

Infill Developments: Tips and Traps

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This article focuses on the issues and challenges of infill developments. Developers and builders, big and small, are seeking to increase density on existing lots by subdividing, or building higher on, those lots.

The success and challenges of infill developments are discussed in this article in three stages - (I) the Purchase; (II) Planning Approvals; and (III) Construction.

(I) The Purchase

Developers should approach the potential purchase of infill development lands with a detailed due diligence checklist.

Factors such as current zoning permissions, historical ownership and title issues, existing or previous use, potential environmental concerns, encroachments and development restrictions should be considered. Depending on the experience of the developer in the marketplace, all of these areas may potentially require the services of an “expert”.

It is therefore critically important for the success of any development, and particularly infill re-development, for the developer/owner to assemble the appropriate primary project team, which should consist at a minimum of the developer/owner; the potential builder (if different from the developer); architect; surveyor; land development lawyer and, where the site or development proposal dictates, may also require an environmental or heritage consultant; planner; designer; marketing and sales advice. The above list is not exhaustive of the various consultants and experts that may be required as the expertise required will depend on the characteristics of the site and the intended development, and is intended to provide a general list of the primary project team members.

While infill re-development sites may be subject to certain particularities that do not necessarily arise with greenfield developments, such as existing infrastructure limitations, historical restrictions on title and boundary concerns, certain challenges apply to all new construction, such as meeting provincial and municipal planning policies while still achieving the objectives of the developer/owner.

Particular areas of concern that we have had to address for our clients in infill development include inconsistent boundary descriptions as between the proposed infill development property and the neighbour site – or what we describe as “sleeping” encroachments; expired City development agreements or restrictions that should no longer apply; abandoned/ignored laneway obligations/inadequate



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public rights; historical title issues; unreasonable NIMBY neighbourhood group demands; traffic and infrastructure challenges.

To the extent possible, prior to going “firm” on the purchase of infill property for development, these factors described should be explored not only from a practical construction perspective, but also from a financial perspective, with the assistance of the project team as needed.

(II) Planning Approvals

The guiding planning instruments for all new developments are found first at the provincial level. Infill development intensification is encouraged by the Province through a number of statutory regimes such as:

- a) the *Planning Act*, which promotes the provision of a full range of housing, the appropriate location of growth and development and the promotion of sustainable development;
- b) the *Provincial Policy Statement 2005* (currently under review), a strategic policy that encourages intensification and redevelopment within built up areas; and
- c) the *Places to Grow Act/Growth Plan*, which direct (or limit) growth, where same apply, to designated settlement areas.

At the municipal level, official plans and zoning by-laws are intended to implement provincial plans and policies; must conform (or not conflict) with provincial legislation; however may restrict or even prohibit intensification through policies or performance standards designed to promote stable neighbourhoods. This is particularly true with respect to development applications for sites in or adjacent to low density neighbourhoods.

This potentially conflicting interest of the provincial and local municipal directives can lead to an appeal to the Ontario Municipal Board. In these cases, the Board must grapple with the issue of what policies, if any, should take priority, or whether the province’s emphasis on intensification prevails over municipal restrictions on height, density etc.

As the Board is not bound by its own decisions, this may also lead to a divergence in decisions. As an example of this divide, in a Decision dated 7 February 2007, the Board in *Birchgrove Estates Inc.* (PL050679) held that planning “encompasses and balances a myriad of worthy, but often competing, interests...[recognizing] the complex, though often subtle, interplay of public preference and private judgment”. In that case, the Board placed considerable emphasis on the policy direction in favour of intensification and approved the proposed project. This appears to be the prevalent Board approach. However, in a more recent Decision released 7 April 2010, *ADMS Kelvingrove Investment Corporation* (PL081065), the Board noted, “[t]his is not a matter of “balancing” Provincial policies...against other Provincial priorities; one starts from the premise that Provincial goals are complementary, not conflicting”. In that case, the Board refused to approve the proposed project in the face of height and heritage concerns notwithstanding the emphasis provincially and locally on intensification.

