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LoGo NoteBook

… a newsletter for local governments

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Improper In Camera Meeting May Jeopardize Bylaw

A recent decision of the Supreme Court of Canada has raised a disturbing threat to the validity of bylaws adopted after consideration of the bylaws, or aspects of the bylaws, at an in camera meeting.

In RSJ Holdings v. London (City), (2007) 36 MPLR 1, an interim control bylaw adopted by the Council of the City of London, Ontario was declared null and void on the basis that the bylaw had been the subject of two meetings held in camera.

At the early stages in the process a planning report and proposed bylaw had been considered at an in camera session. At the in camera portion of the meeting, the City's Planning Committee considered a draft interim control bylaw to freeze all development in the area. At a second meeting a week later, the Committee of the Whole considered a planning report and a solicitor's report and made two recommendations. First, it suggested that a land use study be undertaken and secondly, that Council approve the interim control bylaw. When the Committee of the Whole meeting was terminated, City Council resumed its regular open session and in a matter of eight minutes, without debate or discussion, introduced, read and passed a total of thirty-two bylaws.

In Ontario, municipalities have special powers to enact interim control bylaws that place a one-year freeze or moratorium on land development, to give the municipalities time to consider a broader planning strategy for the land or area subject to the bylaw. Interim control bylaws in Ontario are a powerful planning tool that can be used to move swiftly to protect areas without advance notice or public hearings. To that extent they are distinct from typical land use control bylaws, both in British Columbia and Ontario.

Section 239(1) of the Municipal Act (Ontario) states:

> *Meetings open to public*
>
> *239. (1) Except as provided in this section, all meetings shall be open to the public.*
>
> *Exceptions*
>
> *(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,*
>
> *(a) the security of the property of the municipality or local board;*
>
> *(b) personal matters about an identifiable individual, including municipal or local board employees;*
>
> *(c) a proposed or pending acquisition or disposition of land by the municipality or local board;*
>
> *(d) labour relations or employee negotiations;*

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> *(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;*
>
> *(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;*
>
> *(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act."*

This is very similar wording to section 89 of the Community Charter (British Columbia).

The City had considered the interim control bylaw at an in camera meeting at which its solicitor was present, and argued that, as it was entitled to consider the matter in camera, the bylaw should not be invalidated. Apparently, the council believed the solicitor's presence at the in camera meeting brought the meeting within section 239(2)(f).

The Supreme Court of Canada disagreed. It noted that in the past, in Ontario, as in British Columbia, a council meeting could be held in camera at the discretion of council. Now the legislation in both provinces contains specific rules for holding in camera meetings.

In its interpretation of the statutory provisions regarding in camera meetings the Court quoted at length from the 1984 Ontario Report of the Provincial/Municipal Working Committee on Open Meetings and Access to information, which led to the change in the approach to in camera meetings:

> *Some municipal councils employ lengthy, in camera special and committee meetings to discuss matters under debate and then ratify their decision in full council in a few minutes, with minimal discussion.*

The Supreme Court of Canada agreed with the Ontario Court of Appeal that this is what the Council of the City of London had done in this case.

The Court held that the developer/landowner along with all residents of London had the right to a transparent and open process, and that the City had made a procedural error in considering the issue in camera. The Court does not go so far as to say that it would be improper to receive a solicitor's opinion in camera, but in this case the in camera discussion seems to have ranged beyond the scope of the solicitor's advice.

This decision serves as a reminder for local governments to be very cautious about the use of in camera meetings to hold discussions regarding matters that cannot properly be the subject of closed meetings.

Colin Stewart

Avoid Liability – Revise Your Tendering Documents Now!

What You Should Do Now

You should revise your RFP and tendering documents immediately to include the following clause:

> *Except as expressly and specifically permitted in these Instructions to [Proponents or Tenderers], no [Proponent or Tenderer] shall have any claim for any compensation of any kind whatsoever, as a result of participating in the [RFP or tender], and by submitting a [proposal or bid] each [proponent or tenderer] shall be deemed to have agreed that it has no claim.*

You may include this clause as a separate part of your tender documentation under the heading NO CLAIM FOR COMPENSATION.

