JUNE 2011

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Building

Editors:

Tammy A. Evans
416.593.2986
tevans@blaney.com

Marc P. Kemerer
416.593.2975
mkemerer@blaney.com

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:

Andrew Heal
Chair, ACES Group
416.593.3934
aheal@blaney.com

Brett Tkatch
Chair, Real Estate Group
416.593.3969
btkatch@blaney.com

"In this issue we draw to your attention four specific amendments to the Construction Lien Act*… that will have impact on the construction industry."*

CONSTRUCTION LIEN ACT AMENDMENTS – BENEFIT OR BURDEN?

Tammy Evans and Lea Nebel (with assistance from Aaron Grossman)

In this issue we draw to your attention four specific amendments to the *Construction Lien Act* ("CLA") brought forward under the *Open for Business Act*, 2010 omnibus Bill 68 (which received Royal Assent on October 25, 2010) that will have impact on the construction industry. The first amendment listed below, which expands the definition of improvement under the CLA, is already in force. The next two amendments speak to procedure. The final amendment discussed will be of significance to condominium developers, builders and general contractors alike, as it adds an additional statutory requirement for notice to trades and suppliers. These latter amendments come into force on July 1, 2011.

Expanded Definition of "Improvement"

The definition of "improvement" under the CLA has been expanded to expressly include "the installation of industrial, mechanical, electrical and other equipment" where the equipment installed is *essential* to the *normal* or *intended use* of the land, building, structure or works.

This change is particularly significant to contractors who work in the electrical and mechanical sectors and suppliers of machinery in manufacturing facilities. Under the old definition, it was difficult to predict if the CLA would apply to a project where equipment was to be installed for use by a business, particularly if the equipment was portable and capable of removal from a building. That the item or equipment was supplied and installed in a building (such as an assembly line), was not necessarily sufficient to qualify the installation as an "improvement" giving rise to lien rights under the old definition.

Under the new definition, to determine if a contractor or equipment supplier has lien rights, one must consider whether the installation of the equipment is essential to the characteristic use of the lands or building and is intended to form an integrated whole with the lands or building. It will be interesting to see how the terms "installation", "essential" and "normal use" are interpreted by the Court in the future and if the broader definition will have the intended effect of clarifying what is and is not lienable in Ontario.

Affidavit of Verification no longer required

As of July 1, 2011, a claim for lien will no longer have to be verified by an affidavit of the person claiming the lien or of an agent or assignee of that person. The requirement

Tammy Evans is a commercial real estate partner at Blaney McMurtry and a member of the firm's Architectural, Construction, Engineering Services (ACES) Group. Tammy has extensive experience in all aspects of construction, mixed use and condominium development.

Tammy may be reached directly at 416.593.2986 or tevans@blaney.com.

became procedurally challenging after the introduction of Ontario's electronic registration system and needed to be changed to reflect the reality of electronic registration.

Also, prior to this amendment, any person who had sworn an affidavit of verification and preserved a claim for lien could be cross-examined on the affidavit without an order at any time, irrespective of whether an action had been commenced. Since an affidavit of verification will no longer be required, those persons who may be cross-examined on a claim for lien will be the lien claimant, an agent or assignee of the lien claimant and a trustee of the workers' trust fund, where applicable.

Sheltering Liens

A lien claimant's rights expire unless preserved and perfected within the time required and in accordance with the requirements of the CLA. Once preserved, lien rights must be perfected by commencing a lawsuit to enforce such rights and, where the lien attaches to the premises, registering a certificate of action against title to the property. "Sheltering" is an exception to the requirement that a lien be properly perfected by allowing a lien claimant to perfect its preserved claim for lien by "sheltering" under an action commenced by another lien claimant. However, an issue arises when the other lien is vacated by court order. What happens to the claim of the sheltering lien claimant? In order to protect the rights of a sheltering lien claimant, the CLA has been amended to permit a sheltering lien claimant to proceed with an action to enforce its lien as if the order vacating the original lien was never made.

Notice of Intention to Register a Condominium

This CLA amendment has a particular impact on condominium developers and builders. The amendment creates a new notice system for the benefit of contractors who may want to register a lien claim against a developer's condominium property before the condominium units are conveyed to the end user or "home buyer". The operative provision of the amendment is subsection 33.1(2) of the CLA which requires owners of land intended to be registered as a condominium to publish a notice of impending registration in a construction trade newspaper at least five days and no more than fifteen days, excluding weekends and holidays, before the description is submitted for approval to the municipal authority.

