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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

# 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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*"It is...critically important for the success of any development, and particularly infill re-development, for the developer/ owner to assemble the appropriate primary project team..."*

## INFILL DEVELOPMENTS: TIPS AND TRAPS

**Tammy Evans, Marc Kemerer and Michael Farace**

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

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City development agreements or restrictions that should no longer apply; abandoned/ignored laneway obligations/inadequate 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.

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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*.

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*"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..."*

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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. ■

## TALL BUILDINGS: UP UP AND AWAY?

**Marc Kemerer**

There has been much debate about tall buildings (buildings over 12 storeys in height) in Toronto in the past number of years particularly due to the decreasing availability of development land, and the province and municipal forces on intensification – but how tall is too tall and where should tall buildings be permitted?

As we have reported previously, the City of Toronto continues to review proposals for tall towers against its Tall Buildings Guidelines which set out standards for podiums, setbacks between sister towers and the like. Some of those Guidelines were incorporated into the City's new comprehensive zoning by-law (under appeal and subject to possible repeal by City Council - see the Planning Updates section of

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this issue) while the Guidelines themselves were renewed last year by City Council for continued use in design review.

Over the last couple of years the City has embarked on the "second phase" of its tall buildings review through the "Tall Buildings Downtown Project". In connection with this phase, the City has recently released the study commissioned by the City on this topic entitled: "Tall Buildings: Inviting Change in Downtown Toronto" (the "Study"). The Study focused on three issues: where should tall buildings be located; how high should tall buildings be; and how should tall buildings behave in their context. The Study is now being taken to stakeholders by the City for discussion.

The Study was restricted in terms of its areas of focus. The terms of reference for the excluded lands south of the Railway, Regent Park, the King-Spadina and King-Parliament areas and the University of Toronto Precinct, including Queen's Park. Further, restrictions recommended by the Study itself would preclude the construction of tall towers in residential or low scale retail areas (e.g. Queen West) or where such construction would result in the shadowing of "First Tier" (i.e. Allan Gardens, Grange Park) and "Second Tier" (i.e. Dundas Square, Osgoode Hall Gardens) Parks or interfere with Landmark Views (Toronto City Hall, Queen's Park and Old City Hall.

In its "Downtown Vision", the Study identifies portions of downtown Toronto where tall buildings are considered to be appropriate. Those streets are divided into "High Streets" (i.e. University Avenue, Bay Street, Bloor Street and Jarvis Street) and "Secondary High Streets" (i.e. Charles Street, Elizabeth Street). Secondary High Streets are recommended to have a reduced height – or 2/3 the height permissions of High Streets.

Along the High Streets, six building height range categories are proposed with the tallest heights being granted to the Financial District and the lowest being set for portions of Jarvis and Church Streets. The heights for each building are proposed to be broken down further into a three-tiered height limit as follows:

- a base podium height per building equal to the width of the High Street;
- an as-of-right height for the building sites based on the prevailing height of buildings along the particular street; and
- a "maximum" height for sites to be set out in the City's Official Plan. That height, which may require a site-specific rezoning, will take into account all recent development approvals in that area. It will also form the basis for the City's Section 37 "ask". While the tower-podium form will be the preferred typology, the Study proposes other areas where different typologies may prevail, including portions of College Street (Canyon Form) and Jarvis Street (Landscaped Setback Form). In those areas the typology will form the basis for setback and other building characteristic requirements and may result in exceptions to the Regulations set out below. The same is proposed for Secondary High Street Form buildings.

All typologies will be subject to a set of seventeen performance standards identified in the Study as "Regulations". These Regulations would govern

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*"Given the length and complexity of the Study, a careful reading of it is required to understand how it may impact different sites in the City's downtown core."*

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everything from the podium design and height, building material, retail space requirements, streetscaping and overall landscaping, parking, tower foot prints and separation distances, set-backs, shadow and other impacts. The Regulations are intended to be used to test all development proposals, including where through a rezoning application, the proposal exceeds the recommended height for the site,

Priority Retail Streets are supported by the Study, which recommends adding such segments along certain High Streets under the applicable zoning by-law.

Given the length and complexity of the Study, a careful reading of it is required to understand how it may impact different sites in the City's downtown core. This is particularly important for sites along streets like Yonge and Church Streets which are proposed to remain low rise in built form along certain stretches should the Study's recommendations be adopted.

