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VIA EMAIL

Our File No.: 116044

Kevin Behan
Director of Research
Clean Air Partnership
75 Elizabeth St.
Toronto, ON M5G 1P4

Dear Mr. Behan:

Re: Ontario Regulation 586/06, as amended by O. Reg. 322/12
Ontario Regulation 596/06, as amended by O. Reg. 323/12
Local Improvements on Private Property by Agreement

Overview of Recent Amendments to Ontario Regulation 586/06 – Local Improvements on Private Property by Agreement

In late 2012, Ontario Regulation 586/06, *Local Improvement Charges – Priority Lien Status*, was amended (by O. Reg. 322/12) to permit municipalities to raise the costs of undertaking work on private property and impose special charges by agreement on the lots of consenting property owners. Corresponding amendments were made to Ontario Regulation 596/06 (by O. Reg. 323/12), enacted pursuant to the *City of Toronto Act, 2006*.[1] For the purposes of this letter, both of these regulations shall be collectively referred to as the "Regulation."

The new "private" local improvement charges must be imposed and collected in accordance with the provisions of the Regulation. The intent is to provide a high degree of flexibility for municipalities to design and implement programs to meet local needs. One of the reasons for the amendment to the Regulation was to permit municipalities to finance energy retrofits on private properties and to permit the benefitting owners to pay back such amounts over time, with the amounts being secured through the property tax collection process. The definition of "work" set out in subsection 1(2) of the Regulation was amended to include "constructing energy efficiency works or renewable energy works."

You have asked us to consider the Regulation and the recent amendments and provide our advice to you. We understand that the Clean Air Partnership has convened a working group comprised of several municipalities, local utility companies and other interested parties to work together to understand the implications, program/agreement design and implementation issues related to the recent amendments to the Regulation. We also understand that the Clean Air Partnership and the working group, the Collaboration on

[1] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A.

Home Energy Efficiency Retrofits in Ontario ("CHEERIO") initiative, intend to develop a pilot project on behalf of the Toronto Atmospheric Fund and the participants to test and refine how to implement private local improvement charges and to provide general recommendations and "best practices" to municipalities considering the use of the tools in the Regulation as a mechanism to enable and encourage energy retrofits.

We have reviewed the Regulation, the questions you have provided to us and the working group, and the relevant sections of the *Municipal Act, 2001*[2] (and other legislation as may be applicable) in order to provide our advice which is set out below.

Characterization of Private Local Improvement Charges ("LIC") – Municipal Perspective

The municipality does not possess an ownership stake in the private works, but the LIC amount to be collected from private owners pursuant to an agreement is properly characterized as a debt owed to the municipality by the private owner. The Regulation requires a local improvement roll to be prepared and made publicly available before it is certified.

It is up to each individual municipality to determine if and how a program for financing of private LICs will be structured. If a municipality pursues such a program to undertake work as a local improvement on private property, the primary requirement for compliance contained within the Regulation is that the municipality enter into an agreement with the property owner(s) in accordance with sections 36.2 and 36.4 of the Regulation. There is no barrier contained in the Regulation to the establishment of either an "annual pool" program, where funds are set aside yearly for the purpose of financing private LICs or an "on demand" system, where funding is allocated on an application basis.

Similarly, the form and structure of an agreement with an independent contractor to construct/install the LIC works on private property are not subject to formal requirements. As such, the municipality possess discretion to determine the optimal structure of its agreements and could choose to enter into an agreement with the independent contractor, or it could enter into a joint contract with the property owner and independent contractor, or it could develop an alternative structure.

Regardless of the structure selected for undertaking the work, the participating municipality must ensure that it complies with the procedural requirements of the Regulation for the imposition of the special charge related to private LIC.

Determination and Apportionment of Private Local Improvement Charges

In regard to the apportionment of the cost of the work among specially charged lots benefitting from private LIC work (where there is more than one benefitting property) section 36.2 of the Regulation sets out the basic framework. Subsections 36.2(2) and (3) of the Regulation provide that:

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[2] *Municipal Act, 2001*, S.O. 2001, c. 25.

> 36.2(2) An agreement described in subsection (1) may provide for the apportionment of the cost of the work among the specially charged lots on any basis that the municipality considers appropriate, but the method of apportionment must be authorized under Part XII of the Act.
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> 36.2(3) Despite subsection (2), the method of apportionment provided for in an agreement described in subsection (1) shall not result in special charges that are based on, are in respect of or are computed by reference to the assessment of the specially charged lots as shown on the assessment roll for any year under the *Assessment Act.*

Part XII of the *Municipal Act, 2001*, referred to in subsection 36.2(2) of the Regulation, deals with fees and charges. Therefore, in determining a method of apportionment, municipalities must comply with the provisions set out in section 394 of the *Municipal Act, 2001*, which imposes restrictions on the imposition of fees and charges. The section provides:

> 394. (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,
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> (a) the income of a person, however it is earned or received, except that a municipality or local board may exempt, in whole or in part, any class of persons from all or part of a fee or charge on the basis of inability to pay;
>
> (b) the use, purchase or consumption by a person of property other than property belonging to or under the control of the municipality or local board that passes the by-law;
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> (c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;
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> (d) the benefit received by a person from a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law; or
>
> (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.
>
> (2) Nothing in clause (1) (b) prevents the imposition of a fee or charge that is based on, is in respect of or is computed by reference to the location of the property, the physical characteristics of property, including buildings and structures on the property, or the zoning of property or other land use classification.

