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Crane Swing and Underpinning Easements, Part 1

As the densification of Metro Vancouver increases, more and more commercial and residential real property owners are receiving requests to grant crane swing and underpinning easements over their property in favour of a neighbouring property.

These agreements are requests to: (1) swing a construction crane boom through the air space above your property while the neighbouring property is developed; and (2) to install shoring works (such as steel tie rods) below any structure on your property to provide ground stability while the property being developed is excavated. The underpinning works are intended to prevent your lands from caving into the excavated property. Most often, the underpinning works will be left in place in the ground below the structure on your property after the development is completed.

Below are a few things to consider when you are approached for a crane swing and underpinning agreement over your property.

- 1. Compensation.** The first question we are usually asked is, "What is the going rate for a crane swing and underpinning easement?". When it comes to matters of money, 98% of us seem to belong to the creed of greed. As will be described below, some of the potential benefits to granting the easement can be non-monetary. In regards to financial compensation, we have seen deals concluded between good neighbours for zero to nominal compensation, as well as financial compensation in the five figure range. A few times, we have seen a land owner push for compensation in the six figure range but that is almost always unsuccessful and viewed as very non-neighbourly and opportunistic piracy. A developer will look at relocating its crane or excavating without underpinning (if feasible and possibly with some safety risks to your property) to avoid being held ransom by a neighbour who believes they are entitled to a financial windfall from the neighbouring development. If these negotiations are not done diplomatically, the fallout can have a long lasting impact on your relations with your neighbours.

If your neighbour is only seeking a crane swing easement, without an easement for underpinning works, the compensation figure is usually less.

In addition, do not forget to consider the GST implications for any compensation paid for the easement.

2. **Legal and Consulting Fees.** You will need to consult with a lawyer and an engineer when considering to grant a crane swing and underpinning easement. You will consult with a lawyer to review and negotiate the easement document. You will consult with an engineer to review and advise on the proposed construction plans and to make sure the development works do not impact the structural integrity of any improvements on your property (such as the building foundations, a garage, fence or pool). You may also need to consult with other professionals, such as an architect or a landscape architect.

At the very beginning, you should obtain the written agreement of the property owner seeking the crane swing and underpinning easement that they will pay all of your legal and other consulting fees, **even if the parties fail to agree on the terms of the easement**. An even more conservative approach would be to have retainers paid by the owner seeking the easement to your consultants. What you want to avoid is running up fees with your lawyer, engineer and other consultants and then risk that you will be personally responsible for those expenses if the project does not move forward or you are unable to reach terms with the person seeking the easement. A savvy developer will know that your demands for compensation will be tempered if you face the possibility of paying several thousands of dollars to your consultants if you cannot reach an agreement with the developer as to the terms of the crane swing and underpinning easement.

3. **Term.** The term of the easement should be for a set period of time. Usually something like the estimated construction period (often 1.5 to 3 years) plus a cushion of 6-18 months as there are often unexpected delays with development projects. It is unwise to grant an easement with no end date. Having an end date to the easement also sets up the ability to ask for additional compensation if the developer needs the easement for a significantly longer period of time than originally anticipated.
4. **Registration at the Land Title Office.** As most residential construction projects are completed in less than three years, crane swing and underpinning easements are often not registered at the Land Title Office. The person receiving the benefit of the easement will sometimes seek registration of the easement at the Land Title Office because a registered easement binds future owners of the property subject to the easement in the event the property is sold or the current owner passes away and the property is transferred to beneficiaries.

If the easement is not registered at the Land Title Office and you sell your property before the development project is completed, there is a risk the new owner of the property may take the position they are not bound by the terms of the easement. This could expose you to a law suit from the owner/developer who paid compensation to you for the crane swing and underpinning easement rights.

If the crane swing and underpinning easement agreement is registered at the Land Title Office then you will want the easement discharged at the end to the term. Often this is overlooked and forgotten at the end of the development and it can be frustrating for an owner to have to chase parties for a release of the crane swing and underpinning easement. If the property being developed has been subdivided into many strata lots, it can be very challenging, if not logistically impossible, to coordinate

the discharge of the easement. To avoid this frustration, it should be expressly stated in the easement that at the end of the term the easement expires and should be discharged from title to the property without the requirement for any discharge to be signed and filed at the Land Title Office.

