SUMMER 2015

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

BILL 73

PLANNING ACT AMENDMENTS

The Province is proposing changes to the Planning Act. Bill 73, the "Smart Growth for our Communities Act" is currently being debated. The bill has been given second reading and the time for submitting comments expired June 3.

Highlights of the bill include:

- A moratorium on amendments to Official Plans and zoning by-laws within 2 years of passing a new OP or comprehensive zoning by-law. A similar moratorium is proposed for minor variance applications within 2 years of passing a site specific zoning amendment (without council approval). The intent is to prevent repetitious applications, but the effect may be to hinder legitimate applications and the ability of a municipality to make administrative corrections or respond to changing circumstances. In our view, this is an unnecessary change that has the potential to seriously hinder municipal council's ability to react to development opportunities and to compete for new industry.

  To take a simple example, where an owner obtains a re-zoning to allow a new commercial use, and then realizes that a variance is necessary to best develop the property (or the expected tenant can't continue and a new tenant is found, which requires a change in the development) the Committee of Adjustment cannot deal with the application and it must go to full Council.

- Alternative dispute resolution before scheduling an OMB appeal. Municipalities can now ask for alternative dispute resolution after an appeal is filed, and delay preparing the Board record for 90 days. This change has the potential to reduce the burden on staff and also allow for a resolution before the appeal is placed in the Board system.

- Public consultation enhancement. Municipalities would be able to add policies to their OP's to include formal open houses or other alternate forms of public consultation/notification for plans of subdivision and consents. This is a positive step that will enhance decision making and is something many municipalities already do.

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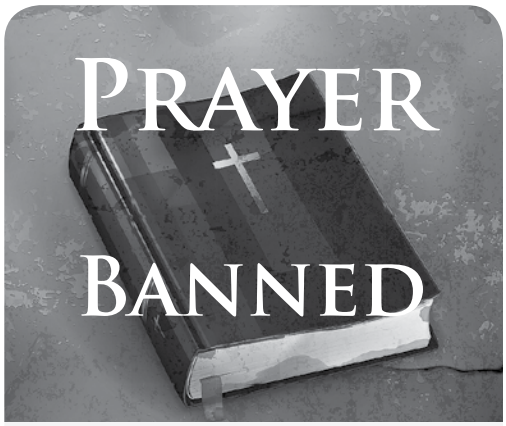

The Supreme Court of Canada upheld a decision of the Quebec Human Rights Tribunal banning prayer at the start of municipal council meetings. The complainant was also awarded $30,000 in damages and the municipality had to remove religious objects (crucifix and sacred heart statue) from the council chambers.

Council gave a 2 minute break between the prayer and the beginning of the meeting to allow those who did not wish to be part of the prayer time to enter the council chambers after the prayer concluded. The Court determined that rather than making the use of prayer acceptable, this exacerbated the discrimination as those who were offended by the practice were then also isolated from those engaging in the prayer.

Municipal governments must be completely neutral and must not favour any religion over another, or hinder any particular belief – and this includes the right not to believe in religion. The municipal government must create a process and a public space that is neutral and free from coercion, pressure and judgment on matters of spirituality. This includes spirituality that is based on historical practices and heritage as well. ■

CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP
SMITH ROBINSON BUILDING · SUITE 300 - 27 PRINCESS ST. · KINGSTON, ON K7L 1A3
TEL: 613.544.0211 · WEBSITE: WWW.CSWAN.COM

