
TO: CITY MANAGER **DATE:** 2011 March 9
FROM: DIRECTOR PLANNING AND BUILDING **FILE:** 2155-01
Ref: LMTAC
SUBJECT: LMTAC DRAFT DISCUSSION PAPER ON THE FEDERAL FNCIDA AND FNCLTA LEGISLATION

PURPOSE: To brief Council on the local government issues and interests related to the recently adopted federal *First Nations Commercial and Industrial Development Act (FNCIDA)* and the *First Nations Certainty of Land Title Act (FNCLTA)* as identified by the 2010 December 10 Lower Mainland Treaty Advisory Committee (LMTAC) draft discussion paper and to advance responding recommendations for the consideration of Council.

RECOMMENDATIONS:

1. **THAT** Council endorse the 2010 December 10 LMTAC draft discussion paper titled, "*Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)*" as a mechanism to initiate further dialogue with the federal government, the provincial government and First Nations.
2. **THAT** Council forward a copy of this report to the Honourable John Duncan, *Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians*; the Burnaby Members of Parliament; the Honourable Barry Penner, *Minister of Aboriginal Relations and Reconciliation (MARR)*; the Burnaby Members of the Legislative Assembly; and Mrs. Agnes Rosicki, *Managing Director, Lower Mainland Treaty Advisory Committee (LMTAC)*.

REPORT

1.0 INTRODUCTION

FNCIDA came into force on 2006 April 1 and provides the federal government with the authority to make regulations, for particular projects on reserve lands, that replicate provincial regulations using an approach called incorporation by reference. By doing so FNCIDA fills a regulatory gap that stems from the fact that property and real estate regulations and legislation are provincial, but Indian Reserves are under federal authority. FNCIDA effectively addresses this by allowing the provincial regulations to be mirrored on reserves.

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The effectiveness of FNCIDA was limited until FNCLTA came into force on 2010 June 30. FNCLTA was designed to narrow the differences between property rights for commercial properties off-reserve and on-reserve. FNCLTA supports the development of commercial real estate on reserves by permitting the registration of project lands in a system that would replicate the provincial land titles system.

These two pieces of legislation should be viewed as complementary tools – FNCLTA providing a more certain torrens-based land title system and FNCIDA providing the supporting regulatory framework. In combination, the two acts increase certainty for investors and purchasers and have the potential to reduce the regulatory gap on commercial, industrial and residential market developments (multi-unit long-term leases) on reserve lands.

As no FNCIDA/FNCLTA projects have been approved thus far in BC, local governments have a unique opportunity to have their concerns put forward to the federal government and provincial government in order to shape how FNCIDA/FNCLTA will be implemented in the province of British Columbia (BC).

2.0 REQUEST FOR ACTION

On 2010 December 10, the Lower Mainland Treaty Advisory Committee (LMTAC) circulated a copy of the LMTAC draft discussion paper titled, “*Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)*” to all of its 26 local government jurisdictions (including three regional districts). LMTAC has requested that each of its member jurisdictions consider the content of the draft discussion paper, and provide further comments and suggestions on or before 2011 March 16. Comments from LMTAC member jurisdictions will be discussed at the 2011 March 23 LMTAC Board meeting.

The purpose of LMTAC’s draft discussion paper is to ensure that both provincial and federal governments understand and consider the complex nature of the potential impacts that FNCIDA projects could have on local governments and emphasize the need for developing a comprehensive implementation strategy that addresses the issues and concerns which have been identified in the draft discussion paper by local government. A copy of the original 2010 December 10 letter from LMTAC and the draft discussion paper is included in the 2011 March 11 Council Correspondence Package.

3.0 PURPOSE

The purpose of this report is to brief Council on the local government issues and interests as outlined in the LMTAC draft discussion paper and to advance these and other related issues and suggestions for the consideration of Council. The preparation of this report relied heavily on the following documents:

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- Federal Minister of Justice, "Fort McKay First Nation Oil Sands Regulations", dated November 17, 2010
- Indian and Northern Affairs Canada, information package on, "FNCIDA"
- Lang Michener LLP, "First Nations Commercial and Industrial Development Act"
- LMTAC, "Additional Information on FNCIDA", dated February 11, 2011
- LMTAC draft discussion paper entitled, "Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)", dated December 10, 2010
- LMTAC Briefing Note, "Local Government Issues and Interests on FNCIDA and FNCLTA", dated February 10, 2011.

