



**Organization and Management  
of Benny Fram Site**

**Public, Private and  
Semi-private Spaces**

**September 25<sup>th</sup>, 2003**

## **ORGANIZATION AND MANAGEMENT OF BENNY FARM SITE**

### **INTRODUCTION**

This report is organized into four sections as follows:

1. Public, Private and Semi-Private Spaces
2. Legal Tools
3. Examples of Residential Projects
4. Recommendations and Next Steps

In the first section, we analyze the Benny Farm site in terms of the different property regimes, namely, public, private and semi-private land. We also identify the issues of overall site integration and management.

In the second part, we provide two possible legal tools that may be used to ensure that the whole project is integrated in terms of overall architectural style and landscaping quality and that the different areas are properly maintained.

In the third part, we provide examples of other residential projects in the Montreal area.

Finally, we provide our preliminary recommendations as to which legal regime is best suited for Benny Farm and how you may proceed.

### **1. PUBLIC, PRIVATE AND SEMI-PRIVATE SPACES**

With reference to the site plan prepared by Saia et Barbarese/Claude Cormier in August 2003 (the "Site Plan"), the site may be organized into three property regimes: public, private and semi-private.

#### **1.1 Public Spaces**

##### **(a) *Definition***

In the event that the City acquires a portion of the northeast corner of the site for a community recreation center, such area will become a public space.

The Benny Farm site plan includes a new road west of Cavendish. This road is an extension of Prince of Wales Avenue, which will be transferred to the City and become public. The alley at the western limit of the site will remain private.

(b) ***Integration and Management***

The City will own the public spaces. Under the *Charter of the Ville de Montréal*, R.S.Q., c. C-11.4, the Borough is responsible for the management and maintenance of local parks and local road networks.

With respect to ensuring the integration of the public recreation center, if realized, Canada Lands Company Limited (“CLC”) and the City may enter into a development agreement, under the terms of which landscaping and architectural standards may be established. In the Angus project, described below, the City was transferred a large park and assumed all the costs related to landscaping work carried out in accordance with plans agreed upon by the developer and the City.

1.2 **Private Spaces**

(a) ***Definition***

The private portion of the site will include the buildings and lots for single-family housing, rental buildings, buildings established as divided co-ownership (condominium property)<sup>1</sup> and co-operative housing.

Parking areas established within the limits of a lot and serving only the building located on the same lot will be private areas. Parking areas shared by occupants of different lots will be semi-private.

Certain gardens and front and rear courtyards may also be considered as private if they are used only by the owners, co-owners or tenants of the respective buildings on each lot within which they are located.

If the CLSC is located on the site, its building and land site will be private. The recreation centre, if built, may be considered public if the City is the owner and manager, or private if, for example, the YMCA is the owner.

(b) ***Integration and Management***

Management and maintenance of the private spaces will be the responsibility of the respective owners. Once subdivided, we understand that blocks of land will be sold to be developed by third-party developers. The Borough raised the issue that, once carved up, there will be no guarantee for the overall integration of the project. This concern may be addressed through the creation of a horizontal condominium or by means of servitudes. In this manner, a private regime for site integration may be achieved. The Bois-Franc, Angus and Cité-Jardin de Fonteneau residential projects described below provide good examples of these legal tools, which are described more fully below.

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<sup>1</sup> The private condominiums will be divided into exclusive portions, common areas and restricted common areas.

### 1.3 **Semi-private**

#### (a) ***Definition***

The circulation paths may be established as semi-private if they are intended to be used only by residents of Benny Farm. If semi-private, the shared use of these paths may be limited to all residents of Benny Farm or just those within each residential block.

Certain parking areas may also be semi-private if they are to be used by occupants of buildings on different lots.

The community garden is intended for shared use by all the residents of Benny Farm and may, therefore, be considered as semi-private. Certain front and rear courtyards, if not private, may also become semi-private. In this case, the garden area would be shared by certain users.

