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GOVERNMENT UPDATE

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Municipalities Could Face Reduced Business Property Assessments

By Jeff Cowan

It took testimony from nine experts, weeks of hearings, and a review of hundreds of exhibits to interpret a statute and determine how income producing properties should be assessed for municipal taxation in Ontario.

The February 22, 2008 Ontario Assessment Review Board decision involving six office tower complexes in downtown Toronto (the "Bank Towers decision") represented the culmination of one of the most lengthy and complex assessment appeals ever determined by the Board or its predecessors.

The decision – which sided predominately with the taxpayers' interpretation of how business property should be valued – could result in a loss of millions of dollars in assessed taxes for the City of Toronto.

The City of Toronto and the Municipal Property Assessment Corporation (MPAC) have sought leave to appeal the decision to the Divisional Court, so a final determination of this case has not yet been made. But the findings of the Board will be of interest to municipalities throughout the province.

FIRST STEP: DETERMINE WHAT HAS TO BE VALUED

At issue in this case was a 1998 amendment to the Assessment Act that required land (including buildings) to be valued at its "current value", defined to mean "the amount of money the fee simple, if unencumbered, would realize if sold at arms-length by a willing seller to a willing buyer."

MPAC argued that it's not enough to value land by reference only to the owner's interest where that land is subject to a lease that creates a tenant's interest of substantial value. It should be the totality of the interests in the title that are used to determine an assessment value.

The Assessment Review Board disagreed. It noted that the 1998 amendments removed the former requirement that land be assessed against tenants to the extent of their occupancy as the basis for business taxes – and it contrasted the Assessment Act definition of land (a physical description including buildings and structures) with that of the Expropriation Act, which specifically defines the interests in land to be valued, including those of tenants.

It further found that leases were legal encumbrances on an owner's fee simple interest, in that they limit an owner's ability to deal with its fee simple estate. The Board also noted that a tenant's lease interest

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in a lease was personal property, which was not subject to assessment.

In the end, the Board found that "fee simple, if unencumbered" did not express a legislative intent to assess all interests, including tenants' "market" interest or value (positive or negative) of its lease contract.

NEXT STEP: DETERMINE HOW TO VALUE

Having determined the legal meaning of the statute, the Assessment Review Board had to decide which of the two competing valuation methodologies presented at the hearing best met this statutory definition.

MPAC proposed a method that replaced current contract rents with current market rents, with standard allowances for vacancy and management expenses and a capitalization rate determined from market sales of comparable properties.

The taxpayers also advocated a method that replaced current contract rents with current market rent. However, the capitalization rate was adjusted slightly upwards (from 8% to 8.75%) to reflect the added costs and risk of acquiring full current market rents for all leaseable areas for the entire property.

The Board accepted the taxpayers' methodology, noting that MPAC's own valuation guidelines provided that the unencumbered fee simple was to be valued "as if the subject space was vacant and available for let".

The Board also settled a number of corollary but important valuation issues, based on the extensive evidence given at the hearing:

- **Market Rents:** The Board found that market rents were to be determined for that of a typical tenant and a typical unit, in this case a tenant occupying one full floor or more. MPAC had used all market rents available in the relevant time frame, including less than full floor leases.

- **Renewal Rents:** While the taxpayers proposed assessing the value based on new leases of full floor tenants and not renewal rents, the Board found that renewals, expansions and "blend and extends" for a full floor or more were part of the market, and should be included in the assessment process.

- **Adjustments to Face Rent**: The Board also determined that face rents should be adjusted to reflect cash inducements, lease takeovers, rent-free periods and lease commissions. It also found that the standardized vacancy allowance should reflect the actual revenue loss incurred and be applied to the estimated potential gross revenue of the property, not the revenue after deduction for non-recoverable operating costs.

- **Parking Income:** The Board determined that parking revenue should reflect monthly charges for unreserved parking spaces only, and that income from transient (daily and hourly) use was not subject to assessment.

- **Tenant Improvements:** There was extensive non-contradicted evidence that new typical tenants attributed no value in exchange to the existing improvements, and the Assessment Review Board determined that the fair market rent was not to be adjusted upwards to reflect any value of tenant improvements. The Board clearly noted however that this finding was restricted to the facts of this case, and that the assessed value in other cases could include the value of tenant improvement.

Based on these established ground rules, the Board asked the parties to determine the appropriate market rents and resultant changed assessments. Both the results of the final assessments – and the status of the leave to appeal application – remain to be determined. Ironically, if the decision stands, the impact on assessment practice should not be significant given fluctuations, capitalization rates and traditional use of full floor leases. □

Toronto Lobbyist Rules – A New Way of Doing Business

By Chris Tzekas

The City of Toronto's computer leasing scandal unfolded nearly a decade ago, but its impact continues to be felt today as the City puts procedures in place to minimize the chances of such a scandal recurring.

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Jeff is one of Canada's most highly regarded administrative law and public law specialists. He is a partner at the firm and a recognized senior civil and public law litigation lawyer with extensive tribunal and appellate court experience. Jeff regularly litigates in matters relating to real property, including development approvals, purchase and sale disputes, lease and contract interpretation, expropriation, valuation, taxation, boundary and ownership issues, land claims by First Nations, and arbitration proceedings, including acting as an arbitrator and mediator. Jeff represented one of the largest bank tower complexes in the case discussed. Contact Jeff at 416.947.5007 or jcowan@weirfoulds.com.

YOU MAY BE A LOBBYIST

If you have dealings with City of Toronto employees, or elected officials and their staff, you must now register as a lobbyist before making any communication on behalf of your clients. The registration requirement applies to a great many professionals who do not consider themselves lobbyists, including lawyers, planners, architects, engineers and many others. It may also apply to in-house lobbyists who are directly employed by organizations who deal with City Hall in the course of their work.