4.0 LOWER MAINLAND TREATY ADVISORY COMMITTEE (LMTAC)

LMTAC was created with the signing of a Memorandum of Understanding (MOU) between the Province of British Columbia and the Union of British Columbia Municipalities (UBCM) on 1993 March 22. LMTAC is comprised of 26 local government jurisdictions (including three regional districts) and has as its mandate:

"Coordinating and representing the collective interests of local government, and through them their constituents, in defining and building relationships between First Nations and other orders of government."

Local government interests in treaty negotiations are communicated to the provincial government through the UBCM (which provides a province-wide local government perspective) and individual treaty advisory committees, like LMTAC (which provides a region-specific local government perspective). Although local governments are not one of the three negotiating parties in the BC Treaty Process, LMTAC is a full member of the provincial negotiating team and provides advice and guidance to provincial negotiators and its member local governments on treaty and Aboriginal issues from a local government perspective.

On 22 September 2008, the MOU between the Province and UBCM which covers the 19 Technical Advisory Committees in the Province (including LMTAC) was renewed and significantly expanded to also consider New Relationship and other Aboriginal issues and interests as part of their mandate. Issues related to FNCIDA/FNCLTA fall under this renewed mandate.

Councillor Johnston has represented the City of Burnaby as a member of the LMTAC Board since January of 2009.

5.0 BACKGROUND

The following provides background information on reserve lands, FNCIDA and FNCLTA.

5.1 Reserve Lands

The title or ownership for all reserve lands remains with the federal government under the terms defined by Section 18 of the *Indian Act*. A previous LMTAC draft discussion paper on the federal Additions-to-Reserve (ATR) policy describes a reserve as an area of land that is held in trust by the federal Crown for the use and benefit of an Indian Band (First Nation). As such, reserve lands are federal lands which are provided for the exclusive use of Indian Bands. These lands are managed as common property by the Indian Band – the Indian Band has exclusive use of the property, but it does not own the property itself. Although the Indian Band manages the common property, the Minister responsible for Indian and Northern Affairs Canada (INAC) retains the power to veto land use decisions made by the Indian Band.

Under Section 91(24) of the *Constitution Act, 1867*, the normal federal-provincial division of legislative powers is altered and the Federal Parliament is made fully responsible for Indians and lands reserved for Indians. As a result, all federal lands held for reserves are exempt from provincial land use legislation. Provincial legislation and jurisdiction can be introduced if an Indian Band enters into a voluntary agreement. However, this results in an uneven application of provincial legislation and jurisdiction as it varies from Indian Band to Indian Band.

Reserve lands are also outside of municipal boundaries and are not subject to local government bylaws. As a result, the Indian Band is responsible for providing the local services that a municipality and/or regional district would otherwise provide. Regional district policies and regulations also do not apply to reserves.

5.2 *First Nations Commercial and Industrial Development Act (FNCIDA)*

FNCIDA was a federal legislative initiative led by five First Nations¹ across Canada (including the Squamish Nation). The initiative provides for the potential development of large-scale on-reserve residential, commercial and industrial projects. Example projects contemplated by the initiating First Nations included a commercial market housing development, a deep sea port facility, an oil sands project, a sawmill, and other retail/commercial/light industrial projects.

FNCIDA came into force on 2006 April 1 and provides the federal government with the authority to make regulations, for particular projects on reserve lands, that replicate provincial regulations using an approach called incorporation by reference. This ensures

¹ Squamish Nation (BC), Fort Mckay Nation (Alberta), Tsuu T'ina Nation (Alberta), Carry Kettle Nation (Saskatchewan), and Fort Williams Nation (Ontario).

that on-reserve developments are covered by these provincial regulations. INAC has stated that this approach creates a way to tap into the appropriate parts of a well-developed provincial system for the regulation of large-scale and/or complex projects.

Potential residential developments have always been at the forefront of FNCIDA as the original five First Nations that participated in the development of FNCIDA were each looking at specific projects that they could develop (with Squamish Nation proposing a commercial market housing development). The definition of FNCIDA to “commercial and industrial undertakings” is very flexible as the Governor in Council can enlarge the meaning or approve projects that are not necessarily commercial in nature. This flexibility creates a tremendously wide variety of projects which could find application under FNCIDA.

