The Multiple and Conflicting Roles of Local Government in Negotiating Parkland Acquisition: Can the Negotiations Satisfy the Criteria of Ethics and the Dimensions of Interests?

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ABSTRACT

The practice of providing urban parks as an integral part of community development no longer creates public debate about the function or legal authority of local governments to make such purchases. However, the debate continues on the ethics of local government’s parkland acquisition practices. These practices have the capability and motivation to influence the land value of sites they wish to acquire. Local governments are responsible for determining land use, which in turn affects land value. The limited financial means of local government to acquire parks makes influencing land value one way of stretching the scarce resources of the community.

The ethics practiced in the negotiations to acquire urban parkland where the land has development potential are unique because:

1. Parkland is a public good and not a market commodity;
2. The potential for other higher land uses exists; and
3. Local government plays a dual role: one of a regulator and approving authority for determining land use and providing community stewardship, and the other as the corporate cost controlling agency seeking to acquire land.

These qualities create the strong possibility for ethical conflict to occur in the negotiating process.

Building upon the Interest-Based approach to negotiations, this paper uses a set of Prescriptive, Intuitive and Evaluative (P.I.E.) criteria that define ethical conduct, and the dimensions of Fact, Social Consensus and Experience that defines the dimensions of interests,
to develop a General Model for Ethical Negotiations (GMEN). Conceptually, the GMEN model is a three-sided pyramid within a sphere of negotiations. Negotiations that adhere to the principles defining the parameters of the pyramid would be considered ethical. Negotiations outside the pyramid are considered unethical.

Six parkland acquisition cases are discussed using the GMEN model. In this study, the parameters establishing the criteria for passing ethical judgment are the functions of the political economy, the policy statements of the local government, and the legislation that delegates power and authority to local government.

The study finds that ethical conflict is inherent in parkland negotiations where the land has development potential because of the multiple roles and dual character of local government. This conflict is not necessarily illegal since prescriptive criteria are only one means of judging ethics. Nor is the outcome necessarily negative to the vendor, since the public may end up with a less attractive park agreement. However, the parameters that would require parkland acquisition negotiations to be ethical sometimes conflict with some of the multiple roles held by local government. Several recommendations are made that would help to reduce ethical conflict and the imbalance in parkland negotiations.
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Is there still time to play Open House??
1.0 ETHICAL CONFLICT IN PARKLAND NEGOTIATIONS

1.1 CONTEXT FOR THE PARKLAND NEGOTIATIONS PROBLEM

1.1.1 INTRODUCTION

Society has long recognized the potential for conflict of interest between governments and landowners. The potential for conflict in land acquisition has led to expropriation procedures and other legislated requirements to guide the land acquisition process. Land acquisitions by local government, however, have greater potential for creating conflicts of interest than land acquisitions by federal and provincial governments. The reasons for greater conflict in negotiations with local government arise from:

- the direct role local government has in determining land use which in turn directly impacts land value;
- the desire by local governments to avoid the expropriation process which encompasses a greater range of stakeholder interests;
- the responsibility local government has in allocating local resources to develop and maintain local infrastructure that affect land value; and
- the restricted financial capacity local governments have for taxation and in borrowing to fulfill their commitments.

The limited resources of local government, combined with multiple competing objectives for those resources, have led local governments to adopt negotiating strategies that broaden its resource base. The land development approval process is one venue where these
strategies have become most evident. In my opinion, this has led local government to actively engage in a process of unduly shaping the Best Alternative to a Negotiated Agreement\(^1\) of land developers/owners. These strategies are also applied when acquiring parkland where the land has development potential. The reasoning underlying these strategies is simple. Land use, as determined by local government, influences land value. While local government has the power and authority to determine land use, improve and maintain the community infrastructure, and set policies for community development, the role of public stewardship is sometimes jeopardized by an increasing emphasis on corporate based, rather than community based, operational policies.

An example of this conflict is reflected by recounting an experience I had in March 1992 when I attended the Parkland Acquisition Committee of a local government in its regular monthly meeting to discuss administrative issues. This meeting differed from other meetings because a new site within an established residential neighbourhood was to be presented to the committee. After rationalizing the selection of the site, the critical question was posed. How to acquire the properties as none were listed for sale.

"If we can get just one, the others will follow" said the spokesperson.

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\(^1\) The Best Alternative to a Negotiated Agreement (BATNA) (Fisher, R., Ury, W., and Patton, B., 1991) is the standard against which any proposed agreement should be measured. It is the standard by which a party can determine if the terms of the proposed agreement are too unfavourable or contain terms which are in the interest of the party to accept. The BATNA concept is an integral part of interest-based negotiations.
"You mean if we follow our standard practice of tearing down the house and dumping a load of gravel on the driveway?" queried another.

"Exactly!" was the reply.

The conversation consciously portrayed a land assembly tactic commonly known as block-busting. The tactic is designed to thwart the assembly of land by other developers. It causes the physical decline of a neighbourhood so the land can be easily assembled. This time however, the context of the tactic was different. The institution entrusted to foster community growth, bring about neighbourhood improvement, and maintain a community’s live-ability, was the instigator of the tactic.

1.1.2 PROBLEM STATEMENT

Hypothesis

*Ethical conflicts may arise in urban parkland acquisition negotiations due to power imbalances and the multiple competing roles of local government.*

This thesis examines the context in which ethical conflict may arise in local government’s parkland acquisition negotiations. The potential for conflict exists because two of the multiple roles of local government, land use regulations and the level of civic infrastructure servicing the land, are the sole domain of local government and directly influence
land value. This power has the potential to prescribe and define the negotiations for parkland acquisitions.

Research Objectives and Approaches

The overall objectives of this thesis are to analyze and evaluate the process for negotiating parkland acquisitions in the context of the interest-based negotiating model, and determine if ethical conflicts can arise. To narrow the research, the focus is on parkland acquisition negotiations where the land has development potential. If conflict does exist, how is it manifested in the negotiations, and what changes can eliminate or reduce the conflict?

The approach employed in this thesis to address this research objective includes the following components:

- outlining the basic linkages that define the parameters of the problem;
- outlining the four major components that set the parameters of interest-based parkland acquisition negotiations;
- developing a framework for ethical negotiations;
- applying the framework to parkland negotiations through an analysis of case studies; and
- proposing recommendations to address the problem.
Limits of Study

The scope of the study is of a general community planning nature and not a detailed analysis of the legal, economic, financial, political, engineering, administrative, social or civic practices. It assumes the reader has a basic understanding of the land development approval process and how local government functions. It is limited to parkland acquisitions involving local governments in British Columbia, and to lands where development opportunities exist. Persons in other jurisdictions should be aware that the findings might not apply outside the province or to situations where land development opportunities are not prevalent. The study also takes a ‘purist view’ of the basic underlying principles. It does not seek to explain why the fundamental principles are skewed by social and political influences in the real world.

Methodology

This study is based on:

- literature, legislative, information circular, correspondence, and government report reviews;
- discussions and conversations with local government administrators, land developers, real estate professionals, lawyers, and property owners affected by parkland acquisitions as part of my personal experience working in land development and parkland planning;
- website searches on keyword topics such as: parkland, parkland acquisition, negotiations, expropriation, highest and best use, ethics, and conflict of interest.
• website searches of local government Council minutes and reports. (Some web sites have subsequently eliminated the search function to their minutes).

• topical studies published on government and media group websites; and

• examinations of past and on-going parkland negotiations.

The literature review provided the historical context of parkland in the urbanization process and identifies the aspects that make parkland negotiations unique. The literature review was structured to analyze the four basic components (e.g. government, ethics, negotiations and the land valuation process) that comprise parkland acquisition negotiation practices. An examination of the legislation, information circulars, government reports, and conversations with persons in the industry built upon the academic literature. No formal interviews with prepared questions were conducted. All discussions were informal, and generally based on my employment experience. A web site review broadened the analytical base and provided an array of case studies and debates concerning parkland acquisition. From these broad parameters, a conceptual model was formulated. Six cases were then selected to be evaluated in the context of the model. The cases had to demonstrate:

• the opportunity for land development;

• an adequate public record; and

• involve ethical questions related to land use and social values.

Finally, recommendations were formulated to address the problem.
1.2 URBAN PARKLAND: AN HISTORICAL PERSPECTIVE

1.2.1 PERSPECTIVES ON PARKLAND

Parks are an important part of the history of gardens and landscape design. They are a means of understanding society and how social forces shape, and are shaped by, the physical world. Social, economic, demographic, political and psychological processes influence park location, size, shape, composition and equipment, and landscaping (Cranz 1989; Seymour 1969). As a societal statement, parks are an asset to the community, especially to the weak, the invalid and the poor because they are free. The poor’s “existence is silently acknowledged at the very gates of public parks: park advocates justified free admission as a way to demonstrate their democratic character and those of limited means benefited in particular.” (Cranz 1989).

In most municipal contexts, the provision of parks by local government has been seen as an option, not a legal necessity. In western civilization, establishing parks in older areas often involved or was in conjunction with slum clearance, though few bureaucrats mentioned land values, business interests, or political-economic considerations as a motivator. Creating parks was seen as a response to an abstract demand or need (Cranz 1989; Seymour 1969). The public purpose of adequate parkland is now so clear that the fundamental legal power for local government to spend money on parkland acquisition is well established. (Siegel 1960). Legislation concerning community planning, such as the Local Government Act of BC, encourages local government to make provisions for parks.
Historical Acquisition Practices

Today, the majority of parkland acquisitions come from a mix of public spending and land development negotiations. This is a change from earlier times when realtors, in some cities, built rail lines with parks at their ends to attract potential buyers for the land along the line. Real estate developers were ardent park advocates. Some bought land in advance of park site selection in hopes of being able to charge exorbitant prices or reap great profits on the unearned increment on adjacent lands. Local and municipal governments found that they had to protect themselves from land-grabbers, and real estate sharks who might try to gouge the city (Cranz 1989).

During the Depression when property values were at a low, local governments acquired numerous properties through defaults on property tax payments (Cranz 1989; McCurdy 1985; Siegel 1960). Following the Second World War, the coordination of parkland acquisition with other civic departments and agencies allowed for the creation of complex fiscal and legal arrangements, and the application of strategic influences to facilitate the acquisition process. This was to address park professionals' complaints that city planning and parkland acquisitions were too often piecemeal (Cranz, 1989). The continuation and intensification of top-down planning for parkland acquisition has evolved to the point where the process can now only be challenged by insiders with expertise in law, politics, finance, and community planning.
1.2.2 UNIQUE PROBLEMS TO URBAN PARKLAND ACQUISITIONS

Acquiring land with development potential for park purposes distinguishes itself from other negotiating forums by evoking issues of geography, governance, two-tiered sequential bargaining, and a subjective valuation process.

Geography

Negotiations for all land acquisitions are unique in that land is immobile and its value comprises both absolute and relative locational characteristics (Baxter 1995). In parkland acquisition, the physical attributes of the land can often dominate. Park site selection is often justified on the basis a site’s unique topographical, locational and environmental attributes. Parks are often an assembly of contiguous land, which often spans several legal titles. Once an assembly has begun, relocating a proposed park site to another area becomes a major impediment. Therefore, the alternatives to negotiating an agreement are more restrictive. Unlike negotiating a labour contract or business service, geography plays a major role for both vendor and purchaser, and land substitutions are not readily available.

Governance

Local government is generally seen as having the unfettered right to regulate land use.² It is also the institution through which urban parkland is acquired. The price local government

² Although a few legal scholars may argue otherwise, it is generally held that local governments have absolute power to zone or change the zoning of land without regard to the economic implications or palatability of the decision to landowners or others in the community. This is because local governments do not have to give a reason for their decisions. The Pacific Investment case presented in this thesis is one legal case substantiating this perspective. CMHC vs. District of North Vancouver (2000) is another noted case.
pays for parkland is, in conceptual terms, determined by market value. Yet, market value is affected by the alternative land uses available for a site, the neighbourhood context, and the availability of infrastructure services. Therefore, the spending and revenue practices of local government, and its land regulatory provisions, have a direct influence on the relative value and price any particular park site can command.

Local government is also the provider and custodian of the community’s infrastructure. The method of providing and improving the infrastructure, and the means and diligence by which it performs its custodial function, affects the level of service and the physical depreciation of a neighbourhood. This, in return, reflects on land value.

Local government has the role of serving the public at large, as well as each individual. Its operations must be economically prudent and efficient, and its application and interpretation of the regulations must be consistent, applied equally, and not subjected to public opinion. The rights of one person cannot be sacrificed at the expense of the other. This is not to suggest that regulations must be rigid. Flexibility and discretion are intrinsic elements within regulations to account for variations in circumstance. However, since the system of local government does not have an official opposition to debate the issues, the latitude of any discretion must be based on principles valued by society at large.
Two-Tiered Sequential Bargaining

In the negotiations to acquire developable land for park purposes, the parties must agree on the alternative land use the site may deliver if it were not designated for a park. Agreement is required because parkland is a public good that is not valued on the basis of actual use, but on the basis of 'Highest and Best Use'. Therefore, parkland acquisition is a two-tiered negotiating process. First, there must be agreement on the best alternative land use, and then the value of the alternative use must be negotiated (See Figure 1).

The negotiations with a local government to change land use for a given site are themselves highly complex. There are a wide array of land use planning tools, in addition to standard zoning, to empower land use changes. This array of instruments is a reflection of the fact that a community's interests are better served by flexible regulations, than by the rigid historic template of zoning. Some of these statutory instruments include:

- Development and Development Variance Permits,
- Heritage Alteration and Revitalization Permits,
- Bonus Density zoning and
- Comprehensive Development (CD) zoning.

