SUMMER 2012

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Supreme Court Confirms Respect for Municipal By-laws

The District of North Cowichan in British Columbia enacted a municipal tax by-law in which the tax rate for Class 1 (residential) property was set at $2.1430 per $1,000, while the tax rate for Class 4 property (major industry) was set at $43.3499 per $1,000; a tax ratio of 1:20, one of the highest in B.C.

A major paper mill operator was unhappy with the tax rate as it did not use many municipal services (it had its own sewer, water system and deep water port). The mill challenged the municipal tax by-law as being unreasonable when objective factors like actual consumption of services was considered.

The Supreme Court of Canada (SCC) concluded that the power to set aside a municipal by-law is narrow, and cannot be exercised simply because a by-law imposes a greater share of the tax burden on some ratepayers than on others.

This is clear recognition and support from the highest court for the independence and importance of the democratic function of a municipal council and for municipal decision-making autonomy generally. This is a reiteration that the power of the courts to set aside municipal by-laws is very limited. The SCC held, "courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable." The Court further clarified that the legal test

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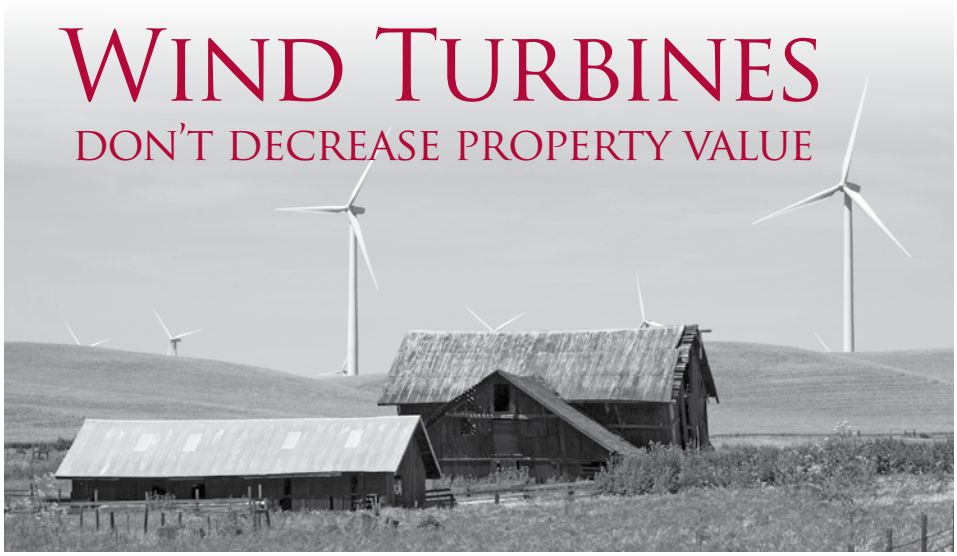
Wind Turbines don't decrease property value



Homeowners appealed the assessment of their waterfront property located on the west side of Wolfe Island on the St. Lawrence River near Kingston. They argued that their proximity to wind turbines diminished the value of the property. Evidence accepted by the Assessment Review Board (ARB) confirmed that there were over 20 wind turbines within 3 km of the property, the closest just over 1 km distant.

The owners believed that the industrial noise, lighting, impact on their view, health related concerns, nuisance and annoyance, industrial traffic and degradation of the natural environment related to wind turbines all negatively impacted the value of their property and their way of life. MPAC disagreed, arguing that the construction and operation of the wind turbines on Wolfe Island has not reduced the saleability or current values of properties on the Island.

Although the owners argued that the noise levels of the wind turbines impacted their property value, they had no evidence of the impact on value. Two real estate agents provided limited evidence but only MPAC and the municipality introduced expert evidence on property values.

The ARB found that the owners failed to present evidence which linked proximity to a wind turbine to a lower assessed value of their property. Additionally, the Board found that there was no evidence presented to justify any reduction in the assessed value of their property for reasons unrelated to wind turbines.

The evidence accepted by the Board confirmed that the sale of waterfront properties had continued since the approval, operation and construction of the wind turbines, and that Island properties had not experienced any diminution in value. Property values continued to increase over time, with no evidence of any reduction in value (related to any cause). The argument that properties within sight of the turbines were not selling (or could not sell) was not made out on the evidence.