Once a condominium is registered and the individual condominium units have been created as separate parcels in Ontario's land registration system, a lien claimant can no longer conduct a search and lien the property as a whole, except by searching each unit and registering a lien against each unit in that particular condominium. This type of registration against all units in the project can be problematic where a particular unit or units has been transferred to the home buyer, as these interests are not properly the subject of the lien claim. The CLA protects home buyers from lien claims that should be properly brought against the developer/builder. Under the CLA, the end user home buyer is not the 'owner' with an interest in the property who made the request for the contractor's work, therefore the home buyer is not a person whose interest can be the subject of the lien claim.

Lea Nebel is a partner in the firm's Commercial Litigation and Architectural, Construction, Engineering Services (ACES) Groups. Lea represents a wide variety of clients in the construction industry, including owners, general contractors, subcontractors, material suppliers and design and engineering professionals.

Lea may be reached directly at 416.593.3914 or lnebel@blaney.com.

Aaron Grossman, a BEng graduate of the University of Western Ontario, is currently working towards his LL.B. degree at Osgoode Hall Law School. Aaron is currently enrolled in Blaney McMurtry's summer student program.

Further, in order to lien the common elements of the condominium, the contractor must lien each condominium unit as each such unit enjoys its appurtenant interest in the common elements with all other units. So even if the claim relates only to, or the lien claimant prefers only to lien the common elements (rather than a particular unit or units) to avoid the excessive search and review costs, this is not possible, as there is no longer a separate parcel (or register) for the common elements of a condominium. Therefore, the lien must be registered against individual units, but only the units sitting in the developer's inventory should be subject to the lien. Units that have been transferred to the end user homebuyers should not be included. Pulling the land registration records for each unit in the condominium to ascertain whether ownership in any unit has been transferred out to a home buyer can be a lengthy and expensive process for the lien claimant, especially in the case of a large development. As the intent of the new amendment is to provide early notice to contractors who may have a lien claim that their ability to lien the development as a whole and before condominium registration is about to expire, this notice does benefit the lien claimant by alerting it to the impending registration, so that it may determine whether or not to register a lien claim prior to condominium registration and transfer out of the condominium units.

It is important to note that the legislature chose to place this obligation on the "owner" as defined in the CLA – rather than on the "declarant" as that term is defined in the *Condominium Act, 1998*. Therefore, all parties considered owners under the CLA are caught under this new provision. This may include mortgagees, general contractors and investors in addition to the developer/builder. The contents of the notice are also specified in the amendment, with a standard format to follow by Regulation. The notice must include: (a) name and address of the owner; (b) description of the property (eg. municipal address, project name) including the legal description; and (c) the names and addresses of any contractors, who in the owners' knowledge, have supplied materials or services during the 90 days before the description is submitted for approval.

The consequence of an owner not publishing a notice is that the owner will be liable to any lien claimant who suffers damages as a result of the owner's failure to notify. This liability provision raises many questions, for example, what damages would flow, particularly where lien rights have a statutory expiry date that is, in the normal course, strictly interpreted? Does this amendment affect the strict interpretation of Part V of the CLA with respect to expiry and preservation of a lien? How will this requirement be monitored for compliance, and by whom? How will a lien claimant know when the clock starts to run on the required notice period? Will a developer/builder have all of the subcontractors names to add to the list, or is there additional enquiries to be made of the contractor, and what if the information is not supplied in a timely fashion? What happens if a trade is not included in the list – is this fatal to the notice? While aiming to target an area of admitted frustration for lien claimants and developers alike, this amendment may result in a more complicated process given that it does not include a corresponding obligation on the contractor to provide missing information, and

"There is arguably no field in development as marked by controversy as the imposition of development charges."

Marc Kemerer is a municipal partner at Blaney McMurtry, with significant experience in all aspects of municipal planning and development.

Marc may be reached directly at 416.593.2975 or mkemerer@blaney.com.

within a certain time, for the developer/builder to be able to properly and fully comply.

Notwithstanding the concerns noted, we advise developers to assemble the required information and publish the notice in the time required to do so, in order to comply with the CLA and avoid any potential negative consequences.

