

# Beautiful Land, Tricky Transactions: Five Things You Should Know About Leasing Reserve Lands for a Residential Development

By Andrea East

First Nations' reserves contain some of Canada's most beautiful land, including undeveloped properties that are frequently eyed by developers for large residential or recreational projects. In my region, British Columbia's beautiful Okanagan Valley, our neighbors the Westbank First Nation have been leasing land for residences for more than 40 years.

There are dozens of different projects on Westbank First Nation's reserves. To the north, the Tk'emlups First Nation is home to the master-planned Sun Rivers; to the south, the Osoyoos Indian Band hosts the stunning Spirit Ridge Resort. There are many other such developments on reserves all around British Columbia.

The legal elements of these transactions can be tricky, however. Whether you are acting for the First Nation whose reserve will be leased for the project, or the developer who will be leasing, building and marketing homes, there are five things you should know before you get started.

**1. What is your regime?** When dealing with reserve lands, most First Nations are governed by the *Indian Act*, which states that reserve lands are held by Her Majesty for the benefit of the First Nation and that all dealings with reserve lands are contracts entered into by Her Majesty with the approval of the First Nation and/or the individual band member. Some bands have what are known as "53/60 powers", which allows the First Nation to approve leases but it must follow all of the processes set out in the *Indian Act*.

There is a growing trend towards the adoption of Land Codes under the *First Nations Land Management Act*, which removes the lands from the *Indian Act* system, as well as towards self-government agreements. There are also unique lands systems such as that employed by the Nisga'a, who under their modern treaty will allow non-Nisga'a people to buy and hold fee simple in their lands. Upon implementation of this system, the Nisga'a Lisims Government will have authority for zoning and taxation, but Nisga'a lands will be fully transferrable and mortgageable.

**2. Reserve land can only be leased.** With very few exceptions, reserve land cannot be sold to a person who is not a member of the First Nation, nor can it be used as security for a mortgage. However, it can be transferred by a long-term pre-paid lease to anyone. This leasing structure forms the basis of the legal interest that is bought and sold in on reserve real estate development. A long-term prepaid lease can be used as mortgage security.

**3. Government agencies don't see eye to eye.** If the First Nation is subject to the *Indian Act*, Department of Justice lawyers will represent Aboriginal Affairs and Northern Development Canada (AANDC) in your lease negotiations. AANDC's policies and procedures are detailed in a publicly available "Lands Management Manual." AANDC uses a standard form commercial lease for these projects, but approach it with caution. Canada Mortgage and Housing Corporation ("CMHC") approval of your development is key for a successful transaction, because unless CMHC approves, many conventional lenders will not issue mortgages to your purchasers. And CMHC does not like all of the clauses in AANDC's standard lease.

**4. Keep an eye on the Canadian Human Rights Tribunal.** A recent line of decisions from the Canadian Human Rights Tribunal ruled that AANDC's handling of a leasing application was paternalistic and discriminatory where the First Nations landholder wished to enter into a lease that departed from AANDC's standards. While this decision is currently under appeal, it could significantly shift AANDC's role in the leasing process if upheld.

**5. A strata without a strata.** A small project with a single tenant may be complete with only a head lease, but typically, we see situations where the lease is further divided into many subleases, the individual units which will be leased on a long-term pre-paid basis to homeowners. Strata legislation does not apply to reserve lands. Therefore, ongoing maintenance for the common property, including collecting common costs, is usually carried out by a society, called an owners association, incorporated to represent the tenants. Corporations can also be used, but they run into issues with securities regulations for large projects. The owners' association may take an assignment of the head lease when the development is complete, and carries on in a manner very similar to a strata corporation.

First Nations land development is an extremely exciting practice area, but you need a reliable guide before setting out on a project. The points discussed in this article will give you a starting point to help you find your way.

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