wetlands Alliance: The Ecological Response (WA:TER) to comment on the purpose of, and best practices in using, a Phased Development Agreement. Phased Development Agreements are substantially different from amendments to zoning bylaws or the Official Community Plan and it will generally not be appropriate for a municipality to simply receive and enter into a PDA in the same manner as these types of amendments. We would urge you to reject the proposed PDA; if you believe that the SmartCentres development is in the best interests of Salmon Arm then you should instruct City Staff to negotiate a PDA which advances the City's goals, rather than accepting the current proposed PDA as a take it or leave it proposition.

Phased Development Agreements are controversial, because they violate a basic principle of democracy – a democratically elected government of today should not be allowed to bind the democratically elected government of tomorrow. PDAs allow a government to do just that – guaranteeing a private developer that no matter how problematic later phases of a development prove to be – future Councils will not be allowed to represent their constituents.

Despite the huge potential for abuse, Phased Development Agreements, used cautiously and in the best interests of a community, do have the potential to result in real and huge benefits to a community. However, local governments need to be sure that they understand what these agreements are, and do not enter into them lightly.

## **Phased Development Agreements under the *Local Government Act***

Phased Development Agreements are created under s. 905.1 to 905.6 of the *Local Government Act* as revised. They are, as the name implies, an *Agreement* – albeit that gains force of law through the passage of a bylaw. In this way PDAs are fundamentally different than Official Community Plans which set out the Local Government’s vision for the city or a zoning bylaw through which a local government places restrictions on the use of private property as a legislative tool.

Thus under s. 905.1(2) a municipality may “enter into a Phased Development Agreement with a developer.”<sup>1</sup>

While it might arguably be open to a municipality to accept a developer’s first offer in negotiations, PDAs are intended to be the result of hard negotiations by both the municipality and the developer. A local government seeking to enter into a PDA should give direction to their staff as to what the municipality hopes to negotiate in the PDA and authorize the negotiation of such an agreement, because with limited exceptions the local government will be bound by the terms of the PDA.

During the legislative debates Liberal MLA Joan McIntyre described the nature and purpose of Phased Development Agreements as follows:

With this amendment, local governments can provide certainty to abide by zoning through all phases of a large development, ensuring that future councils or boards uphold the original agreement with the developer. In exchange, local governments can also likely negotiate greater or longer-term benefits for their communities. ... [K]eep in mind that these phased development agreements are voluntary – the operative word being "voluntary" – and they are between two parties, each of which will bring something to the table.<sup>2</sup>

MLA McIntyre also acknowledged the risks of local governments entering into PDAs which did not live up to this vision of mutual negotiation for the benefit of the community, noting that “I also understand that the Ministry of Community Services will be developing advisory material for local governments to ensure phased development agreements are used appropriately.”<sup>3</sup> We have been unable to locate this advisory material, if it exists.

### **“Application” for a PDA**

Based on the above explanation, it should be obvious why PDAs should not generally be considered on an application by a developer, but rather after a mutually agreed upon negotiation. However, we are advised that in this case the proposed PDA has in this case been received as part of an application to amend the City’s Official Community Plan and zoning bylaws.

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<sup>1</sup> *Local Government Act*, R.S.B.C. 1996, c. 323, s. 905.1(2), as amended by *Community Services Statutes Amendment Act, 2007*, S.B.C. 2007, c. 6, s. 21.

<sup>2</sup> DEBATES OF THE LEGISLATIVE ASSEMBLY, March 26<sup>th</sup>, 2007, Vol 17, No. 2, <http://www.leg.bc.ca/Hansard/38th3rd/h70326p.htm>, last accessed July 19, 2010.

<sup>3</sup> *Ibid.*

Neither the *Local Government Act* nor the City of Salmon Arm's own bylaws contemplate an application to enter into a PDA.

Local governments can and generally do have procedures inviting applications from property owners to amend the zoning bylaws or OCP bylaws as they relate to their property. These procedures are contemplated by section 931 of the *Local Government Act* which allows local governments to set fees for applications of this type; having received an application and associated fees there is a legal obligation to consider a requested bylaw change:

A local government may, by bylaw, impose one or more of the following types of fees ...

(a) application fees for an application to initiate changes to the provisions of a plan or bylaw ...;<sup>4</sup>

The Local Government Act therefore allows property owners to make application to *change* existing plans or bylaws. In the case of a Phased Development Agreement, however, the property owner's request would not be to change an existing plan, but to enter into an agreement **and** enact a new bylaw. Section 931 does not contemplate fees related to such an application.

Similarly, the City of Salmon Arm's bylaws set fees for applications to amend the Official Community Plan (\$800) or amend zoning bylaws (\$400, except in zone R-8) or both (\$1200),<sup>5</sup> but not to enter into Phased Development Agreements. This is not merely an administrative oversight because PDAs are so new – the Local Government Act does not empower Councils to set fees for such an application. We submit that the reason for this is that PDAs are not merely bylaws that apply to a developer's property, for which Council may unilaterally consider a request, but rather reciprocal agreements negotiated by both parties.

## **Conclusion**

Phased Development Agreements are a new and powerful legal tool. However, local governments should not be rushed into using them before they have developed the knowledge and policies to ensure that they are using them well. Moreover, they should be certain that they are using PDAs to their full potential for their communities, and not allowing developers to lock in a controversial zoning with little in the way of benefit to the community.

**Accepting a Phased Development Agreement on application is a dangerous precedent. We urge you to reject the Phased Development Agreement as submitted.**

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<sup>4</sup> Local Government Act, *supra*, s. 931.

<sup>5</sup> *Fee For Service Bylaw*, Bylaw No. 2498, Appendix 2, as amended, available at <http://salmonarm.ihostez.com/Documents/DocumentList.aspx?ID=345>, last accessed July 19, 2010.

If you believe that the SmartCentres development is in the best interests of the City of Salmon Arm, the responsible course of action is to reject the Phased Development Agreement as proposed, and to give direction to City Staff as to the amenities and other features that the City would like to see included in any negotiated Phased Development Agreement.

Sincerely,

**WEST COAST ENVIRONMENTAL LAW**

A handwritten signature in black ink, appearing to read "Andrew Gage". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Andrew Gage,  
Staff Lawyer

cc. WA:TER