5. **Insurance.** Before you permit your neighbouring owner to swing its construction crane boom over your property or enter onto your property and start performing any substantial site related work, you should require your neighbour to provide you with evidence of satisfactory insurance (general liability insurance of not less than ten million) and the owners of your property should be recorded as additional named insureds under the policy. Have your insurance adviser review the certificate of insurance the neighbour provides to you to confirm it is acceptable and in-line with industry standard terms. The developer or its general contractor should also provide evidence of its registration with the Workers Compensation Board.
6. **Negotiation Matters.** As mentioned above, if you start incurring significant legal and consulting fees, this can reduce your bargaining position especially if the owner requesting the easement is only responsible for those fees if a final agreement is signed.

If you are one of several owners the neighbour is approaching for a crane swing and underpinning easement, then the notorious fear of missing out can creep in and paralyze negotiations. No one wants to hear they settled for \$5,000 and their neighbour received \$30,000 for the exact same easement. One way of addressing this issue while not delaying the development from moving forward is to request that you are paid the same amount as the developer pays to the neighbour who receives the most compensation for granting the crane swing and underpinning easement (in international economic negotiations, this is referred to as “most favoured nation status”).

The redevelopment of the property may also present an opportunity to upgrade or redesign landscaping along the property line, a new fence or retaining wall, vehicle entrance ways to the properties, or parking issues. While the neighbour/developer will not want you to meddle with their development plans, it is possible that addressing a design issue along the property line would be far more valuable to you than the financial compensation the neighbour is willing to pay to receive the crane swing and underpinning easement.

If the main compensation will be performance of certain works along the property line or to one of the properties, a schedule of the works to be done should be attached to the easement and the owner granting the easement should also consider having its neighbour pay a deposit that is held in trust as security for the costs to perform those works, which are often not completed until the very end of the development. If the work is not performed by a certain deadline, you should have access to the deposit funds and reasonable access to the properties to complete the works.

If you anticipate that you will be developing your property in the future or selling your property to a developer, then you may take the approach of seeking nominal compensation but requesting a reciprocal crane swing and underpinning easement over your neighbour’s property for a longer period of time (five, ten or more years). This will mean that when it is your time to develop your property

you already have the crane swing and underpinning agreement in place and do not have to worry about karma when the roles are reversed.

7. **Termination Rights.** The form of crane swing and underpinning easement a developer prepares typically does not have any termination rights. We recommend that the easement have termination rights in the event the developer breaches the easement and fails to correct the breach within a certain reasonable period of time. For example, if the developer damages your building during the course of its activities and takes no steps to repair the damage, you should be able to terminate the easement and refuse to allow the developer to make any further use of the easement rights until the damage to your property is corrected.
8. **Sale of Development Property.** Consider including a covenant in the easement that if your neighbour sells their property to a new owner/developer, the new owner/developer must enter into an assignment and assumption agreement directly with you confirming the new owner/developer's agreement to be bound by all of the terms of the negotiated crane swing and underpinning agreement, especially if the easement is not registered at the Land Title Office.
9. **Cleaning, Noise and Parking.** Construction projects often create significant dust and grime that impacts neighbouring lands and buildings. It is common to require your neighbour or the developer to clean all windows, gutters and the outside of your building and to power wash driveways and patios. If the construction project will extend for years, you may want cleaning to take place once a year or on a more regular interval.

The City of Vancouver Noise Control Bylaw allows for construction on private property between 7:30 am to 8:00 pm on weekdays and from 10:00 am to 8:00 pm on Saturday but not on Sundays or statutory holidays. Consider if you do not want any construction to take place on weekdays after a certain time or on Saturdays. Construction activities attract construction workers and increased traffic and this could put a strain on parking in and around the development site, including your property. Consider if you want your neighbour to make sure your individual or your customer's parking needs are not unduly impacted by the construction activities.

10. **Other Property Related Issues.** If you have other miscellaneous property issues, (such as a fence or garage structure encroaching onto the neighbouring property, you want to cut a tree down to obtain a better view or there are storm water drainage issues) you now have an opportunity and some leverage to resolve those issues on favourable terms. Psychologically, for whatever reason, it is usually easier to agree on these physical property improvements/issues than it is to negotiate financial compensation for the granting of a crane swing and underpinning easement.

If a neighbour or developer approaches you about granting a crane swing or underpinning easement, we can assist you to make sure your interests are protected and you receive an agreement on fair and reasonable terms. One of our starting positions will be that the neighbour or developer pays all of your legal and other consulting costs to review and finalize the agreement, so there should be no costs or financial risks to you whether or not an agreement is reached.