WINTER 2013

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Character, Aesthetics and Infill Development

In a decision with important planning implications the OMB recently recognized municipal authority to zone for aesthetic concerns under certain circumstances.

In 2012, Ottawa adopted a by-law which heavily regulated the facades of new builds/additions in several central, mature neighbourhoods. A number of developers appealed, arguing that the City did not have the authority to zone for these purely aesthetic purposes as the authority to regulate design matters had been repealed by the province in 1983. The developers argued that while the authority to regulate design in Official Plans and Site Plans had been reintroduced by the province in 2006, the authority to zone for design was not.

The Board found that Official Plans, zoning and site plans are meant to function harmoniously with one another and that it would be incongruous to assert that zoning could not consider the stages immediately preceding and following it. While character and design are not synonymous, zoning can be based on conceptual design as it relates to the surrounding streetscape (the "character" of the neighbourhood). In addition, municipalities have the authority to zone for design when it is necessary or incidental to regulating the use of property.

CHARACTER continued on page 3 >

A municipal conflict of interest case Rob Ford was not involved in! Hazel McCallion, the long-time mayor of Mississauga, was before the courts defending an application to remove her from office for alleged conflict of interest.

In 2008 the Mayor voted in favour of a by-law to extend the deadline for developers to qualify for lower development charges. The court found that the Mayor knew, at the time of the vote, that her son's company had a proposal before the City to construct a hotel, conference centre and condominium complex. The extension could have saved the company millions of dollars. The Mayor was deemed to have a pecuniary interest in the company under the Municipal Conflict of Interest Act ("MCIA"). The Mayor argued that because development charges were by-laws of general application, it was impossible for a council member to have an interest other than the same interest held by the public at large.

Ultimately, the action was dismissed on the basis that the company could not have qualified under the provisions of the Development Charges by-law because the company had not filed a "complete" site plan which was a pre-requisite to qualifying for the lower Development Charge. The application fee had not been paid in full and the site plan required revisions.

Notwithstanding this very technical finding, the court went on to note that the fact that electors generally have an interest in common with respect to a by-law does not preclude council members from having a financial interest that is distinct from the general interest. Failing to disclose such distinct interests is a clear violation of the MCIA.

GTA continued on next page >

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Demolition by Neglect

The owner of a heritage building applied for and was denied a demolition permit in 2005. The owner then allowed the property to fall into a state of disrepair and in 2013 advised the city that the building was in an unsafe condition and ought to be demolished.

Section 8 (2)(a) of the Building Code Act (BCA) provides that demolition orders which contravene applicable law shall not be issued, including the Ontario Heritage Act (OHA). Because the building was designated under the OHA, the CBO was obligated to consider whether or not the building could be partially or wholly remediated to preserve its heritage attributes before issuing a demolition permit. The OHA factors must be considered regardless of whether or not the permit has been applied for or is being considered for safety reasons.

The city responded to the notice from the owner that the building was unsafe by ordering the owner to provide a peer review commenting on the ability to remediate the building. Two reviews were conducted. The owner supplied the city with only one of the reviews and claimed litigation privilege over the other.

The court determined that section 18 (1) of the BCA provides building inspectors broad powers that include the power to compel production of any relevant document from any person. The city therefore had jurisdiction to compel the production of the second peer review report.

Where heritage or other issues arise outside of the expertise of your Building Department, the Act provides broad authority to order all necessary studies to enable the CBO to exercise his or her discretion properly. In addition, requiring third party reports can help to reduce liability. ■

Licence to Strip

The City of Brantford passed a by-law imposing licensing requirements on adult entertainment establishments. A "Gentlemen's Club" appealed the licensing by-law, arguing that the provisions exceeded the City's statutory authority under the Municipal Act ("the Act"). The Court of Appeal disagreed, finding that the combined operation of sections 8(3) and 10(2) of the Act allowed municipalities to pass by-laws creating a system of licenses with respect to any activity, matter or thing under 10(2).

The court found that the municipality had the authority to pass licensing requirements for adult entertainment parlours under: s.10(2)(6) matters relating to health, safety and the well-being of persons in the municipality; s.10(2)(8) matters relating to the protection of persons and property, including consumer protection; and, 10(2)(11) business licensing.

