



## Committee of the Whole Report For the Meeting of February 20, 2020

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**To:** Committee of the Whole **Date:** February 14, 2020  
**From:** Karen Hoese, Director of Sustainable Planning and Community Development  
Tom Zworski, City Solicitor  
**Subject:** Air Space Subdivision Fees

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### RECOMMENDATION

That Council instruct the City Solicitor to bring forward amendments to the *Victoria Subdivision and Development Servicing Bylaw* 12-102 to establish a \$15,000 fee for air space subdivision applications.

### EXECUTIVE SUMMARY

Air space parcel subdivision is a three dimensional subdivision under Part 9 of the Land Title Act which creates “a volumetric parcel, whether or not occupied in whole or in part by a building or other structure, shown as such in an air space plan.” Air space parcel subdivision requires approval by the municipal approving officer who must be satisfied that the proposed subdivision creates a viable parcel. This involves review of not merely the proposed air space plan but also the numerous legal agreements (easements and covenants) that govern the relationship between various air space parcels and provide for rights of access and support between them. Since air space parcels are typically created as part of complex developments, the subdivision process also involves necessary code compliance reviews to ensure technical compliance with all applicable standards. This work imposes significant burden on City staff, especially staff in Land Development Services, Sustainable Planning and Community Development, and Legal Services. Exact amount of work varies depending on the nature of the project and number of air space parcels being created, but it is conservatively estimated to involve between 100 and 300+ hours of staff time per application.

At the moment, the *Victoria Subdivision and Development Servicing Bylaw* does not have any special provisions for air space subdivisions and they are treated like any other subdivision despite the far greater complexity and amount of work involved. As a result, the regular application fee (\$150 for up to three parcels, \$250 for more than three parcels) applies to air space subdivisions and does not come anywhere near covering actual City costs of processing the application. Therefore, it is recommended that the City amend the bylaw to provide for a fee that would reflect the actual cost of processing these applications. Based on resource requirements in processing past applications and fees charged by other municipalities for air space subdivision application, a fee of \$15,000 is recommended.

## PURPOSE

The purpose of this report is to provide Council with information and advice regarding air space subdivisions and to propose establishment of a fee for air space subdivisions that reflects actual City resource costs of processing them.

## BACKGROUND

Under Part 9 of the *Land Title Act*, a property owner can subdivide land by establishing one or more air space parcels. Air space parcel is a volumetric parcel whether or not it is occupied in whole or in part by a building. Air space parcel is considered to be “land” and it can be owned separately from other air space parcels above, below, or beside it. Most importantly, its ownership can be separated from the ownership of the surface of land below it.

Air space parcels allow an owner/developer greater flexibility with ownership, design, marketing, construction timing and financing. Air space plans are frequently used in larger, more complex commercial and mixed use developments to create separate parcels between the commercial and residential components. Like other land, air space parcels can be further subdivided through a strata plan.

A fine example of the use of air space parcel is the Hudson building – a redevelopment of the old Hudson Bay building. The project contains two distinct components: commercial uses at the ground level and residential uses above. While this type of development could be accommodated in a traditional strata, in the Hudson, the developer chose to create an air space parcel for the residential component. That air space parcel was itself divided through a strata plan. As a result, the commercial component of the building is owned separately and is not part of the residential strata – i.e., the residential owners do not have a role in decision making related to commercial part of the building.

Typically, air space subdivision is done as part of a complex development project and is not completed until buildings are constructed to ensure that air space parcel boundaries coincide with as built walls. However, air space parcel subdivision can occur prior to construction to allow for separate ownership/financing of different parts of the project.

Whether done before or after construction, air space parcel subdivisions involve significant amount of work. The level of complexity is much greater than in case of any other type of subdivision. Typical air space subdivision requires complex legal agreements (e.g., easements for access/egress, easements for elevator shafts, covenants of support, etc.) as well as detailed technical reviews to ensure compliance with building codes. Those reviews can themselves lead to further legal agreements to address instances where a single building occupies multiple parcels. As an example, the Hudson project involved approximately \$20,000 worth of legal work on behalf of the City.<sup>1</sup>

While there have been few air space parcel projects in Victoria in the past, the use of air space parcels has been quite popular in recent years in other parts of the province, especially the Lower Mainland, and the number of air space subdivision applications in Victoria has increased. To

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<sup>1</sup> Because of the fee arrangements in place at the time, this is higher than the actual amount paid by the City. However, this number reflects the value of the time City's external legal counsel at the time spent on work related to the project. Approximately \$15,000 can be attributed to the work related to air space subdivision. Through an agreement made in 2010, the developer of the Hudson made a voluntary payment of \$10,000 towards the City's costs of processing that air space subdivision.

address the significantly higher costs involved in processing air space parcel subdivisions, many municipalities have established special fees for air space subdivision applications as shown in the following table:

<b>Municipality</b>	<b>Air Space Subdivision Fee</b>
Saanich	\$5000.00
Langford	\$5000.00 plus for each parcel: \$500 commercial / \$400 residential
Richmond	\$7067.00 plus \$175.00 per additional parcel
Coquitlam	\$3620.00 plus \$132.77 for each additional lot
Burnaby	\$12,227.00 for FSR of up to 2.0 \$18,338.00 for FSR 2.0 or more
Kelowna	\$15,915.00
Vancouver	\$47,700.00 for FSR of 3.0 or less \$91,200.00 for FSR greater than 3.0

## ISSUES & ANALYSIS

Since the Hudson project in 2010, the City has approved five air space subdivision applications. Three more applications are currently pending. It can be expected that some form of air space subdivision will likely be part of every large development in the future. Although the bulk of the legal work associated with air space subdivisions is usually undertaken by the developers' lawyers, review and approval of the many complex legal agreements still involves considerable amount of staff time, including considerable resources from the City's in-house legal team. In addition, reviews by staff in Land Development (Engineering) and Permits and Inspections (Planning) are required for technical compliance with applicable codes and to ensure that the proposed subdivision provides for necessary servicing and support.

