Barbara Bulmer's presentation to Vancouver City Council

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Analysis of Vancouver City's proposed empty homes tax.

Vancouver's proposed "empty homes tax" is in reality a retroactive zoning change. It will rezone all residential property in Vancouver as rental housing, unless the owner qualified for certain exemptions.

These exemptions are few, the dominant one being the current principal residence of the owner. There are hundreds of other situations which demand an exemption to prevent harm and prejudice to an innocent owner. Only a few have been considered.

Current owners, who bought and used their second home in Vancouver in full compliance with and reliance on the existing bylaw, are entitled to continue this use unaffected by the new bylaw.

If the new bylaw operated prospectively, in the future, rather than retroactively, current owners of a secondary residence in Vancouver would not be made to suffer serious economic consequences and personal displacement. The proposed retroactive bylaw smacks of "*Hair On Fire*" legislation designed to deal with one group of people, with no full analysis of the unintended consequences and harmful effects on other citizens.

Current zoning defines "use" as residential. There is no upper or lower limit on the amount of time the owner is free to occupy either a principal or secondary residence. There is no express provision in the current zoning bylaw to prevent an owner of a residence that is not his principal residence from occupying it on a part or full time basis. Nor is there any penalty/tax if an owner uses the property for his own full or part time residence rather than renting it to another person.

In *Sanders v. Langley (Township)*, 2010 BCSC 1453 CanLII) at para. 33 Wedge, J. distilled the principles for relevant "use" under s.911(1) of the LGA:

"where a property owner can demonstrate that at the time of a new zoning bylaw his or her property was actually used in a manner that was a lawfully permitted use but for the new bylaw, the property owner is entitled to continue that formerly lawful, but now non-conforming use."

The concept of fairness underlies allowing a use that was legal under the current bylaw to continue under the new zoning bylaw. To do otherwise is unfair because it is tantamount to giving the zoning bylaw retroactive effect, to the prejudice of the owner.

The old legal use is "grandfathered in" to allow it to continue unaffected by the new zoning bylaw: its status is an allowable non conforming use. The non conforming use principle has been embedded in the zoning process to prevent retroactive injustice from being wreaked upon the landowner.

In Cowichan Valley (Regional Dist.) v. Little, 1987 CanLII 2724 (BCCA) the B.C. Court of Appeal stated *[80] The law has recognized that a person may have more than one residence:.....*and found that the defendants were residents of their second home, which they used periodically several months of the year.

The Court dealt with the legal framework:

[99] Lawful non-conforming use is permitted under certain circumstances, as set out in s. 911 of the LGA. This section provides that a use of land that is lawful when a bylaw is adopted, but is subsequently rendered unlawful by the enactment of the bylaw, may continue. Section 911 of the LGA provides as follows:

If, at the time a bylaw under this Division is adopted

- ***(a) Land, or a building or other structure is lawfully used, and***
- ***(b) The use does not conform to the bylaw,***

The use may be continued as a non-conforming use, but if the non-conforming use is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the bylaw.

**The common law prevents governments from making retroactive legislation to protect individual rights. Governments are to find the least intrusive way to achieve their objective.
Legislation should be forward looking with full notice.**

Individuals should be permitted to do what they want so long as they do not harm others. Having two homes does not create a harm: the harm is lack of social housing. People using their home part time are not creating a harm – they are being treated as villains.

The proposal to tax owners of secondary residences in Vancouver will force many to sell or move out (evict themselves) and make their home to tenants. It is deeply flawed and unfair. It has been designed for administrative efficiency ("self-reported principal residence") rather than based on a proper analysis of use and occupancy.

The City has not done an adverse impact assessment. It has not determined if these effects are justified. Should it be up to owners of property to solve the rental shortage problem on behalf of governments and to carry and pay the costs of solving it? Is there a review panel to determine good and bad effects, and is there a proper evidentiary basis?

The primary fallacy is the assumption that secondary residences owned by residents of B.C. who have their principal residence elsewhere in B.C. are "empty". In reality they are fully occupied as the owner's home for a significant part of the year. They are simply not available for long term rental,

and never have been. To force the owner to bear the huge personal and economic costs of moving out while continuing to pay the mortgage, property taxes, strata fees, maintenance, insurance, special levies, management as a landlord and other costs of owning the property amounts to retroactive expropriation without any compensation from the City.

The proposed tax is draconian: 1% of a property in Vancouver assessed at one million dollars is $10,000 after tax dollars each and every year on top of all the other costs of ownership. Rental income rarely meets the actual costs of ownership, and rental losses are common – so the owner loses his right to occupy his own property part time, and gains little if any income.

