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Condo Developers Should Be Concerned with *Construction Lien Act* Amendment

By Jules Mikelberg, Michael Toshakovski

The passage of the *Open for Business Act, 2010* introduced several key amendments to the *Construction Lien Act* ("CLA"). For condominium developers, the most important change to the CLA is the addition of section 33.1 which requires developers to adhere to strict notice requirements when registering a condominium. Section 33.1 came into force on July 1, 2011.

The New Notice Requirements

As a result of the introduction of section 33.1 into the CLA, developers are now required to publish notice of their intention to register condominium lands in accordance with the *Condominium Act, 1998* (the "*Condo Act*"). The notice must be published in a construction trade newspaper between five and 15 days (excluding weekends and holidays) prior to submitting the condominium's description for approval to the relevant municipal authority under subsection 9(3) of the *Condo Act*.

The notice must include the following three pieces of critical information:

1. The developer's name and address for service;
2. A concise overview of the land described in the description (including reference to the lot and plan number and the parcel number(s) of the land); and
3. To the best of the developer's knowledge, information, and belief, the name and address of any contractor that supplied services or materials to improve the land in the preceding 90 days from the day

that the description is submitted for approval.

The prescribed form of notice is Form 24 and is provided in Ontario Regulation 175, R.R.O. 1990.

A developer is liable to any person entitled to a construction lien who suffers damages as a result of the developer's failure to comply with this new notice requirement.

A Benefit for Contractors

Contractors and other potential lien claimants can register construction liens against condominium lands both before and after the condominium has been registered. A lien registered prior to the registration of the condominium may be enforced against the property as a whole. In contrast, once a condominium is registered and its units have been created as separate parcels in Ontario's land registration system, contractors must conduct a search of each individual unit and then assert separate liens only on those units still held by the developer (liens cannot be registered against units that have been sold to a "home buyer").

Registering construction liens after the condominium has been registered is a complicated, costly, and time-consuming process for contractors. To address these problems, section 33.1 ensures that contractors will be given advance notice of a condominium registration which, in turn, provides them with a window of opportunity to preserve their lien rights against the property as whole. Since registering a lien against the entire property is a simpler, more efficient, and cost-effective method of asserting a lien, contractors are undoubtedly welcoming the benefits they receive from this new amendment.

A Burden for Developers

Section 33.1 does not offer any benefit or added protection for developers. Instead, it has the effect of creating an additional administrative burden that developers must satisfy in order to avoid exposing themselves to liability.

This amendment also introduces an unwelcome dose of ambiguity into the lives of condominium developers. For example, the following important questions are left unanswered by the legislation:

- What if a developer fails to include a contractor's name in the notice? Does this render the entire notice ineffective?
- Are developers obligated to make active inquires to determine contractors' contact information? If so, what type of inquiries should be made?

Without answers to these and other questions, it will be difficult for developers to properly and fully comply with the new notice requirements ushered in by the recent amendments to the CLA. Despite these difficulties, developers are encouraged to make every reasonable effort required to satisfy the burden placed upon them by section 33.1.

City of Toronto's 5 Year Review and Update Process of Official Plan Starts in 2011

By Mark Piel

This fall, the City of Toronto will begin its mandatory 5 year review and update of the City of Toronto Official Plan (the "Official Plan"). This newsletter update will provide stakeholders with information regarding statutory requirements for this process, information regarding timing and the scope of the review and update, and, finally, rights of appeal regarding employment lands policies will be discussed.

What Does the *Planning Act* Require?

Under the *Planning Act*, the City is required to begin its Official Plan update process no later than the fifth anniversary of the coming into effect of its Official Plan. Although the Official Plan was adopted by City Council in 2002, appeals of the Official Plan to the Ontario Municipal Board meant the Official Plan was not in effect until

2006. Some policies are still the subject of appeals but the majority of the Official Plan is now in effect by order of the Board.

Generally speaking, the City has broad discretion to examine and revise any aspect of its Official Plan, however, under the *Planning Act* certain matters must be addressed. Pursuant to subsection 26(1) of the *Planning Act*, the City must revise its Official Plan to ensure that:

- It conforms with provincial plans, including the Provincial Growth Plan for the Greater Golden Horseshoe (the "Growth Plan"), the Rouge Plan, the Green Belt Plan and Metrolinx' Regional Transportation Plan, or does not conflict with them, as the case may be;
- It has regard to matters of provincial interest under the *Planning Act*;
- It is consistent with the Provincial Policy Statement 2005; and
- With respect to existing policies regarding areas of employment, including the designation of areas of employment and policies dealing with the removal of land from areas of employment, those policies are "confirmed or amended" (collectively referred to as the "conformity requirements").