5.2.1 FNCIDA Project Review Process

Development of a project under FNCIDA is triggered by a request from the First Nation. The applicant First Nation submits a proposal which will be reviewed for eligibility by the federal government. In demonstrating eligibility, the land to be used must be confirmed as reserve land or currently proposed as reserve land through the federal ATR policy. The applicant First Nation must demonstrate that the lack of existing regulations is an impediment for proceeding with the development project, and that no other regulatory regime can be used to effectively implement it. The provincial government must be supportive of the project and agree to administer, monitor and enforce the regulations developed for the project. The regulations are then developed and a tripartite agreement is signed between the federal government, the provincial government, and the First Nation.

5.2.2 FNCIDA Implementation – Provincial Regulations

FNCIDA is unusual in that although it is federal legislation, once a tripartite (federal, provincial, First Nation) agreement is signed, it is implemented and administered by the provincial government. It is also important to note the hierarchy of legislative order suggested by FNCIDA – federal laws (e.g., the Criminal Code of Canada) remain paramount (unless otherwise expressed in the project specific FNCIDA regulations), then the FNCIDA regulations, and finally the laws and by-laws of the First Nation.

As the process of implementing FNCIDA is done on a case-by-case basis (due in part to the large and varied range of projects that it covers – residential, commercial and industrial) it is anticipated that the FNCIDA process will be time consuming and expensive. As a result, it is anticipated that the pool of potential projects will be significantly narrowed to projects which offer significant financial return for those First Nations with adequate institutional capacity to manage, finance and complete the process.

To date, only one set of regulations have been developed under FNCIDA – the oil sands regulations passed for the Fort McKay First Nation utilize nine provincial acts of legislation (in whole or in part) from the Government of Alberta. It has been noted that part of the reason these regulations were successfully passed was the Fort McKay oil sands project had tremendous support from the Government of Alberta, including inter-ministry coordination.²

Moreover, it was also noted that, “...FNCIDA aims to create a seamless transition from the federal reserve regime to the provincial regime, with the effect of lowering transaction costs for investors, while providing security to First Nations.”³

However, FNCIDA does not change the ownership of reserve land, ownership of resources, nor does it reduce the Government of Canada’s fiduciary duty to First Nations.

5.3 *The First Nations Certainty of Land Title Act (FNCLTA)*

The effectiveness of FNCIDA was limited until FNCLTA came into force on 2010 June 30. Like FNCIDA, FNCLTA is also legislation that is triggered by a request from the First Nation and was designed to narrow the differences between property rights for commercial properties off-reserve and on-reserve. FNCLTA supports the development of commercial real estate on reserves by permitting the registration of project lands in a system that would replicate the provincial land titles system.

Prior to FNCLTA, leasehold interests on reserve could only be registered under a deeds system (the Indian Lands Registry).

- This deeds-based system fails to provide certainty of interests.
- There is no guarantee that registered documents are valid.
- It is extremely difficult to obtain accurate and timely information from the Registry.

Under FNCLTA, the provincial torrens system will be mirrored on reserve.

- This torrens-based system provides more certainty and requires an assurance fund.
- This torren-based system is more attractive to potential developers/purchasers.

These two pieces of legislation should be viewed as complementary tools – FNCLTA providing a more certain torrens-based land title system and FNCIDA providing the supporting regulatory framework. In combination, the two acts increase certainty for investors and purchasers and have the potential to reduce the regulatory gap on

² Lang Michener LLP, “First Nations Commercial and Industrial Development Act”

³ Lang Michener LLP, “First Nations Commercial and Industrial Development Act”

commercial, industrial and residential market developments (multi-unit long-term leases) on reserve lands.

As noted, no FNCIDA projects have been approved thus far in BC. Thus local governments have a unique opportunity to have their concerns put forward to the federal government and provincial government in order to shape how FNCIDA will be implemented in the province of British Columbia (BC).

6.0 PERSPECTIVES

This section of the report presents the perspectives of the federal government, the provincial government, First Nations, and local government on FNCIDA and FNCLTA.

6.1 Federal Government

From the perspective of the federal government, First Nation reserve lands have the potential to be used for large-scale commercial and industrial projects – be it oil sands, hydro-electric projects or large real estate developments. First Nations across Canada are increasingly developing plans for complex commercial and industrial development projects. These efforts are often hindered by a lack of adequate regulation for projects on reserve land. These regulatory gaps contribute to uncertainty and can discourage investment, frustrating the objective shared by First Nations and the Government of Canada of expanding economic development on reserves.

