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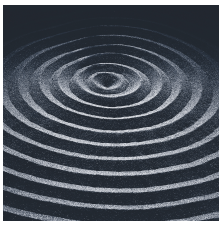

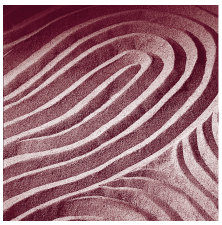

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What is the Municipal Role? Responsibilities and Resources for Dealing with Contaminated Sites

Steven J. O'Melia

May 1996

WHAT IS THE MUNICIPAL ROLE? RESPONSIBILITIES AND RESOURCES FOR DEALING WITH CONTAMINATED SITES

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Introduction

Municipalities have viewed with some trepidation the impending adoption of the Ministry of Environment and Energy's Proposed Guidelines for the Clean-Up of Contaminated Sites in Ontario (the "Guidelines") since they were first released in July of 1994. The Guidelines contemplate an expanded municipal role in dealing with the clean-up of contaminated properties, and there has been a general concern about the ability of Ontario's cities, towns, villages and townships to assume these added responsibilities. Municipalities will no longer be able to simply rely on the MOEE to address all environmental matters, but will instead be expected to identify when remedial action must be taken, to concur in a privately-selected course of action, and to play an active role in ensuring that such actions are carried out to a satisfactory conclusion.

The purpose of this paper is to identify the ways in which the municipal role will be expanded once the Guidelines are implemented, to comment upon the response which can be expected from municipalities to this increased role, and to suggest ways in which the Guidelines will need to be approached if they are to become an accepted part of the regulatory landscape. Understanding the impact of the Guidelines from a municipal perspective is important not only for those who actually work for or advise municipalities, but also for anyone who has to deal with a municipality in order to obtain development approvals or other municipal permissions.

The Municipal Perspective

To evaluate the effect which the Guidelines will have on municipalities, it is important to understand the role which municipalities play in the Canadian system of government.

From an organizational perspective, a municipality has more similarities to a private corporation than it does to the senior levels of government. A municipal council acts like a corporation's board of directors, with the mayor or reeve assuming the role of chairman/chief executive officer

and the ward councillors comprising the individual members of the board.[1] It has no formal party structure, no official opposition, no question period and no speaker of the house -- in short, no parliamentary procedure in the traditional sense. Instead, each matter to be decided by a municipal council is debated and put to a vote in a manner which is very similar to the treatment of resolutions which are before the board of directors of a private corporation, with the intent that each matter will be approved or rejected on its merits. Similarly, municipal staff assume roles which are analogous to their counterparts in the private sector. Most of the larger municipalities have a Chief Administrative Officer and Corporate Counsel, and all municipalities are required to have a Clerk (which is a position similar to a corporate Secretary) and a Treasurer.[2] On a fundamental level, a municipality is simply a statutorily-created corporate entity which is in the business of providing snow removal, garbage collection, fire response, policing, sewage treatment, public transportation, land use planning, and a host of other services which have traditionally been provided by local government.

Notwithstanding the above comparison, there are a few differences between a private corporation and a municipality which make the municipal corporation a more complicated entity. For instance, instead of holding relatively civilized quarterly or bi-monthly meetings in a corporate boardroom, municipal councils meet on a frequent basis, in a politically-charged atmosphere, and under a statutorily-mandated requirement of public openness and participation. Rather than representing the interests of a limited group of shareholders, the municipal council is answerable to all of the residents of a municipality. As an added twist, each individual council member within a ward system is elected by (and therefore accountable to) a separate and mutually-exclusive set of constituents, each of which have their own set of sub-regional priorities. Perhaps most significantly, municipalities labour under the restrictions imposed by the largest single enactment contained in the provincial statutes as well as a host of subsidiary legislation,

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[1] Section 69 of the *Municipal Act*, R.S.O. 1990, c. M.45, as amended, provides that the mayor of a city or town and the reeve of a village or township is the head of the council and the chief executive officer of the corporation.

[2] Sections 73 and 77 of the *Municipal Act*.

all of which set out in excruciating detail the manner in which municipalities may or must do business.

