governmentupdate

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MUNICIPAL LAW – FALL 2006

Flexing that municipal muscle

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In their legislative role, municipalities face challenges not seen by other levels of government. Luckily, there's never been a better time for creative solutions

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Great change often starts with a lone voice of dissent, and that certainly holds true for the changes that have provided municipalities across Canada with greater powers.

In 1994, Madam Justice McLachlin of the Supreme Court of Canada made a strong case for supporting the legitimate role of municipal bodies in making decisions in the best interests of their communities. Her comments were part of a dissenting opinion in a judgment relating to a dispute between Shell Canada and the City of Vancouver.

Little did we know that 12 years later, that lone voice of dissent would mark the beginning of an evolution toward a more generous, deferential approach to municipal decision-making. In today's municipal world, laws that grant municipal powers contain broad statements about the expansive role of municipal governments and the deference to be given in interpreting those laws. And courts continue to exercise caution in substituting their views for those of municipal councils.

There are several key examples of this in recent Supreme Court of Canada decisions. In 2000, the City of Nanaimo, B.C. was successful in having a soil processing operation declared a nuisance and having it stopped. In 2001, the Town of Hudson, Quebec had its right to limit pesticide use within its boundaries upheld. In 2004, the City of Calgary, Alberta successfully defended its right to freeze the issuance of taxi plate licences.

All of these cases made their way up to the Supreme Court of Canada and were decided in favour of the municipality – and all relied on what many now refer to as the "McLachlin rule" in reviewing municipal decision-making, with broad deference given to the solutions of various municipalities in tackling problems in their jurisdictions.

While the challenges and responsibilities faced by municipalities have never been greater, so have the potential solutions. But creativity and innovation is often needed. Local

governments should be encouraged to "flex their municipal muscle" to achieve the results needed to serve the people who elected them and carry out their broad mandate that is now prescribed by legislation in most provinces.

In assessing response to the challenges faced by municipalities, it is essential to factor in the legislation and the courts of today in creating solutions. Municipalities may have more latitude than they think in taking innovative approaches to problem-solving.

100 years of change

The attitudes of courts towards municipalities have changed over 100 years, as the quotes below illustrate.

Courts of yesterday

"Municipal corporations, in the exercise of their statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts." (Ontario Court of Appeal, 1895)

Courts of today

"If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values." (McLachlin Dissent, Supreme Court of Canada, 1994)

"It is well established that the Court adopts a "broad and purposive" approach to the construction of the powers of a municipality" (Supreme Court of Canada, 2005)

New teeth for *Ontario Heritage Act*

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Municipalities have new powers to protect heritage resources, but outdated designating by-laws could thwart protection efforts

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It was a long time coming, but the Ontario government recently passed the first set of comprehensive amendments to the *Ontario Heritage Act* since the Act was introduced in 1975.

The changes are significant. Municipalities can now prohibit, and not just delay, the demolition or removal of property designated under the Act, or apply terms and conditions for approval. These powers apply to properties currently designated as well as to future designations.

Of course, with these new protection powers come new responsibilities – the primary one being to ensure that designating by-laws (including existing by-laws) clearly set out the cultural heritage value or interest of the building or resource in question. While updating existing by-laws isn't a requirement of the new legislation in every case, it's a step that could be an important element in any heritage protection dispute.

Here's why. Along with granting new municipal powers to protect heritage resources, the province has also introduced a right of appeal to the Ontario Municipal Board (OMB) for owners wishing to challenge a municipal decision regarding the demolition or removal of a heritage resource. Since the Act does not set out the criteria for determining when demolition or removal should be allowed, the OMB may look to designating by-laws for guidance as to what is significant and needs to be conserved.

The Act and new regulations set out the criteria for determining heritage significance. All new designations must meet the prescribed criteria. While existing designations are protected under a grandfathering provision, if the designating by-laws don't reflect the new prescribed criteria, they may be vulnerable to challenge at the appeal level.

The prescribed criteria relate to characteristics such as a property's historical association, design, physical attributes, and the context in which it's located. These criteria are a test against which properties can be judged. The stronger the heritage attributes of a property, the greater its heritage value.

Because many existing designating by-laws were drafted years ago – and may lack the detail necessary to reflect all heritage attributes – municipalities risk losing heritage resources if they don't take steps to bring their by-laws up to today's standards.

The good news is that the Act provides a streamlined process for updating an existing designating by-law. For the update, municipalities need to provide a statement explaining the cultural heritage value or interest and a description of specific heritage attributes. To ensure heritage protection, municipalities should consider consulting a heritage architect, consultant or other heritage expert to help create these statements and descriptions.

The Ministry of Culture has produced the Ontario Heritage Tool Kit, which contains a series of guides to help

heritage stakeholders – such as municipalities – work through the heritage preservation process.

The Tool Kit is available free in hard copy at Ontario government bookstores, or online at www.culture.gov.on.ca. It's a good place to start when a municipality is reviewing its by-laws and policies to ensure that heritage resources gain the protection that the Act now provides.

Planning to shape your municipal future

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Recent changes to the Planning Act give municipalities more authority to control local development

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On October 19, 2006, Bill 51 received Royal Assent, and changes to Ontario's Planning Act took effect. Bill 51 introduces a number of significant changes to the way in which municipal land use planning decisions are made – changes that will have a profound impact on the role of municipalities in the decision-making process. Here is a brief overview of some of the key changes introduced by the legislation.

- **Municipalities entitled to more information from applicants.** Municipalities can now require that additional information and materials be submitted with various development-related applications. This will allow municipalities to make more informed decisions at the local level.

