

Legal update

Creating confusion: the City of Montreal gives itself a right of first refusal over certain lands

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Real estate

In September 2017, Quebec adopted *An Act to increase the autonomy and powers of Ville de Montréal, the metropolis of Québec* (the *Act*). The *Act's* purpose, as its name would indicate, is to provide the City of Montreal (the city) with far-reaching powers permitting it to, amongst other things, exercise more influence over the development of low income housing.

While the adoption of the *Act* was, for the most part, under the radar of many real estate practitioners in Quebec, the *Act* includes an extraordinary right composed of a general right of first refusal in favour of the city over certain lands to be identified by the city.

On November 19, 2018, the city adopted a resolution identifying the lands that could be subject to the right of first refusal and, needless to say, now that the *Act* is in force and has real consequences, it has generated a plethora of questions as to how the *Act* will be applied in practice. The lands identified are in 10 different areas within the city, including certain lands in Anjou, Quartier-Latin, N.D.G, downtown, Rosemont, Lachine and Nun's Island just to name a few. The owners of the identified lands are to receive notices specifying that their lands are subject to the right of first refusal and notices are also registered on title against the affected lands. The City of Montreal has reserved approximately \$18 million to proceed with acquiring the targeted properties.

In a nutshell, no lands identified by the city can be transferred without being offered to the city upon the same terms and conditions as the third-party offer. The *Act* specifies that if the offer includes, in whole or in part, a non-monetary consideration, a reliable estimate of the value must be given to the city. Regardless of the delays in the offer, the city has 60 days to exercise its option and must pay the purchase price within 60 days of exercising its option. If the city does exercise its right, it is to indemnify the purchaser under the offer the reasonable expenses it incurred in negotiating the offer. There are not many other parameters regarding the exercise of such right.

Potential issues

So let's quickly think of some situations where the *Act* could lead to problematic situations:

- the offer includes lands that are not identified by the city resolution: can the city pick and choose what it wants? Even if all the lands within the offer are covered by the city's resolution, can the city also pick and choose the lands it wishes to purchase?
- would a share transaction be captured by the *Act*?

- what happens to a financing that is lost because of the delays imposed by the city's right? Is the purchaser entitled to indemnification?
- what if before November 19, 2018, there was an offer that was accepted, all conditions were waived and all that is left is closing: can the city still exercise its right? Are all the due diligence costs to be reimbursed as well?
- is a transfer of title resulting from a judgment captured by the *Act*?

The *Act* ignores the realities of many real estate transactions, and perhaps the intent was to force developers to consult with the city before making any offers on the targeted lands. Moreover, the unilateral restrictions imposed upon the owners of the targeted lands also seem somewhat harsh and could be viewed as a quasi-expropriation. There likely will be a greater need for legal counsel services as a result of the uncertainty and confusion created by the *Act*.

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