All of these instruments are conditional approval processes, rather than outright approvals, meaning that an approval is subject to terms and conditions that have various economic

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3 The term ‘Highest and Best Use’ is a term most commonly utilized in the land appraisal and urban land economic profession to give land uses a hierarchy based on economic units of measure. It is not a term referring to traditional planning concepts concerning the intensity of land use or density. The highest economic returns do not necessarily equate to the highest rate of land utilization or highest density. The qualities and definition of this term are discussed in Section 2.4
Figure 1. Two-Tiered Parkland Negotiations

All negotiations present both opportunities and potential obstacles to achieving one's interests. Where local government is the prospective purchaser and the designator of land uses, two hurdles are involved for successful negotiations. Since parkland is considered a public good, this makes parkland acquisition negotiations unique.

implications specific to each project. The uncertainty raised in negotiating an approval for an alternative land use means the valuation of parkland "bristles with difficulties." (Brown 1983).
Valuation

From the outset, land has been the cornerstone of wealth creation in an economy (Baxter 1995; Bracewell-Milnes 1982; Dale, McLaughlin 1999). Land, along with labour and capital, is part of an economy’s factors of production. How these processes of production are combined determines economic efficiency and wealth generation. Land is the most fundamental of the three vehicles of wealth generation because, without it, labour cannot live and there is no space to manage the capital (Dale, McLaughlin 1999). Land has social, political, and economic dimensions.

Land value varies solely on the basis of where it is located within an urban area (Baxter 1995). Even without considering the terms and conditions that need to be met for an alternative land use, different urban contextual settings affect the market price and consumer expectations for otherwise identical land uses. The traditional approach to valuing land is to determine at what price a willing buyer and a willing vendor would come to an agreement. The methodology used to make this determination is known as the comparative method of land valuation (Martin 1987; Brown 1983). It involves the process of assembling information on land sales in an area and comparing the similarities between the sold sites and the subject property. In circumstances where the opportunities for comparison are less apparent, the cost method is employed. This method breaks down the components that create real estate value to determine a residual land value. (UBC Professional Programs, 1995).

In parkland acquisitions, where the land is suitable for development, the principle of ‘Highest and Best Use’ is employed. This notion refers to the value that is most likely to
produce the greatest net return over a period of time under a land use other than parkland. Net return may be monetary as with an income-producing property, or take the form of amenities such as pride of ownership, comfort, or convenience (Martin 1987).

Worldwide, various jurisdictions use different methodologies and administrative structures for determining land value. The different practices are a recognition of the variety of land acquisition techniques and discrepancies in deriving value through an open market analysis. For example, Brazil’s valuation process is done judicially as opposed to administratively. Its valuation process is unusual in that it considers the profit-earning capacity of the property. Lost profit arising from the time it takes for the owner to reasonably buy another property is part of the compensation. India adds a 15% premium to the market value as compensation for injured feelings due to the unilateral actions of the authority in acquiring the land. Singapore bases its value on declared tax value within the last two years. Guatemala’s criterion is tax value plus 30%. Venezuela determines value by a committee of two, one appointed by the buyer and one by the seller. Sweden engages in a process known as value freezing. It is a technique that picks a time before the date of expropriation and declares that the value to be paid will be the value of the land as it existed as of the specified period. Germany allows land to be sold in the open market and then pre-empts the sale prior to its registration acquiring the site at the negotiated price between the parties (Brown 1983; Kitay 1985). These various methods demonstrate that the valuation processes are not simple and can vary greatly.
1.3 THE POTENTIAL OF ETHICAL CONFLICT IN PARKLAND ACQUISITIONS

The political history of park development, the uniqueness of geography, the multiple roles of local government, the two-tiered sequential bargaining process and the difficulties in valuation, all suggest there are many opportunities for ethical conflict to arise in parkland acquisition negotiations. Different methodologies utilized worldwide demonstrate that land valuation is not a science but a subjective process. The market price for urban parkland relies on substitutional comparisons based on the principle of Highest and Best Use. Highest and Best Use relies on local government to specify what alternative land uses are suitable. However, obtaining approvals on alternative land uses is itself a highly complex negotiating process and not a simple call by a local government bureaucrat.

Local government controls the structures for negotiating land uses. They also control and maintain the physical infrastructure servicing the land that affects land value. There is also the political influence that can overshadow not only the negotiating protocol, but also the planning process that leads up to negotiations. All these powers lead to the potential for ethical conflict in parkland negotiations.

In order to determine whether ethical conflict occurs in parkland negotiations, the parameters or factors defining ethical conduct in a given context must be defined as discussed later in this chapter. The structures of ethics, local government, negotiations and the land valuation process must be analyzed, and a basis for passing ethical judgment regarding parkland negotiations must be established as addressed in Chapter 2 of this thesis. Then a
conceptual framework for ethical negotiations must be developed as outlined in Chapter 3. After that, case studies can be tested against the conceptual framework as outlined in Chapter 4. Finally, conclusions and recommendations to improve the parkland acquisition process can be drawn, as presented in Chapter 5. Together, these components are the means for addressing the problem statement and research question as outlined earlier.

1.4 THE QUESTION OF ETHICS IN GOVERNMENT

The problem of ethics and the institution of government is rooted in classical philosophy. It arises because government is a structure with collective power and authority built upon the principle that its actions are committed to some substantial ideal. However, the individuals authorized to prompt actions may do so inequitably because they may have a vested interest in the process. Plato's Republic argued that public officials should hold no property at all and merely receive a wage for caring for the public welfare. (Van Sant 1975). Aristotle recognized conflicting private interests as one of the most insidious evils afflicting government:

"Governments which rule with a view to private interests, whether of the one, the few, or the many, are a perversion." (Van Sant 1975).

In the 18th century, Montesquieu argued the separation of government powers was the essence of good government (Lane 1989).

The topic of ethics in government crystallized in the 1970's with Watergate marking the loss of confidence in social institutions and government. The ethical debate recognized that the systems analysis and applied economics approach, which has driven public administration since
World War II, were resistant to ethical reasoning and evaluative discourse. Techniques such as policy analysis assumed a general agreement on societal priorities and values that did not exist (Patton, Carl, David S. Sawicki 1993). Since an agreement on priorities did not exist, the field of negotiations as an academic and professional concern grew. Negotiations were a means to find common preferences and priorities among groups to develop a consensus. Techniques in interest-based or principled negotiations emerged to facilitate the consensus building process. The interest-based negotiating techniques advocated a win-win process. However, in my opinion the win-win negotiating process in government has failed to recognize that interest-based negotiations are more than a practical technique for negotiations. Win-wins must adhere to accepted ethical representation of the democratic and fiduciary obligations governments hold. In addition, there is a need to acknowledge that the ethics that guide the decisions of corporate entities are different from the ethics that guide the principles of governance.

A predominant social value of the western world is governance by democracy. Central to the concept of democracy is the need to separate the powers held by government. In democratic governments the executive, the administrative and the judicial powers are separated. The separation is based on an analysis of governmental functions. Two of these functions, the administrative and executive, are social groups participating in the political process. The third, the judiciary arm, is non-political (Gwyn 1965; Lane 1989).

In local government, the administrative role has become the critical, ongoing, permanent focal point of political choice, and hence, the locus of political power. It is flanked on one side by a city council, which sets broad limits of administration. On the other side, the
courts define those limits more precisely case by case. Nevertheless, these legal actions are sporadic and temporary. The central governing arena that affects the local population on a day-to-day basis is not the city council, but the administration and its exercise of authority (McCraw 1981).

Authority distinguishes itself from power by its ability to secure compliance. It combines power with the exercise of reason and is designed to influence others. Authority implies a mutually recognized relationship giving one party the right to command and the other the duty to obey. Authority can only persist as long as the normative arrangement is accepted by both parties. It is power clothed in legitimacy. However, power can prevail without legitimacy or acceptance by both parties (Lukes 1991; Dahl 1976).

The powers and authority of local government encompass the principle that its spending, revenue raising and regulatory actions reflect a commitment to some substantial ideal of the ‘good life’ as defined by society through either the provincial or federal government. However, all levels of the governing system involve politics, and political decisions are “the production of intended effects”. 4 It is not a trivial or insignificant matter when power and authority are exercised, or deliberately not exercised, to evoke actions and consequences that result in skewing the distribution and delivery of the ‘good life’. Power and authority must adhere to the democratic governing principles that acknowledge all individuals have certain

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4 Bertrand Russell coined the phrase ‘the production of intended effects’ in his description of power in Power: A New Social Analysis
inalienable rights, should be treated fairly, and subject to basic rights and fairness, the preferences and priorities of all individuals affected have equal merit (Dorcey 1986).

The right of any government to claim authority as the justification for its action is lost when the basic principles of democratic governance are denied. Similarly, an authority that engages in producing inconclusive evidence and argument rather than engaging in the pursuit of conclusive fact and proof also loses its justification (Weiss and Barton 1980). Authority as the reason for action, should not fear disclosure, but embrace it. The more obscure the response to a challenge of one’s authority, the less likely the authority actually existed.

While parkland negotiations may legitimately revolve around the power and authority of local government, that power and authority becomes unethical when it is applied inconsistently or timed to impact either pending or on-going negotiations. It must also be remembered that while the exercise of power and authority may be a legitimate exercise of government, it may not be ethical given the other common notions of negotiating fairness.
2.0 ANALYSIS OF THE COMPONENTS THAT DEFINE ETHICAL PARKLAND NEGOTIATIONS

2.1 THE STRUCTURES OF ETHICS

2.1.1 DEFINITION AND PARAMETERS OF ETHICAL CONFLICT

Ethics is about values. Traditionally, ethics investigates the application of value choices involving human conduct. (Barry 1983; McDaniels 2001 (personal communications)) Hence, an ethical conflict involves a value conflict regarding human conduct. Values are structured on social perceptions designed to maintain a high standard of conduct. These values have a worth to individuals and the community at large. Ethical conflict is a deviation from the socially negotiated classifications of behaviour which instill trust and confidence in society (Williams 1985; Barry 1983).

Ethical conflict is a general term that covers other more specific forms of dubious behaviour. In a negotiating environment, common ethical conflicts include acting in bad faith and conflict of interest. Actions of bad faith are characterized by a lack of frankness to inquiries (Levine 1996). A conflict of interest can be determined by whether:

1. A party could make a reasonable perception of the distinction between the exercise of its official duties and function, and personal decisions;
2. A party knows it will receive direct benefit for its singular action;
3. The time interval between the decision-making process and the actualization of the perceived benefits. The closer the time interval the more relevant the linkage (Levine 1996).
Other forms of ethical conflict exist. However, all forms of ethical conflict share common characteristics that allow a basis for passing judgment without going into the distinguishing features of the different types of ethical conflict.

In my view, ethical conflict in the negotiations of parkland can occur in several ways. These include:

1. Failure to disclose pertinent information pertaining to a site;
2. Acting contrary to the duties and obligations of the parties under law;
3. One party unduly influencing land values or the process of negotiating land value through operational procedures that breach the policies of their institution; and
4. Adopting policy actions that are not of a general application or intention in order to directly affect only those sites identified for parkland acquisition.

2.1.2 A BASIS FOR PASSING ETHICAL JUDGMENT

Ethics involves questioning whether conduct is right or wrong according to some selected criterion or reasoning. Ethical questions do not ask what one would do but what one ought to do. These questions require judgments regarding values and actions. These judgments can manifest themselves in either relative or absolute terms. Ethical concerns are stated in simple but powerful terms expressing different kinds of judgments such as:

1. Right and wrong;
2. Should and ought; and
3. Obligation and duty (Barry 1983).
Based on the writings of Barnsley, Barry, Cook and Fleischacker on ethics and morality, it is my view that these three pairs of words can be aligned with Barnsley’s label of the Intuitive, Evaluative, and Prescriptive criteria\(^5\) of ethical debate. These criteria are discussed below.

**Intuitive Criteria**

Intuitive criteria are based on social and cultural experiences. These criteria are an extension of one’s morality to their own community. Western culture assumes everyone should intuitively know what type of conduct is ethical. It is learned through sensory experiences without the aid of reasoning or inference (Barry 1983). Intuitive criteria are attitudes toward human nature, the natural world, time and activities and social relationships. They are about ideas concerned with action. Common concerns include telling the truth, avoiding the destruction of property, keeping promises, avoiding theft and inappropriate sexual relations. They are about responsibility and therefore, are applied to people with the capacity to be held accountable (Barnsley 1972).

Intuitive criteria are strongly tied to linguistics. An ethically competent reader intuitively recognizes the philosophical merit of written statements in the context of functional relationships within a given setting. This recognition of attitude or value statements is not dependent on the words themselves, but on common human being experiences and shared desires (Barnsley 1972; Wilson 1960).

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\(^5\) The order of the three criteria of ethics and the three dimensions of interest (discussed later) are interchanged in this document to symbolize that one criterion does not possess higher ranking that the others.
Evaluative Criteria

Evaluative criteria are standards of right and wrong defined on public reaction. They reflect the values of society and commit one to a kind of conventionalism. These values are more 'objective' than arbitrary individual preferences. Reason is applied to decisions resulting in voluntary actions. The objects of moral judgments are distinguished from other types of valued objects by their being intimately connected with human conduct, involving intentional voluntary actions (Barnsley 1972). Generalities are important for their definition.

Prescriptive Criteria

Ethical conflict based on prescriptive criteria is conflict based on rules and law. These rules are more constraining than mores or customs, and frequently conflict with a person's desires and wishes. Sanctions are attached to prescriptive criteria. The sanctions can be internal, or external like guilt or shame, and they may be positive by providing rewards or negative by imposing penalties (Barnsley 1972).

2.1.3 ETHICS AS A HIERARCHY

The three criteria of ethical debate and ethical judgment should not be considered in isolation. Clearly they are closely related and influence one another. They are treated separately here for clarity, but their links must be recognized because all three criteria play into the equation of passing judgment to articulate a dominant value profile. One criterion may dominate in passing judgment to one's actions but it is rare that a situation is scrutinized by only one of the three measures. There is always a reference to the other two measures even if it is minimal.
Ethics relies on a hierarchy of judgments and every individual wrestles with the task of ordering their value system. The independence of the ordering, however, does not preclude a general consensus on what is right and wrong, what are duties and obligations, and what should or ought to have been done. At some level people’s value systems overlap. We all share some common values.

