SPRING 2014

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

A TALE OF TWO CITIES

The Township of Stone Mills and the City of Kingston both recently passed by-laws changing their electoral ward structures and each by-law was appealed to the OMB. In both cases, the respective by-laws passed by just one vote.

Electoral ward boundaries must create effective representation. This is primarily established through parity in voting power—one vote for one person. However, deviations from parity may be justified to recognize communities with distinct interests. Such a "community of interest" may arise on the basis of distinguishing features in physical geography, community history, community interests and minority representation.

In Stone Mills, council passed a by-law dissolving its three electoral ward boundaries in favour of elections-at-large as the former ward structure created a dramatic disparity in voting power that left some districts with a vote effectively worth 2.5 times that of a vote in others. The by-law was appealed on two bases: a flawed process, and disregard for geographically-distinct concerns. While councillors were not provided with copious research leading up to the vote, the Board found no significant flaw in the quantity or quality of the available information and the question of elections at large had been a topic of discussion before a number of previous councils. The Board also was not persuaded that the different geographic areas within the Township represented unique communities of interest, nor was there a risk that a community would lose its representation in an at-large system. The key areas for council attention like roads and services were already organized on a Township-wide basis and therefore there was little opportunity for localized favouritism to override broader public interests. The by-law was upheld.

In Kingston, council passed a by-law reconfiguring its twelve electoral districts. The primary issue on appeal was that the by-law did not provide effective representation because it excluded the post-secondary student population (in excess of 25,000 people) when it apportioned population among the re-divided electoral wards. The argument for excluding postsecondary students included: neither census nor MPAC data provide accurate numbers on student residence; and, because the voter turnout of students is chronically low, including them in the count would significantly dilute the vote for residents in wards without a high student contingent.

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NOT YOUR BUILDING?

NOT THE MUNICIPALITY'S RESPONSIBILITY.

A municipality is not an insurer against any form of mishap that can occur within its boundaries. A municipality is obliged to keep public property in a reasonable state so that the public may safely use and travel upon it, but the standard is not one of absolute perfection, nor does that obligation extend to private property located within a municipality.

The recent decision of Hull v. The Corporation of the Town of Greater Napanee serves as an important reminder that the "non-insurer" principle pervades all areas of municipal law.

Mr. Hull is the owner of one half of a 140 year old plus commercial/residential building. The other half of the building is owned by an estate. Mr. Hull had generally maintained his side of the building, while his former neighbour allowed the other half to deteriorate. Neither the estate nor any secured creditors wished to rehabilitate the other half of the building.

The two neighbouring property owners had no arrangement in place for ongoing maintenance of the building and, despite major signs of

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deterioration, neither had shown an inclination to tackle the problem.

When a rear wall on the estate's side collapsed, Orders under the Building Code Act prohibiting use and occupancy of both properties were issued.

Mr. Hull appealed the Orders, arguing that his side of the building was safe for occupancy and that the Municipality should be required to restore and rehabilitate the other side to permit safe occupancy and use of his side of the property.

The Municipal Council took the position that it was not a prudent use of taxpayer dollars to repair a privately owned structure for the benefit of a single individual.

Justice Rutherford accepted the Municipality's position, stating:

> I appreciate that Napanee does have statutory authority to enter and make repairs to unsafe properties within its boundaries, and to lien and recover the costs of doing so against the property and its owners. ….However, Napanee's political discretion as to the possible use of its various powers is not a matter for intervention by this Court in these proceedings.

While individuals often look to municipalities with a misperception of "deep pockets" to redress all harms and misfortunes that may befall them, this case is an important reminder that municipalities are not insurers against unfortunate circumstances simply because they occur within their boundaries. Individuals are responsible for their actions (or lack of action) and bear the financial consequences that may arise.

The municipality's guiding principle must be protecting public health and safety, even when that goal may be perceived as having a disproportionate impact on a private property owner.

James McDonald is an associate with Cunningham Swan who argued this case before the Superior Court on behalf of the Town of Greater Napanee. ■

BLOCKING A PRIVATE DITCH IS A PUBLIC NUISANCE

A land owner purchased a property in 1994, which since 1969 contained a drainage ditch that served several properties abutting a public road.

In 2010 the County took steps to engage landowners in the area to address drainage and the ditch in particular to resolve complaints. All of the landowners except for one executed a drainage easement to allow the County to clean the ditch to improve the natural flow. The work was completed on all properties up to the property line of the owner that refused to sign the agreement. On the same day that the work was complete the disagreeable owner blocked the ditch by building an earth berm, resulting in significant flooding of neighbouring lands and threatening the stability of the public road.

All parties agreed that the drainage ditch was a private and not a public ditch.

