LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

IN THIS ISSUE

In civilized life, law floats in a sea of ethics.

~ Earl Warren (1891 – 1974), 14th Chief Justice of the United States

LIBEL

Here comes the tort of invasion of privacy!

Julian H. Porter, *Q.C.*,
Barrister and Solicitor

An Ontario case has elevated the tort of invasion of privacy as an alternative to libel.

When the internet began, its present power and reach was not contemplated. In North America today, it is a font of most people's stream of information.

The American emphasis on free speech without limits is ensconced in the *Communications Decency Act*, s. 230 of which prevents people from suing the Googles of this world if they are only providing information from other sources. American law treats Google as a post office that is not responsible for the content of the letter sent in the mail or published on the internet.

The challenge

Clients who come to a lawyer's office complaining of internet attacks generated from American sources are pretty well stymied; there are some loopholes, but it is a huge, uphill battle. Once in cyberspace, words have a tendency to pop up later, no matter what legal actions are taken.

Ontario case

In January of this year, a dramatic case in Ontario elevated the tort of invasion of privacy as an alternative to libel. In

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WHITE COLLAR CRIME

Are you protected from social engineering fraud?

Jim Patterson and Amanda McLachlan,
Bennett Jones LLP

With social engineering fraud on the rise, insurers are growing increasingly more cautious when underwriting crime endorsements.

Technology creates new opportunities for corporate crime and in particular, for computer savvy criminals. As cybercrime increases in sophistication and quantity, businesses are faced with a heightened risk of falling victim to losses sustained through digital schemes.

While cybercrime coverage is increasingly included in commercial insurance policies, certain types of new and evolving crimes — including social engineering fraud — may

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his reasons in *Jane Doe 464533 v. D. (N.),* Mr. Justice Stinson noted:

> [1] This lawsuit arises out of the actions of the defendant, the plaintiff's ex-boyfriend, who posted an intimate video of her on a pornography website without her knowledge or consent. The defendant has failed to serve a statement of defence and has been noted in default. The plaintiff has therefore brought this motion for default judgment. In addition to seeking compensatory and punitive damages, the plaintiff seeks a permanent injunction to prevent any further such conduct by the defendant.
>
> ...
>
> [5] The factual background may be summarized fairly briefly. The parties went to high school together in a small Ontario city, where they started dating while they were both in Grade 12. Although they broke off that formal relationship, they continued to see each other romantically throughout the summer and the fall of 2011. By the fall of 2011, the plaintiff and the defendant were both 18 years old.
>
> [6] In September 2011, the plaintiff was living in another city while attending university. Despite the fact that they had broken up in July 2011 and were no longer "boyfriend and girlfriend", she and the defendant communicated regularly by Internet, texting, and telephone and continued to see each other when she returned to visit her parents' home.
>
> [7] In August 2011, the defendant began asking the plaintiff to make a sexually explicit video of herself to send to him. For some time, she refused to do so, but the defendant kept asking her repeatedly. He sent her several intimate pictures and videos of himself, and told her that she owed him a video of herself in return. She did not want to do so, but she ultimately recorded an intimate video of herself in November 2011. Before she sent it to the defendant she texted him, telling him she was still unsure. He convinced her to relent, and reassured her that no one else would see the video. Despite her misgivings, due to pressure from the defendant, she "caved in" and sent the video to him.
>
> [8] In early December 2011, the plaintiff learned that the defendant had posted the video she sent him on an Internet pornography website under the "user submissions" section of the website. As posted by the defendant, the video was titled "college girl pleasures herself for ex boyfriends (sic) delight." She further learned that the defendant had been showing it to some of the young men with whom they had attended high school. She later learned that the video had been posted online on the same day she had sent it to him, and that its existence had become known among some of her friends.

The video was on the website for at least three weeks, and the plaintiff suffered great psychological damage.