Most modest properties in Vancouver have escalated in value so that their assessed value bears no relationship to what would be an appropriate market rent. Yet the penalty/tax escalates according to assessed value.

This is more like a penalty than a tax – punitive in design and effect. Owners of a second home may have owned it for many years, are not wealthy, planned to occupy it as their home part of the year indefinitely and often to move in permanently as they age. These homes are not business holdings, owned for investment purposes, or bought for a quick sale, flip or profit. They were bought in good faith to live in, pursuant to residential zoning.

The proposed tax is ex post facto legislation – in substance it is a change in zoning to the detriment of the owner. He can no longer use it for the previously valid and legal use in effect when he bought it. He went in with clean hands, a bona fide purchaser for value, and relied on the existing zoning. Retroactive, or ex post fact legislation, is grossly unfair and for this reason has often been struck down by the courts.

To tax/penalize occupied second homes on the fiction that they are "empty" amounts to expropriation without compensation. Many owners will be forced to sell, likely to someone who will use it as their principal residence it so it won't be available to rent at all. The former owners will then have to rent something in Vancouver in which to live when they are not occupying their other B.C. residence. There are a hundred valid reasons why people want and need to live several months of the year in Vancouver: occasional work, family and marital issues, elder or grandchildren care, medical care, use of all the facilities only found in Vancouver, to name just a few. These people will be forced to rent other places in Vancouver, putting greater pressure on the available rentals.

The province recognizes that MLAs, whose principal residences are scattered throughout B.C., need a secondary residence to live in while they are in Victoria, and provide them with a stipend to rent or buy one. These MLAs do not work "full time" in Victoria, just as many people who need to be in Vancouver for work part of the time do not work here "full time".

Being forced to sell involves realtor fees, moving expenses, taxes and many other costs, all of which is apparantly to be borne by the owner with no compensation from the city. It is not as if the City is offering to buy the secondary residence at market value and compensate for the costs of moving.

The City has not factored in the costs of ownership in their public information bulletins. These cite a high potential rental income without mentioning or subtracting the equivalent costs of ownership, which are borne by the owner. Nor are the risks of non payment of rent, problem tenants, repair of damage and the work of being a landlord mentioned.

Seniors:

The needs and circumstances of seniors, between the ages of 65-90, have been missed. Many downsized and sold their Vancouver home, bought a principal residence in a less expensive area of B.C. and a small condo in Vancouver for their periodic and future use. The total value of these two is less than the value of a single home in Vancouver. It is prudent to plan for different needs as one gets older, becomes widowed, or requires more of the facilities of the City. Most seniors, especially single ones, live on pension income and lack the resources to pay an exorbitant tax/penalty.

Retired people have diverse needs and skills and diversity enriches a community. They volunteer and women in particular do a lot of the unpaid unacknowledged work that supports the community and families. They need a home in Vancouver to be near family and friends, use the facilities of the city, care for elderly or infirm relatives or friends, care for grandchildren, go to the cultural and entertainment events available in the city, get ongoing medical care for themselves and their spouse, have a secure home to return to full time when they are no longer able to manage living in their principal residence elsewhere in Vancouver, and/or spend the winters in Vancouver rather than in the cold, snowy or remote location where their principal residence currently is (an internal B.C. snowbird).

Seniors get discounts for good economic reasons. Their income is from CPP, OAS and perhaps some savings. They should not be subject to an economic penalty because they have an asset – a property in Vancouver they bought years ago and now want to use and occupy on a part time basis. They are not less deserving of living in Vancouver than anyone else.

FEDERAL TAX on the CHANGE of USE of a property does not appear to have been considered at all by the drafters of this proposed empty homes tax.

CRA has very strict rules about the tax effects both of changing the use of property from personal use to rental and changing it back to personal use at a future date. These rules often involve a deemed disposition of the property at fair market value, whether the property has been sold or not. Capital gains tax is then payable as a result of the deemed disposition, even if has not in fact been sold. The

tax effects, especially if capital cost allowance is involved, are draconian. Forcing an owner of a secondary property to rent it out, especially if he/she intends to live there in future years, is rife with tax pitfalls.

CRA allows citizens with two properties to allocate some years to and other years to the second in calculating the principal residence exemption. This permits owners of two residences to save a great deal of money when the two properties are sold. A change of use of one from personal use to a rental property prevents that property from being considered any further. Being forced to rent a personal use property out may cost the owner well in excess of $100,000.00 given the unknown real estate values at a future time of sale.