FNCIDA and FNCLTA are both optional pieces of legislation triggered by a request from the First Nation. Of the 13 activities listed by INAC as elements of the four-step FNCIDA process, seven (7), or the majority, are to be led by the First Nation. This would imply that the federal government has provided the applying First Nation the ability to control the pace of the process to a great extent.

The federal government has cited the following benefits from their perspective - FNCIDA:

- creates a way to tap into the appropriate parts of a well-developed provincial system for large-scale and/or complex projects;
- more effectively balances federal economic development, environmental protection and social policy goals;
- supplies many economic development opportunities to First Nations - these economic development opportunities will lead to more jobs and contribute to the broader economy; and
- increases certainty for investors in major developments on reserve.

In 2007, INAC officials stated that due to resource requirements, they only expected to take on two projects a year, which could each take two years to complete. It is not clear

if this is still the case, but when LMTAC met with INAC in early 2011, the federal representatives stated that, because of the time and costs involved, FNCIDA would likely only be pursued for large-scale projects. However, LMTAC has noted that it is ultimately up to the First Nation to decide which projects are worth pursuing - if the First Nation feels the FNCIDA/FNCLTA process is suitable for a small-scale project, then the option is available to pursue the project under FNCIDA/FNCLTA.

6.2 Provincial Government

The 2010 Annual Report for the BC Treaty Commission states that, "...there are multiple paths to reconciliation, which the BC Government will pursue with willing First Nations, including incremental treaty agreements, strategic engagement agreements and reconciliation protocols... ..These agreements provide tangible benefits to communities and help to develop a cooperative working relationship between the parties. As such they are welcomed stepping stones to comprehensive agreements [treaties]."⁴

B.C. Treaty Commission Chief Commissioner Sophie Pierre said⁵ LMTAC may have some legitimate concerns [regarding FNCIDA] but said civic leaders need to recognize that urban bands with reserves in desirable locales may not opt to take the same approach as those in rural regions. "There are maybe two paths that are parallel but different," she said. "These are all stepping stones toward full self-government."

Minister of Aboriginal Relations and Reconciliation Barry Penner recently stated⁶ that, for the first time ever, FNCIDA will allow a host of provincial regulations to apply on aboriginal land (previously under the terms of the *Indian Act*, only federal regulations applied to reserves). From the provincial government's perspective:

- FNCIDA is an important step in protecting the rights of both residents and citizens at large.
- FNCIDA has given the provincial government more authority, specifically in relation to the *Builders Lien Act*, *Civil Forfeiture Act*, *Commercial Tenancy Act*, *Dike Maintenance Act*, *Environmental Management Act*, and the *Homeowner Protection Act*.

⁴ BC Treaty Commission, "BC Treaty Commission Annual Report 2010: Recognition Honours Our Past, Creates Our Future.", page 5.

⁵ Jeff Nagel, "Thousands to flock to homes on untaxed native land", *BC Local News*, 11 January 2011

⁶ Kelly Sinoski/Jeff Lee, "Fears of Lost Taxes Arise as Non-Aboriginals Move to Reserves", *Vancouver Sun* January 14, 2011

6.3 First Nations

All five of the original First Nations⁷ involved in developing FNCIDA with the federal government found that, with the specific projects they were pursuing prior to FNCIDA, businesses were hesitant to make large investments on reserves due to the uncertainty of the provincial regulatory gap. The regulatory gap stems from the fact that property and real estate regulations and legislation are provincial, but Indian Reserves are under federal authority. FNCIDA effectively addresses this by allowing the provincial regulations to be mirrored on reserves.

All five First Nations have passed band Council Resolutions in support of FNCIDA and some have advanced plans for various residential, commercial and industrial projects using FNCIDA, including a wood fibre optimization plant for Fort Williams Nation and a land title and strata property regulatory regime project for Squamish Nation.

LMTAC has reported that there is no clear answer to why some market developments have already been done on reserve land pre-FNCIDA – it essentially comes down to the risk tolerance of the developer and ultimately the purchaser. However, Squamish Nation found that there were “*significant differences in market reaction to developments on reserve lands, and developments on neighbouring off-reserve lands resulting from the difference in the regulatory environment and the market’s perception of the risk associated with that development.*”⁸ According to LMTAC, this quote seems to signify that the issue was not just about being able to attract developers, but the regulatory gap was also lowering the market value of projects that did happen.

