THE LAWYERS WEEKLY August 24, 2001

WHAT WILL 'BROWNFIELDS' LAW DO FOR MUNICIPALITIES?

By: Dan Kirby, Michael Bowman and Shari Elliott

On May 17, 2001, the Minister of Municipal Affairs and Housing introduced Bill 56, an omnibus Bill entitled the *Brownfields Statute Law Amendment Act, 2001.* This Bill received second reading on June 28, 2001. It was subsequently referred to a standing committee and could be passed into law as early as the upcoming fall session.

If adopted, the legislation would significantly amend Ontario's *Environmental Protection Act* and certain other statutes. More importantly, this legislation would form the foundation of the province's brownfields redevelopment initiative.

This articles focuses on the impact of the proposed legislation from the perspective of municipalities and their role in approving development applications. The question to be asked and answered is "what does Bill 56 do for the municipalities?"

Many municipalities have brownfield lands that are currently underused or not used at all and which they would like to return to productive use. Examples include the port areas in Hamilton; the port lands, the Ataratiri lands and certain other lands near the waterfront in Toronto; and the former heavy industrial area of the former municipality of East York (Toronto).

From a municipal perspective, there are at least four major issues on brownfield development:

(1) Returning brownfield lands to productive use;
(2) Ensuring the safety of municipal inhabitants and the integrity of the environment;
(3) Establishing the extent of jurisdiction for municipalities to require proof from the developer that any proposed use safeguards municipal inhabitants and the integrity of the environment; and
(4) Protecting municipalities from potential liability arising from the grant of municipal approvals and permits for the development and use of brownfield properties.

In previous articles we have addressed the probable effect of Bill 56 on issue (1), particularly the glaring lack of any provincial funding initiatives. Those comments will not be repeated here.

With respect to issue (2), the statutory process essentially mirrors the process designated under the existing Guideline for Use in Contaminated Sites in Ontario, and except for its potential mandatory application under Bill 56, the process for ensuring safety of the municipal inhabitants and the integrity of the environment is not significantly different.

Bill 56 may solve the issue of jurisdiction raised by issue (3): Under the current regime the jurisdiction of municipalities to require Record of Site Conditions (RSC) is, at best, questionable.

Under Bill 56, if the requirement to file an RSC with the Ministry is, in effect, made mandatory under s. 168.3(3), evidence of compliance with the requirements of Bill 56 could legitimately be required by a municipality in order to show compliance with "other applicable laws" as set out in the Ontario *Building Code Act, 1992.*

However, with the exception of a change in use from industrial or commercial to residential or parkland, the extent to which the new regime would have mandatory application will remain to be determined by the regulations in relation to s. 168.3.1(1)(b).

With respect to issue (4), Bill 56 could raise more questions than it resolves. Bill 56 does not provide any specific protection from liability for municipalities despite the fact the Ministry has provided itself with protection from civil liabilities arising from any inaccuracies in an RSC.

The fact that the Ministry thought it necessary to provide itself with such protection from liability suggests that there could be more exposure to the Ministry in the absence of that provision. If the apparent Ministry conclusion in this regard is correct, it seems likely that municipalities relying on the accuracy of RSCs could be similarly exposed. It seems inconsistent that the Ministry would not have provided similar protection to the municipalities.

In light of this inconsistency, municipalities that receive RSCs prior to approving development applications should determine whether they have an obligation to consider the accuracy of the RSCs submitted. And if such an obligation does exist, municipalities must assess how far they must go to discharge that obligation.

This issue of the extent of a municipality's responsibilities is exacerbated in circumstances where a Site Specific Risk Assessment (SSRA) is included as part of the RSC process and where the Ministry reviews and accepts the SSRA.

Presumably the Minister's protection from liability arising from inaccuracies still applies, but no similar protection is offered to municipalities that rely on both the RSC and the fact that the Ministry has reviewed and accepted the RSC.

If the RSC/SSRA contains inaccuracies, that would suggest that the property in question is inappropriate for the development approved by a municipality after reliance on a RSC/SSRA approved by the Ministry.

From this, the question arises whether a municipality could be separately exposed to liability to a person harmed as a result of the use that was permitted?

Dan Kirby is a partner in the Environmental Law Group of Osler, Hoskin & Harcourt LLP. Michael Bowman is a partner in the Municipal Law Group of Osler, Hoskin & Harcourt LLP. Shari Elliott is an associate in the Litigation Department of Osler, Hoskin & Harcourt LLP.