The Ministry of the Attorney General is considering additional proposals to reform the CLA, including, (i) the automatic release of project holdback funds for completed work once the statutory holdback period has expired, unless a lien has been preserved or perfected that may be claimed against that holdback, (ii) the continuation of all parties' lien rights through to 45 days after substantial performance unless there has been early release of the holdback, and (iii) the deemed division of contracted services of an architect into two parts; supply of services up to and including commencement of the improvement and supply of services thereafter. The Province is currently in consultation with the construction industry in this regard and we will continue to monitor the status of these proposals and provide an update in a future issue. ■

THE RISE AND FALL AND CONTINUED RISE OF DEVELOPMENT CHARGES

Marc Kemerer

The Rise

There is arguably no field in development as marked by controversy as the imposition of development charges. This form of revenue raising is complicated and has been the subject of much litigation before the Ontario Municipal Board (the "Board") and the courts as municipalities and school boards square off against land owners/developers over who should pay for new infrastructure. Generally speaking, the former have had the benefit of the doubt as development charges have become a permanent and expensive fixture on the development landscape.

The Fall

There has been a lot of (court assisted) activity in the field of development charges recently. Most notably, the Ontario Divisional Court (the "Court"), in a decision released on 21 March 2011, refused to grant leave to appeal to the Town of Orangeville (the "Town") from a decision of the Board dated 3 September 2010 (DC090049) rejecting the methodology for calculating development charges contained in the Town's Development Charges By-law 78-2009 (the "By-law").

Through the By-law, the Town proposed to move to a "gross population" methodology whereby development charges are determined solely on the population levels projected to live in new residences. Essentially this means that new development funds all new services.

The Town had previously relied on a "net population" methodology where development charges were determined in a more nuanced manner, determining servicing needs caused by new development by taking into account the future estimated decline in population levels in existing homes. That estimated decline is subtracted from the projected population in the new homes to arrive at the net population figure.

This distinction is best described by the Building Industry and Land Development Association (BILD) as the "use of households rather than population" in its advocacy efforts over development charges. It was BILD, through the Orangeville District Home Builders Association, that appealed the By-law to the Board.

The Court agreed with the finding of the Board that the gross population methodology "focuses only on the need for services and not on the *increase* in needs" whereas the criteria under the *Development Charges Act*, 1997 relates to the "*increase* in need for service attributable to the anticipated development" (s.5(1)) (emphasis added). As the Court put it:

> "it is evident that development charges can only be imposed for increased capital costs arising from or caused by the increased need for services caused by development. The Board recognized that the Act is not concerned with the services that the development needs in isolation. A development charge may only be imposed if the development results in an increase in the need for services in the broader context of the services already offered by the municipality".

There were other issues raised by the Town in seeking leave from the Court, including the Board's interpretation of the 10 year average level of services for the Town (this standard is established by the Act as a means of measuring the reasonableness of the proposed development charges) and the meaning of "excess capacity". These other issues were addressed by the Court using the same response the Court provided regarding the issue of methodology.

This decision of the Court has already had an impact as some municipalities currently in their development charges review period (the Act provides that development charges by-laws expire 5 years after coming into force unless they are repealed earlier) are delaying the implementation of new methodologies to ensure they are "decision-proof". Consequently, municipalities, school boards, developers and consultants will all have to carefully review the state of existing infrastructure and the statistics on (current) household sizes to assess the true increased need for services resulting from development.

If we examine this reasoning in the context of other recent Board decisions with respect to what development charges should be assessed for nursing homes (DC080008, 25 February 2010) it is clear that there are new and successful arguments to be used in limiting the rise and breadth of application of development charges. This may be further impacted by Provincial requirements to restrict growth to built up areas; compact growth may not be as expensive for new development.

The Continued Rise

Notwithstanding these recent decisions, municipalities and school boards continue to significantly increase the rate of development charges they impose on new development as the costs of land acquisition and infrastructure projects rises. As development charges by-laws come up for renewal some of these bodies are raising or proposing to raise development charges anywhere from 43% (Halton District School Board) to 79% (Simcoe County) to 145% (Town of Georgina) for various types of residential projects.

BLANEYS ON BUILDING

"As we enter into our third decade of dealing with the federal Goods and Services Tax, most recently amended in Ontario by harmonization with the Retail Sales Tax to become the Harmonized Sales Tax, many aspects of the GST/HST continue to be the subject of some confusion."

John Brunt is corporate/commercial partner at Blaney McMurtry, where his practice focuses on real estate and financing involving both real and personal property. John acts for borrowers and both private and institutional lenders. His experience allows him to provide sophisticated advice to clients on a personal level with respect to business organization, transaction structuring, contractual relationships and financing matters.