Squamish Nation has publicized its intention to construct large-scale commercial and condominium developments on its reserves located in Vancouver and in West Vancouver/North Vancouver, where more than 25,000 additional residents could reside over the next 20 years (a population increase equivalent to the existing size of City of Port Moody⁹).

According to LMTAC, no Squamish Nation lands have been officially selected for application under FNCIDA/FNCLTA as discussions with INAC are ongoing. However, current Squamish Nation development proposals include:

- Two forty-storey luxury market rental apartment towers proposed for about 4.15 acres on the southwest corner of the Burrard Street Bridge located in Vancouver. The lessee for the project would be a Squamish Nation Company who would then

⁷ Squamish Nation (BC), Fort McKay Nation (Alberta), Tsuu T’ina Nation (Alberta), Carry Kettle Nation (Saskatchewan), and Fort Williams Nation (Ontario).

⁸ Lang Michener LLP, “*First Nations Commercial and Industrial Development Act*”

⁹ Port Moody's 2006 Census population was 27,512. Currently BC Stats estimates the population of Port Moody at approximately 33,000.

sublease to an investor for a term 99 years plus construction time.¹⁰ According to LMTAC, the Burrard Street Bridge lands being proposed for rental apartment towers would not likely be FNCIDA/FNCLTA projects. Nevertheless, it is possible that this land could also be included under FNCIDA/FNCLTA, as a final decision has yet to be made.

- Squamish Nation's 2004 Capilano Plan features variations of high-density residential development on land between Park Royal South and Ambleside Park. It designates approximately 40 per cent of the 1.7-square kilometre Capilano reserve to economic growth.¹¹ Market allowing, over the next 25 to 35 years, the Squamish Nation plans to build some 12,000 condominiums, townhouses and commercial units on its reserve lands near the Park Royal shopping mall in West Vancouver.¹² According to LMTAC, it more likely that the projects proposed for development on the lands between Park Royal and Ambleside will be FNCIDA/FNCLTA projects.

6.4 Local Government

The perspective of local governments, as represented by LMTAC recognizes:

- The potential for FNCIDA/ FNCLTA to encourage socio-economic development on reserves (including the potential for market-housing development) which could be mutually beneficial to both First Nations and neighbouring local governments.
- That the overall concept of FNCIDA (to close the regulatory gap on reserves) has merit.
- FNCIDA/FNCLTA are untested and unproven as there has yet to be a project completed in BC.
- There is a large amount of uncertainty regarding how the provincial government will implement projects and what the effect will be on local government.
- There is no defined role for local government in the FNCIDA process. Stakeholder consultation is required while the provincial government drafts the regulations, but local governments are not explicitly referenced.
- It is understood that the provincial government will require First Nations to negotiate service agreements with neighbouring municipalities and regional districts to service any FNCIDA project. At this time, negotiation of service agreements appears to be the only mechanism for local government involvement in the FNCIDA process.

It should be noted that there are currently no reserve lands in the City of Burnaby.

¹⁰ http://www.squamish.net/files/PDF/events/Senakw_Business_Terms.pdf

¹¹ http://www.bclocalnews.com/greater_vancouver/northshoreoutlook/community/105377093.html?mobile=true

¹² <http://www.vancouversun.com/business/First+Nation+build+condos+North+Shore+after+federal+bill/3222892/story.html>

7.0 ISSUES AND RECOMMENDATIONS

This section of the report lists responding actions proposed by the LMTAC draft discussion paper to address the issues and interests identified in the LMTAC draft discussion paper, and comments from Burnaby staff, where it is warranted. Please note that this information has been distilled in the interest of providing a summary and that readers wishing to gain a full understanding of the issues should refer directly to the LMTAC draft discussion paper, included in the 2011 March 11 Council Correspondence Package (as an attachment to LMTAC's letter of 2010 December 10).

Concern #1: Implementation and Administration of FNCIDA Agreements

Responding Actions Proposed by LMTAC:

The provincial government:

- *Needs to clarify how it will implement and administer FNCIDA projects in BC.
How will the provincial government:*
 - *Determine which provincial body will be responsible for FNCIDA agreements?*
 - *Designate a specific body for all future agreements, or will it vary on a project-to-project basis?*
 - *Ensure that new residential, commercial, and industrial development on reserve lands is planned in consultation and coordination with neighbouring municipalities and regional districts?*
 - *Ensure application of construction (BC Building Code), workplace (WorkSafeBC), and environmental standards for FNCIDA projects?*
 - *Ensure implementation of a property assessment system equivalent to BC Assessment (BCA) for FNCIDA projects?*
 - *Ensure that developments on reserve lands, particularly non-aboriginal market housing, pay appropriate taxes including hospital (TransLink), school, and regional district taxes.*
- *Undertake extensive consultation with local governments throughout the implementation process, so that issues that are likely to resurface during future FNCIDA projects can be identified and mitigated as early as possible.*

