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Crane Swing and Underpinning Easements, Part 2

Peeking Behind the Curtain in regards to Crane Swing and Underpinning Easement Negotiations

If you search online for Crane Swing and Underpinning Easements, we suspect our article on the subject is on your first page of search results. We receive inquiries about that article weekly, including inquiries from across Canada and the US. For whatever reason, our article is a winner on the internet.

At any given time, we likely have a number of crane swing and underpinning easement negotiations ongoing.

In this article we are going to share some insights on things we have learned from negotiating many crane swing and underpinning easement agreements.

A. Negotiator Experience

A long, long time ago, I was involved in the acquisition of a professional sports team. When negotiating transaction issues with the league's head office, it became very apparent that I was at a supreme disadvantage at the negotiation table. This was my first negotiation with the league's head office in New York, whereas the league's legal and support team had negotiated these transaction terms multiple times before. In response to any issue I raised, they could respond as to how that issue had been dealt with in the last five deals with teams A, B, C, D, and E.

Real estate developers are like the league's head office, they negotiate crane swing and underpinning easements all the time. If you are a neighbouring owner, we highly recommend you hire someone who has the same level of experience or more than the people negotiating on the other side.

If the developer recommends a lawyer to you, reflect on why the developer is recommending a lawyer they know to negotiate on your behalf.

B. Law of the Land

In our experience, a good percentage of property owners are genuinely motivated to be a good neighbour and help their neighbours out, even if their neighbour is a real estate developer. That is an admirable quality, and nice civic spirit to see in the City of Vancouver, which has a housing affordability crisis. However, we see a number of developers try to take advantage of that mindset. More than fifty percent of the time, the first offer the developer makes is far below market terms.

One of the first things we tell neighbouring owners is the real estate developer is seeking a **favour** from you.

If the client prefers a more visual metaphor, we paint them the following picture. Our client is safe in a boat, has a life jacket on, they are warm, and have plenty of food and their favourite refreshments on hand. In contrast, the developer is in the water, does not have a life jacket, is a little cold, has a cut on their hand, and thinks they may have seen a shark's dorsal fin (or two) nearby. The developer would really appreciate it if you would let them into your boat.

Translate that metaphor to reality on the ground. The developer has made a multi-million dollar investment to purchase the development lands, has likely borrowed a significant part of the development lands purchase price, is carrying operating costs (property taxes, insurance, etc.), and is paying monthly loan costs to the bank which, if interest rates are increasing, may also be increasing. If the developer fails to obtain the crane swing and underpinning easement rights from you, that could significantly delay progress on the development project, drive up development costs, and drive up carrying costs on the property. The developer crossed the point of no return when they purchased the property. The developer must, **and will**, find a way to move forward with its development project, even if you refuse to cooperate.

Key takeaway point: The developer is asking the neighbouring property owner for and, in fact, needs a favour.

C. Reciprocal Easement Rights, but No Compensation

Often, the developer will propose the parties grant reciprocal crane swing and underpinning easement rights and, because each party is granting the other the same easement rights, no compensation will be payable between the parties.

This approach is from the P.T. Barnum negotiation playbook and is premised on the view "there's a sucker born every minute". Our advice is do not be that sucker.

In fact, we would caution the developer to think twice about making such an offer. When a neighbouring property owner seeks our advice and informs us the developer has proposed reciprocal easements with no compensation or nominal compensation, we inform our client the developer is knowingly trying to take financial advantage of them. Any developer which has negotiated multiple crane swing and underpinning easements knows that reciprocal easements with no compensation is a below market deal for the neighbouring property owner.

D. Dangle Some Quick Cash

Real estate developers also understand the allure of cold cash on the table. Frequently, the developer's initial position will be to offer the neighbouring owner compensation in the range of \$2,500 to \$7,500 and the developer will cover the neighbouring owner's legal fees if the neighbouring owner signs the developer's standard form crane swing and underpinning easement. The developer may even come by with the cheque in hand, all the neighbouring owner needs to do is sign the easement agreement and take the cheque.

