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BARRISTERS AND SOLICITORS

Municipal Act By-Laws

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INTRODUCTION - OVERVIEW OF MUNICIPAL LAW AND MUNICIPAL ACT

(a) Limits on the Exercise of Municipal Authority (Constitutional, Statutory and at Common Law)

(i) Basis of Municipal Authority

Municipalities in Ontario have long been considered "creatures of statute". This distinction arose as a result of the separation of powers between the federal government and the province in sections 91 and 92 of the British North America Act. Section 92 of the British North America Act sets out the powers which are assigned exclusively to the provinces. Subsection 92(8) gives to the provinces the exclusive authority to legislate in the area of "Municipal Institutions in the Province". Because of this division of powers, municipalities derive all their authority solely from the province. Thus, municipalities are historically, legally and constitutionally inferior and subordinate to the province. As a result, all legislation enacted by the province to give power to the municipalities must be within the constitutional competence of the province and further, any legislation enacted by a municipality (called by-laws) must also be within the scope of the provincial jurisdiction. If they are not they are said to be ultra vires the competency of both the municipality and the province.

Being creatures of statute, municipalities are not permitted therefore to enact their own subordinate legislation which would infringe on areas regulated by the province or the federal government. Accordingly, by-laws which purport to regulate in the area of environmental matters (for example) provincially or in the area of criminal law federally, are ultra vires the powers of the municipality and are subject to being struck down by the courts. This is a bit of an oversimplification of the legal principles involved but sufficient for the purposes of understanding how the Municipal Act works.

The main limitations on a municipality's ability to legislate or regulate are as follows:

1. The by-law must be within the competency of the province (described above).

2. The authority to act must be found within a provincial statute granting the specific authority to the municipality.

3. Municipal by-laws cannot regulate in areas assigned by the British North America Act to senior (federal or provincial) levels of government (described above).

4. Geographically, municipalities can only enact legislation within their own boundaries (unless specifically authorized to the contrary in some piece of provincial enabling legislation).

5. Municipalities must act either by by-law or resolution especially in the area of regulation (the exception being matters of administrative detail which are necessarily incidental to or implied in some other statutory power).

6. The courts have imposed the following common law restrictions on the exercise of municipal powers. Municipalities cannot enact by-laws:

(i) in bad faith;

(ii) for a collateral purpose;

(iii) which do not adhere to principles of procedural fairness;

(iv) which discriminate (except where specifically authorized by the statute);

(v) which operate retroactively (except where specifically authorized by a statute; however there are several decisions which have also held that the doctrine of legal non-conforming use does not apply to regulatory type by-laws);

(vi) which are uncertain or vague;

(vii) which are unreasonable; and

(viii) which subdelegate authority which has been delegated to the municipality (unless the statute specifically so provides).

(b) Scheme of the Municipal Act

The Municipal Act is the single largest piece of legislation which governs a municipality's ability to legislate and act within the province of Ontario. As indicated earlier, municipalities as creatures of statute must find a specific statutory authority to undertake a certain act or thing. Most municipal, non-planning related authority can be found in the Municipal Act.

As a general matter, the municipality deals with a wide variety of matters related to municipal functions. The Municipal Act can be traced back to the Baldwin Act of 1849. As a result, the Municipal Act has developed as a "hodge podge" of statutory authority over the years. Because the courts have interpreted municipal powers to be "prescriptive" in nature, a specific statutory authority has to be found before a municipality can act in a certain area. This has led to an incredible number of piecemeal amendments to the Municipal Act over time, as well as the enactment of a considerable amount of special legislation applicable only to certain municipalities that have requested it.

As a result, the Municipal Act deals with many of the day to day administrative matters that municipalities must concern themselves with, such as personnel matters, the composition and election of council, the duties of certain statutory officers, procedural by-laws, purchase and sale of land and the opening and closing of road allowances. Very broadly speaking, the Municipal Act can be divided into two categories of authority, the authority to regulate versus the authority to deal with administrative matters. Most by-laws fall into one of these two categories.

Generally speaking, although not exclusively the case, most regulatory by-laws will include provisions related to their enforcement, including some rights of entry, the ability to create offences, the ability to enforce the by-law other than penally and the ability to impose penal sanctions for contraventions of the by-laws.

Administrative type by-laws on the other hand, normally empower the municipality to undertake a certain act or do a certain thing and as mentioned, are necessary to give the municipality the right to do that thing in the first place. Most powers granted to municipalities by the Municipal Act, whether regulatory or administrative, are discretionary, although there are some matters which the municipality must undertake. Section 55 of the Municipal Act for example requires a municipality to enact a procedural by-law for governing the calling, place and proceedings of meetings of council. For the most part however, the municipality has the choice whether to exercise the authority granted to it by the Municipal Act.

As well, the regulatory type authorizations in the Municipal Act can be further distinguished by virtue of whether they apply to public or private property. For example, the Municipal Act makes a distinction between the regulation of trees on private versus public property and a different set of rules govern each.

Needless to say, it is very important before a municipality enacts or proceeds to enforce a by-law, that the statutory authority be checked to ensure that firstly the statutory authority exists, secondly, that the municipality does not exceed its authority in the enforcement of the by-law and thirdly, that the appropriate

enforcement mechanisms, including any rights of entry, are in place. Special care should be taken with older by-laws, as the Municipal Act in recent years has changed frequently and quite radically. By-laws that were drafted under an old version of the Municipal Act, which gave certain enforcement rights to municipalities, may no longer be in effect or validly enacted. For this reason, periodic review of by-laws to ensure compliance with the statute is absolutely essential.