In addition, the owners did not produce any evidence to demonstrate that noise from the wind turbines restricted their activity/lifestyle such that the operation of the turbines constituted a nuisance. The evidence from the owners through cross-examination revealed that the turbines did not restrict any daily activities and they had

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Protecting Prime Agricultural Areas in Ottawa

As part of a series of OMB hearings related to the expansion of the City of Ottawa's urban boundary, the Board dealt with the methodology the City used in deciding where the urban boundary is to be expanded (i.e which lands are in and which are out). A third phase of the hearing respecting the interpretation and application of the methodology as it relates to specific properties (i.e. which particular properties will be included) is scheduled to be heard in July.

One of the central arguments advanced was whether it was appropriate for the the City to exclud from consideration land designated as Agricultural Resource Areas ("ARA") under Ottawa's Official Plan. A number of developers argued that some of the best land for urban expansion may have been unnecessarily excluded because the criteria precluded consideration of any ARA land.

The argument centered on the premise that some lands designated ARA included land which was not prime agricultural land, while some lands designated general rural ("GR") included prime agricultural lands. Developers argued that because there was no land use differentiation between ARA and GR in the OP, nor Prime Agricultural areas and Non-Prime Agricultural areas as set out in the Provincial Policy Statement ("PPS"), all land should be considered in the initial analysis, and if agricultural land was land worth expanding into, at that point the City should perform a reasonable alternatives analysis as required by the PPS.

The Board held that the methodology and criteria adopted by the City was appropriate, given the City's stated objectives at the outset of the process. In coming to its conclusion, the Board discussed the interpretation of 'prime agricultural areas' when considering an urban boundary expansion. The Board confirmed that the PPS directs that prime agricultural lands must be protected for long-term agricultural use.

The PPS protects prime agricultural areas through a series of policies that only allow the expansion of a settlement area boundary into prime agricultural areas where:

(1) The lands do not compromise specialty crop areas;

(2) There are no reasonable alternatives which avoid prime agricultural areas; and

(3) There are no reasonable alternatives on lower priority agricultural lands in prime agricultural areas

In interpreting the PPS, the Board found that a municipality may completely exclude prime agricultural areas from the analysis of candidate areas for expansion. A municipality does not need to conduct an assessment of reasonable alternatives to agricultural lands where there is sufficient land available outside of prime agricultural areas. In this case, the "reasonable alternatives" were all lands that were not designated ARA. It is only where an expansion is proposed that must occur on prime agricultural land that a "reasonable alternatives" analysis is required. ■

Tony Fleming was counsel for several landowners at this appeal.

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for overturning a municipal by-law is high, essentially stating that a by-law will only be set aside when it can be demonstrated that no other body (i.e. a differently constituted municipal council) could have come to the same decision.

This is an important case affirming the role and authority of municipalities because it reinforces the notion that Courts must uphold by-laws passed by an elected Council, even where the by-law may appear unfair or unreasonable. The decision to pass a by-law is largely a policy decision, and the SCC clearly recognized this.

Councils must still ensure that their by-laws are made within the statutory authority granted to them and that they observe all procedural requirements imposed by the parent statute, but provided that there is legal authority for the by-law, the courts will not review to determine whether the law is reasonable or not; reasonableness is a decision left to the voters every four years. ■

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not perceived the alleged nuisance as sufficiently disruptive to consider air conditioning or any other mitigation measures.

The Board rejected the allegation of nuisance by the owners, but made an important finding about how the Board considers claims of nuisance. The Board held that all of the elements of the civil tort of nuisance need not be made out in order to establish a negative impact on property value. A property owner may be entitled to a reduction in assessed value if they can demonstrate that a nuisance exists, even where the evidence is less than that required to demonstrate an actionable nuisance that would result in compensation in a civil action.

This was the first Ontario case before the Board to assess these arguments, but is unlikely to be the last. ■

Tony Fleming was counsel for the Township at this appeal.

Brownfield Redevelopment

- Overcoming barriers and unlocking value

This four-part series will examine the barriers to brownfield redevelopment and review solutions that suit a variety of municipal needs and budgets.

Every municipality, regardless of size, has brownfields; an urban or rural property that is abandoned or underused because of real or perceived contamination. These properties do not contribute to the municipal assessment base and may hinder other redevelopment in the area due to perceived stigma.

The first step in brownfield redevelopment is to understand the barriers that create and perpetuate brownfields. Whether you are considering a brownfield program, are in the midst of developing or implementing a program or are monitoring and refining an existing program, a thorough understanding of the basics is essential to be able to tailor a program to your municipality's specific issues.

