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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

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.

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 Architectural/ Construction/Engineering Services or Real Estate Groups:

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"In the last few years an ongoing battle between rival unions has resulted in multiple 'raids' where one union seeks to displace another as the bargaining agent of a particular trade."

ONTARIO GOVERNMENT RESPONDS TO CONSTRUCTION INDUSTRY CONCERNS

Mark E. Geiger

Under the *Ontario Labour Relations Act*, workers have a right to seek decertification or representation by a different union during the last three months of operation of a collective agreement (the open period). In the construction industry here in Ontario, most ICI related collective agreements, and all residential collective agreements in the GTA have a three year term that expires on April 30th of 2016, and every three years thereafter. In the last few years an ongoing battle between rival unions has resulted in multiple 'raids' where one union seeks to displace another as the bargaining agent of a particular trade. Construction companies have found these activities to be disruptive with representatives of one union appearing on jobs and attempting to convince members of one union to sign cards for another, thus triggering a raid application.

In a recent piece of proposed legislation, [Bill 146], the Ontario Government proposes to bring in a number of changes to several labour related Statutes. One proposal is to reduce this open period in the construction industry to two months. The Government wants to reduce the disruption by reducing the length of time the open period lasts. It is not clear to this author that this proposed change will have the effect desired. Nothing in the proposal stops union organizers from commencing their raids prior to March 1st. They just have to wait until the open period to make their applications. In any event, even if the amendment passes, the open period for ICI and residential construction in the GTA will not be upon us for more than two years. Time will tell if this amendment has the result intended.

Stay tuned. ■

CONSULTING ON CHANGE: PROVINCIAL REVIEW OF THE LAND USE PLANNING SYSTEM

Marc P. Kemerer

The Province is in the process of reviewing, in a limited manner, the land use planning and appeal system to focus on issues of predictability, cost-effectiveness, municipal leadership (conformity with Provincial requirements) and infrastructure support (the "Review"). The most interesting of these

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"Obtaining benefits (usually for existing constituents) through density and height incentives can represent the most lucrative and political type of planning."

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issues involve matters where real reform has not been realised: the creation and use of (1) section 37 benefits, (2) local appeal bodies and (3) development permits.

Section 37 Benefits

Under section 37 of the Planning Act, a municipality may authorize increases in height and density in return for the provision of community benefits. While the Review does not directly address these benefits, this issue engages predictability, conformity and municipal leadership and is effectively addressed in the January 2014 submissions of the Ontario Homebuilders Association on the Review. As those submissions note, and this author has experienced time and again, a number of municipalities "intentionally under-zone lands to extract and maximize [section 37 benefits] during the approvals process."

Obtaining benefits (usually for existing constituents) through density and height incentives can represent the most lucrative and political type of planning. For this reason, the need for, and the quantum of, such matters is often litigated before the Ontario Municipal Board. The Board has taken a conservative approach to these asks: any benefits must be predictable and have a connection to the proposed development. Some municipalities however refuse to accept this approach.

If a development represents good planning and furthers provincial and municipal objectives, why are section 37 benefits appropriate? In our view, the Province should use the Review to examine the purpose and utility of section 37.

Local Appeal Bodies

As part of the last round of changes to the land use planning system, the Province granted the municipalities the power to establish local appeal bodies (LAB) to hear appeals from Committee of Adjustment decisions on consents and minor variances. Notwithstanding that no municipality has yet to set up such a body (the City of Toronto is hosting public consultations this month and next on a LAB), the Review will examine whether the power of such local tribunals should be expanded.

This appears to be premature given that there is no experience that could serve as a basis for the success of the existing provision. There are oft-expressed concerns on the part of the public that OMB Members are biased. It is possible that municipalities which implement a LAB may chose LAB Members with a certain bias to counter this public perception. The land use system would thus be no further ahead.

Development Permits

The Province has enabled municipalities to institute an approvals process through the mechanism of Development Permits. Such permits are to be based on criteria developed by the municipalities who use them and they would provide more flexibility and objectivity in the approvals process, including by delegat-

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"The Ministry is in the process now of finalizing its action plan which will outline legislative amendments and policy considerations ..."

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ing decision making to staff. The increasing use of design and other expert panels to review development applications provides a precedent for such an approvals process. Those particular panels are not, however, binding on decision makers.

Unfortunately, and notwithstanding efforts by the Province to encourage such a system of approvals, municipalities have not embraced this change, presumably either unconvinced by the potential benefits or unwilling to cede political control over the process.

The Review seeks comments on the barriers to implementing the development permit system. It is the author's view that the Province should consider requiring that municipalities implement the new system. The Province has shown a willingness to impose policy down from the top through the Growth Plans; if the purpose of the Review is to make land use planning more predictable and cost-effective, the most effective ideas need to be enforced.

Conclusion

We do not envy having to mediate between the different stakeholders in the land use planning system. If the Review is to succeed in its purpose it must focus on encouraging approvals that are separated from day to day politics and that implement the clear Provincial emphasis on appropriate intensification and infrastructure.

This author will continue to follow the Review and other initiatives affecting the land development system. We would be pleased to discuss any of these issues with industry members.

