WINTER 2013

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

When is a conflict of interest not a conflict?

When it's a nullity (apparently).

By this time, it's safe to assume that everyone in Ontario has at least some familiarity with the conflict of interest saga involving Toronto Mayor Rob Ford ("Ford"). To date there have been 3 court decisions and indications are that leave to appeal to the Supreme Court of Canada is being sought.

Although the case has been dealt with extensively in the media, breaking the matter down helps to illustrate the lessons that can be drawn from the case.

In a report issued to Council in August 2010, the Integrity Commissioner ("Commissioner") concluded that Ford (then a Councillor), breached various sections of the Code of Conduct ("Code") when he solicited donations for his private football charity. Council approved the Commissioner's recommended sanction that Ford reimburse the $3,150.00 in donations made by lobbyists and corporate donors. He refused to do so.

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Brownfields

Part three - Records of Site Condition

In order to ensure that a brownfield program will be effective it is critical to understand Records of Site Condition (RSC) and how they facilitate brownfield remediation. Without a solid knowledge of the RSC regulation and its impact, a municipality cannot create the meaningful incentives necessary for a successful program, and may create unintentional barriers to redevelopment.

An RSC is required whenever a property undergoes a change from industrial or commercial use to a more sensitive (i.e. residential) type of use, whether or not a building permit is required. An RSC is a statement from the property owner and a qualified consultant detailing the nature and extent of contamination on the property and confirming that the property meets the applicable standards set out in the "Soil, Ground Water and Sediment Standards" for the type of property use proposed.

Once an RSC is filed in the Environmental Site Registry the owner and occupier of the property cannot be issued a clean-up or other order by the MOE except in limited circumstances (including filing a fraudulent RSC or where contamination moves off-site after the certification date).

Phase 1 and 2 environmental site assessments are mandatory elements of an RSC. In addition, the absence of phase I and phase II information is a significant barrier to brownfield redevelopment. An effective Brownfield incentive is a Community Improvement Plan grant that funds phase I and II assessments. Municipalities may also elect to prepare their own environmental site assessments on select properties to reduce the uncertainty associated with a specific site.

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In early 2012, the Commissioner reported to Council that Ford had failed to comply with the earlier order to reimburse. Council reversed its earlier decision, absolving Ford of his personal liability for $3,150.00. Rather than recusing himself, Ford spoke to and voted on the matter.

Paul Magder then filed an application under the Municipal Conflict of Interest Act ("MCIA") alleging that Ford breached the Act. Ford argued: 1, that the MCIA did not apply to violations of the Code; 2, that Council had no jurisdiction to require him to pay back the $3,150 and the resolution was therefore a nullity (and no conflict existed); 3, that the amount involved was so insignificant it could not be regarded as influencing his actions; and 4, that his contravention was through inadvertence or an error in judgment.

The trial court disagreed with all of Ford's defences and declared his seat vacant.

Ford appealed the trial decision to the Divisional Court which overturned the trial decision and reinstated Ford to the Mayor's Office.

The Divisional Court correctly ruled that a code of conduct cannot impose penalties other than issuing a reprimand or suspending pay for up to 90 days. The decision of Toronto Council ordering Ford to repay the donations was not authorized by the Municipal Act. Municipalities should review their own codes of conduct to ensure that they do not contain illegal penalties. The Divisional Court left some room for flexibility, but it will be a fact specific analysis to determine whether the penalties your municipality would like to impose are authorized under the Act.

The Divisional Court ruled that because the original sanction was illegal, the pecuniary interest never arose; Ford therefore could not breach the MCIA as no pecuniary interest existed in the circumstances.

This aspect of the decision is somewhat troubling in our view. In our opinion, Ford's vote in 2012 was a violation of the MCIA. In 2012 a pecuniary interest did in fact exist and Ford voted on a matter directly impacting that pecuniary interest. The fact that the underlying decision was one that could have (and should have) been legally challenged does not eliminate the pecuniary interest in our view. If Ford disagreed with the Commissioner's recommendation and Council's sanction, which he did, he could have applied to court to quash the decision, which he did not do.

The Divisional Court decision may encourage people to ignore otherwise valid orders that they disagree with, and wait to challenge the order if they are prosecuted. This is not the intent of the legislation.

What are the lessons for Councillors? Firstly the Court has made it clear that the MCIA can apply to Code of Conduct matters, not just business or commercial matters (where a sanction creates a pecuniary interest).

Secondly, the threshold for being an insignificant pecuniary interest is not dependent on the means of the individual involved; the test is whether a reasonable elector would consider the amount likely to influence the behavior of the councilor.

Thirdly, council members have an obligation to educate themselves about the nature and effect of the MCIA, which can include obtaining legal advice about the possibility of a conflict. Had Rob Ford obtained an opinion from a lawyer addressing either the issue of the conflict or Council's jurisdiction to make the original order, he could have stood behind that opinion and asserted that he had done everything that was required of him (due diligence) in the circumstances. A legal opinion might have permitted Ford to keep his seat, even if convicted. In our experience, many Councilors are provided a budget to obtain these types of opinions and we encourage counselors to seek advice when in doubt.

We will monitor the application to the Supreme Court of Canada and report back on whether there will be another chapter to this drama. ■

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If your municipality decides to prepare a site assessment, it must comply with the requirements of the Brownfield Regulation so that the ultimate developer of the property can use the assessment as part of an RSC.

