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Case Law and Statutory Update

MNR Wetland Evaluations – “Best Evidence” as proof in an OMB hearing - *South Georgetown Landowners Group v. Halton (Region)*, [2006] O.M.B.D. No. 834

In *South Georgetown Landowners Group v. Halton (Region)*, [2006] O.M.B.D. No. 834, the Region of Halton (the “Region”) proposed to designate a portion of land (the “subject-lands”) owned by certain individuals as Greenlands A in Regional Official Plan Amendment No. 25 (“ROPA No. 25”). Lands designated as Greenlands A in ROPA No. 25 must include wetlands as determined by the Ministry of Natural Resources (the “MNR”). As evidence of the MNR wetland determination, the Region relied on correspondence from a biologist called by the Region, that confirmed the MNR assessment. However, the Region did not call the author of the correspondence to give evidence, and instead relied on an ecologist from the MNR and an outside ecologist to give evidence, neither of whom had any conversations with the author of the correspondence. The Ontario Municipal Board held that the evidence of the two ecologists was confirmatory of the wetland assessment by the MNR as a factual matter only, but was of no assistance as to how the MNR actually carried-out the assessment.

The Ontario Municipal Board found that the Region had not shown how the wetland evaluation was carried out and what conclusions were actually reached, and there was a need for the Region to prove that the MNR evaluation was properly and appropriately undertaken. The Ontario Municipal Board held that the evidence did not substantiate the appropriateness of the MNR wetland evaluation, based on the contradictions in the Region’s evidence and on the lack of “best evidence”, which would have been the evidence of the author of the correspondence, who actually carried-out the assessment, and ordered that the Greenlands A designation be removed from the subject-lands.

Recreational Trail – Occupier’s Liability Act - *Herbert v. Brantford (City)*, (Ont. S.C.J. Oct 25, 2006)

The City brought a motion for summary judgment to dismiss the plaintiff’s claim for injuries suffered while biking on the Gordon Graves Memorial Trail in Brantford.

The plaintiff, who had frequently bicycled on the trail, swerved off the pathway to avoid striking a pedestrian and fell into an area with boulders, rocks, and pieces of concrete embedded with steel rods. He

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sustained very serious injuries including a fractured spinal column.

The plaintiff lead evidence that established that the Trail was not designed or installed in accordance with any recognized standards developed by the American Association of State Highway and Transportation Officials or those of the Hamilton Ontario Design Guidelines for Bikeways. In particular, the expert evidence questioned the width of the trail and the lack of a recovery zone beside the trail where the plaintiff was forced off the trail.

The City brought a motion pursuant to s. 4(3) of the *Occupier's Liability Act* for summary judgment on the basis that a person who enters on a recreational trail is deemed to have willingly assumed the risks of doing so subject to a duty of the occupier of the trail "to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property." In finding that the plaintiff had "a real chance of success" at trial, the court dismissed the motion. There was no suggestion that the City created "a danger with the deliberate intent of doing harm or damage" to the plaintiff. The issue to be determined by the court was whether it was a triable issue that the City acted "with reckless disregard of the presence of the person" in relation to the area where the plaintiff fell and hence breached a duty to the plaintiff. The court found that the City did not comply with recognized standards in providing a wider path and a recovery zone which it could easily have done by laying down more asphalt and by laying down sod adjacent to the asphalt after burying the boulders, rocks and concrete. By failing to do so, the court

concluded that a trial court could easily find that the City acted "with reckless disregard for the presence of the person."

**Access to Information - MFIPPA
David v. Information and Privacy
Commissioner Ontario (Ont. Div. Ct. Oct.
30, 2006)**

The Ontario Divisional Court heard three related applications together, all of which dealt with access to information under the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA") and its application to independent contractors of the municipality.

In the first of the three related applications, *David v. Ontario (Information and Privacy Commissioner)*, the court considered a request made under the MFIPPA with respect to the bidding process for the renovation and operation of Union Station in Toronto. The municipality retained a retired judge to inquire into the process used by the municipality to: develop its request for proposals, evaluate the proposals and select the preferred bid. The overriding purpose of the review was to determine whether the process was fair.

