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The area of “property development” is generally divided into two categories: real estate/ financing and municipal/land use planning. As the latter area is within the particular expertise of the authors, the following update focuses more on matters relating to land use planning and development. Moreover, since the regulation of land use planning is a matter within provincial jurisdiction, the emphasis will be on provincial statutes and decisions. While specific legislation does not have extraprovincial application, nonetheless the general legal principles are relevant to other provinces.

The one exception to exclusive authority over land use planning by the provinces relates to the use of lands by the federal Crown or entities entitled to claim rights of federal paramountcy or interjurisdictional immunity. Such a case was decided this year by the country’s highest court.

British Columbia (Attorney General) v. Lafarge [2007] SCC No. 23

In a unanimous decision, the Supreme Court of Canada (SCC) upheld the decision of the British Columbia Court of Appeal that Vancouver’s zoning and development by-laws were inapplicable to the planned use of the waterfront lands owned by the Vancouver Port Authority (VPA) and used by Lafarge Canada as a cement mixing facility. The SCC stated that the question before it was “whether it can be said that federal jurisdiction over all development on VPA lands within the port area of Vancouver, even non-Crown lands *not* used for shipping and navigation purposes, is ‘absolutely indispensable or necessary’ to the discharge by the VPA of its responsibilities in relation to federal

‘public property’ or ‘shipping and navigation.’”

The SCC ruled that Parliament authorized the VPA and other port authorities like it “to engage as Crown agents in their traditional activities related to shipping, navigation, transportation of passengers and goods, handling of goods” to the extent that these activities are specified in letters patent issued to each port authority. However, port authorities are also authorized on their own behalf to undertake “other activities that are deemed in the letters patent to be necessary to support port operations”. Relying on the doctrine of federal paramountcy over navigation and shipping, the majority of the SCC found that the whole of the Lafarge project on VPA lands was sufficiently integrated into the ship/barge unloading facility to make federal regulation apply to all aspects of it. Accordingly, local municipal by-laws were found to have no force and effect.

Restrictions and Limitations on the Right to Appeal to the Ontario Municipal Board

In January 2007, most of the sections of Bill 51 amending the *Planning Act* came into force. Several of the amendments affect rights to appeal to the Ontario Municipal Board (OMB), requiring property owners to be involved earlier in the planning process, and in a more active capacity, otherwise leaving them with limited opportunity to protect their interests.

a) Restrictions on Appellants

Prior to the amendments introduced by Bill 51, any person or public body was permitted to appeal municipalities’ decisions such as those to adopt or approve official plans, pass zoning by-laws, approve plans of subdivision, impose conditions or change conditions to the approval of plans of subdivision. There

were also no restrictions respecting who may be added as a party to an appeal hearing. Under *Bill 51*, only the applicant, the Minister, public bodies and persons who participated in the planning process (made oral submissions at a public meeting or written submissions to council before the approval authority made its decision) may appeal the above-mentioned decisions. The amendments provide that only these same entities may be added as a party to a hearing of an appeal of an official plan, zoning by-law or a plan of subdivision.

As a result, a person or persons who did not make oral or written submissions to council cannot appeal to the OMB or be a party to a hearing, unless the OMB finds that there are reasonable grounds to add such a person as a party. With respect to the adoption of official plans, the appropriate approval authority may also appeal or be added as a party to the appeal. With respect to plans of subdivision, the municipality in which the land is located or the planning board in whose planning area the land is located may also appeal. In unorganized areas, where the land is not located in a municipality or planning area of a planning board, any person or public body continues to be entitled to appeal.

