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Wednesday, February 14, 2007

Marcia Wallace, Brownfields Coordinator
Ministry of Municipal Affairs and Housing
777 Bay Street, 16th floor
Toronto, ON, M5G 2E5

Dear Ms. Wallace:

Brownfields Reform Submission – AF07E001

1. Introduction

The Ontario Bar Association (OBA), Environmental Law Section (ELS), welcomes the opportunity to comment on your ministry's proposal to reduce certain obstacles to brownfields redevelopment: posting # AF07E0001 *Proposal - Potential Components for legislative Brownfield Reform*.

2. Background

The OBA consists of 17,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 500 of these lawyers belong to our very active Environmental Law Section. Our members have considerable expertise and experience in how environmental laws and policy are actually interpreted and applied, and represent many points of view.

3. Overview

As expressed in the multi-stakeholder letter to the Premier dated February 6, 2007, the ELS of the OBA commend the Government of Ontario on this initiative, and are generally supportive of the reforms proposed. The current brownfields liability regime is a significant obstacle to brownfields redevelopment, and this initiative includes several modest but useful steps in the right direction. We urge the government to ensure that this matter is placed on the legislative agenda and earmarked for passage in the spring session.

We have specific comments on two elements of the proposal:

- Post-RSC offsite migration, and
- Horizontal severance

Once the wording of the legislative changes is proposed, we may have additional comments. We also urge you to continue to address the many obstacles to brownfields redevelopment that will remain after this amendment.

4. Post-RSC off-site migration

We strongly support the proposed amendments to subsection 168.7(3) of the EPA and subsection 89.2(3) of the *Ontario Water Resources Act* (collectively, the “off-site migration re-opener”), but would ask that you consider the following:

1. potable site condition standards should be used, in part, to determine the maximum concentration of contamination allowed to migrate off-site without triggering the re-opener unless
 - a. both the property for which the RSC will be filed (the “RSC Property”) and all properties in the vicinity of the RSC Property satisfy the requirements in subsection 35(3) of O. Reg. 153/04, or
 - b. the process in item 4 below is followed;
2. the determination as to the sensitivity of off-site uses (and thus, the applicable site condition standards) should be based on the most sensitive of actual current uses and all as-of-right uses under current zoning (not just current uses) in the vicinity of the RSC Property;
3. “vicinity” should be clearly defined;
4. the legislative regime should permit the use of criteria developed under a risk assessment in accordance with all applicable requirements provided that the interests of the municipality and all property owners in the vicinity of the RSC Property are adequately protected.¹ As a practical matter, we expect that the use of risk assessment will be of particular importance when environmentally sensitive areas are in the vicinity of the RSC Property if such properties are otherwise required to meet the background site condition standards; and
5. even if the off-site migration is below the applicable site condition standards, as a matter of fairness, a RSC should not provide protection from causing an exceedance of the applicable site condition standards on another property (e.g., due to existing contamination on the off-site property plus the migration of the contamination). Without this qualification, it is possible that contamination could migrate from the RSC Property to an off-site property and the owner of the

¹ ELS members agree that consent of the municipality and neighbours would be acceptable evidence of adequate protection, but not all members agree that such consent should be required.

RSC Property would not be subject to an order, while the off-site property owner could be subject to such an order.

In our view, enacting the described off-site migration re-opener will promote appropriate for all involved, including developers, purchasers and neighbours of RSC Properties.

5. Horizontal severances

Most of the proposals are intended to reduce obstacles to Brownfield's redevelopment. However, there is one exception. Buried within the Brownfield's reform proposals is a proposal to plug a loophole. Some legal counsel have advocated using horizontal severances to avoid responsibility for cleanup of contaminated sites. If the contaminated soil and groundwater can be made into a separate legal parcel, and transferred into a corporation with no other assets, it may be possible to develop the upper parcel without dealing with the contamination below. The lower corporation could then be allowed to become bankrupt, thus escheating the contaminated property to the Crown. One of the tools that could be used to facilitate such sloughing of responsibility is Section 50 (2) of the Planning Act.

The ELS agrees that such abuses should be prevented in order to protect public health and the environment and to avoid the unscrupulous shifting of environmental liabilities from polluters to the general taxpayer. However, as discussed at the meetings of January 22 and January 25, horizontal severances are valuable tools, necessary for many desirable and legitimate brownfields redevelopment/ reuse projects. Horizontal severance is the only tool now available that allows an innocent purchaser to acquire an interest in a contaminated site without acquiring a risk of liability (with no limit in amount or time) for the pre-existing contamination. Although the brownfield law reform of 2001, together with Reg. 153/04, did provide some increase in protection for innocent owners, the protection is insufficient given the many reopeners and the continuing exposure to civil liability.

Thus, the OBA recommends that the ministry should revise its proposal to establish appropriate conditions in which horizontal severances can continue to be used. We recommend that such conditions be structured in a "permit by rule" approach, rather than one requiring a discretionary government approval, because the cost, delay and uncertainty entailed by government approvals are already major obstacles to brownfields redevelopment.² Reasonable rules, binding on all, that can be determined in advance and reasonably complied with would strike a reasonable balance between the twin objectives of encouraging valid projects while blocking those severances that are abusive.

In principle, the OBA would support imposing liability on a current upper owner should any of the circumstances of Section 168.8 exist, unless a Record of Site Condition has been filed in the Environmental Site Registry for the lower property. Once a Record of Site Condition has been

² ELS understands that the Canadian Environmental Law Association dissents on this point, and will be filing its own submission.

filed for the lower property, an innocent third party who has purchased the upper property in good faith should be free of all further liability relating to the lower property. That is, the upper owner should be entitled to rely upon the lower property's Record of Site Condition and the horizontal severance without having to go behind either document. This is the same principle that allows efficient trading in both real property and personal property under, for example, the Land Titles system and the Personal Property Security Act.

Conclusion

We appreciate having the opportunity to provide our comments on this important initiative, and hope that our comments will help you to improve it.

Yours truly,

A handwritten signature in blue ink that reads "Marc McAree". The signature is fluid and cursive, with a long horizontal flourish at the end.

Marc McAree
Chair, Environmental Law Section