Many neighbouring owners are very pleased with themselves when they negotiate the developer up from the initial \$2,500 offer to \$6,000 or \$8,000, double or triple the original offer! However, the neighbouring owner typically feels far less pleased with their negotiation skills when they find another neighbour received \$50,000 in compensation (or more) for those very same rights.

We suggest neighbouring owners use their common sense. If a developer makes you an UNSOLICITED offer of \$[x], that is a pretty good sign that: (a) the developer needs those rights; and (b) [x] is not the developer's best offer for those rights.

We recall a negotiation where the developer advised they had never paid more than Ten Thousand Dollars (\$10,000) for a crane swing easement. Two weeks later, the offer was up to One Hundred and Five Thousand Dollars (\$105,000). As an aside, when that developer negotiates their next crane swing easement agreement, we fully expect the developer will advise the new neighbouring owner they have never paid more than Ten Thousand Dollars (\$10,000) for a crane swing easement. Welcome to the negotiation game.

We often negotiate crane swing and underpinning easement agreements with large law firms. Large firms always talk about "seamless service" and "harnessing collective knowledge" but often the reality is Nicole and Brian working in the same Real Estate Group may not talk to each other much or even like each other. In one instance, we had a lawyer at a national law firm advise we were far out of our depth and they had never seen more than \$25,000 in compensation paid for crane swing and underpinning easement rights by a developer. We enjoyed suggesting they converse with their senior partner [someone King's Counsel] who had just negotiated an agreement with our office for One Hundred and Fifty Thousand Dollars (\$150,000) in compensation.

This goes back to the earlier point of retaining someone to represent you who knows when the other side is talking nonsense or bluffing as to what are market terms.

E. Urgent Deadline

Another negotiation tactic we often see is the "urgency" tactic. The developer will claim that in order to secure a construction crane for the site or to be included on a municipal meeting agenda for an important permit or rezoning approval, the crane swing and underpinning easement must be signed by the neighbouring owner in the next 24-72 hours. The developer is hoping this urgent deadline will cause the neighbouring owner to sign off on the deal on the table and not hold things up. In our experience, ninety percent of the time there is no urgent deadline and it is just a negotiation ploy.

The developer and the developer's lawyer should also appreciate that whenever the developer's side says finalizing and signing the crane swing and underpinning easement is "urgent", the neighbouring owner hears the developer will pay more for the rights and our law firm hears the developer is prepared to pay higher legal

fees for us to make this file our number one priority. If the developer is not prepared to pay more for urgent service, then neither the neighbouring owner nor our firm are inclined to drop everything and rush around for the developer.

And let's be honest, the developer knew many months if not years before the construction crane is erected or excavation began that crane swing and underpinning easement rights were necessary. It is not like a month before the excavation commenced the developer discovered, to their great surprise, that a construction crane and underpinning easement was necessary. If the developer has put off securing the easements right until the month (or week) before the developer wants to erect the construction crane or start excavation of the development site, they are the author of their own emergency. As the saying goes, "bad planning on your part does not constitute an emergency on my part", and all the more so when the developer will not pay extra compensation or legal fees to work on an urgent basis.

Accordingly, we recommend the developer not demand urgent service or action if they are trying to keep compensation and legal costs down.

A similar time crunch situation is caused when the developer makes a low ball initial offer which is met with a higher counter offer from the neighbouring owner. After the developer realizes the neighbouring owner wants real compensation, the developer ghosts the neighbouring owner and the file goes cold. I appreciate that developers are always mindful of their cash flow burn rate on a project, so they want to delay making significant compensation payments as long as possible. However, the developer should appreciate they will receive little sympathy if they go radio silent for multiple months and then suddenly resurface and demand a crane swing easement must be signed in the next two weeks. When this scenario plays out, we feel professionally obliged to advise our client the developer is now desperate for the crane swing and underpinning easement rights and the neighbouring owner is in a very strong negotiation position to push for the terms it considers fair and reasonable.

F. Liability for Professional Fees

After a neighbouring owner is approached by a developer about a crane swing and underpinning easement, a frequent reaction of the neighbouring owner is to seek advice from multiple professionals with respect to the impact of the crane swing and underpinning easement on their property, which is often their home.

