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ONTARIO PLANNING PRACTICE

WeirFoulds LLP

Release No. 2, June 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in June 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2021 release. We will continue to review and update the content according to the works publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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What's New in this Update:

This release features updates to the Appendix, Issues in Focus.

Highlights

- **Appendices: Issues in Focus – What are the requirements of the duty of procedural fairness relating to public hearings involving municipal planning, development, or zoning by-law decisions? What duty of procedural fairness do municipal governments owe in regard to hearing notices, legitimate expectations and pre-hearing disclosure?** – The leading precedent on the requirements of the duty of procedural fairness relating to public hearings involving municipal planning, development, or zoning by-laws is *Canadian Pacific Railway v. Vancouver (City)*. In that case, the Supreme Court of Canada asserted standards for the content of procedural fairness in terms of public hearing notice, disclosure, and legitimate expectation in the context of municipal land-use decisions. Subsequent courts have continued to interpret and develop the parameters of procedural fairness in this context. The following is a current statement of law on the issue.

Municipal governments owe a duty of procedural fairness when making administrative decisions relating to land-use planning, development, or zoning by-laws. Such decisions must be made “using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context”. Further, there must be an opportunity for individuals affected by the administrative decision to put forward their views and evidence for consideration by the decision-maker. The duty of fairness is “flexible and variable”, depending on the statutory context and the affected rights. What is required by the duty of procedural fairness in a particular circumstance is determined by several factors.

Notice of public hearings is of fundamental importance to the legitimacy of administrative decisions on land use and zoning by-laws. However, in terms of content, notices of public hearings are required to be fair, but not perfect. The duty of procedural fairness may require a municipal government to take any legitimate expectations into account, but it does not necessarily require their fulfillment. A municipal government must provide the proposed by-law and “reports and other documents that are material to the approval, amendment or rejection of the [by-law] by local government” prior to a public hearing. Disclosure must be sufficient to allow for meaningful participation in the public hearing.

- **Appendices: Issues in Focus – What is the test for bad faith in relation to a municipality, and to a building**

code official or municipal employee acting in the execution of his or her duties? – The *indicia* of good faith include frankness and impartiality, reasonableness and the chance for the interested party to be heard, also described as fairness, openness and impartiality.

The indicia of bad faith include interference from other officials, delaying tactics and a lack of notice and also implies dishonesty and malice. Arbitrary application of by-laws and the enactment of *ultra vires* by-laws are also considered indicia of bad faith.

The onus of proving bad faith rests with the party alleging it.

- **Appendices: Issues in Focus – What are the potential grounds for granting judicial review of an Ontario Municipal Board decision?** – Possible grounds for judicial review in these circumstances include: (i) reasonableness; (ii) failure to provide adequate notice; (iii) failure to provide a fair hearing including the right of reply; (iv) legitimate expectation; and (v) reasonable apprehension of bias.

- **Appendices: Issues in Focus – Does a zoning by-law take precedence over other municipal by-laws (in this case a by-law pertaining to use of a public dock)?** – There is apparently no case law stating that zoning by-laws take precedence over other, non-zoning municipal by-laws.

The case law makes it clear, however, that there is a distinction between regulatory by-laws passed under a *Municipal Act, 2001* [generally], and zoning by-laws passed under a *Planning Act* [generally]. A municipality cannot enact a zoning-type by-law without adhering to the requirements of the *Planning Act*.

Any suggestions, corrections or concerns from readers are appreciated and can be sent to the editor, Bruce Engell at bengell@weirfoulds.com or Raj Kehar at rkehar@weirfoulds.com.

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView generated PDFs of entire sections and pages