

# **BUILDING CODE AND MUNICIPAL LIABILITY: AN OVERVIEW**

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# Overview

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## Recent Building Code municipal liability issues:

- *Upchurch v. Oshawa (City)*
  - Lawsuit alleging negligent building permit advice and inspection
- *Ontario (Ministry of Labour) v. Guelph (City)*
  - Charge under the *Occupational Health and Safety Act*
- *Saugeen Valley Conservation Authority v. Tedford, et al.*
  - Charge under *Conservation Authorities Act*
- *Woods v. Elliot (c.o.b. Huron-Kinloss (Township))*
  - Lawsuit alleging improper property standards by-law enforcement

# *Upchurch v. Oshawa (City)*

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[2013] O.J. No. 2661, Ontario Superior Court of Justice

## **Facts**

- Plaintiff built a deck
- Prior to construction, asked building official if permit required
  - Told no, but did not present plans at time of request
- During construction, building official issued order requiring plaintiff to obtain a building permit
- Plaintiff appealed order
  - Court ultimately agreed no building permit was required
- Plaintiff sued City
  - alleged City officials were negligent for:
    - providing incorrect information regarding necessity to obtain a building permit
    - prosecuting them for relying on advice provided by City officials

# *Upchurch v. Oshawa (cont.)*

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## Duty of Care

- Is there a relationship of proximity between the parties such that it would be reasonably foreseeable that carelessness on the part of the public body would result in injury to the other party?
- If so, are there any policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which a breach of it may give rise?
- Municipalities have a responsibility for enforcing the BCA
- With that comes a duty of care to people who might suffer damages by negligent inspections
  - “The duty of care is limited to making sure that buildings under construction are built so as to avoid endangering the health and safety of occupants.” *Gorsack v. 1138319 Ontario Inc.*, [2003] O.J. No. 3822

# *Upchurch v. Oshawa (cont.)*

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## Standard of Care

- The municipality “avoids liability if its officials meet the standard of care in inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances.”
- Building officials must administer the BCA in a fair and impartial manner
- Objective test
  - What would the reasonable person expect the official to do?
- *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2
- *Ingles v. Tukuluk Construction Ltd.*, [2000] 1 S.C.R. 298

# *Upchurch v. Oshawa (cont.)*

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## Findings

- Provision of advice by building official not negligent
  - A reasonable person would accept the building official's conduct as proper
- Issuance of order and prosecution for failing to obtain building permit not negligent
  - Building officials acted reasonably in:
    - concluding that a building permit was required for the deck,
    - issuing order to comply, and
    - in commencing prosecution for failing to comply with order

# ***Ontario (Ministry of Labour) v. Guelph (City)***

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[2013] O.J. No. 1073, Ontario Court of Justice

## **Facts**

- City hired third party to design and construct washroom as part of park renovations in 2004
- City issued building permit based on stamped drawings
- Privacy wall collapsed in 2009, killing 14 year old student
- Agreement wall was improperly constructed and that it was load bearing; wall collapsed because it could not withstand force
- Building department did not have architect or engineer on staff
- City followed its plans review policy / practice
- City charged under OHSA in relation to failure of wall for:
  - Failing, as an employer, to ensure that a wall or other part of a workplace was capable of supporting all loads to which it may be subjected, without causing the materials therein to be stressed beyond the allowable unit stresses established in the Building Code Act, contrary to s. 25(1)(e) of the OHSA

# ***Ontario (Ministry of Labour) v. Guelph (cont.)***

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## **Findings**

- Charge dismissed
  - Crown did not prove charge beyond a reasonable doubt; wording of offence
- Court found failure was on the part of the masonry contractor
- Court found City acted reasonably and established due diligence defence
  - “The evidence in that regard satisfies me that the City of Guelph acted reasonably, in accordance with provincial legislation and in a manner consistent with the practice of other municipalities in Ontario in setting up and staffing its building service. It appropriately regarded the application for a building permit in this case no differently from the manner in which it approach every other application...The standard is not perfection, but reasonableness.”
- Municipalities could be liable to conviction under OHSA if they “act unreasonably in issuing a building permit”

# ***SVCA v. Tedford, et al.***

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Unreported, Ontario Court of Justice

## **Facts**

- 1,475 square foot addition to a house in a flood plain
- Area regulated by Saugeen Valley Conservation Authority
- SVCA development permit required to authorize addition
  - SVCA regulation O. Reg. 169/06, made under *Conservation Authorities Act*
  - s. 2 - “no person shall undertake development or permit another person to undertake development in or on the areas within the jurisdiction of the Authority that are [prescribed]”
- SVCA development permit not sought by owner
- Municipal Chief Building Official (CBO) issued building permit
- CBO charged with permitting person to undertake development without a SVCA development permit being issued
  - Owner also charged

# ***SVCA v. Tedford, et al. (cont.)***

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## **Outcome**

- Court-sanctioned settlement was reached
- CBO and owners plead guilty
  - Were convicted on one charge each and fined
- CBO fined \$4,375, plus a 25% surcharge
- Municipality agreed to pay a deterrence fee of \$8,150
- Changes are to be made to site's zoning and to property to make it safe in event of flood
- Municipality, CBO and SVCA entered into a memorandum of understanding
  - process for future building permit applications involving lands regulated by SVCA

# ***Woods v. Elliot (c.o.b. Huron-Kinloss (Township))***

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[2013] O.J. No. 482, Ontario Superior Court of Justice

## **Facts**

- Plaintiff had a number of motor vehicles on his property
- Property standards officer received complaints
- Issued Order to Remedy
- Order was not complied with
- Vehicles were removed by municipality
- Plaintiff commenced lawsuit alleging:
  - Theft
  - Negligence
  - A number of Constitutional or quasi-Constitutional claims

# ***Woods v. Elliot (cont.)***

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## **Findings**

- **Theft**

- Municipality not liable in theft

- s. 15.4(1) of the *Building Code Act, 1992*: if order not complied with, municipality may cause property to be repaired or demolished
- s. 15.4(3) of BCA: municipality, or person acting on its behalf, is not liable to compensate the owner...by reason of anything done by...the municipality in the reasonable exercise of its powers under s. 15.4(1)

- **Negligence**

- Municipality not liable in negligence
- No breach of standard of care

- **Constitutional and Quasi-Constitutional Matters**

- Claims dismissed

# Questions

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