Typically, the developer offers some amount of compensation to the neighbouring owner for the easement rights plus the developer agrees to pay the reasonable fees for a lawyer, engineer, or other consultant to provide advice to the neighbouring owner. As a result, the neighbouring owner develops a mindset that they will be paid [\$x] for the easement rights in the near future plus the developer will pay the neighbouring owner's professional fees.

However, if the neighbouring owner requests higher compensation for the easement rights or some other ask from the developer (fixing a fence, planting a hedge for a privacy screen, etc.), the developer may refuse and advise the developer has decided it no longer requires the crane swing and underpinning easement rights. Now, instead of being up the easement compensation amount the developer originally offered, the neighbouring owner is looking at no compensation and the neighbouring owner may have run up accounts with multiple professionals for a few thousand dollars each.

This can result in a neighbouring owner being desperate to conclude an agreement with the developer to avoid being out of pocket the fees to the professional consultants. Beware of this trap. The neighbouring owner should not retain or incur any professional fees whatsoever without: (a) receiving a retainer from the developer for those fees; and/or (b) confirming in writing with the developer that the developer will pay the neighbouring owner's professional fees even if the developer and neighbouring owner fail to agree on terms.

As mentioned at the very beginning, the developer is seeking the favour, so the neighbouring owner should take no financial risk with respect to professional fees owed to their lawyer, engineer, environmental consultant, landscape professional, etc. If the developer will not pay those fees, then do not incur the third party fees and end the negotiation.

G. Compensation Payment Deadline

Another outcome the neighbouring owner should avoid is signing a letter of intent, term sheet, side agreement, or summary of the key transaction terms that does not include a deadline date for the compensation payment to be made to the neighbouring owner.

From the developer's perspective, it is a great outcome if the owner agrees to the high level terms of the crane swing and underpinning easement rights but the developer can defer until much later when the compensation payment is made to the neighbouring owner.

We recommend the letter of intent, term sheet, side agreement or summary of the key transaction terms include an express provision that such agreement is conditional on the neighbouring owner being paid the compensation amount in full on or before an outside date, which is usually 30-60 days from the signing of the letter of intent, term sheet, side agreement, or summary of the key transaction terms.

We have been involved in files where the neighbouring owner signed something with the developer before we were engaged and then it takes over 12-18 months before the developer actually pays the compensation to the neighbouring owner.

H. Municipal Position

In general, municipalities consider crane swing and easement rights to be a private matter between the developer and the neighbouring owner. No different than building a fence along a common property line.

However, on more than one occasion and especially in municipalities with considerable high rise development activity, we have seen a municipal planning department refuse to issue a development permit unless the developer can provide evidence that the developer has crane swing and underpinning easements in place or that the developer made reasonable efforts to obtain such rights from the neighbouring owner(s).

I. Tips for Potential Clients

If a client asks us what is our win/loss record with a specific developer, that communicates the client has no idea what they are talking about. We do not go to court to negotiate these agreements; we negotiate them by email and over the telephone with the developer's lawyer.

If the client immediately advises they want a million in compensation, that is a red flag that the client has unreasonable expectations and we should decline the file.

When a client demands we fix our legal fees to a certain amount, we pass on the file. In our view, the developer should pay reasonable legal fees, whatever they may be. If we provide a fixed fee quote, that gives the developer an incentive to draw out negotiations and keep racking up legal time on the file. Why give the developer that strategic advantage in the negotiations? It is better for our client if the developer understands the longer the negotiations go on, the higher the legal fees the developer will pay. We have lost clients before because of our position on this point.

We had a client advise they did not require the developer to have general liability insurance, which is a standard term for these transactions. We declined to act further on that file as we knew if something happened during the development of the project and there was significant damage to the client's property or anyone on their property, the client would sue us even though we had advised the developer should have general liability insurance. If you want to take a crazy legal position, we do not want to be your scapegoat when things do not work out as you naively assumed they would.