SPECIFIC AREAS OF REGULATION

Of the regulatory type by-laws, the Municipal Act gives municipalities the authority to regulate in the following areas (and this list is by no means exhaustive):

- smoking by-laws
- shop closing by-laws (although largely subsumed by the Retail Business Holidays Act)
- licensing
- parking
- trees
- yard/debris
- noise
- fence by-laws
- animal control
- sign by-laws
- street control
- street vending
- vital services by-laws
- site alteration by-laws
- two-unit house registration system and granny flat regulation [include section references]
- discharge of firearms
- sale of fireworks
- garbage disposal
- heat in rental units
- litter prohibition
- scaffolding regulation
- sewage regulation
- snow and ice removal
- postering on public utility property
- nuisances

What follows is a discussion of those areas which I felt might be of interest to this organization.

(a) Yard/Debris By-laws

Many municipalities have enacted both yard/debris by-laws pursuant to the Municipal Act and property standards by-laws pursuant to the Planning Act. To a certain extent these by-laws overlap in terms of requiring properties and yards to be kept clean and clear of debris. However, there is a marked difference between how each of the by-laws operates and the versatility of each in maintaining minimum standards for the maintenance and use of private property. An example of such a by-law is attached as Appendix "A".

As you all know, the property standards by-law route is quite an involved procedure with a number of statutory steps which must be strictly adhered to for successful enforcement and prosecution. A prosecution under a property standards by-law has many opportunities to become derailed because of non-compliance with that procedure. A Municipal Act by-law on the other hand, is a relatively simple procedure which essentially involves four steps:

1. Inspection;

2. Notification (not statutory, but recommended);

3. Prosecution;

4. Rectification.

However what the municipal debris/yard by-laws offer in simplicity, they definitely lack in comprehensiveness. Property standards by-laws cover a large range of property standard matters and are clearly authorized by the Planning Act to do so. The Municipal Act by-laws by comparison, typically deal with matters such as garbage, refuse and junk being stored on property and yards as well as the filling up of any hole, excavation or depression on the lands and usually includes a provision with respect to derelict vehicles.

The reason for this of course is the difference in the statutory authority for both types of by-laws. Clearly it is section 31 of the Planning Act which the legislature intended to be the authority to permit municipalities to govern property standards. Yard/debris by-laws on the other hand, which are passed pursuant to the provisions of the Municipal Act, were enacted originally pursuant to the section of that Act which deal with the filling of holes or depressions in yards. The by-laws themselves were expanded over time to prohibit a slightly broader range of activities, not specifically referred to in the authorizing legislation. A good example of this is the inclusion of derelict vehicle provisions in current yard by-laws. This broadening of the authority reached its peak in 1987 in Re Allen and City of Hamilton (1987), 59 O.R. (2d) 498 (Ontario Court of Appeal).

In Allen, the City of Hamilton fought the battle to establish the principle that a yard by-law is in fact authorized by the Municipal Act. The court of appeal upheld the City of Hamilton's by-law as having been authorized by the then section 210, subsections 74, 76, 77 and 129. These sections (which in the current Act are section 210, paragraphs 80, 82, 83 and 135) now read as follows:

"80. Filling up, draining, etc., private drains. - For requiring and regulating the filling up, draining, cleaning, clearing of any grounds, yard and vacant lots and the altering, relaying or repairing of private drains. ...

82. Prohibiting littering of private or municipal property. - For prohibiting the throwing, placing or depositing of refuse or debris on private property or on property of the municipality or any local board thereof without authority from the owner or occupant of such property.

83. Regulations for sewerage, etc. - For making any other regulations for sewage or drainage that may be considered necessary for sanitary purposes. ...

135. Control of land used for disposal of refuse. - For prohibiting or regulating and inspecting the use of any land or structures within the municipality or any defined area or areas thereof for dumping or disposing of garbage, refuse, or domestic or industrial waste of any kind.

(a) A by-law under this paragraph,

(i) may establish a schedule of fees chargeable upon inspection of such regulated land or structures,

(ii) may require the owners, lessees or occupants of such land or structures, at the expense of the owners, lessees or occupants, to cease using such land or structures for such purposes, or to cover over any garbage, refuse, or domestic or industrial waste in any prescribed manner, whether or not such land or structures were so used before the passing of the by-law,

(iii) may define industrial or domestic waste.

(b) A by-law under this paragraph does not apply to the use of any land or structure by a municipality."

The court in Allen held that the City of Hamilton waste by-law, which recited each of these sections in its preamble, had been properly enacted pursuant to these sections combined. The court found that section 210, paragraph 129 (now paragraph 135) especially permitted the municipality to regulate the dumping of

domestic or industrial waste on private property. (The section clearly also authorizes the municipality to define what "waste" (domestic or industrial) means.) The court held that this section and section 31 of the Planning Act had been enacted for different purposes and therefore the waste by-law did not conflict with the city's property standards by-law. The court also held that the headings of the Municipal Act (section 210, paragraphs 80, 82 and 83 came under the heading "Health Sanitation and Safety" and section 210, paragraph 129 came under the heading "Nuisance") were not relevant because there was no ambiguity in the wording of the sections themselves.

The decision is also significant for a number of other reasons. The court held that the city was not required to proceed under its property standards by-law, but rather was free to proceed under its Municipal Act yard by-law. The court held that the property standards by-law did not deal with industrial or domestic waste and therefore it was perfectly proper to proceed under the yard by-law.

The court further held that there was no conflict between the by-law and section 31 of the Planning Act and that there was no violation of section 8 of the Charter of Rights and Freedoms which protects an individual's right to be secure against unreasonable search and seizure.

The city had authorized the cleaning of the yard itself and had purported to charge the costs back to the owner. In this sense, the court held that the "seizure" and the manner in which it was carried out was reasonable and that in any event, property rights were not protected by the Charter and therefore the right would not extend to property.

More significantly, the much wider implications of that decision with respect to property maintenance at least were the court's findings with respect to the municipality's actions in cleaning the yard up itself and charging the costs back to the owner. It is not insignificant that the court upheld such action in the case of a yard by-law passed pursuant to the Municipal Act as being authorized under section 325 of the Act. Section 325 of the Municipal Act authorizes the municipality to do such things as they are authorized by by-law to do where there is default in its being done by the person directly required to do it under the by-law and gives the municipality the authority to recover the costs of so doing in a like manner as municipal taxes (which is not quite the same "as taxes" in terms of the priority of the lien).

