Economic Development on Aboriginal Lands and Land Use Compatibility

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As part of their pursuit of self-government and improved opportunities for their members, First Nations in Canada have begun to emphasize economic development as one of their major goals. Successful economic development projects provide much needed employment for First Nation members. They also provide a revenue stream which can be used for improved First Nation services and living conditions, and economic independence from the Federal Government. The result is that existing reserve lands are being developed for the first time. In addition, particularly in Saskatchewan, new reserve lands are being created specifically for the purpose of economic development.

First Nation economic development projects occur largely on reserve lands, which are lands of special status under the federal *Indian Act*[1]. Where this economic development occurs on or near an urban centre, the issue of land use compatibility between the reserve lands and the surrounding municipality becomes particularly acute. The purpose of this article is to review the land use problems which arise, and their cause, and to describe some potential solutions.

The Problem

In Canada, land use planning and control is virtually always a delegated function of local government. The provincial government, or a planning body appointed by the provincial government, retains the ultimate authority. In particular, the provincial government, in some form, is the final arbiter where there is conflict between the development plans of neighbouring local governments.

However, "Indians, and lands reserved for the Indians:"[2] are a subject matter of exclusive federal jurisdiction. Provincial Planning Acts and municipal Zoning Bylaws do not apply to reserve lands.[3] The result is that new economic development on reserve lands

takes place outside of the provincial structure of land use planning and land use conflict resolution.

No effective federal scheme exists to replace the provincial scheme of land use conflict resolution. Such federal control over reserve lands, as exists under the *Indian Act*, is intended to ensure that the land is used for the benefit of the First Nation. It is not a land use planning scheme which anticipates or has structures to deal with conflicting land uses by neighbouring jurisdictions.

In addition, the Federal Government lacks the systems of effective land use regulation. Planning and land use issues are always local. They involve trying to find a consensus among the competing interests of neighbours who live so close to each other that what one does directly affects the other. In order to have credibility, this process must be transparent. It requires public hearings and public decision-making.

The Federal Government deals in the realm of policy-making which may include public consultation, but never a formal hearing structure and never public decision-making. The Federal Government therefore, while it may be able to intervene in a crisis situation, is not an effective replacement for the provincial planning systems.

This "vacuum" in land use planning and conflict resolution shows up clearly whenever a First Nation plans a new economic development on reserve land.

The First Nation, while it may be anxious to get along with its neighbours, is often fearful of any involvement by the surrounding municipality. This is in part because control of land and the use of land is fundamental to First Nation concepts of self-government and self-determination. This is not an area where concessions can be easily made. Another reason is that zoning decisions are, by their very nature, not measurable by technical or objective standards. They involve a subjective decision as to what balance or "saw-off" of competing interests is best for the community as a whole. First Nations fear that such decisions will go against them, not for legitimate reasons, but because of racism. In some cases this fear is justified. And when it is not justified, it is a difficult accusation to disprove because of the subjective nature of zoning decisions.

A third concern is that First Nations, in most instances, have a fixed amount of reserve land in a fixed location with little or no opportunity of acquiring additional or alternative reserve land. The First Nation cannot sell its land and acquire a different site, in the event that its economic development project is deemed to be incompatible with the surrounding land.

For the surrounding local government and local residents, the absence of an established, effective process for resolution of land use conflicts is also frightening. From

their perspective, it is not a question of no control over reserve land development by local government. It is a question of no control, period.

The surrounding residents know that economic development projects on reserve land are not subject to local government approval. They know that any potential land use conflict is not subject to any established conflict resolution system, as these are all provincial. They know that the Federal Government has no established system for land use conflict resolution. The result is that they fear, with some legitimacy, that they are at the mercy of the good will of the First Nation, with no rights or remedy in the event that the First Nation development project is detrimental to the surrounding community.

The problem is how to achieve harmonious land use planning between two neighbouring but independent jurisdictions in the absence of a supervisory senior government scheme.

