FALL 2012

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

BROWNFIELDS PART TWO - DOING YOUR HOMEWORK MAKES THE DIFFERENCE

In the first article in this series we identified some barriers facing brownfield redevelopment and identified that municipal intervention/incentives were necessary to spur remediation and redevelopment. The key for municipalities is to identify what incentives will best address the problems faced by developers in the local context – this is not a one-size-fits-all model.

A brownfield Community Improvement Plan requires an understanding of the factors (barriers) that contribute to sites being brownfields. This is more than just identifying contaminated properties and may include servicing constraints, land use constraints, property ownership (fragmentation) challenges, transportation inadequacies and neighbourhood concerns. A successful Community Improvement Plan (CIP) for brownfields must understand all of the potential barriers and consider whether and how they can be addressed within the CIP.

The process for creating a CIP is set out in the Planning Act and is not the focus of this article. The process is not the difficult aspect; the content is where your energies should be spent. Once a municipality understands where its brownfields are and what issues in addition to contamination must be overcome, the real work begins.

First, what is the primary barrier – likely the cost of remediation. The tools available to assist a developer are fairly well known (tax relief, grants and waiving development charges and other fees). What may not be well understood is the municipality's capacity to fund these incentives, and the time required to pay back the municipality through new assessment. This analysis must be the cornerstone of the incentive program. If the new development requires significant servicing upgrades, and these upgrades are not paid through development charges, what is the impact on the municipality's ability to fund (borrow) for other infrastructure projects? A comprehensive understanding of the long-term impacts of projects (and the cumulative impact of a number of projects) must be part of the analysis.

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EXPROPRIATING ENVIRONMENTALLY SENSITIVE LANDS

In the Spring 2012 edition, we reported that the City of Windsor expropriated 267 lots from a developer to preserve an environmentally sensitive area. The City was ordered to pay the developer over $3,000,000 for the market value of the lands expropriated and approximately $770,000 for injurious affection. The basis for the earlier decision was that the value of the lands was established independently of any impact on value that the Provincial Policy Statements might have created (ignoring the significant development constraints imposed by the environmental policies in the PPS).

One of the key principles of the Expropriations Act is that in determining the "market value of the land", no account is to be taken of any increase or decrease in the value of the land attributable to the governmental actions that resulted in the expropriation (the "scheme"). The Court of Appeal for Ontario confirmed that the Provincial Policy Statements, introduced in 1996, would have reduced the value of the lands, and that this reduction in value was NOT part of the municipal "scheme" of expropriation in Windsor.

The Court noted specifically that the PPS would have an impact on value given the need for any development to be consistent with the PPS, limiting the amount of land actually available for development. This impact was distinct from any impact attributable to the expropriation scheme of the City.

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Is advice from staff accessible through MFIPPA?

A request was made under the Freedom of Information and Protection of Privacy Act ("FIPPA") to release records relating to the advice and decision-making process prior to an actual decision made by the Minister of Finance related to amendments to the Corporations Tax Act. Section 13(1) of FIPPA gives discretion to refuse to disclose a record "where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by the institution." This is substantially the same as section 7(1) of MFIPPA, and contains similar exclusions.

The applicants wanted a series of communications internal to the Ministry which proposed or communicated various options and possible courses of action. The Court of Appeal held that the function of s.13(1) (and by implication section 7(1) of MFIPPA) is to protect the deliberative process of Minsters and high-level advisors. This is necessary due to the recognition that in pursuing their public duty, a wide variety of possibilities on opposite ends of a spectrum might be canvassed and that if open to public scrutiny, there might be a chilling effect on the ability of Ministers to pursue their responsibilities free from worry of electoral backlash.

The Court noted that "it would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness."

The court pointed out that while a specific recommendation is protected, advice is also protected, and that advice might simply take the form of materials which permit the drawing of inferences but which do not advocate a specific course of action. The court held that advice and recommendations in drafts of policy papers that are part of the deliberative process leading to a decision are protected. The important conclusion to take away is that the protection afforded by MFIPPA covers materials that are part of the process, not just materials which lead to a specific conclusion or action. ■

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The Court of Appeal also found that damages for injurious affection must be calculated independently of the "scheme", which was not done by the OMB or the previous court. The only measure of loss for injurious affection is the impact of the expropriation itself on the remaining lands of the owner. In this case, the remaining lands might not have had any value for development, independent of whether the adjacent lands were expropriated. Calculating the loss in value of the non-expropriated lands by considering the impact on value of the "scheme" of expropriation overvalued the lands and was not consistent with the Act.

