WINTER 2016

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

CONSERVATION AUTHORITY EXCEEDS ITS JURISDICTION

A recent Divisional Court decision clarifies the jurisdiction of conservation authorities related to development that may affect flooding. The Gilmors purchased a plot of land in Amaranth Township with a garden shed, a shed and a driveway on it. They wished to build a home on the land, but the property the Gilmors purchased was within a floodplain regulated by the Nottawaska Valley Conservation Authority (NVCA).

The NVCA has authority to "grant permission" for development, if in their opinion, the conservation of land or the control of flooding would not be affected. When the Gilmors applied for permission from the NVCA to develop on the lot, they were denied. The Gilmors ultimately appealed this decision to the Divisional Court.

The Divisional Court found that neither the *Conservation Authorities Act* nor the NVCA Regulation prohibit development generally. The NVCA Regulation contained a fairly standard provision that no person may develop certain lands without a permit. The NVCA could grant a permit if, "in its opinion, the control of flooding ... will not be affected by the development". Therefore, only development that affected the control of flooding could be prohibited, regulated or subject to a permit.

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BILL 73 – PLANNING ACT AMENDMENTS PASSED

We reported on the proposed changes to the *Planning Act* contained in Bill 73, the "Smart Growth for our Communities Act", in the Summer 2015 Edition of Legal Matters. The Bill has now been passed and a few amendments are in full force and effect, with most awaiting Proclamation.

Highlights of the amendments that will be proclaimed include:

- Section 2 of the *Planning Act* now includes an additional matter of provincial interest for decision makers to consider: the promotion of built form that is "well designed, encourages a sense of place, and provides for public spaces that are of high quality, safe, accessible, attractive and vibrant". It will be interesting to see how "high quality, attractive and vibrant" especially are interpreted; both by municipalities and the Board.
- There is 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 imposed for minor variance applications within 2 years of passing a site specific zoning amendment. The intent is to prevent changes to newly approved policy, but the effect may be to hinder legitimate applications and the ability of a municipality or land owner to make administrative corrections or respond to changing circumstances.

Council may waive this moratorium, but it requires a separate decision of council (which may be site specific, specific to a class of applications or of general application). In our opinion, it would have been preferable to give municipalities the authority to prohibit amendments when enacting approvals, rather than enacting a blanket prohibition and requiring a waiver.

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The NVCA relied on an internal policy which spoke to safety risks associated with developing in a floodplain to justify prohibiting development. The legislation does not allow a conservation authority to expand its jurisdiction to prohibit development simply by adding considerations of public safety into an internal policy. Refusing development was beyond their jurisdiction because there was no effect on flooding associated with the development. The proposed development was to locate the house itself outside the floodplain and the only development within the floodplain was the access driveway, which NVCA argued posed a risk because the driveway would be flooded. The Court found that there was no actual risk associated with the driveway in the circumstances and flood control was not impacted by the development. The NVCA could consider safety as that is a legitimate factor in flood risks, but they could not create jurisdiction to refuse development where the actual control of flooding was not affected by the development.

The court left open the possibility that cumulative impacts might be valid criteria to consider, but on the specific facts of the case there was no reasonable prospect of cumulative impacts occurring.

The court awarded costs to the Gilmors on "the high end" for a case of this nature and complexity, for a total of $33,175.71.

There is no question that conservation authorities perform an invaluable role in protecting the natural environment. This case highlights the growing opposition to regulation of private property, and those opposed to such regulation will attempt to use this decision to argue that conservation authorities' have little or no jurisdiction. It is important to understand the limits of this case and support conservation authorities role in environmental protection, development and land use planning. ■

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- After receiving a notice of appeal from a non-decision, an approval authority may now issue a notice that contains certain information (prescribed by regulations that have not been drafted as yet). The notice must be provided to all persons or public bodies that made a written request to be notified of the approval authority's decision. Twenty days after this notice is provided, no other person or public body will be entitled to appeal the non-decision. This will not prevent other persons from seeking party status at the appeal.
- An approval authority will now be restricted from approving any part of a lower-tier's adopted official plan that does not, in the approval authority's opinion, conform with the upper-tier official plan. This includes conformity with any new upper-tier official plan or conformity with an amendment made to the upper-tier official plan that was adopted no more than 180 days after the lower-tier municipality adopted its plan.
- Municipalities can now ask for alternative dispute resolution after certain appeals are 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.
- Every official plan must now contain a description of the measures and procedures for informing and obtaining the views of the public in respect of proposed official plans (and amendments), zoning by-laws (and amendments), plans of subdivision and consents to sever. Adding procedures for informing the public regarding other types of *Planning Act* approvals will remain discretionary.
- When issuing decisions on official plan amendments, zoning by-law amendments, minor variances, consents, and plans of subdivision municipalities will now be obliged to explain the effect of written and oral submissions received with respect to their decision on the application. We question how detailed this obligation must be and what impact, if any, the explanation will have on appeals?
- The OMB will now have regard for the material that was before council when it failed 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 change is unlikely to have any meaningful impact on appeals.
- The four part test for a minor variance will remain unchanged. However, the amendments introduce additional criteria to be prescribed by regulation (no draft has been prepared as of yet) and authorize individual municipalities to establish their own criteria by by-law.

The effect of these changes will be to ultimately allow each municipality in Ontario to create its own additional minor variance test. The extent and impact of this change will be determined in large part on the content of the provincial regulation that provides prescribed criteria to which a minor variance must conform.