Tort of invasion of privacy

Justice Stinson relied on the Ontario Court of Appeal's decision in *Jones v. Tsige.* In that case, the court recognized the tort of invasion of privacy in the context of intrusion upon seclusion.

In reaching this decision, the Court of Appeal looked to the American academic, William Prosser, who set out the tort's framework:

> [41] ... "Public disclosure of embarrassing private facts about the plaintiff." That category is

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> described ... as follows: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

Intimate matters

The Court of Appeal adopted Prosser's dramatic description of events which a person wouldn't want revealed:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Truth is not a defence

I find this description quite rattling. What is interesting is that truth — which was and is an absolute defence in a libel action — is not a defence here. It is the basic assumption of this tort that the facts are, in fact, true, but none of your business.

Damages and injunction

Mr. Justice Stinson found for the plaintiff. Her action was commenced under the simplified rules, so $100,000 was the most she could be awarded in damages. She was awarded general damages of $50,000; aggravated damages of $25,000; and punitive damages of $25,000, plus interest and costs.

Mr. Justice Stinson also ordered a permanent injunction, prohibiting the defendant from publishing or posting any intimate images of the plaintiff.

Anonymity of claimant

Libel has become a difficult and expensive tort, with embarrassing publicity attached to the claim. Privacy actions have a much greater allowance for anonymity in pleadings.

In this case, the plaintiff was identified as Jane Doe and the defendant wasn't identified (as that might have revealed who Jane Doe was).

What is interesting is that truth — which was and is an absolute defence in a libel action — is not a defence here.

In May of this year, in England, the U.K. Supreme Court, in *PJS v. News Group Newspapers Ltd.,* granted an interim injunction preventing anyone from reporting on who the actual claimant was in that case. The Court noted the facts of the case as follows:

> [4] ... PJS, the claimant (now the appellant) is in the entertainment business and is married to YMA, a well-known individual in the same business. They have young children. In 2007 or 2008, the claimant met AB and, starting in 2009, they had occasional sexual encounters. AB had a partner, CD. By text message on 15 December 2011, the claimant asked if CD was "up for a three-way", to which AB replied that CD was. The three then had a three-way sexual encounter, after which the sexual relationship between PJS and AB came to an end, though they remained friends for some time.
>
> [5] By or in early January 2016, AB and CD approached the editor of the Sun on Sunday, and told him about their earlier sexual encounters with PJS. The editor notified PJS that he proposed to publish the story. PJS's case is that publication would breach confidence and invade privacy. He brought the present proceedings accordingly, and applied for an interim injunction to restrain the proposed publication.

Injunction

The Court of Appeal initially granted an interim injunction preventing the newspapers from revealing the name of the plaintiff. There was evidence that maybe up to 20 percent of the public had discovered who the plaintiff actually was through the internet, but the court, in preserving the essence of invasion of privacy, supported the interim injunction until the matter was decided at trial.

So, the tort of invasion of privacy is alive and well.

REFERENCES: U.S.A. *Communications Decency Act*, s. 230; *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541, 2016 CarswellOnt 911 (Ont. S.C.J.) (January 21, 2016); *Jones v. Tsige*, 2012 ONCA 32, 2012 CarswellOnt 274 (Ont. C.A.); *PJS v. News Group Newspapers Ltd.*, [2016] UKSC 26.

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present various coverage issues, depending upon policy wording.

Social engineering fraud

Although it can occur in a variety of forms, social engineering fraud typically operates through a very simple scheme. A targeted employee receives an email that appears (on its face) to be from the company's CEO or CFO who requests that the employee wire funds to an account to cover costs or expenses which (on their face) appear to be legitimate.

In some cases, the email copies individuals purporting to be local counsel to add to the appearance of authenticity. Perpetrators of social engineering fraud often alter a legitimate email slightly and in a manner that won't easily be detected, such as by swapping a letter "l" for the number "1."

The CEO's email underscores the urgency and confidentiality of the request, and cautions the employee not to discuss it with anyone else. The employee completes the wire transfer as requested, on an urgent and confidential basis, only to later learn that the email was a fraud.

