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Blaneys on Building

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This newsletter is designed to highlight new issues of importance to the development and construction industry. We hope you will find it interesting, and welcome your comments.

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CITY OF TORONTO EMPLOYMENT LANDS REVIEW: TO CONVERT OR NOT TO CONVERT

Marc P. Kemerer

A key piece of the City of Toronto's current review of its Official Plan concerns the City's Employment Areas policies. This is particularly important, as an owner or developer who wants to convert employment lands to another use must, under both provincial and City policies, do so in the context of a Municipal Comprehensive Review.

The City commissioned a group of outside consultants to carry out a comprehensive study of employment uses. That study determined that the City should see a large growth in both retail and office space and a more modest growth in industrial uses. This growth however must be accommodated on a finite land base. Practically speaking, this means that there are limited opportunities for conversion.

City Planning staff have, on the basis of the study, proposed a policy direction that includes:

- preserving "core" lands for industrial uses, principally by protecting such uses against incompatible (sensitive) or competing uses;
- differentiating between Employment Areas to permit, for example, commercial, retail and major retail uses in some of these areas; and
- promoting office uses in downtown areas and along intensification and transit corridors and examining the ratio of employment to residential uses in mixed use areas to allow for the intensification of office uses.

Employment Areas are proposed to be designated as one of: Core Employment Areas, General Employment Areas, Retail Employment Areas or Large-Scale Stand Alone Retail Stores, Power Centres and Employment Areas.

As the Official Plan review is a Municipal Comprehensive Review, City staff are facing a deluge of conversion applications and requests. Should owners and developers not submit such applications prior to the adoption of the proposed Employment Area policies, they will face a difficult time getting the City to process such applications. Indeed, City Council recently refused a conversion proposal in the City's west end and subsequently took the position that the refusal could not be appealed to the OMB. The only appeal route according to City staff is through the current Municipal Comprehensive Review. This matter of interpretation will now go to the Ontario Municipal Board for a ruling.

This is a complicated and evolving area of planning law. If you are a land owner or developer, we strongly recommend that you review, as soon as possible, the City's current mapping of the pro-

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"If you are a land owner or developer of lands, we strongly recommend that you review, as soon as possible, the City's current mapping of the proposed Employment Areas to understand if and/or how your lands are affected."

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posed Employment Areas to understand if and/or how your lands are affected. It is possible that you may receive additional permissions; it is also possible that your plans for development may be further constrained under the proposed new regime, particularly if your lands are designated as mixed use. Finally, if you are interested in converting your lands to another use this is the time to act.

We would be pleased to assist you with such a review and submission. ■

THE CONSTRUCTION RAID SEASON IS UPON US!

Mark E. Geiger

Background

As most unionized employers in the construction industry know, the raid season began on February 1st. For those less familiar with this phenomena some explanation might be necessary.

Industrial/commercial sector as well as residential sector construction employers in the Greater Toronto Area, per s. 150.1 of the *Ontario Labour Relations Act* (OLRA), have, by law, collective agreements which run for three years, with the next expiry date being April 30, 2013. The OLRA provides for a three month "open period" at the end of each collective agreement term. During this open period, employees may apply to have the union de-certified. This occurs occasionally but not very often. More importantly, during the same period, rival unions can apply to represent employees who are currently represented by another union. This most commonly occurs in the residential sector where there are a number of unions that compete to represent employees in different categories. Local 51 of the Sheet Metal Workers, Local 183 of the Labourers, Local 27 of the Carpenters as well as CLAC are amongst the most active in attempting to displace each other in representing employees with various construction employers.

Raiding Rules

In order for one union to displace another it must bring an application for certification. In the construction industry applications for certification use what is commonly referred to as the "snapshot" approach. In other words, a snapshot is taken of the employees actually at work in the bargaining unit doing bargaining unit work on the date of the application. Thus a union which wished to "raid" another union can choose a day when it knows that the majority of workers actually working are members of the union that is seeking certification.

Often these raids take place on a weekend when a majority of the regular workers are not there. Notwithstanding this fact, the board will only count those individuals who were actually at work on the date of the application and performing work in the bargaining unit. That means they have to be performing work which is actually covered by the terms of the collective agreement with the union which is being raided.

