

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

WELCOME

Welcome to Legal Matters, our newest client newsletter written especially for people in the municipal sector.

Whether you are a member of council, a CAO or department head, or a consultant working with municipalities, our goal is to give you practical information and helpful ideas about legal issues that affect local government.

Never before has it been so important for those who work in municipal government to have a clear understanding of both the laws that govern them and the laws they pass.

A new Municipal Act with expanded powers for municipalities and their councils; a Planning Act that puts greater emphasis on local decisions; and an endless stream of environmental regulations are just some of the areas that continuously challenge councils and staff.

For over 60 years, Cunningham, Swan has been a recognized leader in providing specialized, expert advice on all aspects of municipal law to municipalities, conservation authorities and public utilities in eastern Ontario.

Through Legal Matters, we hope to pass on some of this knowledge and experience in a straight forward, easy to read format. No legalese – we promise!

More importantly, we sincerely hope you and your colleagues enjoy reading Legal Matters and find something that helps make life a little easier.

We welcome your questions and comments, and any requests for information in future editions.

WHAT TO DO WHEN THE M.O.E. CALLS

PART I, REPORTING

A regulatory prosecution can be a nightmare. It consumes enormous amounts of staff time and causes stress at all levels of the municipality.

A prosecution is often inevitable; however, it is possible to successfully manage an investigation so it doesn't result in charges. Every situation is unique, but a municipality can increase its odds by following a few important steps.

The best method of course is a robust, effective environmental management system. Even then, accidents happen; but when they do, how you respond to the investigation may be nearly as important as what you did before the accident.

The first decision that can affect a prosecution following an accident is whether to report it. Has there been a spill or workplace accident? Is it reportable? When does the incident need to be reported?

Not every spill is in fact a spill as defined in the Environmental Protection Act. Even when it is a spill, there are circumstances when it does not need to be reported to the Spills Action Centre, or at least, not immediately.

Since the decision to report is a very fact-specific assessment, its not one that should be left until a spill happens. It requires pre-planning and training to understand the different types of spills that can occur and the procedures for handling each of them.



The municipality should also have a "script" that allows staff to "fill in the blanks" when reporting. This ensures consistency in reporting and gives the Ministry the information it needs, but nothing more. "Ad libbing" by municipal staff can lead to unnecessary investigations if they don't fully understand the situation or give a proper account of the incident. Note to file: The Spills Action Centre records all calls.

On the other hand, failure to report a spill is an offence. Don't give the Ministry the "easy" prosecution for failure to report. There is no defence to failing to report and it says to the Ministry that you may be a "bad actor"; which inevitably leads to more charges.

Next: Part II, Investigation versus Inspection



ADDING MUNICIPAL COSTS TO THE TAX ROLL

The Municipal Act and several other statutes allow the municipality to add different types of costs and expenses to the tax roll and “collect them in the same manner as taxes.”

Since a municipality can sell property to collect tax arrears, this statement commonly found in the legislation may sound like a sure thing. But on closer examination, it is not quite as good as it appears.

In a nutshell, “collected in the same manner as taxes” does not mean “collected as taxes.”

To understand this distinction, you must first understand the system of priorities established by the Municipal Act.

At the top of the list are those items that fall with the definition of “real property taxes” in Part XI of the Act. These are the sections that permit the municipality to sell property for tax arrears.

In addition to property taxes levied each year, amounts levied under several statutes such as the Education Act and Drainage Act, and amounts given “priority lien status” can be recovered as part of the cancellation price.

The concept of priority liens is also dealt with in subsections 1(2.1) and (3). It refers to those taxpayer debts that a statute has expressly stated have “priority lien status.”

Within the Municipal Act, charges for utilities and waste management services are given priority lien status. But there are also eleven other statutes, including the Building Code Act, the Environmental Protection Act, the Fire Protection and Prevention Act, the Drainage Act and Weed Control Act, that create “priority lien status” for some (but not necessarily all) of the amounts that a taxpayer might owe to the municipality.