Insurance coverage

Notwithstanding the fact that, at first glance, the scenario outlined above may appear to fall within traditional commercial crime policy endorsements, insurance carriers are increasingly denying coverage to claimants without a specific social engineering fraud endorsement.

With social engineering fraud on the rise (some sources estimate daily attacks number in the hundreds of thousands), insurers are also growing increasingly more cautious when underwriting crime endorsements.

Insurance coverage for this type of fraud, when available, often comes at the price of high deductibles. It also generally features low sub-limits and strict conditions precedent.

Recent U.S. case law

Although Canadian courts have not yet been required to weigh in on the question of coverage in these scenarios, U.S. courts have held that the mere use of a computer in the execution of a scheme is not necessarily sufficient to warrant coverage. In many cases, the fact that no client or corporate data is stolen in the execution of these schemes renders traditional cybercrime coverage inapplicable.

Decisions rendered in the U.S. to date fail to reveal any clear patterns; they suggest that businesses and organizations at risk of being targeted by social engineering fraud may want to keep a close eye on emerging developments.

No unauthorized access

In the recent case of *Pestmaster Services, Inc. v. Travelers Casualty and Surety Company of America*, a U.S. District Court in California dismissed an insured's claim. The court concluded that computer fraud coverage only extended to cases in which an individual hacked or otherwise gained unauthorized access to a business' computer system to transfer funds. As the funds in this case were electronically transferred by an employee, rather than by unauthorized access to the company's computer systems, coverage did not apply.

Fraudulent email

In a more recent decision of the U.S. District Court, coverage was upheld under a computer crime policy in a case involving a fraudulent request for the transfer of payments for services. After receiving an email from a social engineering fraudster requesting a change to the existing payment information associated with a legitimate vendor, the insured's employee diligently requested that the change request first be made on company letterhead.

Upon receipt of an email attaching the formal change request, the employee again acted diligently, telephoning the number on the letterhead before transferring approximately $2.4 million in payments to the new account. In upholding coverage under a computer crime policy, the court ultimately concluded that the fraudulent email was a substantial factor in bringing about the loss, notwithstanding the fact that a telephone call had also been made to the fraudulent vendor.

The court in this case also noted that if insurers were only required to cover losses perpetrated by direct hacking, computer fraud provisions would be rendered virtually useless. The court went further, suggesting that insurers who seek to restrict computer crime policies in this manner should be very clear in the language of their policies.

Significance

In the absence of any insight from Canadian courts on these emerging coverage issues, and given the inconsistency with which these issues have been addressed in the U.S., businesses and organizations in Canada are encouraged to carefully review their existing insurance policies. Prudent employers should implement training to advise employees of the prevalence and risk of social engineering fraud.

Employers should also develop strategies and policies to reduce the risk of falling victim to such schemes. Employees should be on the lookout for emails containing incorrect punctuation, misspelled text or strange links.

In many cases, a simple call-back can reduce the risk of loss. Companies should adopt compliance measures, with additional checks and balances aimed at validating unusual electronic requests for payments or fund transfers.

REFERENCES: *Pestmaster Services, Inc. v. Travelers Casualty and Surety Company of America*, 2014 WL 3844627 (U.S.D.C. C.D. Cal., July 17, 2014); *Apache Corporation v. Great American Insurance Company*, 2015 WL 7709584 (U.S.D.C. S.D. Tex., August 7, 2015).

New developments in the law of options

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The Court of Appeal for Ontario has re-stated the general test for relief from forfeiture where a lease option requires the tenant to be in compliance with the terms of the lease.

Recent decisions from the Court of Appeal for Ontario have shed some light on two issues that frequently arise in connection with real estate options to purchase or to renew. As a result of those decisions, the criteria for when a court will find that an option to renew a lease is sufficiently certain as to the renewal rent to be an enforceable agreement (as opposed to an unenforceable "agreement to agree") appear to have been relaxed.