The provisions set out above place limitations on the determination of apportionment of a private LIC benefit. There does not appear to be further statutory or regulatory provisions which would place restrictions on the development of eligibility criteria for private LIC

funding. Municipalities should have regard for and comply with any requirements of relevant human rights legislation when developing their eligibility criteria. In addition, municipalities may want to examine eligibility criteria for other types of municipal funding of works on private property, such as through community improvement plan implementation tools like façade and building rehabilitation loans.

Adding Private Local Improvement Charges to the Property Tax Bill

Private LICs are added to property tax bills pursuant to a statutory regime. Subsection 1(3) of the Regulation provides that the charge for a private LIC has priority lien status as described in section 1 of the *Municipal Act, 2001* (and there is a corresponding provision in the *City of Toronto Act, 2006*). Subsections 1(2.1) and (3) of the *Municipal Act, 2001* provide:

> 1(2.1) If, under this or any other Act, an amount is given priority lien status, the amount may be added to the tax roll against the property in respect of which the amount was imposed or against any other property in respect of which the amount was authorized to be added by this or any other Act.
>
> ...
>
> 1(3) If an amount is added to the tax roll in respect of a property under subsection (2.1) or (2.2), that amount, including interest,
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> (a) may be collected in the same manner as taxes on the property;
>
> (b) may be recovered with costs as a debt due to the municipality from the assessed owner of the property at the time the fee or charge was added to the tax roll and from any subsequent owner of the property or any part of it;
>
> (c) is a special lien on the property in the same manner as are taxes under subsection 349 (3); and
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> (d) may be included in the cancellation price under Part XI in the same manner as are taxes on the property.

Once a municipality has entered into agreements, prepared and certified a local improvement roll for private LIC and has enacted a special charges by-law pursuant to section 36.5 and/or 36.14 of the Regulation, it appears that sufficient steps will have been taken to qualify the special charge as having priority lien status as identified in subsection 1(3) of the Regulation and subsections 1(2.1) and (3) of the *Municipal Act, 2001.*

From a practical perspective, the annual amount of the LIC that is due to the municipality appears on the property tax roll and the property tax account for the participating property. The municipality may collect the private LIC in the same manner as property taxes as set out in subsection 1(3) of the *Municipal Act, 2001.*

Positive Covenants Running with the Land

Despite the fact that private LIC have priority lien status and may be collected as property taxes, municipalities may still face issues with regard to enforcing the other provisions contained in agreements with property owners participating in a private LIC program.

The law in Ontario provides that positive covenants contained in a contract relating to land *cannot* bind future owners of that land who are not a party to the original contract. A positive covenant is an obligation that is active in nature, as opposed to being negative or restrictive. An obligation to pay monies is a positive covenant.

The Ontario Court of Appeal considered the common law rule against positive covenants running with the lands in *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123.*[3] This case involved two condominium corporations where their original predecessors in title had entered into a reciprocal agreement that provided for the sharing of costs related to common shared facilities for existing and contemplated future phases of development. The agreement was registered on title and expressly indicated that it would be binding on future owners of the land. Subsequently, one of the condominium corporations refused to pay the costs related to the shared facilities on the basis that its obligation under the agreement was positive and could not run with the land.

The Ontario Court of Appeal conducted an extensive review of the development of the common law rule respecting positive covenants. In finding that the rule continues to be settled law in Ontario, the majority of the Court of Appeal acknowledged that while the Province has not adopted "a comprehensive scheme to deal with covenants affecting freehold land, there are a number of statutory exceptions to the rule that positive covenants do not bind freehold successors in title," including, for example, "the burden on certain positive covenants made in favour of public bodies" which can run with the land.

The Court of Appeal listed a number of statutory exceptions that operate to provide a specific override to the common law rule.[4] The decision was appealed to the Supreme Court of Canada and leave was granted which presented a landmark opportunity to re-visit the application of the common law rule in Canada. However, the parties settled their dispute before the Supreme Court of Canada could adjudicate upon the issue.

The Regulation contains no specific statutory override or exception that would exempt the application of the common law rule for agreements made pursuant to LIC (we believe such an override would need to be statutory in nature). There is a potential workaround which is outlined below.

Accordingly, we believe that amendments to the *Municipal Act, 2001* and the *City of Toronto Act, 2006* would be required in order to legally provide that the agreements

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[3] *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 50 R.P.R. (3d) 1, 58 O.R. (3d) 481 (C.A.).

[4] Specific statutory exemptions included specific provisions of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, and the *Planning Act*, R.S.O. 1990, c. P.13.

between property owners and municipalities could be registered on title and could be enforced against subsequent owners of property with regard to private LIC.