Consultation on the Study's recommendations is ongoing until the end of April at which time City staff is to report back to City Council on the outcome of those consultations. Some time after that, it is anticipated that a new, consolidated, set of guidelines for tall buildings will be presented to Council for approval. This process may significantly re-shape the downtown landscape and with it new development proposals may be challenged and redevelopment opportunities may arise.

We will continue to follow the progress of the Project and keep you updated. ■

## UPDATE: CITY OF TORONTO'S THIRD PARTY SIGN TAX BY-LAW UPHELD BY ONTARIO SUPERIOR COURT

**Catherine Longo**

In a Decision dated March 3, 2011 on an application to quash the effect of a municipal Bylaw to tax third party signage, the Ontario Superior Court of Justice upheld the ability of the City of Toronto to impose a tax on the owners of third party signs through the City's Third Party Sign Tax Bylaw No. 197-2010 (Municipal Code Chapter 771) (the "By-law"), while at the same time grandfathering existing signage as at 6 April 2010. See *Pattison Outdoor Advertising LP v. Toronto (City)*, 2011 ONSC 537.

The By-law was challenged on a number of grounds, including that: it imposed an indirect tax; it represented a tax on the revenues of the sign industry; and it unlawfully discriminated against signs that are not in fact located on City-owned property. In coming to its decision to uphold the tax, the Court held (1) a significant portion of the tax was intended to reinforce the City's goals of reducing sign clutter and environmental impact; and (2) the tax was targeted at a structure (the sign itself) as opposed to a commodity (advertising). Thus the tax was rationally connected to legitimate municipal purposes and imposed an additional cost of doing business on the sign owner rather than an indirect means of raising revenue.

Interestingly, the decision by the Court to grandfather existing signage as at 6 April 2010 is expected to reduce the City's estimated revenue from the sign tax from $10 million a year to $2 million. ■

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## UPDATE: MANDATING A HEALTHY BUILT ENVIRONMENT?

**Catherine Longo**

In our December 2010 issue we informed you about the healthy building initiative titled the Health Background Study undertaken by the Region of Peel in collaboration with the City of Toronto. Readers will recall the purpose of the Study is to create a User's Guide for municipalities to assist in evaluating the health impacts of development proposals.

The feasibility workshops held in respect of the Study are almost complete and Peel and Toronto anticipate finalising the Study within the next few months. Remaining challenges identified at the workshops include determining (a) which design elements are primarily the responsibility of the municipality rather than for the private developer, and (b) how the User's Guide should be incorporated into municipal planning policy documents.

We will continue to monitor the progress of this Study and its potential impact on your development over the coming year. ■

## CITY OF TORONTO PLANNING - BREAKING NEWS!

**Marc Kemerer**

The 24 March 2011 meeting of the City of Toronto Planning and Growth Management Committee was a big one. At that meeting the Committee voted unanimously to repeal the City's new Comprehensive Zoning By-law 1156-2010 (reported on in our June and September 2010 issues) - which is subject to no less than 700 OMB appeals - and to request that a new City-wide zoning by-law be brought forward to that Committee by January 2012 (Item PG2.5). This recommendation went to Toronto City Council on 12 April 2011 where Council voted to send the matter back to Committee for a special Committee meeting to be held on 10 May 2011. This by-law may be history.

That Committee also requested that the City's Chief Planner bring forward an action report to the Committee's 27 April 2011 meeting regarding the Mandatory Purchase of Metropasses for New Condominium Buildings policy (reported on in our June 2010 issue). That report is to explain the effectiveness of the policy, the extent of its application to date, any recommended changes to the policy, the amount of money the policy has generated for the TTC and the financial impact of the policy. That policy may also be history.

The Committee also requested that the Chief Planner bring forward a report as soon as possible on a zoning by-law amendment (to which by-law is to be determined) to require that potential habitable attic space be included in any gross floor calculations. ■

## GROWTH PLAN UPDATES

**Marc Kemerer**

On 4 March 2011 the Province of Ontario released the Growth Plan for Northern Ontario, 2011. It is rather long on rhetoric - promising to create "a highly productive region, with a diverse, globally competitive economy that

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*"Discovery planning is now required in all actions under Rule 29.1 of the* Rules of Civil Procedure."

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offers a range of career opportunities. This is to be largely accomplished through a provincial focus on economic development strategies." Local municipalities are "encouraged" to do their part by preparing long-term community strategies and to amend their official plans in accordance with such strategies.