- **Ontario Municipal Board ("OMB") deference to municipal decision-making.** When making a decision, the OMB or other approval authority must now specifically "have regard to" any *Planning Act* decisions made by municipal council relating to the same matter.

- **Materials that can be relied upon at the OMB.** Parties appealing a decision to the OMB are now limited to relying upon only the information and materials that were before municipal council at the time of its decision, except where the OMB admits new evidence on the appeal in situations where such evidence could not reasonably have been before council when it made its decision. This limitation is not applicable to public bodies. As a result, private applicants are faced with the possibility of having to prepare a wider initial range of materials or reports if it is anticipated that there might be an appeal of the matter.

- **Focus placed on policies at time of decision.** Previously, planning decisions were based on the policies in place at the time an application was made. Now, decisions must be based on the policies in place at the time the actual decision is made. While this ensures that decisions reflect current policies, it could have drastic consequences for applicants whose application is reviewed under a different policy regime than the one that was in place at the time of application.

- **Powers for formation of local appeal bodies.** Municipalities will now be permitted to set up local appeal bodies to hear appeals of matters such as minor variances and severance applications. While municipal councils will have the power to appoint appeal body members, the province will establish the minimum criteria for conducting appeals and the processes to be used. While the formation of local appeal bodies places more decision-making at the municipal level, it may not be financially feasible for many municipalities to establish these tribunals.

- **Municipalities have greater power to create land-use policies.** The legislation provides greater powers to municipalities in terms of regulating a proposed development (both minimum and maximum height and density can be specified), exterior design, and sustainable infrastructure for subdivisions, such as the requirement for walkways, transit passages, and conservation measures.

In addition to the significant changes noted above, there are a number of further, and potentially significant, changes to the *Planning Act* that will affect municipalities and private development interests. These include: increased public participation in the decision making process; earlier minimum update requirements for Official Plans and zoning by-laws; additional matters of provincial interest to consider; restrictions on appellants; employment area restrictions; and amended community improvement plan provisions.

Municipalities should review both the scope of the new *Planning Act* changes and their Official Plan to ensure they're able to maximize the benefits provided by this new legislation. Landowners should review the changes to the *Planning Act* to determine the Act's effects on both short and long term development interests.

New regulation extends reach of *Aggregate Resources Act*

As of January 1, 2007, the *Aggregate Resources Act* will be extended to public land in southern Ontario and parts of central and northern Ontario not currently covered by the Act. Most public land in southern Ontario and all Crown land is already regulated.

The province is also increasing the annual fee and minimum royalty rate for aggregate operators. In addition to providing extra revenue for pit and quarry rehabilitation and additional enforcement officers, the additional fees will also provide municipalities with increased funding from aggregate operations.

Bill 130, *Municipal Statute Law Amendment Act*, 2006

This statute affects several others, including the *Municipal Act, 2001*, and the *City of Toronto Act, 2006*. The amendments to the *Municipal Act, 2001* would give municipalities most of the powers and duties that were given to the City of Toronto under the *City of Toronto Act, 2006*. Among the most notable are broad delegation powers, broad permissive powers to pass by-laws, including by-laws respecting business licensing, and broader powers to establish, change and dissolve certain local boards.

The Standing Committee on General Government held public hearings in Toronto in November 2006 to consider Bill 130. In light of this schedule, it is unlikely that the Act will come into force in January 2007, as originally anticipated.

Recognition

- WeirFoulds LLP has once again been ranked as one of Central Canada's Top Ten Mid-Sized Law Firms by *Canadian Lawyer Magazine* (September 2006 issue).
- *The Best Lawyers in Canada* ranked WeirFoulds LLP as the #1 Firm in Canada in Real Estate Law. They define Real Estate law to include commercial real estate, commercial leasing, and municipal, planning and development law.
- WeirFoulds LLP partner Sean Foran was recently named President of the Ontario Expropriation Association, a non-profit association of professionals with an interest in the field of expropriation law and practice.
- Weirfoulds LLP partner George Rust-D'Eye was designated by The Law Society of Upper Canada as a Certified Specialist in Municipal Law, one of the first three certified municipal specialists in the Province of Ontario.
- WeirFoulds LLP partner George Rust-D'Eye was named Director of Canada's first masters degree programme in municipal law by Osgoode Hall Law School, York University. George will also be teaching at the programme, along with WeirFoulds LLP partner Ian Lord.

What We Are About

- WeirFoulds LLP lawyer Chris Tzekas recently presented the annual case law update at the Ontario Expropriation Association Fall Seminar. WeirFoulds LLP lawyer Constance Lanteigne co-authored the paper presented by Chris at the seminar.
- WeirFoulds LLP lawyers Ian Lord and Constance Lanteigne are involved in the first Ontario Municipal Board appeal under the province's recently amended *Heritage Act* provisions concerning the demolition and removal of heritage buildings.
- WeirFoulds LLP was successful in gaining leave to appeal to the Supreme Court of Canada on a municipal issue on behalf of one of the firm's municipality clients dealing with the validity of an interim control by-law. The appeal was heard in Ottawa in mid-November. The Court reserved its decision.

Please visit www.weirfoulds.com to learn more.

Information contained in this publication is strictly of the general nature and readers should not act on the information without seeking specific advice on the particular matters which are of concern to them. WeirFoulds LLP will be pleased to provide additional information on request and to discuss any specific matters. If you are interested in receiving this publication or any other WeirFoulds publication by e-mail, please let us know by sending a message to publications@weirfoulds.com.

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