The applicant requested notes made by the municipality's investigator in his interviews with the applicant and interviews with others that referred to the applicant, all of which were refused by the municipality on the basis that those notes were not in the custody or control of the municipality.

The Divisional Court held that for the purposes of the MFIPPA the records were not in the custody or control of the municipality because the investigator was not an employee, an agent or officer of the

municipality, but instead was an independent person appointed to conduct an independent inquiry, with no power or authority to bind the municipality. However, the Court of Appeal went on to note that had the municipality attempted to assign the responsibility of one of its municipal functions, it may have found that the municipality could not escape its disclosure responsibilities by delegating such a function to an outside entity.

In the second of the three related applications, *David v. Binstock*, the applicant argued that his privacy rights were breached in the report prepared for the municipality, which referred to the applicant by name. The Divisional Court refused to grant judicial review of the Privacy Commissioner's decision that she had no statutory duty to investigate complaints of breaches of privacy provisions in the *Municipal Freedom of Information and Protection of Privacy Act*, on the basis that this was a matter for the legislature, not the courts. However, the Divisional Court did note that the Privacy Commissioner's conclusion that the applicant's personal information was in the public domain because he put it there, was not an unreasonable conclusion.

In the third of the three related applications, *Reynolds v. Binstock*, the applicant sought an Order quashing two decisions of the Privacy Commissioner dismissing her complaints that her privacy had been invaded by the publication of her personal information in the report prepared for the municipality contrary to the *MFIPPA*. The applicant also alleged that because the municipality did not retain custody and control of the report, her privacy was unlawfully invaded. With respect to the first complaint, the Divisional Court held that the

Privacy Commissioner could not be compelled to act as a tribunal to resolve privacy disputes brought by the public, and in any event, the requirement for procedural fairness at the intake stage had been met. With respect to the second complaint, the Divisional Court relied on its ruling in the first of the three related applications, that the municipality had never had custody and control over the report and therefore the *MFIPPA* did not apply to the report.

Normal Farm Practice – *Farming and Food Production Protection Act Hill and Hill Farms Ltd. v. Bluewater (Municipality)*, (Ont. C.A. Sept. 18, 2006)

This appeal concerned the jurisdiction of the Normal Farm Practices Protection Board under the *Farming and Food Production Protection Act, 1998*, S.O. 1998, c. 1 (the "FFPPA") to grant relief from the application of a zoning bylaw. The Board is empowered, pursuant to subsection 6(3) and 6(6) of the *FFPPA*, to determine whether an agricultural operation or proposed operation that is directly affected by a municipal bylaw is a normal farm practice. If so, then, pursuant to s. 6(1) of the Act: "No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation." The issue before the Ontario Court of Appeal was whether the term "by-law" as used in the *FFPPA*, included or excluded a zoning bylaw.

In 2001, the appellant applied to the municipality for a building permit in order to increase the capacity of their pig farm from 700 pigs to 1,350 pigs. The appellant also applied to the local Committee of Adjustment for three minor variances to accommodate the proposed construction. Section 4.5 of the zoning bylaw provided that the erection or expansion of a livestock

facility had to comply with the minimum distance separation (MDS II) for new or expanding livestock facilities set out by the Ontario Ministry of Agriculture, Food and Rural Affairs. Section 29 of the bylaw stipulated how the MDS II requirements were to be calculated. Two of the variances sought were for relief from the MDS II requirements. MDS II required that a new or expanding agricultural operation that was located in the vicinity of an institutional use be sited double the distance required from an ordinary neighbour, a requirement known as "the doubling factor". The appellant's farm was located next to the township municipal complex, a community centre and institution. The evidence was clearly indicated that the land upon which the complex was located had been used for a number of years for municipal purposes and that the municipal offices and an auditorium were regularly rented for weddings and used for other community events. The Municipality dismissed the application for the variances and the applicant then applied to the Normal Farm Practices Protection Board on the grounds that the proposed expansion was a "normal farm practice" that the bylaw restricted. The Board determined that the proposed expansion was not a normal farm practice. However, the proposed operation would be a normal farm practice if the applicant was relieved of the doubling factor and, in effect, held the applicant did not have to comply with the bylaw. The Municipality appealed the Board's decision to the Divisional Court. The Court held that a "municipal bylaw," as used in section 6, did not include a zoning bylaw. Rather, section 6(1) and (2) were intended to refer to bylaws which dealt with matters prohibiting or regulating nuisances and disturbances of the type referred to in the preamble of *FFPPA*.

