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Blaney McMurtry
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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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IN THIS ISSUE:

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BEWARE OF UXO - THEY'RE OUT THERE!

Shawn Wolfson

We recently acted for the owner/operator of a scrap yard, who decided to shut down its business after more than 50 years in operation and sell their property to a developer. As would be expected, the purchase agreement required the vendor to remove the scrap metal stored on the site prior to closing. On the day before closing, while the crane operator was picking up the remaining scrap at the far corner of the property and dumping it in a truck to be hauled away, he came upon what appeared to be a large cache of shells and other munitions. He immediately (and wisely) stopped the crane and notified the owner.

Our client called CFB Borden to report the finding, who immediately sent an inspector down to investigate. Our client's second call was to us: "Do you have any experience with this and how is it going to affect the closing?" The answer to the first question, of course, was "no, no one does." Interestingly, as we delved into the issue, we discovered that the existence of munitions is not all that uncommon at scrap yards, particularly ones that have been in business for a long time, as well as at properties that were once used for military purposes or near such properties. In fact, they are common enough to have a name - Unexploded Explosive Ordnance - or UXO, as well as a program through the Department of National Defence (the UXO and Legacy Sites Program), to keep records of where UXO may potentially exist, inspect sites, conduct risk assessments and remove it if necessary.

Given the presence of the UXO, the closing date was extended until the DND was able to remove it, conduct a post-removal inspection and provide a letter confirming that all UXO was removed from the site - a process that took 4 weeks. Fortunately, the costs of the removal were fully covered by the DND.

How did the UXO get on the property? While there are no written records, it is suspected that the prior operator bought it from the DND, likely many decades earlier. The DND would sell munitions scrap to scrap yards. Although DND policy was that everything to be sold was to be screened to ensure the ordnance was decommissioned, the screening process was

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not perfect, resulting in some live UXO being sold. Unfortunately, the outcome has been a number of injuries and deaths across Canada over the years. Needless to say, the DND no longer sells munitions scrap to scrap yards.

As it turns out, despite the delay in closing, the crane operator and our client did the right thing by leaving the UXO in place and reporting it, rather than simply hauling it away with the rest of the scrap metal. A few weeks after the sale closed, our client received a call from the DND commending them on their approach. The UXO from the site was re-screened and some of it was confirmed to be live. Removing it with the crane could well have proven disastrous. ■

WHAT'S NEW IN PLANNING: CHANGES TO THE PROVINCIAL AND THE LOCAL STANDARDS

Marc P. Kemerer

In previous issues of *Blaneys on Building*, we have written about the emerging issues of the 2014 Provincial Policy Statement (2014 PPS) and the creation by the City of Toronto of a Local Appeal Body (LAB) to hear appeals of minor variance and consent applications.

As an update on these and other items:

1. New Provincial Policy Statement 2014

The 2014 PPS came into effect on 30 April 2014. It maintains the 2005 PPS policies and adds new policies that emphasize inter-connected and environmentally responsible growth. The 2014 PPS:

- promotes coordinated development between and within municipalities, including with respect to economic development and infrastructure;
- protects "Major Facilities" and sensitive land uses from incompatible land uses;
- increases protection for transportation corridors and Employment Areas;
- promotes green infrastructure; and
- requires that the potential impacts of climate change be considered in planning applications.

The 2014 PPS also includes, for the first time, a recognition of Aboriginal interests in planning. It requires consideration of such matters and imposes a duty to consult with these communities where applicable.

As the Provincial Policy Statement sits atop the Province's hierarchy of planning instruments, and planning applications must be consistent with its provisions under the *Planning Act* (the "Act"), the new policies have the potential to significantly impact development in the Province. Moreover, the transition period between final release and implementation was very brief. The new polices came into effect on 30 April 2014. Any development projects currently awaiting approval must be consistent with the new PPS.

If you have a project in mind or you are waiting for an approval, we encourage you to review the 2014 PPS to determine whether it impacts your development plans. You may be

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"You may be required to make changes and/or to consult with new stakeholders to be consistent with the 2014 PPS."

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required to make changes and/or to consult with new stakeholders to be consistent with the 2014 PPS. We would be pleased to assist with this review.

