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New Developments in the Law

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Liability in Leaky Condo Actions

The British Columbia Supreme Court has recently awarded \$3.15 million to the owners of the Riverwest development ("Riverwest"), a condominium development in the Municipality of Delta, to cover the cost of repairing their water-damaged units. This decision is the first to hold a municipality liable for negligent inspection with respect to the construction of a "leaky condo", and has far reaching implications for anyone involved in the development industry.

In *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*, [2001] BCSC 1214, the plaintiff strata corporation brought action against the developer and the contractor, the structural engineer, a building design company and the Corporation of Delta ("Delta"). The case at trial, however, involved only the strata corporation and Delta. The strata corporation's action alleged negligent approval of an application for a building permit, negligent inspection of construction, and negligence in the final act of issuance of an occupancy permit.

In 1989 the Riverwest project was presented to Delta for rezoning along with architectural drawings indicating the outward appearance of the buildings. At this stage the outward appearance of the buildings was quite different from what became the final design. An architect had prepared these drawings and Delta's City Council approved the proposal and the project went to the building stage. At this point, the defendant building design company became involved, preparing the plans that accompanied the permit application. The final configuration of the buildings and some of the construction details were determined by these plans. These plans were not drawn by a professional architect; however, the plans met with the approval of Delta's Building Department and a permit was issued. During the course of construction, Delta conducted inspections at three of the five stages indicated in their building bylaw.

A municipality's power to regulate construction emanates from s. 694 of the *Local Government Act*, RSBC 1996, c. 323. The provision is permissive in nature; municipalities, which adopt regulation of building standards in their districts, enact bylaws accepting the jurisdiction and delegating powers to their officials. The standards to be applied in regulating construction are stipulated in most part by the Provincial Government through the establishment of a Provincial Building Code (the "Building Code"). These standards have provincial effect and by s. 692(3) of the *Local Government Act*, a municipal council accepting the regulation of construction must not provide regulatory standards inconsistent with the Building Code. Delta, in the preamble to its building bylaw, accepted the regulation of construction within the municipality.

The evidence presented at trial showed that Delta's building department did not undertake any processes to ensure compliance with most of Part 5 of the Building Code, which prescribes the design objectives relating to wind, water and vapour protection for buildings. Delta acknowledged that the bylaw adopted enforcement of all parts of the Building Code and that under the bylaw, plans submitted for permits were required to show information necessary to establish compliance with the Building Code. The department practice, however, was only to check plans for full compliance with Part 3 of the Building Code, relating to use and occupancy requirements. Delta argued that it chose not to implement procedures designed to enforce Part 5 of the Building Code as a policy decision. The Court also found that Delta purported to "make provision for the administration and enforcement of the said building code without any reservation of responsibility for individual parts." The Court found that Delta did not make any reservations stipulating that it was only responsible for enforcing limited parts of the Building Code in its building bylaw.

(over)

Given that the enabling bylaw adopted enforcement of the entire Building Code, the Court held that it was not open to Delta to say it then took no responsibility for certain parts of the Building Code.

In essence, Delta made a policy decision to administer and enforce the Building Code through the process of permit approval and subsequent inspection; administration of these processes through its Building Department became implementation at the operational level. Although the bylaw adopted enforcement of the entire Building Code, it was at the departmental level that a decision was made not to deal with certain provisions. The Court confirmed that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy and that where inspection is provided for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect. The Court also commented that the public would reasonably expect that a municipality would put some effort into its responsibility to administer and enforce the Building Code provisions.

With respect to Delta's argument that its treatment of Part 5 of the Building Code was to the same standard adopted by other municipalities, and that it shouldn't be obliged to have exercised greater care than was common, the Court held that there was a clear obligation to enforce all parts of the Building Code and that a municipality could not avoid this duty because other regulating authorities chose not to deal with their own responsibilities for enforcing the Building Code.

The Court also commented on the issue of the increase in expenditure of municipal funds that would have been required if Delta was required to enforce all parts of the Building Code. The legislative scheme allows that a municipality can largely avoid the costs of enforcement and supplement its resources through reliance on professional certification. For example, the *Architects Act* would have required the Riverwest project to have been planned, and the construction supervised, by a person licensed under the statute. Although a municipality would not have had any direct role in enforcing the *Architects Act*, by requiring professional involvement a municipality can supplement a lack of resources and expertise in satisfying its responsibility under the Building Code. It appears that the Court was saying that Delta may have been able to avoid liability for negligence in its failure to spot design defects and its failure to properly supervise construction through appropriate inspection procedures by requiring professional involvement deemed appropriate under the *Architects Act*.

This decision will have the greatest impact on those municipalities that have adopted enforcement of the entire Building Code but do not have adequate procedures in place to ensure that reasonable efforts are made to ensure

compliance with the Building Code, whether it be through proper inspection protocols or by requiring professional involvement in the planning and construction process. Although it is expected that this decision will be appealed by Delta, municipalities should be aware of their potential liability to condominium owners for failure to enforce the Building Code and should take steps to ensure that their inspection procedures are in compliance with their responsibilities under their building bylaws.

This decision is also of importance to developers, contractors, consultants and anyone else involved in the construction industry. The main argument in defence of liability put forward by Delta was that the "face-seal" system of applying stucco directly to the exterior wall of the buildings, was commonly used in the construction industry for the construction of wood-frame apartments. The municipality argued that it was not negligent since it could not reasonably have known of the likelihood of the problems that developed. This is the same argument being put forward by many developers and contractors in defending negligence claims on the basis that they were simply constructing buildings based on the then prevailing construction standards. The court rejected this argument and stated that the design clearly presented significant risks which together with poor quality of construction led to a foreseeable problem with water penetration and damage to the wood structure.

For further information, please contact any member of our real estate or municipal law group.

This BULLETIN is intended to provide general comments on new developments in the law. It is not intended to be a comprehensive review of all developments nor is it intended to provide legal advice. Readers should not act on information in this BULLETIN without seeking specific advice on the particular matters which are of concern to them. We will be pleased to provide additional details on request and to discuss the possible effect of these matters in specific situations.

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