Another significant departure from the municipality/corporation comparison is the way in which revenues are raised. Although municipalities are increasingly looking for alternative sources of revenue, the bulk of most municipalities' budgets are financed by direct taxes on real property and business operations within their boundaries, together with transfer payments from the province. Unlike the senior levels of government, municipalities are not permitted to rely upon deficit financing except in limited circumstances (such as certain long term capital projects, for which debentures may be issued) and they must therefore always be highly conscious of the financial bottom line. If an unusual or unexpected expense arises for a municipality, a way must be found to pay for that expense within the existing budget, which entails either increasing revenues or decreasing other expenses. In today's political climate, it is the latter option which is more palatable, and this can lead to strange results such as the closure of a municipal swimming pool in the summer because snow clearing costs in the preceding winter were higher than expected. The smaller the municipality (and the smaller its revenue base), the greater the impact of these indirect budgeting effects.

One final difference between a municipality and a private corporation (and indeed, between a municipality and the senior levels of government) which is worth pointing out is the role of public participation and the degree to which municipalities are affected by extraneous concerns which arise at a local level. Municipal councils are close to their constituents, easily accessible, and rely on those constituents for both their operating revenues and their continuing mandate. Regardless of the level of government which bears responsibility for a particular matter, municipalities will often receive the initial inquiry from a taxpayer which is seeking assistance and, whether it wishes to or not, a municipal council will often be compelled to deal with issues which are not strictly within its jurisdiction. For instance, a municipal resident is most likely to contact his local ward councillor to complain about an abandoned, contaminated property which has become an eyesore, and is unlikely to be satisfied with the answer that he should instead contact his M.P.P. This tendency to pay attention to all concerns which have impacts at a local level, regardless of jurisdiction, may also be the result of a practical compulsion created by the insecure state of municipal finances. In the case of contaminated properties, it is of little comfort to a municipality to rely on the fact that environmental issues fall within provincial jurisdiction if

the application of provincial policy is creating incentives which drive businesses from a municipality's boundaries. Municipalities are "closer to the ground" than any other level of government, and for this reason are forced to be more responsive to local needs.

On a political level, it is important to realize that most municipal councillors are elected with a very small plurality. As noted above, there is no formal party support system in place, and each councillor is in effect an independent political contractor. Voter turnout in municipal elections is lower than that for provincial or federal elections, and even in major municipalities it is possible to win many ward elections with fewer than 3,000 votes.[3] This narrow margin of security, combined with the fact that municipal elections are held every three years, may also help to explain why local politicians endeavour to be more responsive to their constituents' desires than politicians in the senior levels of government.

Understanding the manner in which municipalities conduct business and the constraints which are imposed upon them both by statute and by circumstance is important in attempting to anticipate how they can be expected to deal with the new responsibilities which are set out in the Guidelines. As a general rule, municipalities want to get the lands within their boundaries into productive use, particularly those lands which are designated for employment generating uses. Municipalities have a limited inventory of assessable property and businesses, and in order to meet their budgets and please their constituents they must get the most out of that inventory. Accordingly, municipalities are concerned about getting certainty and workability into the remediation process. If the Guidelines can accomplish these goals at a reasonable overall cost, they will be accepted by municipalities.

The Expanded Municipal Role under the Guidelines

Historically, municipalities have tended to rely upon the MOEE to take care of all matters relating to environmental issues, including soil and ground water contamination. While this provided comfort to municipalities which they will be reluctant to give up, it is clear that the

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[3] For one of numerous examples, refer to *O'Donohue v. Silva* (1995), 27 O.R. (3rd) 162, (Ontario Court of Appeal).

Guidelines contemplate a dramatic transfer of responsibility away from the Ministry. Many municipalities consider the Guidelines to be a blatant down-loading of responsibility by the province. Matters which have traditionally been within the MOEE's jurisdiction will now be left to be dealt with in the private sector, with municipalities being thrust into the role of arbiter. Unfortunately for municipalities, there will be no concurrent down-loading of revenues to address these added responsibilities.

Municipalities do have limited experience in dealing with environmental issues, particularly in their role as land use regulators. In most cases, a local municipality will have greater knowledge of the site specific environmental characteristics of properties within its boundaries than will the MOEE. This information will include such matters as the history of uses on a site, the history of uses on adjacent sites, and previous and anticipated land use patterns within the municipality as a whole. Accordingly, although it has not been specifically mandated,[4] any municipality which approved a change in land use without taking environmental considerations into account was simply not doing its job correctly. However, once a major environmental issue was identified, most municipalities immediately shipped this problem off to the MOEE and asked developers to come back for their planning approvals once they had satisfied all requirements of the Ministry.

