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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Building

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:

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NEW YEAR, NEW PROVINCIAL POLICIES

Tammy Evans and Marc Kemerer

As we head into 2011 we look to a year that will likely see the issuance by the Province of Ontario of significant new planning policies, most notably a new Provincial Policy Statement (PPS) and an amendment to the Growth Plan for the Greater Golden Horseshoe (the "Growth Plan"). These initiatives represent the latest in a co-ordinated effort by the McGuinty government to direct growth toward intensification and away from sprawl. As these new policy directives could shape development patterns for years to come, the development industry and other stakeholders should be taking a keen interest in these processes.

A New Provincial Policy Statement

Section 3 of the *Planning Act* requires that all planning decisions made in the Province "shall be consistent with" the PPS. As we know, the PPS consists of a series of general high level policies focused on the efficient and sustainable development of land throughout the Province. The present PPS policy framework directs growth within existing settlement areas, seeks to conserve employment areas, requires the provision of a wide range of housing types, particularly affordable housing, and protects prime agricultural areas, the environment and significant built heritage resources and significant cultural heritage landscapes.

To remain current, the PPS is required to be reviewed by the Province every five years. At the present time, the Province is in the process of reviewing the PPS 2005 and has been seeking input from stakeholders on what changes, if any, need to be made to that instrument. Promoting growth while protecting other competing priorities results in a balancing of interests that makes this review of the PPS more important than ever before for industry stakeholders.

The Province has promised to soon release a draft of the proposed new PPS for further comment. The development industry will be looking for limits on further regulation, flexibility in dealing with development proposals, particularly for sensitive areas, and consistency with the provincial policies set out in the more prescribed Provincial plans. Environmentalists, heritage advocates and resident groups will be looking for increased regulation and stronger protection from development.

It will be interesting to watch as the government reveals its position on these issues, particularly given that regulating growth necessarily increases costs to developers– costs which are typically passed on to consumers– and leads to denser neighbourhoods. How much appetite will there be among Ontario residents to accommodate this type of sustainable development? It will also be interesting to see the impact of decisions of the Ontario Municipal Board (OMB), for example to recognize major retail development as employment uses, on the new policies. Finally, there is a real question as to whether the new PPS will be ready to be approved by the government before the next provincial election in October of 2011.

Landowners, developers and investors are encouraged to provide comments to the Ministry of Municipal Affairs and Housing (the "Ministry") regarding the new PPS to ensure that their interests are properly addressed.

BLANEYS ON BUILDING

"Staff at the Province have stated that a prime objective of Amendment 1 is to 'rationalize uncoordinated planning' in an area where too much land has been designated for development, and to thus make development in this area 'more financially sustainable'."

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Proposed Amendment 1 to the Growth Plan

In 2005 the Province passed the *Places to Grow Act, 2005*, the purpose of which is to provide for the coordination of (sustainable) growth policies among all levels of government in prescribed areas. This is to be done through the growth plans established by the Province. The Growth Plan, approved in 2006, sets population and employment targets for municipalities subject to the Growth Plan and requires that upper and lower tier official plans be amended to achieve those targets. This has lead to the comprehensive review of, and amendment to, many of those official plans, a process that has been the subject of some controversy, as evidenced by the recent decision of the Province not to accept certain portions of Durham Region Official Plan Amendment No. 128[1].

One of the most important issues for industry stakeholders with respect to new policy implementation is the impact of such policies on development rights. This matter of transition was addressed by the Province through O. Reg. 311/06 which set out which approvals would be subject to the Growth Plan and which would be exempt. For example, official plan (amendments) commenced before 16 June 2006 that do not result in the addition of 300+ hectares to settlement areas are not subject to the Growth Plan.

In 2009, the Province released a draft growth plan for the Simcoe Sub-Area (the County of Simcoe and the cities of Barrie and Orillia) entitled *Simcoe Area: A Strategic Vision for Growth*. That document, and the feedback received back from stakeholders on it, formed the basis for Proposed Amendment 1 to the Growth Plan ("Amendment 1") released in October of this year. Amendment 1 allocates population growth targets (really caps) to four proposed urban nodes and other identified settlement areas[2]. and employment growth to strategic employment areas along the Highway 400 corridor

Staff at the Province have stated that a prime objective of Amendment 1 is to "rationalize uncoordinated planning" in an area where too much land has been designated for development, and to thus make development in this area "more financially sustainable". Amendment 1 is also intended to complement recent Provincial legislation in this area through the resolution of the Barrie-Innisfil boundary issue and the adoption of the Lake Simcoe Protection Plan.

Most notably and controversially, Amendment 1 requires that the County and its constituent municipalities delineate interim settlement area boundaries to accommodate the density targets set out in Schedule 7 over a 20 year time horizon[3]. Lands outside of that interim boundary, even if within the existing settlement area, will not be approved for further development, and development will not be able to occur in designated greenfield areas outside of that boundary, until the interim settlement area has been built up. Even at that point, if a municipality has reached the cap on population growth imposed by Amendment 1, further development may not be permitted until the Schedule has been revised to allow for a new population target[4]. No interim boundary may be changed without a municipality first going through a municipal comprehensive review.