Update: In the November 2012 issue of *Blaneys on Building*, we reported on the approval by City of Toronto Council of Official Plan Amendment 214. OPA 214 would update the City's section 37 official plan policies on affordable housing. That Amendment was approved by the Ministry of Municipal Affairs and Housing on January 31, 2014. We would be pleased to assist any readers who are interested in understanding or appealing this approval. The last date for filing an appeal is February 23, 2014. ■

FURTHER UPDATE ON CONDOMINIUM ACT REVIEW

Tammy A. Evans

We have been monitoring and reporting to you on the Province of Ontario's consultation process to address certain consumer protection issues and to update the *Condominium Act, 1998*, to address current market concerns.

We are currently sitting at Stage 3 - which is a more targeted process whereby smaller working groups have been set up by the Ministry of Consumer Services to respond to the proposed recommendations of Ministry staff, which recommendations came from the public consultations and recommendations through the wider consultations and working group sessions through Stages 1 and 2.

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"The recent charges ... demonstrate once again the serious responsibility everyone involved in construction and related industries have to ensure safety in the workplace."

Mark E. Geiger is a member of the Employment and Labour group at Blaney McMurtry and the Labour Section executive of the OBA. Mark acts for a wide variety of employers and individuals in many sectors of the economy with respect to employment and labour relations.

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The Ministry is in the process now of finalizing its action plan which will outline legislative amendments and policy considerations for specific recommendations of the various stakeholder groups. Meetings are now in progress with the Ministry and smaller groups of stakeholders intended to represent a balanced cross section of the condominium industry, with a view to reaching consensus on these recommendations. It is anticipated that completion of Stage 3 will occur early 2014.

The author continues to be actively involved in this initiative, and will keep readers informed as more details are available and can be shared. Readers are welcome to contact the writer to discuss how this initiative may impact your condominium development. ■

CRIMINAL CHARGES IN THE ELLIOT LAKE MALL COLLAPSE

Mark E. Geiger

Earlier this week the police laid criminal charges against the engineer who inspected the Algo Mall in Elliot Lake just weeks before it collapsed killing two women. This follows closely on the Ontario Court of Appeal's recent decision on the famous Metron case. Just before Christmas of 2009 three workers and a site supervisor plunged to their deaths when all of them attempted to descend from the fourteenth floor of a construction site on a swing stage designed for only two. Contrary to *Ontario Health and Safety Act* (OHSA) Regulations, only one worker was wearing fall arrest. Three of the four workers, including the site supervisor who also died, had recently ingested marijuana.

At trial the corporation pleaded guilty to criminal negligence causing death. Under the *Criminal Code*, the site supervisor's actions, under the law, were deemed to be the actions of the corporation. He was a 'senior officer' and his actions resulted in the deaths - including his own.

At trial, the owner of Metron was fined under the OHSA at almost the maximum level available under that Act. But under the *Criminal Code* amendments introduced in 2004 following the Westray disaster, there is no maximum fine for the *Criminal Code* offense. The Company can be fined a maximum of $500,000 under the OHSA, but at trial, under the *Criminal Code*, with no similar limitation, the trial Judge fined Metro only $200,000 - less than many fines for fatalities under the OHSA which IS NOT a criminal statute.

The Court of Appeal, on appeal by the Crown, raised that fine to $750,000 notwithstanding the fact a fine of that magnitude might bankrupt Metron. The court found that not to be a deciding factor in the case. This was an extremely serious criminal act and an appropriate fine against a corporation must reflect that fact.

The recent charges against Mr. Wood in the Elliot Lake case demonstrate once again the

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serious responsibility everyone involved in construction and related industries have to ensure safety in the workplace. In the Metron case, only the Company was charged criminally. In this most recent situation in Elliot Lake, the engineer has been charged personally with two counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. These charges are in addition to charges brought against him by the Ministry of Labour for providing 'negligent advice'. These latest charges could result in significant fines and even jail time for Mr. Woods.

It is becoming increasingly clear that our society is prepared to seriously punish those who through negligence or neglect cause workplace accidents. Both companies, and the individuals responsible for them, need to be aware of the significant responsibility they have to ensure safety in the workplace, and the very real risks they take if they fail to do so. ■

Annual Construction Law Update

On Wednesday, February 26, 2014, our Architectural, Construction and Engineering Services (ACES) Group will hold its Annual Construction Law Update, with keynote speaker John G. Mollenhauer, President, *Toronto Construction Association*, discussing Opportunities and Challenges for 2014.

Topics:

- What's New in Health and Safety?
- Environmental Hot Topics: Excess Soil Movement and Liability Issues.
- Planning and Development Policy Changes: Panacea or Pothole?
- Latest Word on Bill 69, Prompt Payment Act, 2013.
- Two Worlds Collide: When the Construction Lien Act Meets the Companies' Creditors Arrangement Act.

When: Wednesday, February 26, 2014, 8:00-10:00 a.m.

Where: Offices of Blaney McMurtry LLP 2 Queen St. E., 15th Fl, Toronto

Cost: Complimentary.

Register: http://blny.ca/ACESUpdate

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We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Gosia Puzio at 416 593.7221 ext. 2100 or by email to gpuzio@blaney.com. Legal questions should be addressed to the specified author.