WINTER 2017

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

CHIEF BUILDING OFFICIAL'S ZONING INTERPRETATION IS ENTITLED TO DEFERENCE

A chief building official's interpretation of the municipality's zoning by-law is entitled to judicial deference by courts on appeal.

In Adjala Township, a property owner applied for and received a building permit to construct a horse riding arena on her property. Her neighbours challenged the decision by the chief building official (CBO) to issue the permit.

Drawing on recent trends in administrative law, the Court ruled that the CBO's interpretation of the zoning by-law was entitled to the court's deference:

> In my view, a Township's zoning by-law is equivalent to a home statute for the Township's CBO. Accordingly, a reasonableness standard should apply. Decisions of all administrative decision-makers, including statutory delegates such as CBO's, are subject to the same deferential standard of review as are tribunals, including when interpreting a home statute.

To our knowledge, this is the first time a court has ruled that a zoning by-law is equivalent to a building official's "home statute." The "home statute" rule generally requires that courts defer to decisions of municipal officials, tribunals and boards where those decisions

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COURT SUPPORTS BROAD POWERS OF INTEGRITY COMMISSIONERS

The City of Vaughan received a complaint that Deputy Mayor DiBiase had received a benefit from a contractor, had assisted the contractor to obtain City business and had voted improperly with respect to matters dealing with the contractor. The Deputy Mayor's lawyer responded by alleging that the complaint was politically motivated, was not based on any facts, was inviting a "fishing expedition", and also charged that the complainant had obtained the Deputy Mayor's e-mails "illegally" (the emails formed part of the complaint). The Integrity Commissioner completed an investigation despite the Deputy Mayor's objections. The Integrity Commissioner's report was accepted and Council voted to suspend Deputy Mayor DiBiase's remuneration for 90 days.

The Deputy Mayor applied to quash the council decision and report of the Integrity Commissioner, alleging that the Integrity Commissioner and the City denied him natural justice and breached procedural fairness by relying on a non-transparent investigative process. The Divisional Court ultimately determined that there was no merit in any of the applicant's numerous submissions and dismissed the application.

The Divisional Court stressed the importance of reviewing an Integrity Commissioner's Investigation through the lens of the "statutory scheme", which includes not only part V.1 of the *Municipal Act*, 2001 and the code of conduct established by a municipality, but also the municipal complaint protocol, rules and any other guidelines or documents that set out the process for receiving, investigating, and reporting the findings of a complaint to the municipal council. The Court stated that an effective Integrity Commissioner System provides both an advisory service to help councillors and staff who seek advice before they act, and an investigative or enforcement service to examine conduct alleged to be an ethical breach.

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TAX SALE SURPLUS IS NOT GUARANTEED

A First Nation Band owned property that was sold by the City of Thunder Bay in a municipal tax sale. As required by the Act, after deducting the cancellation price, the City paid the surplus into the Superior Court. Pursuant to subsection 380(4), the former property owner had one year from the date of payment of the surplus into court to bring an application for payment out of court. However, while the property owner was aware of the one-year deadline, it did not receive the required notice of payment into court, which had been sent to the assessed (and sold) property. The former owner therefore brought its application three weeks after the one-year deadline.

Pursuant to section 380(6), one year after the payment into court, the monies were deemed forfeited to the City. The City brought a counter-application seeking payment out of court of the monies pursuant to section 380(7) of the Act.

In the applications court and on appeal, the former property owner argued that it was entitled to relief from the deemed forfeiture under section 380(6). The Court of Appeal ruled that since the Municipal Act does not expressly, or by implication, exclude the court's general power to grant relief from forfeiture in civil proceedings, and the automatic forfeiture under 380(6) is not imposed as a penalty for breach of any requirement of the statute, the court has jurisdiction to grant such relief. The court also noted that to grant relief would not undermine the purposes of the Municipal Act, or interfere with the finality and certainty of the municipal tax sale scheme.

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The statutory scheme often does not create any legitimate expectation that the person who is subject to a code of conduct complaint will receive full disclosure of all documentation obtained by an Integrity Commissioner, and an Integrity Commissioner has a broad power to decide whether or not to commence an investigation, a decision that the Court will often be reluctant to review. From an administrative law perspective, the Divisional Court also recognized that by interpreting and applying a code of conduct or complaint protocol, an Integrity Commissioner essentially applies what can be considered their "home statute". The court confirmed that an Integrity Commissioner's decisions are to be given deference.

The Divisional Court was satisfied that throughout the investigation the Integrity Commissioner exercised her discretion with respect to the participation of the Deputy Mayor in a manner that properly balanced his right to meaningfully respond to allegations in the complaint and the need to protect City staff who had cooperated in the investigation.

The Court also held that an Integrity Commissioner: (i) is entitled to continue to investigate any non-criminal complaints after determining that an allegation in a complaint form is on its face criminal in nature; (ii) has no obligation to determine whether the interception of private communications provided or referenced by a complainant was in fact lawful; and (iii) does not breach procedural fairness or engage in illegal actions by targeting a search of an individual's email address hosted on a municipality's computer system.

The decision is an important overview of the powers of an Integrity Commissioner that will potentially become even more important given indications by the Province in Bill 68 that mandatory codes of conduct and Integrity Commissioners may be forthcoming. ■

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are based on the interpretation and application of a statute with which the decision-maker has particular familiarity and which is closely connected to the decision-maker's core function.