Currently, the City does not have a specific fee for air space parcel subdivision and, therefore, the fee payable is the same as for any other subdivision application: \$150 for up to 3 lots, or \$250 for more than 3 lots. These fees do not begin to cover the City's costs processing the air space subdivision applications. Pursuant to section 194 of the *Community Charter* the City may impose fees to recover costs of processing applications, including subdivision applications. Given limited City experience in processing air space applications, it is difficult to accurately estimate the cost of processing an application, especially since no two air space subdivisions are ever the same.

Experience with the Hudson project suggests that legal costs alone of processing an air space subdivision are likely to be somewhere between \$10,000 and \$20,000. This is supported by more recent experiences.<sup>2</sup> Given that the Hudson project was done approximately ten years ago, setting a fee in the middle of that range appears to be a reasonable approximation of the City's costs. Therefore, staff recommend amending the *Victoria Subdivision and Development Servicing Bylaw* to provide for a \$15,000 fee for processing air space subdivision application. A fee at that level would be at the higher end but still within the range of fees charged by other municipalities as shown in the table above.

<sup>2</sup> Unlike in the case of the Hudson project, more recent applications have been handled by in-house legal team and we don't have the billing data that was available when the work was handled externally. However, estimates of the time spent on these applications is consistent with the Hudson project.

## OPTIONS & IMPACTS

### Option 1: Create a New Air Space Subdivision Fee (recommended)

This option would involve amending the *Victoria Subdivision and Development Servicing Bylaw* to establish the new air space subdivision fee. The fee would cover costs associated with processing air space subdivision applications and would allow staff to allocate the necessary resources to process the applications within the timelines expected by the developers.

Because air space parcels are usually present only as part of large, complex developments, it is not expected that a fee of \$15,000 would represent a hardship to the developers or materially alter project viability as it would likely be only a small fraction of the total legal and permitting costs of the project. On the other hand, without this fee, staff may not be able to process the applications within the usually very ambitious timelines required by the developers without impacting other work.

### Option 2: Do Nothing

Council could leave the existing fee structure in place. The virtually nominal fee collected would not off-set any of the processing costs. Air space subdivision applications would have to be processed within the existing resources which is likely to result in much longer processing times than sought by the developers. Delay in City processing times is more likely to negatively impact development projects than a modest fee.

### Option 3: Create a New Air Space Subdivision Fee but include Exemption(s)

This option is essentially the same as Option 1 but with an addition of a provision for exemption or reduction of the applicable fee for affordable housing projects. This option is not recommended because it is highly unlikely that an affordable housing only project would require air space subdivision. More likely is a scenario where a project includes affordable housing component, which the developer wants to separate from the market part of the project through air space subdivision. In such instances, the market component obtains a benefit of separate governance structure and there is no reason for the City to subsidise this benefit by absorbing some of the associated costs.

Were the City to adopt a fee structure model which provides for fees based on number of air space parcels (e.g., Langford, Richmond, or Coquitlam) or based on FSR (e.g., Burnaby, Vancouver) then exempting the affordable housing portion of the development might be possible. However, with a flat fee model that is proposed under Option 1, there is no mechanism for providing an exemption that would be associated with the affordable part of a project. This option is not recommended because there is no indication that air space parcel subdivision is necessary to provide affordable housing or that it adds cost to affordable housing component of the project.

### *Accessibility Impact Statement*

Amending the *Victoria Subdivision and Development Servicing Bylaw* does not have any impacts on accessibility.

### *2015 – 2018 Strategic Plan*

Increasing resources needed for processing air space subdivision applications would be consistent with Strategic Plan Objective 3: Strive of Excellence in Planning and Land Use, in particular the desire outcome of reducing processing time of applications.

### *Impacts to Financial Plan*

The proposed bylaw amendment and a new fee would not affect the existing Financial Plan as the number of air space applications is not expected to be more than three to four applications a year. Funds collected through the fees would be used to off-set City's internal costs of processing these applications.

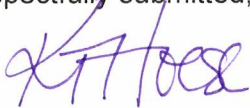
### *Official Community Plan Consistency Statement*

Increasing resources needed for processing air space subdivision applications in a more efficient manner supports OCP Land Management and Development goal 6(A) that seeks to achieve compact development patterns that use land efficiently within Victoria.

### **CONCLUSIONS**

Air space subdivisions are technically complex and require significant City resources to process. The current fee for subdivision applications does not reflect that. Therefore, an amendment to the *Victoria Subdivision and Development Servicing Bylaw* is recommended to increase the fee for air space subdivision applications to \$15,000.

Respectfully submitted,




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Director of Sustainable Planning and  
Community Development



Tom Zworski  
City Solicitor

Report accepted and recommended by the City Manager:

  
Date: Feb 14, 2020