Secondly, the general test for relief from forfeiture has been re-stated. The Court of Appeal has clarified that where a lease option requires the tenant to be in compliance with the terms of the lease, the prerequisite for relief from forfeiture is that

> the tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of his or her own.

Enforceability of a renewal option

Prior to the Ontario Court of Appeal's recent decision in *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc.* ("*Mapleview*"), courts had almost consistently held that for an option to renew a lease to be enforceable, the option must contain two elements regarding the renewal rent:

(1) a formula or reference standard to fix the renewal rent if a dollar amount is not set out, e.g. "market rent" or "fair market rent"; and
(2) procedural machinery to determine the renewal rent in the event that the parties do not agree, typically a form of ADR such as arbitration.

"Then current rate" is sufficient

In *Mapleview*, the Court of Appeal affirmed the lower court's holding that the "then current rate" was a sufficiently certain reference standard for the renewal rent and did not constitute an "agreement to agree" because it was the functional equivalent of saying the rental rate would be at the "then market value" or the "then prevailing market rate" — expressions that have been found to be sufficient to overcome a void for uncertainty argument.

Although the option did not provide for arbitration or specify procedural machinery to determine the "then current rate," the Court of Appeal held that there was nothing which prevented the parties from submitting the matter to arbitration or the courts if negotiations proved unsuccessful.

There is limited authority for the point that the court can supply the mechanism to determine the new rent, although none was cited. (See, for instance, *Dagny Development Corp. v. Ocean Fisheries Ltd.*) *Mapleview* is now clear authority for this point.

Relief from forfeiture

Options are generally interpreted by the courts to be unilateral contracts, separate from the underlying contract in which they are embedded. The option is an irrevocable offer, and it is only open for acceptance in the exact manner — and on the exact conditions — specified.

Any conditions precedent to exercising the option, such as the common precondition in a lease that the tenant not be in default under the lease, must be complied with strictly or the option cannot be exercised.

When a tenant's purported exercise of an option is challenged on the basis that the tenant was not in strict compliance with the option terms (in addition to any other arguments that can be advanced, such as interpretation arguments, the doctrine of spent breach, waiver, and estoppels), the tenant will typically claim relief from forfeiture.

Test for relief

Relief from forfeiture is available pursuant to the court's inherent equitable jurisdiction, as codified in s. 98 of the *Courts of Justice Act* ("CJA"). In *Kozel v. Personal Insurance Co.* ("*Kozel*"), a 2014 case involving forfeiture of an automobile insurance policy, the Court of Appeal held that the test under s. 98 of the CJA to grant relief from forfeiture requires the court to consider the following three factors:

(i) the conduct of the applicant,
(ii) the gravity of the breach, and
(iii) the disparity between the value of the property forfeited and the damage caused by the breach.

Previous case law

Prior to *Kozel*, the test for relief from forfeiture required the court to ask whether the object of the right of forfeiture was essentially to secure the payment of money, which some Ontario courts had held meant that relief from forfeiture was not available in the case of lease options to purchase and renew. (See, for instance, *Annett v. Robert Breadner Children's Trust (Trustee of)*.)

This approach was contrary to earlier case law that permitted such relief. (See, for instance, *Sheikh v. Sheffield Homes Ltd.*; *Ross v. T. Eaton Co.;* 120 *Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*; and *1383421 Ontario Inc. v. Ole Miss Place Inc.*)

Additionally, some courts, adopting the unilateral contract theory of options, reasoned that while relief from forfeiture could cure loss of the lease following defaults, it is not available to cure non-compliance in exercising a lease option, as there is a difference

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between the loss of a right and a failure to acquire a right. (See, for instance, *Sparkhall v. Watson*; *Re Pacella and Giuliana*; and *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*)

Application of test

This approach was rejected and the reformulated three-part *Kozel* test was applied by the Court of Appeal in *PDM Entertainment Inc. v. Three Pines Creations Inc.* ("*Three Pines*"). Here, the court upheld the lower court's decision to grant relief from forfeiture where an optionee made a mistake in exercising its right to extend its movie option.