This approach represents a significant change with respect to settlement areas and has given rise to confusion and concern over what devel-

"Amendment 1 has also thrown a wrench into the growth plan conformity exercise undertaken recently by the County of Simcoe."

opment rights remain for current approvals/designations granted for lands located within the settlement area but outside of the interim boundary. While the Province continues to claim that Amendment 1 would not remove existing development approvals, staff at the Province have not been able to say with any certainty how approvals will be dealt with in the transition provisions that will accompany the implementation of Amendment 1. This concern has been compounded by the current position of the Province that the transition regulation will not be released in draft form for comment prior to its implementation, a position which amazes these writers given that the very substance of the transition provisions has dominated all of the stakeholders submissions on Amendment 1. Many landowners and developers in Simcoe County are understandably concerned with this approach.

Amendment 1 has also thrown a wrench into the growth plan conformity exercise undertaken recently by the County of Simcoe. That exercise resulted in a new draft County official plan, which has been appealed to the OMB. The County will now be required to undergo a further conformity exercise if Amendment 1 comes into force, which places the draft official plan and the OMB appeal in limbo.

Schedule 8 of Amendment 1 identifies both the urban nodes and the strategic employment areas and economic employment districts. Major retail and residential uses will not be permitted in these areas/districts and the uses/lot sizes permitted will likely be set out in detail. How this limitation will fit in with the concept of a "complete" community- a major objective of the growth plans- is yet to be determined.

The Province has set a deadline of 31 January 2011 for all submissions on Amendment 1. Any person with land holdings in the Simcoe Sub-area should familiarize him/herself with Amendment 1 and provide comments directly to the Province. We would be pleased to review with you the impact of Amendment 1 on your property and to assist in communicating your views on Amendment 1 to the Ministry.

As a final comment, we will continue to monitor whether the government will be able to approve Amendment 1 in final form prior to the election.

Conclusion

The McGuinty government has been an activist one in the area of regulating land development. Notwithstanding the upcoming election, 2011 promises to be no different with a proposed new PPS and the proposed Amendment 1 to the Growth Plan. While these two significant policy initiatives share the same objectives of intensifying and rationalizing growth, the planning tools they propose may differ in some significant ways. Thus the consistency landowners and developers are seeking across the policy spectrum will likely not be a resolution the Province shares.

Stay Tuned in the New Year! ■

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[1] Last month the Province issued its decision on much of ROPA 128, refusing to approve expansions of urban areas proposed by the Region in northeast Pickering, in Courtice, in north Whitby and north Oshawa.

[2] The targets/caps are set out in Schedule 7 of Amendment 1.

[3] The cities of Barrie and Orillia are not subject to this requirement.

[4] The position of the government on this point is that these caps are subject to review every five years and any shift in population will be recognized.

BLANEYS ON BUILDING

"The purpose of the Health Background Study is to establish a set of standards... to assess the health impact of development proposals."

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MANDATING A HEALTHY BUILT ENVIRONMENT?

Tammy Evans, Marc Kemerer and Catherine Longo

We have previously written on the new "green" building standards being imposed by municipalities, particularly the City of Toronto. Those policies may soon be complimented by additional initiatives with respect to "healthy" buildings as urban planners have been directed to take a closer look at the correlation between health and the built environment.

Leading the way in this respect is the Health Background Study (the "Study") being undertaken by the Region of Peel in collaboration with the City of Toronto, with funding through the federal Public Health Agency and the Heart and Stroke Foundation. The purpose of the Study is to establish a set of standards intended for adoption by municipalities in Ontario, and eventually across Canada to assess the health impact of development proposals. The Study will focus on the following areas, which are incorporated into its terms of reference:

1. Density
2. Service Proximity
3. Land Use Mix
4. Street Connectivity
5. Road Network and Streetscape Characteristics
6. Parking
7. Aesthetics and Human Scale

These terms of reference, and eventually a user's guide, are intended to address both greenfield and infill developments. The challenges faced by developers in retrofitting existing sites are expected to be taken into consideration. A further challenge for the project team will be to sort through any conflict with existing municipal and/or provincial policies

The Region of Peel and the City of Toronto are currently conducting workshops and inviting interested parties to discuss the terms of reference and to provide input into the substance and implementation of development criteria for this healthy building initiative. The result of these consultations will be a user's guide intended eventually for adoption by provincial governments and/or municipalities. This guide could therefore have very significant implications for the development industry.