A Certificate of Property Use may be imposed depending on the conclusions of the RSC. A Certificate of Property Use is a registered notice that sets out restrictions on the types of uses that can be made of the property, requirements to install equipment, and monitor or report on the contamination present at a site. The costs to implement a Certificate of Property Use should also be included as an eligible cost under a brownfield program. Do not limit the effectiveness of a brownfield program by ignoring costs incurred after clean-up occurs; this may make or break a redevelopment project.

Another key consideration in a Brownfield program is that an RSC can be based on a risk assessment. Risk assessments are regulated by the Province and permit contamination to remain on site provided a scientific assessment of the toxicity of the contamination, potential exposure pathways and the predicted effect on ecology and human health is conducted. Removal of contamination is not always necessary so long as the risk assessment confirms it is safe to use the property.

Municipal brownfield programs must acknowledge that a risk assessment is just as valid a remedial method as traditional dig and dump. If your municipality only reimburses costs incurred to remove contamination, you are creating an artificial barrier to brownfield redevelopment. Often a risk assessment is the only economically viable solution for a contaminated site. Market conditions, financing and perceived stigma constitute significant systemic barriers; municipalities should not create new barriers.

In the fourth and final installment in this series we will examine some innovative models available to a municipality that wants to do its own Brownfield redevelopment. ■

A BIT OF GOOD NEWS FOR BUILDING DEPARTMENTS

Our regular readers may recall the article in our June 2011 Newsletter, "Added Liability for Building Departments". We reported that Chatham-Kent owned a former dump site (acquired through amalgamation) that it sold, with disclosure to the purchaser of a phase I Environmental Site Assessment (ESA). The ESA identified past dumping as an issue but did not preclude future use for residential. The purchaser subsequently sold the property but did not disclose the ESA to the new purchaser. The municipality issued a building permit with no conditions imposed related to the contamination. The subsequent owners sued the municipality.

At trial, the Court found the municipality had a duty to issue a conditional building permit, with conditions designed to address issues raised by the contamination and that the municipality's duty did not end when it sold the property. The Court held that the municipality had a continuing duty to future purchasers because of its knowledge of contamination and its role as the administrator of the Ontario Building Code. The municipality was found liable and damages were awarded to the current owners.

In our previous article, we felt that the broad language in the decision was concerning because it expanded the knowledge that could be imputed to a municipal building department.

The Court of Appeal has now overturned the decision, holding that as soon as the owners knew about the site's former use as a dump and opted to proceed with construction, any connection with the alleged negligence of the municipality was severed.

Unfortunately, given the Court's findings on the issue of damages, it did not thoroughly analyze the issue of whether the municipality was liable because of its failure to issue a conditional building permit. The Court did take the step of noting that nothing in its decision was intended to affirm such a finding however, stating:

"The precise basis upon which the trial judge found a duty of care is unclear to us. It appears to rest, in part, on the proposition that in its capacity as owner and vendor, Chatham-Kent owed a duty to the Biskeys as subsequent purchasers and in part upon Chatham-Kent's responsibilities in relation to building permits. As the appeal can readily be disposed of on the third ground, we make no comment on the trial judge's conclusion as to a duty of care and nothing in these reasons are intended to affirm the finding that Chatham-Kent owed the Biskeys a duty of care in negligence."

The trial decision still stands on the issue of liability, but it has been severely weakened by the Court of Appeal. It is unfortunate that the Court did not take the opportunity to clarify that the trial decision was incorrect with respect to the ongoing obligations of municipal building departments. The end result is that the prospect of liability still exists if the building official has knowledge about a specific site and does not take steps to protect the public when issuing a building permit. ■

YOU CAN'T GET AROUND A LANDLORD LICENSING BY-LAW WITH A ZONING AMENDMENT

This was the resounding conclusion reached by the OMB in Oshawa. As part of a student accommodation strategy, the City enacted a Residential Rental Housing Licensing By-law (LBL). The LBL required landlords to demonstrate, as a condition of obtaining and continuing to hold a rental housing license, that the landlord and the property in question complied with various minimum health, safety and maintenance standards and it also included specific regulations to limit the maximum number of bedrooms permitted in a Rental Unit.

The Home Owners of North Oshawa ("HNO") applied to rezone an area subject to the LBL. The zoning amendment (ZBA) proposed a change from single family residential to two new "shared accommodation" zones that would increase the total number of bedrooms permitted as well as increase the amount of basement area available to be used for bedroom space.

The OMB quickly determined that the LBL covered the area in which HNO's properties were located and that HNO's primary reason for the application was to effectively circumvent the LBL. The Board found that HNO was unhappy with the limits the LBL placed on bedroom space and was now attempting to override

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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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those limits through a ZBA, which would include a provision that the ZBA would supersede the LBL.

The Board stated clearly that under the provisions of the Municipal Act, any appeal against an LBL has to be made within one year of its passing, which HNO did not do in this case. The Board went on to state that it had "great difficulty with the concept that the Planning Act should be used to do an end-run around the Municipal Act" and concluded that the broad public interest would be best-served by refusing the ZBA.

This case is an excellent example of how a licensing by-law can be used to address certain planning objectives that may not be possible through zoning. If done properly, the OMB will not permit a collateral attack through further zoning amendments. ■

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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