#### (b) ***Integration and Management***

An important issue raised by the Borough concerns the integration and long-term maintenance of the semi-private spaces. The semi-private nature of the paths and parking lots, the aesthetic standards and the responsibilities for maintenance may be ensured through the creation of a divided co-ownership regime or reciprocal servitudes. These two options are described below.

## 2. **LEGAL TOOLS**

### 2.1 **Horizontal Divided Co-ownership (condominium)**

The legal regime of divided co-ownership may be adopted to address the issues regarding landscape integration and ongoing management and upkeep of the private and common areas (semi-private portion) of the site.

Divided co-ownership of the site would be established by the publication at the registry office of a declaration of co-ownership under the terms of which the ownership of the property is divided into fractions defined as private and common. The declaration may be prepared and registered by CLC prior to selling the land. The declaration of co-ownership will bind subsequent owners.

Under the terms of the declaration, the site will be composed of private areas, common areas and restricted common areas. A technical description of all the portions must be prepared by a land surveyor. The sale of each private portion will include the share of the common portions and the right to use restricted common portions, where applicable.

It should be specifically mentioned in the declaration that certain buildings to be erected in the private portions may be subject to a subsequent publication of a declaration, divided co-ownership, this time, vertically. In other words, you may

create a condominium building on a site that is organized as a horizontal condominium.

The relative value of each private portion is determined and defined in the declaration. The relative value of each fraction is based upon the nature, destination, location and dimensions of the private portions.

Depending upon how we ultimately divide the site, the private areas may be defined as the building lots.

The common areas would include the circulation paths and may include certain parking areas and certain green spaces. Each co-owner has an undivided right of ownership in the common portions. The share of each co-owner in the common portions is proportionate to the relative value of his fraction. Some of the common areas may serve for the use of only one or several of the co-owners. These areas, known as restricted common areas, may include certain paths and courtyards and parking areas. The use and obligations to preserve the restricted common areas may be defined in the declaration.

Upon publication of the declaration of co-ownership, the co-owners as a body constitute a legal person known as the syndicate. As provided by law, the mandate of the syndicate is to preserve the whole property, maintain and manage the common portions, protect the rights of the co-owners and take all measures of common interest. The declaration also provides for the creation of a board of directors of the syndicate, its powers and duties and the procedure applicable to decision-making and voting by co-owners.

By-laws including rules of enjoyment, use and upkeep of the private, common and restricted common portions form part of the declaration of co-ownership. The by-laws deal with the operation and administration of the co-ownership (composition of board of directors, their appointment, replacement and remuneration) and the procedures of assessment and collection of contributions to the common expenses. The declaration may provide, for example, that a landscaping contract will be given each year for the whole site and each co-owner must contribute to the cost of such contract proportional to their respective fraction. A contingency fund may also be created for major repairs and the cost of replacement of common portions.

Similar to servitudes, the declaration of co-ownership binds the co-owners and their successors. Moreover, under article 2724 of the *Civil Code of Quebec* (“CCQ”), if a co-owner refuses to comply with the declaration of co-ownership, for example, does not pay his share of the costs, the syndicate’s claim for the payment of the common expenses or contribution may give rise to a legal hypothec charged against the property of the defaulting co-owner.

## 2.2 Reciprocal Servitudes

A servitude is a charge imposed on a property, the servient land, in favour of another property, the dominant land. A servitude is a real right and may be created for a fixed period or in perpetuity. Under the terms of a servitude one may include rights and conditions to use the servient land and obligations to maintain the servient land in a certain manner.

A servitude may be created while CLC is the owner of the land in anticipation of its division and sale to third parties.

With respect to the circulation pathways, the legal regime of servitude may be applied to define the users, conditions for use and obligations to maintain the paths. Under the regime of servitudes, the path would be defined as the servient land allowing rights of passage to the owners of the other lots (defined as the dominant lands). As such, there would be a series of reciprocal servitudes created.