Setting aside the debate about which level of government is better equipped to deal with environmental issues, it is clear that the MOEE is getting out of the business of granting such approvals, and therefore the municipal role must change. Municipalities will no longer be able to rely on the expertise of the MOEE to ensure that all environmental issues are addressed, which will leave them without the provincial safety net upon which they formerly relied.

The Guidelines contemplate an increased municipal role in a number of ways. Firstly, they establish an objective standard against which soil and ground water conditions at a site may be compared, and all municipal approvals or permissions which affect a property will have to have

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[4] For 4 On a general level, section 2 of the *Planning Act,* R.S.O. 1990, c. P. 13, as amended, provides in part that the council of a municipality, in carrying out its responsibilities under that *Act,* shall have regard to, among other matters, matters of provincial interest such as the orderly development of safe and healthy communities; the protection of public health and safety; and the appropriate location of growth and development.

regard to the environmental "target" which has been established by the Province. For most municipalities, this will involve making enquiries and imposing conditions which extend beyond those which have customarily been made or imposed.

A second way in which the municipal role will be increased is in cases where the objective "target" cannot be met, and where a land owner is instead proposing to proceed by way of a site specific risk assessment ("SSRA"). This approach will likely be pursued in many instances, since the more stringent background or generic clean-up approaches will in most cases be either too costly or otherwise impossible to carry out. In order for a developer to proceed with an SSRA, the local municipality must "concur" in this approach, which can be expected to add to the due diligence which the municipality must conduct prior to reaching its decisions on such matters. Some municipalities may simply refuse to give such concurrence, in which case only the background or generic clean-up approaches will be permissible.[5]

Thirdly, all remediation efforts are to proceed through an established set of procedures, the first of which is the completion of a Phase 1 Environmental Site Assessment. This will require the collection of environmental information from all available sources, including municipal records and officials. While municipalities are accustomed to receiving requests for such information, these enquiries are sure to become broader and more numerous, and there will be a greater onus on municipalities to answer these enquiries in a complete and timely manner.

A fourth way in which the Guidelines contemplate an increased municipal role is the requirement for public communication and input. The Guidelines are based in a large part upon the intended

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[5] At the August 11, 1994 public information session held in Hamilton, Ontario by the Advisory Committee on Environmental Standards ("ACES", the independent advisory body set up by the MOEE to solicit input on the Guidelines), Ron Pearson of the MOEE is reported in the transcription as stating that, "Municipalities play a role right now in this whole process. In fact, municipalities tend to be the agencies that refer many of the reports and requests for comment to us. *Under the new Guideline, municipalities will have to decide whether or not risk assessment and risk* management are going to be part of the game in their jurisdiction. Municipalities now negotiate land use agreements with proponents and this just becomes one more thing that's on the table when those negotiations are taking place." (Emphasis added).

use of private property. By controlling the use to which such property may be put and by being charged with eliciting public input in the exercise of such powers, municipalities will play a direct role in hosting public debate and determining to what extent a property must be remediated prior to being put into use.

What Triggers Municiual Involvement?

Municipal involvement can be triggered in a variety of ways, but will most frequently occur where a property owner applies for a change in the use of his land. This application can be as comprehensive as official plan and zoning by-law amendments to permit an entirely new use of a property, or as limited as an application for a building permit or site plan approval to permit the utilization of an existing use permission. Many municipal official plans already contain provisions which contemplate the need to deal with environmental issues as part of this planning approvals process.[6]

Applications for a change in land use require a lengthy set of approvals which are set out in the *Planning Act* and related legislation, and the preferred point in this process at which environmental issues should be fully resolved can be the subject of debate. One approach is to require that all environmental concerns be fully remedied before *any* approvals are granted (or even considered), which is the position which the MOEE has taken with respect to several recent development applications within the City of Scarborough. This is certainly the most cautious approach, but it is not necessarily the best one. Where environmental issues are within the realm

