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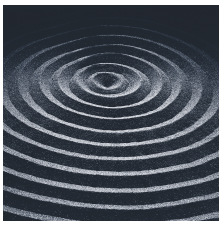

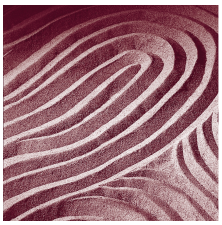

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Municipalities and Their Growing Role in Assessment Litigation

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MUNICIPALITIES AND THEIR GROWING ROLE IN ASSESSMENT LITIGATION

Municipalities have traditionally been the absentee parties to assessment proceedings. They are statutorily granted party status[1] and stand to directly gain or lose from any outcome, but they seldom appear in support of their own position. In an admittedly unscientific test, the words, 'No one appeared for the Municipality" were entered as a search phrase in the Quicklaw database of all Assessment Review Board decisions since January 1, 1999. According to the search summary, well over half of the decisions within the database contained that phrase. One could take it from this result that municipalities simply don't care about assessment issues and therefore don't bother to attend these hearings, but nothing could be further from the truth.

Who has the Municipal Role been Limited?

The poor record of municipal attendance at assessment review hearings is not due to a lack of interest, but more generally to a lack of resources combined with a feeling on the part of some municipalities that their presence at assessment appeals is not really required. Until about the last half dozen years or so, the field of assessment law was fairly stable and there may have been some merit to that position. However, this changed when the outgoing Provincial government introduced a slew of reform legislation, beginning in 1997 with the first of the *Fairness for Property Taxpayers* acts and extending through numerous other pieces of legislation since that time. The rapid pace of change that was introduced into what had been a rather predictable assessment system left most (if not all) municipalities scrambling to keep up. In many instances, legislative change was introduced in the middle of the municipal budgeting process, causing further consternation and grey hair among municipal treasurers. In addition to having to establish a broader range of taxation rates, municipalities must now consider a number of additional factors (such as assessment caps, clawbacks, freezes, etc.) that can significantly alter their bottom lines.

The Municipal Budget Process

Municipalities are the most accessible and directly responsible level of government. The tax revenue that they collect each year goes principally to operating expenses that will be incurred in that year (or to satisfying debt obligations incurred for long term capital projects) and they may not budget for annual deficits. Although there have been some limited efforts made to expand municipal sources of revenue, the large majority of all municipalities' revenues are accrued from their property tax bases. Since the size of a municipality's tax base consists of the aggregate of the assessed values of the property within its geographic boundaries, it has a clear interest in ensuring that those values are established in a fair and equitable manner.

Municipalities budget based on calendar years, and municipal budget deliberations generally commence well in advance of the beginning of each budget year and are completed in the early months of the year. Revenue projections and the taxation rates necessary to achieve them are based on the assessment roll, which is to be delivered in December of the immediately

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[1] *Assessment Act*, R.S.O. 1990, c. A.31, as amended, s. 40(5)

preceding year.[2] Once a municipality's tax rates have been set, lowered assessments mean lower revenues. Municipalities therefore have a direct interest in ensuring the accuracy of the initial roll and in ensuring that their assessment base is not thereafter eroded through too many successful appeals.

Stated another way, a municipality's property tax base is the "pie" from which the municipality makes its decision as to how large a tax "slice" needs to be extracted in order to meet its projected expenses. While this is a bit of an oversimplification (since there are in fact many small slices that must be taken from the different commercial, residential and industrial parts of the pie), once the size of the pie has been set and time for initial corrections has passed, the municipality must set its tax rates without knowing how large the pie will ultimately be once all assessment complaints have been addressed.

Although assessments can be increased on appeal (even where the appeal was initiated by a property owner), the more common result of most appeals will be either the maintenance or reduction of the assessment complained against. For large and mid-sized municipalities, a single appeal will not generally have a measurable impact on tax revenue projections, but the cumulative effect of a number of successful appeals can noticeably shrink the assessment pie. For smaller municipalities, an adverse result on even a single major commercial or residential property can have immediate and significant budget impacts.

