SPRING 2012

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Is a Public Private Partnership Illegal?

The plan to redevelop Lansdowne Park in Ottawa depends on a public private partnership between the City and a consortium of developers referred to as the Ontario Sports and Entertainment Group ("OSEG"). In exchange for obtaining a lease of the City land for 30 years at $1/year, OSEG agreed to construct improvements including a refurbished football stadium and hockey arena, converting the existing parking lot into a municipal greenspace, building 1,500 underground parking spaces and developing substantial commercial, retail and residential space.

The Friends of Lansdowne argued that the by-law was contrary to the anti-bonusing provisions of the Municipal Act and that the by-law was contrary to the city's own procurement by-law. The case centered on whether the below-market value lease conferred an obvious advantage on OSEG.

The Court disagreed that leasing land at a nominal rental as part of a public private partnership is automatically an illegal bonus. The Court stated the test as:

> The commercial arrangement must be viewed as a whole and the question asked as to whether the City has conferred an obvious advantage on the private developer (OSEG) which is not balanced by a concomitant benefit to the City. Moreover, this is primarily a question for the City Council to answer as a matter of policy and business judgment and such answer, if arrived at in good faith, is entitled to a very high degree of deference by the court.

The Court ruled it had no jurisdiction to interfere with council's determination of the reasonableness of the financial model used for the project. Viewed as a whole, the project did not involve bonusing in contravention of the Municipal Act, 2001.

The Friends of Lansdowne also argued that the sole-sourcing of the redevelopment was contrary to the City's procurement by-law and thus illegal. The Court dismissed this argument and agreed with the City that the failure by a municipality to follow its own policy set out in a by-law does not render a by-law illegal. The City was lawfully entitled, when acting in good faith, to make the decision to depart from the procedures in its procurement By-Law, notwithstanding s. 270 of the Municipal Act which requires municipalities to "adopt and maintain" policies with respect to the procurement of goods and services. ■

Councillor Loses His Seat Due to Pecuniary Interest

Is an expression of interest a conflict of interest? A former Thunder Bay municipal Councillor learned the hard way that it is.

The City of Thunder Bay owned a commercial property as a result of a tax sale. Following receipt of a report by staff in June 2008, there was some discussion by Council around putting the property out for public tender. On July 2, 2008, Councillor "T" emailed City staff and asked for a copy of the advertisement for the property when it was produced and indicated that he might be interested in bidding on the property.

On July 14, Committee of the Whole met in closed session and considered a report that recommended the property be declared surplus. Councillor "T" was not present at the July 14 meeting, but was present a week later at an open meeting of the Committee of the Whole, where a motion to adopt the recommendations of the in-camera report was passed. Councillor "T" voted on this resolution. Councillor "T" then submitted a bid on July 22, one day after the Council meeting that authorized the public sale of the property. Councillor "T" only disclosed his pecuniary interest at the next meeting of Council held July 29.

The majority of the Divisional Court found that Councillor "T" should have disclosed a pecuniary interest as soon as he considered purchasing it (July 2); not simply at the time his interest 'crystallized',

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Expropriating Environmentally Sensitive Lands

What will it cost a municipality to preserve environmentally sensitive areas? The City of Windsor expropriated 267 lots from a developer to preserve an environmentally sensitive area. The OMB ordered the City to pay the developer over $3,000,000 for the market value of the lands expropriated and approximately $770,000 for injurious affection.

The OMB ruled that the natural features on the land did not make it inherently inappropriate for residential development until the city actively took steps to protect it by changing its planning policies and designations. In addition, it ruled that development and the provision of services to the lands that remained after expropriation would be more expensive, because of the requirement of working around the protected area (the basis for injurious affection).

The OMB's decision was upheld by the Divisional Court on appeal.

The Expropriations Act mandates that the value of land cannot be decreased because of the "scheme" or the "development" for which the land was expropriated. In the example of an expropriation for industrial land use, the owner is not entitled to a windfall because the value of the land is higher as a municipal industrial park. In the Windsor case, the Board and the Court ruled that the municipality could not devalue the lands because the use of the lands was for environmental conservation.

The Court upheld the OMB finding that the lands had development potential, but for the "scheme" of the City to designate the lands for environmental protection. The decision meant that no limits on development related to natural features were considered in calculating the fair market value and the highest and best use of the lands.