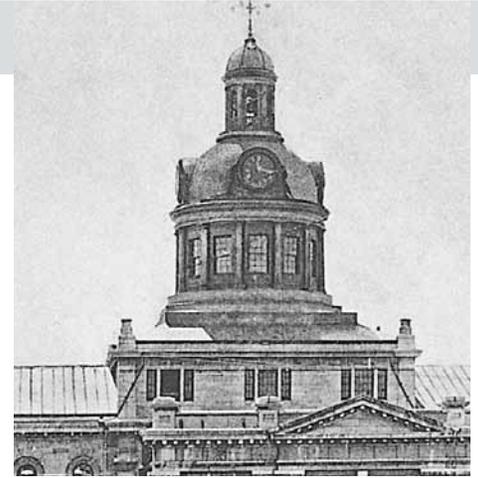
Once a debt has priority lien status, it has the same status as property taxes and may be collected ahead of all other interests in the property, except the Crown.

So what’s left? First, the Municipal Act creates five other possible taxpayer debts

that can be collected in the same manner as taxes, but do not enjoy priority lien status. They include all types of fees and charges (other than for utilities and waste management services), charges for removing snow and ice, farm membership dues and certain types of housing assistance loans.

In addition, there are certain types of debts under the Clean Water Act, 2006, the Development Charges Act, 1997, the Drainage Act and the Line Fences Act that can fall within this category.

Even if an amount added to the tax roll cannot be collected by forcing the sale of the property, there is still a strong incentive for the property owner to pay. Like property taxes, the debt can accrue interest at 1.25% per month (15% a year), which in the current economic climate is almost on par with credit cards!



The debt’s presence on the tax roll will almost certainly guarantee full payment if the owner tries to sell or refinance the property. Even if the debt does not have the same priority as property taxes, no purchaser or lender will touch the property unless the amount owing is paid in full.

The only times when a municipality may have to write off a debt added to a tax roll that does not have priority lien status is if the property is sold by tax sale or by a mortgage holder under power of sale. If there are insufficient proceeds after payment of other creditors who have higher priority claims to the property, then the municipality may be out of luck.

COUNCIL’S RIGHT OF ACCESS TO PROTECTED INFORMATION

Everyone knows the Municipal Freedom of Information and Protection of Privacy Act give the public a right to request access to municipal records. Unless the Act specifically protects the information in those records from disclosure, the public is entitled to it.

But what about Council’s right of access? Do individual councillors have any greater right of access to protected municipal records than other members of the public?

Contrary to some popular belief, the answer is no!

Section 16 of the Act permits protected information to be disclosed only when a “compelling public interest” outweighs the normal reasons for protecting the information.

This issue has been the subject of some recent controversy between members of Toronto’s City Council and the Information and Protection of Privacy Commissioner for Ontario. Some councillors claimed that the Commissioner was interfering with them performing their council duties when she denied them unrestricted access to the City’s database of planning and by-law enforcement issues.

In defending her position, the Commissioner stated that councillors only have a right to protected information if they can demonstrate a “legitimate need.” In other words, they must prove that access to the protected information is necessary to the performance of their council duties. But if the reason for the request is simply to satisfy a councilor’s curiosity or to respond to a citizen concern, they have no right of access to the information.

DELEGATING COUNCIL'S POWERS AND DUTIES

If you are reading this at 11 p.m. during your fourth council meeting this month, you might be interested in the new powers given to council to delegate some of its duties. It could get you home earlier too!

The new powers to delegate are in Sections 23.1 to 23.5 of the Municipal Act. Not surprisingly, they are filled with a bunch of exceptions, and exceptions to the exceptions, that make it hard to accurately summarize in the space available. But we will try!

Council can generally delegate its power to pass by-laws and to make decisions on applications for approval under the Municipal Act and Planning Act. The delegate can be staff, individual members of council, a committee of council or a committee made up of councillors and non-councillors.

But here come the exceptions. First, Council cannot delegate the power in the Planning Act to adopt an official plan or zoning by-law or their amendments. But everything else (i.e. severances, minor variances, site plans etc) is possible.

Also, Council cannot delegate the authority to hire or fire municipal officers, but everyone else is permitted.

Council can always delegate administrative matters to staff, but the delegation of powers under the Municipal Act to the municipality's officers and employees is limited to those matters that council considers mi-

nor. In deciding whether a delegated power is minor, Council can consider the number of effected people, the geographic area, the time period involved and any other matters Council considers applicable.