In addition to providing shared use of the pathway, the servitudes may include obligations for the servient landowners to maintain the paths, remove snow and any other obstacles. An operating agreement may be executed among all the owners to provide for management and maintenance of the path. Under the terms of the operating agreement, a landscaping contract could be given each year, the cost of which would be shared by the landowners in accordance with a percentage allocation which may be determined for each lot. The servitude could refer to the operating agreement. In this manner, the cost of management and maintenance would be minimized and an integrated landscape approach would be guaranteed.

Similar to McGill College Avenue, which has special landscaping standards, a non-profit organization could be created to oversee the landscape maintenance. The Operating Agreement could refer to this organization as the “Operating Manager”. Each of the landowners could be represented on the board of directors of the non-profit organization with voting rights determined in accordance with their percentage allocation (as in the case of the *Association des propriétaires de l’avenue McGill College*).

In addition to requiring owners to maintain land and grant access, where applicable, servitudes may also be used to ensure the integration throughout the site of the initial landscaping elements and architectural building standards. Examples of such provisions are provided in part 3.

As noted, servitudes create real rights and are charged against the land. Unlike a simple contract that only binds the immediate parties thereto, servitudes run with the land and the obligations bind all subsequent owners.

In the event that a servient landowner fails to respect the obligations provided under the terms of the servitude, the dominant landowners could take an action in court to force compliance.

### 3. **EXAMPLES OF RESIDENTIAL PROJECTS**

Several examples of residential projects in Montreal use divided co-ownership or servitudes or a combination of these tools to define the different uses of the land and ensure ongoing maintenance and upkeep. We have selected three residential projects that may serve as models for Benny Farm: Bois-Franc in Saint-Laurent, the Sentiers des Brossard on the South Shore and Angus in Rosemont.

#### 3.1 **Bois-Franc, Saint-Laurent**

Bois-Franc was initiated in 1993 by a real estate consortium led by Bombardier Real Estate Services. The project covers a vast area and has several phases. The majority of Bois-Franc has been completed. Nouveau Saint-Laurent is the next major phase which is partially completed. In the future, the existing Challenger Golf Course will become a residential project. Please see the plan and images of Bois-Franc in Schedule “A”.

As described on the website, “Bois-Franc is the ideal place to actually live within nature. The development is dotted with countless large and small parks and residential squares. Green spaces account for more than twelve percent of the total area. And upwards of 20,000 grown trees have been planted throughout Bois-Franc, including along streets. All in all an alliance with nature that helps create a truly green city.”(www.boisfranc.com)

The Bois-Franc project maximizes the combined use of servitudes and divided co-ownership to ensure integration of architectural and landscaping styles and guarantee on-going maintenance.

An example of the standard servitude clause that is included in the deeds of sale of property in Bois-Franc provides an interesting example of how detailed a servitude may be. The landscaping provision is recited below.

1. *« Il est interdit d'effectuer toute modification que ce soit, à l'aménagement paysager de la cour avant, qui va à l'encontre du concept d'aménagement paysager tel qu'approuvé par les autorités de la Ville de Saint-Laurent, y inclus :*
  - a) *de créer un mur écran entre deux propriétés voisines ou de séparer un chemin piéton ou entrée charretière commune;*
  - b) *d'ajouter des murs de soutènement ou bacs de plantations ou de modifier la forme, les matériaux ou les couleurs de ceux qui existent déjà;*
  - c) *d'enlever ou de changer la couleur d'une clôture décorative existante; d'installer une clôture décorative lorsque non prévue aux plans d'aménagement paysager;*

- d) *de paver la cour avant par quelque matériau que ce soit lorsque ne faisant pas partie d'un plan d'aménagement paysager intégré;*
- e) *de couper un arbre existant ou de planter un arbre lorsque la distance limitative ne le permet pas selon les règles de l'art;*
- f) *de cultiver un jardin potager dans la cour avant.*

*Il est interdit d'effectuer toute modification à l'aménagement paysager de la cour arrière et latérale qui va à l'encontre du concept d'aménagement paysager tel qu'approuvé par les autorités de la Ville de Saint-Laurent, y inclus :*