The most obvious barrier to redeveloping a brownfield is cost. Costs arise through a number of factors other than the most obvious upfront cost of cleaning up contamination. Higher financing costs and uncertainty also contribute to the total cost of remediation and redevelopment.

Any property that is contaminated may have also contaminated adjacent properties. This creates the very real potential for civil liability. This is an example of uncertainty that translates into costs, both the costs to determine whether off-site impact has occurred and the costs to address off-site impacts (physical remediation and/or settling litigation).

In addition, the Ministry of the Environment has broad powers to issue regulatory orders under the Environmental Protection Act against owners and past owners to investigate, remediate and monitor contaminated sites. These orders have the potential to add significantly to the redevelopment costs of a contaminated site. There are protections available under the Act to restrict the Ministry's ability to issue orders, but there are limitations on these protections as will be discussed in a future article.

The combination of a potential civil claim and/or a Ministry order results in an unwillingness of traditional lenders to accept contaminated land as security for a loan. Non-traditional sources of financing are considerably more expensive, assuming such a source can even be found. Without traditional financing, the number of potential developers who can redevelop a contaminated site approaches zero. Add to this the fact that in much of South East Ontario the underlying value of the land does not support an expensive cleanup and redevelopment (as compared to the GTA) and the barriers to brownfield redevelopment are such that without municipal assistance of some sort, these sites will remain idle and out of productive use.

Add to these financial barriers the challenge of remediation, planning approval requirements and market stigma and the result is a significant set of obstacles to redeveloping brownfield properties.

Uncertainty can only be addressed with site-specific information. Should a municipality conduct studies itself to alleviate uncertainty; or are financial incentives enough? What can a municipality do to reduce the financial barriers?

In the three articles to follow we will consider the tools available to municipalities to overcome barriers to brownfield redevelopment. The next edition of Legal Matters will explore Community Improvement Plans and other incentives that municipalities can use to facilitate brownfield redevelopment. The third part in the series will review Records of Site Condition and Risk Assessments. The final article in the series will look at alternatives to a traditional CIP including municipally initiated remediation and other contractual methods to achieve remediation and redevelopment. It is essential to understand the rules and the options available to a developer so that municipal incentive programs do not inadvertently create additional barriers. ■

The Drummond Commission Report and Ontario Budget 2012

In February, the Commission on the Reform of Ontario's Public Services, led by former TD Chief Economist, Don Drummond released its report (the "Drummond Report"). A number of recommendations with a (potential for) direct impact on municipalities were put forward, some of which were adopted in Ontario's 2012 budget.

The report begins by noting that municipalities raised $16.4 billion in property tax revenue in 2011 – the largest single source of revenue for the municipalities. Another major source of revenue (accounting for 20% of municipal revenue) is the Ontario Municipal Partnership Fund, which will provide $583 million in grants to 373 municipalities this year. In the 2012 Budget, the Liberal Government plans to reduce that amount to $500 million by 2016, but make up the shortfall by uploading costs to the tune of $1.77 billion by 2016.

The Drummond report recommended combining and delivering ODSP (disability) and Ontario Works at the local level. This recommendation was noticeably absent from the 2012 Budget.

The Liberal Government did accept part of the Drummond Report's recommendation to deal with the problem of uncollected Provincial Offences Act (POA) fines. The Budget contemplates making it impossible to renew a vehicle license plate if there is an unpaid POA fine related to the operation of a vehicle. In addition, the Province is proposing a mechanism whereby unpaid POA fines would be set off against tax refunds issued by the Canada Revenue Agency. Although the Drummond Report recommended more general initiatives to facilitate the collection of POA fines (one such

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WHO'S WHO ...

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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.

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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.

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example would be adding unpaid POA fines to the offender's municipal property tax bill), any discussion of more specific powers was conspicuously absent from the 2012 Budget, in our view an unfortunate exclusion.

The Drummond Report also recommended implementing full cost pricing for water and wastewater services and introducing centralized bargaining for municipalities, particularly in relation to police officers and firefighters. Neither of these recommendations was adopted in the 2012 Budget.

Only time will tell if more of the recommendations of the Drummond Report are implemented. ■

Come see us at the Ontario East Municipal Conference in September

> Tony Fleming will be discussing lake front planning issues for municipalities

> Alan Whyte will be talking about Employee turnover and how to prepare yourself today for tomorrow

Visit the OEMC website for details and to register.

David Munday

David Munday as an associate in 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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