

Case Law Update: City of Toronto v. WJ Holdings

December 20, 2010

By Tiffany Tsun

Appeal Jurisdiction of Ontario Municipal Board Statutory Deadlines

This is an appeal by the City of Toronto (the “City”) from the Ontario Municipal Board’s (the “Board”) order directing the City to issue demolition permits to the Respondents, who owned thirteen buildings located on Bloor Street West. The Respondents wanted to demolish those buildings, and applied for permits to do so in March 2006. No decision had been made by November 2007, and the Respondents filed an appeal with the Board. The issue on appeal at the Divisional Court was whether the Board erred in law in determining that it had jurisdiction to hear the appeal brought by the Respondents.

Under section 3 of the *City of Toronto Act, 1985* (the “Act”), where council has neglected to make a decision within one month after receipt of the demolition application, the applicant “shall” file the appeal within 20 days after the one-month period following receipt of the application has expired. In other words, to appeal from a failure on the City’s part to make a decision, an applicant must file its appeal within 50 days of its application. The City took the position that the Board lacked jurisdiction as the Respondent had not filed their appeal within the statutory deadline, and asserted that the Board lacked jurisdiction to extend the time for bringing a spent appeal.

The Court had to decide whether the word “shall” in section 3 was mandatory or directory. If the word “shall” was mandatory, the breach of the section would result in a “total nullity” of the appeal. If “shall” was determined to be directory, the breach of the provision would have been a mere “irregularity” that could be cured. In determining whether the word “shall” in a statutory provision was mandatory or directory, the Divisional Court applied three factors:

1. The Legislature’s intention in enacting the time limit in question, and specifically, whether the Legislature intended that non-compliance with the time limit was to result in loss of jurisdiction or nullification of the action. The Court is to consider the entire scope of the statute when applying this factor.
2. If the provision intends for a public duty to be performed within a certain time, the provision is more likely to be directory than mandatory.
3. The Court must compare the possible prejudice to the parties that may arise if the provision is interpreted as “mandatory” with the potential prejudice to the parties if the provision is read as “directory”.

In this case, the Divisional Court held that the second factor did not apply, as the provision did not relate to the performance of a public duty. The other two factors supported reading the provision in question as directory rather than mandatory. First, the legislative purpose of the time limit in question is “to facilitate the more efficient administration of the statutory scheme governing demolition permit applications”. The Court noted that, in most cases, it was effectively impossible for the City to process demolition applications within 50 days. It then held that the Legislature could not have intended to force applicants to file appeals to the Board before the City could reasonably be expected to have had time to consider their application. Furthermore, the City would not suffer any prejudice if the time limit provision was interpreted as a directory one. On the other hand, the Respondent could lose their appeal

right if the appeal time limit was interpreted as mandatory.

Accordingly, the Divisional Court found that the use of the word “shall” in section 3 of the Act is directory, not mandatory. It held that the Respondents’ appeal was brought in time, and dismissed the City’s appeal. This decision suggests that in some circumstances, a statutory provision stipulating an appeal deadline that appears mandatory on its face may be a mere guideline for filing such appeals. Courts and tribunals will examine the entire statutory scheme and the legislative intent in determining whether there is jurisdiction to extend the time for bringing an appeal that is not filed within such time line.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035