In an apparent departure from this decision, two more recent decisions have struck down portions of municipal waste by-laws. In Veri v. Stoney Creek (1995), 26 M.P.L.R. 312, the Ontario Court (General Division) struck down a portion of the City of Stoney Creek's waste by-law on the grounds that the definition of "domestic waste" in the by-law was vague and on the grounds that it was ultra vires the Municipal Act. The court held it was vague because the inclusion of the words "or any motor vehicle that is not being operated as a motor vehicle" were not fairly and readily understandable and it would be virtually impossible, taking the literal meaning of the words, to define when a "motor vehicle" becomes domestic waste.

In addition, the court held that the municipal authority to regulate or prohibit the dumping or disposing of domestic or industrial waste did not include the authority to include motor vehicles in the definition of domestic waste. The reason the court gave for this is that the Municipal Act in other parts of section 210 gives municipalities a limited power to regulate the storage of motor vehicles. Therefore, that power cannot be "read into" section 210, paragraph 80.

In Caledon v. Mik (1995), 31 M.P.L.R. (2d) 112, the Ontario Court of Justice, Provincial Division struck down the Town of Caledon's waste by-law as not having been authorized by the Municipal Act. In that case, the court found that the town's by-law had been aimed at regulating aesthetic or visual appearance and that the authorizing section (section 210, paragraph 80) was aimed at regulating health and safety matters because it came under the heading "Health Sanitation and Safety".

The third decision which may be of some interest is the recent case of Bell v. Toronto (1996), unreported (Ontario Court of Justice, Provincial Division), Court File No. 3146 (copy attached as Appendix "B"). In that case, the court struck down a portion of the City of Toronto's housing by-law which had the effect of prohibiting "wild" or naturalized gardens. The specific section in question came under the heading "Rubbish" and it required residential yards to be kept free of "excessive growths of weeds and grass". The by-law had been enacted in 1968 under the City of Toronto Act, 1936 (special legislation obtained by the city). The court struck down the excessive growth section of the by-law on the grounds that the phrase quoted above is void for vagueness or uncertainty and because it unjustifiably violates the freedom of expression guarantee contained in section 2(b) of the Charter.

On the issue of vagueness, the court found that the use of the word "excessive" imported too subjective a standard. The court held that the by-law should dictate an understandable standard.

On the Charter issue, the court found that the owners act of growing a naturalistic garden that included tall grass and weeds had expressive content and conveyed meaning, that the effect of the by-law was to restrict that expression, and that the restriction was not justifiable because the means utilized (a total ban) did not restrict the freedom of restriction as little as is reasonably possible in trying to achieve the objective (minimize aesthetic blight, avoid health and fire hazards and environmental nuisances). The court felt that a by-law could be drafted which would not catch natural gardens, but would catch lazy gardners - no small task!

With respect to the Bell decision, one can imagine the difficulty a municipality will have in trying to satisfy the Charter test set out by the judge. Certainly, regard can and should be had with respect to the court's pronouncements on the vagueness issue; and they would be equally applicable to yard/waste by-laws (even though yard/waste by-laws generally do not, and probably cannot regulate the growth of vegetation). Words such as "excessive" which do tend to import an element of subjectivity, should be avoided if possible.

In coming to the conclusion that the court did in Caledon, it appears to me that the court appears not to have considered the Ontario Court of Appeal decision in Allen. In doing this, it did not have the benefit of the Court of Appeal's pronouncements that:

1. There are no ambiguities in the language of the authorizing sections of the Municipal Act (including section 210, paragraph 80) and therefore the headings can be disregarded.

2. That section 210, paragraph 135, which deals with "nuisances", can also authorize a waste by-law (as distinct from health and sanitation matters).

3. That section 210, paragraph 135 specifically permits a municipality to define domestic waste.

For these reasons, I do not believe that too much reliance can be placed on the Caledon decision. It should be noted finally that the case does also have an interesting discussion about whether a by-law enforcement officer's inspection of land outside a residence for administrative or regulatory purposes constitutes an "unreasonable search" within the meaning of section 8 of the Charter. The court held that it was not.

In my opinion however some regard should be had for the Stoney Creek case, particularly in the area of motor vehicles. Municipality's and by-law enforcement officers should review the derelict vehicle provisions of their waste by-laws with their solicitors. Probably the vast majority of them will pre-date the plate to owner system of licensing in Ontario as well as the Stoney Creek decision. In my opinion, the by-laws should:

1. Reflect the realities of the current plate to owner system in Ontario (i.e. lack of plates no longer sufficient on its own as evidence of derelict condition).

2. If derelict vehicle provisions are to be included, they should be clearly and specifically defined as waste and the definitions should not rely solely on the fact that the vehicle is inoperative. The advice of your solicitor should be sought as to how far you need to go before it can properly be defined as waste or debris. My own feeling is that the court in Stoney Creek may have gone too far in suggesting that vehicles could never be included. Generally, where the Municipal Act allows a municipality to define terms, the courts have given the by-law definitions substantial judicial deference, provided that the definition is clear and reasonable. This recognizes the intent of the enabling legislation which is to give some latitude to the municipality in defining the term. Clearly section 210, paragraph 135 does this. It permits the municipality to define "domestic or industrial waste".

3. Recite all four enabling provisions of the Municipal Act.

(b) Fence By-laws

Fence by-laws are regulated by several sections in the Municipal Act namely section 210, paragraphs 25 to 30 and section 228, paragraph 3. These sections read as follows:

Section 210

"25. Height and kind of fence. - For prescribing the height and description of lawful fences.

(a) A by-law passed under this paragraph may apply to the whole municipality or to any defined areas thereof, and may prescribe different standards for the height and description of lawful fences in different defined areas of the municipality. R.S.O. 1980, c. 302, s. 210, par. 18; 1989, c. 11, s. 7(1).