Provisions of the *Planning Act* which permitted the OMB to dismiss appeals where the appellant did not make oral submissions at a public meeting or did not make written submissions to council have been repealed since they are now redundant.

b) Restrictions on Appeals Respecting: Employment Lands

Bill 51 provides that where the official plan of the municipality contains policies dealing with the removal of land from areas of employment, appeals to the OMB are restricted with respect to the refusal or failure to adopt or approve an

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official plan amendment or zoning by-law amendment that proposes to remove land from such an area of employment, even if other land is proposed to be added. It is now solely the municipal council which decides to either approve or refuse the application and that decision cannot be appealed to the OMB. Further, Bill 51 provisions require municipalities to revise their official plan at least every five years to ensure conformity with provincial policy and to address a number of specific policies, including those applying to employment lands and the removal of land from areas of employment. This requirement provides the opportunity for potential appeals respecting employment uses but only on a sporadic or intermittent basis.

c) Repeat Offenders

Bill 51 provides the OMB with an additional ability to dismiss matters without holding a hearing relating to appeals of official plans, zoning by-laws, minor variances, Minister's zoning orders plans of subdivision and consents to sever. Where the appellant has persistently and without reasonable grounds commenced proceedings before the OMB that constitute an abuse of process, the matter may be dismissed upon a motion or at the OMB's initiative.

d) Substantially Different Applications

Another amendment provides that appeals pertaining to official plans, zoning by-laws and plans of subdivision may now be dismissed by the OMB on its own initiative or on a motion brought by the Minister, a municipality or an approval authority, where the application to which an appeal relates is "substantially different" from the application that was before council at the time of council's decision. This is different from situations where the OMB finds that new evidence,

information or material is being introduced at the OMB hearing.

e) Time Limits for Filing Appeals

Finally, appeals of refusals of official plan amendments and zoning by-law amendments must now be filed within 20 days of the notice of refusal. Previously, there was no time limit after council's refusal by which appeals needed to be filed.

Bill 130, *Municipal Statute Law Amendment Act*

Bill 130, which came into force in January 2007, implemented amendments to the *Municipal Act*, 2001, providing Ontario municipalities with significant authority and flexibility in areas such as services, governance, and regulation. Bill 130 gave virtually all of the same authority to municipalities across Ontario that the *City of Toronto Act, 2006* gave Toronto. It provided that the *Municipal Act* no longer applied to the City of Toronto or a local board of the City. Without going into detail, some of the changes worth mentioning include the ability of municipalities to delegate certain powers and duties, establish corporations, and charge reasonable costs associated with electrical and gas installations in municipal roadways.

Rental Housing Demolition and Conversion

As an example of exercising its newly acquired powers, the City of Toronto has taken two initiatives which will make it virtually impossible to convert existing rental buildings to condominiums or to demolish them as part of the redevelopment of the site without the support of City Council.

Even prior to the new legislation, appeals relating to the rental housing policies in the new City of Toronto Official Plan were settled and the final

policies came into force and effect. These policies prohibit the demolition or conversion of any building containing rental housing units, unless one of the following four categories applies:

1. The building contains less than six rental housing units;
2. All of the rental housing units have rents that exceed mid-range rents at the time of application (the City considers mid-range rents to be rents which are below 1.5 times the Canadian Mortgage and Housing Corporation average rents);
3. As part of the redevelopment of the site, the landowner agrees to provide full replacement, to cap the rents for the replacement units for a period of not less than 10 years to the rent at first occupancy (which will only be allowed to be increased by an amount no more than the Provincial Rent Increase Guideline), and the provision of an acceptable tenant relocation and assistance plan; or
4. In Council's opinion, the supply and availability of rental housing in the City has returned to a healthy state and is able to meet the housing requirements of current and future residents.

Bill 53, gave the City of Toronto the right to pass by-laws pursuant to the *City of Toronto Act, 2006* prohibiting and regulating demolition and conversion of residential rental properties that contain six or more dwelling units. As noted previously, under Bill 130, a similar right was given to all Ontario municipalities. In July 2007, the City of Toronto adopted a by-law to prohibit and regulate the demolition or conversion of such properties. The provisions set out in this new by-law are essentially the same as the policies contained in the City of Toronto Official Plan. However, under the new regime the City's refusal to issue a permit

is not appealable to the OMB or any other third-party tribunal. Another key change is that landowners can now be charged and prosecuted for any contravention of this by-law. Landowners of rental property and all potential purchasers of rental property should be aware of these policies and provisions.