Registration of Agreement on Title

A notice of agreement may be registered on title to lands which has the effect of providing notice to the world of the existence of the agreement.[5] However, the provisions of the agreement while creating a cloud on title, do not necessarily serve to bind the future owner of the land, which is particularly true for any positive obligations (see aforementioned discussion). The simple registration on title of an agreement, even if its contractual terms are clear and there is an enurement clause,[6] will not serve to make the obligations run with the land.

One method of complying with the common law rule where there is no available statutory exception but still ensuring that positive covenants are enforceable against future owners is to require that each subsequent land owner is successively separately bound to the original party to perform, complete or undertake the positive covenant. The creation of a chain of covenants, while administratively cumbersome, will ensure that positive covenants will continue to be enforceable by maintaining privity of contract. A chain of covenants is nothing more than a series of contractual requirements whereby each successive land owner agrees to obtain from their purchaser (successor in title) a covenant to fulfill the obligations under the original agreement and to obtain a similar covenant from their successive assigns. This will generally involve a commitment to enter into an assumption agreement whereby the future owner is assigned the positive obligation from the vendor and agrees to be bound to the covenant with the original enforcing party.

Creating a series of covenants creates the necessary privity of contract to allow the positive covenants to be binding and enforceable against successive owners of the land. This scheme is fraught with risk because if the chain of covenants is broken, the positive obligations are lost and cannot be enforced against the owner of the land. This mechanism is both cumbersome and practically inefficient.

We note that section 81 of the *Land Title Act*[7] applies to registration of by-laws and agreements. That section provides:

> 81. The land registrar may,
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> (a) refuse to accept for registration an instrument,
>
> (i) that is wholly or partly illegible or unsuitable for microfilming, or

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[5] See, for example, s. 71 of *the Lands Titles Act*, R.S.O. 1990, c. L.5 and s. 22 of the *Registry Act*, R.S.O. 1990, c. R.20.

[6] An enurement clause is a provision that stipulates that the benefits or obligations of one or more of the parties to the agreement will be binding on their assigns, heirs, transferees and successors.

[7] *Land Titles Act*, R.S.O. 1990, c. L5.

> (ii) that contains or has attached to it material that does not, in the land registrar's opinion, affect or relate to an interest in land; and
>
> (b) refrain from recording a part of a registered instrument where the part of the instrument does not, in the land registrar's opinion, affect or relate to an interest in land.

If the document is not a transfer/mortgage/easement/lease or other document specifically noted in the *Land Titled Act*, our experience is that it is generally not accepted for registration because it does not relate to an interest in land. The Land Registrar will look for the statutory authority for the registration of the document such as through section 41 of the *Planning Act* for site plan control agreements or section 51 of the *Planning Act* for subdivision agreements or section 34 of the *Municipal Act, 2001* for road closing by-laws. There is nothing in Ontario Regulation 586/06 which authorizes registration of documents.

Characterization of Private Local Improvement Charges – Property Owner Perspective

Special Considerations for Multi-unit Residential Buildings ("MURB")

There are separate legal considerations that should be reviewed with respect to the application of the LIC in MURB. For the purpose of this analysis, multi-unit residential buildings will be subdivided into two categories: rental units in a building owned by a single entity and a condominium building wherein units are owned separately.

Rental Units in a Building Owned by a Single Entity

The rental building is generally more similar in its nature to previous analyses, as it would be an agreement between the municipality and a single property owner, whereby the property owner could provide the appropriate consent to permit the municipality to undertake the work. As set out in subsection 2(4) of the Regulation, "(n)othing in this Regulation authorizes a municipality to enter and undertake a work as a local improvement on private property without the permission of the owner or other person having the authority to grant such permission." However, a rental property diverges from previous analyses because the building owner would be subject to the *Residential Tenancies Act*.[8] It should be noted that "municipal taxes and charges" are defined under section 2 of the RTA to explicitly exclude "charges for work in the nature of a capital expenditure carried out by a municipality."[9] As such, there are limitations in terms of the property owner's ability to pass on such costs to its tenants, as the only permitted increase under the RTA is an annual guideline increase, which is determined in accordance with section 120. However, exceptions can be made under sections 121 or 126. Under subsection 121(1),

> 121. (1) A landlord and a tenant may agree to increase the rent charged to the tenant for a rental unit above the guideline if,

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[8] *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("RTA").

[9] *Ibid.* at s. 2.

(a) the landlord has carried out or undertakes to carry out a specified capital expenditure in exchange for the rent increase; or

(b) the landlord has provided or undertakes to provide a new or additional service in exchange for the rent increase.[10]

Therefore, the landlord would need to come to an agreement with its tenants to increase the rent charged to undertake this capital expenditure. In many cases, it will be unlikely that the landlord will be able to reach such an agreement, which would result in an inability to recapture its costs from its tenants. Furthermore, section 123 of the RTA and section 16 of Regulation 516/16,[11] provide a definition of additional services which is unlikely to encapsulate the desired work. As a result, unless an agreement can be reached with all tenants to recapture the landlord's costs, it is unlikely to be successful under this approach.

