WINTER 2011

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Getting, or Avoiding, Costs at the OMB

Anyone who has been to the OMB knows, that depending on the issue, it can be costly. An award of costs can help defray the expense, or increase a municipality's costs if it is liable for all or a portion of the costs of the other side.

Municipalities need to understand the rules surrounding costs to ensure they are not exposed to cost awards unnecessarily, and so that they appreciate when asking for costs is appropriate. Costs are not awarded frequently and the outcome of the case is not a factor that determines whether costs will be given. The Board's Rules provide that costs are awarded where the conduct of a party is not reasonable, is frivolous or vexatious or amounts to bad faith. The Rules set out examples of conduct that might attract a cost award.

When a municipality makes a decision that is contrary to its own land use planning staff's recommendations, it may be exposed to an award of costs at the OMB if the matter is appealed. The Board has found that acting against land use planning advice without sufficient justification is unreasonable and has awarded costs against municipalities.

We recommend that before making a decision contrary to land use planning advice that the municipality adjourn the meeting and seek a third party opinion. By doing this the municipality can argue,

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HIDDEN Demolition Dangers

Demolishing buildings holds many obvious dangers. What an Eastern Ontario municipality didn't expect was that its demolition project would result in an additional $80,000 in costs – paid as a fine to the Ministry of Labour for violating the Occupational Health and Safety Act.

In the process of demolishing some interior space in an existing building to make way for renovated offices, the municipality failed to conduct a pre-construction designated substances review to check for asbestos, lead and other regulated substances.

Ontario regulations require that every person constructing or demolishing an existing building must determine whether the project area contains asbestos or other designated substances and disclose the results of the assessment to contractors before entering into a contract with them. Because no assessment of asbestos was conducted, the contractor unknowingly removed asbestos containing material. The contractor's employees were not wearing protective equipment and the removal itself did not meet regulatory standards.

Even though the municipality advised the contractor that it had not conducted an asbestos assessment and told the contractor that it would be responsible for any tests it thought necessary before starting the work, the municipality breached the regulation. The owner is obligated to have the designated substance review conducted before the contract is entered into; simply advising the contractor that such a report is not available is not sufficient.

As a general rule, any building constructed or renovated prior to the late 1970's may contain asbestos in floor, wall and ceiling tiles, insulation, pipe wrap or within heating and cooling equipment.

There are two ways to ensure that you do not inadvertently breach the Act:

1. Conduct the designated substances review before any demolition and then include the report from the review in all contract and tender documents; or
2. incorporate the requirement to conduct a designated substance review into the contract for demolition and/or construction. Clauses dealing with removal of designated substances will be necessary to ensure qualified persons do the removal and to ensure the best price.

Whichever method works better for your timing and project, carefully drafted contracts are critical to allocate legal responsibility and to ensure that the process respects the requirements of the Occupational Health and Safety Act. ■

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Contractors are People Too

A long-standing dispute over a municipally owned piece of shoreline and dock used as public access by cottagers, contractors and commercial barge operators ended up in court to determine whether a by-law regulating use of the dock was a matter of zoning or general municipal regulation.

The dock had been used by cottagers and contractors for well over 40 years (people had been complaining about it for at least that long!)

The township passed a public docks by-law in 2003 that restricted who could use the dock and when (prohibiting commercial use on Fridays during the summer months). In 2009, council amended the by-law, lifting the Friday restriction.

A resident's association argued that the regulation of commercial activity could only be dealt with through a zoning by-law. The court disagreed, finding that the by-law involved the intensification of an existing use, and therefore no new zoning was created, it was simply regulation of a long standing legal use. The court held that public use as defined in the by-law included use by the public – contractors were people too.

The court also found that the township's general power to regulate under section 11 of the Municipal Act gave them clear authority to make regulations governing the commercial use of township water access sites, independently of its zoning powers under the Planning Act.

Interestingly, while the Court upheld the initial 2003 by-law regulating use, it quashed the 2009 amending by-law as not having been passed in good faith because council didn't follow its own earlier direction to review all aspects of the commercial use amendments, as well as refusing a request for deferral.

In our opinion, the decision properly interprets the broad powers a municipality has under section 11, but reinforces that municipalities must remain vigilant in ensuring decisions are made in an open and transparent manner, capable of being understood both at the time and after the fact. ■

Making Polluters Pay

Diesel, hydraulic oil and other contaminants are routinely spilled on municipal roads and other municipal property. When the municipality's emergency services or public works department respond to these spills, the municipality can recover its costs from the polluter.

The *Environmental Protection Act* permits a municipality to issue cost orders against a person who owns or controls contaminants that spill within municipal limits.

The costs that are recoverable can be for either preventing the adverse effects of the spill or restoring the natural environment.

In order to recover these types of costs the order must:

- identify the spill;
- describe the costs or expenses incurred;
- detail the costs and expenses; and
- direct the person to pay the costs and expenses to the municipality

If the polluter refuses to pay, the municipality can file its order with the Court and enforce that order without suing the polluter.