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[6] The City of Scarborough Official Plan provides that all development proposals within the "area of influence" of a waste disposal site shall be reviewed prior to the approval of Official Plan amendments, zoning changes, site plan approvals, severances or subdivisions of land in order to ensure that development can safely take place without creating undue risk for existing and proposed development. As part of this review, there is a requirement that certain environmental studies be carried out by the proponent to the satisfaction of the City, in consultation with the MOEE. By way of contrast, the Official Plan for the Town of Oakville imposes the more restrictive requirement that major development on lands on or abutting a waste disposal area shall only be considered once written approval has been received from the MOEE indicating that the development satisfies the provisions of the *Environmental Protection Act.* Both of these provisions, and in particular the one in the Oakville Official Plan, will need to be revisited in light of the reduced provincial role.

of those commonly encountered in land development, there is no reason why the ultimate resolution of those concerns cannot be "red-flagged" at an early point for ultimate resolution at a later stage in the process. This allows a proponent to proceed with the certainty that, upon the successful resolution of all environmental issues, development will be permitted to occur. Otherwise, a land owner could spend thousands of dollars to resolve such issues only to find that a proposed development was deemed to be inappropriate for other reasons which were completely unrelated to the environmental concerns.[7]

Under the Guidelines, environmental issues should be identified as early as possible in the planning approvals process. However, the Guidelines do not mandate when these concerns must be addressed, and municipalities should take a results-oriented approach to this secondary question. In many cases, environmental matters are capable of being dealt with by way of a financially-secured subdivision or development agreement,[8] with municipal building permits providing an additional lever to ensure that remediation measures are carried out. In other, less straightforward cases, a holding by-law designation may be necessary in order to provide the municipality with the comfort which it needs to approve a proposed change in land use. In either case, it seems reasonable to conduct the comprehensive review which is required in order to

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[7] For example, there is little point in requiring a property to be cleaned up to meet the residential standard if residential uses are later deemed inappropriate for the site because of other planning concerns, such as a lack of schools or inadequacy of services.

[8] An example of this approach is the way in which the MOEE currently deals with environmental concerns relating to noise levels. These concerns are commonly caused by the proximity of a major traffic artery, such as a provincial highway. The MOEE has established objective noise levels which must be met in order for development to occur. However, in recognition of the fact that many of the measures required in order to meet these levels (such as noise barriers, additional landscaping, upgraded windows, central air conditioning, etc.) can only be accomplished as part of the development process, they are usually established as conditions of subdivision approval and subsequently incorporated as terms of the development agreement. Thus, a developer obtains the certainty that development may occur provided that the provincially-established objectives are met, and the municipality is able to secure the provision of the required measures while allowing their actual implementation to be deferred to an appropriate time.

amend a municipal official plan before requiring that a proponent spend large sums of money to address environmental concerns as part of that process.

The second major instance in which municipal involvement will be triggered will be in any situation in which a proponent is proposing to proceed by way of an SSRA clean-up. In these cases, the Guidelines require municipal concurrence regardless of whether or not there is a proposed change in the use of the subject property.

What are the Municipal Resources to Deal with the New Role?

The short answer to the above question to the above answer is that there are none. Implementing the Guidelines will require a plethora of experts including, but not limited to, engineers, geologists, hydrogeologists, biologists, toxicologists, archaeologists and soil and ground water consultants of various descriptions. Not even large municipalities have all, or any, of these experts on staff, and smaller ones cannot even contemplate retaining them for brief periods of time within existing budgets. While it is not constructive to engage in an intergovernmental finger-pointing exercise, it is beyond dispute that the municipalities which will now be "empowered to deal with environmental remediation issues under the Guidelines simply do not have the financial resources to get the job done.

One of the ways in which to resolve this dilemma could be for each municipality, or each group of municipalities within a region, to hire the necessary expertise in order to properly carry out this new role. This alternative is probably not workable for a variety of reasons, chief among which are the ever-increasing constraints on municipal budgets. The more likely solution will be that, in addition to the costs of complying with the Guidelines (and the cost of peer-reviewing the purported compliance with the Guidelines), the costs of providing the expertise to permit municipalities to concur in an SSRA approach will be borne by the proponents of development projects. In large scale projects, this will likely not be a problem and should in fact result in a speedier resolution of such matters. However, many smaller proposals will not be profitable enough to bear the cost of the SSRA requirements, and may be rendered unviable unless a generic clean-up approach can be undertaken.

