NOVEMBER 2012

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Building

EDITORS:

Tammy A. Evans
Direct 416.593.2986
tevans@blaney.com

Marc P. Kemerer
Direct 416.593.2975
mkemerer@blaney.com

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.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the heads of our Real Estate or Architectural/Construction/Engineering Services Groups:

Andrew Heal
Chair, ACES Group
Direct 416.593.3934
aheal@blaney.com

Shawn Wolfson
Chair, Real Estate Group
Direct 416.593.3930
swolfson@blaney.com

IN THIS ISSUE:

Toronto planning staff want developers to "offer more housing choices with better affordability."

CITY OF TORONTO PROPOSED CHANGES TO SECURING AFFORDABLE HOUSING THROUGH SECTION 37 BENEFITS: DOES AFFORDABLE HOUSING FOR SOME MAKE HOUSING MORE EXPENSIVE FOR OTHERS?

Marc P. Kemerer

At its meeting of 2 October 2012, Toronto City Council approved the recommendations of the 16 August 2012 Planning Staff Report that the City update its policies on affordable housing by amending the City's Official Plan to:

1. recognize affordable ownership housing and to authorize affordable rental units to be located within a registered condominium, subject to certain conditions, as community benefits through the City's section 37 height/density incentives policies; and
2. provide more flexibility in the housing definitions in section 3.2.1.

According to the Staff Report, the Official Plan has helped to conserve the City's stock of affordable rental housing but has achieved little in the way of creating new affordable housing. To correct this, the City intends to look to developers to "offer more housing choice with better affordability." Recognizing affordable home ownership and releasing the previous prohibition on the provision of rental housing through registered condominiums are seen as effective tools in this effort.

As developers are generally at odds with the City's ever-expanding approach to section 37 benefits, they are not likely to embrace these proposed changes. Moreover, these additionals costs of development are likely to be passed on to purchaser through higher market unit pricing, suggesting that those who are subsidizing affordable housing are not the City's citizens at large, but rather those who purchase market condominiums. In the author's view, new policies suggest a form of income redistribution within the building itself – giving a whole new meaning to "love thy neighbour." ■

UPDATE ON THE CONDOMINIUM ACT REVIEW

Tammy A. Evans

In our previous issue of Blaney's on Building we reported on an announcement by the Provincial Government of its intention to launch a public consultation process to modernize the *Condominium Act, 1998*.

The consultation process, being undertaken in 3 stages, is now well underway and is anticipated to culminate in proposed Condominium Act reform scheduled to commence Spring of 2014.

We are now in the midst of Stage 1 of the review process, with Minister's Public Information Sessions well underway. Three public information sessions have been held in Toronto, Mississauga

BLANEYS ON BUILDING

"The consultation process, being undertaken in 3 stages, is now well underway and is anticipated to culminate in proposed Condominium Act reform scheduled to commence Spring of 2014."

Tammy A. Evans is a commercial real estate partner at Blaney McMurtry and a member of the firm's Architectural, Construction, Engineering Services (ACES) Group. Tammy has extensive experience in all aspects of construction, mixed use and condominium development.

Tammy may be reached directly at 416.593.2986 or tevans@blaney.com.

and Ottawa during the month of September, providing an overview of the consultation process and to gather some high level preliminary feedback from interested parties. Key concerns raised during these meetings include:

- need for low cost dispute resolution mechanisms;
- need for greater guidance with respect to financial management, and in particular, the concern regarding underfunding of condominium reserve funds;
- underqualified property managers and the lack of regulation over the condominium property management industry;
- concern over consumer protection and overly complicated disclosure to purchasers; and
- wide-ranging concerns regarding condominium governance.

In October, a panel of residents was selected by lottery to work alongside other stakeholders in roundtable discussions. Tammy Evans continues to work with the Condominium Act Review Committee established by the Ontario Home Builders Association (OHBA) and Building Industry and Land Development Association (BILD) in their efforts to make submissions to the Province for this important legislative initiative.

Stage 1 will conclude with the issuance of a Findings Report setting out a list of priority proposals for changes to the Act and scheduled to be released in early 2013.

Stage 2 will end with a detailed review of the Findings Report by condominium industry stakeholders, including the Residents' Panel, who will each then bring forward recommendations in an Options and Recommendations Report for changes to the legislation.

In Stage 3, the Residents' Panel and other industry stakeholder groups will again be called upon to review the Options and Recommendations Report and generate an Action Plan to be submitted to the Province by Fall 2013.

Blaneys will continue to work closely with the building industry to ensure that our clients' interests are brought forward during this consultation. We will keep you apprised of any new developments.