As noted above, municipalities are able to respond to changes in their assessment base by adjusting their tax rates. However, this can only be done for the current year and it is not possible for municipalities to "reach back in time" to adjust tax rates for past years. Accordingly, in setting its tax rates a municipality must factor in the likelihood that some assessments will be reduced by budgeting for that expected shortfall (particularly where the assessment of properties has been challenged over a number of taxation years) and then do whatever it can to ensure that those projections are not exceeded.

What Can a Municipality Do to Assist in the Assessment Process?

Having established that municipalities have a direct interest in ensuring the integrity of the assessment process, the question then becomes how they can assist in the pursuit of that goal. When weighing the costs of any proposed course of action it must be recognized that, although the burden of collecting taxes falls to lower tier municipalities (except in the case of single-tier municipalities such as Toronto, Hamilton or Ottawa), those municipalities retain only a relatively small portion of any resultant tax revenues. Using the Town of Markham as an example, every $100,000 of commercial value (without capping or clawback) in 2002 equated to a property tax bill of $2,641.02. Of that amount, the Town retained only $304.08, with the remainder going to the Region of York and the local school boards. For residential properties, every $100,000 of assessed value produced a tax bill of $1,137.05, of which the Town retained $276.43. Although a local municipality has regard for the interests of all taxing authorities, it cannot ignore the amount of its own tax dollars that are at stake when making the decision to incur the costs that are necessary to participate in an assessment proceeding.

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[2] *Assessment Act*, s. 36(1)

Assuming that the decision to take a more active role in the assessment process has been made, there are several things that municipalities can do to assist in the smooth and equitable operation of the process. These include the following:

1. **Ensure that all relevant information within the municipality's possession is conveyed to MPAC**: In addition to collecting property taxes, local municipalities are responsible for considering and approving planning and development applications made under the *Planning Act* and entering into subdivision and other development agreements that can have the effect of changing the value and assessment classification of a parcel of land. Municipalities should ensure that the most recent information regarding their planning processes is communicated to MPAC in an accurate and expedient manner to ensure that any changes in status are fully reflected in the assessment roll. As a general rule, municipalities should do whatever they can to establish and maintain close communications with their local MPAC representatives.

2. **Review the assessment roll as soon as it is returned**: Clerical and typographical errors do occur and, upon the receipt of each assessment roll, municipal staff should immediately review the entire list of assessed values for accuracy. Particular attention should be paid to assessments which have increased or decreased by a material amount. Any apparent errors or inconsistencies should be immediately reported to MPAC. It is much easier to correct errors within the time frame permitted for the return of the assessment roll than it is to file a complaint after that time and have to argue for the correction before the ARB.

3. **Seek to be part of any settlement discussions**: Where a request for reconsideration is made before December 31st of each year, MPAC has the ability to settle[3] a disputed assessment with a property owner and then must notify the municipality of the settlement. Although the municipality still has the ability to object to the settlement and to file a complaint to the board,[4] it would at that point be in the position of opposing both MPAC and the owner and would need to lead its own expert assessment evidence in support of its position. Municipalities should seek to avoid this type of situation by involving themselves in settlement discussions and continually communicating with MPAC before settlements are reached. Although MPAC has no statutory obligation to consult prior to reaching a settlement, it does have an interest in avoiding unnecessary hearings and should be receptive to such overtures.

4. **If necessary, file complaints against incorrect assessments with the Assessment Review Board**: The *Assessment Act* provides that any person, including a municipality or a school board, may complain in writing to the Board that the current value or classification of another person's land is incorrect.[5] The last date for filing such complaints is March 31st of each year,[6] unless the date for the return of the assessment

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3 *Assessment Act*, s. 39.1(5)

4 *Assessment Act*, s. 39.1(8)

5 *Assessment Act*, s. 40(1)

6 *Assessment Act*, s. 40(2.1)

roll has been extended, in which case it is 90 days after that extended date.[7] This may be the only option open to a municipality if the date for making amendments to the roll has passed before information in support of a complaint becomes known. Upon a complaint being filed by the municipality, MPAC obtains party status[8] and will in most cases assume primary carriage of the assessment review hearing if it agrees that a property has been incorrectly assessed or classified.