Under section 126 of the RTA, a landlord may apply to the Landlord and Tenant Board for an order permitting the rent charged to be increased by more than the guideline for any or all of the rental units in a residential complex. It may be possible that the LIC would qualify for an above guideline increase, as an eligible capital expenditure incurred respecting the residential complex or one or more of the rental units in it. Clause 126(7)(e) of the RTA indicates that a capital expenditure is an eligible capital expenditure if it promotes energy or water conservation. Furthermore, clause 126(8)(b) of the RTA provides that a capital expenditure for a system or thing which did not require major repair or replacement is an eligible capital expenditure if it promotes energy or water conservation. While it may be possible for a landlord to receive an above guideline increase, it will be according to the order made by the Landlord and Tenant Board, which necessarily incorporates some risk, as well as additional costs to prepare a proper application.

Therefore, a rental building is limited in its ability to spread the cost to tenants, due to the limits imposed upon guideline increases. It may be possible for the landlord to receive an above guideline increase through an application made to the Landlord and Tenant Board, but there would be a significant financial risk for the landlord undertaking such an approach.

With respect to how private LIC would be treated in terms of a commercial building's tax filings, we note that municipalities should advise building owners to obtain their own independent financial, tax and legal advice in this regard as each owners' tax situation will be unique. That being said, it is a general proposition that building owners may be able to deduct interest paid on private LIC if such interest is characterized as interest on a loan and it is clearly identifiable as such. Municipalities that are considering a private LIC program for multi-residential buildings will want to obtain specific legal and financial advice with regard to the structure of the LIC funding arrangements and payments and should engage in discussions with the multi-residential owners in their communities prior to finalizing the structure of the private LIC agreements and payment structures.

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[10] *Ibid.* at s. 121(1).

[11] O. Reg. 516/06 at s. 16.

Condominium Building where Units are Separately Owned

In the context of a condominium, it may be possible to enter into an agreement with each condominium owner separately, or with the condominium corporation itself, depending on the nature of the improvement. While unlikely, it is possible that a municipality could enter into an agreement with a single unit owner to undertake work and impose a local improvement charge upon that owner's specific property. However, there is a much greater chance that the energy efficient retrofits of private property enabled by the amendment to the regulation will be realized in the context of the common elements or assets of the building, and the municipality would need to be mindful of the *Condominium Act, 1998*.[12] Under subsection 97(3) of the *Condominium Act, 1998*, this work could be undertaken by the corporation on notice to the condominium owners where such notice provided meets the requirements of this subsection. Alternatively, if the work meets the definition of a substantial change under subsection 97(6) of the *Condominium Act, 1998*, then the corporation must hold a meeting duly called for the purpose of undertaking this work. At this meeting, the corporation must receive the support of at least 66 2/3% of the units of the corporation voting in favour of approving the work. If the corporation receives sufficient support at such a meeting, then it would be empowered to enter into the necessary agreements on behalf of its unit owners.

Summary Conclusion

In summary, and from the perspective of a property owner, a private LIC is a debt owed to the municipality. It is an amount owned that has priority lien status and may be collected like property taxes. Ultimately, the amounts added to the tax roll and given priority lien status become part of the cancellation price/minimum bid should the property fall into arrears. A municipality could ultimately collect these amounts through a tax sale conducted pursuant to the *Municipal Act, 2001*. The priority lien status allows the municipality to recover the private LIC. As noted above, there are limitations on the registration of private LIC agreements on title and the ability to bind future owners for anything other than the charges themselves. It may be difficult for municipalities to enforce provisions other than those for payment of private LIC that are set out in the required agreements between municipalities and property owners as against future owners of the impacted properties.

Financing Options and Limitations – How do Municipalities Fund Private Local Improvement Charges?

A municipality entering into a private LIC agreement has a multitude of choices with regard to financing the private LIC works. The works can be funded from municipal budgets (operating and/or capital) or from municipal reserves (and reserve funds if available). Municipalities can also consider options for financing of private LIC works that are repayable beyond the current year's budget. However, in considering options that involve incurring debt or seeking third party financing, municipalities must consider and comply with the specific rules on municipal debt and investment.

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[12] *Condominium Act, 1998*, S.O. 1998, c. 19.

All municipalities, except for the City of Toronto, must comply with specific statutory provisions for municipal debt and investment. Clauses 17(1)(e) and (f) of the *Municipal Act, 2001* make it very clear that all municipal authority to incur or sell debt is governed entirely by Part XIII of the *Municipal Act, 2001*. Municipalities may not rely on broad, general authority contained in sections 8 through 11 of the *Municipal Act, 2001* in relation to these activities.

The *City of Toronto Act, 2006* also contains debt and investment provisions, however, they vary significantly from those contained in the *Municipal Act, 2001*. The authorities for debt and investment are set out in Part VIII of the *City of Toronto Act, 2006* and are to be carried out in accordance with Ontario Regulation 610/06

Loan-loss Reserves

Whether loan-loss reserves would be required for a municipality will likely require the guidance of the financial department of a municipality, as the municipality's action will need to be guided by its risk tolerance and financial policies.