2. The Creation of a Local Appeal Body by the City of Toronto

At its meeting of 29 May 2014, the City of Toronto Planning and Growth Management Committee recommended that City Council, at its meeting of 10 June 2014, approve the establishment of a LAB. That recommendation is accompanied by eight "guiding principles" for implementing the LAB, including that LAB Members be recruited "using a fair and impartial recruitment process" and that the LAB be operated as an independent decision making body free from influence of outside parties." These principles represent an answer to concerns that the real purpose of the LAB would be to counterbalance the perception that the Ontario Municipal Board (OMB) is too developer-friendly.

A further proposed principle is that the fees for the LAB be established using the Planning Act tariffs (non-prescriptive), the City's User Fee Policy (user pays) and the principles of natural justice (deeper pockets pay more?). In the author's view, this vague principle will likely result in higher fees for appeals than are presently charged for appeals to the OMB, although the extent of those fees will not be known until the by-law establishing the LAB is available for review.

Finally, and perhaps of most interest, the Committee also recommends that Council request that the Province amend section 45 of the Act to provide "a clearer definition of a minor variance." The early decisions of the OMB on this section gave rise to the infamous "four tests" whereby minor variances had to (1) rnaintain the general intent of the zoning by-law (2) rnaintain the general intent of the official plan, and be (3) desirable and (4) minor. While there is a considerable body of OMB jurisprudence on these points, the tests have been generally distilled into an examination of the impact of the proposed variances.

In 2005, the Divisional Court in *DeGasperis v. City of Toronto* took a narrower view of how flexible the tests could be, stating that minor meant minor ("comparatively small"). This did not stop litigation over this point and more recently that same Court has reintroduced the idea of flexibility into the consideration of what is "minor." No one definition is going to satisfy all sides of the debate, and the writer cannot imagine that the Provincial Legislature wants to wade in with a solution that will result in yet more court challenges.

At its meeting of 10 June, Council voted to defer consideration of this item. We will keep you posted on all the developments regarding this proposed LAB.

3. New City of Toronto Environmental Regulations Around the Conveyance of Land to the City

Every year, the writer presents on the topic of "The Clash of Planning and Brownfield Rules" at the Canadian Environmental Conference (CANECT). This topic examines the impact of Provincial environmental regulations and stan-

"City staff are proposing to impose more stringent standards for accepting potentially contaminated lands to be conveyed to the City."

dards on municipal approvals under the Act. Some municipalities, including the City of Toronto, impose stricter standards than are required by the Province pursuant to the Supreme Court decision in *Spray-Tech v. Hudson*, particularly where municipalities require the conveyance of lands to the municipality for road widening, parks or other purposes.

City staff are proposing to impose more stringent standards for accepting potentially contaminated lands to be conveyed to the City. In a 3 June 2014 report on this topic adopted by the Public Works and Infrastructure Committee at its meeting of 18 June 2014, staff recommend that Council update the City's approach to risk assessment in a number of ways. The most notable of these would be:

1. the imposition of a 1.5 metre "un-impacted cap". Developers seeking site plan and other approvals would be required to ensure that the lands being conveyed to the City are "clean" to this depth and that utilities buried below this level would be placed in a clean trench of un-impacted material. While that is the traditional number used by the City, the Province, in the case of a site-specific Modified Generic Risk Assessment (MGRA) permitted under the *Environmental Protection Act*, prescribes a depth of 1 metre; and
2. for this reason (keeping the 1.5 metre depth standard), a refusal to accept a Record of Site Condition (RSC) based on the Province's stratified site condition standard or the MGRA. As the purpose of these site-specific standards is to allow for more flexibility to develop Brownfield and similarly contaminated sites, this new policy would have the effect of discouraging development. This may better shield the City from liability but it is at odds with both Provincial environmental and Growth Plan policy of promoting difficult to develop urban sites.

These recommendations will be considered by City Council at its meeting of 8 July 2014. Landowners and builders facing this issue are encouraged to make your concerns about this proposed policy to City Council. We would be pleased to assist with this.

We will keep you posted on all these significant policy issues.

