Clifton Kok LLP
Legal Counsel

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CASE LAW UPDATE, JULY 2007

Condominium's Right to Use of Other Condominium's Land Invokes Equitable Duty to Maintain and Repair the Subject Lands

July 6, 2007: *Wentworth Condominium Corp. No. 12 v. Wentworth Condominium Corp. No. 59,* (Ontario Superior Court of Justice, Court File No. 03-10516), [2007] O.J. No. 2741, D. S. Crane J.

FACTS

In the early 1970's, a developer, Frank Long, obtained approval for two condominiums on adjacent sites. Wentworth Condominium Corporation No. 12 (WCC 12) was registered on March 3, 1975, at which time the second condominium – ultimately to be Wentworth Condominium Corporation No. 59 (WCC 59) – was under construction.

As the plan for WCC 59 progressed, the project increased in size and changes were required to the storm water management system by relocation of water flow from the WCC 59 lands to a portion of the lands already included in WCC 12. Absent such changes, the Hamilton Region Conservation Authority would not approve the development of WCC 59.

At the relevant time the developer was in control of WCC 12 and as such caused WCC 12 to grant an easement, permitting the owner of the WCC 59 lands (ultimately WCC 59 itself and its unit owners),

> *To enter, construct, maintain, inspect, alter and repair a storm sewer or storm sewers, including all appurtenances thereto, on and under* [the relevant portion of the WCC 12 lands].

Over time, WCC 59 was registered and received the on-going benefit of the easement for the purpose of storm water management. However, no maintenance or repair of the storm water system in that part of the WCC 12 lands was ever performed and, at the time of this hearing, there was, according to the Court,

> *a serious risk of collapse of the structure, with risk of flooding in times of heavy run-off and the risk of erosion and damage to the course of the waterway, particularly, the undermining of the structural integrity of a number of the units of Condominium No. 59*

The question before the Court was who should be responsible for its repair.

JUDGMENT

The Court determined that WCC 59 should be responsible for the repairs to the storm sewer on the WCC 12 lands, stating that:

a. although the language of the easement is ambiguous, it would not be rational to believe that an easement and rights to "*construct, maintain, inspect, alter and repair*" would be created unless there was an intention (and need) to do such things; and

b. the title holders of the WCC 59 lands, who appear to be the sole beneficiaries of the easement, could not "*in law and equity*" on the one hand elect to receive the benefit of the right under the easement to construct (and therefore use) the storm sewer but on the other hand "*reject the maintain and repair burden*".

To explain and justify its judgment, the Court spends a good deal of space explaining (by quoting minutes of the Ontario legislature and commentary by such luminaries as Audrey Loeb) the objective of condominium legislation in Ontario to balance consumer protection with the interests/commercial realties of the condominium development industry.

A part of this balancing act included the eventual imposition (by amendment of the legislation) of the right of the developer to grant easements from or to other land that it owns for the benefit or burden of the condominium it is developing. It was under such legislative entitlement that Frank Long was able to grant an easement from WCC 12 in favour of WCC 59.

The Court determined that the objective of the legislation, as set out above, imposes a duty of the developer relying on such legislative rights to act in good faith in the best interests of the unit owners of the condominium. This in part informs the Court's determination that it could not have been intended by Frank Long that WCC 12 be held responsible for the costs of the benefits of its land that were being enjoyed solely by WCC 59.

The Court also relied in part upon the reasoning of the Ontario Court of Appeal in a 1983 case involving issues relating to the mutual use of pool facilities.[1] The Court of Appeal in that case stated:

> *As far as possible and with due regard for the particular mutual covenants of the individual owners, the Courts should bring a broad and equitable approach to the resolution of their problems… The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both condominium corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair.*

Since the Court in the case at hand found that there was no sharing of benefits, it determined the total costs of repair should be borne by WCC 59.

[1] *York Condominium Corporation No. 59 v York Condominium Corporation No. 87* (1983), 42 O.R. (2d) 337 (Ont. C.A.).

APPLICATION

The main impact of this judgment may only be within the narrow range of similar situations to that of the parties involved.

That is, it provides guidance where condominiums have, by one means or another, obtained the use or benefit of common elements or assets belonging to another condominium (or other property owner) and there is dispute over the obligations that follow upon such benefit.

This judgment would incline one to the position that in such cases the party obtaining a benefit of such lands or assets should bear the burden of maintenance and repair of the same at least to the extent of the benefit being enjoyed.

Mutual Use Arrangements

In relation to mutual use arrangements generally amongst condominiums, which are similar but not identical to the circumstances of the condominiums in this case, this judgment reaffirms the principle that fairness should be the over-arching principle of such arrangements.

However, at the same time the Court, in relying on the judgment in the York Condominiums case (referenced at footnote 1 above) also relies upon the statement of the Court of Appeal that, in determining what obligations should exist between the parties, the Court should not take "a narrow legalistic" approach, but

> *…should take into account a number of considerations* [that] *may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total* [cost in question]*, that nature of the work required*…[and] *the benefit which may be acquired by all parties…*

It should be noted, however, that in many such cases there already are agreements in place to define the relationship amongst the parties. The terms of such an agreement might override some of the principles of equity expressed in this case; but where such agreements do not exist, or are ambiguous or otherwise inadequate, the principles of this case could be brought to bear.

Covering Costs

While it is difficult to argue against a judgment that says parties must act in good faith and with the objective of fairness, it seems there may be one point in which this judgment might go wrong, where it might in fact produce inequity rather than fairness.

That is, it never seems to be asked whether WCC 12 included the storm sewer in its reserve fund studies and plans over the years.

If it had, then there would have already been a store of funds set aside to pay for its repair. The prior boards and owners of WCC 12 would have been knowingly contributing to the same with the intent that the funds be used for that purpose. Is it equitable that now, at the moment when such funds need to be paid, they should

withhold them, resulting in what will likely be a fairly significant special assessment or indebtedness being incurred by WCC 59 (which undoubtedly had never considered that it was responsible for those lands nor saved a penny toward it)? It might in fact be perfectly fair, but it is another factor that could and likely should have been looked at by the Court before making that determination.

On the practical level, this case should direct property managers and boards of directors of condominiums that enjoy the benefits of easements or other rights over others' lands or facilities to consider whether they have adequately considered and prepared for the possibility that their condominium may be on the hook for at least a proportionate share of the maintenance and/or repair costs of the same.

Other Matters

Although the main application of this judgment is relatively narrowly focussed on the foregoing situations, it also contains some principles and discussions of the law that could have more broad application. Two primary points are:

1. That this is yet another case defining condominium legislation in Ontario (described as still as "relatively new body of law") as consumer protection legislation. Yet, at the same time, the Court acknowledges that such protection is to be balanced against the requirement to fairly address the commercial realities of the condominium industry. The example of the right given to developers to impose easements on condominiums for the purpose of facilitating development is a good illustration of this balance leaning in favour of the commercial interest.

and

2. That, in turn, the Court recognizes that in exercising such a right the developer must act "*in good faith in the best interests of all the unit owners*". This principle could likely be applied to everything that developers are required or permitted to do under the *Condominium Act, 1998*, particularly in terms of the manner in which services and facilities of the condominium are proposed to operate and be sustained. In any event, it is a good basic principle under which developers should operate, diverting from it only where commercial realities relentlessly intervene.

Michael H. Clifton (July 2007)