26. Along highways. - For prescribing the height and description of, and the manner of maintaining, keeping up and laying down, fences along highways or parts thereof, and for making compensation for the increased expenses, if any, to persons required to maintain, keep up or lay down any such fence. R.S.O. 1989, c. 302, s. 210, par. 19.

27. Division fences, apportionment of cost. - For determining how the cost of division fences shall be apportioned, and for providing that any amount so apportioned shall be recoverable under the Provincial Offences Act, but, until a by-law is passed, the Line Fences Act applies.

(a) A by-law passed under this paragraph may be restricted in its application to such defined areas of the municipality as are set out in the by-law. R.S.O. 1980, c. 302, s. 210, par. 20; 1986, c. 47, s. 14.

28. Barbed wire fences. - For requiring proper and sufficient protection against injury to persons or animals by fences constructed wholly or partly of barbed wire or other barbed material and for prohibiting or regulating the erection of fences made wholly or partly of barbed wire or other barbed material.

(a) A by-law passed under this paragraph may be made applicable to the whole municipality or to any defined areas thereof. 1989, c. 11, s. 7(2).

29. Water gates. - For requiring the owners of land to erect and maintain a water gate where a fence crosses an open drain or watercourse.

30. Fences around private outdoor swimming pools. - For requiring owners of privately-owned outdoor swimming pools to erect and maintain fences and gates around such swimming pools, for prescribing the height and description of , and the manner of erecting and maintaining, such fences and gates, for prohibiting persons from placing water in privately-owned outdoor swimming pools or allowing water to remain therein unless the prescribed fences and gates have been erected, for requiring the production of plans of all such fences and gates, for the issuing of a permit certifying approval of such plans without which permit no privately-owned outdoor swimming pool may be excavated for or erected and for authorizing the refusal of a permit for any such fences or gates that if erected would be contrary to any by-law of the municipality.

(a) A by-law passed under this paragraph may be made applicable to the whole municipality or to one or more defined areas thereof as set out in the by-law, R.S.O. 1980, c. 302, s. 210, pars. 23, 23."

Section 228

"3. Fences. - For the exercise in respect of fences along highways under the jurisdiction of the council of the powers conferred upon the councils of local municipalities by paragraph 26 of section 210."

It is important to note that paragraph 25 of section 210 permits the by-law to apply to the whole municipality or to any defined areas thereof and to prescribe different standards for the height and description of lawful fences in different defined areas of the municipality. I have always interpreted these words to mean that the municipality may pass fence by-laws which are site specific in nature if the circumstances warrant, provided they do not do so for some collateral purpose.

These sections of the Municipal Act permit municipalities to regulate fences on private property (paragraph 25 of section 210) as well as on public property (paragraph 26 of section 210, which permits the regulation of the height and description of fences along highways). The latter provision is especially important for fences which are located in front yards. The front yard of many homes, especially in more urban settings, typically forms part of the road allowance. This is not understood by a great many homeowners. However, municipalities will have enacted by-laws which regulate the height of fences on portions of the road allowance which appear to form part of the private property. As well, municipalities sometimes also regulate fence height through their zoning by-laws.

Paragraph 27 of section 210 deals with Division Fences, which will not be dealt with in this paper and similarly, paragraphs 28 and 29 of section 210 deals with barbed-wire fences and water gates, which are not that common a provision in too many fence by-laws.

Paragraph 30 of section 210, which is more common, gives municipalities the authority to require owners to fence privately owned swimming pools and erect fences and gates around them. It permits a municipality to prescribe the height and description of the fence, how the fence is erected, permits the municipality to prohibit the placing of water in the pool unless the prescribed fence has been erected and maintained and provides for a permit issuing system requiring the production of plans prior to the excavation of the pool. The provision once again, permits the regulations to apply site specifically.

Paragraph 3 of section 228 gives the councils of counties the same powers that municipalities have under paragraph 26 of section 210.

In terms of enforcement, the municipal fence by-laws will be enforced much in the same manner as most other Municipal Act by-laws. That is, the enforcement procedure is triggered in most municipalities by the receipt of a complaint (few municipalities have the resources these days to enforce fence by-laws on a pro-active basis). Upon receipt of the complaint, the municipality will usually dispatch the by-law enforcement officer to investigate. Rights of entry are seldom an issue in these cases because either the homeowner will grant entry to the premises, or alternatively the neighbour complaining will allow the municipality access to the fence through their own property. I have found in my experience that rarely will a neighbour complain if the fence does not immediately abut their own property, however that does happen as well.

The inspection will usually involve some kind of a measurement from grade as most by-laws use grade as the point of reference. In some peculiar situations, there may be some question as to what constitutes grade, therefore it is important to ensure that the definition of grade in the fence by-law is understandable and referenceable.

If the inspection reveals that there is a violation of the fence by-law, the officer will usually advise the owners verbally and it is probably good practice to follow-up with a written notice. Most municipalities have adopted standard notices of violation for all Municipal Act by-laws. The only two available remedies in the event of a

contravention of the fence by-law are to bring the fence into compliance with the by-law (usually either lowering the fence or changing the composition of the fence to comply with the by-law) or, if the provision is contained within the zoning by-law, to either bring a zoning by-law amendment or a minor variance application to vary the provisions of the by-law. In both such cases, the determination of the council and/or the Committee of Adjustment are appealable to the Ontario Municipal Board. In the case of Municipal Act by-law contraventions, non-compliance may result in prosecution under the Provincial Offences Act.

Other remedies with respect to violation of Municipal Act by-laws are described below.

There are two decisions which deal with the issue of whether fence height restrictions contravene the right to life, liberty and security under section 7 of the Charter. Specifically, in Guerrera c. St-Sauvere-des-Monts (Village) (1988), 40 M.P.L.R. 129 (C. S. Que. G. E.), the court, on appeal, reversed the conviction of an individual found guilty of contravening the height restriction provisions of a municipal by-law. The conviction was appealed on the ground that the fence was erected around the property in order to ensure the safety of his 6 1/2 year old child who suffered from several handicaps and in order to allow himself and his wife freedom of movement. The court found the by-law to be inoperable with respect to the appellant by reason of the right to life, liberty and security protection under section 7 of the Canadian Charter of Rights and Freedoms.