Burnaby staff comments:

Although FNCIDA is federal legislation, the larger challenge is likely with the provincial government in determining the regulation(s) to implement and administer FNCIDA. Moreover, as regulations for FNCIDA have to be drafted for each project on a case-by-case basis, the resulting burden on all parties involved may be a heavy one.

As FNCIDA has yet to be implemented in BC, there is a unique opportunity for the provincial government to take a measured and thoughtful approach to addressing the issues and questions raised by LMTAC in this section of the draft discussion paper. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the provincial government.

Concern #2: Implementation of an Assessment System Equivalent to the BCA

Responding Actions Proposed by LMTAC:

The provincial government:

- *Ensure an acceptable property assessment system will be implemented for FNCIDA projects.*
 - *Should require a comprehensive and accurate property assessment roll, equivalent to that of the BCA, to ensure that the appropriate amount of taxes are levied on FNCIDA projects.*
 - *Ensure that assessment of property values on-reserve lands must be calculated in a manner comparable to those located off-reserve.*

Burnaby staff comments:

To our understanding, FNCIDA had limited traction until such time as FNCLTA came into force. As noted, these two pieces of legislation should be viewed as complementary tools – FNCLTA providing a more certain torrens-based land title system and FNCIDA providing the supporting regulatory framework. In combination, the two acts increase certainty for investors and purchasers and have the potential to reduce the regulatory gap on commercial, industrial and residential market developments (multi-unit long-term leases) on reserve lands. However, to ensure an acceptable property assessment system is implemented for FNCIDA projects, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the provincial government.

Concern #3: Effect of Growing Non-Aboriginal Populations on Reserves

Responding Actions Proposed by LMTAC:

The federal government and provincial government:

- *Must ensure that First Nations provide fair and equitable representation and property tax treatment of both aboriginal and non-aboriginal residents living on reserves to avoid situations of “taxation without representation” for non-aboriginals on reserve.*
- *Enact appropriate legislation to ensure transparency and accountability on Indian Reserves.*

The provincial government:

- *Must ensure that the non-aboriginal population living on reserve lands must pay school, hospital (TransLink), and regional district taxes to ensure equity and fairness with their neighbours and avoid being "subsidized" by their neighbouring municipal tax payers.*
- *Ensure that both aboriginal and non-aboriginal residents living on reserve lands not be allowed to participate in neighbouring local government elections unless those residents living on reserve pay full municipal, regional district, school and hospital (TransLink) taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*
- *Ensure a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant for FNCIDA development should agree to:*
 - *Consent to any FNCIDA development paying school, TransLink, hospital, and regional district taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*
 - *Implement a system for non-member representation on all matters related to services and taxation to ensure some degree of fiscal accountability.*
 - *Replicate relevant provincial legislation such as the Freedom of Information and Protection of Privacy Act to ensure transparency and accountability for FNCIDA developments.*
 - *Replicate relevant provincial legislation such as the Residential Tenancy Act to ensure that the rights (and obligations) of renters are protected in a manner equivalent to renters not living on reserve lands.*
 - *Replicate relevant provincial legislation such as the Strata Property Act as the Strata Property Act allows for leasehold title in cases where the freehold owner is a public authority.*

Burnaby staff comments:

Ensuring an equitable representation and equitable property tax treatment of both aboriginal and non-aboriginal residents living on-reserves and off-reserves is essential to ensuring an equitable and transparent long term delivery of services within the broader community. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government and the provincial government.