5. **Monitor all properties in the municipality for possible changes in classification**: In addition to paying close attention to the planning and subdivision/severance processes, monitoring for classification changes may be as simple as conducting periodic driving tours of the municipality to confirm that, for example, lands subject to the farmland assessment rate continue to be farmed.

6. **Attend Assessment Review Board hearings**: Not every assessment hearing requires municipal attendance. Preparing for and attending at hearings costs money, and it may be the case that some appeals and some hearings are not worth the municipal effort from an economic perspective. One example is the many appeals made by the owners of single family residences which involve requests for relatively small reductions in assessments. However, although the interests of MPAC and the municipality will generally be similar, there are a number of reasons why municipalities should consider attending an assessment hearing where either a large amount of assessment or a significant principle are at stake:

    - *It demonstrates to the Board that the issue before it is significant to the Municipality*: Having counsel and staff present at a hearing conveys the message that the matter before the Board is of importance to the municipality. While the Board as an impartial arbiter will in all cases give each appeal its full consideration, having the municipality attend as a separately represented party ensures that its particular viewpoint is fully advanced.

    - *Advocacy advantages*: Although the municipal position will not always be identical to that of MPAC, there will generally be a substantial similarity of interest. Having two similarly-situated counsel with standing means having two opportunities at cross-examination and two closing arguments in opposition to the assessment complaint.

    - *Greater municipal involvement in reaching settlements*: By failing to participate in a hearing, the municipality foregoes the right to be a party to any settlement that may be reached within the hearing process. While I understand that many MPAC offices make efforts to consult with an affected municipality in advance of finalizing a settlement, they are not legally obliged to do so. This is perhaps one

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7 *Assessment Act*, s. 40(2.2)

8 *Assessment Act*, s. 40(5)

of the most important reasons for municipalities to participate in assessment litigation.

- *The limited availability of a right to appeal*: Appeals from decisions of the Board must now be made to the Divisional Court, with leave, and are permitted on questions of law only.[9] A relatively high degree of deference is shown to the decisions of the Board, which increases the importance of the initial hearing. In any event, failure to participate in the ARB hearing will mean a forfeiture of the municipal right of appeal.

Authority for Municipalities to File Complaints

Once a municipality has made the decision to request or participate in a hearing, there are some important initial considerations that should be addressed. One of the most fundamental is to ensure that the municipality's council, which sits as the board of directors of the municipal corporation, has authorized the necessary action. For example, in cases where it is too late for MPAC to adjust the assessment roll but the time period for appeals has not yet expired, it is possible for a municipality, as a "person" under the *Assessment Act*, to commence an appeal of an assessment on the basis that it is too low. This commences the hearing process and permits MPAC to step in and take carriage of the matter if it wishes. In such cases, it is strongly recommended that a municipal treasurer be authorized, in advance wherever possible, to file complaints with respect to specific properties. However, given the rigid time frames provided for making complaints under the *Assessment Act*, it is sometimes not possible such advance authorization to be obtained. Fortunately, the Divisional Court in *East York (Borough) v. Ontario (Assessment Review Board)*[10] has taken a realistic and pragmatic approach to the issue of authorization and determined that retroactive ratification of such complaints by a municipal council is sufficient authority to support the filing of the complaints by an appropriate municipal official. This decision has been referred to and relied on in a number of subsequent Board decisions.