In general, and without such knowledge, it is likely that a loan-loss reserve for this type of financing would not be required where a local improvement charge is enacted and enjoys priority lien status. The municipality is thereby permitted to apply a special charge to the property in accordance with section 33 of the Regulation. Special charges will only constitute an encumbrance on the land where they are unpaid and in arrears, and local improvement charges in arrears constitute encumbrances only for the specific purposes set out in section 33. In short, the municipality is in a position where it should be able to recover its funds. Where special charges are paid, the municipality will not be in a position of loss. Where special charges are not paid, the municipality is permitted to enforce against the property owner's obligations and collect the amounts that it has advanced. As special charges for a local improvement are a priority lien, the municipality has a right to compensation from the property owner prior to other creditors. Therefore, the municipality should receive full compensation for its financing and is unlikely to require a loan-loss reserve.

However, as aforementioned, a municipality may choose to create a loan-loss reserve out of an abundance of caution. In such a case, the municipality would need to determine and allocate an appropriate reserve of funds to be set aside in order to mitigate any potential loss.

Minimizing Municipal Liability

Flexibility with Respect to Contractor Arrangements

The Regulation does not appear to provide specific guidance with respect to contractor arrangements entered into by a municipality. Where a regulation is silent on these issues, one must turn to statutes and the common law for guidance. In this case, it would appear that the municipality is provided with flexibility with respect to its arrangements since, as will be discussed below, it is required to "undertake" this work.

By and large, municipal corporations are subject to the same laws of contract as are private individuals and corporations. The primary difference is that municipalities are

creatures of statute and, as such, their contractual powers are strictly limited and circumscribed by legislation.[13]

The scope of these powers were expanded in the *Municipal Act, 2001*, which granted general "natural person powers" to municipalities. Section 9 of the *Municipal Act, 2001*, which is to be read in conjunction with section 8, provides that "a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act." These natural person powers are essentially the equivalent of the powers of a business corporation, whereby municipalities may: (a) enter into contracts; (b) purchase own and dispose of property; (c) hire, compensate and dismiss employees; (d) delegate responsibilities; (e) provide and charge for goods and services; and (f) dispose of assets.[14]

Broad authority has also been provided under the *City of Toronto Act, 2006* to permit the city to enter into contracts. Subsection 8(1) generally empowers Toronto to provide "any service or thing that the City considers to be necessary or desirable for the public." As a result, Toronto has been provided with a potentially far-reaching authority that may extend beyond the traditional spheres of municipal jurisdiction.[15]

Generally, the legality of a municipal contract depends on: (i) whether the municipality could legally enter into the contract; (ii) whether the municipality's representative possessed the request authority to enter into the contract; and (iii) compliance with statutory formalities.[16] Therefore, the ability of the municipality to enter into contracts with contractors will be case specific, and the flexibility possessed by the municipality when entering into such contracts will depend upon its enabling by-laws and statutory grants of powers.

Subsection 2(3) of the Regulation provides that "...this Regulation applies to undertaking the private work as a local improvement as if the municipality were undertaking its own work." Work is defined as "a capital work" in subsection 1(1) of the Regulation. Defining the requirement that the municipality "undertake" such work is critical to the determination as to whether the municipality is required to be a party to any contracts with an independent contractor and private home owner, or whether it is possible for the creation of a funding mechanism whereby the municipality acts in a different capacity. As such, it is useful to turn to a legal resource defining the requirement for an undertaking with respect to local works:

> Section 92(10) of the Constitution Act, 1867 provides that "Local Works and Undertakings" of certain types fall under the federal legislative competence. "Works" are "physical things, not services" – *Montreal (City) v. Montreal Street Railway* (1912), 1 D.L.R. 681 at p. 685, [1912] A.C. 333,

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[13] David G. Boghosian and J. Murray Davison, Q.C., *The Law of Municipal Liability in Canada*, (Markham: LexisNexis Canada, 1999) at §2.182 ("Boghosian").

[14] John Mascarin and Christopher J. Williams, *Ontario Municipal Act & Commentary, 2013 Edition*, (Markham: LexisNexis Canada, Inc., 2012) at 24.

[15] *Ibid.* at 25.

[16] Boghosian, *supra* note 12 at §2.182.

> 13 C.R.C. 541 (J.C.P.C.). An "undertaking" is "not a physical thing but is an arrangement under which...physical things are used." (in *Quebec (Attorney General) v. Canada (Attorney General)*, [1932] 2 D.L.R. 81 at p. 85, [1932] A.C. 304, [1932] 1 W.W.R. 563 (J.C.P.C.). As was stated by I.H. Fraser in "some Comments on Subsection 92(1) of the Constitution Act, 1867" (1984, 29 McGill L.J. 577 at p. 567: "an undertaking has no concrete existence in the tangible world, but exists only as a construction of the legal imagination. While a work is a part of the physical world around us, an undertaking is nothing but a product of legal theory."[17]

This definition indicates than an undertaking is simply a legal arrangement in order to create the work. Such a definition would provide flexibility in terms of the format of the arrangements that the municipality can develop in order to undertake the work as a local improvement. Section 36.2 of the Regulation provides that a municipality is permitted to undertake work as a local improvement on private property only where it receives the consent of the property owner(s). The requirements for this agreement are set out in sections 36.2 and 36.4 of the Regulation. Therefore, given that a municipality's contractual powers are strictly limited and circumscribed by legislation, the Regulation provides authority for the municipality to enter into agreements to undertake such work.

