



Take care when amending zoning by-laws

by Bernice R. Bowley, Fillmore Riley LLP

Two recent Supreme Court of Canada cases ought to be of interest to municipal councillors when considering amendments to zoning by-laws that may affect third parties.

Enterprises Sibeca Inc. v. Frelighsburg (Municipality) is an October 2004 decision from the Supreme Court of Canada. A Quebec municipality originally gave approval in principle to a real estate development project. The project was vehemently opposed by local environmental groups. Eventually, the plaintiff abandoned the recreational aspect of the project and encountered delay in developing the residential aspect such that the building permits expired.

A new municipal council was elected, including several environmental advocates.

The new council had different development goals and amended the zoning by-laws to place fairly onerous obligations on completion of the plaintiff's development project including a requirement that buildings only be erected on land adjacent to existing roadways. The project was not profitable to the plaintiff in that form and so it subdivided the land and sold it off in pieces.

The plaintiff then sued the municipality for loss of profits. The trial judge held that the municipal councillors had not acted maliciously and could not be held personally responsible. However, the municipality had committed "administrative bad faith" and was ordered to pay damages of \$330,500 to the plaintiff. The Quebec Court of Appeal set aside both the finding and the award.

The Supreme Court of Canada affirmed that decision.

The Supreme Court stated that the adoption, amendment or repeal of a zoning by-law does not in and of itself attract liability, even if the result decreases land values. A municipal council has a broad discretion to deal with zoning by-laws while acting in good faith and within the scope of relevant legislation. In this case, the amended zoning by-law was compatible with the municipality's new development plan, there were no building permits or applications for permits attached to the land, and the municipality's objective of protecting the environment was a proper goal for a municipal council. Therefore, the municipality had acted within its authority and was not liable in damages to the plaintiff.



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ALLEMAN, Iowa (Sept. 24, 2002) - Cummins Inc. (NYSE:CUM) today announced at Farm Progress Show 2002 that it had achieved an important milestone in the application of existing combustion technologies and hardware for its industrial engines required to meet the Tier 3 emissions standard. Cummins successfully demonstrated it could meet the Tier 3 requirements without the addition of aftertreatment devices or other costly hardware and will launch engines prior to the 2005 standard.

"Cummins serves a broad range of off- and on-highway markets, each having different customer requirements," said John Wall, Cummins vice president and chief technical officer. "We have invested in the technologies that matter most so we can apply the best technical solution to meet customer needs in each of the markets we serve. There is no one else in the world who has this capability," said Wall.

Cummins solution for achieving Tier 3 standards enables customers to minimize engineering and product development costs by using existing engine platforms with electronic fuel systems, but without the addition of expensive and unproven aftertreatment devices using fuel that can include up to 5,000 ppm of sulfur. Sulfur has been proven to significantly degrade aftertreatment performance. All of the emissions-related changes at Tier 3 will be virtually transparent to the OEMs and the end users with existing fuels, and will provide the lowest total costs at these standards.



The *Sibeca* decision must be contrasted with the later decision of *Pacific National Investments Ltd. v. The Corporation of the City of Victoria*. This case went to the Supreme Court of Canada twice. The provincial government and

the City agreed to redevelop provincial Crown land on the City's inner harbour for various uses. The Crown's rights and obligations were assigned to a real estate developer and the City and the developer entered into an agreement which required the developer to build roads, parkland, walkways and a new seawall.

The developer incurred these costs in the expectation that it would be allowed to develop the water lots it owned. In exchange, the City would re-zone the area to permit residential and commercial uses on the developer's water lots. The developer completed the required works and improvements at a cost of about \$1.08 million.

However, when the developer applied for building permits to develop its two ocean front lots, council down-zoned the lots to permit only one-storey commercial buildings, which eliminated the developer's planned two-storied residential condominiums.

The developer sued the City for unjust enrichment. On the first trip to the Supreme Court of Canada, the Court rejected the breach of contract claim because the City lacked the statutory authority to be bound by an implied term to keep zoning in place long enough to allow completion of the project. The action returned to trial on the unjust enrichment claim. The trial judge found that the City had been unjustly enriched at the developer's expense and awarded \$1.08 million to the developer. The Court of Appeal set aside the trial judge's decision, but the Supreme Court of Canada unanimously restored the damage award to the developer.

The City argued that the extra works and improvements were not a benefit because they were built on what was then provincial Crown land and their upkeep cost the City about \$40,000 per year. The Court stated that the City's portrait of itself as a victim was not sustainable. The Court agreed with the trial judge that the City had insisted on the works and improvements because it wanted planned development with services, parks and other

amenities at no cost to its taxpayers. Given the benefit to it and in view of the change in zoning that deprived the plaintiff of benefit, the Court felt the City should pay the costs of construction. The Court put it as follows:

I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith. This

is precisely the sort of unfairness that the doctrine of unjust enrichment is intended to address. Municipalities are subject to the law of unjust enrichment in the same way as other individuals and entities.

When altering existing zoning by-laws, councillors are advised to carefully consider the impact those changes will have on third parties and whether the changes are being made for legitimate municipal purposes. When in doubt, councillors ought to consult with legal counsel in order to avoid the aforementioned situations. §

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