Why You Should Do This

We make this recommendation because the BC Court of Appeal has just recently reviewed and approved of this clause in the case of Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways), December 3, 2007. The Court found this exclusion clause to be clear and unambiguous and to effectively bar any claim for compensation or damages.

In the Tercon case, the trial judge had found that the RFP process was in fact a tendering process. The trial judge held that Tercon's bid was compliant, whereas the contractor who was awarded the contract by the Province had a non-compliant bid. The trial judge ordered the Province to pay 3.3 million dollars in damages to Tercon. On appeal, the BC Court of Appeal allowed the Province's appeal and found it was not necessary to analyze whether the bids were compliant or non-compliant since the exclusion clause providing that no compensation would be allowed was a complete answer to Tercon's lawsuit.

The Importance of This Decision

This case is extremely important as it appears to indicate that the highest Court in the province has finally realized that you, as the owner of a project, are entitled to define the rules of the tendering process in your contract documentation.

Just a few years ago, the justices on the BC Court of Appeal appeared to be split on the correctness of this proposition. In two different decisions in 2004, two different panels of the Court of Appeal reached contradictory conclusions on that very same issue. In Graham Industrial Services v. Greater Vancouver Water District and in Kinetic Construction Ltd. v. Regional District of Comox-Strathcona, the Court was asked to decide whether an owner could include a broadly worded discretion clause to allow it to accept bids which were non-compliant and which, without the discretion clause, would have been ineligible for the contract award. In answering the question whether the owner could define the rules for the tendering process in the contract documentation, the Court gave two different answers: in Graham, it did not allow the owner to exercise the discretion which it had reserved to itself and, several months later in the Kinetic case, it reached the opposite conclusion to permit the owner to do so.

Now in the Tercon decision, the Court of Appeal has agreed that owners can draft broadly worded clauses for their own protection. It will be up to the construction industry and not the judges of the courts to determine whether exclusion clauses, discretion clauses or any other clauses for the owner's protection are acceptable to the industry. The Court stated:

The answer lies not in judicial intervention in commercial dealings like this but in the industry's response to all-encompassing exclusion clauses. If the major contractors refuse to bid on highway jobs because of the damage to the tendering process, the

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Ministry's approach may change. Or, the industry may be prepared to accept that the Ministry wants to avoid suits for contract A violations, and the contractors will continue to bid in the hope that the Ministry acts in good faith."

Guy McDannold

New Elector Approval Exemption – Interests In Land

In November, 2007, the B.C. Legislature brought into force the Approval of the Electors Exemption Regulation, B.C. Reg. No. 358/2007 (the "New Regulation"), which grants municipalities and regional districts the ability to enter into certain commitments under agreements relating to land, or an interest in land, without the necessity of obtaining the approval of the electors. The exemption under the New Regulation applies to a commitment that the local government maintain land, or that the local government indemnify the grantor of the interest or right in land being acquired by the local government, or both. Such commitments might typically arise in a lease or a statutory right of way.

Commitments to maintain land, or to indemnify the owner of land against loss or damage, often involve capital expenditures, or at least the possibility of capital expenditures that would exceed the five-year threshold for municipalities under Section 175(2) of the Community Charter, and the "approval-free liability zone" under Section 7 of the Municipal Liabilities Regulation, B.C. Reg. 254/2004 and, for regional districts, section 819 of the Local Government Act and section 2 of the Regional District Liabilities Regulation, B.C. Reg. 261/2004.

However, the exact nature and extent of the expenditures involved is usually impossible to predict in advance, leaving the cautious local government no choice but to seek approval of the electors before committing to a potential expenditure that may or may not ever arise. To make matters worse, in seeking approval of the electors the local government may not be able to put forward more than a vague estimate of liability for them to consider.

The New Regulation provides some welcome clarity to the issue, removing not only the requirement for approval of the electors, but also doing away with the necessity of working through calculations to determine if other statutory exemptions apply. It does not matter whether the term of an agreement is more or less than five years, whether the commitment(s) under that agreement are of a capital nature or not, or even how much they might cost the local government. As long as those commitments are in relation to land or an interest in land acquired by the local government, and involve either maintaining the land or indemnifying the owner of the land, or both, then they are exempt from approval of the electors.

Many other liabilities remain subject to the elector approval requirements of the Community Charter, and whenever in doubt a local government should seek legal advice.

