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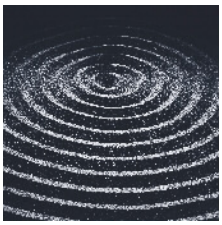

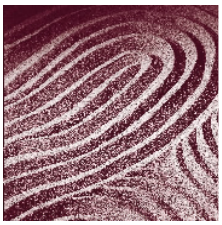

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Municipal Regulation of Propane Storage Tanks: An Explosive Issue

Steven J. O'Melia
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MUNICIPAL REGULATION OF PROPANE STORAGE TANKS:

AN EXPLOSIVE ISSUE

By Steven O'Melia

The recent decision of the Ontario Court of Appeal in *Superior Propane Inc. v. York (City)* (1995), 27 M.P.L.R. (2d) 1, 17 C.E.L.R. (N.S.) 1, 80 O.A.C. 362, 23 O.R. (3d) 161, 123 D.L.R. (4th) 445 [summarized at 3 D.M.P.L. 148], which was released on May 3, 1995, has revisited some interesting questions about the role of municipal by-laws as they relate to matters within provincial jurisdiction. The Court allowed the appeal by Superior Propane Inc. and set aside an earlier decision of the Ontario Divisional Court, with the end result being that a zoning by-law passed by the City of York was declared invalid as *ultra vires* the municipality. Although the decision deals specifically with the narrow issue of the regulation of propane storage tanks, it has the potential to impact upon the entire spectrum of instances in which municipalities attempt to regulate subject matters which are also dealt with under provincial statutes.

The Impugned By-Law

The by-law under attack was a municipal zoning by-law which attempted to regulate the size and height of propane storage tanks within the City of York, and to establish screening and setback requirements for such tanks from roads, buildings, railways and residential areas. The implementation of the by-law had been sparked by an explosion which had occurred at a taxi repair garage in the City after a propane leak, resulting in severe damage to the surrounding area. The by-law was an attempt to address some of the concerns which had been raised by this experience using the land use control powers contained within Ontario's *Planning Act*, S.O. 1983, c. 1 [now R.S.O. 1990, c. P.13].

The provincial regulation of matters relating to the dispensing of propane was set out in Ontario's *Energy Act*, R.S.O. 1980, c. 139 [now R.S.O. 1990, c. E.16], and the regulations enacted thereunder. These regulations incorporated, with amendments, the Installation Code for Propane Burning Appliances and Equipment issued by the Canadian Gas Association. The requirements of York's by-law were either more restrictive than similar requirements set out in the regulations, or dealt with matters not specifically addressed therein.

The Divisional Court Decision

The central issue to be addressed by the Court was whether or not the zoning by-law intruded within the regulatory scheme established under the *Energy Act* in a manner which was not within the jurisdiction of the City. The Province of Ontario intervened in both the application and the appeal in support of the applicants' position.

In a split decision delivered on November 19, 1991, the Ontario Divisional Court in *Superior Propane Inc. v. York (City)* (1991), 9 M.P.L.R. (2d) 165, 6 O.R. (3d) 117, 86 D.L.R.(4th) 60, 52 O.A.C. 340 [summarized at 1 D.M.P.L. 402] upheld the City of York's by-law. O'Brien J., with O'Driscoll J. concurring, found that the by-law merely enhanced the provincial statute and regulations, and that there was no conflict between the two legislative mechanisms.

The majority decision relied heavily on the ratio which had been set out by Justice Morden of the Ontario Court of Appeal in *Ontario (Attorney General) v. Mississauga (City)* (1981). 15 M.P.L.R. 212, 10 C.E.L.R. 91, 33 O.R. (2d) 395, 124 D.L.R. (3) 385, which required that there be an actual conflict between competing pieces of legislation before one was to be preferred Morden J., quoting existing authorities, had summarized this approach as follows:

> "In my view, if the competing pieces of legislation are intended to advance the same policy and the provision in the statute covers the same ground as the by-law in a way to give rise to the interpretation that the statutory provision is intended '...completely, exhaustively, or exclusively [to express] what [shall be] the law governing the particular conduct ... to which its intention is directed ...' then there is a case of conflict." [15 M.P.L.R. p. 232]

However, Morden J. went on to emphasize that:

> "Where the municipality, acting within its powers, passes more stringent, enhancing legislation than the provisions of a statute, it cannot be said that the two pieces of legislation cover the same ground. There is room for the municipal law to operate." [15 M.P.L.R. p. 233]