Real Estate Fraud Update

Bill 152, which among other things clarifies the law in Ontario respecting real estate fraud by amending the *Land Registration Reform Act*, the *Land Titles Act* and the *Registry Act*, became law in December 2006. The amendments that provide the most clarity pertain to the entrenchment of the concept of deferred indefeasibility as law in Ontario – the concept that a fraudulent instrument itself is not effective to create, transfer, charge or discharge any interest in land, but instruments registered subsequent to and in reliance on a fraudulent instrument are valid. The Ontario Court of Appeal in *Lawrence v. Wright* (2007), 84 O.R. (3d) 94, re-affirmed deferred indefeasibility as the status quo in Ontario rejecting the immediate indefeasibility theory adopted in *Household Realty Corp. Ltd. v. Liu* (2005), 43 R.P.R. (4th) 1. The court stated that deferred indefeasibility imposes the risk of title loss on the new party making the purchase or advancing the loan.

Pursuant to Bill 152 amendments to the *Land Registration Reform Act*, the Director of Land Registration now has the ability to immediately suspend the authorization of a lawyer or other electronic document submitter within the electronic land registration database, if in the Director's discretion, there are reasonable grounds to believe that the user submitted an electronic document that was not authorized by the registered owner of the property. Also, the Director may have a notice of delivery issued to the registered owner of a property when an

electronic transfer or charge is submitted to the electronic land registration database.

An amendment to the *Land Titles Act* allows the Director of Titles to enter a caution in the register to prevent any dealing with specific land, if it appears that a registered instrument may be fraudulent. There are also significant changes to the *Land Titles Act* with respect to the operation of the Land Titles Assurance Fund. The Fund has been made more accessible with the removal of the legislative requirement that the person applying to the fund must exhaust other means of recovery before making a claim for compensation. The amendments are explicit in the requirement that any person making a claim to the Fund must demonstrate due diligence as specified by the Director. A further amendment regarding the Fund states that subrogated claims or claims by the insurers will not be paid.

Brownfields and Records of Site Condition

Recognizing the need to control sprawling development and the importance of utilizing old industrial lands in urban areas where infrastructure is in place, many provinces have embraced brownfield development but have struggled with the implementation of policies. In Ontario, Bill 187 received Royal Assent in May 2007 bringing a number of changes to the Record of Site Condition (RSC) regime under the *Environmental Protection Act* and the *Ontario Water Resources Act* affecting brownfields. The amendments include protection for municipalities and conservation authorities from liability pertaining to inaccuracies in an RSC where a building permit is issued, and amendments to the “re-opener” provisions including: its expansion to include false or misleading certifications in RSCs,

clarification for “re-openers” for soil management violations and when changing to a different use than that specified in an RSC. As well, there is a limitation regarding existing “re-openers” such that if contamination moves offsite as a result of a contravention of a certificate of property use, an order, the soil management or disposal regulations, then only the person responsible for the contravention loses the RSC protection. Also worth noting is the *Tax Increment Financing Act*, a fiscal tool for municipalities, which received Royal Assent in December 2006. It allows municipalities to use property tax to encourage developers and private sector partners to develop in areas where development is restrained by the presence of local economic factors or underutilized, contaminated and/or abandoned lands.

Addressing Concerns Respecting: Scarcity of Water

The issue of water scarcity is of growing concern to developers in Alberta. As part of a recent Water Management Plan, the Alberta government imposed a moratorium and will no longer accept new water license applications from users wanting to draw water from most rivers in southern Alberta. While provisions of the *Water Act* relating to transfer of existing allocations have been in place for some time, scarcity and recent policy decisions have only recently brought these provisions into use. It was not until the implementation of the moratorium that criteria for such transfers were finally set out and commercial transfer of water entitlements became a reality.

