SUMMER 2013

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Do It Yourself Brownfield Redevelopment

In this fourth and final installment in our brownfields series of articles, we consider situations where it is advantageous for a municipality to conduct its own Brownfield remediation and redevelopment.

A strategic property may be critical to "kick-start" development of a larger area; a municipality may want to develop the property for public uses; or the economics of remediation and redevelopment may be unappealing to local developers. For these and many other reasons a municipality may decide to take a more active role in a Brownfield project. The options available include a public process to select a developer to acquire, remediate and redevelop property that the municipality may own or acquire through a tax sale, a public private partnership where the municipality partners with private entities and each has a role defined in a complex contractual arrangement, or do it yourself.

As with any Brownfield project, information is essential. A municipality, like any other developer, must understand the nature and extent of contamination before taking ownership and before making a final determination on the best model for development. The Environmental Protection Act includes protections to allow municipalities to conduct investigations on non-municipal property without becoming liable for the contamination. In addition, a municipality may vest title in a tax sale property and for a period of five years enjoy protection from MOE orders (with limited exceptions).

The first decision for a municipality is whether to remediate and develop itself or have third parties involved, whether as partners or purchasers.

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It's not why you dug up the road, it's the fact that you dug up the road.

The City of Toronto collects fees for pavement degradation caused by excavation in its roads. The by-law imposes a fee per square metre of proposed excavation based on pavement type, pavement age and road type, to be paid by each person applying for a cut permit.

Enbridge, a natural gas distributor, argued the City had no authority to impose the fee without providing for specific exemptions for excavations relating to utilities generally or for Enbridge's gas transmission and distribution activities specifically.

The Court of Appeal re-affirmed that municipal by-laws are presumed to be valid and any party challenging a by-law for lack of jurisdiction must very clearly demonstrate that the by-law is beyond the municipality's powers before a court will interfere with it. Enbridge failed to establish that the challenged fee was outside the city's authority given that the Regulation under the City of Toronto Act (the provisions are mirrored in the Regulation under the Municipal Act, 2001) specifically allowed the city to recover costs for issuing permits, including those relating to excavation, despite exemptions created in other sections. The fee was not for the 'use' of the property, (as argued by Enbridge), nor did it matter why the road was dug up – the fee was imposed to recover the costs of degradation to the road caused by digging it up. This is an important ruling that gives municipalities a new tool to recover costs for acts that degrade its roads. ■

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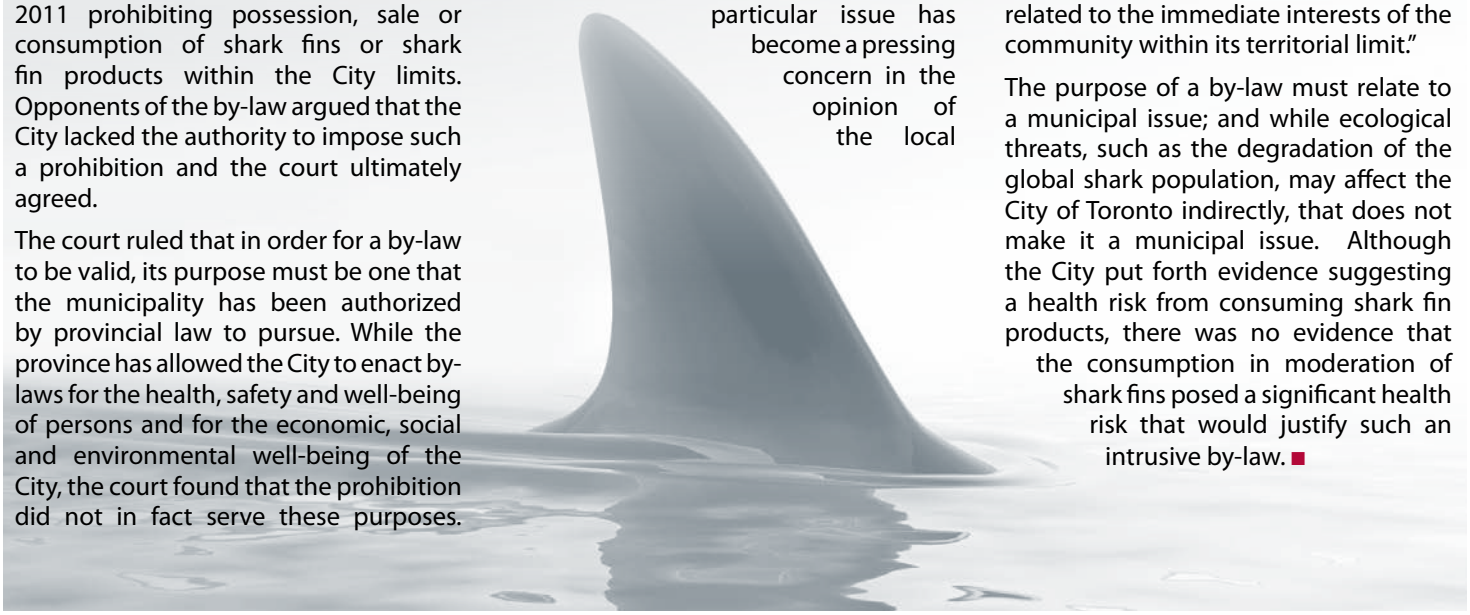
Shark fins – They can go in soup; but not in by-laws

As a response to widespread media coverage of the morally questionable practice of shark finning, the City of Toronto passed a by-law in October 2011 prohibiting possession, sale or consumption of shark fins or shark fin products within the City limits. Opponents of the by-law argued that the City lacked the authority to impose such a prohibition and the court ultimately agreed.

