governmentupdate

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Power to delegate far reaching for Ontario municipalities

By Constance Y. Lanteigne

A new era for municipal governments in Ontario was ushered in on January 1, 2007 with the proclamation of Bill 130's major amendments to the *Municipal Act, 2001.*

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Like the *City of Toronto Act* (also in force January 1, 2007), the new amendments to the *Municipal Act, 2001* ("the Act") recognize municipalities as responsible, accountable governments, granting them new and broader powers and more autonomy.

The changes not only provide municipalities with greater flexibility in determining the appropriate mechanisms for delivering municipal services, they also provide municipalities with much wider scope for determining the types of services they can offer to meet community expectations and needs.

Specifically, municipalities now have the power to "provide any service or thing that the municipality considers necessary or advisable for the public." The potential room for new types of municipal services to evolve is huge. For example, a city could provide health-related facilities or even provide health services itself – a potentially attractive option for municipalities looking to attract doctors to their area.

Gone are the prescribed activities needed for municipalities to "foster the economic, social and environmental well being" of their communities. In their place is a single purpose – to provide good government – and a new set of tools to accomplish this.

Delegation powers may change the municipal landscape

Of all the new tools in the municipal toolkit, none are as far reaching as the new rules relating to the delegation of municipal powers.

Under the new Act, municipalities are enabled to delegate many of their powers and duties under the Act or *Planning Act*, including their legislative and quasi-judicial powers, to one or more members of council, a local board, a council committee, or any body of which at least 50% are members of the council or appointed by council.

And for minor matters, municipalities can also delegate legislative and quasi-judicial powers to any individual officer, employee or agent of the City.

While certain core powers cannot be delegated – such as taxation, budgeting, development of official plans, creation of zoning bylaws, and the power to incorporate – the new rules could provide community councils or neighbourhoods with the ability to deal with local issues, and certain municipal employees could be authorized to undertake duties on behalf of council.

There are a number of potential advantages to the delegation of certain powers:

- **Clearer focus:** With some decision-making delegated to other groups, councils will have more time to focus on more strategic issues and directions.
- **Better use of expertise:** Individuals and groups with delegated authority will in many cases be closer to the action and have more specialized expertise to make the right decisions and take appropriate actions.
- **Faster response:** The delegation of authority away from a centralized municipal council may relieve bottlenecks and speed up the decision-making process.

Of course, these are still early days under the amended Act and it remains to be seen how far municipalities will go in exercising these new delegation powers.

With change comes challenge

While municipalities undoubtedly welcome the greater flexibility the amended Act provides, many will face challenges in coming months as governance mechanisms are developed and the limits of their new powers are tested. With municipalities testing broader powers, and the courts and Province both able to set limits, it's clear that much of the tale of the new era of municipal government remains unwritten.

Province can withdraw powers

While the Province has the ability to withdraw municipal powers by regulation, there are some restrictions to this right. First, cabinet must believe it is necessary or desirable to limit the municipal power, taking provincial interests into account. Second, the regulation is valid for a maximum of 18 months, giving the province time to consider whether it needs to permanently remove the power. Third, if no legislation is enacted within 18 months, the regulation is automatically revoked and municipal powers are fully restored.

Clean drinking water: Provincial protection with a municipal impact

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Ontario residents will soon benefit from greater protections for their drinking water, but these protections will come with both responsibilities and changes for municipalities. Here's an overview of what the new *Clean Water Act, 2006* means for Ontario municipalities and the businesses and landowners who reside there.

Source Protection Plan is key

At the heart of Ontario's new *Clean Water Act, 2006* is the requirement that a Source Protection Plan be established for each source protection area in the Province.

Source protection areas generally correspond to the geographic areas of conservation authorities, who, in most cases, are designated as the Protection Authority responsible for the development of Source Protection Plans.

Each Protection Authority must appoint a committee (whose membership will be determined by a regulation yet to be promulgated) to prepare terms of reference for an assessment report that will ultimately form the basis for the Source Protection Plan. The assessment report and Source Protection Plan must be submitted to the Source Protection Authority, and

approved by the Ministry of the Environment. The Act provides landowners and municipalities a limited opportunity to provide submissions to the Source Protection Authority.

The Source Protection Plan must include, among other things:

- policies intended to end existing threats to drinking water and policies intended to prevent future activities from becoming threats to drinking water;
- a list of activities that are prohibited in certain locations;
- a list of activities that are not permitted until a risk assessment has been submitted, a risk management plan developed, and a permit issued;
- a list of locations where a landowner cannot build or change the use of land without a permit.

These requirements will significantly impact some landowners, as they impose restrictions and prohibitions on both existing and future uses and activities that have been identified in the Source Protection Plan as being a significant threat to drinking water.

In addition, the power of municipalities in relation to land use is significantly altered by the Act. For example, the Act:

- requires that existing Official Plans and Zoning By-laws conform to the Source Protection Plan, with the Source Protection Plan prevailing in the event of conflict;
- prohibits municipalities from passing by-laws for any purpose that would conflict with the policies of the Source Protection Plan, or carrying out any public works or undertakings that conflict with these policies;
- requires municipalities to consider the Source Protection Plan policies in making planning decisions.

While municipalities are subject to the limitations and restrictions of the Act, they are also responsible for enforcing it and appointing officers and inspectors to carry out the enforcement. These officials will have wide powers including the power to issues orders to landowners contravening either the Act, Source Protection Plan, or any risk management plan imposed on particular lands to reduce a threat to a drinking water source. Contravention of orders can result in significant monetary penalties.

With the Act providing significant changes to land use planning – and establishing a new framework for the protection of drinking water sources – it's important for municipalities to be clear about the restrictions that apply to them and the new responsibilities that they now carry.