Recent Court Cases

There are many recent court cases applicable to real property of interest to lawyers in various jurisdictions. One such case is *York Region Vacant Land Condominium Corporation No. 968 v.*

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Schickendanz Bros. Ltd., (2006), 50 R.P.R. (4th) 79, in which two of nine owners of parcels of tied land in a common elements condominium corporation sued the developer and the condominium corporation claiming that the expense allocation formula, which “front end loaded” most of the construction and early maintenance costs of the road onto them and required them to continue to carry a major part of the common expenses, was unfairly prejudicial, oppressive and contrary to the provisions of the *Condominium Act*. The Ontario Court of Appeal found that there was no obligation under the *Condominium Act* to structure a common elements condominium corporation to allocate all of the common area expenses proportionately among the owners. The court stated that so long as the formula was precisely drafted, properly disclosed to prospective buyers before they purchased and the notice and disclosure protocols set forth by the *Condominium Act* were duly observed, the developer was not required to justify or defend the reasonableness of the allocation formula.

Ridgely v. Nielson (2006), 53 R.P.R. (4th) 1, serves as a drafting warning to the bar. The purchaser applied to the Ontario Superior Court for an order entitling him to rescind an agreement of purchase and sale and for the return of the deposit. The purchaser had discovered that the property was subject to a 20-foot wide subsurface storm and sanitary sewer easement covering most of the rear garden and 26% of the property. The purchaser argued that the agreement did not require a prospective purchaser to accept title to property subject to any encumbrances unless they were permitted encumbrances and this easement was not a permitted encumbrance. He testified that he planned to build a pool on the property and possibly an extension to the house, both of which were not possible with the sewer easement occupying such a large portion of the

backyard. The agreement did contain a clause (similar to the one found in the Toronto Real Estate Board standard form) stating that “provided that the title to the property is good and free from all registered restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this Agreement and save and except for... (d) any easements for drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines or other services which do not materially affect the present use of the property.” The vendor argued that as a matter of interpretation, the present use qualification only modified or applied to “any easements for... other services” and not the remaining enumerated easements. The court, in granting the application for a declaration that the requisitions were valid and that the purchaser was entitled to rescind the agreement because the easement materially affected the present use of the property, rejected this argument stating that the words “which do not materially affect the present use of the property” apply to each of the enumerated forms of easements as well as to “other services”. The court viewed the purchaser’s plans to install a pool and an addition as a present and not a future use, indicating that the plans were to be reasonably expected. Further, the yard was an integral part of the enjoyment of the residential property and the sewer easement interfered with such enjoyment. Commercial agreements of purchase and sale are also affected by any expansion of what constitutes a present use because present use is often referred to when permitted encumbrances are defined in commercial transactions.

In *Syvan Developments Ltd. v. Ontario (Ministry of Government Services)* (2006), 49 R.P.R. (4th) 161, an agreement of purchase and sale for a commercial property erroneously described the property as having the benefit of the right-of-way over abutting lands. The

right-of-way had been expropriated by the municipality but when the property was converted from the Land Registry System to Land Titles Conversion Qualified, the expropriation by-law and plan were not included in the parcel register. Therefore, the legal description for the property referred to it as a valid appurtenance. The solicitor for the purchaser ordered a title search of the property but did not search the abutting properties except to ensure compliance with the *Planning Act*. Further, the solicitor did not inspect the servient tenement but asked his client to do so. The president of the property developer (an experienced commercial real estate developer) inspected the property, including the servient tenement over which the right-of-way would run. After closing, the parcel register for the dominant tenement was amended to reflect the expropriation. The developer claimed the appraised value of the loss of the right-of-way from his title insurer and the insurer in turn sought a subrogated claim through the Land Titles Assurance Fund. The insurer’s claim was dismissed on the ground that the developer’s own negligence had contributed substantially to the loss suffered. The Ontario Superior Court agreed stating that the developer’s actions fell below the standard practice of a prudent developer and, therefore, the developer could not claim compensation from the Fund, as such the insurer did not have a right to compensation either. Although the court avoided making any determination respecting the solicitor’s negligence, the risk practitioners take ignoring the servient tenement when searching title was stressed in *obiter*.

The authors or any of their colleagues in the real estate department of Fraser Milner Casgrain LLP would be pleased to discuss anything raised in this article or any other matters relating to property development issues. [n](#)

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