In the past many of these applications took months if not years to decide. That's because either the raiding union or the incumbent union would submit very generalized objections to individuals either included on the list or not included on the list. They would simply indicate that a particular individual was not at work on the day of

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the application, not an employee, and/or not performing bargaining unit work on the date of the application. They would not be required to provide any more details. The issue as to whether or not particular employees were or were not employees or were or were not at work on the day of the application, or whether they were employees or independent contractors would be determined by a hearing conducted by the Ontario Labour Relations Board (the OLRB). Often this would involve very lengthy and protracted hearings.

The new Chair of the Labour Relations Board, Bernard Fishbein, has made it clear that he intends to have these applications dealt with in a much more expeditious fashion. This new approach will create some significant administrative problems for construction employers who may be caught in the battle between two rival unions. Here are some basic points for employers to be aware of:

1. The open season commences on February 1st, 2013 and runs until April 30th, 2013. A union seeking to raid another can make an application on any day between February 1st and April 30th when some employees of a particular contractor are actually working;
2. Applications are brought on a particular date and must be delivered to the construction company on the day of the application. It is therefore crucial that someone in your company is assigned the duty of carefully monitoring whether or not any documents have been received, whether from a union or from the OLRB during this period. Applications for certification can be delivered by hand, by fax or by Canada Post Priority Courier Service;
3. The employer has only two days following the service of this application to respond. It is absolutely imperative that the construction company respond appropriately within that two day period. In order to properly respond, the construction company must have detailed information concerning the individuals who are actually at work, the projects on which they are working, and the location and sector of each project. You will also need to know whether or not the employees that were working were doing work which is actually covered by the collective agreement. For this reason it is especially important during the period from February 1st to April 30th, that construction companies keep good records as to those individuals who are actually at work and the work they are performing.
4. A construction company that is the subject of a raid will likely require legal assistance in properly responding to the application. If you are the subject of such a raid, contact your legal advisor immediately. To properly assist you, your lawyer needs all relevant information in order to respond properly within the two days permitted. That means your legal counsel needs to have all of the information so that he or she can prepare the forms required to respond and get them to the Board within the two day period. Failure to properly meet these obligations may have a significant effect on whether or not the rival union is successful in its application. Often you will only be aware that a raid is taking place or has taken place when you receive the application.

"It is important that the company and management be seen as neutral, so engaging in any discussions other than voting logistics at this time with bargaining unit members is not advised."

5. There are posting requirements. Specifically, the OLRB will send a confirmation of filing of Application for Certification. Once received, copies must be posted and confirmation of such posting has to be sent to the OLRB.
6. It is important that the company and management be seen as neutral, so engaging in any discussions other than voting logistics at this time with bargaining unit members is not advised.

The Issues

The issues to be determined in an application of this sort generally involve the following four questions:

1. Was the individual performing bargaining work on the date of the application?
2. Was the work that was being performed within the geographic area defined in the bargaining unit description in the collective agreement?
3. Was the employee performing the work an employee within the meaning of the OLRA or was he or she a manager, supervisor or independent contractor?
4. Is the individual an employee of some other entity, such as a crew leader or sub-contractor?

This last question is an issue that often arises in the residential sector where "crews" are often used to perform the work and the question that arises is whether or not the individual is an employee of the construction company or of the crew leader.

The Process

To speed up the process and to put the OLRB's resources to better use, the Board has now instituted a new process specifically for raids during the open period. This new process requires each party (the employer is a party) to identify in writing no later than the conclusion of balloting on the day of the representation vote, those individuals on the list that it disputes. Since the employer is responsible for preparation of the initial list, it can be either the incumbent union or the raiding union that disputes an individual on that list. It is also quite likely that one or other of the unions will assert that there are missing individuals from the employer's list that should be on the list. Submissions with respect to these issues must be made within 10 days after the vote has occurred.

Disputes as to whether or not a particular individual should or should not be on the list are not normally determined before the vote. Instead the Labour Relations Office conducting the vote will allow disputed individuals to actually vote, but will then segregate their ballots in separate envelopes. Their votes will only be counted when the issue as to whether or not they are properly on the list is resolved, wither by agreement amongst the parties, or by a determination by the Board.

Under the Board's new rules, parties making submissions about names to be included/removed are now required to provide significantly more information. It will no longer be sufficient to merely claim the individual is not an employee, not at work on the day of the application and/or not performing bargaining unit work. Significantly more details will be required.