The Court sent the matter back to the OMB with directions as to how the value was to be calculated. The decision of the Court of Appeal is important as it now clarifies that environmentally sensitive lands are not valued as if the PPS did not impact value and they were "available" for development. ■

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Second, what low cost incentives can be included that might have significant value? Do not underestimate the value of a municipally-sponsored Official Plan Amendment and re-zoning. A well-done secondary planning exercise can often spur investment by creating certainty in the development community. It may also be important to plan for the surrounding community, not just specifically identified brownfield properties. In brownfield areas it is often the case that the surrounding neighbourhood has been dragged down with the brownfield properties and in order to redevelop, the entire community needs to be part of the solution. A CIP can include incentives for more traditional community improvement projects in addition to the brownfield-specific incentives; treat the solution holistically for maximum benefit.

Also, do not conduct a secondary plan process in isolation. Market studies are essential and should include information on remediation costs and realistic redevelopment scenarios. For example, designating an area for single family homes is counterproductive when the nature of the contamination is such that it is uneconomical to clean up to that standard. If multi-family residential is the preferred option, is this realistic in the particular community and in the prevailing market conditions? Would commercial and retail be a more effective and economic solution? This process can often be most effective when the municipality and the owners/developers work as a team to identify and then create the best solution.

An alternative to consider is a CIP tailored to a single property or a small area that is strategically located. A more focused CIP takes fewer resources and allows more intensive fact gathering and study. With better intelligence, a more focused CIP can be created that understands the site specific barriers and the incentives needed to turn a brownfield into a productive property.

In the next issue, we explore regulatory requirements and how understanding the Record of Site Condition process can make a CIP more effective. ■

New Wastewater Systems Effluent Regulations

– Is your wastewater clean enough?

The new regulations were finalized and published July 18, 2012, and apply to all wastewater treatment plants in Canada. Depending on a particular plant's certification, the upgrading of facilities and compliance with regulations will be mandated as of December 31, 2020 (high risk), or the end of 2030 or 2040 (medium and low risk respectively).

It is estimated that almost 25% of wastewater facilities currently operating do not meet the new standards. Regulations will be phased in, beginning with effluent monitoring requirements, record-keeping and reporting requirements, which come into force on January 1, 2013. Effluent quality standards come into force on January 1, 2015, except for total residual chlorine which takes effect on January 1, 2021. Operators of wastewater systems that do not meet the effluent quality standards must apply for transitional authorization between January 1, 2013 and June 30, 2013. A transitional authorization will set out standards for continued operation and timelines for compliance.

Estimates as to the costs of compliance have been put in the $9 billion range.

What do the new regulations mean for wastewater facility operators? In the short term, only those facilities rated 'high risk' face the need for immediate improvements, in the longer term all operators will need to develop plans for improvements to meet the new requirements. ■

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 neighboring 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

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Federal Government gets caught cheating on its taxes! (Sort of.)

The Minister of Public Works and Government Services made payments in lieu of taxes (PILTs) to Halifax for the Halifax Citadel National Historic Site on the basis of a valuation of the site Halifax did not agree with. Notwithstanding that federally owned properties are constitutionally exempt from provincial and municipal property taxation, the federal government pays PILTs pursuant to the Payments in Lieu of Taxes Act.

This dispute went all the way to the Supreme Court of Canada. The matter at issue was the manner in which the value of the land was calculated.

The property is valued by the Minster who formulates an opinion as to what the value would be if the property were taxable. In this instance, it meant that if the historical citadel in the center of the city of Halifax were NOT reserved for historical and public park use, but instead was usable as business, urban residential and commercial use like the rest of the surrounding city center, what would the value be for tax purposes?

In the original instance, the Minister made a determination of value which placed a nominal value for the land, namely 40 acres of land in the center of Halifax, at $10 due to the impossibility of developing it because of its historical designation. It was noted that the Minister also had evidence before him that other Canadian assessment authorities would not attribute nominal value to land on the basis that its uses were restricted due to historical designation status.

The Supreme Court held that the Minister "cannot base his valuation on a fictitious tax system that he himself has created…", and held that the decision of the Minister was not reasonable, and thus remitted the case back down to the Minister with guidance as to how to reassess the PILT system.

For municipalities with federal government properties, this is an important ruling that gives them additional ammunition to require a fair assessment of the market value of those properties. ■

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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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. ■

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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