2.2 THE STRUCTURE OF LOCAL GOVERNMENT

2.2.1 CHARACTERISTICS OF LOCAL GOVERNMENT

In general, the rationale for local government is founded on concepts of providing services rather than concepts such as democratic principles of representation, participation, and popular control. Support for, and opposition to, the establishing local government institutions has been based on pragmatic factors such as:

- financial considerations;
- the compelling need for rudimentary local services such as roads, water, sewage and garbage disposal; and
- the “boosterism” aspirations of the local commercial elites (Higgins 1986).

Local governments are voluntary in nature. The people of a locality bring local government into being through popular assent (Higgins 1986; Lane 1989). The Local Government Act provides for their structure and formation including cities, municipalities, and Regional Districts.
Local government contrasts with senior levels of government in several ways. Senior governments fulfill pragmatic functions as well as ideological commitments to democratic principles. The principles of democratic governance are:

- Individuals have certain inalienable rights that cannot be violated by the courts, ordinary legislative action, or administrative organizations;
- Individuals and groups should be treated fairly by society; and
- Subject to basic rights and fairness, the preferences and priorities of all individuals affected have equal merit in governmental decisions.

In these concepts lay the system of representative government (Dorcey 1986).

These principles of democratic governance are somewhat downplayed within local government given its emphasis on local service functions. Local government is not self-government. Nor is it a constitutionally recognized order of government (British Columbia Minster of State for Community Charter 2001). Therefore, the roles of the democratic principles are often secondary in the execution of local governments duties. This pattern is evidenced by:

- the powers of local government being explicitly delegated in a charter of incorporation (Higgins 1986); and
- the absence of an official opposition to challenge the application and integrity of the local government’s bylaws or conduct (Lane 1989).

Some degree of democratic principles are imposed upon local government by the rules of the provincial and federal crown. These rules include requirements for public hearings and
consultation, elections, bylaw procedural processes and the composition of the local governance unit.

Local government’s relative detachment from the democratic principle of representation is seen by its statutory inability to legally deal with many of the affairs that affect local communities. The scope of democracy in local government is primarily a function of the community’s size. Local governments do not have the same checks and balances built into the systems as senior levels of government. While local governments are brought into being by popular assent, continued participation by the population in the governance process is sometimes reduced to nothing more than participation on election day (Higgins 1986).

Some may argue that local government is more democratic than the senior levels of government because of the independence of local councillors and the lack of the federate structure found in provincial and federal politics. While party politics are generally absent in local government, party affiliations are common and manifested by electoral slates. A council member’s affiliation to a slate is reflective of their political leanings on policy matters. The advantage of slate membership is the political tutoring and mutual support such organizations provide to its members (personal communications).

2.2.2 HOW LOCAL GOVERNMENT FUNCTIONS

Local governments are creatures of dual character (Lane 1989). On the one hand, they are entrusted with certain powers of governance by the province to benefit the local inhabitants.
On the other hand, their legal embodiment and administrative function is that of a corporation. The incorporation of government is unique to local government.

When municipal corporations are the agents in executing provincial law, it can be said they are acting in a governmental capacity (Lane 1989). As a statutory vehicle, municipal corporations are a convenient method of exercising some of the functions of government and administering local communities. They are part of the province.

When municipal corporations are performing the duties of regulating the conduct and supplying the wants of the population by local law, they are acting in their corporate capacity (Lane 1989). As corporations, municipalities are independent from government. That is to say, the local government administration is a private corporation and its actions are not a branch of the state. As a corporate body it can only act by agents, and it is the duty of those agents to best promote the interests of the corporation whose affairs they are conducting. It is not their duty to promote the interests of the state (Lane 1989). They can challenge the right of government to impose financial burdens upon it.

The statutory corporation of local government provides a device by which a community can administer its affairs. It is a vehicle that provides the usual advantages of corporations, such as name and perpetual succession. It emphasizes economic administrative practice for health and safety reasons over ideological societal formations. At the same time, the charter of incorporation allows provincial legislators the ability to confine the powers of local authorities.
Those powers are limited to those issues that promote the welfare of its inhabitants, whose only bond is their proximity.

2.2.3 THE POWERS OF LOCAL GOVERNMENT

Local governments are endowed with three administrative powers:

- to raise revenue;
- to spend funds; and
- to regulate land.

These powers are exercised in two different capacities; one, in the capacity of a private corporation, and the other, in its capacity as a statutory entity. The purpose of these powers is to promote local welfare.

The functions of raising revenue and spending are typically carried out in a manner similar to any private corporation. Fees are charged for services provided, such as land taxes, service charges, and user, licensing and development fees. In its spending powers, local welfare is promoted through the economies of scale obtained in delivering infrastructure services. The provision, improvement, maintenance and operations of the capital infrastructure are administered by the corporation.

In its corporate capacity, local government is required to adhere to the same standard of dealing prescribed by law for private individuals or corporations. This standard is lower than
the standard required if the municipality is acting in its governmental role. A municipality acting in its governmental role has a fiduciary duty. It is a trustee managing the affairs of a community. However, a municipal corporation is not a trustee for either the ratepayers or its inhabitants. The reason for its existence is non-fiduciary in nature. It is not legally committed to operate for the benefit of its inhabitants and some operations may be detrimental. For this reason a municipal corporation can only be loosely regarded as fiduciary since it is the protector of public rights (Lane 1989).

The primary means for local government to promote local welfare among its regulatory powers is land use regulation. Land use regulations both limit and enable the capacity of land to generate wealth. To increase the wealth-generating capacity of land, one has to go through the land development approval process. This involves meeting the corporation’s needs, in conjunction with the statutory law-making authority of local government, acting as an agent for the province. Although the two seem inseparable, the statutory law-making provisions can operate independently from the corporation’s needs. Yet the corporation’s needs can never operate independently of law making.

**Land Regulatory Powers**

The land regulatory powers of local government deserve greater discussion. These powers are an important component of negotiating the acquisition of parkland, when the land has development potential. Land development is still considered entrepreneurial in nature in spite of the corporate and institutional umbrellas that try to structure the process (Miles, Haney
& Berens 1996). The unusual dynamics linking finance, marketing, legal, construction, management and political skills, make it difficult to construct comparisons on anything but the most basic components. Everything else is open to negotiations. This factor makes development the most challenging component of the real estate industry.

The Local Government Act provides the basic regulatory powers and authority for local government to manage development. These regulations prescribe the various processes, and in descending hierarchical order, involve:

- Official Community Plans (OCP),
- Rezoning,
- Subdivision, and
- various permitting processes.

The OCP defines the broad general policy objectives of the community, while the 'permit' process is site specific. In terms of negotiating land development, OCP designations, zoning and some permitting processes are 'conditional' approvals. As conditional approvals, negotiations are involved to make a land development proposal acceptable to the corporate side of local government. While the issuance of conditional approvals requires the consent of Council, the process allows for different degrees of Council participation. The level of Council’s participation is usually an indication of the level of public participation. 

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6 My experience in organizing public participation programs has been that the greater a Council perceives the importance of an issue and pre-judges the anticipated participation by the public, the more they will influence what elements and resources are to be dedicated to a public participation program. Many times, a Council’s anticipation of heightened public participation or concern on an issue fails to materialize.
The subdivision process is technically not a conditional approval, but statutory in nature. However, one caveat affects the subdivision approval process and that is the Approving Officers' prerogative to consider the 'public interest' in his assessment of a subdivision application. This caveat often provides the context for the corporate side of local government to bear upon the Approving Officer's decision.

Public Participation

The land regulatory powers contain within them one of the most important democratic elements in the local government; the process of public consultation. Land use planning and land use changes are required by provincial statute to engage in a public process to allow people to speak to proposed changes. The standards for what qualifies for a mandatory public consultation, and when and how it is to be conducted, is limited. The local administration normally chooses the intensity of the public process. These choices include the venue of discussion, the release of information on the proposal, the amount of advertising to notify the community and the timing of the event.

The elected officials within local government have generally become quite sensitive to the public's response to land use planning proceedings. Hence, these forums provide individual councilors public exposure to maintain their profile and contact with the community. These proceedings are a means by which elected officials gauge the social consensus.

However, the interaction between the public and elected officials on the parkland acquisition process has become limited. Whereas acquisitions were once acquired by
individual bylaws that went through the public process, omnibus bylaws now provide for the administration to deal with the acquisition process. Council’s participation is reduced to approving the execution of the negotiated documents. The matter only goes to Council if there are other community issues associated with an acquisition. These limitations are intended to address potential concerns over political intervention in the acquisition process.  

2.3 THE STRUCTURE OF NEGOTIATIONS

2.3.1 PURPOSE OF NEGOTIATIONS

The fundamental purpose of negotiating is convergence; a convergence of interests. There needs to be a convergence of interests in order to obtain an agreement. Convergence needs to occur on two levels. The first condition of an agreement is a convergence on the nature of the rules that are part of the negotiating process (Fisher, R., Ury, W., and Patton, B., 1991). The second condition is a convergence on shared interests.

All parties entering negotiations must address three questions for the purpose of analyzing and planning for negotiating, and to lay the groundwork for a convergence of interests.

- How can my own goals best be achieved?
- How can the other party’s goals best be achieved?

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7 In one community the political influence on the parkland acquisition process was so intense that the administration identified three potential park sites with the objective of acquiring only one (LeMaistre, 2001). The purpose was to have a fall back position to counter the political pressures exerted on staff. This illustrates the differences and tensions between the corporate arm and the executive arm of local government.
• How can my own goals best be achieved in light of the agreements that appear possible? (Dorcey 1986)

2.3.2 POSITIONAL APPROACH

There are two commonly recognized forms of negotiations; those based on positions and those based on principles (Messelt 1998). Positional negotiations are when each party takes a position and argues for it. Concessions are made on each side to reach a compromise. It depends on the successive giving and taking of a sequence of positions (Fisher, R., Ury, W., and Patton, B., 1991). The strength of positional negotiations is:

• it tells the other side what is wanted;
• it provides an anchor in an uncertain and pressured environment; and
• it can produce an acceptable agreement.

Positional negotiations may invoke a number of different tactics to reach a compromise. These include:

• dirty tricks;
• psychological warfare;
• positional pressure tactics;
• lock-in tactics; and
• take it or leave it offers.

Critics of the positional approach claim it is:
• unwise since it tends to lock parties into a position because of the need to clarify one’s position and defend it against attack;

• inefficient since negotiations generally start from extreme positions in an effort to improve the chance of a more favourable agreement;

• adverse to building ongoing relationships because the process becomes a contest of wills; and

• impractical when more than two parties are engaged in the negotiations due to the difficulty in finding common ground.

2.3.3 INTEREST-BASED APPROACH

The alternative to positional negotiations is called “Principled Negotiations” or Interest-Based Negotiations. The approach involves negotiating on merit, based on the interests of the parties. This method employs four points:

1. Separate the people from the problem;

2. Focus on the interests, not positions;

3. Generate a variety of possibilities before deciding what to do; and


This model has the parties approach negotiations as though they were solving a problem together. Instead of forcefully advocating a position, the negotiating parties work with each other to identify individual and mutual interests with the hope of satisfying them through
negotiations. The parties then work together through brainstorming and an evaluation process to fashion options that might, if agreeable, solve the problem while meeting their individual and mutual interests.

The four essential elements of productive interest-based negotiations are:

- People;
- Interests;
- Options; and
- Criteria.

These four elements go through the three stages of:

- Analysis;
- Planning; and
- Discussion.

In the analysis stage, the parties try to diagnose the situation. Information is gathered on the people, their interests and the interests of the other party. Notations are made on the options tabled and the criteria suggested for the basis of an agreement. In the planning stage, the four elements are dealt with again. At this time, while generating ideas on the problems and deciding what to do, they come up with additional options and additional criteria for deciding amongst them. During the discussion stage, the same four elements are visited, but this time with the intent of communicating the similarities and differences in the hope of coming to an agreement. Each side should come to an understanding of the other's interests. Then they can
generate options that are mutually advantageous and seek agreement on objective standards for resolving their different interests (Dorcey 1986).

The four major obstacles inhibiting the inventing of options are:

- premature judgment,
- searching for the single answer,
- the assumption of a fixed pie; and
- thinking that solving their problem is their problem.

To invent creative options, the act of inventing options needs to be separated from the act of judging them. This is done by brainstorming. The option set can be broadened by defining and analyzing the problem, looking at strategies for addressing the problem and following through to determine the mutual gains and means for making the decision-making process easy.

The two prominent negotiating models sound practical and straightforward. Practitioners of the Positional and the Interest-Based negotiating models concede that there is some overlap in the tactics and strategies of negotiations (personal communications). The dirty tricks, psychological warfare, and pressure tactics could potentially be used in either model during various phases of the negotiating process, even though the interest-based approach is intended to be free of such strategies. Sometimes, however, the effort, complexities and
working relationships are such that employing the interest-based approach on all the sub-issues within the interest-based negotiating framework is not achievable.

Deeper reflection on the two approaches indicates one fundamental difference. Positional negotiations do not differentiate between desires (positions) and interests. It seeks to find compromises rather than a convergence. These compromises may satisfy either a desire or an interest. A lack of clarity abounds and a separation of desires from interests may lead to unsatisfactory agreements.

The following section provides an articulation of my perspectives on the relationship between interests and ethics, and what separates interests from desires. The linkages among ethics and interests gives the interest-based model greater potential, and a framework with which to consider the prescriptive, intuitive and evaluative dimensions that define ethics and interests in the negotiations for parkland. It should also facilitate the distinction between desires and interests brought to the negotiating table, and assist the parties in separating their desires from their interests. The extent to which the interests of local government can be adequately addressed, given its dual governance and corporate responsibilities, will be addressed with an analysis of the six case studies presented later.
2.3.4 HOW INTEREST-BASED NEGOTIATIONS RELATE TO ETHICS

Fleischacker stated that ethical thought always puts interests into question (Fleischacker 1992). I find truth in this statement easily grasped when one reflects upon the purpose of deriving a code of ethics. Someone's interests are being served, whether it is society at large or a segment of society. Ethics have the end purpose of governing conduct.