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"[It] is very difficult for a developer purchasing development lands to obtain a legal remedy when the vendor refuses to complete the sale."

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He has experience with the corporate oppression remedy and in handling partnership disputes. He acts for creditors, debtors, receivers and trustees in insolvency proceedings and all other aspects of debtor-creditor and banking law. He has extensive experience in obtaining extraordinary remedies, including obtaining certificates of pending litigation and Mareva injunctions to freeze land and other assets to ensure his clients will collect on their judgments, and Anton Piller orders that preserve evidence by authorizing the private search of premises and seizure of documents from a defendant.

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When dealing with issues concerning whether individuals are properly on the list or not the Board will now review the submissions of the parties to determine whether or not there are sufficient facts about the disputed person or other circumstances so that the Board can make the determination with a hearing. The Board may also decide the dispute on the basis of the materials filed and not hold a hearing at all. Unlike applications in the past, the Board must now be persuaded that there is a need for a hearing. The Board has made it clear that it can and will, in appropriate cases, decide these issues based solely on the written submissions and the documentary evidence provided by the parties in advance of the scheduled expedited hearing.

The Board has also removed the requirements for regional certification meetings for all raid applications in favour of an obligation on all parties involved to provide relevant documents to the other parties within five days of receiving a request for same. If a party objects to producing these documents, it must set out its reasons in writing and provide those reasons to the other parties and to the Board within that five day limitation period.

Expedited hearings has now replaced the lengthy hearing process. Generally speaking, an expedited hearing will be held on Thursday or Friday, eight weeks after the date of the Board's initial decision on the matter in question. There will not be case management hearing. Instead, if the panel of the Board that reviews the file decides there are issues to be litigated at an oral hearing, that panel will set out what the issues are and may also determine the manner in which the hearing is to take place. All parties are expected to attend the expedited hearing ready to proceed on the issues identified by the review panel, and in the manner set out by that panel. Any party that asserts a particular individual should be on the list or in the bargaining unit has the responsibility to ensure that individual's attendance at the hearing unless the Board orders otherwise.

Conclusions

Although employers are not directly interested in which of two potential unions may represent their employees, it is very much in their interest to have as complete records as possible so as to avoid the cost of lengthy and protracted hearings, as the employer is a party to the process. It is therefore important during the raiding season that employers keep detailed records of those individuals actually present on the job on a day by day basis, together with the work they are performing. By doing so, the employer's disruption and time commitment can be reduced.

We would be pleased to answer any questions you may have with respect to this new process and to assist should your company be the subject of a raid application. ■

LOCATION, LOCATION, LOCATION - OR NOT

John Polyzogopoulos

A recent decision of the Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, confirms that it is very difficult for a developer purchasing development lands to obtain a legal remedy when the vendor refuses to complete the sale.

"Developers will want to consider inserting language in their offers to purchase to counteract the effects of the Southcott Estates decision..."

The facts in the case were typical of a sale transaction involving development lands. The plaintiff, Southcott, was a single-purpose entity incorporated to purchase development land from the defendant, the Toronto Catholic District School Board. The plaintiff carried on no business and had no assets other than the deposit that was advanced to it by its sole shareholder for the purpose of acquiring the subject property. The sole shareholder was a developer carrying on business as the Ballantry Group. The land in question was just under five acres and the purchase price was $3.44 million. The sale was conditional on the School Board obtaining a severance of the land.

After some initial attempts, the School Board ultimately decided not to continue pursuing the severance. Southcott sued for breach of the agreement. The trial judge found that the School Board's failure or refusal to pursue the severance was a breach of its obligations under the agreement. This finding was not challenged on appeal. The issue before the Supreme Court of Canada was the appropriate remedy to be awarded.

At trial, Southcott initially sought specific performance of the agreement, requiring the School Board to complete the sale. The trial judge determined that the property was not special or unique enough to warrant granting specific performance and declined to grant that remedy. He found that this was merely a development property purchased with a view to earning a profit and therefore damages for lost profit would be an adequate remedy. He awarded damages of almost $2 million.

The Supreme Court agreed with the trial judge that damages, and not specific performance, were the appropriate remedy, however it reduced the award from $2 million to $1.00. The reason for the reduction was that the Court determined that Southcott had failed to meet the obligation of virtually every plaintiff suing for breach of contract - it failed to take any steps to mitigate or minimize its damages.