Potential Sources of Municipal Liability under the Guidelines

(I) Environmental Enquiries

With greater responsibility comes greater liability, and municipalities will have to take precautions to avoid becoming defendants in future litigation while they are carrying out their duties under the Guidelines. One specific area which will have to become the subject of greater focus will be the answers which municipalities give to persons enquiring about the environmental history of a property. These types of enquiries have become increasingly common,[9] but will presumably now be considered mandatory by lawyers and consultants acting for purchasers who intend to remediate contamination on a property once they have acquired it, since municipalities have been included in the Guidelines among the agencies which should be consulted as part of a Phase 1 Environmental Site Assessment. Particularly if a change in the use of a property is planned, a proponent will want to consult with the local municipality at the earliest possible opportunity. Accordingly, the municipal response to environmental enquiry letters will take on a greater significance under the Guidelines.

As stated above, municipalities now receive letters every day from solicitors who are making enquiries with respect to municipal knowledge of the environmental status of lands which their clients are intending to purchase. The length and scope of these letters have tended to increase over time, to the point where municipal officials are often faced with multi-page enquiries relating to environmental issues, many of which may not be within the direct or indirect knowledge of the municipal corporation. Typical questions which are contained in these types of letters include:

- have the lands ever been used for the disposal of waste?
- is the municipality aware of any spills which have occurred on the property?

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[9] Since MOEE records on waste disposal sites date back only to 1971, local municipalities have always received requests for any information in their possession which relates to the location of waste disposal sites prior to that date, particularly where large tracts of land are being purchased for redevelopment purposes.

- have there been any offences or convictions relating to the property under the *Environmental Protection Act* or the *Ontario Water Resources Act*?

- have any certificates of approval been issued for the property pursuant to Section 8 of the *Environmental Protection Act*?

- have there been any violations of the municipal sewer use by-law? The property standards by-law?

- are there any records of hazardous waste or substances being stored or disposed of on the property?

- are there any outstanding requests or notices fiom the Industrial Abatement Section of the MOEE concerning the property?

Many of the enquiries set out above relate to matters which are not within municipal jurisdiction, but they are included as part of the "grab-bag" approach which many solicitors take to environmental investigations. Such letters typically conclude with an omnibus enquiry, such as whether or not the municipality is aware of any environmental hazards or other matters which could affect the current or future use of the property.

A prudent municipal official, faced with such a far-reaching and expansive enquiry, will quite properly proceed with a great degree of caution. Given the expanding area of case law which deals with municipal liability for statements which are relied upon to the detriment of a property purchaser, municipal officials are often reluctant to provide the type of information which many purchasers feel is necessary to make an informed decision in this respect. Somewhat conversely, as the enquiry letters have become more expansive, the answers to these letters have become correspondingly more limited. The end result is less than satisfactory -- a purchaser perceives that it is attempting to pry information from a reluctant municipal official; the municipal official perceives that a purchaser is attempting to address its environmental concerns by seeking an effective indemnity from the municipality for all environmental concerns which may arise in the future.

Since it is not likely that the Courts will discontinue holding municipalities responsible for information which they disseminate, it is likely that this struggle between enquirers and

municipal officials will continue. Given the increasing use of such information and the potential liability which is involved, municipal officials would be unwise to depart from their increasing tendency towards caution in this area, and should only respond to matters which are within the direct corporate memory of the municipality. In light of this situation, a prudent purchaser should not rely on the municipality alone to provide it with environmental assurances, but should conduct a full program of environmental due diligence, including the making of enquiries of all relevant agencies and the actual physical testing of a site.

(ii) Issuance of Building Permits

Liability concerns are nothing new for municipal chief building officials. The chief building official is a statutorily-created position, and it is a requirement of the *Ontario Building Code Act* that each municipality appoint one in order to fulfill its obligation to enforce that *Act* within its boundaries.[10] Under the *Act*, a chief building official is legally obligated to issue a building permit upon an application therefor, unless the proposed construction will not comply with the *Act*, the *Ontario Building Code* made thereunder, or will contravene "any other applicable law".[11] There is a large body of case law which deals with the legal issue of what comprises other applicable law, and the complete answer to this question continues to evolve. Beleaguered building officials are left to use their best guess as to how they are to fulfill their role, caught between a statutory duty to act and a common law duty of care to those who could be impacted by their decisions. However, it seems clear that certain environmental concerns, and particularly those matters which are directly provided for within the *Environmental Protection Act*, form part of the body of "other applicable law".[12]

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[10] R.S.O. 1990, c. B. 13, as amended, section 3.

