

Charlesfort Developments Ltd. v. Ottawa (City of), 2019 ONSC 4460

In this July 24, 2019 Ontario Superior Court of Justice decision, Justice Sally Gomery addressed the question of whether the City of Ottawa was legally required, as part of a site-specific rezoning process, to advise the developer, Charlesfort Developments Ltd. (Charlesfort), of the risks of developing next to critical municipal infrastructure that was located in an adjacent municipal easement. In this case, the property was being rezoned to permit the development of a 15-storey condominium tower with a 2-storey underground parking garage. The property adjacent to the development site contained an easement in favour of the City of Ottawa, within which a high-pressure water main was located. At the time of rezoning, Charlesfort was under the mistaken belief, based on discussions with the City that the easement contained only a trunk sewer. During the site plan approval process Charlesfort learned that the easement contained both the trunk sewer and a critical water main and as a result, Charlesfort could not carry out the construction of its project as originally conceived.

Ultimately, Charlesfort was successful in the action and was awarded almost \$4.5 million in damages and pre-judgment interest due to the City's negligent misrepresentation regarding the nature of the infrastructure within the easement. Not only is this case notable for the quantum of damages awarded to the developer, it also highlights the risks local governments face when issuing approvals for complex development projects.

Background:

The background facts in the case are relatively straightforward. Prior to 2004, Charlesfort entered into a conditional purchase and sale agreement for the acquisition of

the property in question. One of the subject conditions for the acquisition was the successful rezoning of the property to permit Charlesfort's proposed project. At the time of rezoning, Charlesfort believed, based on discussions with the City, that the easement on the adjacent property contained only a trunk sewer. Notably, the City's Planning Department had received comments from the owner of the adjacent property indicating that the easement contained both a trunk sewer and water main and expressing concerns given the proximity of the proposed construction. Further, there was evidence that City engineers, as part of the interdepartmental referral process, had advised planning staff that a water main was located within the easement. Notwithstanding the receipt of such information, planning staff did not take steps to verify the nature of the infrastructure within the easement, nor did they pass the relevant communications on to Charlesfort for consideration.

The property was eventually rezoned, and Charlesfort proceeded to complete the acquisition. At no point during the rezoning process was the developer advised that the easement contained both a trunk sewer and water main, nor were the risks of developing next to the water main raised. Charlesfort did not learn about the water main until 2007, during the site plan approval application process. At that time, further investigations revealed that the water main was located within a metre of the property, installed 60 years earlier and had never been inspected. The water main was four feet wide, under high pressure, and a critical part of the City's infrastructure - as millions of gallons of water flowed through every hour, feeding into a municipal reservoir which provided water to half a million people in the City of Ottawa, including local hospitals and fire fighters.

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Proceeding with excavation and construction as originally planned was not an option, due to the risk of rupturing of the water main – which would have had catastrophic consequences. Further, the City’s engineering department would not approve the underground parking structure being located within a few feet of the water main. After considering both the short and long term risks, the developer redesigned the garage size and location and made the decision to employ more complex (and expensive) construction methods. Completion of the project was delayed by 2 years and the developer was unable to provide the parking / storage originally marketed to buyers. As a result, the developer faced significant losses stemming from increased costs due to construction changes and delays, in addition to lost revenue and profits.

Charlesfort's Claim:

Charlesfort brought a claim against the City on the basis of negligent misrepresentation, seeking damages for its additional construction costs, lost revenue and lost profits. Charlesfort argued that had it known of the water main prior to waiving its conditions for the purchase of the site, it would have found an alternative site to develop. The City took the position that it had no duty to advise Charlesfort of the water main at the rezoning stage and that the risks of construction next to the water main arose only at the site plan approval stage. The court categorically disagreed with the City’s arguments.

The Court’s analysis of Charlesfort’s claim centered on the following issues:

- whether the City had a duty of care to provide the developer with accurate information about the water main in 2004-2005;
- whether the City’s failure to do so was negligent;
- whether the developer reasonably relied on the information it received from the City;
- and if so, what damages did the developer suffer as a result of this reliance; and
- whether the developer was contributorily negligent.

Justice Sally Gomery held in favour of Charlesfort on all issues. First, the court found that the City had a duty of care to provide the developer with accurate and complete information during the process of rezoning based on their close and direct relationship. Further, it was held that the City undertook to take reasonable care to provide the developer with information relating to municipal infrastructure in the adjacent property, which was materially relevant to the redevelopment of the property. The representations made by the City regarding the easement were negligent because the City failed to take reasonable steps to ensure the information available to them was accurate and was communicated to Charlesfort. Charlesfort relied on the City’s negligent misrepresentation when it waived its conditions to purchase the property and made the decision to continue with construction. Charlesfort’s reliance on the City’s representations was reasonable - as it was found that a developer at that time would not normally investigate the infrastructure of an adjoining property without the City indicating the potential for any problems. Finally, the court found that Charlesfort was not contributorily negligent.

Takeaways:

There are always inherent risks with complex construction projects, both for the developer undertaking the project and the local authority issuing approvals. In making economic investment decisions developers may rely on communications with local government staff members regarding the feasibility of, and risks associated with, their projects, especially where local governments have access to information not available to the developer. In this context, the decisions staff make to communicate and share information with developers during approval processes will likely be characterized as “operational”, rather than “policy” decisions, such that a local government may not be shielded from negligence liability.

To the extent a local government has the legal authority to do so, it should require developers to undertake their own studies and investigations with respect to both site development and the impacts on adjacent properties.

From the developer's perspective, engineers, planners and other specialists should be consulted early and detailed plans and studies should be prepared and reviewed early on in the approval process, such that key risks are identified early, before approvals are issued and significant expenditures are incurred. However, even if developers are required, or choose, to carry out pre-application due diligence with respect to their projects, this does not mean that local governments in possession of information relating to development risks need not communicate such information. This case clearly highlights the opposite.

While a local government's duty to a development applicant will not extend to carrying out feasibility studies for the applicant or identifying every piece of municipal infrastructure on adjacent property, such duty may extend to known health and safety risks arising from existing infrastructure within proximity to the development site, especially where the local government is in unique possession of information relevant to assessing such risks. Further, where local governments do provide information, they may face liability if the information provided is misleading or incorrect.

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Pam Jefcoat & Navneet Ghoman

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

710 - 900 West Hastings Street, Vancouver, BC, V6C 1E5
604.639.3639 | www.civiclegal.ca |  CivicLegal



Pam Jefcoat
604.358.2248
pam@civiclegal.ca

Pam brings over 19 years of combined legal experience in local government and commercial real estate matters with a focus on land use planning, subdivision, rezoning and redevelopment of residential, mixed-use and industrial properties. Pam has worked on numerous large-scale development projects throughout the Province and provides strategic and practical advice on project development, infrastructure financing and transactional matters. Pam also has a Master's Degree in Public Administration and is a seasoned advisor for local governments in all aspects of their legislative authority, including bylaw development, constitutional jurisdiction, conflict of interest and FOIPPA.



Navneet Ghoman
604.358.7014
navneet@civiclegal.ca

Navneet is an associate lawyer of the firm. Prior to joining Civic Legal LLP, Navneet practiced in the Okanagan Valley with a primary focus on real estate law. In addition to her formal education, Navneet has extensive practical experience in business and real estate, as her family owned and operated hotels in the Northeast United States for several decades. Navneet's entrepreneurial upbringing, unique background and viewpoint – having been a consumer of legal services as an owner / developer, allows her to fully understand the client's position and perspective.