4. Will the Provincial Election Result Change the Planning Landscape?

The above planning issues are the result of changes made by, or made possible by, the Liberal Government in Ontario. With the return of the Liberals to power in a majority government we will be watching closely to see what, if any, changes to the Act or other statutes governing development are introduced. As an indication of changes that may come, the Liberal election platform indicated that they will expand the boundaries of the Greenbelt and protect farmland close to urban centres from development. ■

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"Courts may increasingly find oral real estate agreements enforceable, due to the increased use of electronic communication ..."

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UPDATE ON CONDOMINIUM ACT, 1998 REVIEW

Tammy A. Evans

As we now know, the provincial general election brought the Liberals into a majority position in Ontario. Once the election was called, we entered the "caretaker period" where a general suspension of work is triggered (except for routine administrative work and matters of emergency). This period effectively suspends progress on any new policy or program initiatives as well as in progress consultation work. The Condominium Act review team completed the public consultation process immediately prior to election call and the reports from outside consultants and stakeholder groups were delivered, however the internal policy deliberations within the Ministry of Consumer Services were at that time still underway. Accordingly, all work on the Condominium Act review initiative was also suspended.

Once the Ministry is confirmed over the next week or so, it is expected the Ministry of Consumer Services will resume its internal policy work. Given the high consumer protection value and substantive investment of time and energy from both the public and government in the Condominium Act review initiative thus far as well as the Liberal majority, it is expected that progress on this initiative will move forward more quickly to completion. We will continue to keep you updated. ■

AGREEMENTS OF PURCHASE AND SALE AND LEASES: THE STATUTE OF FRAUDS AND PART PERFORMANCE

Christopher J. Kropka

There is an old saying that an oral agreement is not worth the paper it is written on. After all, doesn't the *Statute of Frauds RSO 1990, c s.19* (the "*Statute*") require that agreements in land, including leases and agreements of purchase and sale, have to be in writing. Recently, there have been important developments in the case law on leases and agreements of purchase and sale of real estate. Courts may increasingly find oral real estate agreements enforceable, due to the increased use of electronic communication and the Ontario Court of Appeal's recent approach to part performance in *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.*, 2009 ONCA 709. The following is a brief overview of a few developments in the law on leases and agreements of purchase and sale of real estate in Ontario.

The Statute of Frauds

The *Statute* provides that leases for more than three years or agreements of the purchase and sale of property must be made in writing, signed by both parties to it and lawfully authorized in writing. Section 4 of the *Statute* provides that no action can be brought where there is no written agreement or, in the alternative, "some memorandum or note thereof." A written contract would obviously meet the *Statute*'s writing requirement. However, in instances where there is no written contract, there is no requirement that the memorandum or note has to be in a particular form.

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"In deciding whether a valid contract exists through correspondence, there must be clear indication within the correspondence that an offer was made and that the offer was accepted."

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Evidence of the agreement could be contained in correspondence, a receipt or even an internal company memorandum. The memorandum could have be made at any time, and does not need to be created contemporaneously with the formation of the agreement, as long as it existed before the action to enforce the contract.

Courts have found that written proof of an oral agreement can be in electronic form and even in an exchange of emails. They may find through an examination of email correspondence that an agreement had been made between the parties and that such agreement complied with the *Statute*'s writing requirement. In deciding whether a valid contract exists through correspondence, there must be clear indication within the correspondence that an offer was made and that the offer was accepted. Also the parties must have agreed upon the essential terms.

In order to sue upon a contract, only the person who is being sued is required to have signed the document whether a contract or written proof of an oral agreement. As long as the other requirements of the *Statute* are met, the courts have stated that "a plaintiff may sue upon a contract required to be in writing by the *Statute of Frauds* even though he has not signed it providing that the defendant has signed the memorandum or contract upon which he is sought to be charged."

Essential Terms of an Agreement

Essential terms must be present for the formation of a valid contract for the sale of land which would otherwise be void for uncertainty. In general, the four essential terms are: 1) the identity of the parties, clearly set out; 2) the property being dealt with, clearly set out; and 3) the price, or a formula to determine the value, must be established; 4) evident intent to convey, i.e. sell.