J. Managing Neighbour Owner Expectations

We have seen a lot of different requests by neighbouring owners. Everything from the impact on the feng shui to a property's garden to painting the construction cranes green to blend in with the mountains in the distance. There are times we have to advise our client their expectations are not reasonable or consistent with industry standard terms.

For example, we had one client whose North Shore view from their multi-story apartment building was going to be impacted by the new multi-story development across a major street. As a result, our client wanted seven figure compensation for the loss of the view and the impact on future rental rates in their apartment building. The client did not appreciate our advice that the development's impact on the view from their building and future rental rates are not factors in calculating compensation for crane swing easement rights. In general, a property owner cannot sue a developer because the development impacts the property owner's view from their property.

More than one client has advised they want the developer to pay for the client to live in alternative premises during the buildout of the new development. We have never seen a developer agree to this request.

K. Litigation Reality Check

When we first meet with a neighbouring owner client, we have to be frank with respect to what happens if an agreement is not reached with the developer.

We have never seen a developer throw up their hands and walk away from a development project because they cannot negotiate crane swing and underpinning easement rights with the neighbouring property owner. As the developer has invested millions in the acquisition of the development site, they are financially committed to moving forward with the project. Somehow, the developer will find a way to move forward with the project and this should be kept in mind.

We have seen developers elect to continue forward with a development and knowingly trespass or commit nuisance after negotiations with a neighbouring owner have broken down. Sometimes the developer will be so bold as to dare the neighbouring owner to take legal action.

The practical reality of the situation is that many neighbouring property owners lack: (a) the financial resources for commercial litigation; (b) the steely nerves to deal with the stress of commercial litigation; and/or (c) the free time and patience to be involved in multi-year commercial litigation with a developer. Often, the developer has far deeper financial pockets than the neighbouring property owner to fund the costs of litigation.

For the above reasons, most developers are aware the neighbouring property owner cannot or will not follow through with litigation against the developer for a violation of the neighbouring owner's airspace rights or for installing underpinning works in the neighbouring owner's lands. This is especially true of: (a) strata corporations; and (b) not-for-profit organizations. It is a challenge to convince a special resolution percentage of strata owners to pay an immediate significant special assessment to start litigation with a developer with deep financial pockets. Even more so if the developer has offered the strata corporation \$10,000 or \$20,000 in compensation for the easement rights.

In our experience, far more than fifty percent of neighbouring property owners will not commence legal proceedings even if they developer proceeds to swing a construction crane through their airspace or installs underpinning works in the neighbouring owner's lands. If you know you would not or cannot litigate a violation of your property rights, then temper your expectations during the negotiations with the developer.

If negotiations between a developer and neighbouring property owner are not successful and the neighbouring owners wishes to file a notice of claim against the developer and bring an application for an injunction to stop a construction crane boom from swinging above their lands, the neighbouring owner should budget to pay legal fees in the range of \$30,000 to \$50,000 for a litigator to complete an injunction application. The legal costs will be higher if the matter proceeds to a full blown trial. Our firm does not handle commercial litigation matters and refer litigation matters out to other law firms. Please note that if you ask a litigator to take your injunction file on a contingency basis, you will have a difficult time finding experienced legal counsel to assist you.

Some neighbouring property owners will rant to us for a long time about the impact of the proposed development on their property, including the anxiety about a construction crane swinging overhead for months or years, the dust and grime from the construction, the constant construction noise, the lack of parking in the neighbourhood during the day, the lack of privacy, etc. However, when we learn the client's house is fully rented or partially rented and then inquire how much of the compensation paid by the developer will be shared with the tenant, we are inevitably advised no compensation will be shared with the tenant. I have never seen an adjacent property owner share any of the compensation paid by the developer with their tenant even though the tenant is experiencing all of the same issues the property owner complained to me at length. The practice of law can be a fascinating insight into the self-interested way humans perceive the world and what is fair.

L. Personal Mission

Sometimes a neighbouring property owner is morally incensed with respect to the conduct of the developer and their indifference to the neighbouring property owner's concerns or requests.