Similarly, ethics puts the interests of an individual into question. Therefore, individuals could employ the three criteria for passing ethical judgment as outlined earlier (prescriptive, evaluative and intuitive criteria) to define their interests. By considering the prescriptive, evaluative and intuitive criteria of ethics, the question of what legitimately should constitute one's interests is clarified. It is done by demonstrating a consistency in facts, an adherence to a social consensus, and the validity of experience which are the information bases for the three sets of criteria. The three dimensions of fact, social consensus and experience give structure and content to one's interests at the negotiating table, as discussed below.

Interests by Facts

In the first case, our interests question the prescriptive rationale of ethical judgment. We engage in a rationale debate to show authority which allows us to take action and accept consequences. However, the authority does not have to be in legal form. People also obtain

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8 Of the writings by Barnsley, Barry, Cook, Fleischacker and Luke, only Fleischacker connects interests and ethics. However, I find all the writers grappling with a common theme expressed in different words. In my view, the assertion by Fisher, Ury and Patton that interest-based negotiations represents practical, not moral, advice (Fisher, R., Ury, W., and Patton, B., 1991) fails to recognize the proximity of interests to ethics. The writings of Barnsley, Barry, Cook, Fleischacker and Luke on ethical matters interlock with Fisher, Ury and Patton concepts on interest-based negotiations allowing one to consciously construct a framework for defining interests within a supporting framework for classifying ethics.
authority through mutual acceptance or agreement (Luke 1991). The authority may come from one’s educational achievements or holding of a position within the community. We accept as fact certain views simply because we have no argument against it. We sometimes accept one’s social position as having the authority to take action or bring about consequences even if the individual has no knowledge of the subject matter and, therefore, is incapable of taking action.

In my view, authority may also come from an inferior position. For example, an individual may gain authority from the notion that government, as a legal authority, is obligated to serve the individual. A person obtains authority from the perspective that they are the one to receive service. Government is obligated to enlighten the individual so they can make an informed decision. In either case, one’s authority is asserted as a fact and given measurable weight to substantiate a party’s interest in the same manner that rules of law and physics provide substance to rational debates.

**Interests by Social Consensus**

In the second case, we engage in an evaluative approach comparing interests with desires to show how much less questionable an ‘interest’ is compared to a desire (Fleischacker, 1992). We engage in an evaluative process to justify or excuse a particular act (Barnsley 1972). Reason is employed to draw upon facts and draw connections between the facts and the situation, or to dismiss past actions as a response to a desire. We seek to have our claim of an interest justified by a social consensus. We do not want to stand alone proclaiming an interest that is not recognized by anyone else. A social consensus can develop even if an objective
evaluation would not stand up to impartial testing. The evaluative approach of building a social consensus often appeals to the emotions of others. The reasoning seeks to place others in similar circumstances and asks if society would not recognize them as legitimate interests.

**Interests by Experience**

In the third case, the direction and priorities of our interests have to be revised to provide consistency with our ethical standards. It is a matter of forming an ethical opinion or selecting one from several opinions based on intuition (Fleischacker 1992). We rely upon our experience and the intrinsic nature of our being to give bearing and ranking to the wide variety of items to which we have committed our actions. To be direct, our interest is expressed through our gut feeling that we can actualize an action - we know it, we feel it, we have taken on similar challenges before. It is a functional cognition driven by trust and confidence in ourselves to substantiate an interest.

In the second and third case, there is much more room for disagreement about the nature of ethical matters than in the facts used to substantiate one’s interests. In the case of prescriptive criteria, the interests are written in law or the authority is acknowledged by mutual consent even if that consent is not explicit. Substantiating an interest through reason or emotion is not easy to communicate.

While interests are based on our own perceptions and parts of how we define ourselves, our ethics are shaped by our entire self-concept and our role in the world (Barnsley 1972, Barry
1983, Cook 1999, Fleischacker 1992). Our ethical values are something we receive from our culture because of our relationship to it, while our interests are something we have nurtured from our relationships with the value system. Our interests germinate without a full understanding of the intricacy of ethical analysis, and therefore, require constant reference back to ethical standards. The discussion of ethical standards pertains to the entire concept of the duties and roles held in society, and therefore, unlike the self-analysis of interests, cannot bracket out or disregard any part (Fleischacker 1992). Interests can be narrower since they are self-serving and genuine at the same time.

In my view, because interests and ethics use the same three dimensions to analyze their roots, one influences the other. However, the scope of interests is more limiting simply because they are self-serving and more directly contain qualities of:

- advantage;
- responsibility; and
- investment.

The quality of advantage identifies things which are important to us. Each individual structures a hierarchy of values meaningful only to themselves. The quality of responsibility appeals to one’s need to demonstrate inclusion in society with the expectation of reciprocation should the tables turn against oneself. The quality of investment means an expenditure of self commitment, not just an economic investment. Ethics, on the other hand, are unselfish and relate to others.
Ethics is not about facts, but the underlying values (Barry 1983; Fleischacker, 1992; Lukes 1991). The facts are used to interpret and fit the argument into the real world. An ethical debate can create differences that are incommensurable. Therefore, in the context of parkland acquisitions, ethical interest-based negotiations must be limited to the powers, authority and intentions surrounding the context of the debate or the debate will be without resolution. However, limiting the debate to power, authority and intentions does not preclude the duty to consider the societal values when discussing intention and judging conduct. For it is societal values that bestow parkland the special status of a 'public good'.

2.3.5 DIFFERENTIATING THE NEGOTIATIONS OF INTERESTS FROM THE NEGOTIATIONS OF DESIRES

The core element in passing ethical judgment on the parkland acquisition negotiating process is whether the spectrum of interests represented at the negotiating table are fully accepted or recognized. A judgment of unethical behaviour requires a genuine belief of wrong doing in the process based on the criteria established by others. This belief is identified and described only within a dense pattern of beliefs (Barnsley 1972; Barry 1983; Fleischacker 1992). An observer can only believe there is a better, more ethical process because other processes either exist or are possible. These other processes offer fundamental structures that can be adopted, in whole or in part, to improve the existing process. No particular further belief is required to give substance to the observer's opinion but some appropriate set of related beliefs must be there. If there is no substance to the belief, then the observer is wrestling with a desire for an alternative that does not exist.
In the same manner in which one concludes that a better way to negotiate parkland acquisition exists, so too the elements that subscribe one’s interests in land must have substance. In order for a party to accentuate their claim of an interest, they must convince the other party, through a linkage of shared beliefs, that their opinion has substance. Otherwise the party is wrestling with a desire.

The distinction between interests and desires permeates the entire debate on ethics and interests in the parkland acquisition negotiating process itself. In Fleischacker’s view a desire is an unreasoned assumption by which we define ourselves. The more reflection given to the self-defining concept, the more other perspectives will affect it, thus elevating or suppressing a desire. Hence, desires become bracketed through reflection (Fleischacker 1992). Consequently, a hierarchy of desires must be constructed. Facts derived from experience will strengthen or weaken a desire. The more we can match real world experiences to the self-defining concept, the more a desire will take on the properties of an interest. However, a real world experience is not needed to substantiate a desire. Reflections on experiences that provide direct parallels suffice to provide reason to the assumption.

To further refine the distinction, one could say an interest is a belief with substance. Although the best means of validating an interest is with demonstrated experience, an interest does not have to be experienced to be valid. The substance of the belief may be through peripheral experiences that provide the awareness, judgment and knowledge to give consistency, coherence and pragmatic qualities to a desire. These experiences are satellites to the central desire. The lack of direct experience fosters the intuitive quality of an interest.
Desires are a necessary phenomenon both in life and in negotiations. They provide encouragement to live by opening the thinking to unreasoned possibilities. They present a challenge requiring one to sort out their beliefs. They spur decisions but can obstruct the thought process in rendering a decision. Thus, desires can lead to good or bad choices. Appropriate reflection will challenge the emotions associated with a desire. The longer a desire is reflected upon, the more consistent the emotion associated with it will become. The desire will either transform into an interest or fade from the negotiating table.

The transformation of long term desires into interests are characterized by projects that survived the ‘thought of the day’ and no longer need to be continuously felt or experienced throughout the period a person may have them (Fleischacker 1992). The transformation of a desire into an interest is made when the following differentiating qualities are apparent:

- an interest lacks the distracting qualities of emotions;
- an interest provides some sense of a real possibility of thinking about fulfillment;
- an interest, at some level, tested the social consensus; and
- an interest survived the test of fact, as well as the test of competition with other short or long term desires.

An interest is, first and foremost, socially entrenched. For this reason, interests have a cognitive as well as an affective stance toward reality built into them (Fleischacker 1992).

Not all interests can be satisfied. Interests, like desires, are ordered in a hierarchy (Fleischacker 1992). Some interests may never be fulfilled because they have been overridden.
by other interests. Some interests may conflict with other interests. Interests can change if either our facts or our desires change. The attributes of satisfaction, hierarchy, conflict and change in beliefs, are similar to the attributes that challenge one's ethical values.

The interlocking of beliefs and desires in interpretation only reinforces the connection of beliefs with interests. If we cannot guarantee that an interpretation will bring both the desires and the beliefs of others into satisfactory alignment with our own understanding, this interlocking suggests that we may need to see some sets of prepositional attitudes radically different from our own (Fleischacker 1992). It requires a form of gestalt therapy to drop the past and interpret interests in the light of the present. Something that will cause the interests of others to be placed ahead of our own.

When negotiating, the best means of seeing a new idea this is through interest-based, as opposed to Positional Based, negotiations. The format of interest-based negotiations emphasizes a convergence on both the process and the interests shared by the negotiating parties. Only through dialogue will the elements that differentiate the desires and interests of the parties become clear. Brainstorming provides the vehicle to radically change the hierarchy of interests and desires. After an understanding of each other's interests is agreed upon, then the land valuation process for parkland acquisitions may proceed.
2.4 THE STRUCTURE OF DETERMINING LAND VALUE

2.4.1 GENERAL ELEMENTS THAT COMPOSE LAND VALUE

Land value is determined on the basis of location and physical requirements. This value is expressed in both economic and intrinsic terms. While the intrinsic issues are difficult to negotiate, they are a valid interest at the negotiating table. The economic issues are more quantifiable, one-dimensional, and subject to less disagreement.

Economic value is affected by the physical requirements and alternative uses of a site. Two sites in the same urban context may differ because of the physical aspects of the land. One site may have better access or topographical features that make implementation of an alternative land use cheaper or it may offer amenities, such as views, that can be capitalized upon. Similarly, the potential alone to alter the land uses, such as a favourable OCP designation, provides value through the possibility of greater economic returns.

2.4.2 HIGHEST AND BEST USE

Land valuation is based on the principle of market value. Market value is generally established by a comparison of prices other people have negotiated in the real estate market. A common criterion is to establish the land's Highest and Best Use. This concept recognizes that alternatives to the existing land use are probable and this is reflected in the market price.

The economic analysis of Highest and Best Use focuses in on three objectives:
1. Identifying comparable land uses;

2. Recognizing that land value is distinct from property value, as a whole, which may include buildings and other amenities; and

3. Establishing the use of a property that is anticipated to produce the highest overall return per dollar invested in capital.

It can be analyzed from two perspectives:

1. Highest and Best Use as though undeveloped; with the intent to establish a land value distinct from improvements; or

2. Highest and Best Use of property as improved with the intent to establish property value that maximizes the investment property’s long term net operating income.

In addition to these two classes of Highest and Best Use, several other general features apply. First, market value denotes a present worth of future benefits. While there is no certainty, value is based on probabilities of the future. Therefore, Highest and Best Use must be a function of probabilities rather than possibilities.

Second, market value is affected by improvements on the land. Land and buildings unite to become a productive entity. The question then becomes one of optimizing the use, given the factors of production that compose the property.

Third, time is a factor affecting property values. All uses change with time. The potential volatility time inflicts on market value is reflected in the interest rate or discount rate.
Fourth, land may be idle because changing market conditions negate the immediate Highest and Best Use of the property. Undeveloped land need not be put into immediate production to increase its value.

Finally, zoning restrictions, land use controls and other statutory regulations limit the potential number of uses. These regulations establish fairly precisely the land use possibilities in urbanized areas. Other determining factors include that the use is physically possible, legally permissible, financially feasible, and economically productive (Martin 1987).

The objectives, features and factors that define Highest and Best Use encapsulate a number of generalities, determinants, techniques and special considerations integral to determining land value. As discussed in the introduction of this thesis, the core issue is that land use and its services, ultimately determines economic value. The evident problem is that land use regulations and the provision of infrastructure services is intertwined through the land development process that is controlled by local government. By stipulating land use regulations and the provision of services, local government exercises influence on the market value of land.

When it comes to parkland negotiations, the power to influence land value is played out in two-tiered discussions. On the one hand, a complex hypothetical land development process that manipulates substitutable variables, policy statements, negotiating tactics, coercion, and varying interpretations of facts to derive highest and best use, must be blended with the other
interests to reach a satisfactory agreement to actuate the sale. Whether the exercise is ethical or not, can only be judged by comparing the process to the standards set by the community at large.

2.4.3 WHICH ETHICAL VALUES ARE USED IN DETERMINING LAND VALUE

The land valuation process does not directly incorporate intangible or ethical values into the valuation process. Appraisal techniques are based on the fundamental assumption that neither party has the ability to influence land values. It is assumed the market is acting freely, and prices are free to fluctuate to reflect the demand and supply of the commodity. The market price has traditionally been further refined as:

"The most probable price in terms of money which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimuli." (Martin 1987 emphasis added).