In the context of a lease, the requirements for a binding agreement are as follows: 1) the premises must be clearly defined and ascertainable; 2) the parties must be named and the names must be correct; 3) the rent of all types (i.e. basic and additional) is to be clearly set out; 3) the commencement and expiry dates of the term must be clearly set out and easily capable of being determined; and 5) all other material terms of the contract not incidental to the landlord and tenant relationship including any covenants, conditions, exceptions or reservations must be set forth.

It is important to note that courts have found that even if not all of the details of the lease have been set out, agreement on the fundamental terms of the lease contained in a written document may make it binding. Terms that parties considered fundamental to their particular agreement outside of those listed above can also be considered fundamental terms. Where the understanding of the parties is that their legal obligations will not arise until a formal contract has been executed, the execution of the completed formal agreement is essential to the formation of the contract itself. An agreement that does not comply with the *Statute* is not void, but rather unenforceable.

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"... the court found that an offer signed only by the party making the offer, but not by the vendor, was binding on the vendor as all of the essential terms were established and the agreement was enforceable on the basis of part performance."

The Doctrine of Part Performance

The doctrine of part performance was developed to deal with cases where requiring strict compliance with the writing requirements of the *Statute* would be unjust. The doctrine of part performance provides that where one party to an oral agreement partially performs their undertaking, the oral agreement may be enforced to avoid injustice to the party conferring value. Part performance should only oust the application of the *Statute* where the acts are unequivocally referable in their own nature to dealing with the land.

The Supreme Court of Canada set out the requirements that must be satisfied before the doctrine of part performance applies as follows; 1) the performance must be unequivocally referable to the alleged contract. Payment of money is not sufficient to establish part performance; 2) the acts of performance must be acts of the plaintiff who acted to his detriment and which acts are known to the other party; 3) the contract must be one for which the law would grant specific performance if it had been properly evidenced in writing, i.e. it must have the essential terms discussed above; and 4) there must be clear and proper evidence of the existence of the contract.

Recent Changes

The Ontario Court of Appeal (the "ONCA") recently revised the law on part performance in *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.* In that decision, the court found that an offer signed only by the party making the offer, but not by the vendor, was binding on the vendor as all of the essential terms were established and the agreement was enforceable on the basis of part performance.

The decision is significant because real estate leases or agreements for purchase and sale, which do not satisfy the writing requirements of the *Statute of Frauds*, may be more likely to be enforced than they were in the past.

The ONCA found that payment of money could constitute a sufficient act of part performance, which is a deviation from the law as it existed before, and, secondly, the court also found that the acts of part performance needed to be referable to **a contract** and be consistent with the oral contract alleged, but not necessarily be unequivocally referable to the alleged contract. In other words, if the acts of part performance are on the balance of probabilities referable to a contract, then even though there could be other possible explanations are as to why such acts of alleged part performance occurred, sufficient part performance could arise. Furthermore, the court widened the concept of the detriment that was necessary to be found to the party alleging the contract. Previous to *Erie*, an inability to acquire the property was not considered to be sufficient detriment. *Erie* appears to have changed that analysis and appears to recognize that an inability to acquire the property is sufficient detriment to the party alleging the contract. In *Erie*, the land in question was a gravel pit and the buyer was an operator of gravel pits who said they needed the land for the purposes of their business. As well, prior to *Erie*, the

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courts focused on the acts of the party claiming part performance. *Erie* suggests that courts should look more broadly at the actions of both parties to determine if there was part performance. With courts now looking to the actions of both parties, a binding lease or an agreement for purchase and sale may now be found to exist in situations where it had not previously.

So, basically, the possibility now exists that an exchange of e-mails followed by an allegation by a party that the essential terms of an agreement were set forth in the e-mails and together some act of part performance, which may simply constitute the payment of some money, could be the basis for an enforceable agreement for the acquisition of an interest in land. In other words, if you intend that such e-mail communications and letters to be non-binding and that any agreement only arise pursuant to an actual negotiated and executed agreement of purchase and sale or offer to lease, then this had better be made explicit and, be aware that the acceptance of money following such an exchange of communications could result in a surprise allegation that the parties have made a binding deal. ■

EXPECT THE BEST

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