Mitigation in this case would have involved seeking to purchase an alternative property to develop. The evidence of the Ballantry Group's executive at trial was that he did not even consider having Southcott purchase another property, particularly given that it was involved in litigation with the School Board regarding the subject property. To have purchased an alternative property through Southcott would have exposed the equity in that property to an adverse costs award made against Southcott in the litigation.

The Supreme Court did not approve of this position. The Court recognized that the decision to create a single-purpose entity provided the Ballantry Group with the benefit of limited liability by shielding its assets from the creditors of Southcott. Accordingly, the Court reasoned that having enjoyed the benefits of incorporation, the Ballantry Group should also bear the burdens of incorporation, including the obligation of all plaintiffs to mitigate their damages. The Ballantry Group's failure to search for a substitute property was a breach of its obligation to mitigate.

On the evidence, there were approximately 81 other development properties available for sale in the GTA that Southcott could have purchased. Furthermore, the Ballantry Group had purchased seven other development properties since the School Board's breach of the agreement, none of

"...the fees will apply only to new [Community Mail Boxes] installed where residences or businesses do not share a common indoor entrance."

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which were purchased in the name of Southcott. The Supreme Court determined that the evidence of other available properties was sufficient to discharge the School Board's burden to prove that Southcott had failed to mitigate its damages. This finding was made notwithstanding that there was no evidence that any of those other properties could be profitably developed. The Supreme Court was also not swayed by the argument that none of the seven properties purchased by the Ballantry Group in the interim were true alternatives to the subject property because they all would have been purchased in any event, even if the School Board had completed the transaction.

At the end of the day, the Court's over-arching concern appears to have been that single-purpose entities should not be treated differently from other corporations or individuals regarding the duty to mitigate. To treat them differently would unfairly burden vendors who deal with single-purpose entities with additional liability.

The impact of this decision for developers is that specific performance will only be available in rare circumstances - typically when a developer is assembling properties for a master plan development and the failure to obtain one parcel jeopardizes the viability of the entire development. Moreover, even damages will be difficult to obtain, unless the plaintiff can show that there were no suitable alternative properties available for sale.

Developers will want to consider inserting language in their offers to purchase to counteract the effects of the *Southcott Estates* decision, by, for example, including a provision in which the parties expressly acknowledge that the land is special and unique to the development and setting out the consequences of default without mitigation being required.

Blaney McMurtry's Real Estate Group has the expertise to assist developers in crafting appropriate provisions for agreements of purchase and sale for development lands and in the event an issue arises, our Commercial Litigation Group can advise on the viability of a claim for specific performance or damages at an early stage. ■

UPDATE ON CANADA POST FEES FOR CMB INSTALLATION

Tammy A. Evans and Anthony D. Garber

In our previous Blaney's on Building, we reported on a new plan by Canada Post to charge developers a one-time fee of $200 per new address for the installation of Community Mail Boxes ("CMBs") in new residential and commercial developments. For our condominium developer clients, this new initiative represented yet another increase in development costs which, in this competitive market where hard and soft costs are skyrocketing around the GTA faster than we can object to or accommodate them, are already way too high.

Canada Post's new fees became effective on January 1, 2013, and are intended to offset the costs incurred by Canada post to connect new mail equipment to an expanding delivery network. Interestingly, most of these "costs" are already funded in large part if not entirely, by developers through usual costs imposed on new construction.

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In large part thanks to BILD's communication and advocacy efforts, the industry responded quickly to Canada Post's initial announcement, leading Canada Post to clarify its new "tax" in a recent "Developer's Guide to Ensuring Mail and Parcel Delivery with New Neighbourhoods" piece which sheds some new light on how these fees will be implemented - an improvement from what was originally proposed. According to Canada Post, the fees will apply only to new CMBs installed where residences or businesses do not share a common indoor entrance. Good news for high-rise condominium developers, as this would exclude these multi-unit buildings. The Guide confirms that these new fees will be implemented as a condition during the development application process much like other utilities and infrastructure conditions. A set up agreement will also be required to be entered into by the developer with Canada Post to complete the process, and a security deposit may be required.

Contact the writers for any questions in this regard. ■

EXPECT THE BEST

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