One of the interesting areas of infill intensification is building a “house behind a house”. Notwithstanding their desire to see higher densities, municipalities are generally loathe to permit laneway houses, the conversion of coach houses to permanent residences and the like. The reasons for this appear to have more to do with neighbourhood concerns with respect to overlook, privacy and additional traffic than with any additional infrastructure required to support the infill project. Despite NIMBY objections, the Board approved such a project in *Douglas Cornwell v. City (Kitchener)* (PL090708) in large part on the basis that “[i]ntensification of residential uses is being strongly encouraged by the Province and planning authorities as a way to make better use of existing infrastructure and the land base”.

In contemplating an infill project, whether it involves constructing two or more houses on one (former) lot or proposing higher density, it is important to note the weight of provincial policy and considerable Board jurisprudence in favour of same. That said, local policies, performance standards and politics for the particular site must be considered. Some questions that will arise in the planning review process are: Where is development encouraged? What approvals will be needed? How stringent or clear are the current policies and what impacts, if any, will flow from the proposed infill development? How difficult (or expensive) will it be to navigate the approvals process? How does the balancing act of competing interests weigh in your favour?

It is always wise to engage municipal staff and neighbourhood residents at the earliest opportunity in discussions regarding your proposal. It is also crucial to assemble the appropriate project team members to assist in navigating the development process.

(III) Construction Stage

Once lands purchased, planning and municipal approvals are underway, the concept has been substantively finalized with design plans, and the property is ready for demolition/construction, developers will need to engage the services of either a general contractor or a construction manager unless they have this expertise in house. This involves entering into a contract with an individual that is experienced in the business of construction, which will provide that that company will be involved in most, if not all, aspects of design and specifications for the structure and will be required to enter into contracts with subtrades required to construct the project.

Developers should take the time to consider the various forms of construction contracts and the shifting risk allocations in each form.

There are a variety of standard form contracts that the owner/developer can enter into with the general contractor, including:

- a) a fixed price contract where the total price is predetermined and fixed such that only extras to the contract would be added to the total contract price if any were required. In this scenario, the general contractor would be deemed to be the Constructor for the purposes of providing Notice of Project to the Ministry of Labour and also would be responsible for the overall safety under the *Occupational Health and Safety Act* for the construction site, as well as be responsible for subtrade holdbacks under the *Construction Lien Act*.
- b) a cost-plus contract that would require the owner to pay the general contractor the cost of engaging various trades as well as a fixed percentage of the value of each such contract. This would equate to the fee to be paid to the general contractor by the owner. In this case it could either be the owner or the general contractor who enters into the contracts directly with the subtrades and is responsible for paying the subtrades directly and responsible for holdbacks under the *Construction Lien Act*. The construction manager provides services on-site, such as scheduling work shifts, controlling access to the site and coordinating the activities of the direct trades. Typically, the construction manager will also be responsible for the overall safety on the site given its presence at the construction site and will be named as the Constructor on the Notice of Project to the Ministry of Labour.

With respect to retaining a construction manager (rather than a general contractor), the owner/developer should enter into a construction management contract with the construction manager setting out the responsibilities of each party in respect of fees, supervision, extras, sign off, *Construction Lien Act* requirements, insurance and liability.

In all construction pyramid models the owner/ developer will work closely with the project team, the general contractor or construction manager to complete the detail drawings and specifications for construction of the project. Those drawings and specifications are the foundation of the bid process for engaging the sub-trades.

Given that many potential complexities involved in construction, particularly an infill project, it is important that the contract between the owner/ developer and the general contractor or construction manager be clear, fair and balanced and that it reflects what in fact will take place during the course of construction. If all parties understand their contractual obligations from the start, the project will progress with as few hiccups as possible.

Conclusion

Throughout this article, we have attempted to emphasize the importance of early consideration of the particularities of the infill development site and assembly of an appropriate project team. Working closely with that team will go far to ensure consistency in communications, efficiency in implementation and timely completion of the project. ■