Will this initiative materialize into yet another dip into the developer's pocket, with increased consultation, additional expert reports, studies, time and expenses to develop land in Ontario? It certainly has the potential. We will be monitoring the progress of these consultations and the development of the user's guide in the coming year and would be pleased to discuss the Study and its potential impact on your future developments. ■

DEVELOPMENT CHARGES ALERT - A HOLIDAY GIFT FOR MUNICIPALITIES

Municipalities are indexing and/or raising development charges again. Take note for your construction budgets - York Region will increase their current development charge rates effective January 10, 2011, and the City of Toronto's increase - by approximately 25% – is effective February 1, 2011. Other municipalities across the GTA will be indexing in accordance with their stated timelines. Contact us for rates in your development area. ■

BLANEYS ON BUILDING

"The main argument in the Progressive Homes *case was that 'property damage' does not result from damage to one part of the building arising from another part of the same building."*

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SUPREME COURT CLARIFIES WHEN INSURANCE MUST RESPOND TO DEFEND CONSTRUCTION DEFICIENCY CLAIMS

Andrew Heal

In *Progressive Homes Ltd. v. Lombard General Insurance Co., 2010, S.C.C. 33*, the Supreme Court of Canada recently ruled on an insurer's duty to defend a general contractor in the context of a construction deficiency claim. These cases often involve the decay of, or damage to, interior building component parts after the failure of an exterior cladding system, or portions of it. The S.C.C. ruling settled differences among provincial appellate decisions when considering the coverage of such claims under a Comprehensive General Liability ("CGL") insurance policy. The *Progressive Homes* decision provided some guidance on the interpretation of policy definitions of "property damage", "accident", "occurrence", and the "work performed" exclusion.

The *Progressive Homes* case endorsed a uniformed approach to these interpretive issues. The British Columbia courts, and the British Columbia Court of Appeal in particular, in cases which preceeded *Progressive Homes,* had approached the interpretation of the policies in question that led to coverage denial under the particular CGL policies in question. And often in leaky condominium building envelope cases

In *Progressive Homes*, the Supreme Court of Canada overruled the B.C. Court of Appeal, and the lower court which had decided that no coverage extended to the contractor for the claims it was being sued for in a number of lawsuits. The defence costs alone were going to be significant.

The main argument in the *Progressive Homes* case was that "property damage" does not result from damage to one part of the building arising from another part of the same building. According to the argument, damage to other parts of the same building is pure economic loss, not "property damage". What follows from this argument is that "property damage" is limited to damaged third party property. This argument builds on a distinction between property damage and pure economic loss, which argument is drawn in part from the Supreme Court of Canada's prior decision in *Winnipeg Condominium Corporation v. Bird Construction* [1995] 1 S.C.R. 85. In the *Winnipeg Condo* case, subsequent owners claimed negligence by the original general contractor, subcontractor and architect after a storey high section of exterior cladding fell from the side of the building to the ground below. The S.C.C. in *Winnipeg Condo* found that the loss was not "property damage" but a recoverable form of economic loss. In short, the insurer argued that "property damage" does not include damage to the insured's own work, and the context matters, the work should be looked at as whole when a building is the context for the claim.

In answer, the S.C.C. said an insurer's duty to defend only requires the possibility of coverage. Whether any specific property fell within the definition of "property damage" or not would be a matter to be determined on the evidence at trial. For purposes of the application and the trigger of the insurer's duty to defend, it was a low threshold of showing the pleadings reveal a possibility of "property damage" for the purpose of deciding that question.

"The alleged 'property damage' at the root of this case requires an application of sometimes confusing concepts of an exclusion to coverage, and exceptions to exclusions to coverage."

The alleged "property damage" at the root of this case requires an application of sometimes confusing concepts of an exclusion to coverage, and exceptions to exclusions to coverage. The common exclusion to coverage is a "work performed", or "own work" exclusion. A common exception to such an exclusion is a "subcontractor exception". Exclusions do not create coverage and neither do exceptions to exclusions. Exceptions bring an otherwise excluded claim back within coverage where the claim fell within the initial grant of coverage in the first place.

The central exclusion in the appeal was whether the "work performed" exclusion applied. To make matters more complicated, there were three version of the "work performed" exclusion at play in the appeal since there were successive insurance policies that applied to the period of alleged damage, which spanned a number of years.

The Court persuasively traced changes in insurance policy language in their various forms and found (1) on a plain reading damage was excluded only where it was caused by Progressive Homes to its own completed work but not property damage caused to, or by, a subcontractor's work (2) the pleadings indicated the involvement of subcontractors which was itself sufficient to trigger to duty to defend (as it might at trial materialize that the damage was caused to a subcontractor work or a subcontractor's work itself caused the damage) and (3) coverage for repairing defective components might be excluded on one version of the policy at play, but resulting damage would not be excluded.

It must be remembered that these issues were only determined at the pleading stage, which is to say very early in the lawsuit. Triggering a duty to defend requires the insurer to pay the investigation and litigation costs (i.e. defence costs) but not necessarily provide an indemnity. Depending on what was ultimately proved at trial as the Supreme Court of Canada itself noted "if as Lombard alleges the buildings are wholly defective, then the exclusion will apply and Lombard will not have to indemnify Progressive" under one of the versions of the policy.

At the early stages of a construction deficiency claim, an insurer will be properly required to defend those claims which possibly result in coverage. These claims are often historical claims brought years later, and are not inexpensive claims to defend. ■

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 Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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