In a similar case decided at the Court of Appeal level in Quebec, the same argument with respect to a fence height restriction for similar reasons was unsuccessful. The higher court in this case ruled that section 7 of the Charter was not applicable. It held that municipal by-laws involved restrictions on residents' freedom of action and that these restrictions were enacted for the common good of all residents. The court held that the provisions applied regardless of personal or family situation and that to turn regulatory restrictions of this kind into Charter violations would be to trivialize the fundamental values protected by the Charter (Dorval (Ville) v. Provost (1994), 29 M.P.L.R. (2d) 131 (C.A.)).

I would submit that the decision of the Court of Appeal is the more appropriate approach with respect to fence height by-laws.

With respect to pool fence by-laws, it is interesting to note the language of the current pool fence provisions of the Municipal Act, especially the ones related to the permit system and the requiring of plans. This was likely in response to a decision of the Ontario High Court in 1967 called Re Davies and Forest Hill, [1965] 1 O.R. 240, which held that the Municipal Act did not authorize a municipality to impose conditions and requirements for the construction of a pool. At that time it only authorized by-laws requiring fences and gates around swimming pools.

The Line Fences Act also has significant application for municipalities, however it is not discussed here. There are also provisions of the Planning Act which may apply to fences, which have not been discussed in any detail.

Other provisions of the Act which deal marginally with fences are paragraph 39 of section 210 which deals with wooden fences, paragraph 173 of section 210 which authorizes the pulling down, repairing or renewing, at the expense of the owner, of any fence by reason of its ruinous or dilapidated state, faulty construction or otherwise is in an unsafe condition as regards danger from fire or risk of accident and paragraph 4 of section 314, prohibits the building or maintaining of fences on any highway.

(c) Sign By-laws

Sign by-laws are authorized by the Municipal Act and regulated pursuant to section 210, paragraphs 146 through 149 and section 224(2) with respect to signs advertising body-rub parlours (section 210, paragraphs 146 through 149 of the Municipal Act are attached as Appendix "C").

The regulation of signs is structured somewhat differently than most other Municipal Act by-laws. For example, by-laws regulating signs may be passed with respect to any class or classes of signs. Accordingly, it is my opinion that the sign by-law must treat all types of signs within the class equally, regardless of location. For this reason sign by-laws may not be site specific. While the enabling introduction to section 146 is not entirely clear, I read it to mean that the grant of authority to pass by-laws site specifically (define area or areas) is restricted to the regulation of posting of notices on buildings or vacant lots and not the sign by-law regulations generally.

The section goes on in subsections (a) through (i) to indicate what the exact limits of the by-law making power are. Subsection (a) provides that signs within a class may be specified as to a time or times during which the signs may stand or be displayed and may provide for the removal of signs which continue beyond the time period. Subsection (b) contains provisions allowing for the by-law to require the production of plans, the inspection and approval of plans and the fixing of fees for same.

Subsection (d) provides for the pulling down or removal at the expense of the owner of the sign that is displayed in contravention of the by-law and provides for rectification of certain instances.

Subsection (e) requires public notice of the proposed by-law and the meeting at which the by-law will be discussed to be published once at least 14 days prior to the council meeting and subsection (f) requires council to hear any person who applies to be heard with respect to same.

Subsection (g) is quite unusual with respect to a Municipal Act by-law in that it authorizes council to authorize minor variances from the by-law if in the opinion of council the general intent and purpose of the by-law are maintained. This is similar to the procedure in the Planning Act for the granting of minor variances from zoning by-laws.

As well, additional protection is built into subsections (h) and (i) and these subsections should be read carefully before drafting or enforcing a sign by-law. Subsection (h) is a grandfathering provision and provides that no by-law passed under the 1983 version of this section, that prohibits or regulates signs, applies so as to require a sign that was lawfully erected or displayed on August 1, 1983, but cannot be made to comply with the by-law or removed from the land, even if it does not comply with the current by-law standards, provided the sign or advertising device is not substantially altered.

The provision does allow for maintenance and repair of the sign and for the change in the message displayed, which are deemed not to be an alteration. This is a form of legal non-conforming use specifically enacted for sign by-laws to protect existing signs which pre-date the amendment to the Municipal Act.

In addition to this, there is a grandfathering provision for signs in existence prior to any change in a by-law itself. Subsection (i) provides that no by-law passed under this section applies to a sign or an advertising device that is lawfully erected or displayed on the day the by-law comes in force. If the sign or advertising device is not substantially altered, similar rules with respect to maintenance and repair apply here as well.

The thing to note in terms of enforcement is that the date of erection of the sign will become relevant and any enforcement action will have to deal with the grandfathering protections. It should be remembered that the provision provides for the continuation of "legal" signs. Accordingly, as in the case of legal non-conforming uses, signs which had been illegally erected prior to August 1, 1983 or prior to the introduction or amendment of a sign by-law, are not afforded the grandfathering protection. Therefore, it will be necessary to gather evidence with respect to the legal status of the sign which is purported to pre-date the by-law or the amendment to the Municipal Act.

As well, it will be crucial to draft any sign by-laws so that these statutory provisions are included as well, although the absence of them will not eliminate the statutory provision in the Municipal Act. The exemptions would continue to apply in any event.

Paragraph 148 of section 210 is also interesting because it appears to permit municipalities to regulate the attachment of posters or signs on property managed and controlled by a public utility commission or local board. Accordingly, it may be possible to use this provision to authorize local municipalities to prohibit postering on hydro poles which are located on local municipal road allowances as well as on poles which are located on upper-tier (regional or for the time being Metro roads or county roads) roads. Of course, any restrictions on postering should be carefully drafted to comply with the Supreme Court of Canada dicta in Ramsden and Peterborough and the several other decisions decided since Ramsden that set out in painstaking detail what may or may not be permissible in terms of postering by-laws to ensure that they do not restrict the freedom of expression guaranteed by the Charter. This area is a potential mine field if the by-law is not drafted and enforced properly.