The kinds of communications caught by the by-law are very broad and include any oral, written and electronic communications that relate to a great many areas, including:

- The introduction, development, adoption or repeal of any by-law or other formal decision, policy, program, directive or guideline;
- The approval or denial of any application for a service, grant, planning approval or other licence or permission;
- The awarding of any financial contribution, grant or other financial benefit.

While the by-law is broad in scope, it does contain some key exceptions and some types of communication are excluded from the registration requirement. These exceptions include:

- Communications made in a public forum, such as a deputation at Council or before the Committee of Adjustment;
- Communications with staff assigned to process an application (such as the planner who is processing an application to amend a zoning by-law);
- Communications relating to the submission of a bid as part of a formal procurement process;
- Communications in which you ask for or respond to simple requests for information, materials or directions.

The by-law does not apply to constituents who are communicating with their Councillor about general neighbourhood or public policy issues. It also exempts representatives of municipal, provincial, federal or foreign governments when they are acting in their official capacity, school boards, members of First Nation councils, as well as not-for-profit organizations in most cases.

AN ONGOING REQUIREMENT

Registration is an ongoing requirement and must be undertaken each time lobbying activity on a matter caught by the by-law is about to take place.

While a single registration can cover a series of separate communications on a single subject, the registration must identify each public office holder the lobbyist expects to lobby and the communication methods to be used. If you communicate with a public office holder not listed on your original registration, you must amend your registration to include this person.

The failure to register can result in prosecutions and fines. It might also lead municipal officials to stop communicating, perhaps at a very critical point in the process you have undertaken.

EXPOSURE IS A CONCERN

The lobbyist registry is open to the public and to the media, and clients cannot use solicitor-client or other forms of privilege to skirt these requirements. Not surprisingly, one of the key concerns for those who deal with City Hall is the exposure that the lobbyist registry may bring.

A lobbyist must disclose the client, business or organization that they are working for and the subject matter they are communicating about. This disclosure may also include information about the business' corporate structure, its subsidiaries – and other things normally kept private.

For a client interested in securing a licence, assembling or developing land or doing some other kind of business with the City, this kind of disclosure may not be welcome and could lead to unanticipated competition or unwanted publicity.

Whether the lobbyist registry will address the kinds of problems that were exposed in the MFP inquiry remains uncertain. What is certain is that people who deal with matters caught by the by-law must now engage in a new way of doing business with the City. □

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Major Shift in Law Relating to Bidding and Tendering

By Glenn W. Ackerley

A simple clause in an RFP document excluding liability has the potential to alter the business tendering landscape.

For over 25 years, the law has imposed binding contractual obligations on owners and bidders when a tender goes out – a measure designed to protect the integrity of the bidding process. Now, a recent decision of the British Columbia Court of Appeal has the potential to change that.

The landmark case is ***Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*** ([2007] B.C.J. No. 2558 (B.C.C.A.)), which was released in December of 2007.

Tercon Contractors Ltd. ("Tercon") was one of the bidders for a highway construction proposal run by British Columbia's Ministry of Transportation and Highways ("MOTH"). The Request for Proposal ("RFP") was issued to six companies only, and only those six companies were permitted to bid.

One of the bidders was Brentwood Enterprises Ltd. ("Brentwood"). Brentwood was facing difficulty meeting the requirements of the RFP on its own, and joined forces with Emil Anderson Construction ("EAC") in a 50-50 joint venture. Brentwood wrote to the MOTH prior to the closing of the RFP to tell them of the change and the MOTH did not respond.

Although the MOTH was aware of the proposed joint venture between Brentwood and EAC, they proceeded on the assumption that the joint venture would only be entered into if Brentwood was successful in being awarded the contract. At the conclusion of the evaluation process, the MOTH selected Brentwood as the preferred proponent.

Tercon sued for its lost profits, taking the position that the MOTH should not have awarded the contract to Brentwood because the actual proponent was a joint venture between Brentwood and EAC and that such an entity was not one of the six pre-qualified participants.

THE "EXCLUSION OF LIABILITY" CLAUSE

At trial, the court concluded that the Brentwood proposal was materially non-compliant. The court held that the proposal had really been submitted by a joint venture, which was an ineligible proponent. Brentwood's proposal was not capable of acceptance by the MOTH, and Brentwood should not have been awarded the contract.

Stuck with the finding that they had selected an ineligible bidder, the MOTH relied on the exclusion of liability clause in the RFP documents. The clause stated that:

"Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim."

The MOTH argued that this exclusion clause was a complete defence to Tercon's claim. The trial judge disagreed and held that the wrong committed by the MOTH was so egregious that it was neither fair nor reasonable to enforce the exclusion clause and damages would be awarded.

The British Columbia Court of Appeal overturned this ruling and upheld the exclusion of liability clause. The appellate court held that the words used in the clause were sufficiently clear and unambiguous in covering the wrong in question and the clause therefore exempted the MOTH from liability.

The implications of this decision are far-reaching, with the addition of a few words into their tender documents, owners will be free to behave during the bidding process however they wish, without fear of consequence. We will have to see whether the Supreme Court of Canada takes up the challenge presented by this very interesting decision, and whether it chooses to limit the impact of such exclusion of liability clauses in the future. □

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Glenn Ackerley practises construction law, representing clients from across the construction industry, in all aspects of projects and construction-related disputes. Glenn is regularly consulted about negotiating and preparing construction and consultant contracts.

Appreciating the important role played by alternative dispute resolution, Glenn has trained and gained experience in both mediation and arbitration, acting as counsel, mediator and arbitrator. Contact Glenn at 416.947.5008 or ackerley@weirfoulds.com.