[11] Ibid., section 6.

[12] For example, section 46 of the *Environmental Protection Act*, R. S.O. 1990, c. E. 19, as amended, provides that no use shall be made of land or land covered by water which has been used for the disposal of waste within a period of twenty-five years from the year in which such land ceased to be so used unless the approval of the Minister of the MOEE for the proposed use has been given. Given the wide definition of "waste disposal site" which is set out in section 25 of the *Act*, this provision can have extremely far-reaching effects.

The adoption of the Guidelines will not introduce liability for chief building officials where none formerly existed, but it will add to the complexity of the regime in which these officials currently operate. As mere "guidelines", it should be arguable that the Guidelines in and of themselves will not constitute other applicable law, but chief building officials will still have to be aware of their content, and their decisions will likely be judged retrospectively in light of the standards set out therein. In its, "*Report on Environmental Issues*" prepared by a working committee of the Large Municipalities' Chief Building Officials Group ("LMCBO", whose membership consists of the 42 chief building officials in Ontario appointed by municipalities with a population of 50,000 or more people) and endorsed by the LMCBO on May 9, 1996, the Guidelines were viewed as follows:

> It is anticipated that these revised Guidelines will assist developers and municipalities in identifying more cost-effective and practical solutions to address the remediation of contaminated property. . . . Building officials are not experts with regard to environmental issues. They only request that the standards are reasonable, easily understood and that regulatory responsibility is clearly established. The Guidelines should stress the recycling or reuse of buildings and property. . . . It often appears that it is an objective of government agencies, when dealing with soil contamination, to design measures which avoid having to take on responsibility and liability. Instead, the emphasis should be on developing appropriate clean-up standards, encouraging innovation in remediation approaches and assisting the task of identifying appropriate risk management solutions[13].

Copies of this report have been sent to the Ministers of the MOEE, the Ministry of Natural Resources, the Ministry of Municipal Affairs and Housing, and the Premier of Ontario. The position set out therein would seem to indicate that the chief building officials of this province are prepared to assume the responsibilities placed on them under the Guidelines, particularly if the stated goals of the Guidelines can be met. It will be up to developers and their consultants to

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[13] LMCBO Report on Environmental Issues, endorsed May 9, 1996, pages 6 -7.

provide these officials with the background reports and other tools which will be necessary in order to realize upon this willingness to act.

(iii) Concurring in Site Specific Risk Assessments

Municipalities have quite properly expressed concern about the legal liability which may arise from concurring in an SSRA, since they will not have the in-house expertise to make an informed decision in this area, particularly if "concurrence" is taken to mean "approval" or "endorsement" of the final product of the SSRA. It would appear that some of this concern has been addressed in the most recent amendments to the Guidelines (which were recently released to a limited group of individuals, but have not yet been made available to the general public). The revised Guidelines still state that a local municipality must concur with the use of an SSRA approach for a property, but the words "prior to the risk assessment being undertaken" have been added to the end of this requirement. Concurrence has also been loosely defined to include a council resolution, an approval in principle, or any other mechanism deemed appropriate by the municipality. These are constructive changes to the Guidelines which should be viewed positively by municipalities. Not only do they make it clear that it is only the SSRA process which is being concurred in by the municipality (as opposed to the end product), but they also permit municipalities to determine in what form their concurrence will be manifested.

Even with these helpful clarifications, there may still be some concern about the role of a municipality in allowing development to occur in situations where an SSRA approach is required. By concurring in such an approach, however mildly, a municipality can be said to become a party to a course of action which could potentially result in damages to a third party. That is, "but for" municipal concurrence, development of a property requiring an SSRA-type remediation could not have occurred, and this may result in the municipality being assigned an apportionment of liability for any resultant damages. Given municipal experience with joint and several liability, merely limiting the amount of this apportionment is unlikely to be of much comfort. The end result of these fears, at least in some municipalities, is likely to be a refusal to concur in an SSRA approach in all circumstances, effectively eliminating this alternative. Barring legislative change to protect municipalities from all liability for the act of concurring in an SSRA, this reluctance to concur could become widespread, and one of the more useful components of the Guidelines will not be able to be utilized.