The key is determining what development plans existed prior to the "scheme" to preserve the natural features. Where the prior development plans include protection of natural features, the expropriation value may consider the reduced value for the lands that were always considered worthy of protection. In the Windsor case, until the protection scheme was implemented by the municipality, all of the lands were available for development. On this basis the OMB and the Court found that it was not appropriate to reduce the value of the lands to recognize the natural features.

The PPS protections for natural features were not a significant factor in the decision as the planning regime in place did not meaningfully incorporate that type of protection into the land use designations. As such, the land was considered "available" for development and this was the highest and best use that could have been made of the lands.

The case law in this area is very fact-specific and is driven by expectations and considerations related to whether ignoring the "scheme" would create a windfall for either party. There was a dissenting decision at the Divisional Court, indicating that the area is not settled and that when considering expropriation values it is essential to understand when the "Scheme" is deemed to have been first established. ■

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which he argued did not occur until he had viewed the property on July 22 and decided to make an offer.

Once Councillor "T" sent the July 2 email to city staff requesting a copy of the advertisement for the property and indicated, "I may be interested in bidding on this property", he had a pecuniary interest. The question for all councilors is, "does the matter to be voted on have a potential to affect my pecuniary interest?" As soon as Councillor "T" saw himself as a potential buyer or decided that he 'might' make a bid he had a pecuniary interest.

To comply with the Municipal Conflict of Interest Act, Councillor "T" needed to declare his potential conflict at the first meeting after he sent the email. Because he was not present at the July 14 in-camera session, he was obligated to declare his potential pecuniary interest at the next meeting, and before the vote related to the matter of the sale.

Councillor "T" was disqualified from holding municipal office for four years. As a councillor of almost 12 years experience, Councillor "T" should have been aware of the need to avoid placing himself in a position of conflict and therefore the defence of inadvertence was not available to him.

It was a split decision with a strongly written dissent. The dissenting judge wrote that it is, "too broad to define 'indirect pecuniary interest' as including an expression of interest in submitting a bid for a property being sold through public tender and asking for a copy of a public advertisement and making an appointment to view the property, as this would exceed any principle expressed in the existing case law and open the door to speculation, uncertainty and potential abuse."

The Court of Appeal granted leave to appeal on February 21, 2012, so stay tuned for further developments.

In the interim, this case remains the law and should serve as a warning to all municipal councillors that it is better to be safe than sorry when deciding whether or not a conflict may exist. ■

When do the Minimum Maintenance Standards Apply?

A driver successfully sued a municipality for failing to take reasonable steps to avoid ice forming on a road. Liability was imposed notwithstanding the fact that the accumulation of snow was only 2 cm at the time of the accident. Section 4 of the Minimum Maintenance Standards only requires clearing the snow within 6 hours if the accumulation is greater than 5 cm.

The Court of Appeal ruled that the municipality could not rely on section 5 of the Minimum Maintenance Standards as a defence, which required the municipality to treat icy roadways as soon as practicable, and within 4 hours after becoming aware of icy conditions. It did not matter that the road became icy because of cars driving over and compacting fallen snow rather than being caused by freezing rain or ice pellets.

The municipality was liable because, "proper monitoring of weather forecasts would have enabled an appropriate operational response. A road patrol would have taken steps to ensure that the road was treated with the appropriate materials and equipment in order to make it safe. Salt applied at the beginning of the storm would have prevented the ice build-up and the formation of icy conditions."

Where a municipality knows or ought to know that a road may or will become icy (how it becomes icy is irrelevant), it cannot rely on section 5 of the Minimum Maintenance Standards as a defence. There is an obligation on municipalities to take reasonable steps to avoid ice forming on a road where it knows or ought to know that a road may become icy.

The Court expressly found that the Minimum Maintenance Standards do not establish a minimum standard to address the accumulation of less than five centimeters of snow on a class 2 highway, nor do they establish a minimum standard for the treatment of a highway before ice is formed and it becomes an icy roadway.

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Inspection Powers – Is a Backyard a Dwelling?

In our summer 2011 newsletter we reported on a case that found a backyard was a dwelling for purposes of municipal inspections. We wrote that we believed the case to be wrongly decided and cautioned municipalities that if it were upheld on appeal that inspecting outdoor spaces might require a warrant.