The Solution

The issue is really a constitutional problem of First Nation government and its interrelationship with the federal and provincial governments. However, it is an issue which is acted out at the local level and which needs to be addressed in advance of a wider constitutional solution.

The need is for a system of establishing land use compatibility which treats both the First Nation and the surrounding local government, for the purpose of land use planning, as equals. Neither can control the other's developments. Each has the obligation to not harm the other with land use decisions. Each has the right to not be harmed by the other party's land use decisions. And because land use issues are local, the system must be local in order to be effective.

The first question which needs to be answered is "who makes the final decision in the event of a conflict between the parties?". The best answer at the present time is probably a process of mediation and arbitration backed by the courts.

This is not to assume that land use conflicts cannot be resolved by the parties affected. Most of them probably will be. But both sides need to know, in advance, what their rights and obligations are, if they cannot agree.

The second question is to clarify or define land use conflict and make it a mutual obligation. In other words, the surrounding municipality has an obligation to not harm First Nation lands through their land use decisions and developments, as well as to not be harmed by First Nation land use decisions and developments.

The concept of land use conflict could be defined as those effects which overflow the boundaries of the jurisdiction such as smell, noise, light or lack of light, increased traffic, ground water pollution, etc. These are the legitimate concern of a neighbouring jurisdiction.

The third question is how to put such a process in place—both in the short-term as First Nation self-government is being developed, and in the long-term.

Land Use Conflict Resolution by Agreement

One of the opportunities for addressing the need for a land use compatibility process is when land claims are settled. In Saskatchewan in 1992, 26 First Nations signed the Saskatchewan Treaty Land Entitlement Framework Agreement to settle outstanding treaty land claims[4].

This Framework Agreement gives First Nations the right to purchase new lands, and have them turned into dedicated reserve lands under the *Indian Act*. Many of the new reserves which have been created are in or near cities, and are created solely for the purpose of economic development.

The Framework Agreement also provides that First Nations will negotiate binding legal agreements with the "host" municipality, as a precondition to establishing the new reserve. These are known as Article 9 Agreements.

One of the main issues to be negotiated is land use compatibility. Most of the agreements which have been signed to date, provide that the First Nation will only allow on its new reserve land those land uses which would have been allowed by the municipal planning scheme, if the land was not reserve land.

This scheme works well at the time of reserve creation. The First Nation will have a specific economic development project in mind (eg. casino, tourist development, office complex) and can shop for and purchase appropriately zoned land. This ability to create new reserve land in a location which is appropriate for the planned use avoids much of the land use conflict which occurs when existing reserve land is developed.

For example, Saskatchewan has four First Nation operated casinos. Three of the four are located on newly created reserve land in cities. However, their location is agreed to be an appropriate one by the "host" city (eg. along a major highway) and the casinos have not caused land use conflict problems.

What is not clear for the future is how ongoing land use compatibility will be maintained by the two jurisdictions. Over time, land is normally rezoned and redeveloped. Both the reserve land and the immediately surrounding urban land will sooner or later be subject to this process, but with two separate governments each doing its own rezoning and redevelopment.

In the absence of any officially established dispute resolution body, most Article 9 Agreements contain standard arbitration clauses. These may be used in future to arbitrate what is a "compatible" land use, either on the reserve land or on the surrounding urban land, in the event of a breakdown in the tandem compatible zoning schemes envisaged.

Not all new reserves are created within city boundaries. Some are being established on rural land immediately adjacent to cities. Such developments require a more complex land use agreement. The land is usually zoned agricultural and rezoned to other uses on a project-by-project basis. This means that the First Nation cannot buy land which is already appropriately zoned for the project it has in mind. Nor will it want to subject itself to a local government rezoning for the reasons already mentioned.