A few examples of minor Municipal Act items that can be delegated to staff include the power to temporarily close highways and to issue and impose conditions on licences.

Another possible area for delegation involves those situations where council is required to hold a hearing (think Planning Act!) or provide an opportunity to be heard (think road closings!) before a decision is made. Rather than tying up all of council, responsibility to conduct the hearing may be delegated to a person or committee, even if the person or committee conducting the hearing is not the eventual decision maker.

If council is concerned that delegating may let too much of its authority get away, council can impose whatever restrictions or conditions on the delegate that council considers appropriate. And if council later has second thoughts, it can always revoke a delegated authority at anytime.

Take another look at your agenda. Did all of council really need to deal with everything on the agenda? Delegating some of those items of business to staff or a committee just might have got you home at a decent hour.

CLOSED MEETINGS

COMMON MISTAKES AND HOW TO AVOID THEM

The Municipal Act has broadened the list of items that can be discussed in a closed meeting, but also imposed new sanctions if the meeting is held improperly.

Several common mistakes made by Councils include:

1. Going in camera for the wrong reasons. The Act lists the subjects that may be discussed. Don't deviate from this list.
2. Failing to pass a resolution to move in camera. The resolution must state that a closed meeting is being held and describe the general nature of the matter to be discussed during the meeting.
3. Voting in camera. Votes may only be held for giving instructions to staff or agents or for a procedural matter; all other votes must be held in an open meeting. Even "straw polls" are not permitted.
4. Discussing matters other than those for which Council went into closed meeting. Even if related to the original matter, if the substance of the new matter is not on the list of permitted in camera matters, it cannot be discussed.

To avoid an investigation of Council's conduct, there are a few simple rules to follow:

1. Understand the list of matters permitted in closed meetings. When in doubt, seek legal advice.
2. Pass a resolution that gives the public enough information about why you are going behind closed doors. Simply repeating one of the permitted items listed in the Act may not be sufficient. Instead, there must be a balance between giving the public enough information and not defeating the purpose of going in camera. Again, seek legal advice in advance. It could avoid invalidating the meeting and an embarrassing investigation.

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WHO'S WHO ...



TIM WILKIN
PARTNER



Tim Wilkin is a Partner in our Municipal and Land Use Planning and Development Groups. Tim has 30 years experience advising municipal government.

Municipalities and private clients throughout Eastern Ontario regularly consult Tim on a wide range of issues concerning municipal government, planning and development. 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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TONY FLEMING
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Tony Fleming is a Senior Associate in the Municipal and Land Use Planning and Development Groups. Tony provides advice to municipalities and private sector clients on all aspects of municipal government, land use planning and development and 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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3. Don't vote in camera. Procedural matters and instructions to staff mean just that. Don't turn them into substantive decisions.
4. Limit discussion to permitted in camera topics only. When in doubt, move the discussion to open session or adjourn the meeting to get advice.

EXPROPRIATION ISN'T AS BAD AS YOU THINK

Municipalities often need to buy land. It might be to extend a new road, expand the landfill site, create an industrial park, or build new municipal facilities.

But what can you do when the landowner won't sell? Expropriation may be your answer.

Municipalities seem to have an intense dislike about using their power to expropriate. It probably feels like they are taking a person's property at the point of a gun.

But let's be clear, a municipality that decides to expropriate is not getting the land for free. In fact the property owner generally stands to do better financially than if the land was sold on the open market.

In addition to fair market value, the owner is entitled to disturbance allowances of least 5% of the market value plus any other reasonable expenses that are a "natural and reasonable" consequence of the expropriation. Some of the more obvious items are legal, appraisal and moving expenses and business losses, but as the language of the Act suggests, it can go well beyond that.

If the expropriation only involves the taking of part of the owner's land, there might be additional compensation for the loss of value in the remainder of the owner's land caused by the expropriation.

Finally, the Act encourages the expropriating authority to be generous with its offer of compensation. To avoid having to pay the owner's costs for an expensive hearing before the Ontario Municipal Board, an additional premium of at least 15-25% is usually paid.

So the next time you are worried that expropriating may be unfair to the property owner, you may want to reconsider. Compared to what the owner might receive from selling the property in the open market, an expropriation may actually do him a favour!