Cunningham Swan LAWYERS

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- Specific direction for the OMB to have regard for the material that was before council when it fails to make a decision (subdivision and re-zoning). This will allow the Board to consider more directly comments from the public that were before council, as well as the material (or absence of material) from the applicant. In practical terms, the Board must still conduct a full hearing and its decision will be based on all of the evidence presented at that hearing, whether or not it was material that was also available to council. This proposed change is unlikely to have any meaningful impact on appeals.
- The amendments suggest that the province can impose new criteria for minor variances. There are no criteria listed in the Bill (they would be introduced by regulation). Until we see what potential criteria would look like it is not possible to comment on the impact of this proposed change. This has the potential to be very significant depending on what criteria are imposed.
- Mandatory planning advisory committees would be required for upper tier and single tier municipalities, with at least one member from the community included on the committee.
- The Minister could impose mandatory development permit systems on municipalities. In addition, an upper tier municipality could require a lower tier municipality to develop and adopt a development permit system. No criteria or rationale for when or why such a decision would be made have been provided. While the development permit system has many benefits, in our opinion it is not appropriate for the Province or an upper tier municipality to unilaterally decide that a municipality will be forced to use such a system.
- Decisions may be required to include explicit statements as to how written and oral statements submitted affected the decision. We question how detailed this obligation will be and what impact, if any, the explanation will have on appeals?

We will monitor the progress of this Bill and keep you updated. ■

Illegal Wind Turbine By-laws

Suncor Energy v Plympton-Wyoming is another example of illegal by-laws passed by Councils frustrated by the inability to regulate renewable energy and the impacts these projects have on communities.

In this case, the Town passed a number of by-laws imposing minimum setbacks and noise emissions standards that far exceeded typical provincial requirements and in effect prohibited the development of commercial wind turbines anywhere in the Town. The by-laws also required owners to indemnify the municipality for any loss of property value or adverse health effect from the construction of turbines, as well as imposed $200,000 in security for future removal costs per turbine and additional wind turbine permit fees.

Despite the high degree of deference given to municipal by-laws, the Court held the by-laws were invalid.

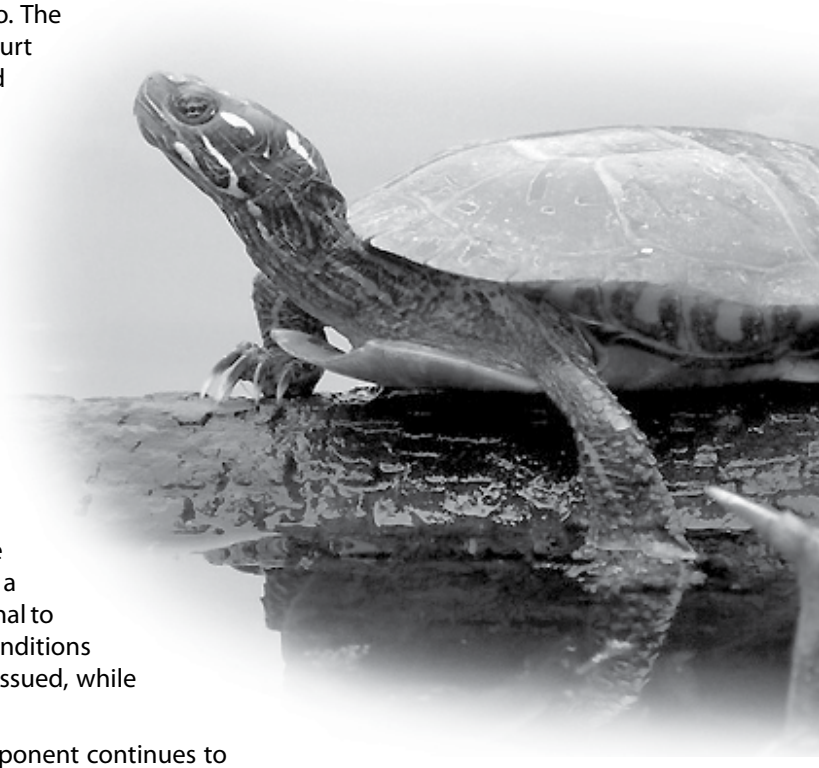
Among other reasons, the court found that none of the proposed wind farm sites could comply with the setback and sound limits prescribed. Therefore, there would be a direct conflict with any future Renewable Energy Approvals (REA) issued by the MOE for sites within the Town. Since the *Municipal Act* renders any by-law unenforceable to the extent that it conflicts with approvals issued under the authority of Provincial legislation, the Court declared that the by-laws would be unenforceable should an REA be issued.