While valuation techniques acknowledge that undue stimuli can affect price, the appraisal discipline is hard pressed to recognize stimulating factors. A solid understanding of the differences between functional and descriptive knowledge on valuation is required to assess local market influences. Without such an understanding it is impossible to incorporate the intangible and ethical values into the equations. The applied economic approach, which is the basis for determining value is resistant to evaluative discourse. The Appraisal Institute of Canada recognizes:
"It (influence on property value) is beyond the scope of an appraiser to determine or measure." (Jarman, Norah Administrator - Professional Standards Appraisal Institute of Canada March 1, 2000)

The negotiating parties must negotiate the adjustments that need to be made to include intangible items. These may include social, political, economic and physical forces that set the assumptions guiding the appraisal process. The community’s land use plans and policy statements provide the reference points upon which to have the ethical values of the community guide the land valuation process.

2.5 SUMMARY

The structures of local government, interest-based negotiations and land valuation significantly influence the negotiations for parkland. Each structure is distinct and can operate independently from the other. All three structures attempt to represent specific interests at the negotiating table. The local government structure attempts to represent people’s interests through the administration of community services. The negotiating structure attempts to represent people’s interests through its methodology. The structure of determining land value attempts to represent people’s interests through applied economics. These structures are predominantly one dimensional, and therefore, lack at least one of the three dimensions that

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9 Some might say parkland negotiations are a Wicked Problem (Dorcey 1986). Yet, in my view that is not an adequate characterization. Parkland acquisition negotiations do not have the dimensions of a Wicked Problem because the problem of ethical parkland negotiations is resolvable
compose both interests and ethics. Local government relies on the prescriptive dimension of law, the negotiating process relies on an intuitive sense that technique will result in acceptable agreements, and the land valuation process relies on evaluative reasoning based on limited observations.

If interests are to be fully considered at the negotiating table, we must accept that the intuitive, evaluative and prescriptive criteria that define ethics can also be used to define interests. If we do not, can the negotiations be considered ethical? The question has to be asked since intuitive, evaluative and prescriptive criteria that define the ethical debate are a vital component in defining the facts, social consensus and experience that define interests. The next chapter provides a conceptual framework for encapsulating ethics and interests in the sphere of parkland negotiations.
3.0 A FRAMEWORK FOR ETHICAL INTEREST-BASED NEGOTIATIONS

3.1 A CONCEPTUAL FRAMEWORK

Parkland acquisition is a public institutional function. Ethics are about social values, and interests are about personal values. Therefore, if ethical judgment is to be passed upon local government's parkland acquisition negotiations, it should be framed in a context reflecting the social, institutional and personal values of the society it serves. A model depicting what constitutes a framework for ethical negotiations needs to be expressed to illustrate the linkage between ethics and interests. The basis for such a model is found in the three criteria for ethical judgment and the three dimensions for articulating one’s interests.

3.1.1 THE SPHERE OF NEGOTIATIONS

Local government's control over land use, the civic infrastructure, and the objectives, perspectives and features of Highest and Best Use, has given local government the power to influence negotiations on land value through its operational and policy decisions. The determinants of:

- physical possibility in terms of infrastructure services;
- legal permissibility in terms of zoning or rezoning; and
- financial feasibility in terms of the service level of a site,

are all within the realm of local government's authority. The question is whether these influences are ethically exercised through the diligent and consistent application of power and authority or characterize an ethical conflict.
The sphere of negotiation encompasses the issues central to the bargaining process. In parkland acquisitions, it consists of community planning, urban land economics and governance as they pertain to land valuation, ownership and fundamental rights. An example of issues exogenous to the sphere of parkland negotiations would be labour relations, disarmament and international trade barriers. In any set of negotiations, the sphere contains the bundle of issues relevant to the discussion. It contains all forms of negotiations such as unethical, positional, and ethical negotiations.

3.1.2 A GENERAL MODEL FOR ETHICAL NEGOTIATIONS

Within the sphere of negotiations, the ethics that guide the decisions of the corporate entity of local government is different from the ethics that guide the principles of governance. So to, the ethics that guide one party’s interests at the negotiating table are different from the ethics that guide the other party’s interests. Each party also brings their own interests derived from their own ethical values to the table.

This thesis proposes the criteria of prescriptive, evaluative and intuitive ethics as the basis for passing ethical judgment, and the three dimensions of facts, experience and social consensus as the basis for separating interests from desires. Conceptually, I have arranged these six elements to form a structure to define ethical interest-based negotiations. If all forms of negotiations are represented by the sphere, the three criteria that define ethics and the three dimensions that define interests can be arranged to form a three-sided pyramid. The enclosure of the pyramid represents the field of ethical negotiations. The pyramid constitutes what I have called the General Model for Ethical Negotiation (GMEN) within the sphere of negotiations.
Interests by Experience

Intuitive Ethics

Interest by Facts

Interests by Social Consensus

Evaluative Ethics

3 criteria for ethical judgment

The Sphere of Negotiations

Convergence defining a party's interests

Figure 2. General Model of Ethical Negotiations (GMEN)

The three elements that define interests (*italicized*) and the three criteria for passing ethical judgment (*underlined*) form a three-sided pyramid within the sphere of negotiations. Negotiations within this pyramid are ethical.

In Figure 2, prescriptive, evaluative and intuitive ethics form the base edges of the pyramid, and the three elements that compose interests are represented by the three edges of the elevation. All three elevation edges converge at the top representing the origin of a party’s interests. The strength, simplicity and stability represented in a triangular shape is appropriate
given these qualities also characterize society’s three commensurable ethical standards and the three pillars for defining an individual's interests.

In reality, there will be one pyramid for each set of interests represented at the negotiating table. These pyramids will share a common base representing ethics. Accepting the objective of negotiating as a process that involves the convergence of interests, somewhere within the spatial volume of the overlapping pyramids, the parties are capable of achieving an agreement that is ethical (See Figure 3). The convergence point does not have to be in the centre of the pyramid. An amicable and ethical agreement could be achieved favouring one particular criterion. If there is no overlap between the pyramids, then there will be not agreement. This is regardless whether the negotiations are ethical or unethical. The parties share no interests.

The use or misuse of power and authority that moves the negotiations outside of the parameters would constitute unethical negotiations. Negotiations can persist outside of the pyramid and there may be an opportunity for agreement. However, moving outside of the framework means that the fundamental values of society have been disregarded. In essence, the negotiations are unethical in accordance to the defined values of at least one negotiating party or society at large. Being outside the pyramid means interests have been disregarded allowing desires to overshadow negotiations.
Figure 3 Multiple Interests in the Sphere of Negotiations

The negotiating pyramid that accounts for everybody’s interests gets smaller as more interests are represented at the table. The ability to satisfy everyone’s interests gets more remote as represented by the small area of overlap.
3.2 REFINING THE APPLICATION OF THE GMEN MODEL TO PARKLAND NEGOTIATIONS

3.2.1 THE NEGOTIATING ENVIRONMENT

To narrow the debate as to what may constitute ethical parkland negotiations and how the general model would be applied, a closer examination of society’s values expressed by the inter-relationship between power, authority, and the operational role of the local government administration is required. The uniqueness of local government as an entity of dual character presents the question whether local government has dual and conflicting interests. If the corporate interests of local government align with the interests of those that are governed, there should be no ethical conflict. If the interests differ, the origin and criteria of the conflict should be identified.

The question of aligning interests becomes even more critical as local governments continue to re-structure to better reflect a more conformist, corporatist and capitalists' model of governance (Saul 1995). The corporatist model measures community performance in denominations that disregard the most fundamental aspects of community, including health, equity and opportunity. It contrasts with the social institutional model that local government was born from the confidence, reliance and dependence by individuals for a social formation to manage and deal with local technical issues, such as roads, water and waste disposal. The corporatist formation seeks to become increasingly more global and speculative rather than local and secure in its doctrine. We witness this trend through the amalgamation of communities to form mega cities such as Toronto.
The structural change in local government has been attributed to the dominance of technical reason in the fields of science, technology and economics. (Patton Carl, David S. Sawicki 1993; Weisskopf 1971). This rational approach limits security and interests to one dimension, explicitly rejecting the multitude of goals, emotions, ideals and norms that constitute the essence of the interests of individuals or social groupings. One senses the complexity of this setting when one finds contradictions between the directions of the ideological values expressed in public policy and the operational actions undertaken by local government (McCraw 1981). Many times the wording of policy statements reflect the values sought in a community. When it comes to implementation, the operational actions are scuttled because the benefits cannot be quantified or guaranteed with the same precision as the costs incurred on the local government’s corporate ledger.

Local government’s utilization of public policy to reflect the public interest, and operational policy to reflect its own corporate self-interest\(^\text{10}\) contrasts with the practice to use public and self-interest interchangeably when defining community by a corporate economic doctrine. The economic principles are morally justified by government on the basis that they offer individuals maximum income opportunities, lead to distributive justice by rewarding all according to their productive capacity, and are the best way to allocate resources (Weisskopf 1971). This argument of justification has the corporatist within local government defining self-interest and public interest as one in the same. However, a distinction in the terminology

\[^{10}\text{Some argue that public interest is differentiated from self-interest in that the populous is served with the public interest as opposed to the individual. However, a number of economists see self-interest as being the same as public interest since individuals, each acting independently, composes the public realm. This argument concludes that governments should not interfere with individual actions and pre-judge what is in the interest of others.}\]
between self-interest and public interest is made by government when defending or justifying their exercise of power and authority in the political system. There is a consistent effort within our society to distinguish the political process from the economic process. In reality, politics and economics are integral units of one another and should not be separated. They both engage in the distribution of resources. In my view, it is only through the pretense of authority that differing definitions can be used by local governments to explicitly dismiss criticism on public and self-interest matters. The integrity of the arguments favouring the re-structuring of local government to a more corporate approach is lost when a common definition for the public interest cannot be sustained. Depending on the circumstances behind the question, the definition of 'the public interest' changes to suit local government’s needs.

The lack of a common definition for ‘the public interest’ allows local administrations to adopt the public interest defense as a negotiating strategy to promote corporate objectives. However, municipal corporations are much more complicated than holders of the public interest. They are maintainers of the existing social hierarchy. The legal profession has also obscured the edges of what constitutes the public interest by frightening judges with the prospects of a detailed review of social affairs (Bayne 1986). Consequently, prescriptive ethical judgment has been promoted over intuitive or evaluative ethical judgments in the courtroom. The judicial arm rarely questions matters of a local government public interest, deeming them matters of policy rather than operations. This principle, which began as a minor exception, is now so dominant an argument that it is difficult to prove that policy matters

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11 The legal distinction between public policy and operational policy provides government significant liability protection against the unfair allocation of resources within a community.
do not cover all forms of social exclusion. This situation contrasts with the founding concept of local government as a social formation to deal with and manage shared communal issues.

3.2.2 THREE SOURCES FOR DEFINING ETHICAL CONFLICT IN PARKLAND ACQUISITIONS

A claim of ethical conflict must be substantiated by contrasting actual actions to supposed actions. The standard by which such a judgment is made must be based on rules in which the person judging has had no hand in fashioning the criteria (Cook 1999). It requires the ability to find consistency between the intuitive, evaluative and prescriptive ideals, and the actual actions (Barnsley 1972; Barry 1983). One can only determine the internal consistency of a system according to an external standard of what it “is supposed to be”. Therefore, judgment is restricted to taking ideals and the maxims of ones' actions as corresponding to, or failing to correspond with, the truth about how the system functions (Fleischacker 1992). It is likely that there will be disagreements as to what constitute ethical actions. Disagreements and agreements are intelligible only against a background of massive agreement. In other words, there is a social consensus as to what is ethical and unethical.

To avoid fashioning my own criteria for ethical judgment on parkland acquisition negotiations, I have employed three simple measures:

1. The legal requirements contained in legislation reflecting prescriptive ethics;
2. The policy statements of local government reflecting evaluative ethics; and
3. The political economy that defines social formation experiences reflecting intuitive ethics.

These three sources also help define interests as represented in the elevations of the GMEN pyramid. Legislation codifies the rules, regulations and authorities in society. It provides us with facts. These facts may be rooted in law or in the ability of the negotiating parties to demonstrate authority through knowledge.

The policy statements and the land use plans found in planning documents such as the Official Community Plan reflects the social consensus of the community. The planning documents have gone through an evaluative process to derive a social consensus. It is expected that local government, as a representative of the community, would follow its own policies in matters involving parkland negotiations.

The functioning of the political economy defines the social and actual experiences of individuals. It is from within this cultural setting that all experiences and inspirations emanate. The political economy defines the theatre of operations. One’s experiences, whether objective or subjective, will differ under a communist, socialist or capitalists political economy. The political economy is particularly important in defining the operation of a corporation that is guided primarily by objective criteria.
The Political Economy

Beginning with the latter first, this thesis adopts D'Alembert's (1717 - 1783) political-economic philosophy as the intuitive criteria for ethical decision making:

The science of morals is perhaps the most complete of all the sciences when we consider the truths of which it is composed. It rests on one single and incontrovertible fact - the need which men have for one another, and the reciprocal obligation which that need imposes. All the moral laws follow from this. The interests of the individual and the group are never incompatible (Cunningham n.d.).

This phrase is interesting because it places the responsibility of morality upon the individual just as our political economy places economic responsibility upon the individual. Individual responsibility amounts to a society's synergy. The assertion that the interests of the individual are not incompatible with the group, lies at the heart of the competitive free enterprise political economy. Although it is recognized that our economic system is not in the pure form some people advocate, the workings of the marketplace are at the heart of the ideology, guiding corporate decision-making and the land valuation process. The voluntary actions of individuals, each acting independently and motivated by profit maximization, amass to form decisive direction for the group at large. There is no nobler deed than to act in a manner that protects your own interests because this benefits society as a whole.

Utilizing the existing political economic system as an intuitive criterion is fitting since:
• It is part of the governance system in which local government has no mandate to be engaged. The senior levels of government command the realm of social engineering, which impart social experiences. Senior governments have no intention on surrendering their authority on the ideological formation of society.