In reviewing the Regulation, and in response to your inquiries, we advise that there is no requirement that the municipality: (a) provide contractor guidelines; (b) require the use of licensed and insured contractors; (c) provide suggested contractors; or (d) require the use of pre-approved contractors. Alternatively, there are no restrictions set out in the Regulation that prevent a municipality from developing selection controls to meet the public policy interest of ensuring the successful completion of such work at the expected level of quality and to limit liability (as will be discussed in much greater detail in the response below to your second question).

Generally, where the municipality is party to the agreement with the contractor it would not be necessary to provide explicit guidelines, as the municipality would have the ability to determine which contractors it would select to undertake the work. However, each municipality will have its own purchasing and procurement requirements, and care and consideration must be given when developing a regime to govern contractor arrangements for local improvement charges on private property.

It would appear to be possible under the legislation where the municipality would not pay the contractors directly, but would provide the funds directly to the homeowner earmarked for the purposes of the work as a local improvement on private property. However, a municipality should use an abundance of caution when entering into such an arrangement due to the law of agency. In effect, such an arrangement could lead to a principal-agent relationship whereby the municipality would be ultimately liable for the work performed by the contractor, even though it was not a party to the agreement. An arrangement whereby a third-party institution provides the funds to a client would also appear to be possible under the Regulation, but would be subject to the same concern.

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[17] John D. Gardner and Karen M. Gardner, eds., *Sanagan's Encyclopedia of Words and Phrases Legal Maxims Canada*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2005) at U-23.

Each municipality should review its procurement policies to ensure that any programs established to undertake such work are in compliance with its procedures. Each municipality should also review any agreement with an independent contractor on a case-by-case basis to ensure that it will not place them in breach of their statutory and contractual obligations, for example, ICI Labour Trade agreement, fair wage obligations, and the *Construction Lien Act*, among others.

Preliminary Contractor-City-Participant Work Flow Models

This section will seek to directly address the questions that were provided by the CHEERIO legal working group with respect to the creation and delivery of the pilot project to participants. This section will first review the municipality's ownership stake in the property. It will also review the participant-managed work flow, wherein the property owner is responsible for the implementation of the energy efficient retrofits on its private property. This is subdivided, in accordance with the working group's outline, into a first stream focused upon a single property owner, and a second stream that is focused upon MURBs. Some of the questions overlap between these two streams and are addressed within the first discussion. Finally, a turnkey approach will be analyzed wherein the municipality would be responsible for managing the agreement with the independent contractor and participants would simply apply.

Municipality does not Possess an Ownership Interest in the Property

It is unlikely that a municipality itself would have an ownership interest in privately-owned property. In undertaking the local improvement by agreement, a municipality has not entered into any agreements to acquire a legal or beneficial interest in the property itself, but has received a statute-imposed interest in the form of the local improvement by agreement, and the resulting imposition of a by-law and special charge. This differs from an actual interest in the property itself, and it should be noted that there is no change to the ownership interest provided upon the property roles. All that is provided by the Regulation is that a local improvement by-law and special charge may be imposed by agreement, which cannot encumber the property in a form other than that of a priority lien. Therefore, neither the agreement for funding contemplated under the Regulation, nor does any other aspect of the Regulation appear to provide an ownership interest in the local property to the city when undertaking this work.

Participant-Managed Work Flow

Fulfillment of the City "Undertaking" the Work

There is no clear bright-line test for what it means for a municipality to undertake a work, which will require that each approach used in a municipal program be evaluated upon its own merits. As was stated previously, an "undertaking" is "not a physical thing but is an arrangement under which...physical things are used": *Quebec (Attorney General) v. Canada (Attorney General)*.[18] The question in terms of a "Participant-Managed Work Flow", is concerned with the quantum of work that must be assumed by the municipality in order to adequately "undertake the work." An undertaking in this context is a novel issue

[18] *Quebec (Attorney General) v. Canada (Attorney General)*, [1932] 2 D.L.R. 81 at 85.

that has arisen due to the expansion of the Regulation to include private property, and a recognition that the municipality may not perform the work directly.

Since this is a new area of the law, there is no established jurisprudence that can provide clarity in terms of what will constitute an undertaking. In such circumstances, it is useful to turn to how the courts have previously defined an undertaking and the requirements for such an undertaking.

As was previously discussed, in *Quebec (Attorney General) v. Canada (Attorney General),* which sought to respond to a constitutional question regarding "Local Works and Undertakings" under subsection 92(10) of the *Constitution Act, 1867*, an "undertaking" was defined to be "not a physical thing but is an arrangement under which...physical things are used."