Concern #4: Impact on Existing Service Agreements

Responding Actions Proposed by LMTAC:

The federal government and provincial government:

- *Consider introducing legislation to allow municipal and regional district authorities to implement relevant bylaws and regulations for services provided on reserve.*

The provincial government:

- *Determine the potential legal implications for municipalities and regional districts regarding permitting, enforcement of bylaws and regulations on reserve lands as part of service agreements with First Nations.*
- *Needs to develop an approach to deal with such issues in an efficient manner, one that incorporates the input of affected parties, including local governments.*
 - *Consult regarding the potential impact on existing service agreements and/or the requirement for new service agreements.*
 - *The inclusion of local governments in the FNCIDA process also must be continued as part of the process after the Squamish Nation submits an official FNCIDA proposal; as well as being part of any future FNCIDA projects.*
- *Recognize that the Lower Mainland local governments support an all-in approach, or 100% cost-recovery model of service provision to First Nations that include Development Cost Charges (DCCs) and sinking funds for future infrastructure replacement.*
- *Support the negotiation of service agreements following the all-in approach (both hard and soft services) for service delivery to FNCIDA developments, rather than selecting only certain types of services.*

First Nations:

- *Should agree to the application of municipal and regional district Development Cost Charges on FNCIDA projects, as well as the provincially-mandated TransLink real estate / density / land lift development charges, school, hospital (TransLink), and regional district taxes.*
 - *Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*

Burnaby staff comments:

There needs to be an effective approach developed to deal with the approval, delivery and enforcement of local services on reserve by local governments and regional districts. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government, the provincial government, and First Nations.

Concern #5: Increase in Additions-to-Reserve (ATR) Applications

Responding Actions Proposed by LMTAC:

The federal government:

- *Review the inconsistency in the ability to use ATR land for market development activities (Step 1 – Project Identification and Proposal under FNCIDA) as it may lead to an increase in ATR applications driven by a desire to further capitalize on market development opportunities.*
 - *Needs to implement a legal mechanism to ensure that First Nations do not submit an ATR application for acceptable land constraint issues, such as band member housing, only to use it for market development after the application is approved.*
 - *Needs to clarify the allowance of land acquired under the ATR process to be used for FNCIDA projects as ATR is supposed to be used for land constraint issues, not market development such as contemplated for FNCIDA projects.*

Burnaby staff comments:

The federal ATR policy was the subject of a separate report recently adopted by Council which endorsed the 12 separate recommendations contained within the LMTAC discussion paper titled, “*Local Government Issues and Interests on the Federal Additions-to-Reserve Process*” and approved the additional three (3) recommendations put forward by the City of Burnaby staff. One of the recommendations previously endorsed was that:

“Local government needs assurance that criteria and processes described in the INAC ATR policy will not be overridden by the Governor General in Council. In circumstances where a Federal Cabinet decision differs from the recommendation of INAC regional staff, a process is needed for Federal politicians to communicate directly with affected local governments so that the potential implications for local communities are fully understood by the decision makers.”

As LMTAC has noted, the existing link between land acquired under ATR and land available for FNCIDA projects (Step 1 – Project Identification and Proposal under FNCIDA) contradicts the intrinsic purpose of the ATR policy to address land constraint issues such as expansion for band member housing. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government.

Concern #6: Cross Boundary Impact of Large-Scale Development

Responding Actions Proposed by LMTAC:

The provincial government:

- *Needs to clarify how, and by whom, such Development Cost Charges (DCC's) in the broadest sense, will be collected from FNCIDA projects.*
 - *Should ensure neighbouring municipalities and regional districts are compensated in order to offset the extra costs incurred when providing services to the new development in order to avoid FNCIDA projects being "subsidized" by neighbouring municipal taxpayers.¹³*
 - *Should develop a mechanism to collect DCC's from federal reserve land that needs to be imposed on FNCIDA projects.*
 - *Should ensure that a prerequisite to provincial support for implementing FNCIDA projects, the First Nation applicant should consent to DCCs, or equivalent fees, be accounted for in service agreements.*
- *Ensure that FNCIDA projects need to take into account and be consistent with municipal Official Community Plans, Regional Growth Strategies, and servicing plans, to the benefit of both neighbouring jurisdictions and the reserves, during the FNCIDA review process.*
 - *Should enable FNCIDA projects to be incorporated into the regional district's Liquid Waste Management Plan (LWMP) and Air Quality Management Plan (AQMP) to thereby legally permit servicing and facilitate proper regulatory management.*
 - *Include a "sunset clause"¹⁴ on proposed FNCIDA projects that ensures that they are completed in a reasonable timeframe.*

Burnaby staff comments:

To our understanding, large scale development on reserves have the potential to increase demand for the provision of services, strain the existing systems which provide these services, challenge our ability to pay for these services, challenge the ability to meet future demand planned, and reallocate capacity that had previously been allocated to other areas. To address these issues, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the provincial government.