• It is the system in which real estate transactions, land use decisions, negotiations and land valuations occur.

• It is the foundation of business structures, and defines their measure of performance. This includes the efficiency of the corporate decision-making framework which local government administrations strive to achieve.

• It defines the environment of responsible government. Because everyone's life depends on business, responsible governments must create situations conducive to corporate success. In doing so, government maintains and strengthens business institutions and class inequality inherent in the free enterprise system (Weiss and Barton 1980).

The ideology of the freedom to pursue individual interests is the political-economic framework we must adopt for ethical judgment. Even if this political economic framework is in conflict and incompatible with our own perceptions and beliefs, using the existing system avoids fashioning desired criteria by which ethical judgment is to be passed. Judgment on the ethics of local government must be based on the system to which it is a part of.
Policy Statements of Local Government

The second basis for passing judgment is the compatibility between the policies passed by local government, and the actions it undertakes. The actions should be compatible allowing one to draw a direct link to policy statements. Conflicts between the purpose, goals or values expressed in local government policies must be recognized and resolved. They are not to be left open for interpretation to yield incompatible or ineffective direction, or become instruments of selective application.

The production of policy is a functional approach to management, involving pre-judgment on the consequences of any particular action. It is implicitly ethnocentric, and is motivated by actions conducive to social order (Barnsley 1972). Since policies involve pre-judgment, actions taken because of it may prove to be a mistake when reason is applied. Therefore, passing ethical judgment on a predetermined evaluation presents real confrontations.

Legal Requirements of Local Government

The third basis for passing judgment generally receives the most attention. It is the compatibility of a local government’s actions and its obligations for fulfilling the conditions prescribed by law. Rather than looking at goals, objectives and intentions to define duties, the ethical parameters are judged on the basis of the actions that are required for a given situation. The legal code, not discretion, guides the action. An ethical dilemma arises if no action can remove the conflict because each action involves the violation of an obligation.
The next step is to test six cases of parkland negotiations to determine how they fit into the GMEN model. The cases are presented on mass and without analysis for a reason. The reason shall be explained after the presentation of the cases.
4.0 PARKLAND NEGOTIATIONS CASE STUDIES

4.1 EXAMPLES OF THE NEGOTIATING PROCESS

Some form of negotiations is required on all parkland acquisitions. It is the hypothesis of this thesis, that ethical negotiations may be compromised where re-development potential exists because land use affects land value, and land use is controlled by the same agent with an interest in negotiating the acquisition of the land. To investigate the hypothesis, six case studies were examined. To begin, there is a need to clarify whether the cases reflect the elements of an ethical negotiating model or if the power and authority of local government were unduly exercised in influencing the negotiating process. Hence, the cases will be assessed on their ability to demonstrate prescriptive, evaluative and intuitive ethics as defined by:

- the legal requirements contained in legislation;
- the policy statements of the local government; and
- the political economy that defines social experiences.

4.1.1 DOUGLAS ISLAND

Douglas Island is in the Fraser River just east of the Port Mann Bridge. It has no land access and lies within the jurisdiction of the City of Port Coquitlam. The shores of the 187 hectare island were used by logging companies as a log boom storage area. Rights to the site were acquired by a successive number of development companies as they explored various development concepts. The original value of $1.5 million changed as each successive development proposal increased the island’s perceived worth from about $3 million to $8
The development potential of the lands entered the public debate. Soon thereafter, the BC government purchased the site for approximately $4.5 million for preserving it in its natural state. The lands were subsequently turned over to the Greater Vancouver Regional District in 1995, in a 50/50 cost sharing agreement with the province.

Initially, the island was part of an unincorporated area but required access from the City of Port Coquitlam. The land subsequently became part of the jurisdiction of the City of Port Coquitlam. The City of Port Coquitlam responded to initial development inquiries by adopting a number of OCP policies that stressed the preservation of the island (Port Coquitlam Official Community Plan, Policies of the Official Community Plan<http://www.city.port-coquitlam.bc.ca/Departments/Planning/ocpsummary.htm>). The Island was declared a Special Study Area with one policy specifically stating development of an urban intensity would not be supported.

### 4.1.2 FORSYTH ROAD

Forsyth Road involves the acquisition of a joint school/park site in Surrey in a single-family residential neighbourhood designated for multiple family use. The site required the acquisition of several parcels averaging 2,000 m² in size. Acquisition of the properties started in 1988, at which time, the site was designated for townhouse use. Over the course of the acquisition program, the OCP was updated twice, and is currently undergoing a third update.
The zoning bylaw was also completely rewritten with several significant amendments undertaken over the years.

The first OCP update increased the maximum proposed densities from townhouses at 14 units per acre (upa) to low rise apartments at 45 upa. The second update increased the maximum proposed density to multiple family apartments at 70 upa. The second update also segregated land use designation and zoning categories into those:

- Permitted outright;
- Permitted conditionally through Neighbourhood Concept Plan; and
- Allowed only in Surrey City Centre (City of Surrey, Official Community Plan 1996).

The categories indicated the types of land use the local government would support within each designation. The categories were subsequently redefined in an amendment bylaw following a challenge to the terminology during the negotiating process. “Permitted Outright” now means “may”. The redefinition occurred shortly after a property owner questioned the Appraiser’s and the City’s assertion that some land uses labeled as ‘permitted outright’ would not be permitted (Jones, K. AAIC, RI Letter to Don Elving, AAIC September 17, 1998). Therefore, land valuations under those uses would not be considered.

Changes to the zoning bylaw over the acquisition period initially decreased the minimum site size for a multiple family development to 2,000 m² (District of Surrey Zoning
Bylaw 5942, 1979 as amended 156). In 1990, a real estate agent assembled options on a number of parcels. The assembly was non-contiguous but met the criteria for implementing higher and better uses. Subsequently, the City made amendments to the zoning bylaw requiring a 1 hectare (2.47 acres) contiguous assembly to maximize allowable density under alternative land uses (City of Surrey Zoning Bylaw 12000, 1993 as amended 23.2).

The Forsyth Road site is marked by another peculiarity. The proposed lands are marked by a deficiency in municipal services. The City’s engineering department issued a memo in 1993 itemizing the infrastructure deficiencies that needed to be upgraded for development to occur. Although the City has a bylaw requiring new developments to upgrade the infrastructure along a property’s frontage, either Development Variance Permits were issued to waive infrastructure improvements or the City accepted cash-in-lieu of construction for those developments that did occur in the area. In one case, a Development Variance Permit was issued to allow for the construction of a fourth dwelling unit on a consolidated property. Prior to consolidation, the site had three dwelling units. The zoning bylaw only permitted two dwelling units.

Appraisals commissioned by the City for negotiating purposes noted the lack of physical infrastructure as a factor for depressing land values compared to other comparable properties used in the appraisals (Jones, K. AAIC, RI Letter to Don Elving, AAIC September 17, 1998). Complaints regarding the financial impact of the lack of infrastructure and the City’s role in waiving development requirements from a party at the fringe of the proposed park, resulted in those properties being dropped from the acquisition program.
4.1.3 BURNS BOG

Burns Bog is a peat bog in the Municipality of Delta consisting of approximately 5,000 acres. The majority of the lands are privately owned by a partnership and consist of several large parcels. Over the years, several concept plans regarding the development of the bog have been put forward. One of the more innovative was the creation of a Venetian City / Port development. A more recent concept was the creation of a theme park with the relocation of the Pacific National Exhibition.

The bog has been the subject of local conservation societies advocating the site be retained in its current state as parkland. The site is not pristine and was subjected to peat mining over the years. The lands are outside of the Agriculture Land Reserve and designated “Resource Study Area” in the OCP. The Greater Vancouver Livable Region Strategic Plan identifies the lands in the Green Zone. Since the Livable Regional Strategic Plan was adopted by the Ministry of Municipal Affairs as a regional growth strategy, municipalities must indicate how inconsistencies between the Livable Regional Plan and the local OCP will be resolved. Delta responds to the inconsistency by stating:

“Without foreclosing any future land use options, Delta will work toward protecting Burns Bog’s Green Zone values through further study which may include preparing a plan." (Municipality of Delta OCP Bylaw No. 5587, 1997, 3)

The local government conducted a referendum in 1998 asking if local residents were in favour of preserving the bog as public open space. The response was unquestionably in favour of preservation. However, the OCP land use designation was not changed. Rather, the local
government adjusted their OCP application fees. The fees were adjusted to increase incrementally with lot size. Properties over 5 ha would be charged a base fee plus a unit fee per hectare (Corporation of Delta, Council Report, Amendments to the Development Applications Procedures Bylaw March 12, 1999). The effect was to increase the development application fees for Burns Bog from approximately $2,500 to $25,000. Since the fees were based on legal parcel size rather than the scope of the development, the fee would be substantial even if a small part of the original parcel was being considered for development.

Negotiations for acquisition have been on going for years. Land valuations currently range between $33 million to $65 million. Valuations have been as high as $103 million (Western Delta Lands vs. 3557537 2000 BCSC 1096 <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/00/10/s00%2D1096.htm>).

4.1.4 PACIFIC NATIONAL INVESTMENTS

Pacific National Investments is a case involving a development corporation negotiating with the City of Victoria to develop lands along Victoria’s inner harbour. The development company negotiated land uses for the area that involved rezoning the lands from industrial to commercial and residential uses. Part of the negotiations included the agreement to build two three-storey structures on waterlots. The negotiated agreement included the developer providing parkland and infrastructure upgrades.
A substantial part of the project was completed before the developer sought to obtain the necessary permits to develop the waterlots. When the permits were submitted, there was substantial public opposition to the completion of the project. The makeup of Council had also changed since the original concept for the development was approved.

Following a public hearing, Council voted to downzone the waterlots to only one-storey structures. The developer left the waterlots undeveloped taking the view that completion of the project was uneconomical because of the decreased density. The developer took legal action seeking damages. One of the developer’s claims was that the City was unjustly enriched since extensive land dedications and construction of roads and parks had occurred during the earlier phases of the project. Legal action concerning the downzoning of the site failed. However, the courts left the avenue open to litigate under contract law.

4.1.5 PANORAMA GOLF COURSE

The Panorama Golf Course was initially conceived as a residential golf course development, partially in and along the periphery of the Agricultural Land Reserve (ALR) in Surrey. The 174 hectare (436 acre) project involved developing two golf courses in the ALR and approximately 63 single-family housing units on large lots along the course’s periphery. The project encountered several hurdles, including changes to provincial legislation regarding the development of golf courses in the ALR. Part of the argument put forward for having the golf course in the ALR was the limited agricultural potential of the land. The economic returns
for placing the fallow land into agricultural production made farming unfeasible. The project was approved but did not start construction.

In November 1998, under the direction of a new Council, the City negotiated an agreement whereby the City would acquire the lands. In the course of negotiating a price, the feasibility of alternative land uses was raised. The price of $14 million was criticized by some as too expensive. The vendor claimed a value of $18 million. However, it was noted that several appraisals in the area did not support the price with the assessed value around $10 million being more appropriate. The City’s Parks and Recreation Department advised against the purchase (Diakiw 1998).

The agents representing the golf course’s foreign owners were active local developers. One was an ardent supporter of the newly elected Surrey Electors Team Council slate, and the other had been involved in a competing golf course / residential project in the community. To date, the golf course has not been built. At the Council-in-Committee Meeting of January 17, 2000, concerning a proposed golf driving range across the street by a separate proponent, the Parks and Recreation Department stated there were no definitive plans as to how the Panorama Golf Course lands fit into the City’s parks and recreation program.

4.1.6 HIGHLAND

The Highland case involves a developer’s proposal to develop 700 hectares of land in the District of Highlands, northwest of Victoria BC. Prior to the incorporation of the District of
Highlands, the developer received Preliminary Layout Approval (PLA) for the development. Over the course of meeting the PLA requirements, the developer had communications with the Nature Conservatory of Canada regarding a partial sale of the site for conservation purposes.

In 1993, the District of Highlands was incorporated and its boundaries covered the entire area in question. The first Mayor of Highlands had, for some time prior to becoming Mayor, been involved in efforts to preserve the area as parkland. Shortly after the District’s incorporation, the Mayor and the Approving Officer met with the developer to discuss the status of the project including costs and profits. The Mayor communicated some of this information to the Nature Conservatory to assist the agency in their negotiations.

The Nature Conservatory was unable to complete negotiations and the Province of British Columbia, who had been monitoring the situation assumed the Nature Conservatory’s interests. Negotiations continued to the point where all but 120 hectares of the site were to be acquired for parkland by the province. The developer applied to rezone the 120 hectares into 59 lots, a plan that had been highly supported by the public in the past.

At the same time, the Province was re-evaluating their interests and was considering the purchase of all the lands, including the 120 hectares that it would develop to recover some of its costs. Appraisals for these lands ranged from $8.5 -12.4 million. A Memorandum of Understanding between the Province and District of Highland was entered into whereby the District expressed its acceptance of rezoning the 120 hectares for development if the remaining
lands were dedicated to parkland. The Province bought the lands and completed the rezoning a year later, in accordance with the Memorandum of Understanding.

Shortly thereafter, the developer applied to rezone a 12 hectare parcel under the same land use criteria as the Province. The District rejected the application by the developer citing that the application did not provide an amenity in exchange for the density. A judicial review of the matter quashed the rejection and the District was ordered to reconsider the application. The application was rejected again without reason. The matter went to Court with the judge finding the Mayor, the Approving Officer, and the District of Highland had all committed an abuse of public office.

4.2 ANALYSIS OF THE CASE STUDIES

4.2.1 INTUITIVE ETHICS AND INTERESTS BUILT BY EXPERIENCE

Probably the most difficult of the three ethical criteria for passing judgment is to substantiate ethical judgment based on intuition. By presenting the cases without analysis, it is hoped that the reader had an intuitive notion that something was wrong in at least one of the cases presented. The reader did not need to know the law, land use planning practices or the policy statements of the local government that guided the negotiations to come to this realization. Nor did the reader need experience working in local government or real estate negotiations. Somewhere within the reader, a specific identifiable notion of questionable conduct likely arose without the need to stop and rationalize the facts or complete the reading
of the particular case. The notion of unacceptable conduct stood alone. If a reader experienced this sensation, then the intuitive aspect of ethical judgment prevailed.