If a client wants to make the dispute with a rogue developer their personal mission in life, then the scorched earth option is: (a) write to the mayor, every councillor in the municipality, and the head of the planning department where the development is located; and/or (b) launch a social media campaign and reach out to local media outlets. In an objective and factual manner, describe what has happened and why you believe the developer has acted in a high handed and unjust manner.

If the neighbouring owner is a strata corporation, multiple strata owners (municipal voters) writing to the mayor, each councillor and the head of the planning department can have a greater impact. Do not underestimate the impact of an elected municipal official receiving correspondence from a number of municipal voters.

However, be forewarned this approach will make you a mortal enemy of the developer. If the project proceeds, the developer will not cooperate with you on anything. The developer may even sue you for defamation, among other things. This approach should not be done in anger. Reflect long and hard if this is the path you want to take as it is easy to start a legal war but much harder, and usually very costly, to end one.

If you have a connection with the mayor, a councillor, or someone in the municipal planning department, a softer approach would be to reach out to your contact on an informal basis for assistance and guidance. That said, property developers historically have been major financial donors to municipal parties and elected officials, so there can be an interesting dynamic in play between municipal officials and developers in that municipality. Many real estate developers know the heads of the municipal Planning Departments and key municipal staff members on a first name basis.

M. Multiple Property Owners

Based on our experience, the file becomes harder and takes longer to complete if we act for multiple neighbouring owners.

It is challenging to keep a group of multiple owners on the same page with each issue that comes up during negotiations. Things take longer when we need to receive and respond to feedback from eight different owners with many properties owned by spouses. In addition, the more owners we act for, the greater the chance one of our clients is completely bonkers. As a result, we are more likely to seek a financial retainer from our client when we act for multiple owners.

In our experience, acting for multiple owners has not resulted in us negotiating higher compensation or better terms for the group than we typically negotiate for an individual property owner.

N. Compensation

The key question we are always asked is what is the market compensation for crane swing and underpinning easement rights? There is no stock exchange that quotes the current Vancouver market price for crane swing and underpinning easement rights or MLS like tracking of crane swing and underpinning easement transaction payments.

What it really comes down to is how much more it will cost the developer to proceed with the development without the crane swing and underpinning easement rights from the neighbouring owner. If the extra costs to develop the property without crane swing and underpinning easement rights are \$400,000, then the developer is not going to pay the neighbouring property owner more than \$400,000 and likely not more than \$350,000 (i.e. the neighbouring owner should leave some upside on the table for the developer to conclude the deal).

The reason there is no set market value for these rights is each development is unique.

If a developer will be excavating its site down to parking level 7 (so seven levels of underground parking) it will be far more expensive for the developer to excavate that site without underpinning works in the neighbouring lands than it would for a developer who is only excavating to parking level 1 (one level of underground parking).

As excavating without underpinning works can significantly increase the developer's construction costs, the compensation paid for crane swing and underpinning easements is typically much higher than the compensation paid for crane swing rights only.

O. Developer's View

I will confess that a few developers have expanded my vocabulary as to creative ways to use His Majesty's English. You know who you are, and I know you are reading this article and cursing my name yet again.

I have been told by developers that we represent extortionists, mafia like shake-down artists, and people who exacerbate the housing affordability crisis in Metro Vancouver.

I do try to explain the developer's mindset to my client.

I explain the developer has made a multi-million dollar investment in the development lands and taken on a substantial financial risk to complete the project. Accordingly, with so much riding on the project for the developer, it is frustrating for the developer when a neighbouring owner refuses to communicate with the developer or takes weeks or months to respond to simple correspondence.

Developers regularly advise that after the project is completed, the values of the properties adjacent to the development are often increased, sometimes substantially, as the new development replaced older or sometimes derelict housing or buildings and other neighbourhood improvements are made, such as new amenities, improved landscaping and streetscape, new retail opportunities, electrical vehicle charging stations, more public parking, etc. However, instead of being thanked by the neighbours for increasing their property values and improving the neighbourhood, the neighbours put their hands out and demand significant compensation from the developer for crane swing and underpinning easement rights.