Michael Hargraves

Subdivision Requirements and the Enforcement of Long Term Leases

Section 73(1) of the Land Title Act provides that in order to lease a part of a parcel of land for a term exceeding three years, the land to be leased must be subdivided in compliance with the requirements of Part 7 of the Act.

In a 1996 decision (International Paper Industries Ltd. v Top Line Industries Inc.) the British Columbia Court of Appeal ruled that because of this statutory provision, a lease of a part of a parcel of land for a term in excess of three years was void and unenforceable, even between the original parties to the lease, unless the subdivision requirements of the Land Title Act were complied with. In rendering that decision, the Court noted that one of the fundamental purposes behind the subdivision requirements of the Land Title Act was to ensure that municipal authorities maintained their control over subdivision, as a means of enforcing zoning and land development regulations, as well as ensuring the protection of the public interest in subdivision matters.

It should be noted that in the Top Line case, the parties had prepared their own lease and were unaware of the subdivision requirements of the Land Title Act.

Over ten years later, the Legislature has responded to the Top Line decision by adding the following section 73.1 to the Land Title Act:

> *73.1 (1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that:*
>
> *(a) the lease or agreement for lease does not comply with this Part, or*
>
> *(b) an application for the registration of the lease or agreement for lease may be refused or rejected.*
>
> *(2) This section does not apply to an airport lease, as defined in section 41 of the Municipalities Enabling and Validating Act (No. 2).*

Property owners should not view section 73.1 as an invitation to deliberately avoid the subdivision requirements of the Land Title Act. Section 73(1) continues to prohibit the subdivision of land into smaller parcels for the purpose of leasing it, or agreeing to lease it, for life or for a term exceeding three years, except in accordance with Part 7 of the Land Title Act. Property owners who enter into such lease arrangements without following the subdivision requirements of the Land Title Act may find themselves in violation of local government zoning regulations (regulations regarding minimum parcel size, as one example), and as a further result may be unable to obtain other forms of local government approvals, such as building permits.

Under the Land Title Act, the failure to comply with Part 7 subdivision requirements does not give rise to an “offence” that is subject to prosecution. After the Top Line decision was rendered, the significant consequence for parties that failed to follow the subdivision requirements of the Land Title Act was that their lease or agreement to lease was unenforceable. Now, section 73.1 of the Land Title Act seems to avoid that consequence.

However, the integrity of the land title system, and its relationship with local government land use regulations, continues to depend on the subdivision requirements of the Land Title Act being followed in a consistent manner. It remains to be seen what type of remedy the courts will grant to protect the interests of parties who have not complied with the subdivision requirements of the legislation, especially if the lease that the court is asked to enforce runs afoul of local government subdivision or land use regulations.

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In summary, section 73.1 is a welcome amendment to the Land Title Act, as it allows a party to a lease that does not comply with the subdivision requirements of the legislation to seek a remedy. However, it should not be seen as an invitation to knowingly disregard those requirements. Landowners and tenants who desire certainty should continue to comply with the subdivision requirements of Part 7.

Peter Johnson

Look That Gift Horse in the Mouth

Recently, we were asked to review a contract that would accompany a gift to a local government client, whose astute chief administrative officer recognized that there were potential pitfalls hiding between the lines of the contract.

The contract obliged the recipient to place "all risks replacement cost coverage insurance" on the item, at the municipality's expense. The municipality's current deductible is more than the cost of replacing the item, meaning that the replacement cost would be paid for out of the municipality's own funds.

The insurance requirement and other clauses in the contract oblige the municipality to continue to contract with the manufacturer to maintain and repair the item after the 2 year manufacturer's warranty expires.

The term of the contract is open ended and there is no provision whereby the municipality may return or dispose of the item if it simply wears out, which is not an insurable factor. Nor is there any specific provision that allows the municipality to replace the item with another brand or decide not to replace it at all for any reason.

The replacement cost insurance provision may have the effect of obliging the municipality to insure and replace the item ad infinitum with the same manufacturer's product, if it is damaged or lost within the coverage provided under the policy.

This gift comes with strings attached, although the strings may not be intentional. Even though the contract appears to be simple and straightforward, look carefully at it. Remember that some roads are paved with good intentions but may lead to an undesirable place.

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