This was in line with the earlier Ontario Court of Appeal decision in *Uxbridge (Township) v. Timber Brothers Sand & Gravel Ltd*. (1975), 7 OR. (2d) 484, 55 D.L.R. (3d) 516 [leave to appeal to the Supreme Court of Canada refused (1975), 7 O.R. (2d) 484], in which the provisions of a zoning by-law which imposed higher setback standards on a gravel pit operation than those which would otherwise have applied under the relevant provincial legislation were upheld. Other setback requirements which were less than the provincial standard were severed from the zoning by-law and declared to be invalid. Thus, "enhancement" was held to include by-law provisions which were more restrictive, and was not limited to provisions which were merely complementary.

In the *Mississauga* case, Justice Morden had also referred to the principle of accommodation, developed in areas of federal/provincia1 legislative conflicts, pursuant to which a reasonable effort should be made to reconcile competing pieces of legislation before an otherwise properly enacted by-law is held to be inoperative. Nonetheless, based on the wording of the municipal by-law and its underlying statutory authority (the *Municipal Act*, not the *Planning Act*), it was struck down by the Court.

In his dissenting opinion in *Superior Propane*, Hollingworth J. found that the municipal by-law did not enhance the provincial regulation, but in fact was restrictive and prohibitive and nullified the comprehensive provisions set out by the Province of Ontario for regulating the propane industry.

The applicants appealed the majority finding to the Ontario Court of Appeal.

The Court of Appeal Decision

The Ontario Court of Appeal in a brief, unanimous decision, overturned the Divisional Court ruling and substantially adopted the minority reasoning set out therein. Morden A.C.J., in an oral judgment delivered on behalf of the Court, referred principally to the decision in the *Mississauga*

appeal which he had written 14 years earlier, and concluded that the City of York's by-law was at cross-purposes with the provincial regulatory scheme.

The Scope of Land Use Planning Concerns

In striking down the municipal by-law, the Court of Appeal agreed with the minority position of Hollingworth. J. that, "the basic and predominant purpose of the by-law is one of advancing safety concerns ...and not land use planning." This finding played a key role in the decision, since it meant that the City of York was not acting within its powers under the *Planning Act* when it enacted its by-law. However, with respect to the Court, it is not clear that these two purposes are mutually exclusive, or are necessarily different. At least in theory, land use planning attempts to achieve the orderly structuring of human activity in a manner which should ensure that neighbouring uses are compatible. Presumably, considerations of public safety should play as large a role in this process as other planning concerns such as shadowing or wind creation. In fact, good land use planning demands that such considerations be taken into account, and the holding that a zoning by-law cannot deal with public safety issues construes municipal powers in a very narrow fashion.

Since the City was held not to be operating within the powers delegated to it under the *Planning Act*, the question of whether or not the zoning by-law enhanced the provincial regulatory scheme became moot. However, the Court went on to state that, "... even if one were to assume that the by-law in this proceeding properly relates to land use planning, then there would be no reasonable basis for regarding it as enhancing a law enacted for a different purpose." Although only *obiter*, this portion of the decision seems to contradict the earlier reasoning in *Mississauga*, which had provided that "... the fact that the objective of the by-laws is compatible with that of the statute does not, of itself, prevent a conflict from arising, if they cover the same ground. *Indeed, if the by-laws were legitimately directed at a different objective, this might be some ground for avoiding a conclusion of conflict ..."* (emphasis added) [15 M.P.L.R. pp. 233-4]. This earlier position should be preferred since there is no apparent reason that two laws enacted for different purposes cannot enhance one another, provided that they are each properly enacted within their respective fields.

Resolving Statutory Conflict

The resolution of federal/provincial (or federal/municipal) areas of legislative conflict revolves around the constitutional division of powers and the doctrine of federal paramountcy. However, there is no such division of powers separating provincial regulation and municipal zoning powers, since the underlying source of legislative authority is the same for both. Although a limited doctrine of provincial paramountcy exists, such conflicts must be resolved using a variety of interpretive techniques, including legislative conflict clauses.

The Court of Appeal placed great emphasis on the wording of s. 29 of the *Energy Act*, which provides as follows:

> "This Act and the regulations prevail over any municipal by -law."

As noted by the Court, it is implicit in this section that there must first be a conflict between a municipal by-law and a provision of the Act or regulation before the section becomes operative. The section does not exempt the propane dispensing industry from all municipal by-laws.