The Perils of Public Participation

The Guidelines envision a substantial role for the participation of the public in the remediation process established thereunder. The latest version of the Guidelines states as follows:

> Whenever possible, communication with the public on issues related to restoration of contaminated sites should be included as part of the broader public communication program, as required by the land-use planning or approval process. As a result, communication with the public is more likely to be effective and efficient. Proponents are advised to consult with the local land-use planning approval authority to determine the requirements for public communication. . . . A community-based public communication program must be developed and implemented to provide the public an opportunity to participate in the risk assessment process, and in the development of the remedial plan.[14]

With due respect to the Ministry, it is clear that this portion of the Guidelines was drafted by a level of government which does not have much experience with direct and immediate public input into its decision-making processes. A certain amount of public communication as advocated by the Guidelines serves the public interest, but to require that each decontamination proposal be publicly debated as part of the land use planning process seems extremely ill-advised, even if well-intentioned.

Municipalities are already very familiar with the role that public participation plays in the planning approvals process. The *Planning Act* sets out a number of instances in which notice must be given of a public hearing, at which anyone who has an interest in a development proposal may make representations to the municipal council in order to assist the Council in coming to its decision. There are many positive aspects to public participation, but as anyone who is involved in the development industry will attest, there are also potential pitfalls.

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[14] Revised Guidelines, sections 3.0 and 7.2, pages 6 and 41.

In the context of an undeveloped site, there are a number of difficulties in conducting a "typical" public consultation process for decontamination issues. Firstly, the people who will be most affected by any decisions which are made will be, by definition, not capable of participating in the process. These people will be the future residents of the site once it is developed, but will in almost all cases not be identifiable when the environmental issues are being addressed. Accordingly, the members of the public who will be most likely to participate in the consultation process will be the residents of properties in the vicinity of the development site. Generally speaking, although some of these local residents may have strong altruistic tendencies which cause them to expend great amounts of money and energy out of genuine concern for the unknown future residents, the impetus for participating in the public process will be primarily derived from their perception of how the development will impact upon their personal interests. A perceived negative impact is more likely to result in an active participatory role than is a perceived positive impact.[15]

Including technical issues relating to the land remediation process within the standard public participation process creates a number of practical difficulties. Firstly, such issues are site-specific and should have, at most, only incidental effects on neighbouring properties. Secondly, most members of the public do not possess the necessary technical expertise which would allow them to understand what is involved in the clean-up process. Remediation matters are based upon complex scientific and engineering concepts, and the public should not be expected to contribute to this aspect of the planning approvals process in any meaningful way. Furthermore, the fear which can be created by this lack of understanding is a powerful tool in the hands of an opponent to a development proposal, which can be further strengthened by the element of public suspicion which often greets reports which are commissioned by the proponent of a development. The result can be the formation of a determined opposition to a development proposal which is based not upon well-informed community concerns, but upon a lack of comprehension of the scientific issues involved in decontaminating a site. If such opposition is

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[15] These comments are not intended to be cynical, they merely reflect the writer's observed pattern of public participation in the planning process.

successful, the unfortunate outcome may be that no remediation is carried out, and the property remains in its undesirable contaminated state.

Municipal councils resent being placed in a position where they are forced to make planning decisions which involve issues which extend beyond their expertise and that of their advisors, particularly where there is a vocal opposition to a proposed development. A developer which expects to obtain a favourable outcome should do whatever is necessary to avoid putting a municipal council in such an awkward situation, which will involve conducting an extensive public consultation process in advance of the formal one which is mandated by the *Planning Act.* While many developers may perceive this recommended course of action as overly expensive and cumbersome, it is a small price to pay in order to avoid an outright refusal of a development application which could have succeeded had the opposition been addressed at an earlier stage. In fact, if public concern about environmental issues has not already been allayed before the point at which the Guidelines suggest that such input be obtained, a development proposal will probably be refused by a municipal council.

Making the Guidelines Work

Municipalities may well be able to adjust to their new role under the Guidelines. However, the other parties to the land remediation equation must be aware that municipalities will not be "stepping into the shoes" of the MOEE in order to carry out the functions which were once the responsibility of that Ministry. Municipalities will instead be just one part of the new regime, and the full involvement of all of the other interested entities will be required in order to make the Guidelines work. Just some of these roles will have to be as follows:

1. The Developers

There is little doubt that the Guidelines will create additional up-front costs for land developers. These developers will have to recognize that these costs are the price of doing business under the new regime, and that they are an investment in the prevention of future liability. Another positive factor is that controlling the remediation process will allow developers to expedite the development approvals process and eliminate the provincially-induced delays which have been the subject of much complaint under the current system. As well, provided that developers do their homework, they will be able to take advantage of opportunities which are created under the

Guidelines, such as stratified clean-ups and custom-tailored SSRA solutions to unique clean-up issues.