¹³ This issue has heightened importance given the large and very costly sewer, water and transit infrastructure projects anticipated within Metro Vancouver over the next two decades.

¹⁴ A "sunset clause" is part of an agreement that is used to repeal the agreement if certain conditions are not met within a specified period of time.

Concern #7: Impact on the BC Treaty Process

Responding Actions Proposed by LMTAC:

The federal government and provincial government:

- *Need to give careful consideration to developing a comprehensive implementation strategy that addresses these issues and concerns, and supports the treaty process.*
- *Must develop a means for ensuring a seamless transition of the regulations governing developments under FNCIDA to an autonomous Treaty First Nation, where treaties are completed after FNCIDA projects have already been approved.*

The provincial government:

- *Needs to clarify what will happen to FNCIDA regulations if a treaty is concluded and the land used by FNCIDA projects become treaty settlement land rather than reserve land.*
- *Must ensure that economic development initiatives under the auspices of the FNCIDA/FNCLTA legislation should not be viewed as an alternative to the treaty process.*
 - *Must ensure developments on reserve pay full regional district, school and hospital (TransLink) taxes to avoid developments implemented under FNCIDA legislation being an economic disincentive to First Nations pursuing treaties in BC.*
 - *Such 'taxation' would need to be accompanied by 'representation' on the regional district board.*

Burnaby staff comments:

To our understanding, there are two differing perspectives on this issue – one that FNCIDA has the potential to undermine the attractiveness of the BC Treaty Process and the second that FNCIDA is a stepping stone that will allow First Nations to build capacity that will eventually let them work toward realizing self-determination. The responding actions put forward in this section of the discussion paper for the consideration of the federal government and the provincial government help to address the concerns associated with the first view while not introducing anything that would undermine the second view. Therefore, the responding actions proposed in this section of the LMTAC draft discussion paper should be advanced for the consideration of the federal government and the provincial government.

8.0 CONCLUSION

Based on the analysis above, City of Burnaby staff are recommending that Council endorse the LMTAC draft discussion paper titled, "*Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA)*"

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and the First Nations Certainty of Land Title Act (FNCLTA)”, including the responding actions proposed by LMTAC as listed below.

The LMTAC draft discussion paper states that it is intended to identify the general issues and interests of Lower Mainland local governments with respect to FNCIDA and FNCLTA.

The LMTAC draft discussion paper specifically identifies and discusses the following issues:

- Implementation and administration of FNCIDA agreements;
- Implementation of an equitable property (tax) assessment system;
- Effect of growing non-aboriginal populations on reserves, including the inequity of not charging school, hospital (TransLink) and regional district taxes;
- Impact on existing service agreements;
- Increase in Additions-to-Reserve (ATR) applications;
- Cross-boundary impacts of large-scale FNCIDA developments; and
- Impact of FNCIDA legislation on the BC Treaty Process.


Should Council endorse this report, it would be considered and discussed, along with other comments received from LMTAC member jurisdictions, at the 2011 March 23 LMTAC Board meeting. LMTAC has suggested the next steps following the 2011 March 23 LMTAC Board meeting should include:

- LMTAC participating in a dialogue with the provincial government, federal government, and First Nations regarding the concerns and responding actions as identified by LMTAC. The objective of these discussions should be coming to an agreement on mechanism(s) to keep local governments informed and involved in the resolution of the issues identified by LMTAC related to the implementation and administration of the FNCIDA process.
- LMTAC should specifically be involved in the discussions regarding the implementation and administration of the first FNCIDA/FNCLTA projects proposed within BC, likely Squamish Nation projects, as the first projects will have a significant impact on how other subsequent FNCIDA/FNCLTA projects will be implemented and administered in BC.

This report recommends that Council endorse the 2010 December 10 LMTAC draft discussion paper titled, “*Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act (FNCIDA) and the First Nations Certainty of Land Title Act (FNCLTA)*” as a mechanism to initiate further dialogue with the federal government, the provincial government and First Nations; and that Council forward a copy of this report to the federal Minister responsible for INAC, the Burnaby Members of

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Parliament, the Minister responsible for MARR, the Burnaby Members of the Legislative Assembly, and the Managing Director of LMTAC.


Basil Luksun, Director
PLANNING AND BUILDING

DAC/

- cc: Deputy City Managers
- Director Finance
- Director Engineering
- Director Parks, Recreation and Cultural Services
- City Solicitor
- OIC RCMP
- Fire Chief
- Chief Librarian

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