John may be reached directly at 416.593.3925 or jbrunt@blaney.com.

In a novel move, City of Guelph staff are using that City's Development Charges Administration Pamphlet (the "Pamphlet") to place the highest development charges rate on industrial building built on speculation. On this point the Pamphlet, which does not reflect the wording of Guelph's Development Charges By-law (2009)- 18729, reads:

> "In the case of development where the allowable uses under the Zoning By-law include commercial/institutional and industrial and where the nature of the business of future tenants is unknown, the commercial/institutional rate shall apply to the entire gross floor area. Once the units are sold or rented and the initial occupancy and business type can be determined, the development shall be reassessed as to the predominant use and the DCs adjusted accordingly".

This firm is currently challenging that interpretation by staff on behalf of a client.

Conclusion

What does all of the above mean? Development charges continue to rise, making development more expensive, but the methodology behind the increased rates is being increasingly scrutinized and challenged. In certain cases, the result is that development is less expensive than it could otherwise have been had developers simply accepted the municipality's interpretation and application of the development charge rates. Municipalities and school boards have to be cautious about their approach while land owners and developers have to remain vigilant in their review of development charges.

We will continue to monitor this matter and update again in a future issue. Please contact the writer should you require assistance in reviewing and understanding the development charges that may impact your project or in challenging development charges proposed to be imposed by a municipality or school board. ■

THE NEW RESIDENTIAL RENTAL PROPERTY REBATE

John D. Brunt

As we enter into our third decade of dealing with the federal Goods and Services Tax, most recently amended in Ontario by harmonization with the Retail Sales Tax to become the Harmonized Sales Tax, many aspects of the GST/HST continue to be the subject of some confusion. When the GST was implemented, some were concerned about the impact of increasing the cost of new residential housing by the (then) 7% GST. In order to address this, a new housing rebate system was implemented for new housing purchasers in the case where the purchaser (or his or her immediate family member) personally occupies the residential unit as his or her principal residence. This restricted the new housing rebate to new residential units being acquired as a principal residence, but did not address the impact of the GST on new residential rental property, effectively increasing the cost to purchasers of new residential housing renting out the unit to others by the added GST.

It was not until 2001 that this particular consequence was addressed by way of amendments to the *Excise Tax Act* providing for a New Residential Rental Property rebate ("NRRP Rebate"). The NRRP Rebate provided for the

same refund of GST as the new housing rebate, making the treatment of new residential rental property similar to new residential property used as a principal residence. However, the way in which the NRRP Rebate is obtained, the qualifications required for a landlord to obtain the NRRP Rebate and the timing for receipt of refund are all significantly different. In addition, due to the varying structures of ownership of residential rental property such as ground leases and co-ops, the NRRP Rebate is full of technical requirements that need to be examined in each specific case to determine whether or not the NRRP Rebate is applicable.

The NRRP Rebate is generally available in six specific circumstances as follows:

i) GST/HST is paid on the purchase of a newly constructed or substantially renovated residential complex and the purchaser leases the complex or units in the complex to another person for residential use by an individual.

ii) A builder has paid or accounted for GST/HST on the self supply of a residential complex that is leased to another person for residential use by an individual.

iii) A builder has paid or accounted for GST/HST on the self supply of a residential complex and made an exempt sale of the building and an exempt long-term lease of the land under a single written agreement.

iv) A co-operative housing corporation has paid GST/HST on the purchase of a newly constructed or substantially renovated residential complex from a builder and leases units in the complex for long term residential use.

v) A co-operative housing corporation has paid or accounted for GST/HST on the supply of a residential complex or an addition to a multiple unit residential complex and it leases units in the complex for a long term residential use.

vi) A person has paid or accounted for GST/HST on the self supply of land that is leased to another person for a long term residential use by an individual.

Most of these specific provisions above are beyond the current scope of this article; however, it is worthwhile knowing that whenever there has been a supply of a new or substantially renovated residential complex (comprising either a single or multiple unit) or an addition to a multiple unit residential complex which is leased, there may be GST/HST assistance available in the form of the NRRP Rebate which should be fully evaluated.