In related news, the City of Toronto has recently issued a Request for Proposal "to select a qualified vendor to conduct consultations with condominium residents and business occupants in order to identify changes to the condominium, planning and other municipal regulations and programs to address issues and problems associated with '*the way people are living in condos*'." The winning proponent will be required to consider changes to the *Condominium Act, 1998*, and Regulations, Official Plan, zoning bylaws, considerations during negotiations for new development (for example for negotiated section 37 or section 45 community benefits), Urban Design Guidelines, Planning Guidelines, Tall Building Guidelines and Green Standards Guidelines. It is interesting that the City of Toronto is undertaking these consultations parallel in time and objective to the Province's Condominium Act review. We will track this process closely. Stay tuned for further updates. ■

BLANEYS ON BUILDING

"The existing PPS [Provincial Policy Statement] policies remain intact and are supplemented with policies that emphasize compact, inter-connected and environmentally responsible growth."

Marc P. Kemerer is a municipal partner at Blaney McMurtry, with significant experience in all aspects of municipal planning and development.

Marc may be reached directly at 416.593.2975 or mkemerer@blaney.com.

THE NEW PROVINCIAL POLICY STATEMENT IN DRAFT

Marc P. Kemerer

The Province of Ontario has released the draft policies of the proposed new Provincial Policy Statement (PPS). The existing PPS policies remain intact and are supplemented with policies that emphasize compact, inter-connected and environmentally responsible growth.

Briefly: under the new PPS, compact, inter-connected development would require:

- greater economic coordination between municipalities;
- urban development that is transit supportive; and,
- protecting the efficient movement of goods and services by:
    - strengthening protection for major facilities (including transportation and municipal services) and industries against incompatible development;
    - encouraging the adaptive reuse of existing infrastructure and/or the use of green infrastructure; and
    - protecting transit corridors and the employment areas in close proximity to them.

Environmentally responsible growth will mean that:

- development and land use patterns "maintain biodiversity and resilience to climate change;"
- public parks and conservation areas are protected from negative impacts;
- development that may impact on the habitat of endangered and threatened species cannot proceed without first meeting applicable provincial and federal standards;
- stormwater management measures represent an environmental benefit; and
- lot creation in prime agricultural areas will be further discouraged by limiting the size of such lots to the minimum area required to accommodate the use and appropriate sewage and water services.

Whiles these policies do not necessarily represent new principles in our planning lexicon, they are becoming, literally, ever more entrenched as they transform the type of development this Province is experiencing.

The Province is presently seeking feedback on the draft policies. Given that the PPS sits atop the hierarchy of planning instruments, it is important that municipalities, developers and builders, most of whom are now in the throes of the Growth Plan conformity exercises, understand all of the implications of the proposed new policies. We would be pleased to discuss these draft policies and their significance with you in further detail. ■

CONSTRUCTION LABOUR UPDATE: OPEN SEASON COMING SOON

William D. Anderson

Just a reminder that the industry-wide "open season" in the residential construction sector in the greater Toronto area is set to run from February 1 to April 30, 2013, in accordance with the *Labour Relations Act*. Every three years all of the residential construction sector collective

BLANEYS ON BUILDING

"The open season won't just affect unionized companies or sub-contractors. It also has the potential to affect non-unionized sub-trades, general contractors and builders."

A partner in Blaney McMurtry LLP's Employment and Labour Group, William D. Anderson's experience has led to an expertise in complex labour board and employment litigation.

Bill's practice also includes negotiating severance and wrongful dismissal packages on behalf of executives and other employees. He is particularly active in issues relating to the manufacturing, construction and health care industries.

Bill may be reached directly at 416.593.3901 or banderson@blaney.com.

agreements come up for negotiation at the same time and unions have a three month period to lock down their own bargaining rights and attempt to take them from others. During that time you can expect to see a significant amount of union organizing activity on job sites and inter-union rivalry as construction unions seek to protect and expand their bargaining rights.

The open season won't just affect unionized companies or subcontractors. It also has the potential to affect non-unionized sub-trades, general contractors and builders. For example:

- The conflicts associated with raids between unions have the potential to spill over and affect the day-to-day work being performed by workers who become engaged in the politics of the conflict with their friends and co-workers or worse, face strikes and work stoppages as the various factions side off against each other.
- Because of the increased union activity, organizers become more familiar with who is doing what and may walk into an easy certification where a non-union builder has a couple of construction workers on site.
- Increased organizing activity can mean more non-employees on the job site, which raises additional health and safety issues.
- In cases of both legal and illegal strike activity, it is often the builder that ultimately has to take the steps necessary to obtain the assistance of the Ontario Labour Relations Board or the Court.

We can assist you both with taking precautions to prepare for the upcoming open season and in responding to a situation once it has arisen. ■

INTERESTING BC CONDOMINIUM CASE LAW: *MAZAREI V. ICON OMEGA DEVELOPMENTS LTD.*, 2012 BCSC 673

Anthony D. Garber

A recent case out of the British Columbia Supreme Court highlights the hazards that may befall developers entering the marketplace of other jurisdictions.

A condominium project located in Edmonton, Alberta was developed by the Defendant Developer, a company incorporated under the laws of Alberta. The Plaintiffs were savvy real estate investors residing in British Columbia who purchased residential units in the development.