- a) *de délimiter des aires d'agrément extérieures autrement que par des clôtures en mailles de chaînes avec de part et d'autre, des haies arbustives en quinconce d'une hauteur maximum de (5) cinq pieds;*
- b) *d'installer des bâtiments accessoires de type cabanon autres que ceux d'un maximum d'un (1) étage qui s'apparentent à l'allure générale de l'unité d'habitation et au caractère de la cour arrière. »*

2. *« Il est obligatoire :*

- a) *de permettre en tout temps et de laisser libre, l'accès à une servitude de passage;*
- b) *de maintenir en bon état les aires qui font l'objet d'une servitude commune; ».*

A small grouping of residences on Ile de la Brunante at Bois-Franc form a condominium. The by-laws in the Declaration of Co-ownership provide that the co-owners must respect architectural standards and the landscaping plan for the project. Any modifications to the private portions, not authorized in the by-laws or servitudes, must be submitted to the Board of Directors of the Syndicate for approval.

Standards also apply to the common area. The landscaping of gardens in the front and rear courtyards must be maintained in their original state.

Parking by visitors must be on an occasional basis.

The co-owners share in the cost of maintaining the common areas (including the inner courtyard image shown in Schedule "A").



In addition to the declaration of co-ownership, the properties on Ile de la Brunante are also subject to the above-mentioned servitude.

Bois-Franc provides an example of a highly-regulated residential project. It may be more than what is desired for Benny Farm, but it illustrates how servitudes and divided co-ownership may be used to ensure a quality living environment in “perpetuity”.

### 3.2 **Les Sentiers de Brossard**

Whereas Angus and Bois-Franc are relatively recent projects and target middle to high-middle income households, the Sentiers de Brossard project was developed in the late 1970's and provides reasonably priced residential units situated in a development with a substantial area of green space, walkways and shared community facilities (tennis courts, playgrounds and swimming pool). Please see images in Schedule “B”.

Originally the semi-private areas of the project, including the pathways and community facilities, were governed under the regime of servitudes. The servitudes created rights of passage and use of these areas in favour of the residents of Sentiers de Brossard (formerly known as “Construction Neuf Chateau”). In addition, the servitudes provided that the owners of the servient land must “maintain the servient land and its additions thereto in the same good repair that it is in when first completed, reasonable wear and tear excepted”. This is a very simple servitude and, to our knowledge, there was not an operating agreement.

The property was also organized as a divided co-ownership that, similar to the Angus and Bois-Franc examples, outline relatively extensive obligations for preserving the aesthetic quality of the project and its maintenance. The following is a provision regarding landscaping work and cost sharing.

*« L'entretien ordinaire de la cour arrière sera à la charge du copropriétaire qui en a l'usage exclusif. Néanmoins, la coupe des pelouses arrières sera faite par les administrateurs et fera partie des dépenses communes, bien que la taille du gazon le long des clôtures et des fondations est la responsabilité du propriétaire d'une partie exclusive et sera faite à ses propres frais. »*

In 1985, the servitudes were terminated by the owner of the Dominant Land, presumably because the terms of the servitude were redundant in light of the Declaration of Co-ownership.

### 3.3 **Angus Residential Project, Rosemont**

The Angus site covers approximately 223 000 square metres of land in Rosemont. The development project includes residential, industrial and commercial. The developer for the residential and commercial portion of the project is Canadian

Pacific Railway (CPR). The Société de développement Angus (SDA), a non-profit para-municipal organization was created to realize the industrial portion of the site. Please see the plan and images of the Angus Project in Schedule "C" attached hereto (orange buildings are residential, green buildings are industrial).

Within the residential portion of the site, a diversity of housing types is provided: row housing, condominiums, triplexes. Large parks, small neighbourhood parks and green spaces and paths are located throughout the site. The parking is predominantly underground and is generally grouped to serve several housing units.

The parks, green spaces and land upon which will be a bicycle path were transferred to the City in accordance with a Development Agreement entered into between CPR, SDA and the City. Under the terms of the Development Agreement, the transfer of parks and green spaces to the City was done on a phased basis as the project progressed and not all at once.