2. The Banks

The large banks and other institutional mortgagees are going to have to take a more reasonable approach to environmental clean-up issues. The safest, most secure route for mortgagees to take is to require that all properties against which secured loans are granted be cleaned up to a pristine condition. Many industrial businesses attempting to renew their existing mortgages have been met with demands which are not far off this standard of perfection. However, the Guidelines recognize that this is not necessary in many instances, and it will rarely be the most cost-effective approach. While one would hope that market forces would reward those institutions which were prepared to apply a reasonable cost/benefit analysis to assessing loans on real property with a history (or possibility) of limited contamination, the unthinking flight of capital from the real property market in general during this decade would tend to dim that hope. Banks must realize that governments, at any level, should not be expected to (and cannot) indemnify them from risks which arise in the marketplace, but that those risks can be managed if a reasoned approach is taken.

3. The Experts

Consultants will have to be prepared to take responsibility for the results of their studies. This means not only being able to certify that the conclusions reached are justified by the results of the testing which was conducted, but that the testing itself was an appropriate response to the issues which were being addressed[16]. When consultants are acting in the role of peer reviewer, they will have to be ruthless in their criticism and put aside any concerns about jeopardizing their

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[16] You have to break a few eggs to make an omelette, and consultants will have to resist the temptation to limit their testing lest they discover something bad. Although the client/developer will be paying their fee, the work which they will be conducting will be for the benefit of a wide array of stakeholders, including municipalities and the future residents of the property being tested.

future peer review business. Municipalities will not have the expertise needed to make informed judgments in this area, and they must be able to rely on the certifications of these experts.

4. The Insurers

Insurance companies will have to take an approach similar to that advocated above for mortgagees. All of the experts who will be sticking their necks out to certify the results of their work will need to be able to pool their risk at a cost which can be reasonably passed on to their clients. Property owners and developers will also need to know that there is a market for insuring environmental risk to which they can turn if they wish to pay for the extra comfort.

5. The MOEE

And last (but not least) of all, the province cannot breathe a sigh of relief, pat itself on the back for finally getting the Guidelines in place, and put up a "gone fishing" sign on the door of the Ministry. Despite its retreat from the activist role which it used to play in remediation matters, the MOEE can continue to make a valuable contribution to ensuring that the Guidelines will work as they are supposed to. One example would be the creation of a database of established criteria from other jurisdictions which could be made available to land owners who are considering an SSRA approach, together with current information on approaches which have been, or are being, used within the province. This database could be made available on the Internet, and would help to prevent the SSRA wheel from being continually reinvented in municipalities across the province. There are a variety of other ways in which the MOEE can assist in ensuring that the Guidelines will be workable,[17] and it is crucial to the success of the new regime that the Ministry fulfill its obligations in this respect.

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[17] The Guidelines state that the MOEE will continue to be involved in the ongoing review of standards for quality of air, land and water, and that the criteria therein may be subject to adjustment as research advances. Hopefully, these changes will occur in a systematic and thoughtful way, and will not amount to a continual "shifting of the goalposts" in response to the latest study. A degree of certainty will foster a better end result than a constant pursuit of the illusory goal of environmental perfection.

Overview

Whether they like it or not, Ontario's municipalities will have an increased role in the remediation of contaminated sites within the province once the Guidelines are in place. They will have to adapt quickly to this new role, as will the other players in the decontamination equation who have been used to dealing with the MOEE on clean-up issues. There are certain to be some adjustment pains while municipalities get up to speed on their new responsibilities, but it can be hoped that the end result will be worth the effort. It should be the goal of all parties to address remediation issues in a more practical and timely fashion than has currently been the experience. The Guidelines provide an opportunity to do this, albeit at greater expense, which should assist owners of properties which might otherwise remain mothballed to put their lands into productive use. Since the alternative to remediating existing properties is more greenfields development and urban sprawl, a successful transition to the regime contemplated by the Guidelines is in the best interests of municipalities, the development industry, and the province as a whole.