Paragraph 149 of section 210 permits by-laws for prohibiting the pulling down or defacing of signs or other advertising devices and notices lawfully affixed.

Space does not permit an examination of the case law related to signs or postering, however a short list of cases decided pursuant to paragraph 146 of section 210 is appended as Appendix "D".

(d) Vital Services By-laws

The Municipal Act was amended in 1994 to provide for a new section 210.2 which authorizes municipalities to enact "vital services by-laws". "Vital services" are defined to mean "fuel, electricity, gas, hot water, water and steam". The by-law can require landlords to provide adequate and suitable vital services to each part of the building that is used as a dwelling. The enabling section has provisions preventing suppliers from ceasing to provide a vital service until notice has been given in accordance with subsection (5) of section 210.2. Subsection (5) provides that the notice of intended discontinuance can only be given if it is as a result of the landlord breaching a contract with the supplier for the supply of the vital service.

The section also permits the by-law to require the supplier to promptly restore vital service when directed to do so by an official named in the by-law. It also contains enforcement and an offence creating provisions. As well, a right of inspection is provided without a warrant for other than dwelling units and with a warrant for dwelling units.

The municipality is authorized to provide the vital service if the landlord fails to do so in contravention of the by-law and the amounts spent by the municipality plus a 10% administrative fee form a lien which is registerable against the lands in the Land Registry Office. However the provisions specifically provide that the lien is not a special lien in the same manner as taxes and therefore would be subject to any prior existing encumbrance to the lands. Because of this a municipality is put at some risk with respect to the amounts expended. For example, in the event of a bankruptcy or foreclosure or power of sale of a prior existing mortgage, a municipality would likely lose priority, and depending on the circumstances could fail to recover anything at all.

The section also has provisions which allow the municipality to re-imburse itself by garnishing rents (which are deemed not to constitute default of the payment of rent by the tenant under the Landlord and Tenant Act).

To my knowledge, not many municipalities have enacted vital services by-laws. Although the objective of the proposed legislation is clear, some municipalities do not wish to be made debt collectors for utilities, especially if the protection of a "super lien" is not available.

(e) Noise By-laws

Municipalities may enact noise by-laws under one of two pieces of legislation. The first, which is not covered here, is a by-law enacted pursuant to the Environmental Protection Act, R.S.O. 1990, c. E.19, which by-law requires the approval of the Minister. Deviations from the Ministry's model by-law are seldom permitted. The Ministry slavishly adheres to the model by-law.

The authority to regulate noises under the Municipal Act is found in section 210, paragraph 138 which reads as follows:

"For prohibiting or regulating, within the municipality or within any defined area or areas thereof, the ringing of bells, the blowing of horns, shouting and unusual noises, or noises likely to disturb the inhabitants."

The problem with this authorizing provision is that many of the by-laws that were enacted thereunder contain standards which have been repeatedly struck down by the courts as being too subjective in nature. The enacting legislation itself is subjective. It states that by-laws may prohibit or regulate noise which "would likely to disturb an inhabitant" or is "unusual". Many municipalities enacted by-laws that mirrored the wording of the statute almost verbatim. As well, many of the by-laws contain standards that would vary depending on the particular vulnerability of the individual hearing the particular noise. In other words, the by-law created an offence for noises which might disturb or annoy some individuals but not others. Again, as a result, convictions were extremely difficult to obtain and many of the provisions were struck down. As an example, in two such decisions the courts interpreted section 210, paragraph 138 as being restricted to only the kinds of noises actually set out in the section (see: R. v. Hyland Packers Limited (1987), 5 M.P.L.R. 171 (Div. Ct.); R. v. Nunn (1884), 10 P.R. 395). Again, space does not permit a complete review of the case law, however a listing of cases is attached as Appendix "E".

The other problem with noise by-laws in general has been one of enforcement. Because noise infractions occur primarily between individuals or are the result of the acts of individuals, enforcement is made difficult. The infractions are usually limited in time and therefore observing or hearing the infraction becomes difficult, especially if the infraction occurs after hours. These are practical problems which I am sure you have all experienced. It is for this reason that many municipalities for years chose not to prosecute noise infractions even though they had noise by-laws on their books. As a result, noise enforcement was left to the police and was undertaken sporadically. If the police did not enforce some municipalities left enforcement to the complainants by way of private prosecutions under the noise by-law.

Over the years many municipalities have given in to political pressure and have reluctantly agreed to enforce noise by-laws. One of the primary problems however has been the gathering of evidence. As indicated, because of the limited temporal nature of noise infractions, it was difficult for by-law officers to gather information. Therefore, municipalities typically had to rely quite heavily on the evidence of lay witnesses (usually the complainant). This led to the further additional problem of witnesses not being able to gather sufficient evidence to establish an offence, witnesses not showing up in court or if they did, not giving proper evidence. As a result, many municipalities developed policies around the enforcement of noise control by-laws. One example is the City of Scarborough policy which is attached as Appendix "F" where a process was established for attempting to ensure that complainants and witnesses appear in court.

Because of the subjective grant of authority under paragraph 138 of the Municipal Act, I do not recommend to municipalities that they enact a noise by-law under the Municipal Act at all. I feel that a by-law under the Environmental Protection Act (either qualitative or quantitative) is the preferable route. However, if a municipality chooses to do so, then care should be taken not to repeat the words of the statute as the standard in the by-law. The municipality should incorporate as objective a standard as possible.

POWERS OF ENTRY

The current Municipal Act contains no general provision authorizing inspectors or staff to enter onto private property in order to enforce a by-law of the municipality and especially to gather information with respect to whether a contravention has occurred. There are a number of specific instances where a right of entry is given with respect to a specific power (for example, site alteration by-laws under section 223.1, inspection of two-unit houses for the purposes of registration in a registry under section 207.3 and enforcement of vital services by-law pursuant to section 210.2).