What was not noted by the Court is that s. 3(1) of the regulation (as amended by O.Reg. 522/84, s.2) requires that, prior to constructing, altering or adding to a propane filling plant, evidence that the proposed work does not contravene municipal by-laws must be submitted to the provincial Director under the Act. Therefore, the concurrent operation of (and requirement to comply with) municipal by-laws is specifically acknowledged in the very regulation which would otherwise prevail over any such by-law. This would seem to weaken the argument for excluding municipal by-laws which are properly enacted under the *Planning Act*, at least insofar as they compete only with the regulation and not with the *Energy Act* itself, as was the case in this instance.

It should further be noted that the *Planning Act* also has a conflict provision, which provides:

> "71. In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act prevail."

The *Planning Act* is primarily a delegatory Act, in that it establishes powers which are to be exercised by local municipalities. It should follow that municipal zoning by-laws enacted as a proper exercise of that delegated power are afforded the same precedence, otherwise s. 71 is of little effect. If this is the case, then legislative conflict with a zoning by-law cannot be resolved by simply preferring specific to general legislation, since this section establishes precedence over all competing legislation.

Can the Offending By-law Provisions be Severed?

The issue of severability was not raised in any of the reasons for the decision. If an effort is being made to accommodate the co-existence of the municipal by-law, it may be possible to excise only those parts which improperly intrude upon the provincial legislative scheme. Although the City's by-law was passed as a single enactment, it can be (and was in both sets of reasons given by the Divisional Court) broken down into four primary component parts for the purposes of comparing it to the applicable provincial regulation, as follows:

Tank Size: The by-law limited the aggregate size of all tanks on any one property to 10,000 litres. The regulation limited capacity to 19,000 litres where there was more than one tank, and placed no direct limits on a single tank.

Tank Height: The by-law limited tank height to 3.7 metres. The regulation placed no direct limits on tank height.

It is difficult to justify either of these components of the by-law as land "use" provisions, although the same general activity can take on a different character when it is carried out on a large or intensive scale, and at some point may even constitute a different essential use. However, s. 34 of the *Planning Act* also specifically authorizes councils of local municipalities to regulate the height, bulk and size of buildings or structures to be erected or located within the municipality, and zoning regulations limiting height are often enacted for aesthetic purposes. In keeping with the arguments set out herein, it should be possible for municipalities to pass more stringent standards of this type provided that they can be supported as a proper exercise of land use planning powers. In this case, the height restriction may be the most supportable of these two components, since it deals with a matter on which the regulation is silent and is not necessarily motivated solely by issues of public safety.

Setbacks: The by-law required a minimun 30-metre separation between a propane tank and a building, street line of a public highway, or residential district, and a 15-metre separation from a railway right-of-way. The regulation established a sliding setback of between 10 and 100 feet based on tank size, which only applied to buildings, property lines and other tanks.

This component of the by-law both enhances the regulation and creates additional requirements. In the case of a propane dispensing operation, it seems supportable that the advisable setback from a property line depends in large part on what is on the other side of that line. Since the *Energy Act* does not address land use considerations, there should be room for zoning by-laws to operate in at least this respect The specific setback requirements from residential areas and railways can also be characterized as use restrictions which employ a standard distance separation. This method is commonly used as a means of segregating incompatible uses, and recognizes that a use which produces negative local impacts (such as noise, odour, dust or safety concerns) may be able to be permitted if efforts are made to minimize the effects of these negative impacts by, for example, distancing the use from the nearest residential zone. Actual measurements need only be conducted on an application-specific basis using a municipality-wide standard, rather than surveying an entire municipality in advance and delineating the permissible areas. This saves time and money, and allows the by-law to adapt with the changing nature of uses within a municipality.

Screening and Protection: The by-law required screening in the form of landscaping and fencing, and protection in the form of bollards or barriers. The regulation set out six alternative barrier methods with technical specifications.

The portion of the by-law dealing with barricading is redundant and less specific than the provincial regulation, but the requirement for screening is additional to and not in conflict with the regulation (although it is appropriately obtained under municipal site plan control powers).

In summary, at least parts of the by-law would appear to be defensible as valid exercises of the municipal powers established under the *Planning Act*, which either enhance or complement the regulatory scheme established under the *Energy Act*, and which could be severed and allowed to stand.