Given the outcry over the approach of the Province to directing growth in the Simcoe Sub-Area through the proposed Amendment 1 to the Growth Plan (reported in our December 2010 issue) the Province has appointed a Facilitator to work with those area municipalities to (1) review the allocation of the population and employment forecasts; (2) identify how to manage the oversupply of land and implement the Amendment 1 policies (which may deal with concerns over the impacts on existing development permissions); and (3) develop alternative intensification and density targets for designated greenfield areas. The Facilitator is to report back with recommendations to the Province by 1 November 2011 (no surprise - after the Provincial election in October!).

We will continue to keep you posted on all of the above. ■

## ACTIONS UNDER THE CONSTRUCTION LIEN ACT - DISCOVERY PLANNING WILL COST YOU LESS

**Sarah S. Subhan**

Actions under the *Construction Lien Act* (the "CLA") involve three distinct stages: pleadings, discovery (in various forms) and trial. It is generally at the interim phase of discovery that the majority of the expense and time is spent in the proceeding. Oral and documentary discovery are not automatic. However, lien claimants have statutory rights under the CLA to certain information such as the right to demand certain information from owners, contractors, subcontractors, mortgagees and/or unpaid vendors (section 39). There is also the statutory right for any person who has verified a preserved claim to be cross-examined at any time (section 40).

A CLA action is intended to be summary in nature. Therefore, interim phases of litigation such as discoveries or even an affidavit of documents are not necessarily automatic as the CLA states that the parties need to seek leave of the court before engaging in certain costly interlocutory procedures that are not particularized in the statute.

Discovery planning is now required in all actions under Rule 29.1 of the *Rules of Civil Procedure* (the "Rules"). This requirement will also apply in lien actions if permission is granted by the Court for discovery. In general, the purpose of the discovery plan is intended to permit the parties to map out the most efficient and effective way to organize production and discovery needs. An effective discovery plan will outline the particular action, the issues in dispute and the amounts at stake. The discovery plan is a timetable that the parties agree to which includes the scope of discovery, timing for delivery of each party's affidavit of documents, information with respect to the costs and manner for production, the names of the people who will be produced and any other information that will facilitate an expeditious, cost-effective discovery. Once a discovery plan has been

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agreed to, the parties have the continued obligation to keep it updated.

In the recent case of *Lecompte Electric Inc. v. Doran (Residential) Contractors Ltd.*, 2010 ONSC 6290, Master MacLeod outlines the importance of discovery planning in relation to construction lien actions, and offers some guidance on how to do this successfully. Rule 29.1 requires counsel to co-operate in a non-adversarial fashion to create a discovery plan at an early stage in litigation. In CLA actions, because all parties may have the same records, there is often an unnecessary and inefficient duplication of documents, as well as overproduction of documentation that is not relevant to the heart of the legal dispute. Thus, Master MacLeod states the discovery planning process is a key tool that can be used to agree upon common methodology for the identification and numbering of productions, such as electronic production and the use of searchable databases. If these kinds of methodologies are agreed upon, both parties will have more efficient access to each others' documents which will assist in lowering disbursement costs.

A strict adversarial approach in CLA actions may lead to undesired consequences. For example, the court may impose a discovery plan if one is not agreed to. Although the Rules do not specifically require the court to do this, Master MacLeod found that the court has the authority to impose a comprehensive discovery plan that contains a complete set of all procedural orders that apply to the action. Further, the failure to voluntarily agree on a discovery plan in accordance with the Rules could have consequences later in the litigation process. For example, if one party initiates a discovery related motion that implies the other party is in breach of the Rules, the court may refuse to grant the relief sought and/or order costs to be paid by the moving party, if there is no discovery plan in place. Master Macleod warns of the possibility that this result can occur to parties who do not agree to a discovery plan in compliance with the Rules.

Although discovery planning may appear to be an additional step in the construction litigation process, it may have more advantages than disadvantages in terms of resolving matters in a more timely and efficient fashion. Although discovery planning became mandatory in all actions in January 2010, in CLA actions, leave of the court is still required to have oral and documentary discovery. Planning ahead, and having a meeting or a conference is still advisable. The three "C's" of litigation process and planning as espoused by former Justice J. Farley should be part of discovery planning: "communication, co-operation and common sense". However, it remains unclear how the courts dealing with CLA actions will treat any non-compliance. At present, it is advisable to err on the side of caution by voluntarily agreeing to a discovery plan in a timely manner so that your matter does not become the example. ■

*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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