At trial the court confirmed that, "It is not enough to ask: is the individual using his property in what would be a reasonable manner if he had no neighbour? The question is; is he using it reasonably, having regard to the fact that he has a neighbour?"

An injunction was granted preventing the landowner from blocking the ditch and allowing the County to carry out their work to improve and preserve the natural flow of water in the private ditch.

The Court held that blocking the drainage ditch on his property, and the consequent flooding of adjoining properties amounted to a public nuisance. The Court noted the importance of private property rights, but confirmed that those rights have to be balanced against the property rights of other parties and the public interest. ■

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While the decisions of municipal council are entitled to deference, the Board found that Council had acted unreasonably in opting for a system which did not factor in the student population, and ordered that Ward boundaries be established using population numbers that included postsecondary students. The Board emphasized that effective representation entitles each citizen to be represented in government and therefore the large student population numbers could not be ignored. The Board ordered an alternative electoral boundary configuration based on the evidence adduced at the hearing.

Effective representation is primarily "one-person, one-vote". A municipality can only deviate from this fundamental principle where doing so is necessary to protect a community of interest or other group that would be effectively deprived of representation unless the Ward boundaries are drawn to recognize the otherwise disadvantaged group. Research is critical to develop the most effective system, and you can expect the Board to be critical of efforts that ignore the basic principles of effective representation.

Tony Fleming was counsel for both municipalities in these cases.

Municipal conflict of interest issues: still "Front & Centre"

The Town of Aurora sought to appoint two of its councillors to sit on the board of directors of the Church Street School Cultural Centre ("CSSCC"). A significant portion of the CSSCC funding came from the Town, and council wanted to facilitate communication and ensure its resources were being applied properly. Concerned about potential conflicts, the Town brought an application, naming the Provincial Crown as the responding party (who declined to appear) in order to have the Court make a determination of the following question: Where a non-share capital corporation has a pecuniary interest in a matter being considered by council, is a councillor who sits as a council-appointed director of that corporation deemed to have an indirect pecuniary interest under section 2 of the *Municipal Conflict of Interest Act (MCIA)*?

The Court held that placing two councillors on the Centre's board does not violate the *MCIA*, and that even if an indirect pecuniary interest might arise, exempting provisions in the Act would save that councillor from any violation. The Court found that the statutory language only deems a pecuniary interest where the corporation is one which can offer securities (i.e. shares). By definition, this would not be a non-share capital corporation.

Moreover, the court held that subsections 4(h) & (k) of the *MCIA* would exempt a councillor from any duty

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Wrong doesn't always mean negligent

The plaintiff, Mr. Upchurch wanted to build a new deck on the front of his house in the City of Oshawa. At the City offices, he was advised that no building permit was needed if the deck was less than 24" above grade; consequently, he did not obtain a permit. A complaint was later made and a City building inspector visited the property to inspect. Ultimately the plaintiff was told he required a permit. He still did not apply for a permit and a No Permit Order was affixed to the front door. The plaintiff appealed the Order and lost, then appealed to the Superior Court and lost, and then appealed to the Divisional Court where he succeeded and was awarded costs.

The plaintiff subsequently launched an action against the City officials alleging negligence, essentially for failing to provide correct information regarding the necessity of obtaining a building permit. He argued that they breached their duty to him to (1) provide the correct information regarding the requirement to obtain a permit and (2) not prosecute him for relying on this advice. The issue of whether a permit was required was concluded at the Divisional Court and therefore was not considered in this decision.

The Court found that the City officials had not been negligent. The Court affirmed that the City and its staff do owe a duty of care to a member of the inquiring public to provide accurate information. The City acted properly in issuing the No Permit Order and in issuing the provincial offence notice charges made pursuant to the *Building Code Act* for failure to obtain a permit and failure to comply with orders. The standard of care for City officials is to administer the *Building Code* and the City policy for the *Building Code* in a fair and impartial manner. It is an objective test, and a reasonable person would expect the officials to act as they did.

The takeaway from this case is that simply because you were wrong, does not mean that you were negligent. So long as statutory duties are exercised in good faith and according to objective principles, it will be difficult for anyone to successfully allege negligence in the discharge of those duties. ■

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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to abstain from participation in a matter relating to the subject of the conflict. In those sections, the Act specifically contemplates the appointment of a council member to fulfil a public duty even though an indirect conflict might arise when there was otherwise no actual or personal interest at issue, and provides an exemption where any indirect pecuniary interest would be so remote or insignificant that it could not reasonably be regarded as likely to influence the councillor. The judge in this case further noted that Council's objectives here were purely a demonstration of "the hallmarks of good governance". Given the prevalence and attention of recent *MCIA* matters involving high profile mayors of large municipalities, applications to determine such questions in advance may become the rule, rather than the exception. ■

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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