This was the case where a neighbour complained that standing water in a neighbour's pool posed a health hazard. The City of Guelph posted a notice advising the owner that she was in violation of the City's Standing Water By-law. Subsequently, while the owner was out of the country, an enforcement officer removed the pool cover and drained the pool, causing the vinyl liner to peel away and the surrounding earth to begin collapsing into the pool. A further City inspection revealed that earth was collapsing into the pool, which prompted the City to issue a property standards order to repair the problem. The owner appealed and the trial judge refused to admit evidence obtained by the municipal inspectors on the grounds that the evidence was obtained illegally (without a warrant to enter the backyard).

The Court of Appeal completely overturned the trial decision, holding that The Municipal Act and the Building Code Act provide a framework within which municipalities may pass by-laws permitting their officials to enter upon property for purposes of inspection, without consent and without a warrant, subject to certain qualifications.

The Court further noted that: a "room or place actually being used as a dwelling", in this context, is a building, room or physical structure that is actually being occupied and used as a residence or live-in accommodation. A "dwelling" in this sense does not include a backyard swimming pool which is an amenity exterior to the building or structure in which a person lives and is incidental to its use. This interpretation is consistent with the regulatory right of entry provisions in the Municipal Act and the Building Code Act. If this were not the case, a municipality's right of entry could easily be frustrated by uncooperative owners and occupiers who refused consent and who disguised their non-compliant activities in a manner that made it difficult for municipal officials to obtain a warrant.

This decision supports our opinion about the correct interpretation of municipal powers of entry and corrects a badly reasoned decision. The homeowner has sought leave to appeal to the Supreme Court of Canada, but in our opinion the Court of Appeal decision will not be overturned. ■

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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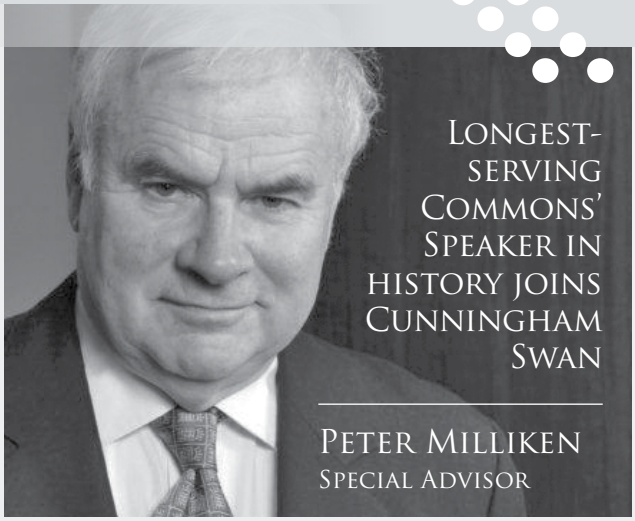
Tim Wilkin
Partner

Tim Wilkin is a Partner in our Municipal and Land Use Planning and Development Groups. Tim has over 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.

Tim may be contacted by email at twilkin@cswan.com, or call 613.546.8074 direct.



Cunningham Swan is excited to welcome Peter Milliken as Special Advisor to the Firm.

Peter practised law for many years prior to first being elected to the House of Commons in 1988. He was returned by voters at six further general elections. In 2001 MPs of all parties chose him as their Speaker, and continued to express their confidence in his judgment by re-electing him Speaker until his retirement. In October 2009 he became the longest-serving House Speaker in Canadian history.
Upon Peter's retirement, the Honourable John Baird, a leading Conservative cabinet minister, predicted that Peter Milliken would, "go down in history as, if not one of the best Speakers, the best Speaker the House of Commons has ever had."
Peter has deep roots in the Eastern Ontario area, unparalleled and extensive knowledge of the people, firms and the public institutions in the area and the problems they are facing in today's world. Few people can match Peter's understanding of political issues and his ability to facilitate positive relations with all levels of government. His extensive experience and judgment place him in a unique position to provide strategic advice and guidance on a broad range of issues that will benefit our municipal clients in the years ahead.

Peter can be reached at 613-546-8085 or pmilliken@cswan.com

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As a result, notwithstanding an obvious gap in the regulation, the court has now clearly stated that a municipality has a duty to prevent the icy condition if it could be reasonably foreseen.

Municipalities should be wary if they are simply mirroring the Minimum Maintenance Standards for winter patrolling and maintenance. This decision is a clear message that a municipality may be held liable if it could have prevented a dangerous condition by exercising reasonable diligence; even where the minimum maintenance standards are adhered to.

The municipality has sought leave to appeal this decision to the Supreme Court; whether it will be granted remains to be seen. ■