In considering an undertaking in the context of labour and employment law, an undertaking has been defined by the Supreme Court of Canada as follows:

> ... I adopt the definition of an undertaking proposed by Judge Lesage in ... *Mode Amazone v. Comité conjoint de Montréal de l'Union internationale des ouvriers du vétement pour dames* [1983] T.T. 227 at 231:
>
> (Translation) The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical, or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exist: in other words, when the undertaking may be described as a going concern. In [*Barnes Security Service Ltd. v. A.I.M.*, Local 2235 [1972] T.T. 1], Judge René Beaudry, as he then was, expressed exactly the same idea when he stated that the undertaking consists of "everything used to implement the employer's ideas."[19]

Additionally, the judiciary in Ontario has taken the following approach to the definition of undertaking in the context of labour and employment law:

> ... in *Charmaine's Janitorial Services*, [1988] O.L.R.B. Rep. Sept 871
> ...
> Just as "business" and "undertaking" are neither conceptually nor in fact synonymous, the definition of "part" of an undertaking cannot be the same as that of "part" of a "business" but must take into account the different ways in which government carries out its functions and in which it acts as

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[19] *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298* (1988), 35 Admin. L.R. 153, [1988] S.C.J. No. 101, 1988 CarswellQue 148, 1988 CarswellQue 125, EYB 1988-67863, [1988] 2 S.C.R. 1048, 24 Q.A.C. 244, 89 C.L.L.C. 14,045, 95 N.R. 161 (S.C.C.) at para. 174 the court per Beetz J.).

> an employer. As "undertaking" is broader than "business", so may "part" of an undertaking be broader than "part" of a business.
>
> ...
>
> A program or project may be comprised of several distinct functions which can be severed but which do not constitute anything resembling a microcosm of the whole.[20]

As can be seen from these judicial definitions of an undertaking, the term is often understood to be a broad concept that can be comprised of numerous components. It is commonly accepted to be an arrangement, or a provision of specific services, rather than the actual execution of the complete work itself. Therefore, while there is no established jurisprudence in this area to provide a definitive guide as to what is the minimum requirement for a municipality to be "undertaking" a work, these judicial definitions can be used as guidance when developing an energy efficient retrofitting program.

Contractor and Participant Eligibility

The contractor and participant eligibility criteria provided by the working group would appear to be sufficient from a legal perspective. Municipalities should seek counsel from a legal representative before commencing such a program and any modifications desired by a municipality should be examined by legal counsel on a case-by-case basis. It should be noted that where an independent contractor and the property owner enter into a direct agreement for the energy efficient retrofitting program, the independent contractor would bear the liability for any damages to the private property, in accordance to the contractual agreement.

However, as the municipality is providing criteria for eligible contractors, it should seek to minimize two potential areas of liability as a result of this inclusion. First, it will be important to determine who will be providing the half-day program of training to the contractors. If the municipality is involved in providing such assurances of the capabilities of the independent contractors to property owners, it may be exposing itself to additional liability as a result of such a determination. Second, it is imperative that the municipality ensure that the requisite level of insurance is provided by the independent contractors on a case-by-case basis to ensure the adequate coverage of potential liabilities for each property.

Responsibility for Payment and Quality of the Work

The municipality could structure the agreement with the owner such that the municipality would not be responsible for participants' failure (or refusal) to pay the contractor. In this case, where the contractor has directly entered into an agreement with the property owner, contract law would apply and the contractor would be able to seek a remedy directly from the home owner. However, a consideration for the municipality is whether the law of agency will apply in this situation. The application of the law of agency will be determined by the flexibility of the program implemented by the municipality. As it is likely

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[20] *O.P.S.E.U. v. Ontario (Ministry of Natural Resources)* (1989), 1989 CarswellOnt 1158, 3 C.L.R.B.R. (2d) 161, [1989] O.L.R.B. Rep. 714 (Ont. L.R.B.) at para. 50 Howe (Vice-Chair), Armstrong (Member).

that municipalities will modify the pilot project to meet their particular procurement requirements, this analysis is broad in its scope.

The law of agency will apply to make a municipality and a contractor parties to an agreement where it can be said that the home owner had little or no discretion in the use of funds provided. In other words, where it can be said that the home owner is acting as the agent of the municipality to improve its energy efficiency, the municipality will be bound by the agreement between the home owner and the contractor. There are certain issues that will be reviewed for the law of agency, including the flexibility and discretion provided to the home owner in its ability to disburse the funds. In a program where disbursements have been specifically allocated, it may be possible for a court to hold that the property holder was acting as the agent of the municipality and impose liability upon the municipality for the failure to pay the independent contractor. However, even if the municipality is to be held by the courts to be in such a relationship, it is likely to be indemnified by the home owner through the imposition of the special charge, which requires that the property owner repay such funds to the municipality on an ongoing basis, collected through the property tax system.