On further appeal, the Court of Appeal held that the Divisional Court erred in law in adopting an interpretation of the words "municipal by-law" that excluded a zoning bylaw. The Board therefore had jurisdiction to determine whether the zoning by-law restricted a normal farm practice. The Court of Appeal then went on to review the Board's decision on a standard of reasonableness, and held that the Board's conclusion that its decision was in compliance with the provincial policy statements was simply not tenable and was unreasonable.

Nutrient Management Act – Powers of Municipality- Peacock v. Norfolk (County), [2006] OJ No. 2582 (Ont. C.A., June 28, 2006)

The Ontario Court of Appeal upheld the decision of the Superior Court of Ontario that held that the Nutrient Management Act (the "NMA") and its regulation overrule municipal drinking water source protection by-laws.

The respondents, the Peacocks, operated a 1,000 head intensive hog operation and wished to double the capacity of their hog raising facility to 2,000 hogs. The facility would contain a large reservoir for nutrient storage. The Peacocks received approval of their Nutrient Management Plan, as required under the "NMA", and corresponding Regulation 267/03 (the "Regulation"). Among the requirements of the Regulation were that the new nutrient storage facility must be at least 100 metres from a municipal well.

The appellant municipality, Norfolk County, passed By-law 64-Z-2003 (the "By-law") that prohibited siting intensive livestock

operations and associated nutrient facilities within Sensitivity Areas 1 and 2. The appellant submitted that the Peacocks' proposed expansion was located within Sensitivity Area 2, also referred to as the two-year capture zone. The two-year capture zone referred to an area from which it would take two years or less for contamination introduced at that point to reach the municipal well.

Norfolk County took the position that the Peacocks had to comply with both the Regulation and the By-law and, that the By-law prohibits the proposed expansion. The Peacocks and the intervener, the Ontario Pork Producers' Marketing Board, took the position that the Regulation superseded the By-law, pursuant to s. 61 of the *NMA* and only compliance with the Regulation was necessary.

Section 61(1) of the *NMA* provides: "A regulation supersedes a by-law of a municipality or a provision in that by-law if the by-law or provision addresses the same subject-matter as the regulation." There were two main issues on appeal. The first was whether s. 61 specifies that, for conflicts between the Regulation and a municipal by-law, a test different from the impossibility of dual compliance test set out in *11957 Canada Ltée (Spraytech Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 is to be used. The second was whether the Regulation and the relevant provision of the By-law address the same "subject-matter".

The application judge ruled in favour of the respondents having found that the Regulation addressed the same subject-matter as the By-law, and as such, superseded the By-law. The Court of Appeal

dismissed the appeal. The Court stated that as set out in *Spraytech*, the impossibility of dual compliance test only applies in the event that the relevant provincial legislation does not specify a different test. The Court held that section 61 of the *NMA*, specifies the test to be applied in the event that the Regulation and a local by-law or provision of a by-law address the same subject-matter. If they address the same subject-matter, s. 61(2) specifies that the by-law or provision of the by-law is "inoperative while the regulation is in force." Section 61 therefore clearly displaces the impossibility of dual compliance test. The Court concluded that the Regulation and the bylaw had similar underlying purposes and objects, namely to protect against contamination of municipal wells. The Regulation primarily dealt with nutrients and how they should be managed in an agricultural operation. It balanced the protection of ground water and the natural environment with the objectives of sustainable agricultural operations and rural development. The Bylaw attempted to make appropriate use of land planning by categorizing both the land in the municipality and its sensitivity to potential contamination. The Bylaw aimed to protect the municipality's water supply and did so by prohibiting land uses within certain areas where those uses posed an unacceptable level of risk to groundwater quality. However, in doing so the Bylaw included a specific provision that regulated intensive livestock operations and associated nutrient storage facilities. The provision addressed the same subject-matter and had the same purpose as the Regulation. It was therefore inoperative.