What if, for some reason, council ratification of the actions of a municipal staff member has not been obtained? Does a municipal treasurer or tax official have an independent authority to file complaints on the municipality's behalf? A municipality is required to appoint a treasurer who is responsible for handling all of its financial affairs on behalf of and in the manner directed by the council of the municipality.[11] The municipality may also delegate to any person all or any of the powers and duties of the treasurer with respect to the collection of taxes, but the treasurer may continue to exercise the delegated powers and duties, notwithstanding the delegation.[12] Such persons will usually have detailed, council-approved job descriptions, which could include such duties as the pursuit of assessment complaints. Would such a job description constitute sufficient authority for a treasurer to file an assessment complaint on a municipality's behalf? A decision

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9 *Assessment Act*, s. 43.1

10 [1995] O.J. No. 321

11 *Municipal Act*, 2001, S.O. 2001, c. 25, as amended, s. 286

12 *Municipal Act*, 2001, ss. 286(5) and 286(6)

released earlier this year by the ARB (which is appended to this paper) dealt with this issue in some detail.[13]

In late March, 2001, the City of Oshawa's Manager of Taxation and Revenue Services filed a complaint that the assessment on a particular property was incorrect. No motion had been passed by the City's Council authorizing this action in advance and none was passed ratifying the action after it had been taken. The Manager detected what he believed was a clerical error in applying an incorrect value per square foot to an incorrect total square footage area. While the Board was of the opinion that the per square foot value might be in dispute and therefore could not be characterized as a clerical error, the correct area to which that figure should be applied was objectively determinable and clerical in nature. In response to the taxpayer's arguments that the Manager had not been delegated the authority necessary to file the complaint, the Board commented as follows:

> ....the Board is satisfied that the specific circumstances in which an action is taken by a municipal officer will dictate the degree of specificity necessary to ensure the validity of the applicable sub-delegation by-law. .... The Board concludes that a hierarchy of specificity applies to the filing of assessment complaints, depending on the nature of the issues. These would range from the remedy of purely clerical matters (the "low-end", so to speak) to ("high end") extraordinary and/or untested issues. Obviously, a "gray" middle area exists. .... The nature of each particular circumstance will determine if a specific by-law or resolution is required.

The Board went on to conclude that the Manager's actions in the specific instance before it fell at the low end of the range, and that the general appointment by-law was sufficient to delegate to him the low level of authority necessary to appeal a clerical error. The taxpayer's motion was therefore denied, with the result that the entire assessment (including the correct per square foot value) was before the Board for consideration.

It is questionable whether the Board's decision in the Oshawa case would have been the same if that if the appeal had been based solely on the assertion that the assessed value per square foot was incorrect. Yet, by hitching its appeal to the clerical error wagon, the City was able to get both issues before the Board. Leave has been sought to appeal this decision to the Divisional Court and that application has yet to be heard. Regardless of its outcome, reliance on a general appointment by-law should be a position of last resort and whenever advance authority (or, at a minimum, retroactive authority) can be obtained ,it should be.

Miscellaneous Municipal Issues to Consider

Set out below are a number of issues, in no particular order, that may affect the manner in which municipalities approach assessment matters.

Time for Responding to Section 40 Complaints: A practice had developed in certain parts of the Province whereby a complainant would file a statement of issues, MPAC would file its

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[13] *671516 Ontario Inc. v. Municipal Property Assessment Corp., Region No. 13*, [2003] OARBD No. 110

response, and a municipality would then determine (based upon the pleadings as they stood) whether or not it had an interest in participating in the assessment hearing. This procedure was advantageous to municipalities because they had the benefit of knowing MPAC's position on a matter prior to having to take their own position. A motion decided by the Board in August of 2001[14] has seemingly brought an end to this practice, which had been followed on consent and not pursuant to any Board rule.

On the motion, MPAC sought (and obtained) the issuance of a procedural order requiring all responses to the issues raised on a large number of appeals within different local municipalities within York Region to be filed on or before the same date. In its decision (which is appended to this paper), the Board noted that the rights of a municipality in an assessment hearing are not less than nor more than the rights of the other statutory parties, and ordered that the procedural order be issued as requested. The result of this decision is that municipalities, which do not necessarily have the information required to make an informed decision on whether or not an assessed value is correct, will need to be proactive in seeking to obtain that information from MPAC so that they will be in a position to make that determination.