There has been some suggestion that a municipality may have an implied right of entry under the Municipal Act to enter onto private property for the purposes of inspection. I have certainly heard the argument made that despite coming under the heading "Further Matters" that section 210, paragraph 46 may be a general inspection authority. My opinion however is that there is no general right of inspection under the Municipal Act and that if the authority is to be found it must be found in an area dealing with a specific subject matter as in the case of site alteration, vital services and two-unit house registries.

The proposals for a new Municipal Act are discussed below, however with respect to rights of entry, the province has indicated in its consultation document released earlier this year called "A Proposed Legislative Framework" that in order to remove any uncertainty, they are proposing that the Act be amended to contain a general entry provision that will apply to inspections for possible contraventions of all municipal by-laws. The power will be subject to certain limits and will not apply to any building used as a dwelling and further, that a search warrant will continue to be required for entry into such a dwelling. The ability to obtain a warrant should include the ability to obtain a warrant for the purposes of inspection only and the officer should not have to seize goods as well (unless necessary).

It has also been recommended by several organizations that the new Act contain a power for municipal law enforcement officers to seize goods from any person or business selling goods without a license where a license is required (i.e. street vendors), similar to the power granted to the Municipality of Metropolitan Toronto.

LIABILITY OF OFFICERS

The general law of negligence would govern the conduct or duties owed by an inspector enforcing by-laws under the Municipal Act. The duties of care would not differ from those for other municipal enforcement officials.

There is a provision in section 210.3 which was added recently and which reads as follows:

"No proceeding for damages or otherwise shall be commenced against an official or a person acting under his or her instructions or against an employee or agent of a local municipality for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in a performance in good faith of the duty or authority."

Subsection (2) of the same section goes on to provide that the local municipality is not relieved of liability as a result of this immunity if it would otherwise be subject to liability in respect of a tort committed by an official or a person acting under his or her instructions or by an employee of the local municipality. In other words, the section gives immunity to individual inspectors provided they are acting in good faith in the performance or intended performance of their duties, including acts of neglect or default, but the municipality itself is not protected and would be liable for the acts of its employees if they were found to fall below the acceptable tort standard of reasonable care.

Municipalities are insured for these types of risks in any event. The immunity for inspectors offers an additional level of comfort which was not previously contained in the statute.

SELF-HELP AND OTHER REMEDIES

(a) Section 220. 1

The Municipal Act was amended by Bill 26 to provide for a system of user fees. The provision has been used by a number of municipalities to recover the costs of inspections.

I interpret section 220.1 as authorizing councils of municipalities and local boards to enact by-laws for the imposition of fees and charges for various "services" and "activities". In my opinion, the amendment to the Municipal Act does authorize the charging of a fee for compliance inspections undertaken pursuant to the Municipal Act on the basis that a reasonable number of compliance inspections would constitute either a "service" or "activity" as contemplated by the provision.

The Municipal Act is quite broad in setting out what the by-law may contain; for instance, the by-law may provide for fees and charges that are in the nature of (a) direct tax for the purposes of raising revenue; (b) interest charges and other penalties including the payment of collection costs, for fees and charges that are due and unpaid; (c) discounts and other benefits for early payment of fees and charges and; (d) fees and charges that vary on any basis the municipality considers appropriate and specifies in the by-law, including the level or frequency of the service or activity provided or done or the time of day or of the year the service or activities provided.

Quite clearly, the permission to vary on the basis of level or frequency of the service or activity would include charging for each compliance inspection and the general power to vary on any basis that the city considers appropriate would also, in my opinion, constitute broad statutory authority for the charging of the cost of return inspections.

The provision would also allow the by-law to deal with different classes of persons in different ways and would exempt in whole or in part any class of persons from any or all parts of the by-law. In my opinion this would permit discrimination on the basis of whether compliance had been achieved upon return of the inspector.

Section 220.1(7) of the Municipal Act gives the municipality authority to determine when and in what manner the fees and charges are to be paid and the interest charges and other penalties, if any, for those fees and charges that are due and paid.

I have considered whether such a fee or charge might constitute a penalty rather than a fee or costs for administrative purposes, however the broad authority in the Municipal Act to vary the fee or charge on any basis the municipality considers appropriate is sufficiently broad to authorize this kind of charge in my opinion.

I have recommended to any municipality to which I have given this advice that any by-law amendment establishing such a charge or fee provide for a mechanism for the giving of notice to the owner of the property of the potential liability for these fees prior to actually carrying out the inspection. This would avoid any argument of the unfairness or unexpected nature of the charge.

(b) Power to Impose Fines

Section 320 of the Municipal Act is the section which authorizes municipalities to provide in their by-laws that any person who contravenes the by-law is guilty of an offence. This is referred to as the "offence creating section". The Municipal Act used to contain a provision providing for the by-law to set out the penalty in the event of a conviction and for the by-law to state the amount of the maximum penalty. That provision has been removed and included in the Provincial Offences Act. As a result, we have amended the penalty section of our by-laws to read as follows:

"Any person who contravenes any provision of this by-law is guilty of an offence and upon conviction, is liable to a maximum fine of Five Thousand Dollars ($5,000.00) pursuant to and recoverable under the Provincial Offences Act, R.S.O. 1990, c. P.33, as amended from time to time."

The exception to this is section 329 which still provides for a penalty for the licensing of body-rub parlours and adult entertainment parlours. This section provides for a maximum fine of $25,000.00 and section 329(1.1) provides for a similar fine for other

licensing offences. The corporate maximum set out in subsection (2) is $50,000.00.

(c) Proof of By-law

Section 325 of the Municipal Act provides that a conviction for a contravention of any by-law should not be quashed for wanted proof of the by-law before the convicting justice, but the court or judge hearing the motion to quash can dispense with such proof or could permit the by-law to be proved by affidavit or in such other manner as may be considered appropriate.