One potential solution is to agree to an overall general Development Plan with no detailed zoning map but with basic standards for different types of development and separation distances for incompatible uses. The First Nation and the municipality can then agree in writing that the First Nation and the surrounding municipality will each develop their own land only in accordance with what would be allowed by the general Development Plan. Again, what is "allowed" or "compatible" would be subject to arbitration and the issue of long-term tandem compatible zoning schemes would need to be addressed.

Enforcement

The issue which is untested in these Agreements is enforcement, particularly over third parties. Establishing an agreed appropriate land use is one thing. Enforcing it is another. First Nations will increasingly have economic development projects on their land which are operated by "third parties" rather than by the First Nation itself or its members. These will require the passing and enforcing of planning and land use laws.

Each government has the obligation to ensure that the people actually using the land, whether reserve land or surrounding urban land, do so in accordance with the agreed planning scheme. If either government fails to enforce its planning scheme, and allows uses which are not permitted to continue, land use compatibility no longer exists. What is yet to be tested in the courts is the right of one government to require the other

government to enforce its land use scheme and to shut down illegal uses; all based on their rights and obligations pursuant to their land use compatibility agreements.

The advantage of the Saskatchewan Framework Agreement is that a legal framework is created for compatible land use schemes. The local government has the right to negotiate compatible land use but must recognize and respect separate First Nation jurisdiction. The First Nation must negotiate compatible land use but is protected from a local government trying to stop reserve land development for inappropriate reasons by a time frame for good faith negotiations. Article 9 of the Framework Agreement gives a First Nation the right to request arbitration which will impose an agreement on the local government and allow the reserve land and development to proceed. Both parties know their legal obligations and rights for the longer term.

Municipal Services

Another advantage of the Saskatchewan process is that it allows "sale of municipal services" to be dealt with in an appropriate context. As part of reserve creation, the local government and the First Nation negotiate for the provision of municipal services to reserve land, as well as for land use compatibility. Article 9 Agreements generally provide that the First Nation (whose land is exempt from municipal taxation) will purchase municipal services from the local government at a price similar to what would be otherwise paid in property taxes.

When a process exists for dealing with land use compatibility, sale and purchase of municipal services is generally not a contentious issue. Where land is within a city, it is generally economic and practical for the First Nation to buy basic services from the local government, rather than trying to create their own. The municipality in turn has a communal standard of services for key items such as sewage treatment and fire protection for all properties within its boundaries.

Where economic development of reserve lands occurs in the absence of a land use compatibility scheme, sale of municipal services can become a contentious issue. For the local government, providing municipal services or not, is the only mechanism they have for dealing with a potentially incompatible land use on the reserve land. For First Nations, the potential withholding of municipal services is a threat by which local governments can prevent a legitimate land development for illegitimate reasons.

Disputes over providing municipal services in such circumstances are often really disputes over land use compatibility. All too frequently, the result is no scheme for land use compatibility, and a First Nation which develops a complete set of independent services (water supply, fire protection, etc.) at significant and unnecessary cost.

Summary

The Saskatchewan Framework Agreement is not the only land claims agreement to deal with land use compatibility. Recent settlements in the Yukon Territory and the Province of Manitoba have also addressed the issue. However, at this time, there is no land use compatibility system in place for the majority of aboriginal lands in Canada. This is unfortunate.

Successful economic development projects on aboriginal lands are good for the First Nation and good for the surrounding municipality. They create a natural opportunity for the First Nation and the neighbouring local government to work together for their mutual benefit. However, unless and until the issue of land use compatibility is addressed, they will continue to frequently be the cause of disputes and disharmony rather than cooperation and good will.

Endnote References

1. *Revised Statutes of Canada*, 1985, c. I-5, as amended.

2. *The Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c. 3.

3. *Corporation of Surrey v. Peace Arch* (1970), 74 W.W.R. 380.

4. Saskatchewan Treaty Land Entitlement Framework Agreement among Her Majesty the Queen in Right of Canada and the Entitlement Bands and Her Majesty the Queen in Right of Saskatchewan dated September 22, 1992.