Although a municipality has parallel jurisdiction to regulate wind turbines for nuisance, noise, health and safety reasons, nothing in the *Municipal Act* empowered the municipality to include indemnification provisions in its by-laws. There was also no authority under the *Building Code Act* for municipalities to require security deposits and unjustifiably high permitting fees.

Like them or not, municipalities cannot indirectly block what they cannot directly prohibit. With the introduction of Criteria Rated points and municipal consent resolutions, there are however opportunities to enter community benefit agreements with renewable energy companies and at least obtain some financial and other benefits from these projects. ■

Turtles Slow Down Wind Project

The Environmental Review Tribunal quashed a Renewable Energy Approval issued by the MOE for a large wind energy project involving an area of land inhabited by Blanding's turtle in Prince Edward County along Lake Ontario. The Director of the MOE appealed and was successful in Divisional Court in having the permit reinstated. The opponents further appealed to the Court of Appeal and as part of that proceeding obtained a stay of the permit pending the hearing of the appeal.



The Ontario Court of Appeal has now determined that despite a lack of evidence on numbers of turtles or the expected traffic from the project that the Tribunal was justified in finding that irreparable harm might be caused. Because the Tribunal has expertise in environmental matters its findings of fact were entitled to deference by the court. The Court of Appeal did not however accept the decision of the Tribunal that the permit should be quashed and they ordered that the issue of the proper remedy be sent back to the Tribunal for further consideration.

The Tribunal stated in its decision that it was not in a position to alter the decision of the Director to issue the permit and therefore it quashed the permit. The Tribunal clearly has jurisdiction to vary a decision of the Director and therefore the Court ordered the Tribunal to revisit the matter and render a decision on whether there were conditions that could be imposed on the permit that would allow it to be issued, while still protecting the endangered species.

The case has not yet been decided by the Tribunal, and the proponent continues to wait to see if its project will move ahead. Apparently slow is better for turtles. ■

Statements in Council Cross the Line

Generally, debate by councillors during council sessions are protected by a legal doctrine known as qualified privilege – the right to make statements in this political forum without having those statements considered defamatory and therefore subject to legal action.

A number of eastern Ontario councillors found out that "qualified" means that there are limits on how far this protection will go. The Councillors were sued in defamation for statements they made about the County Warden in a council session open to the public (and the press). The Warden sued on the basis that the statements amounted to an attack on her reputation that was made maliciously.

The councillors brought an application asking the court to find that they were entitled to the defence of absolute privilege. Absolute privilege protects all statements made in a government session (public meeting) from defamation actions. The Court of Appeal ruled that provincial and federal politicians enjoy the protection of absolute privilege, but not municipal politicians. In municipal politics, councillors can be held liable in defamation claims where the target of the defamation proves that the statements were made with malicious intent or with the intent to harm. It is the intent behind the statement that "qualifies" the privilege that otherwise protects statements made on the council floor.

There has not been a decision on the merits of the claim, but the defence has been seriously curtailed with this ruling. The councillors were also ordered to pay $17,500 in costs for the lost appeal. ■

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
or call 613.546.8096 direct.

SAVE THE DATE

The South East Ontario Municipal Seminar is back!

October 21, 2015 - Eganville

October 22, 2015 - Kingston

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 space, please send an email to **kjames@cswan.com**.

Similarly, if you have any preferred topics for discussion, please send an email to **kjames@cswan.com** with the subject line "seminar topics"

Dave Adams
Partner

Since 1989 David has appeared as lead counsel in hundreds of criminal trials both for the defence and as an assistant Crown attorney. David earned his MBA, which has been valuable as he transitioned into a practice focused on commercial and civil litigation. Dave is counsel to several leading companies across a broad spectrum of matters including contract disputes, construction liens, shareholder remedies and the defence of regulatory and compliance charges. He is also trial counsel in negligence and tort law actions.

Dave may be contacted by email at dadams@cswan.com, or call 613.546.8075

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.

To contact David, please email dmunday@cswan.com, or call 613.546.8091.

Cunningham, Swan, Carty, Little & Bonham LLP
Smith Robinson Building · Suite 300 - 27 Princess St. · Kingston, ON K7L 1A3
Tel: 613.544.0211 · Website: www.cswan.com

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