The British Columbia Decisions

Similar issues were considered by Macdonald J. of the British Columbia Supreme Court in *Propane Gas Assn. of Canada Inc. v. North Vancouver (City)* (1989), 42 M.P.L.R. 29. The municipal by-laws under attack by the Association in this instance completely prohibited the bulk storage of propane within the City's boundaries, and so represented a more restrictive approach to dealing with the perceived problem than had been adopted in York. The City's argument, which was adopted by the Court, was summarized by Macdonald J. as follows:

> "The city's answer to the petitioner's arguments is a simple one. The by-laws in question are amendments to its zoning by-law. Public safety is a relevant consideration in zoning matters. A zoning by-law regulates land use and a municipality has the power to prohibit any particular use in any or all parts of the municipality (see s. 963 of the *Municipal Act*, R.S.B.C. 1979, c. 290). The *Gas Safety Act* deals with how propane installations are to be constructed. It remains to the municipality to determine *where*. The city concedes that the province has

> exhaustively occupied the field of 'how' and that it could not add to ('enhance') those restrictions, but maintains that its zoning authority can co-exist with the provincial scheme; that the province has not occupied the field of land use regulation insofar as facilities for the storage and sale of propane are concerned I have concluded that the city's arguments must prevail ... There is more similarity between the provincial scheme and a building by-law than there is between that scheme and a zoning by-law. A permit for a propane installation issued by the Gas Safety Branch is not dissimilar to a building permit The holder of both must still comply with municipal zoning regulations." (emphasis in original) [42 M.P.L.R. p.32]

The Court distinguished the Ontario Court of Appeal decision in the *Mississauga* case on the basis that the City of Mississauga had passed its conflicting by-law under a provision of Ontario's *Municipal Act*, which duplicated the purpose of the conflicting environmental legislation, whereas North Vancouver's by-law was an exercise of land use control powers and could operate effectively within that sphere with- out conflicting with the competing legislation.

Similarly, in *Pitt River Quarries Ltd v. Dewdney-Alouetre (Regional District)* (1995), 27 M.P.L.R. (2d) 257 [summarized at 3 D.M.P.L. 160] Clancy J. of the British Columbia Supreme Court upheld a zoning by-law which deleted rock crushing as a permitted use in the District on the basis that there was not a direct conflict with the relevant provincial regulation, which had not occupied the field of defining *where* such activity could take place.

These decisions display a greater willingness on the part of British Columbia Courts to allow municipal by-laws to operate together with provincial regulation, even in the face of more severe restriction by the respective by-laws (although it is noteworthy that these more prohibitive zoning by-laws were nonetheless "cleaner" uses of the municipal power to prohibit the use of land).

Conclusions

It must be assumed that the reasoning of the Ontario Court of Appeal in the *Superior Propane* decision does not stand for the proposition that municipalities cannot in any way control the location or character of businesses dispensing propane gas. To hold otherwise would mean that propane stations could be established in any residential zone as-of-right and, although one interpretation of the decision could lead to this result, it would certainly not be a sensible out-come.

One can sympathize with the efforts of the appellants to avoid the creation of a "patchwork quilt" of regulation across the province pertaining to the propane dispensing industry. It seems sensible to place the authority for the regulation of this industry in the hands of a centralized body, which presumably has the expertise necessary to establish province-wide policy, and can effect economies of scale in the formulation and implementation of such guidelines. However, this does not require that propane dispensers be completely exempted from municipal land use control.

Leave is currently being sought by the City of York to appeal the *Superior Propane* decision to the Supreme Court of Canada. If the decision is upheld (or not dealt with) by the Supreme Court, then municipal councils will at best be faced with an "all-or-nothing" decision when dealing with

this or similar types of land use. If it is not possible for a municipality to attempt to ameliorate the perceived negative impacts of the use, councils may choose to err on the side of over-prohibition so that, rather than a use being permitted on the basis of stricter requirements, it may simply not be permitted or be limited to a very narrow range of locations.

The City of York's Council made the pursuit of its appeal conditional on financial contributions being received from other municipalities with similar concerns, in order to assist the City with the high cost of carrying out such action. Given the potential significance of this decision, it is to be hoped that such contributions will be forthcoming. Assuming that these monetary considerations can be overcome, it is then to be hoped that the Supreme Court of Canada will see fit to include this appeal in its heavy docket, in order to instil some national consistency in this area by clarifying the principles which should govern the relation-between municipal by-laws and provincial regulation.