This does not mean that any interpretation given by a CBO is above review. If a CBO's interpretation is not reasonable, a court may still strike the decision down. In order to be reasonable, the court found that it is appropriate for the CBO to seek and rely on the interpretation of planning staff. It is also important to not simply look at the language of the zoning by-law in isolation; zoning is informed by the Official Plan and a contextual interpretation must include considering the policy basis for the by-law, as well as the plain meaning of the provision in light of the entire zoning scheme. ■

SOLICITOR CLIENT PRIVILEGE TRUMPS PRIVACY LEGISLATION

In a recent decision of the Supreme Court of Canada, the importance of solicitor-client privilege in the context of privacy legislation was considered. While the case involved an interpretation of the Alberta *Freedom of Information and Protection of Privacy Act*, the principles articulated by the Court are relevant to Ontario municipalities.

The case involved a constructive dismissal claim and a decision of the Information and Privacy Commissioner of Alberta ordering the production of records over which the University of Calgary claimed solicitor-client privilege. The University of Calgary refused to produce the records. Under section 56(3) of the Alberta Act, a public body must produce required records to the Commissioner "despite...any privilege of the law of evidence."

The Supreme Court determined that the expression "any privilege of the law of evidence" does not require a public body to produce documents over which

solicitor-client privilege is claimed. Solicitor-client privilege is no longer merely a privilege of the law of evidence; it is a substantive right that is fundamental to the proper functioning of our legal system. The Court held that to give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so.

The decision will likely be relevant to the interpretation of MFIPPA, given the similar language in section 41(4) of the Ontario legislation. ■

NO INSURANCE, NO LIABILITY

Is a municipality liable in negligence for losses suffered as a result of a collision with a taxi where the taxi is inadequately insured, in violation of the municipality's licensing by-law?

Two people were injured in a car accident involving a taxi. The taxi was insured, but not with the minimum $1 million third party liability coverage required under the municipality's taxi licensing and regulation by-law. When the taxi company initially applied for a taxi licence, it supplied proof that it carried the required coverage. In 2008, the taxi company submitted a renewal application that contained a pink slip issued by the same insurer that had provided the coverage in 2005, but which did not confirm the level of coverage. The application did contain a signed declaration indicating that the required coverage was still in place. The victims alleged that the municipality negligently failed to enforce the by-law to ensure that the taxi company had the required insurance coverage.

At trial the court found the municipality was liable. The Court of Appeal disagreed, stating that a municipality administering a licensing scheme owes a general duty to the public at large to ensure compliance with the regulatory scheme. However, that general public duty is not the same as a private law duty of care. Without "something more", licensing a third party does not create a "close and direct" relationship between an individual member of the public who may take a taxi and the municipality who issues a taxi license. Without this "close and direct" relationship, there is no duty of care owed by the municipality to persons who take taxis.

The Court of Appeal also held that there are sufficient policy reasons to negate any duty of care under the circumstances, given the extensive burden that would be imposed on a municipality if it were found liable for negligent enforcement of the licensing by-law. The Court emphasized that "the burden on small municipalities with limited resources could be significant."

This is an important correction by the Court of Appeal, confirming a long line of cases that establish that municipalities are not liable for damages simply because legislated standards are not enforced. ■

A RIVER RUNS THROUGH IT

When does a watercourse create a "natural" severance?

The Ontario Court of Appeal recently emphasized the significant burden that is placed on a property owner when attempting to demonstrate that a river or stream is "navigable", creating a natural severance.

Property owners retained a surveyor who provided an opinion that a creek running through their property was a navigable stream, and therefore the land was naturally severed into two parcels. The surveyor deposited a reference plan on title to the property and the property owners conveyed the "severed" parcel. The municipality, however, did not agree with the surveyor's conclusions and brought an application seeking a declaration that the creek was not a navigable stream and a further declaration that the conveyance was void as it was contrary to the Planning Act.

The judge hearing the application agreed with the land surveyor that the creek was navigable, and the municipality appealed. On appeal, the municipality was successful.

The Court of Appeal first emphasized that whether the owner intended to circumvent the Planning Act was irrelevant. The determination of the navigability of the creek must be made as of the date of the Crown grant. The person seeking the natural severance must show not only that the specific location of the waterway in question was physically capable of transportation by boat at that time, but also that it was capable for use as transportation in relation to a public purpose such as commerce, agriculture, or recreation. Although actual public use is not a prerequisite to the finding of navigability, the absence of any evidence that the waterway was used for any practical public purpose can provide circumstantial evidence that the waterway was not navigable. The Court also emphasized that it is essential to demonstrate that there are two points of public access to the water body. Absent such proof, the waterway between such two points (no matter how deep or how wide) has no practical value to the public as a means of transport, serves no public utility and therefore is not navigable.

After review, the Court found the historical evidence was insufficient. In particular, the Court had difficulty with the fact that the evidence related only to a portion of the creek that was several kilometres downstream from the property. The Court invalidated the conveyance, converting the property back into one parcel. ■

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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The Court of Appeal therefore proceeded to apply the relief from forfeiture provisions, and concluded that because the former property owner's conduct was inadvertent (although negligent), and that the City did not suffer any undue prejudice as a result of the three-week delay, that relief should be granted. The Court awarded the surplus to the Band.

This case highlights the lengths that courts will go to find ways to relieve taxpayers of the harsh consequences of a tax sale. The court also looked at the equities between the municipality and the former owner in its analysis, finding: (i) the municipality had received all money owing to it for tax arrears, interest and penalty; (ii) at the time of the application by the First Nations Band the municipality had not yet applied to obtain the surplus; and (iii) there was a reasonable explanation for the delay by the Band.

The lesson is that municipalities are advised to apply for the surplus as soon as it is entitled, and must be vigilant to ensure that all notices are sent properly; the courts seek out any reason to favour the taxpayer. ■

David Munday

David Munday is a partner in our Municipal and Planning and Development Groups.

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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