"Revisions" are amendments which result in conformity with a provincial plan and satisfy both the "conformity requirements" and procedural requirements of a 5 year review and update process.

The 5 year review and update process comes with its own public consultation requirements. Before any "revisions" may be made, the *Planning Act* requires City Council to hold a special public meeting and, pursuant to subsection 26(5) of the *Planning Act*, City Council "shall have regard to any written submissions about what revisions may be required and shall give any person who attends the special meeting an opportunity to be heard on that subject".

City Planning Staff have their work cut out for them; the expectation is City Council will vote on amendment recommendations by the end of 2012.

Scope of 5 Year Review and Update Process

A City Planning Staff Report delivered to the Planning and Growth Management Committee (the "PGMC") earlier this year identified key implementation goals, policies of the Official Plan which require revisions, and indicated that a concurrent study of employment lands conversion issues would be carried out.

As a part of the 5 year review and update process, City Council has directed City Planning Staff to use this opportunity to implement key elements of the City's Avenues and Mid-rise Buildings Study, elements of the City's Tower Renewal Program, policies that encourage the development of residential units for households with children in the downtown, and elements of the City's Climate Change Plan and Sustainable Energy Program. PGMC has also requested that mixed use developments require a minimum of mix of various types of development and the rezoning of community plazas or retail centres to require the retention of a similar amount and type of retail and commercial space on site.

Other planned revisions of note include rewriting existing policies regarding the preservation of heritage properties to reflect powers the City has under the *Ontario Heritage Act* which was passed into law in 2005.

Finally, City Planning Staff will also conduct a Municipal Comprehensive Review ("MCR") concurrently with the 5 year review and update process. The Growth Plan states the City can permit the conversion of employment lands to non-employment uses only through an MCR and where it can be shown the City will meet the Province's employment forecasts, there is need

for the conversion, the conversion will not adversely affect the viability of an Official employment area, infrastructure is in place to support and conversion and the lands in question are not needed in the long-term for employment uses.

Employment Lands and Appeals to the Ontario Municipal Board

The City's decision to proceed with a concurrent MCR is no doubt related to its review of employment lands policies in the Official Plan. Official Plan policies 4.6.3 and 4.6.4 deal with the "removal of land" from areas of employment for the purposes of large-scale and stand-alone retail stores by way of amendments to the zoning by-law and the Official Plan. As a part of the 5 year review and update process, the City Council must "amend or confirm" these existing policies. If City Council amends those policies that decision provides stakeholders with an opportunity to file an appeal where no right of appeal would otherwise lie.

For example, a landowner may consider a privately-initiated development proposal on lands currently identified in the Official Plan as an *Employment Area*, however, pursuing that proposal by filing an Official Plan amendment application comes with considerable risk; the *Planning Act* does not provide an appeal right from a refusal decision of council in those cases. Municipalities have not been shy to refuse these types of privately-initiated applications on the basis that the existing stock of employment lands is required to meet growth targets under the *Growth Plan*.

The 5 year update process therefore provides a window of opportunity to bring conversion of employment lands matters to the Board that otherwise would be statute-barred. If a landowner disagrees with City Council's amendments to policies 4.6.3 and/or 4.6.4 or such other employment policies, the landowner may appeal those amendments provided they made oral submissions at a public meeting or written submissions to council before the amendment was adopted. An appeal may challenge any aspect of the amendment made by City Council and may include the presentation of policy alternatives for areas of employment. Those alternatives may include the merits behind an otherwise appeal-barred privately-initiated amendment about which evidence can be submitted to the Board and final arguments made on those submissions. Appellants should take note the City's MCR will likely provide it with ample policy studies and rationale against the conversion of these lands but the 5 year review and update process looks to be the only opportunity over the next 5 years to argue the merits of those studies before the Board.

New Standard? Purchaser's Responsibility to Prove a Misrepresentation or Omission Was Material. Case Comment: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, Supreme Court of Canada

By Sonja K. Homenuck, Blake Moran (Student-at-Law)

In many commercial situations, legislation mandates a vendor, issuer or other party to disclose relevant information regarding the transaction at hand. In other situations, representations are given in the agreement itself. When a disclosure obligation exists either at law in or a contract through representations made in that contract, how much and what kind of information does a vendor have to provide? What constitutes **"***relevant***"** or **"***material*" disclosure? What is the level of disclosure required? When a representation is made, when is a fact contrary to that representation required to be disclosed? Those are questions that are often asked and seldom answered. While these questions are likely to be asked for years to come, the Supreme Court of Canada (the "Court") has provided some further direction.