The court ruled that in order for a by-law to be valid, its purpose must be one that the municipality has been authorized by provincial law to pursue. While the province has allowed the City to enact by-laws for the health, safety and well-being of persons and for the economic, social and environmental well-being of the City, the court found that the prohibition did not in fact serve these purposes. Instead, it was a policy decision intended to influence matters that were external to the City itself. The court stated, "it is not enough that a particular issue has become a pressing concern in the opinion of the local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within its territorial limit."



The purpose of a by-law must relate to a municipal issue; and while ecological threats, such as the degradation of the global shark population, may affect the City of Toronto indirectly, that does not make it a municipal issue. Although the City put forth evidence suggesting a health risk from consuming shark fin products, there was no evidence that the consumption in moderation of shark fins posed a significant health risk that would justify such an intrusive by-law. ■

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Brownfield properties that are in tax arrears give municipalities the option of acquiring title through a vesting order. One model to consider involves issuing a request for proposals to select an ultimate purchaser who would be responsible for remediation and redevelopment.

The agreement of purchase and sale should permit the developer a period of time to conduct due diligence and develop a remediation plan, keeping in mind a municipality has a two year deadline to vest and transfer title after the tax sale fails. By carefully structuring the agreement, the municipality can avoid acquiring title until a point in time where there is more certainty that the developer can remediate and redevelop consistent with the municipality's goals. The agreement of purchase and sale for the tax sale property should include conditions related to remediation milestones as well as remedies if these milestones are not achieved. A very effective tool is an option to repurchase, assuming the municipality is prepared to acquire title in the event of default.

If your municipality wants to remediate and/or redevelop its own brownfield property an option to consider is incorporating a separate corporate entity under the Municipal Act to take title and manage the remediation, development and operation of the project. The Act sets out the process and preconditions to create such a Corporation. This can be an effective way to limit the liability of the municipality.

Whichever model you choose, remember that the remedial options often dictate redevelopment to a large extent. For example, if first floor residential is essential to the project, a risk assessment may not be viable and a dig and dump remediation may be necessary; how does this cost affect the project? Also, remedial options often dictate what areas of the site will be surface parking and accessory structures, as a paved surface is an excellent way to cap and contain in situ contamination. It is often more cost effective to let the remediation dictate built form, rather than the opposite. Be flexible and creative within the confines of market conditions and community needs.

The number of variables and factors to consider when conducting a Brownfield project can make the exercise daunting. The result, however can be well worth the risk and the effort. ■

If you set POLICIES why not FOLLOW THEM?

A seemingly innocuous by-law passed by the municipality of Northern Bruce Peninsula authorizing the Bruce Trail Conservancy to use an unopened road allowance was challenged by an abutting property owner. While the challenge was ultimately dismissed, it could very easily have gone the other way for the municipality, as the by-law was found to have been illegally passed, largely due to improper notice having been given.

The court found that the municipality was required to post notice on both its website and in the public notice section of the local newspaper because its internal policy on notice was unclear on the matter. While the municipality had in fact published notice of the upcoming vote in both the newspaper and on their website, neither of the notices complied with the municipality's timing and form requirements for providing notice (the notice on the website was posted one week prior to the relevant town council meeting instead of two weeks and the notice was put in the "By-laws" section instead of the "Public Notice" section of the local newspaper).

Since the municipality had drafted these requirements, it had the opportunity to clarify the ambiguous language and failed to do so. These failures rendered the by-law illegal. Despite the finding of illegality, the court did not quash the by-law as the landowner who challenged it had not shown how his rights or interests had been affected. Northern Bruce was lucky. If you have an internal policy in place it will be strictly interpreted, and if your policy is unclear, the lack of clarity is unlikely to be resolved in your favour. ■

Non-Polluters Pay Too

Furnace oil leaked out of the basement of a private property in the City of Kawartha Lakes, and seeped onto an abutting City property which was adjacent to Lake Sturgeon. The Ministry of the Environment (MOE) ordered the negligent property owner to complete remediation. When the owner's insurance funds were insufficient to cover the cleanup costs for the property owned by the city the MOE issued a no-fault remediation order against the City. The City appealed the order to the Environmental Review Tribunal ("ERT") claiming that the order was unfair and contrary to the polluter pays principle.

The ERT upheld the order. No fault orders are explicitly authorized by the Environmental Protection Act and making innocent owners responsible for remediation serves the Act's fundamental objective of protecting the environment. The ERT found that the environmental protection objective of the Act takes precedence over the "polluter pays" principle. It was not enough for the City to rely on its status as an innocent owner without addressing how the legislative objective of environmental protection would be met if the MOE order was revoked.

The City appealed to Divisional Court and then to the Court of Appeal on the basis that they should have been permitted to call evidence in relation to who was at fault for the spill. Both levels of court agreed that evidence of fault was irrelevant when the MOE had made a no-fault order. Evidence of the fault of others says nothing about how the environment would be protected if the no-fault order was revoked. The City was responsible for the clean up because the MOE said they were. At the end of the day, just because you didn't make the mess, it doesn't mean you won't be required to clean it up. ■

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.

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SAVE THE DATE

The South East Ontario Municipal Seminar is back!

Cunningham Swan will be holding two seminars this fall.

The first in Eganville on October 10
And a second in Kingston on October 17

We hope that two alternative venues will allow even more municipalities to send someone for this informative free event.

Invitations will be sent out in early September. If you want to reserve a spot please send an email to **kjames@cswan.com**

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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David Munday

David Munday is 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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