The Court expressly noted that municipalities have specific statutory authority under the businesses licensing provisions (sections 150 -154) to impose restrictions on adult entertainment establishments. The court held that the Act does not require municipal licensing systems to apply to a specific type, category or class of business, trade or occupation. So long as the by-law relates to a general business or in a general sense to a trade or occupation that is commercial in nature then it is a valid exercise of statutory authority. The Court also upheld provisions requiring licenses for individual performers. Provided the license extended only to those persons performing nude in the course of a commercial activity it was within the jurisdiction of the municipality. ■

< GTA continued from page 1

The court found that the Mayor's belief that a direct and distinct interest need not be disclosed when a general interest also exists was contrary to common sense and had the company stood to gain from the by-law the defence of error in judgment would not have been available to her. Further, since the Mayor had knowledge of her indirect financial interest in the company, her failure to inquire into whether or not the corporation would be affected by a proposed by-law amounted to willful blindness and therefore the defense of inadvertence would also not have been available.

Mayor McCallion remains the Mayor only because of very specific facts that allowed the Court to find that no actual pecuniary interest existed due to the incomplete site plan application.

In addition to the Court case, there was a formal public inquiry into this matter by Justice Cunningham. A summary of the findings of the inquiry are available on our website:

www.cswan.com ■

< CHARACTER continued from page 1

The Board examined each section of the by-law individually and upheld zoning performance standards relating to average front-yard set-backs, balconies, parking (orientation of spaces and location), and hard surface and landscaping requirements.

The Board sent back for reconsideration the provisions relating to ground floor glazing, car-ports, garage setbacks and door orientation because the current wording did not indicate whether these restrictions were predicated on existing streetscape patterns (if they were, then they would qualify as character-related zoning).

The message from this case is that municipalities are entitled to implement performance standards relating to aspects of character, so long as they arise from considerations of the surrounding streetscape and where the standards necessarily result from regulating the use of property.

You may want to hold off amending your zoning by-law just yet, as this decision is currently under appeal. ■

Municipalities are Bound by their Official Plans

A Guelph developer appealed council's refusal to amend the OP and ZBL to permit the construction of a high-rise student residence for over 1100 people. The city rejected the proposed amendments despite the fact the property was located within one of the city's designated intensification corridors, citing concerns over the size and shape of the building as justification.

The OMB disagreed and concluded that a student housing facility was needed in the city and the proposed property was an appropriate location with respect to the PPS and the Places to Grow Act. There was no apparent threat of overcrowding, services were available, and the proposal generally conformed to the OP. Further, without such a purpose built facility students would continue to resort to converted houses in less planned and supervised circumstances.

The Board found that the reason for the creation of "intensification corridors" was to identify alternative venues to accommodate major redevelopment such as the proposed residential facility. As well, because the OP did not place residential density limits on intensification corridors, the Board declined to do so.

The Board granted the OP amendment but agreed with the city that, as per the OP, the student residence must be consistent with the character of surrounding buildings. The Board thus placed zoning restrictions on the average number of stories, street set-backs, and angular view planes in accordance with surrounding development. The Board also determined that the designs submitted by the developer would create the appearance of a continuous wall from the street. The Board found that this effect would be inconsistent with neighbourhood character and unprecedented in Guelph. Therefore, the Board required the building design be broken up into a number of towers connected by a low-rise podium.

The moral here is the familiar story that if you're the one writing the rules, you can't ignore them. ■

Councillors Paying for By-laws

The Court of Appeal found that Toronto City Councillors were not personally liable to reimburse the city for payments made under a by-law that had been declared invalid. The by-law authorized the city to reimburse specific city councillors for expenses they incurred in response to election campaign compliance audits. On two occasions, the City Solicitor had cautioned council of the by-law's illegality, yet a majority of council voted to adopt it nonetheless.

Municipal councillors do owe a fiduciary duty to tax payers and this duty includes the duty to avoid conflicts of duties and interests as well as the duty not to profit at the expense of the taxpayer. However, this fiduciary duty is only breached when there is clear evidence of bad faith that demonstrates malice or improper motive. Section 391(1) of the City of Toronto Act (and section 448 of the Municipal Act) specifically states that proceedings may not be commenced against councillors for any act done in good faith in the performance of their duties. Since votes cast by municipal councillors are presumed to have been made in good faith and for a proper motive, the party asserting otherwise must prove evidence of bad faith.

In this case the court found no evidence of bad faith. The vote was specific in nature to the reimbursement of two councillors and not the whole of council; it was mere speculation that councillors had voted for the by-law in the hopes that they would receive similar treatment. Neither the repeated failure by councillors to follow legal advice nor the trial judge's rejection of the city's assertions of good faith amounted to evidence of bad faith.

The lesson here is that the threshold for finding councillors personally financially liable for decisions made in the exercise of their office is extraordinarily high, due in no small part to the chilling effect such findings could have on the willingness of the public to serve. ■

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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Thank you for Attending

The South East Ontario Municipal Seminar on October 10th and 17th

If you wish copies of the presentations or have ideas for next year's seminar please contact us at:

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Tim Wilkin
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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 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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