Statutory Update

Bill 43 - Clean Water Act

Bill 43, The Clean Water Act received Royal Assent on October 19, 2006. The Act will not come into force until a date to be named by the Lieutenant Governor in Council and there remains outstanding regulations yet to be introduced that will impact the legislation. The regulations will be released in stages over the next 18 months.

The Clean Water Act will:

- require local communities to look at the existing and potential threats to their water and set out and implement the actions necessary to reduce or eliminate significant threats.
- empower communities to take action to prevent threats from becoming significant.
- require public participation on every local source protection plan.
- require that all plans and actions are based on sound science.

Conservation Authorities will coordinate planning across watersheds by supporting local municipalities, gathering information, assessing and ranking threats, consulting, and integrating municipal strategies into larger watershed plans.

The Association of Municipalities of Ontario has voiced concerns over eroding municipal land use planning authority and the role of municipal councils at the expense of conservation authorities, and questioned the downloading of services and associated responsibilities to municipalities without adequate financial support.

The Province has allotted \$120 million to prepare water source protection plans and \$7 million for early implementation. However, there has been no full commitment to pay for all related costs that municipalities, farmers and businesses may face.

Bill 51: *The Planning and Conservation Land Statute Law Amendment Act, 2005*

Bill 51, which will have a profound impact on the land use planning process in Ontario, received Royal Assent on October 19th. There are however many significant sections of the Bill which amends the *Planning Act* that are not yet in force. Bill 51 was amended by the Standing Committee on General Government at the end of the summer to provide as follows:

- The OMB will now have the power to determine whether an application is complete and satisfies the requirements of the municipality and whether such requirements are reasonable.
- A municipality will have 30 days to determine whether an application for an official plan, zoning by-law amendment or plan of subdivision approval is complete.
- The controversial limitation on private parties placing evidence before the Board that was not before council has been removed. The OMB will have greater discretion to determine whether such information and evidence could have materially affected council's decision. If the Board reaches such a determination, the information will not be admitted into evidence at the hearing and the Board will give the municipality the opportunity to reconsider its decision

and make a recommendation to the Board. The Board is required to “have regard to” council’s recommendation.

- The limitation with respect to appeals on a refusal to amend an official plan to remove the employment land designation will now only apply where the official plan in question has policies with regard to the removal of land from an employment area.
- The Bill now provides that the Board may dismiss an appeal of an application that is “substantially different” from what was before council.
- The Bill was amended to require open houses prior to statutory public meeting during the five year official plan review or where an official plan amendment is proposed for a development permit system. A zoning by-law amendment to conform to an amended official plan or to implement development permits will also require an open house.

We will provide a further update on Bill 51 when Regulations are enacted by the Minister that provide further details on the legislation and the remaining portions of the Bill are proclaimed in force.

Bill 130: Municipal Statute Amendment Act, 2006

Bill 130 received First Reading on June 15, 2006. The Bill received Second Reading debate on September 25 and 26 before it was referred to the Standing Committee on General Government on October 12. The Standing Committee is currently holding public hearings on Bill 130 to the end of November. It is anticipated that the Bill will receive Royal Assent prior to the end of the year. The proposed *Municipal Statute Law Amendment Act, 2006* replaces prescribed, or very specific, powers with broad permissive powers similar to the *City of Toronto Act*. The intent is to provide municipal governments with greater flexibility in meeting their communities’ expectations and fulfilling the responsibilities. This Bill does not include any proposed powers to levy taxes, meaning all municipalities (other than Toronto) will continue to generate revenues solely through municipal property taxes.

For a complete summary of Bill 130 please see our *July 2006 Municipal and Planning Law Newsletter* or you can request a copy by contacting a member of our Municipal Group.

Loopstra Nixon LLP Municipal and Planning Law Group

The Municipal and Law Group of Loopstra Nixon LLP provides advice and services to both public and private sector clients on a broad range of municipal, land use planning and development matters including:

- **Municipal Liability and Risk Management**
- **Expropriation**
- **OMB Hearings**
- **Development and Cost-Sharing Agreements**
- **Privacy Issues**
- **Development Applications**
- **By-Law Drafting, Enforcement and Prosecution**
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