The Purchasers learned of the development from a real estate agent residing in British Columbia who also happened to be agent for a director of the Developer. The conduct at issue in this case was that of the Director and his Agent. The Director, initially approached by the Agent on an informal basis, arranged for pricing lists, brochures and pre-signed contracts to be sent to the Agent and agreed that the Agent would be entitled to commissions fees from the Developer as an incentive for sales in British Columbia.

Stromberg-Stein J. concluded on the facts that the Developer contracted the Agent to "market" the development in British Columbia; "marketing" being broadly defined under the *Real Estate Development Marketing Act* (REDMA) to include engaging "in any transaction or other activity that will or is likely to lead to a sale or lease" (s. 1).

REDMA provides for very strict disclosure obligations for marketing developments in BC

BLANEYS ON BUILDING

"REDMA [Real Estate Development Marketing Act] provides for very strict disclosure obligations for marketing developments in BC including that the developer must file a disclosure statement of material facts for the development with the Superintendent of Real Estate in BC before going to market."

Anthony D. Garber is an associate in Blaney McMurtry's Real Estate practice group. He works with senior lawyers in the group on all aspects of mixed use and condominium development and construction contract law.

Anthony may be reached directly at 416.597.4887 or agarber@blaney.com.

including that the developer must file a disclosure statement of material facts for the development with the Superintendent of Real Estate in BC before going to market. A developer must also provide this disclosure statement to a purchaser before he or she enters into a purchase agreement. There is a further obligation to update disclosure in the event of material change. Where these obligations are not met, the purchaser may rescind the agreement. These disclosure obligations were determined by the Court not to have been met by the Developer.

The bulk of the legal argument by the Developer concerned whether it had engaged in *marketing* as defined under the Act and the constitutional validity of a BC Act regulating the validity of the Alberta contract. These arguments were dismissed by the court because REDMA regulates marketing and consumer protection, matters within the jurisdiction of that province.

Generally, the form and validity of a contract is determined by the governing law of that contract. One would expect that the contract could not be rescinded by the laws of another jurisdiction, yet that is exactly what happened in this case. The Court ruled that the developer marketed real estate in British Columbia, failed to meet the disclosure obligations under REDMA, and that the purchasers were therefore entitled to rescind their purchase agreements.

This case acts as a reminder to developers to tread cautiously when marketing out of Ontario. Even if a developer meets the disclosure requirements within the jurisdiction of the contract for the subject property, this case would seem to indicate that the failure to comply with the more stringent legal requirements in the jurisdiction where the deal was actually made may entitle the purchaser to a right of termination. ■

WILL DEVELOPERS BE REQUIRED TO SUBSIDIZE CANADA POST'S FINANCIAL LOSSES?

Canada Post recently provided notice via Mayors' offices across Canada that, in addition to the current requirement for the developer to build either a condominium mailroom or provide super mail box pads, developers will now be charged a one-time fee of $200 per address to install and activate these community mailboxes for new developments. The new fee will be charged beginning January 1, 2013.

Municipalities regularly seek comments from Canada Post on planning applications, resulting in a standard condition imposed on developers to complete, at their own cost, the base infrastructure required for installation of the community mailbox. Developers have accepted this condition as part of the costs of building a new community. Rather than offsetting Canada Post's actual activation or installation and maintenance costs however, this new fee appears to be an attempt to recover some of Canada Post's ongoing financial losses resulting from a decrease in mail volume and the ever increasing use of alternative and more immediate delivery systems.

The *Canada Post Corporation Act* grants Canada Post the "sole and exclusive privilege of collecting, transmitting and delivering letter" within Canada. The Act and its Regulations do not, however, contemplate the imposition of development fees such as those being proposed. It is also not

BLANEYS ON BUILDING

clear how Canada Post intends to collect the fee, either through municipalities or as a direct charge.

The Building Industry and Land Development Association and the Ontario Home Builders Association together wrote to Canada Post on 29 October 2012 to express strong opposition on behalf of their members to this new charge - which may very well be outside of Canada Post's statutory authority. Stay tuned! ■

Annual Construction Law Update: Will the 'Boom' End?

On November 1, 2012, our Architectural, Construction and Engineering Services (ACES) Group will hold their annual client seminar: "Annual Construction Law Update: Will the 'Boom' End?"

Topics include:

- "Economic Trends: Outlook for 2013."
- "Health and Safety: Crances and Construction."
- "Forgeing the Standard Contractual Dispute Resolution Process for an Alternative."
- "Why Court is Still an Option and the Importance of Experts."
- "What's New in Managing Municipal Claims."

The seminar will be held from 8:00 a.m. to 10:30 p.m. at the offices of Blaney McMurtry LLP.

For more information, please visit:
www.blaney.com/construction-law-update-registration

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

Blaneys on Building is a publication of the Real Estate and ACES Groups of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Kylie Aramini at 416 593.7221 ext. 3600 or by email to karamini@blaney.com. Legal questions should be addressed to the specified author.