Lands Used for Farm Purposes: A major issue for developing municipalities is the reduced tax revenues that are received from farmland. Land that is being actively used for farm purposes is subject to a much lower assessed value and also to a reduced tax rate, which results in a negligible property tax payment. For the municipalities immediately outside of Toronto where farmland is rapidly being developed, it is important to ensure that only those properties which are entitled to the reduced rate are benefiting from it.

The theory that is behind the farmland exemption is admirable - that lands that are being used in a *bona fide* manner for agricultural purposes should be encouraged to remain in such use and should not be forced by the economic pressures of their rising value to be developed sooner than would otherwise be desirable. The practise that is the result of the theory is arguably less ideal. As a lawyer that does not specialize full time in assessment law, I have always followed with amusement the series of cases that have determined what is and isn't a *bona fide* farming operation. It has struck me that so long as you are producing an annual bushel of winter wheat or even have a farmer driving his tractor over a field to create rut marks on an annual basis, you are likely going to be entitled to benefit from the farmland assessment provisions, and shrewd land developers (and equally shrewd farmers) have been able to use this provision to their economic advantage.

There was in Markham last year an assessment appeal where even this low level threshold was not met. The parties to the appeal were in agreement that no farming had in fact occurred during the years under appeal on the subject property, which had received industrial/commercial zoning approval and was part of an approved subdivision. For the tax years in question (and for a variety of reasons that were canvassed over a two-day hearing) the lands had remained dormant and were not farmed. However, it was the taxpayer's assertion that she had intended to farm the lands but was frustrated by circumstances beyond her control. This

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[14] Various assessed persons v. MPAC and the Municipalities within York Region (attached as appendix)

decision on this case is still reserved and it will therefore not be commented on in detail. However, municipal assessment officials will need to monitor its outcome, since it may mean that it will become necessary to determine not only whether or not farming is occurring on vacant land, but whether or not the property owner has a subjective intent to farm but has not carried out that intention.

Municipal Act Applications where MPAC is not a party: There are a number of tax-related provisions in the *Municipal Act*, 2001 in which the municipality must be named as the respondent and to which MPAC is not a party. Other speakers have dealt with these types of applications and they will not be discussed here in detail other than to note that, unlike the Assessment Review Board, the Superior Court of Justice for Ontario does not find it acceptable for municipalities to fail to attend on matters in which they are parties. In responding to these types of applications, a municipality must retain a lawyer and put in an appearance.

Golf course assessments: I understand that MPAC is in the midst of a reassessment process for golf course properties which was triggered, to some extent, by recent sale prices which were well in excess of the assessed values for golf courses that changed ownership. Given the continuing popularity of this sport and the relatively larger percentage of land area devoted to golf courses in many outlying municipalities within the Greater Toronto Area, this is an initiative worth monitoring for municipal tax officials.

Summary

The days are gone when responsible municipalities can just sit back and expect the Provincial assessment authority to take care of the assessment issues that will affect their tax revenues. At a bare minimum, there is an onus on a municipality to do whatever it reasonably can to ensure that MPAC is in a position to carry out its responsibilities in a manner that will benefit the municipality's interests. This may in some cases mean actual municipal attendance at assessment hearings.

The move to current value assessment and the new complexity of the property assessment field has increased the role that municipalities should assume in the determination of assessment litigation. With municipal budgets continuing to be squeezed, municipalities cannot afford an erosion of their assessment bases and a sharp-eyed tax official can very quickly recover the cost attributable to his or her employment. Although it may not seem so to an individual taxpayer, ensuring that all properties within a municipality are correctly and equitably assessed is ultimately in the best interests of all municipal taxpayers.