Intuition also plays a role in establishing interests. The establishment of interests in a negotiating forum is accomplished in a variety of ways and at different degrees of intensity. The process is primarily one of presenting information to demonstrate experience and convert the other party's beliefs. The information will be analyzed, compared and worked to provide facts and substantiate one's intuition. The presenter of the information intrinsically knows an opportunity exists but it must be conveyed to the other party. This involves the analysis of the development regulations, market conditions and the costs of development. At a junior level, the process encompasses comparable sales appraisal techniques for highest and best use to demonstrate experience. This process examines land uses within existing regulations based on past performance. It is a rudimentary exercise of limited scope.

The process of substantiating one's intuition does not need to conform to existing structures, and may become quite sophisticated and advanced. It may engage land use planning theory, extensive market analysis and higher level economic development initiatives to remove speculation and astutely challenge the existing land use plan. However, a project must be of substantial size to offset the costs of preparing a market plan involving demographic analysis, behavioural dimensions and economic forecasts. At an intermittent level, facts are gathered through consultation with lawyers to define and interpret regulations, real estate appraisers to analyze and critique appraisal reports, and engineers to assess servicing costs. The objective of providing substance to an intuition is to turn a 'desire' into an 'interest' by employing
consultants to add dimension and body to the thought. The design process brings to the forefront, in meaningful ways, quantitative and qualitative measures that communicate an alternative land use which could not be expressed by words alone. It demonstrates a conviction by the person claiming the interest, an ability to ‘make it happen’.

This process of utilizing experience to substantiate an intuitive interest from a desire was demonstrated with Douglas Island. The interest in a mid-river development was further advanced by a similar project in the north channel of the Fraser River. Deering Island, located at the south foot of Blenheim Street in Vancouver, became a residential community. Douglas Island demonstrates the impact substantiating a ‘feeling’ may have on negotiations. The 1995 sale price of $4.3 million reflects the uncertainty associated with intuition and the adoption of local government policies adverse to developing the island. These policies came into effect after negotiations began and their influence on the price is unknown.

A number of people, not knowing the law, intuitively believe the Pacific Investment case contains wrong-doing on the basis of reneging on the land use zoning. However, local governments have an unfettered right to change land use, and the prescriptive elements of ethical conduct, with respect to the land use judgment, prevailed. This demonstrates there will be variability in individual ethical assessments depending on one’s past experiences.

The juxtaposition of substantiating one’s intuitions is the process of convincing the other side that some of their proclaimed interests are nothing but inflated desires. Attacking one’s intuition involves generating ideas that are to the disadvantage of the other party. It
builds up barriers to the possibility of realizing the concept; it tests the strength and consistency of a perception to show imperfections, confusion and a lack of clarity (Barry 1983). It involves challenging facts and propositions. Facts that may be applicable with some comparable sites may not be applicable with the case at hand. The unique geographical aspect of land readily accommodates a tactical challenge to weaken interests based on intuitive or experiential criteria.

Interests built upon intuitive and experiential means, can also be dismantled through process. Alternative land uses are subjected to a series of different regulatory approval processes depending on the nature of the proposed change. The subdivision, rezoning or the development permit process itself, without regard to time, costs and uncertainty of outcome, can be psychologically challenging, stressful and intimidating. These elements alone can lower the hierarchy of one's interest. It might turn an interest into a desire when other facets of the GMEN are added to the mix. The influence depends on the personal character of the negotiators and their familiarity with processes.

The process of dismantling interests is reflected in the Forsyth, Burns Bog and Highland cases. All three are affected by a lack of clarity and consistency in the development process. In the Forsyth case, the content of the OCP was denied. Permitted land uses were not recognized. In the Burn Bog case, there is a lack of clarity between municipal and GVRD policy, and no specific alternative land uses are designated for the site. In the Highland case, there is inconsistency in the development requirements between different developers to achieve a rezoning. The lack of consistency undermines the self-confidence and trust required for
intuitive interests to receive validation. Consistency itself - consistency in social values, is a quality of ethical conduct.

Dismantling one’s intuitive / experiential base of interests is also achieved by introducing other stakeholder interests to the negotiating table. The simple perception of a third hierarchy of interests that may challenge or override the interests of either negotiating party, or suggest the need to enter into another type of negotiating forum, is intimidating and increases uncertainty. Familiarity with the mandates of other potential stakeholders, determines the effectiveness of this type of leverage to dismantle one’s interests.

With reference to the GMEN Model, the introduction of another party places another pyramid within the ‘Sphere of Negotiations’. This will decrease the volume of overlap between the various interests represented by the pyramids. There will be fewer interests upon which the negotiators can achieve a convergence of interests.

A more evident form of dismantling one’s interest is to provide misinformation. The overall complexity of the land development process makes it easy to conceal information and isolate issues that are negative in their own right, but positive when combined in tandem with the overall process. For example, a particular zoning category may permit a certain density providing the structures are constructed in a prescribed form and character. One party may recognize that the required form and character may not be readily marketable. An astute developer may propose a Comprehensive Development (CD) bylaw to achieve the same land use but in a different form and character. A local government negotiating agent may not know
of, or reveal this strategy for bypassing technical restrictions on alternative land uses.
Sidestepping strategies utilized by development experts to overcome obstacles seriously
challenges the interests of the other negotiator. It means things that were non-negotiable are
indeed negotiable.

4.2.2 EVALUATIVE ETHICS AND INTERESTS BUILT BY SOCIAL CONSENSUS

The second means of passing judgment and establishing interests is through evaluative
ethics and the testing of interests through the social consensus. The evaluative and social
consensus elements appeal to deductive reasoning to transform desires into interests or affirm
an ‘interest’. Local governments test the social consensus through public consultation in the
community planning process. The consensus is formulated through subjective and objective
evaluative planning practices. They are articulated in policy statements and referenced
graphically in the OCP and local area plans. The community’s values are captured through
public consultation, debate, and the collection and study of facts. They are supportable at some
level of planning theory and take on concrete qualities through the legislative process. They
reflect not only the community’s needs and aspirations, but the social values held by
community at large.

The degree by which interests can be established by the social consensus strikes at the
heart of evaluative ethics. Both the Forsyth Road and Panorama Golf Course illustrate
examples of parkland negotiations removed from the social consensus. In the Forsyth case, the
administration’s denial of the content of the OCP shows absolute disregard to:
• the legislative process the OCP went through to be adopted;
• the people who supported, participated in, and worked on the OCP; and
• the elected representatives who commissioned, listened to the public and refined the plan presented by the administration before adopting the OCP by bylaw.

It illustrates the administration’s unilateral neglect of the public voice to serve the corporate self-interest, and that the administration’s exercise of authority is the central governing arena that affects the local population on a day-to-day basis. Likewise, the inappropriate use of a Development Variance Permit to alter land use and density is illegal under provincial legislation. However, the administration used the pretense of authority to utilize the DVP planning tool. The relaxations granted by the DVP could have been achieved through the CD zoning process. Whether the more rigorous public consultation process engaged in rezoning would cause City Council to yield the same results will never be known.

In the Panorama case, the acquisition of the site was not identified for park in the local area plan, and the Parks and Recreation Department had no plans for the site. This challenges the essence of substantiating interests with reference to the social consensus. The decision to purchase occurred without public input despite a substantial financial commitment on the part of local government. The search for policy direction and a public consensus on the future of the site as a park only began after the site was acquired.

The second aspect of the evaluative/social consensus aspect of negotiations is tested when a party deliberately avoids surveying the social consensus even though it has the mandate
to do so. Ethical negotiations involving land use issues require a convergence of the interests as expressed in local plans and policy statements. Without explicitly testing the social consensus, it is difficult for either party to provide substance to their beliefs and attitudes. A local government who has the mandate, authority, and obligation to provide clear direction on land use matters, but does not fulfill this mandate, violates its position as the defender of the ‘public interest’. Weak policy statements, vague and sometimes conflicting interpretations of procedures and regulations, and the lack of commitment by local governments to indulge in anything more than cursory comments on land use issues are a few means by which local administrations challenge beliefs.

Examples of deliberate vagueness are illustrated in the Douglas Island and Burns Bog case. Both sites are identified as “Study Areas” in the Port Coquitlam and Delta OCP. There is no clear direction on the future of either site making the valuation process difficult. This is demonstrated by the wide range of estimated values associated with each site. Imposing a substantial OCP application fee for the Burn Bog site restricts, rather than encourages, the property owner to initiate the land use review.

Local governments are not alone in generating vagueness and uncertainty in the land development process. All jurisdictional agencies involved in the land development process engage in the practice at one time or another. The lack of clarity from a public agency responsible for land use decisions hints that the agency is wrestling with a desire. However, the application of reason has not been applied to evaluate the agency’s desire. Without a proper evaluation, the traditional prescriptive instruments exercised through power and authority
cannot be applied to project the agency’s desire into an ‘interest’. Consequently, the affirmation of a belief is not achieved.

The vagueness in land use planning has been justified on the basis that clarity may impose costs and obligations upon local government. On the other hand, restrictive land use policies applied to selected sites, may be deemed as an ‘expropriation of value’. This is a legal term where property value is lost because the government targeted its actions to adversely affect a property in which the local government has an interest. Local government wrestles with the dilemma of providing clarity on the future of a site that might increase its acquisition costs, or imposing restrictions on the site that might be viewed as unlawful. In either case, the ethical issue at hand is that the party is not being treated fairly compared to the rest of the community who do not have to wrestle with vagueness.

Given the wide range of valuations on Burns Bog and Douglas Island, and the protracted negotiations involved in each case, it is questionable as to whose interests are being served by the lack of clarity. Tax assessors are reluctant to apply high valuations since there is no basis to defend a challenge. Therefore, the community will be denied a fair receipt of tax revenue. Acquisition negotiators, on the other hand, have difficulty defending low valuations. The public is left to reconcile low taxation values with high acquisition values.

A third aspect of the evaluative / social consensus facet is that the reasoning and consensus that earmarked the start of parkland acquisition negotiations may change over the implementation period of an agreement. Bringing alternative land uses into being is a time
consuming process involving the positive consideration of City Council on at least two, often three, and sometimes four different occasions. Unfortunately, the composition of the Council can change during the land approval process and the succeeding Council is not bound to the decisions of the Council that preceded them. After the land use approval is obtained, it can be several years before construction of the project is complete. Interests shared under one government administration may not be shared under the next administration. When testing the social consensus to substantiate one’s interests, one needs to be cognizant that aspects of the social consensus fluctuate over time.

One needs to evaluate the implications of political change over the life span of the negotiated agreement. A change in the composition of Council may be more conducive or detrimental to achieving an alternative land use. From the developer’s perspective, a negotiated agreement should span the development’s life cycle. However, from a local government’s mandate, the land use aspects of a negotiated agreement should only span the length of the Council’s consent to that land use. Changes in the social consensus and the evaluative rationale that were in place when negotiations commenced can shift directions during the term of the agreement. The hierarchy of the party’s interests and direction of the negotiations may change. Some interests may fade, while others may be replaced by new interests.

The ability of a Council to alter land use at any time does not invalidate the other party’s right to compensation for frustrating a negotiated agreement. However, it does question the common practice of local governments demanding that all benefits of a negotiated agreement be secured up front rather than delivered over the life of the agreement. This
question is particularly important in the context of the administration knowing they do not have the power to guarantee delivery on the land use aspects of the agreement. They also know that the corporate arm of local government is still bound to its contractual agreements.

The Pacific Investment case is an example of a changing social consensus before the completion of a negotiated agreement. The case highlights the ability of a public administration to negotiate land use issues in a framework set apart from the executive mandate of local government. The administration had knowingly negotiated a deal whose time frame for implementation exceeded the length of the mandate of the current Council, which was not legally binding to future Councils.

From the developer’s perspective, the evaluation of the terms of the original agreement met the requirements to make the project viable. The interests of the developer were substantiated by the original terms and conditions negotiated. This is not to say local governments should not have the ability to enter long term agreements. Long term agreements are a desirable planning tool. However, negotiations of such agreements must be cognizant of the limited mandate of local government administrations. To negotiate terms and conditions outside of the mandate does not meet evaluative ethical reasoning and implores judgment from the prescriptive facet of the GMEN.
4.2.3 PRESCRIPTIVE ETHICS AND INTERESTS BUILT BY FACTS

The third and last facet of the GMEN is that of prescriptive ethical criteria and the presentation of facts to substantiate interests. The prescriptive / fact facet is the easiest of the three facets to identify since direct reference can be made to rules and regulations to identify social values expressed in legal relationships. After all, the law is one means of institutionalizing ethics. In the cases presented, for example, the courts had passed judgment on the rules that prevailed in the Pacific Investment and Highland cases. In the Pacific Investment case, the sanctity of the independence of the executive arm of local government was upheld. In the Highland case, members of local government were found to have exercised an abuse of public office.

Court decisions are not, however, the definitive criterion for passing judgment. Many cases do not make it to court. In the Forsyth case, for example, a direct reference can be made to Section 992 (2) of the Municipal Act (subsequently replaced by the Local Government Act) which forbids the use of a Development Variance Permit to alter land use or density. It is incumbent upon the negotiating parties to understand and interpret the rules and regulations consistently. Likewise, legal battles over the differences of opinion on the purchase values of Douglas Island and Panorama Golf Course are likely to consume potential savings before any wrongdoing can be legally substantiated.

When the courts do find wrongdoing in process, as in the Highland case, the offices the individuals hold remain independent, while the individuals may be reprimanded. The offices
within government are held to be honest and engage in ethical activity. It is the person holding office that is dishonest and engaging in unethical activity. The courts will often refer the matter back to the governing body to reconsider the situation rather than impose a decision upon the public office. The office may then seek legal avenues or pass new bylaws to achieve the same outcome.