In *Mapleview*, the Court of Appeal held it was unnecessary to resolve the conflicting lines of authority on whether relief from forfeiture is available for non-compliance with conditions precedent in a lease option. The court cited its own decision in *Ross v. T. Eaton Co.* ("*Ross*") in noting that one of the prerequisites for relief from forfeiture for a tenant who has not complied with a "not in default" precondition is that

> the tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of his or her own.

Rental arrears and dispute

In *Mapleview*, the tenant had failed to satisfy this requirement. The tenant had admitted rent arrears of $251.92 and was paying its monthly additional rent in the old amount, rather than the increased amount requested by the landlord whose calculations the tenant disputed.

The Court of Appeal held that if the tenant had wished to preserve its right to exercise the option, it could have paid the small amount of admitted arrears and the disputed higher, additional rent amount, and then sought a correcting adjustment in the year-end reconciliation.

Significance

As the Court of Appeal in *Mapleview* did not refer to the test it had articulated and applied in *Kozel* and *Three Pines*, it did not indicate where the *Ross* requirement fits in, but, it seems to be part of the first factor — the conduct of the applicant. The strict application of this requirement in *Mapleview* illustrates that even if the court has the ability to grant relief from forfeiture in relation to the exercise of a tenant's option, it will do so sparingly. (There remain unresolved conflicting lines of authority on this issue.)

REFERENCES: *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc.*, 2016 ONCA 93, 2016 CarswellOnt 1485 (Ont. C.A.); *Dagny Development Corp. v. Ocean Fisheries Ltd.*, 1991 CarswellBC 675, 1991 CANLII 528 (B.C. S.C); *Courts of Justice Act*, R.S.O. 1990, c. C.43. *Kozel v. Personal Insurance Co.*, 2014 ONCA 130, 2014 CarswellOnt 1790 (Ont. C.A.); *Annett v. Robert Breadner Children's Trust (Trustee of)*, 2008 CarswellOnt 83 (Ont. S.C.J.) at para. 35, affirmed 2008 ONCA 787, 2008 CarswellOnt 6892 (Ont. C.A.); *Sheikh v. Sheffield Homes Ltd.*, 1989 CarswellOnt 553 (Ont. H.C.) at para. 23; *Ross v. T. Eaton Co.*, 1992 CarswellOnt 615, 11 O.R. (3d) 115 (Ont. C.A.) at para. 27; *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, 1993 CarswellOnt 5327, [1993] O.J. No. 2801 (Ont. C.A.) at para. 3; *1383421 Ontario Inc. v. Ole Miss Place Inc.*, 2003 CarswellOnt 3681, 67 O.R. (3d) 161 (Ont. C.A.) at para. 80; *Sparkhall v. Watson*, 1953 CarswellOnt 434, [1954] 2 D.L.R. 22 (Ont. H.C.) at para. 8; *Pacella v. Giuliana*, 1977 CarswellOnt 411, 16 O.R. (2d) 6 (Ont. C.A.) at p. 8 [O.R.]; *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24, 2007 CarswellBC 63, 277 D.L.R. (4th) 201 (B.C. C.A.) at para. 30; *PDM Entertainment Inc. v. Three Pines Creations Inc.*, 2015 ONCA 488, 2015 CarswellOnt 9648 (Ont. C.A.); *Ross v. T. Eaton Co.*, 1992 CarswellOnt 615, 11 O.R. (3d) 115 (Ont. C.A.) at p.125 [O.R.], referred to with approval in the Court of Appeal's 2004 decision in *1383421 Ontario Inc. v. Ole Miss Place Inc.*, 2003 CarswellOnt 3681, 67 O.R. (3d) 161 (Ont. C.A.) at para. 80.

MUNICIPAL LAW

Will proposals make the Golden Horseshoe great?