The risk of CRA consequences, just like the risks of non payment of rent and damage to property are all on the owner. If the proposed bylaw had been in effect when the owner purchased his secondary home in Vancouver, he would have had warning and been able to protect himself. To seek to enforce this bylaw retroactively is unfair to all and will cause great hardship to others.

To tell owners of primary residences in Vancouver that they are not affected is untrue. Their property will also have effectively been rezoned as rental, and it is only as long as they continue to use it as their principal residence that they will be exempt from the tax/penalty. But, should they move to another location and use another property as their principal residence, their Vancouver property will immediately become subject to the tax/penalty. Few people in Vancouver have been told about or understand this.

The questionnaire given to Vancouverites is of little value. The questions and allowable responses were limited, omitted relevant areas and were directed to the desired result. It had the appearance of a tailored political poll. Further, one does not ask the unaffected majority to determine the property rights of the minority. The legal presumption against retroactive zoning is to ensure protection of citizens against government excesses and unfair unintended consequences.

There is virtually no relationship between the proposed tax on secondary homes and the stated objective of the tax: to force owners of *empty* homes bought and held solely for investment purposes to rent them or else pay a penalty for leaving them empty. Mayor Robertson was quoted as saying "The tax would only apply to homes that are empty year round and not primary residences. That is, secondary properties that are business holdings", "secondary and investment properties left empty and used as a business holding that could be made available to the rental market."

Citizens of Canada have mobility rights and the right not to suffer discrimination on several grounds. It is not contrary to the public interest for a citizen to own more than one property and live in both as his/her home. Everyones house is both a home and a potential investment. A secondary home in Vancouver that is occupied and used as a home is a real home: many people live in two communities at different times of the year for a myriad of valid reasons.

What is really offensive is the discounting and disrespect of the needs and wishes of a segment of the population who has worked hard, lived and paid taxes in B.C., has done nothing wrong or contrary to the public interest. They relied on the zoning in place when they purchased their property. Brushing them aside as if they are unworthy bourgeois who can and should pay a penalty to continue to live in Vancouver defies logic. Deeming secondary residences to be "underutilized" ignores the fact they are in fact used in accordance with the current zoning as residential homes.

The proposed tax is too broad a brush for the solution. The policy people have not done a proper needs assessment of the issues. They have gone to a "quick fix" on the assumption that only one need, that of tenants, should prevail. Because of that people are harmed.

Many Vancouver principal residences are "underutilized": extra bedrooms, a basement suite, or large square footage. The owners of these are not subject to any tax/penalty if they do not rent their extra space. In Cuba, Russia and other communist countries the State forced owners of larger homes to divide them up and share them with others. Using a tax/penalty to force an owner of his/her one bedroom condo in Vancouver to move out, continue to pay all the costs of ownership, and rent it to some other (presumably more deserving) tenant is not that far off.

Lack of evidence:

Council has stated that they have no idea how many owners have their principal residence outside Vancouver and their secondary residence, usually a condo, in the City. Census data will be available in a few months, which will provide evidence of who lives where and owns what in B.C., so proper planning could be done on evidence. B.C. Hydro has only provided data of actual vacant homes. There is no determination of the number of "secondary" homes that are lived in part of the year. There is no evidence of exploitative or wrongful behaviour on the part of owners of secondary homes. They should not be targeted on the false presumption that condos lived in part time are the same as empty homes. It is easy to rent an empty home: it is another matter entirely to be forced to bear the cost of moving yourself and all your belongings out of your part time home to make way for a renter.

The proposed rezoning gives citizens whose primary residence is in Vancouver the right to own and use as many other homes in B.C. and other countries as they want without tax or penalty. They are able to occupy their Vancouver home as much or as little as they want. Yet, other citizens whose primary residence is outside Vancouver are heavily penalized for having a secondary home in the City.

What if other Municipalities such as Whistler or Victoria adopted this approach?

The City wants the benefit – the social benefit of rental housing. But the only person taking the risk is the landlord, and that risk is compounded by the provisions of the Residential Tenancy Act, some of which provisions are focused on the tenant. The City provides no incentive, insurance, guarantee of rent payment, or break on property tax for owners who rent.

Why do landlords like Air B and B? There is flexibility and control. The owner decides who, when, how long, and how much to charge. Payment is up front and guaranteed. There are full review of both tenants and landlords. Air B and B provides one million of insurance so if your house is damaged the repair costs will be covered.

Perhaps the City could consider offering some of the benefits of the Air B and B platform to owners as an incentive to rent both their primary and secondary residences rather than propose an unfair bylaw that will be hard to enforce and will gain no net revenue to assist social housing.

Barbara Bulmer