If a contaminant is spilled on property owned by the polluter and the municipality incurs costs to remediate, the municipality can issue an order and collect the costs by placing a priority lien on that property and recovering the costs as property taxes.

To make sure the order is valid and enforceable it must be drafted carefully, authorized by proper Council resolution and served properly. ■

Municipalities do not owe a duty to Reckless Drivers

A driver died tragically in a single vehicle accident. His family sued the Regional Municipality of York and the contractor the Region hired to resurface the road.

Despite a number of warning signs about the curvy road and speed limits of 40 km/h and 60 km/h, the driver drove through the area at a speed of 120 km. Where the road surface changed due to construction, the driver lost control, eventually coming to rest some 130 metres from where he left the road.

The Court of Appeal upheld the fundamental legal principle that municipalities in Ontario are not insurers of the safety of the travelling public and that the limit of the duty of care to maintain their roads under s.44 of the Municipal Act, is reached where a driver's behaviour is found to be reckless, rather than merely negligent. A municipality's duty is to reasonable drivers, not reckless ones.

This important decision confirms the rule that a road must only be kept in such a reasonable state of repair by the responsible municipality that users exercising ordinary care, can travel upon the road safely.

While this decision is an important ruling on municipal liability under s.44 of the Act, judicial consideration of the validity of the Minimum Maintenance Standards in the case of Silveira v Regional Municipality of York, et al. is still pending, and we will continue to follow developments and keep you informed. ■

Official Plans as Law

The Court of Appeal dealt with the use of a dock owned by Niagara-on-the-Lake by a jet boating company pursuant to a licence agreement. The licence agreement in question was the third such agreement between the parties since 1993. The Town passed a by-law authorizing the third licence agreement in early 2008. Just over a year later, the Niagara River Coalition successfully brought an application quashing the by-law because the use of the dock didn't conform to the Official Plan and was hence contrary to section 24(1) of the Planning Act, which provides that no by-law may be passed that does not conform with the Official Plan. This includes ALL by-laws, not just zoning.

The Court of Appeal reversed the lower court decision, finding that the jet boat operation was permissible as an existing non-conforming use. The Court of Appeal did not overturn the lower court ruling that all by-laws must conform with the Official Plan, only finding that the Official Plan recognized and permitted the continuation of existing non-conforming uses.

What is far more interesting in the Court of Appeal's decision is its review and commentary about the proper interpretation of an Official Plan and the role of opinion evidence from planners. The court ruled that interpreting an Official Plan was a question of law. As a question of law, opinion evidence was not properly admissible on the question of interpretation – this is the role of the judge.

Some time has passed since this decision and the OMB has not started turning away land use planners who express an opinion on Official Plan policies. In our opinion, the interpretation of an Official Plan is a policy matter that benefits from the expert opinion of land use planners. The Court of Appeal itself recognized that the OMB has discretion to accept this type of evidence.

This ruling will have more impact on appeals from OMB decisions, which are restricted to questions of law under the Ontario Municipal Board Act. Time will tell. ■

WHO'S WHO ...

Tony Fleming
Partner

Tony Fleming is a partner in the Municipal and Land Use Planning and Development Groups. The law Society of Upper Canada has recognized Tony as a Certified Specialist in Municipal Law. Tony provides advice to municipalities and private sector clients on all aspects of land use planning and development as well as environmental law.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston and practised with private law firms in Toronto. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. He has also defended large and small corporations and municipalities against Ministry of the Environment and other regulatory orders, investigations and prosecutions.

Tony may be contacted by email at tfleming@cswan.com
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David Munday
Associate

Cunningham Swan is pleased to welcome David Munday as an associate to our Municipal and Planning and Development Groups.

David joined Cunningham Swan in 2009 as an articling student and, following his Call to the Bar, returned to the Firm as an Associate lawyer in July 2010.

David assists municipalities and private clients with planning and development issues and handles real estate transactions and tax sales for our municipal clients. David also provides advice and opinions on all aspects of the Municipal Act and other legislation that impacts municipalities.

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if costs are sought at the Board, that it acted reasonably and that it proceeded on the basis of an expert land use planning opinion (assuming that the third party opinion supported the decision). In most circumstances, this should insulate the municipality against a cost award.

Where a municipality finds itself facing an appeal where the conduct of the opposing party unreasonably lengthens the hearing or otherwise seems unfair, it should not be concerned about the perception of asking for costs. Taxpayers should not have to pay for additional costs incurred because of the conduct of a single property owner. ■

Tim Wilkin
Partner

Tim Wilkin is a Partner in our Municipal and Land Use Planning and Development Groups. Tim has 30 years experience in municipal, planning, development and environmental law.

Municipalities and private clients throughout Eastern Ontario regularly consult Tim on a wide range of issues concerning municipal government, planning, development and environmental law matters. Tim also appears frequently on behalf of the firm's clients before the Ontario Municipal Board and other administrative boards and tribunals. He has also acted as a special prosecutor for several municipalities in respect of municipal election finance irregularities.

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