In a recent decision of the Court, *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* [2011] S.C.J. No. 23, the Court addressed disclosure standards in a commercial real estate and securities matter. The Court held that it is the purchaser's responsibility to prove that a misrepresentation or omission was material in order to rely upon it as a basis for relief (such material to a "reasonable investor" standard). The decision, therefore, is good news for real estate vendors .

The Court brought more certainty to the idea of "materiality", and disclosure obligations in general, declaring that "issuers are not subject to an indeterminate obligation, such that an unhappy investor may seize on any trivial or unimportant fact that was not disclosed to render an issuer liable for the investor's losses"[1]. Further, the Court held that the materiality of a misrepresentation of a fact or statement or omission must be proven (except in those cases where common sense inferences are sufficient) through evidence by the party alleging materiality. This places the burden of proof squarely on purchasers.

The practical nature of this decision will ultimately provide benefits to vendors as they can feel more comfortable with the disclosure they provide and comfort in knowing that the burden of proving materiality now rests with the purchaser.

The materiality test is an objective test however. A fact is not immaterial just because a vendor says it is immaterial. Similarly, a fact is not material just because a purchaser says it was material to that purchaser. The determination of what is and is not material is a highly fact specific inquiry and will need to be determined on the basis of what would be important to the "reasonable investor"; even if it does not change such investor's ultimate decision.

The present case concerned a class action regarding whether a misrepresentation was made by the Vancouver Airport Centre Ltd. ("VAC") to potential investors of strata lots in the Hilton hotel. It was well understood that VAC was a manager of multiple hotels on the same lot, however, VAC did not disclose the specific financial terms of their existing management agreements with potential investors in the Hilton. The investors that subsequently suffered losses claimed that had the details of the existing management agreements been disclosed, they would not have invested. The court found that because the investors failed to prove that the omitted facts were material, VAC's failure to disclose the specific information did not constitute a misrepresentation and therefore VAC was not liable to the investors for the losses.

In this case, the Court defined what the common law requires for a fact to be material. "An omitted fact is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely might have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available"[2]. The fact need not change the decision.

What is and is not material to a reasonable investor remains a highly fact specific inquiry and therefore difficult to predict. What is important to the purchaser may be considered, and may ultimately influence the outcome of a given case if the judge feels they accurately represent a reasonable investor. While the purchaser's views may be important, it is worthy to note that the behaviour of a single investor might not satisfy a judge that there is "a substantial likelihood that the disclosure of the omitted fact would have

[1] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.,* [2011] SCJ No. 23 at para. 1.

[2] *Ibid.* at para. 61

assumed actual significance in the deliberations of a reasonable investor"[3]. However, the Court did provide a non-exhaustive list of some suggestions of evidence that could have assisted the plaintiffs in proving materiality of undisclosed information as follows:

- Evidence of potential investors who knew of the omitted information and declined to invest or exhibited concerns or doubts about the investment because of it.
- Evidence of potential investors that declined to invest because they found there was insufficient disclosure regarding the common management with VAC's other hotels.
- Evidence that once those that did invest discovered the omitted details they expressed significant concerns about them.
- Evidence that VAC's marketing efforts and management of the hotel were not carried out diligently and in good faith; and
- Evidence that VAC acted on the conflict of interest to the detriment of those that invested[4].

Common industry evidence was of great assistance in defending the claims of insufficient disclosure and conflict of interest in this case. In addition to a statutory defence available to VAC, evidence that it was common industry practice for competing hotels to be commonly managed with the different owners not being aware of the terms of the contracts at each hotel assisted VAC's case.

Purchasers are now going to have to think twice before starting an action regarding insufficient disclosure or misrepresentation by a vendor. The responsibility of proving that there was a significant likelihood that a misrepresentation would have effected a reasonable investor's decision falls upon the party alleging the misrepresentation. Accordingly, it may be more difficult for a purchaser to rescind its contract or obtain damages.

Three New Lawyers Join the Real Estate Group

Fraser Milner Casgrain is pleased to welcome three new lawyers to its Toronto Real Estate Group. Karen Groulx is joining us as a partner specializing in construction law. Janet MacNeil joins us from another major downtown law firm and will continue doing transactional work with an emphasis on project and energy related financing. Michael Toshakovski is returning to the firm as our newest first year associate after having recently been called to the bar. Their respective contact information is set out below:

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For further information, please contact a member of our National Real Estate Group.

[3] *Ibid*. at para. 44

[4] *Ibid*. at para. 87