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# MUNICIPAL AND PLANNING LAW NEWSLETTER

Winter 2008

## Loopstra Nixon recognized by NRU as one of the GTA's top Planning and Development Law Firms

Loopstra Nixon has rocketed up the charts in Novae Res Urbis' tenth annual ranking of the GTA's most prominent planning and development law firms. Our municipal and planning law team jumped from tenth spot to number five as the municipal department continues to grow and expand by representing numerous municipalities across the GTA, Durham Region, and Simcoe County. We are honoured by this recognition and proud of the effective results we have achieved in working in partnership with our municipal clients. Loopstra Nixon provides a full range of legal services for both urban and rural municipalities in a cost effective manner that recognizes the burden of cost constraints that municipalities face on a day to day basis.

## IS THERE A PRIVATE LAW DUTY TO ENFORCE MUNICIPAL BY-LAWS? *FOLEY v. SHAMESS REVISITED*

BY CHARLES M. K. LOOPSTRA, Q.C.

This was a trial decision by the Ontario Superior Court of Justice that held the Town of Parry Sound 40% liable for the damages sustained by Foley, the owner of one of three connected row units in a 100 year old building as a result of an unsafe building order issued by the Town against Foley and Shames, (Shames being the owner of the other two units), that ultimately led to the demolition of all three units. The Town's negligence was found on the following basis:

*By October of 1996, the Town must have known that [Shames] would not be providing the engineering assurances requested in the Town's letter of September 9, 1996. Its failure to enforce its [Property Standards] by-law in the ensuing 12 months coupled with the ongoing deterioration of the entire building, leading to the decision ultimately made to demolish the entire building, contributed...to the damages*

*sustained by the plaintiffs through the loss of their building.*

In his legal analysis, the trial judge determined that the Town owed a duty of care to Foley in its enforcement of the Property Standards By-law, and that it was reasonably foreseeable that the Town's failure to enforce the by-law against Shames would cause harm to Foley. In coming to this conclusion the judgment finds a breach of a private law duty of care for the Town's failure to carry through with the enforcement process started earlier. Even though the enforcement process was discretionary, the Town's failure to make a *bona fide* policy decision not to proceed with enforcement, effectively meant it could not rely on the policy decision defence. The trial judge stated:

*No evidence was called by the Town to explain why during the 11 month period from September of 1996 to*

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## Is There a Private Law Duty Cont.

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*October of 1997, it did not enforce its [Property Standards] by-law. Evidence was not put forward to suggest that for various policy reasons, the Town determined that enforcement should not proceed. A process that had been started by the Town in 1994 was still underway, but not complete, some three years later in 1997.*

The Ontario Court of Appeal in a decision released on August 18, 2008, dealing with an appeal by the Town as well as cross appeals by both Foley and Shames, allowed the Town's appeal and dismissed the cross appeals.

In dealing with the Town's appeal, the Court of Appeal held that the trial judge had erred by finding that the Town was negligent for failing to demolish the two Shames units by October, 1997 thereby allowing the Foley unit to be spared from ultimate demolition due to ongoing deterioration of the building. The trial judge had stated that "no policy reason was put forward by the Town to explain why it did not move to demolish [the two Shames units], and to recover the cost of such work as against the owners.

In allowing the Town's appeal, Justice Laskin of the Court of Appeal stated:

*In my view, finding the Town negligent for failing to undertake a partial demolition of the building was unreasonable. Although the Town owed a duty to the Foley's to enforce its property standards by-law, it owed no duty*

*to them to undertake a partial demolition. For it is one thing to say a municipality has a duty to enforce its by-laws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners. See Frouse v. Hik, 1993 CanLII 2815 (B.C.S.C.) and Nesbitt Aggregate Ltd. v. Smiths Construction Co. (Arnprior), [2000] O.J. No. 1233 (Ont. S.C.J.)...In effect, the trial judge forced the Town to solve the very problem the owners of the building could not solve on their own. Both the Shameses and the Foleys were well aware of the option of a partial demolition and well aware of its expense and risks. They would not agree to undertake it. Why, I ask rhetorically, should the Town be required to do it for them?*

The thrust of the decision in absolving the Town of any liability is the finding that the Town had acted in a reasonable manner in the circumstances. The decision also reinforces the principle that enforcement procedures are discretionary, and the method of enforcement chosen amounts to a policy decision that is not subject to liability. What is not clear from the decision is if there is potential liability from the exercise of the municipality's discretion

not to enforce at all in certain circumstances, assuming the legislation does not impose mandatory enforcement. Applying the rationale of the decision, that a municipality is not liable for its enforcement decisions if it acts reasonably and in good faith would suggest no liability for lack of enforcement if it was a bona fide policy decision made in good faith.

On the other hand, the court stated that "the Town owed a duty to the Foleys to enforce its property standards by-law". This implies a mandatory obligation to act. Failing to act, even in the context of a policy decision to not enforce, may constitute a breach of a private law duty. This is a troublesome conclusion, given the fact that the underlying legislation at the time did not include a mandatory obligation to enforce.

I suspect that the court did not address this issue with clarity because it was more concerned about absolving the Town on the basis of it acting in a reasonable manner. It is suggested that counsel acting for municipalities be aware that this decision not be strictly read to conclude that in all circumstances failure to enforce will result in a breach of a private law duty. If however, a decision is made to enforce, and is then carried out in a negligent manner, the enforcement may be subject to liability.

### Conclusion:

Where the municipality has discretion to enforce or not enforce its by-laws, a decision not to do so is a policy decision and immune from civil action. This principle must be qualified in the following circumstances:

- a decision not to enforce does not avoid a private law duty of care. For example, the failure to prosecute a building code offence may be a discretionary policy decision, but the failure to inspect and note the defect may be a

(Continued from page 2)

breach of a private law duty of care resulting in negligence;

- Where there has been a failure to even consider enforcement, there has not been

a bona fide policy decision, and therefore may give rise to a claim for negligent enforcement.

- Acting in an unreasonable manner or in bad faith in the enforcement process, may give

rise to a breach of private law duty of care if the failure affects innocent third parties.

## Provincial Upload of Ontario Works Benefits and Court Security Costs

On October 31, 2008, the Province, Association of Municipalities of Ontario and the City of Toronto completed the much anticipated *Provincial-Municipal Fiscal and Service Delivery Review* by announcing the uploading of all social assistance benefits and court security costs. The Province will phase in an upload of Ontario Works bene-

fits costs between 2010 and 2018. The Province uploaded the municipal cost share of the Ontario Drug Benefits Program effective January 1, 2008. Starting in 2009, the province will begin to upload municipal costs for the Ontario Disability Support Program (ODSP). The ODSP upload will be completed by 2011.



# LOOPSTRA NIXON LLP

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### Municipal and Planning Law Group

The Municipal and Planning 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
- Municipal Restructuring and Governance
- Real Estate and Condominium Law
- Government Relations

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