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Proposed amendments under the Greater Golden Horseshoe will require municipalities in the outer ring to identify and eliminate excess lands from the development pool.

The Growth Plan for the Greater Golden Horseshoe (the "Growth Plan") is a provincial-level, land-use planning document that, through a rigid set of rules, establishes how and where communities within the Greater Golden Horseshoe Growth Plan Area (the "GGH") can and should develop. After a decade of planning under the Growth Plan, the government has decided to refresh the plan.

Anticipated growth

The refresh is being done in an attempt to keep up with anticipated growth in the GGH, which is expected to be nearly 50 percent in terms of population — from the current population of about nine million people to about 13.5 million people by 2041; and 40 percent in terms of jobs — from 4.5 million jobs to 6.3 million jobs by 2041.

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Outer ring

The changes will likely affect, quite dramatically, how some municipalities in Ontario plan. While there are many notable changes proposed, the one that caught our attention is the change proposed for the "outer ring" of the GGH. The "outer ring" is the area outside of the core of the Golden Horseshoe. It has quite a bit more rural land on the north, east and west boundaries of the Greenbelt area.

It is defined as:

> the geographic area consisting of the cities of Barrie, Brantford, Guelph, Kawartha Lakes, Orillia and Peterborough; the Counties of Brant, Dufferin, Haldimand, Northumberland, Peterborough, Simcoe, and Wellington; and the Regions of Niagara and Waterloo.

It is proposed that the outer ring municipalities must identify and remove excess lands from existing settlement areas if they are not required within the 2041 time horizon established by the Growth Plan.

Growth Plan regulation

To understand the significance of the amendments proposed by the government, some background is necessary. The Growth Plan regulates all land use planning decisions with respect to "transportation, infrastructure, land-use planning, urban form, housing, natural heritage and resource protection." The Growth Plan establishes a set of rules, the purpose of which is to ensure the preservation of community resources through land use planning.

In particular, it directs growth in the GGH by substantially restricting the expansion of urban boundaries and by placing a strong emphasis on accommodating significant portions of forecasted population growth and employment uses within existing urban areas.

Intensification goal

One of the primary goals of the Growth Plan is to intensify development in settlement areas, requiring municipalities to adhere to settlement area boundaries when directing population and employment growth. The Growth Plan establishes a series of population and employment targets over a time horizon to 2041.

Municipalities are prevented from expanding the settlement area boundaries based on local aspirations or other variables unless they can establish that an expansion is required under a complex test under the Growth Plan. Any such expansion must occur using the population and employment forecasts in the Growth Plan.

Review and amendments

In February 2015, the Province of Ontario appointed former City of Toronto Mayor, David Crombie, to lead an Advisory Panel to conduct a Co-ordinated Land Use Planning Review of four key provincial land use plans that are ostensibly intended to work together: the Growth Plan, the Greenbelt Plan, the Oak Ridges Moraine Conservation Plan and the Niagara Escarpment Plan.

In May of 2016, the Ministry of Municipal Affairs and Housing ("MMAH") released the "Proposed Growth Plan for the Greater Golden Horseshoe, 2016" ("Proposed Amendments") which proposes to modify the Growth Plan that has now been in place for a decade. There have been two other amendments to the Growth Plan.

The first amendment, passed in January 2010, paid special attention to the Simcoe Sub-Area to manage unique issues in Simcoe County. In 2013, Amendment 2 was passed to adjust the population allocations to better reflect actual growth as well as to extend the growth projections of the Growth Plan from 2036 to 2041. The Proposed Amendments are the first significant change to the entirety of the Growth Plan.

Settlement area

While the current Growth Plan prevents municipalities from designating new land for development in a manner contrary to the Growth Plan, one of the key policy questions that exists today is what to do in municipalities that have historically over-dedicated lands for urban development, creating numerous settlement areas that exceed the land required to accommodate the forecasted growth. The obvious answer is to reduce the area available to only provide the land necessary to accommodate forecasted development, thereby reducing the size of a settlement area as identified in an official plan.