In contrast to the new housing rebate where the rebate by the purchaser is, in most cases, realized upon closing through an assignment process back to the vendor/builder, the NRRP Rebate is obtained on an application by the purchaser post closing. New home builders traditionally sell new residential property inclusive of GST/HST and take an assignment of the applicable rebate that would be available to a qualifying purchaser on closing and reconcile to the taxing authority in their corporate GST/HST returns. This approach is largely market driven from when GST was first introduced in 1991 and there was no NRRP Rebate. The NRRP Rebate introduced 10 years later is not able to be treated by builders in the same manner and, as a result, is not something for which a builder

can provide a credit to purchaser on closing. The purchaser must apply directly post closing for the NRRP Rebate (or the builder in the case where the self supply provisions apply) which creates a cash flow issue that has to be borne by the purchaser (or builder in the case of self supply). Combined federal and provincial NRRP Rebates can be in excess of $24,000 so it is clearly worth pursuing.

Once the eligibility of a particular transaction for the NRRP Rebate has been determined, the party entitled to the NRRP Rebate must file an application for the NRRP Rebate within two years of the transaction giving rise to same. Thus, for those who have within the past 2 years completed an acquisition of a new residential rental property, all is not yet lost! The NRRP Rebate may still be available, and we encourage you to consult with your lawyer to determine whether the transaction is eligible.

Although the NRRP Rebate for the federal portion of the GST/HST is reduced where the purchase price (or the fair market value in the case of a self supply) exceeds $350,000, and is completely eliminated where the purchase price (or FMV) is equal to or exceeds $450,000, the provincial component of the NRRP Rebate in Ontario is available up to a maximum of $24,000 per unit regardless of the purchase price.

The reality of the $450,000 threshold elimination of the federal portion of the NRRP Rebate is that, at least in Toronto, it is most applicable to new condominium units and freehold townhomes. Given these types of residential units make up the greatest portion of the rental units in the City, these limits are probably reasonable for the NRRP Rebate; however, the thresholds have not been revisited or indexed since they were introduced in 1991 and it may be, particularly in Toronto, that the intended benefits of the NRRP Rebate have been significantly eroded over that time. The same holds true for the new housing rebate.

Finally, having applied for and obtained your NRRP Rebate you should be aware that certain ongoing conditions must be met in order for you avoid being required to repay an amount equal to the NRRP Rebate plus interest. Where a purchaser who has obtained the NRRP Rebate sells the property within one year to anyone other than a purchaser that will be moving into the unit for his or her (or a relation of such person) own use as a primary place of residence, the NRRP Rebate must be repaid. The re-sale of the property to a subsequent purchaser before the first anniversary of the first purchaser's acquisition for rental use will disqualify the first purchaser's transaction for the NRRP Rebate and that first purchaser will be required to repay the equivalent of the NRRP Rebate. The purchaser who gains the benefit of the NRRP Rebate will be denied unless the property is held for at least one year. The NRRP Rebate is a valuable resource for any person purchasing new or substantially renovated rental residential property and can and should be taken into account when determining investment decisions.

While we have attempted to provide an overview of the application of the NRRP Rebate to new condominium construction purchase, the circumstances surrounding any application should be examined to determine the

applicability of the NRRP Rebate to a particular transaction, and we invite you to contact us for further information. ■

TORONTO PLANNING UPDATES

Marc Kemerer

At its meeting of 17 and 18 May 2011, Toronto City Council voted to:

- repeal the City's new comprehensive zoning by-law 1156-2010 (which was subject to approximately 700 Ontario Municipal Board appeals) (the "By-law"). Council directed City Planning staff to bring a revised comprehensive zoning by-law back to Council for consideration in January or early February of 2012, and to report to Council on the progress of that project at its meeting of 6 October 2011. The revised zoning by-law is supposed to clear up numerous errors contained in the By-law and to that end City of Toronto Planning staff are arranging meetings with those who appealed the By-law to determine ways in which the By-law can be improved. For those who did not appeal the By-law, this consultation represents an opportunity to provide comment on the new By-law to ensure that your land interests are protected.; and

- rescind the City's Mandatory Purchase of Metropasses for New Condominium Buildings policy. Staff have been directed to provide information to developers about the TTC's multi-discount pass program, and to review the projects where Metropass conditions are applied to the purchase price of a condominium to ensure that funds are either refunded to buyers or the TTC passes are delivered to the new owners.

Should you have any questions regarding these significant Toronto City Council decisions and how they may impact your development, we would be happy to discuss these with you.

We will also be following the progress of City staff as they embark upon a review of Toronto's Official Plan. This review may lead to changes which will significantly affect land owners and developers. ■

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.

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com