OCA recognizes widespread municipal practice of servicing allocation

www.advocatedaily.com /Court-of-Appeal-recognizes-widespread-municipal-practice-of-servicing-allocation%20-practice-of-allocation-programs.html

Ontario municipal lawyer David Germain says a recent Court of Appeal decision is important for both municipalities and developers as it provides some much needed judicial interpretation of s. 86(1) of the Municipal Act.

The appeal court's decision in *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802 (CanLII) is also significant because it interprets the term "sufficient capacity" in the context of existing municipal allocation agreements, Germain tells AdvocateDaily.com.

The parties had entered into a subdivision agreement "in which Lakeshore undertook to provide capacity in its sewage system to the respondent's proposed development. Subsequently, the parties entered into a supplementary agreement that provided for an enhancement to the town's sewage system that would increase the capacity available to the respondent's proposed development," the decision reads.

"When Lakeshore provided another developer access to the enhanced sewage capacity prior to the completion of the respondent's development, the respondent sued Lakeshore for breach of contract. The respondent claimed damages stemming from the loss of commercial tenancies to the competing developer," it continues.

The trial judge found that by providing the other developer access to the sewer system, Lakeshore breached the supplementary agreement and awarded the respondent damages of $2.4 million, based on the profits that the other developer purportedly realized from certain commercial tenancies, the ruling states.

At appeal, Lakeshore successfully argued that the trial judge erred in interpreting the supplementary agreement as prohibiting it from allocating sewage capacity to anyone else pending completion of the respondent's subdivision.

The Court of Appeal ordered the developer to repay Lakeshore the $2.4 million plus legal fees.

Germain, partner with Thomson Rogers, says the decision "confirms that, while s. 86 of the Municipal Act doesn't explicitly reference the allocation of servicing capacity to developers for future use, the term 'existing capacity,' as it's used in this section, must be understood to mean existing unallocated capacity.

"By interpreting the legislation in this way, the Court of Appeal has recognized and confirmed the widespread municipal practice of allocating servicing capacity through allocation programs and/or allocation agreements."

He says the crux of the court's finding on this point is found in paragraph 84 of the decision, which reads: "These factors lead me to conclude that, properly interpreted, under s. 86(1)(c) a municipality, in assessing whether a sewage system's remaining capacity is sufficient to grant a request for supply, must take into account both capacity that is currently being used as well as capacity that has been reasonably

allocated into the future.”

Germain notes the court found that capacity must have been allocated "reasonably.”

“While the court hints at what might be found to be unreasonable, it doesn't provide a bright line,” he says. “This is in keeping with the policy considerations reviewed by the court, that speak to giving municipalities increased authority, accountability, and flexibility.”