Changes to construction plans? Building permits can be revoked

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In a recent WeirFoulds win, the Ontario Superior Court confirmed that a chief building official can revoke a building permit if the facts on the ground change after the permit is issued, even if the changes don't affect what's built at the end of the day.

Here is what took place. A property owner wanted to increase the height of its building. The town told the owner that if the building was demolished and rebuilt, certain strict requirements would have to be met. The owner therefore applied for and got a permit to renovate the existing building by adding several rows of brick to the tops of the existing walls.

During construction, the walls of the building were demolished. When the chief building official learned that the walls had been demolished, he revoked the building permit on the ground that the information the permit was based on – that the walls would remain standing – was now incorrect. The property owner appealed the chief building official's decision.

The judge concluded that the chief building official had acted correctly in revoking the permit. Since the permit contemplated that the walls would remain standing, once those walls were demolished, the construction authorized by the permit could not be built. It didn't matter that the property owner intended to rebuild the building in exactly the same way as shown on the plans – the owner knew that it had to meet certain requirements if the building was demolished and made a conscious decision to apply for a permit to renovate the existing building. The appeal was dismissed.

The lesson for those applying to municipalities for permits? Make sure the information on your permit application accurately reflects what you intend to do, or you could face the revocation of your permit and a stop to your construction.

415641 Ontario Inc. v. Hardy Bromberg, Chief Building Official of the Corporation of the City of Cambridge and Corporation of the City of Cambridge (February 7, 2007) C-776-05 (Ont. S.C.J.)

Municipal actions. Court reactions.

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With the actions of municipalities having such a direct and wide-ranging impact on the communities they serve, conflicts inevitably occur and court cases result. Here are a few recent cases you may find of interest.

Freeze on redevelopment by City not a taking

The City of Vancouver adopted an official development plan under the Vancouver Charter that designated former railway lands owned by the CPR as a public thoroughfare for transportation and greenways. This froze the redevelopment potential of the site and the CPR sought compensation.

The Supreme Court of Canada held that the City had acted within its powers to freeze the use of the land with a view to preserving it for future development – and did not have to compensate the CPR. The plan did not prevent all reasonable uses of the property and the CPR could still use the land to operate a railway and was not prohibited from leasing the land for uses conforming to the by-law.

Canadian Pacific Railway Company v. Vancouver (City), (Feb. 23, 2006) No. 30374, McLachlin C.J., Bastarache, Binnie, LeBel , Deschamps, Fish and Abella JJ. (S.C.C.)

Naked truth about adult entertainment licensing

The Ontario Court of Appeal ruled that the City of Windsor does not have the power to require people working nude, or partially nude, in adult entertainment parlours to be separately licensed and pay an annual special licence fee of $466.00.

679619 Ontario Limited (Silvers Lounge) v. Windsor (City), 2007 ONCA 7 (January 9, 2007), Ontario Court of Appeal

Reclaiming railway? Build those fences

A municipality bought a stretch of abandoned railway right-of-way, allowing it to be used and developed as a multi-purpose walkway and riding trail. Concerned landowners complained about the lack of fencing dividing their lands from those of the trail – and the nuisances and disruptions caused by motorized vehicles – and attempted to enforce a provision of the *Line Fences Act* that required a municipality buying land formerly used as a railway line to build and maintain fences along the boundaries of the land.

The municipality reacted by enacting a by-law designating the trail as a "highway", thus bringing it within an exception to the municipality's obligation under the *Line Fence Act*. The Ontario Court of Appeal struck down the by-law based on a finding by the lower court that the Township had acted in bad faith and had attempted to avoid responsibility that it knew it had.

Grosvenor et al v. East Luther Grand Valley (Township), 2007 ONCA 55, Ontario Court of Appeal

Trash talk: Garbage may be personal property

The Halifax Regional Municipality decided that all solid waste generated in the Region should stay within municipal boundaries for disposal. The goal was to encourage source separation and reduce the amount of waste product diverted to landfills. The revenue from tipping fees for the landfill site inside the Region accounted for 25% of the Region's solid waste management budget, and the Region also received from the Province $22.00 per ton for every ton of solid waste diverted from disposal.

The Region learned that some haulers were taking waste to landfill sites outside of its boundaries, where tipping fees were substantially lower. In response, the Regional Council enacted a by-law that prohibited the export of solid waste from the Region and required it to be disposed of in the Region. The Court struck down the by-law on the basis of lack of statutory authority, unlawful extraterritorial effect, unlawful municipal purpose, unlawful monopoly, and "quasi-expropriation of personal property". The Court of Appeal has given leave to appeal from this decision. The appeal was heard on May 8, 2007, with judgment reserved.

Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd., [2006] N.S.J. No. 385, Nova Scotia Supreme Court

City can profit from towing services

The City of Abbotsford issued an RFP for the purchase of vehicle tow services for a five-year term. The towing services related to vehicles involved in motor vehicle accidents that needed to be towed off the City's roadways, at rates imposed by the City. An unsuccessful bidder challenged the City's award of an exclusive towing contract to the successful bidder by reason of the fact that the City required, in exchange for the contract, that the towing company enter into a revenue-sharing agreement, as well as provide free towing to the City for its own vehicles.

The Court held that the City had the power to enter into a revenue-sharing agreement, and there was no evidence that the scheme was not for the purposes of good government. The issue of whether or not the municipality ought to raise revenue by extracting a profit-sharing agreement in exchange for an exclusive contract was a matter of policy, and the City's decision was not patently unreasonable.

Jack's Towing Ltd. v. Abbotsford (City), [2007] B.C.J. No. 97, Supreme Court of British Columbia

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