Prescriptive ethics is about rules and regulations that are composed of words. Words are tools that convey meaning and can be interpreted in different ways. An evaluative process is required to structure meaning to words. Soon it becomes intuitive to recognize distinctions in meaning. This linguistic connection between the prescriptive, evaluative and initiative process is not coincidental. It crystallizes the fact that ethical judgment also does not stand alone on any of the three criteria. They are interrelated and our value system structures a hierarchy of right and wrong conduct.

Fundamentally, criteria portrayed as facts are structured in a variety of ways. One is the coding of law. On matters that are not codified, descriptions of empirical relationships or qualities are used to establish facts (Barry 1983). These relationships and qualities substantiate the interests of the party furnishing them. The negotiating parties must share warranted and verifiable beliefs for these facts to have standing. Where facts are not shared, the negotiating process expends considerable effort trying to convert the other party.

Facts are developed by threading attributes into a cohesive paradigm. Constructed facts are most evident in the land valuation process. The appraisal process is by best accounts a
guesstimate. It is a guess based on a variety of assumptions. However, the valuations are often presented as fact. The Douglas Island case built together a series of facts to boost the estimated values. The facts were sufficient to result in an agreement for sale at $4.3 million. Whether the portrayed facts would withstand scrutiny is not known.

The validity of the facts with Panorama Golf Course is more questionable. The facts argued that the lands were unviable to sustain agriculture. This argument supported removal of the land from the ALR and approval of the Golf Course. Later, facts on the viability of agricultural production were used to justify a high valuation for park purposes. This demonstrates that many facts are actually assumptions supported by other assumptions to structure seemingly empirical relationships. These relationships are used to substantiate interests.

4.2.4 THE ROLE OF POWER AND AUTHORITY

Unethical negotiations are caused by the abuse of power and authority. There is either an excessive exercise of power and authority or indifference and inconsistency in its application. It causes negotiations to move outside of the parameters of interests. The Highland and Pacific Investment cases are evidence of abuse stemming from the power and authority invested in public office. The Highland case has been formally judged as violating prescriptive ethics as encoded by law. The Pacific Investment case has re-asserted the fact that Council controls land use and the public interest, not the administration.
Abuse of power and authority from the intuitive and evaluative criteria are more difficult to substantiate. In the Panorama Golf Course case, the reasoning for the acquisition is lost when the administration states they have no plans for the land. One can only assume that the normal process of decision-making was overridden by someone’s pretense of authority. In the Forsyth case, the investiture of authority in land use regulations was abused by granting variances to zoning criteria that were expressly forbidden, and by the authoritativeness the administration held in interpreting the content of the OCP. What quantifiable affect this had on the land valuation process is unknown. What is critical, is the lack of public confidence that builds as a result of misinformation. In the Burns Bog case, the lack of a definitive statement on the future of the bog, and the municipality’s weak endorsement of the regional context statement, illustrates a lack of will by the local government to expressly exercise its authority.

Power and authority have the function of shifting the foci of interests. The point of convergence between negotiating parties, where one is more powerful, simply shifts the convergence point. However, negotiations can remain ethical. The shift could be towards a more prescriptive, empirical type of negotiations or more indicative of a public relations campaign to frame the social consensus. Only when power and authority are abused are negotiations transferred outside the realm of ethical negotiations.

If the volume contained by the GMEN pyramid represents ethical negotiations, can all negotiations outside of the framework be considered unethical? With respect to parkland negotiations on land that has development potential, the answer is yes. The wide mandate of local government exceeds the parameters of ethical parkland negotiations. As a corporate
entity, local government is obligated to be cost effective and respect legal proceedings. As a governing body, it must adhere to the social consensus. The very nature of local government as a dual entity with unfettered control on land use and stewardship of delivering and maintaining public services, ensures that one objective will not be served. One factor within the bundle of interests held by local government must be forsaken.

In cases such as Douglas Island, it is questionable if local government was cost effective given their unfettered right to regulate land use. The original value estimates reflected the land’s raw state and it is questionable why local government would accept propositions on development proposals to increase the value. In the Forsyth case, economies of scale are achieved if the infrastructure contributions from new developments are accumulated and improvements are implemented as one comprehensive project rather than on a piecemeal basis. From a corporate viewpoint, this is logical. However, the ethics are questionable if this practice negatively influences land value. A fundamental valuation principle is that neither party should unduly influence land value.

4.3 FINDINGS

4.3.1 GENERAL FINDINGS

The hypothesis of this thesis was that ethical conflicts arose in urban parkland acquisition negotiations due to power imbalances and the multiple competing roles of local government. The investigation was restricted to sites that had development potential. In the examples investigated, it was found that the negotiations for parkland acquisition, where the
land had development potential, did not meet the ethical standards defined by our political economic system, the legislative mandate of local government or the policies local government themselves set for the community. The finding of unethical negotiations was based on the three dimensions that compose interests for interest-based negotiations, and the three criteria for judging ethical conduct. In my view, all six case studies found contradictions or violations of acceptable conduct when viewed from either the corporate or fiduciary perspective of local government.

4.3.2 THE APPLICATION OF ETHICS AND INTERESTS

Ethical values are a matter of one’s moral character. These values are articulated in different manners and brought into an organization, such as local government, by the people representing it. As a non-person, local government does not personally possess ethical values. Its code of ethics is to guide the people that represent it. The practice of ethics can only reach to the depth that the people within an organization wish to participate in the debate.

4.3.3 LOCAL GOVERNMENT’S DIFFICULT POSITION

Local governments are unique creatures having both a private corporate interest and a fiduciary public interest. This duality is a source for ethical conflict because the interests and criteria by which the corporate entity of local government operates and is judged, are different from the interests and criteria by which the fiduciary public entity of local government operates and is judged. This dilemma is compounded with local government having the role of
determining alternative land uses. Local government has a very difficult if not impossible task of negotiating parkland acquisitions that satisfy the interests of its dual character and still negotiate an ethical agreement with other parties.

4.3.4 RESULT OF NEGOTIATIONS

Neither the outcomes of the negotiations nor the ethical violations that arose, were necessarily negative to the vendor. The six cases reveal an outcome that was negative for at least one of the three entities represented at the table; namely the vendor, the corporate entity of local government or the public fiduciary entity of local government. One of these three entities will forego the recognition of its interests. This occurs through the misapplication of power and authority, or by the power and authority evading its duties and responsibilities and unduly influencing the achievement of a negotiated agreement.

In the cases presented:

- expressed interests were ignored, dismissed or unsubstantiated as interests in the land valuation process;
- rules and regulations were not followed or acknowledged; or
- the evaluation of alternative land uses was always under the power and authority of the principle purchasing agent, and therefore, challenged the objectives of either the corporate or fiduciary side of governance.
Secondly, the accepted interests of the negotiating parties seem to be influenced by the class of the vendor. Factors of influence include political connections, financial capacity, and negotiating experience. Vendors demonstrating strong attributes in these fields enter negotiations at a different level than novices. Discussions with appraisers acknowledged that different degrees of diligence were exercised with different clientele.

4.3.5 LAND VALUATION PROCESS

As shown in these examples, the land valuation process can be an unreliable means of determining value. In the case studies, fluctuations in value were greater than 100%. In Burns Bog for example, appraisals based on 'Highest and Best Use' produced values ranging from $33 - 65 million dollars. On Douglas Island, values were between $3 - 8 million dollars. The applied economic approach to defining value of a public good is suspect when fluctuations are so dramatic.
5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

Parkland is a distinct land use that competes with other land uses. As a public good, parkland is a use that does not prescribe to models of traditional urban land economics. It relies on the principle of substitution to derive its value, and hence, involves a more intense negotiating atmosphere. Parkland negotiations are prone to unethical conduct because of the competing objectives of local government within the sphere of negotiations. This competition is an inherent part of the way local government is structured.

The interest-based negotiating model lends itself to readily construct a framework for conceptualizing ethical parkland negotiations. The three dimensions that compose interests merge with the three criteria for assessing ethical conduct providing a three-sided pyramid by which to conceptualize ethical negotiations. An argument might be put forward that the GMEN is invalid since ethical judgments and interests are so diverse and culturally driven, that to portray them as rigid facets in a three sided pyramid puts unrealistic and meaningless boundaries on negotiations. This argument would have to be accepted if the model were used to set standards for ethical negotiations. However, the model should not be viewed as a static

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12 The core issue is the lack of separation of the powers within the multiple and conflicting roles of local government. This creates conflict. Local government has too many roles and is structured with conflicting value statements. On the one hand, local government is to be egalitarian and serve community. On the other hand, it is administered by the business etiquette of capitalist enterprise. In purest terms, there is philosophical conflict. That conflict is measured by the policy statements, legal requirements and operating principles of local government.

The core to ethical negotiations is the recognition of the interests of all the parties at the table. Local government comes to the table with two conflicting interests. For local government to participate ethically they must divest themselves of one set of interests. Otherwise, someone's interests will be unduly compromised.
framework but as one that is dynamic. Its purpose is to give pause and perspective on negotiations as they proceed. Are the parties relying purely on prescriptive means? Which interests have priority? Can a perspective be justified? Have negotiations moved to the edge or beyond ethical standards?

The value of the GMEN in negotiations is to keep the negotiating agents conscious of the other party's interests and ethical principles. These interests are not purely defined by economics or legal requirements. They encompass an array of competing attributes that each party will position hierarchically into their value system. The need to negotiate arises from the individuality of each party's interests and their respective value system. Successful negotiations must respect the other's interests and values.

5.2 RECOMMENDATIONS

5.2.1 A GENERAL COMMENT

The most direct way to address the ethical question in negotiations is to reduce the opportunity for unethical practices to arise. Adding rules and policies to the existing structure could simply increase the number of avenues by which to judge the negotiations as being unethical. A change in the negotiating structure to reduce opportunities for ethical conflict can be achieved in a number of ways.\(^\text{13}\) The key component to the problem is the lack of separation

\(^{12}\) The parkland acquisitions process is one of compounding process on top of process - governing processes, planning processes, valuation processes, and negotiating processes. Processes that are geared to give the appearance of justice come at the expense of denying the fundamentals of a democracy - namely the separation of powers.
between the agency determining the alternative land uses, the agency entrusted to add value to the community, and the agency responsible for cost efficiencies. These three responsibilities lie within the same agency resulting in opposing objectives.

Another means to reduce the opportunity for ethical conflict is to restructure local government itself so it has only one character rather than two. It is the duality of local government, which in part, provides the ammunition for defining and declaring conflicting interests. On the one hand, it acts as a corporation, while on the other hand, it acts as a governing body. Other levels of government do not face this distinction. Local government needs to be restructured to be a fully recognized form of governance and not a subset of the provincial realm.

5.2.2 FOCUS ON A LONG TERM PROCESS

Parkland acquisition should be viewed as a long-term process and acquisition should recognize the life cycles of neighbourhoods and land utilization. History provides many examples of the ever-changing character of the land and the people that occupy it. Eventually, all lands will come onto the market. Since the providing parkland is an option for local government, there is no need to try to expedite the process at the expense of its obligations and duties.
5.2.3 RECOGNIZE MULTIPLE ACCOUNTING COSTS

Local governments should be aware of the overall costs of parkland acquisition practices. The corporate entity of local government focuses only on land costs. It does not consider the costs of social deprivation, policing, lost tax revenue or other costs associated with trying to influence the market. Multiple accounting costs need to become part of the corporate economic analysis. Acquisition budgets should be viewed within the context of the overall fiscal cost centres within the community.

5.2.4 STANDARDIZE THE PROCESS

Local governments should use a consistent process that does not distinguish between classes of vendors. The protocol of expropriation, even if expropriation was not invoked, would be one step towards consistency in negotiations. Current negotiating strategies rely on the ignorance of parties, and the pretense of power and authority to unduly influence negotiations.

5.2.5 AMEND THE LOCAL GOVERNMENT ACT

Amendments should be undertaken to the Local Government Act to allow local jurisdictions to enter long-term contracts. It would be appropriate to provide local governments with the mandate to manage development under the same manner as the Land Use Contract system used in the late 1970s. This process did not allow one party to amend an agreement
unilaterally. Re-instituting Land Use Contracts or a similar structure would maintain the integrity of the administration to negotiate acquisitions as part of a long term development.

5.2.6 CENTRALIZE PARKLAND ACQUISITIONS

The parkland acquisition process should be separated from the agency regulating land use. The current relationship is abrasive to the fundamental principles of democratic governance that demands the powers of government to be separated. Parks are a regional issue and their acquisition should be centralized to provide an arm's length distance between the agency acquiring the land and the agency determining land use. It would also eliminate direct political interference and provide consistency between local jurisdictions.

5.2.7 UTILIZE PRE-EMPTION

Government should have the right to pre-empt property sales. Speculation and land grabs have historically been a concern of local governments. The ability to pre-empt sales is the strongest means of providing some distance between the actions of the corporate entity of local government unduly influencing the land valuation process. It also balances the age-old fear of speculators acquiring land with a view of reselling it to local government at a handsome profit.
5.3 EPILOGUE

Charges of unethical negotiations will always arise in the politics of local government. However, the number of alleged and actual incidences can be reduced with fundamental changes to current practices and approaching negotiations with cognition of the GMEN framework. There is no best way to address differences in individual value systems. However, recognition of the criteria that sets the parameters of ethics and dimensions of interests will support ethical decision-making. There must be a connection between the prescriptive, evaluative and intuitive criteria that define ethics, and the facts, social consensus and experiences that define interests.

The key component to the parkland acquisition problem is the lack of separation between the agency determining the alternative land uses, the agency entrusted to add value to the community, and the agency responsible for cost efficiencies. These three responsibilities lie within the same agency resulting in opposing and conflicting objectives. The different objectives prohibit the three criteria that define ethics and the three dimensions that define interests from merging, thereby resulting in unethical negotiations.
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