A "settlement area" is defined in the Growth Plan as:

> Urban areas and rural settlement areas within municipalities (such as cities, towns, villages and hamlets) where: a) development is concentrated and which have a mix of land uses; and b) lands have been designated in an official plan for development over the long term planning horizon provided for in the Provincial Policy Statement, 2005. Where there are no lands that have been designated over the long-term, the settlement area may be no larger than the area where development is concentrated.

Approach of municipalities

However, this is an unpopular move for politicians and even more unpalatable for landowners who are already "in" a settlement area. With no specific requirement in the Growth Plan to reduce the size of settlement areas that contain excess development lands, and in light of the significant cost associated with carrying out a proper land evaluation to appropriately reduce the settlement areas across an entire upper-tier municipality, municipalities generally did not prepare a detailed analysis of land needs.

Instead, they rely on a basic calculation purportedly sufficient to conclude that sufficient "opportunities" exist to accommodate forecasted growth. This approach has been taken by some

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municipalities with the support of the MMAH, and no explicit consideration was given to settlement area boundary reductions in the Growth Plan.

Required elimination

The Proposed Amendments will change this. The Proposed Amendments will require municipalities in the outer ring to identify and eliminate excess lands from the development pool. This will affect any land previously identified for future development that cannot be developed within the time horizon of the Growth Plan. In particular, proposed s. 2.2.1.6 provides that:

> Upper- and single-tier municipalities in the outer ring will, in consultation with lower-tier municipalities where applicable, identify any excess lands in official plans and prohibit development on all excess lands to the horizon of this Plan.

Land swap

While it is usually obvious that certain lands are a long way from development, the Proposed Amendments would create a significant risk that such lands could be down-designated. Despite this risk, there is also a potential reward for the savvy landowner or developer. The Proposed Amendments contemplate the possibility of a land swap in conjunction with the identification of excess lands as part of a Municipal Comprehensive Review process as defined in the Proposed Amendments.

The term "Municipal Comprehensive Review" would have a new definition under the Proposed Amendments, as follows:

> A new official plan, or an official plan amendment, initiated by an upper- or single-tier municipality under section 26 of the Planning Act that comprehensively applies the policies and schedules of this Plan.

In particular, proposed s. 2.2.8.3. provides that a settlement area boundary expansion may occur if it meets a number of technical requirements of the plan and:

> b) the overall quantum of excess lands are reduced by re-designation to remove development permissions and the municipality will ensure that any applicable lower-tier official plans are amended accordingly;
>
> c) development is prohibited on all excess lands to the horizon of this Plan in accordance with policy 2.2.1.6, including any lands that will become excess lands as a result of the proposed expansion;

In other words, it is proposed that a settlement area boundary can be expanded where insufficient land is provided for growth, and excess lands have been identified elsewhere in a municipality — essentially providing for a settlement area land swap.

It is quite common in "outer ring" municipalities to have excess lands that are distributed in an odd fashion, since the settlement area boundaries were created based on existing patterns without regard to actual need. As a result, those boundaries do not necessarily line up with reasonable growth and settlement patterns, which provides an interesting opportunity for some landowners, with a concomitant significant risk for others.

Significance

Ultimately, developers and landowners with lands in the outer ring should start the process of identifying land in their inventory to determine where lands are at risk and where future opportunities exist to use the new rules to their advantage. Failure to do so could result in significant issues down the line, with very long-term consequences. Needless to say, the Proposed Amendments will create many interesting official plan processes in the years to come.

REFERENCES: Planning for Health, Prosperity and Growth in the Greater Golden Horseshoe: 2015 – 2041, http://www.mah.gov.on.ca/AssetFactory.aspx?did=11151, p. 9; Proposed Amendments, Section 2.2.8.3(b) and (c).

Briefly Speaking will return in the next issue.

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