The developer is left to sarcastically comment, "so in addition to taking all of the financial risk for this project, significantly increasing your property values, and improving your neighbourhood, you also want me to pay a significant sum to you for the nominal impact of a crane swinging above your land and placing underpinning deep below your house or building." Hopefully, this provides context as to why the developer **genuinely** feels the neighbouring owner's compensation request is nothing more than extortion from an ungrateful beneficiary of the development project.

Multiple developers also point out to me that a crane boom swinging occasionally through a property owner's airspace and the installation of underpinning works far below the neighbouring owners' house or building will barely be noticed by the neighbour property owner and have zero interference with the neighbouring owner's day-to-day use of their property.

Some developers feel compelled to comment that the neighbouring owner's compensation extortion is another unfortunate contributor to the housing affordability crisis in Metro Vancouver.

Occasionally a developer will advise that laws should be passed for dense urban cities so that no compensation is payable for crane swing rights or installing underpinning works. The logic is everyone in dense urban cities should accept that crane swing and underpinning easement rights are necessary for urban neighbourhoods to regenerate and thrive.

While many developers will forcefully assert fair compensation for crane swing and underpinning easement rights is in the range of \$10,000 to \$25,000, I find that perspective does a quick 180 when someone seeks crane swing and underpinning easement rights over the developer's property. In my experience, developers have no qualms requesting significant compensation when another developer seeks crane swing and underpinning easement rights over a property they own. Again, the practice of law provides a unique window to observe human behaviour.

P. Property Rights Irony

Developers frequently claim that a crane boom occasionally passing through an airspace high above a home or building on the neighbouring lands and the installation of underpinning works below ground and far below the home or building on the neighbouring lands is a nominal infringement of the neighbouring owner's property rights.

There is a real irony that a real property developer, whose business model is dependent on the respect and enforcement of private property rights, can easily rationalize violating a neighbouring owner's airspace rights or below ground property rights when it suits the developer's financial interest. From our perspective, it seems to be a case of having your cake and eating it too. As we represent many adjacent lands owners, perhaps our financial interest has clouded our judgment.

Q. Industry Consultants

We are aware there are industry consultants who actively contact property owners adjacent to future major real estate development projects and advise the adjacent owners that they can negotiate better crane swing and underpinning easement compensation terms than the developer will offer them.

These consultants typically charge a fee of 15-18% on the compensation amount the developer pays and the consultant is only paid when the adjacent property owner is paid by the developer. No compensation is payable to the consultant if no agreement is reached with the developer.

R. The Future

If we had to predict things that may occur in the future with respect to crane swing and underpinning easements, the following come to mind.

An insurance company will offer a specific home insurance coverage that someone can purchase directly from the insurance company when the neighbouring property is being developed and there will be crane swing activities and underpinning works. Instead of the neighbouring owner being recorded as an additional named insured on the developer's general wrap-up liability policy for the development, the neighbouring property owner will obtain their own independent insurance policy directly from the insurer. There are distinct advantages for the neighbouring owner to have a direct contractual relationship with the insurer, including more control and input over the insurance policy terms as well as the renewal, alteration, cancellation, or termination of the insurance policy.

Second, at some point we expect a neighbouring owner will register an equitable charge over the development property to secure any damage caused to the neighbouring owner's property. The equitable charge will be subordinated to the developer's construction mortgage financing, but would provide the neighbouring land owner with further security if the neighbouring owner's soils collapsed into a large excavated development site and damaged the neighbouring owner's building foundations, or there was a catastrophic crane collapse resulting in damage to property and/or injury or death to people.

Third, we anticipate there will be pressure on municipalities and/or the provincial government that permits should not be issued to real estate developers who will be erecting construction cranes unless the developer provides evidence that (a) the construction crane will be operated by someone with recognized crane swing training and skills or some recognized professional certification; and (b) the developer must have a certain level of liability insurance in place in the event the construction crane fails and causes loss of life or substantial property damages or there is a collapse of the excavated site and the soils from the adjacent properties slide into the excavation site (i.e., something similar to evidence of 2-5-10 Home Warranty Insurance to obtain a building permit). Given the recent number of construction crane failures and collapse of excavated sites, we anticipate there will be public pressure on the government to further regulate these construction activities and related risks.

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