The large parks were transferred to the City upon completion of the environmental remediation at no cost and without any guarantees as to the environmental quality. The City agreed to carry out the landscaping work for the large parks, at its costs, in accordance to plans agreed upon by the parties. The small parks were landscaped by CPR, at its costs, in accordance to plans and then transferred to the City. Once transferred, the City became responsible for all of the maintenance of the parks.

One major concern for the overall integration and quality of the residential portion of the Angus site was the issue of ensuring that developers and owners respect harmonious architectural building styles and landscaping elements, and that long-term upkeep of the private areas (landscaping and buildings) was ensured. CPR used both the regime of servitudes and divided co-ownership to address these concerns.

To address the initial architectural styles of the buildings and ensure a well-integrated project, architectural plans for the diverse building types were prepared. As blocks of land were sold to developers to build, the land was made subject to a servitude governing architectural styles.

Under the terms of declarations of co-ownership which govern certain parts of the project, portions of the site are divided into private, common and restricted common areas. Restricted common areas included courtyards and parking areas. Common areas included visitor parking units. The by-laws that form part of the declarations of co-ownership provide many strict rules regarding maintenance of the private and common areas and prohibit any modifications to the buildings unless approved by the board of director of the syndicate. The rules are relatively detailed and include provisions such as obligations on the part of the co-owners to maintain the landscaping elements in a good state.

### 3.4 **Cité-Jardin de Fontenaeau**

The Cité-Jardin de Fontenaeau project was developed in the early 1990s in the east end of Montreal. Similar to the Benny Farm proposal, Cité-Jardin de Fontenaeau provides affordable housing and is based upon the 19<sup>th</sup> century garden city ideal of integrating the public, private and semi-private domains. It has pedestrian, vehicular and garden networks. Please see the plan and images in Schedule “D” hereto.

Similar to the other three projects described above, servitudes and condominiums were used to provide for shared use of pathways and gardens and their maintenance.

Under the declaration of co-ownership, the budget provides a specific operating account for on-going landscaping, maintenance work and electricity bills for lighting the paths and garages.

The servitudes provide for shared rights of use and passage over part of the project and certain standards regarding architectural and aesthetic harmony of buildings and landscaping standards. There are open green spaces for the shared use of all residents. A pond and playground were constructed in this shared area.

The costs of maintaining and repairing the semi-private areas are shared among all the dominant landowners in accordance with specified fractions per owner.

## 4. **RECOMMENDATIONS**

The legal regimes described above provide an answer to issues regarding both the initial integration and quality standards of the landscaping and buildings, whether these are private, public or semi-private, and can ensure the long-term maintenance of the site. Not only may the obligations to maintain be included in either servitudes or under the terms of declarations of co-ownership, a scheme for cost sharing among owners may also be provided.

Prior to determining what legal tools should be used, we must first identify what portions of the site will be transferred to the City. It will not be necessary to include the public areas under any declaration of co-ownership or servitudes. We may enter into an agreement with the City to provide for building or landscaping standards as was done in the case of Angus.

If we proceed by way of horizontal condominiums, the first step will be to register a cadastral plan indicating the private and common lots and the Declaration of Co-ownership. A syndicate, the entity that will manage the site, is created pursuant to the Declaration of Co-ownership and all the co-owners of the site will be represented. In this manner, there is no need to create any new organization to oversee the on-going management and development of Benny Farm.

Servitudes may be used in combination with the horizontal condominium to provide for the shared use and maintenance of parking areas. If desired, architectural and landscaping standards may be provided under reciprocal servitudes.