Subsection (2) goes on to provide that nothing in the section relieves a prosecutor from the duty of proving the by-law or entitles the justice to dispense with such proof.

Our practice is to enter into evidence certificated copies of each by-law.

(d) Self-Help

Section 326 of the Municipal Act is quite a useful tool in by-law enforcement matters. It provides that where the municipality has authority to require something to be done, it may in the same by-law or in a different by-law direct that if it is not done by the person directed or required to do it, the thing can be done at the person's expense by the municipality. The provision goes on to provide that the municipality can recover the expense of doing it by action or "in like manner as municipal taxes". It also provides for alternative payment provisions. The rules of thumb that we usually recommend before this section is utilized are as follows. They are essentially procedural safeguards to ensure that the debt is made collectable and enforceable:

1. Ensure that the authority exists for the matter and thing to be done. The wording is very important as the matter and thing can be required either by by-law "or otherwise". Accordingly, if there is some statutory authority for council to require something other than by by-law, then that would apply as well;

2. Ensure that either the by-law in question or a separate by-law provides that in default of the matter being done, the municipality may proceed to itself. My preference is to have a separate by-law authorizing the municipality to do the work in the event of default (as noted below after notice), and authorizing the Treasurer to add the outstanding amounts to the tax roll following a period of time for re-imbursement;

3. Following closely on number 2, my preference is most definitely to provide persons with notice of council's intention to add the amounts to the tax roll, provide the person an opportunity to redeem or re-imburse and a reasonable opportunity to object to the matter being added to the taxes;

4. In larger matters that involve substantial costs or the retention of additional parties to undertake the work (such as contractors in the case of demolition or construction work), I like to recommend to municipalities that they either obtain at least two quotes for the job to ensure that the lowest cost possible is undertaken.

I also make it clear to my clients that use of the words "recovered in like manner as municipal taxes" does not provide the same level of protection as the words "as taxes". The main difference is the priority of the lien that is created and essentially the ability to utilize the municipal tax sales process. Again, the advice of your solicitor should be sought with respect to the extent of the lien and enforcement rights.

(e) Prohibition Orders

Section 327 of the Municipal Act provides an additional useful tool to restrain by order once a conviction has been entered. It provides that where any by-law of the municipality passed under the Act is contravened and a conviction is entered, in addition to any other remedy or penalty, the court in which the conviction has been entered may make an order prohibiting the continuation or repetition of the offence by the person convicted. This is useful in the case of repeat offenders or where the municipality expects the offender to repeat. In my experience, the courts are a little bit reluctant to impose the order for a first offender and therefore it is important to

have a conviction record on hand when speaking to this request. As well, it is also useful to have a draft order of prohibition prepared to hand to the Justice of the Peace to speed the process along and to ensure that the wording in the order of prohibition is satisfactory to suit the municipality's needs. It is also useful to serve the defendant immediately following the making of the order by the court. The intent of an order of prohibition is defeated by faulty wording.

Section 328 of the Act also provides for the power to restrain further contraventions of a by-law by either a ratepayer, the corporation or a local board.

(f) Order Closing Premises

Section 330 of the Municipal Act contains a procedure which would permit an order closing a premises where an owner is convicted of knowingly carrying on or engaging in a trade calling business or occupation without a license. The court can order that the premises be closed for a period of up to two years. The procedure for so doing is set out therein and since licensing is not discussed in this paper, I will not review them in detail. Similarly section 330.1 deals with by-laws authorizing collection of unpaid licensing fees.

NEW MUNICIPAL ACT

As mentioned earlier, the province announced earlier this year in a consultation document that municipalities will be getting a new Municipal Act effective January, 1998. Assuming this rather ambitious timetable is achievable (I have my grave doubts), the Municipal Act and the general municipal law will change substantially and radically with respect to a municipality's abilities to legislate and act. The most significant changes are that the new Act will adopt, as have the Alberta and Manitoba Municipal Acts, a principle of "natural person powers" with the ability to act within certain "spheres of jurisdiction". In addition to this, municipalities will be given "governmental powers" which natural persons do not ordinarily enjoy. The purpose of doing this is to make Municipal Act action more flexible and responsive. As indicated at the beginning of the paper, municipalities have been given power on a "prescriptive" basis since the origins of the Municipal Act. The intention now is not to require a specific grant of power for every little thing that a municipality wishes to do. The intention is to allow municipalities, like business corporations, to have all of the powers of a natural person. This would enable council, subject to certain limits to set its administrative priorities, hire and dismiss employees, provide employee benefits, delegate administrative responsibilities, contract for services, enter into agreements with individuals, corporations and other governments, purchase land, buildings and other assets, and sell and otherwise dispose of its assets without having defined a specific statutory authority for so doing.

As mentioned, because natural persons do not exercise governmental powers (i.e. power to draft by-laws or regulate), the proposed legislation will provide municipalities with certain governmental powers which are not available to natural persons including the power to regulate, prohibit, license, enforce by-laws, levy taxes on real property and expropriate land.

Although a full draft Municipal Act is not available, the province has made available for comment some of the core sections. Section 8 of the proposed legislation provides for the general by-law making power. The notes which follow the draft legislation indicate that the Act will include the power to enforce municipal by-laws, including the power to create offences and to apply for injunctions.

In addition, the note indicates that there will be powers of entry (general ability to inspect when required to enforce Acts, regulations and own by-laws, and for that purpose to enter onto land and buildings other than dwellings, and specific powers of entry to do things, eg. erect snow fences on private property).

In addition, enforcement powers will also be given (power to create offences, apply for injunctions, fines). The power to license will be continued and the imposition of user fees will be continued.

In addition to these natural person powers and governmental powers the government proposes to give municipalities general jurisdiction to pass by-laws in the following broadly defined "areas of authority":

- health, safety, protection and well-being of people and protection of property;
- public utilities;
- waste management;
- public highways, including parking and traffic on highways;
- transportation systems excluding public highways;
- natural environment;