- Mandatory planning advisory committees will now be required for upper tier and single tier municipalities, with at least one member from the community on the committee.

There are a number of positive steps contained in the amendments. Some of the amendments have the potential to add unnecessary cost and effort to process planning applications/appeals and others should improve certainty. The impact of some of the changes cannot be predicted without seeing the detailed regulations. As our municipal clients work through these changes and we see how it impacts the day to day work of land use planning we will report back. ■

FREE-RIDERS BEWARE

Cottage roads are often maintained by local residents who form volunteer committees and organizations for the benefit of all property owners on those roads.

A local Brockville Area Private Road Association sued one of its members for refusing to pay dues for the upkeep of a private cottage road. The non-paying member argued that they had not paid their dues since 2008 because there were no receipts provided, they were not satisfied with the maintenance, they received no notice of association meetings and there was no private road liability insurance.

The Small Claims Court Judge was unimpressed with these arguments and found the member was in the wrong. Since the association was only formed in 2013, it was understandable that some processes took some time to develop – receipts were now available on request and the association was developing a better meeting notification system. The judge held that it was illogical to argue that payment was withheld because the maintenance or liability coverage was substandard. Obviously, the withholding of funds would make it more difficult for the association to maintain roads and purchase insurance policies. The court held that the non-paying residents were unjustly enriched, but unfortunately for the road association, the claim was limited to two years. The recovery for non-payment of upkeep fees prior to that period was barred by the Limitations Act.

This case highlights the well-known problem with private road associations; those who enjoy the benefits but refuse to pay. There is little a municipality can (or should) do about these private disputes. Legal tools exist to solve the problem, but they require cooperation of the members, which as this case illustrates is not always possible. ■

WHEN DOES THE PROFIT OF THE SON FOLLOW THE FATHER?

A Vaughan Councillor's son was part of a team of lawyers retained to appeal a site plan in the City of Vaughan. Settlement was reached, and before the City voted on whether or not to accept the offer the Councillor applied to the Ontario Superior Court for a declaration that he was not breaching the Municipal Conflict of Interest Act (MCIA) by voting on this offer to settle. The trial judge found there was a conflict and the Councillor appealed.

The Ontario Court of Appeal held that the lower court failed to properly apply section 4 of the MCIA, which allows a councillor to participate, notwithstanding his family member's pecuniary interest, if the councillor's interest is "so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence" the councillor. The Court of Appeal articulated that a pecuniary interest is defined and interpreted very broadly to capture a wide sphere of activity; this is necessary to promote the purpose of the Act and ensure councillors are not improperly influenced. The broad definition of pecuniary interest is balanced by the exemptions found in section 4.

In this case, the pecuniary interest of the son was truly remote or so insignificant that a reasonable person would not consider it to be capable of influencing the father. In deciding that the councillor's interest was remote and insignificant, the court considered: his many years as a faithful councillor, that he was acting in good faith, that he was vigilant in attempting to disclose his conflict, that the matters of the site plan were of major public interest to his constituents, that he derived no compensation from his son's involvement, and his son's continued employment was not contingent on the specific appeal.

This case, along with the recent Amaral decision that was decided on a similar basis, gives important guidance to councillors about where to draw the line. This site plan was of such importance to his constituents that the councillor went to great lengths to ensure he could participate. Most council members need not go this far. Our recommendation is that getting a legal opinion as to the potential for a conflict of interest is in most cases sufficient.

If you are interested in receiving copies of these cases, please let us know. ■

FIRE CODE ORDERS NOT BAD FAITH

Fire inspection reports were completed on two residential apartment buildings owned by Norquay. The most significant demand in these reports was to modify the fire alarm systems so that they would be louder, since they did not meet the audibility requirements set out in the Office of the Fire Marshall (OFM) guidelines. When Norquay did not voluntarily modify the systems, the Fire Department issued an inspection order. Norquay appealed the inspection orders to the OFM, and then to the Divisional Court. The fire department withdrew its orders before the matter could be heard in the Divisional Court.

Norquay then took the litigation one step further and commenced a civil action against the Fire Department for negligence in the exercise of statutory duties and misfeasance in a public office. Norquay argued that the inspector ought to have obtained a legal

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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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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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opinion before issuing inspection orders, that they acted without authority, and did so when they knew their guidelines were not enforceable. The court found that the Fire Department did owe a duty to Norquay to act in good faith in their public decision making, but that they met that duty. The inspectors had no obligation to obtain a legal opinion before issuing the orders; they acted properly in seeking guidance from the OFM.

Norquay also alleged that the inspectors were deliberately enforcing a guideline beyond their statutory authority, the orders were issued before getting a legal opinion, and that the Fire Department withdrew from the appeal in order to avoid the judicial review of the Divisional Court. The court held that it is not misfeasance when a fire department does not seek legal counsel before issuing orders, and that if they were incorrect in issuing the order, the error was made in good faith. The decision to withdraw from the appeal was not done to "evade" judicial review – it was done to avoid expenses. The case was dismissed and the court awarded costs against Norquay. While the court found that obtaining legal advice wasn't necessary, doing so would have clearly avoided some, if not all, of the expense of litigation. ■

6th Annual GreenProfit Conference - March 21, 2016

Tony Fleming will be speaking at the GreenProfit conference in Kingston.

This is the 6th annual conference and will include presentations and Panel discussions on:

- economic development opportunities in the energy sector
- negotiating community benefit Agreements
- the future of solar power in Ontario
- Rural communities and renewable energy
- energy storage in Ontario

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