**Bois Franc**  
Rear courtyards



**Bois Franc**  
Shared inner courtyard



**Bois Franc**  
Pedestrian/bike path and park



**Bois Franc**  
Tree lined esplanade





**Bois Franc**

Architectural styles for townhouses and landscaping details



**SCHEDULE "B"**

**LES SENTIERS DE BROSSARD**





**Les Sentiers de Brossard**



**Les Sentiers de Brossard**





**Les Sentiers de Brossard**



**Les Sentiers de Brossard**

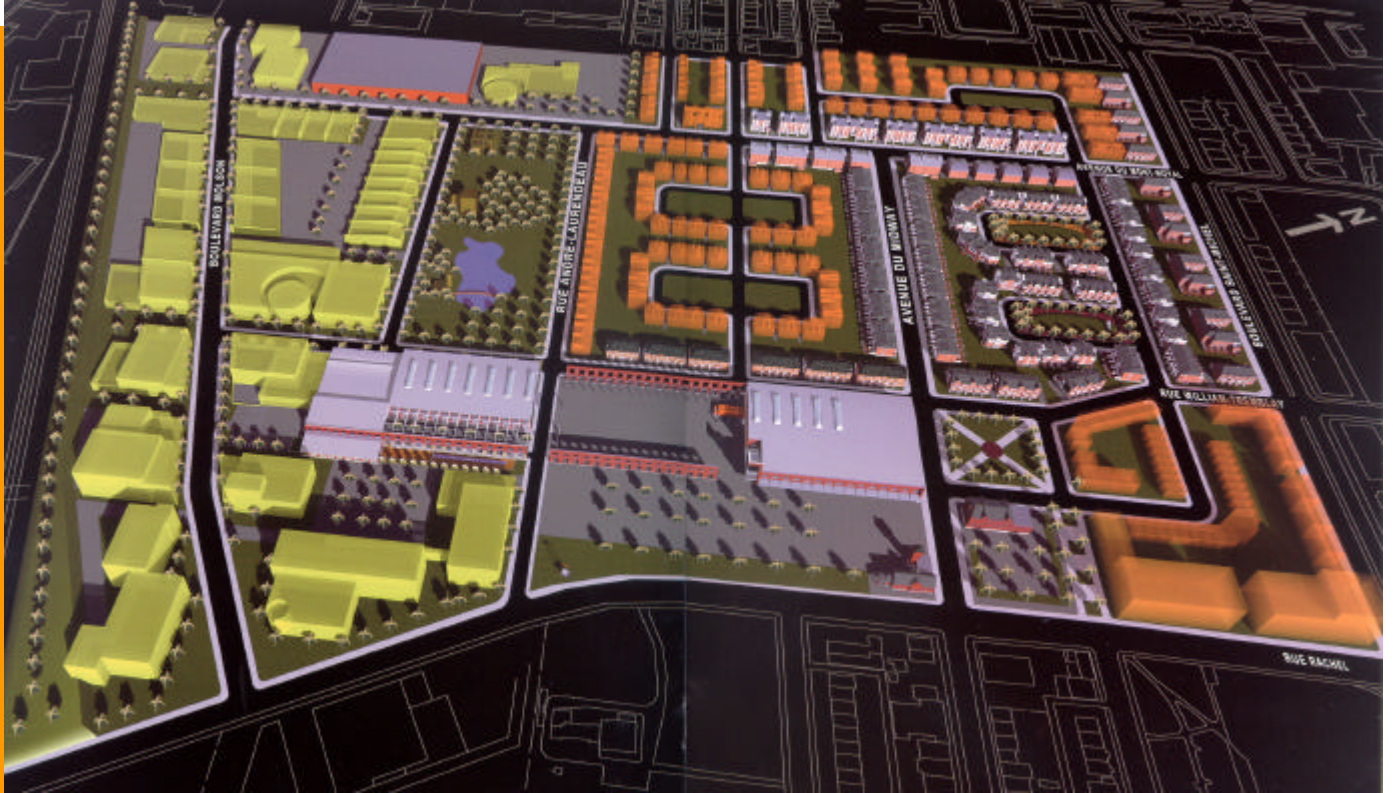


**Les Sentiers de Brossard**



**SCHEDULE "C"**

**ANGUS**



**Angus**



**Angus**  
Architecture



**Angus**  
Small park



**SCHEDULE "D"**  
**CITÉ-JARDIN DE FONTENEAU**