The municipality would also need to develop a policy for the program for when property owners impede contractors' activities in a manner harmful to the contractor. Where such interference occurs, it may cause a breakdown of the contractual relationship between the property owner and the independent contractor, as well as cost and project deadline overruns. These are undesirable outcomes for an energy efficient retrofitting program.

In analyzing the proposed project workflow, payment to the independent contractor would not take place until the work is completed. As such, the question arises as to whether the municipality is responsible for any project that has not fulfilled the requirements of the program. The Regulation appears to provide a remedy for such a question under subsection 36.2(5). This clause provides that the agreement signed by the municipality and the owners of all the lots which would be specially charged must include an estimated cost and lifetime of the work, as well as the "manner in which a cost over-run or under run is to be dealt with, if the actual cost of work differs from the estimated cost of the work." Therefore, it would be wise for the municipality to insert language into its agreements with property owners to mitigate such issues. The municipality should insert language to both address the manner in which the interference of the property owner would: (a) cause a cost over-run; and (b) lead to a breakdown in the relationship with the independent contractor, leading to a cost under-run, as the project is abandoned before it is completed. This will permit the municipality to minimize its financial risk and ensure that the property owner is aware that it will assume any costs for impeding with the contractors' activities in a manner harmful to the contractor.

An additional issue to be reviewed by the CHEERIO working group, with respect to the issue reviewed above, is the allocation of costs and risks with respect to a project when a municipality has not yet reached an agreement with the property owner contemplated by sections 36.2 and 36.4 of the Regulation. In the preliminary models provided, an application is completed by the participant at the first step, yet it does not enter into an agreement with the municipality until the fifth step. However, there are costs in the initial steps and the allocation of risk must be addressed even at this early stage. It may be useful for the municipality to allocate this risk in its program design by clearly requiring that the property owner be responsible for all costs and agreements related to the: (a)

administrative costs for the municipality to administer the energy efficient retrofitting program; (b) initial title search of the municipality; (c) Certified Energy Advisor's ("CEA") energy evaluation; and (d) preliminary visits by the contractors to prepare quotes.

It is important to establish that there is no requirement for the municipality to enter into an agreement with the property owner following these initial steps. While these costs may potentially deter individuals who cannot afford these initial expenses, it is worthwhile to note that, should the work for the energy efficient retrofits progress, these costs can likely be included within the funding for the work advanced by the municipality, as section 36.3 of the Regulation provides that either "engineering expenses" and "reasonable administrative costs" may be included within the "cost of a work under this Part."

Completion of Work

Finally, in terms of the preferred approach used for the municipality in terms of selecting between an approach that: (a) verifies that the work be done; or (b) assesses the actual quality of the work, will, as for the loan-loss reserves, depend upon the risk tolerance of the municipality against its desire to ensure that the program is implemented as desired. An approach that assesses the actual quality of the work would provide a higher level of liability than one that simply confirms that the work has been completed, but would also provide assurances to the municipality and its partners that the project is actually generating the desired energy efficient retrofitting goals. As such, it will need to be determined on a case-by-case basis, in accordance with the municipality's appetite for risk against its desire for oversight to ensure proper compliance with the program.

Multi-Unit Residential Building, Participant-Managed Work Flow

Given that the approach for the MURBs that was provided explicitly states that it will use a "Participant-Managed Work Flow", and that it is not anticipated that there will be a "city-managed workflow" for MURBs, the analysis and liability implications mirror that of the analysis above. There are additional legal issues that arise that are unique to a privately-owned MURB which were not discussed previously under "Characterization of Private Local Improvement Charges – Property Owner Perspective."

These issues arise as a result of section 8 of O. Reg. 516/06, made under the RTA. This section requires notice of capital improvements that are carried out in a residential complex, and if such capital improvements are undertaken without notice to the tenants, then tenants can apply to the Landlord and Tenant Board for a rent abatement. The general approach used by the Landlord and Tenant Board in determining whether a rent abatement is justified as a result of the landlord's interference of the tenant's reasonable enjoyment of the unit or residential complex, is provided in subsection 8(3), which provides:

> 8 (3) In making a determination described in subsection (2),
>
> (a) the Board shall consider the effect of the carrying out of the work on the use of the rental unit or residential complex by the tenant or former tenant, and by members of the household of the tenant or former tenant; and

(b) the Board shall not determine that an interference was substantial unless the carrying out of the work constituted an interference that was unreasonable in the circumstances with the use and enjoyment of the rental unit or residential complex by the tenant or former tenant, or by a member of the household of the tenant or former tenant.

Subsection 8(4) of O. Reg. 516/06 identifies the conditions that a landlord must satisfy to ensure that the Landlord and Tenant Board shall not order an abatement of rent. The municipality should minimize its potential liability, as well as ensuring goodwill for the program, by: (a) informing property owners as to their liabilities under the RTA and O. Reg. 516/06; and (b) requiring that MURB property owners certify compliance with the RTA and O. Reg. 516/06 when entering into the local improvement agreement.

City Managed Work Flow (Turn Key)

Fulfillment of the City "undertaking" the works

Where the municipality is an active participant with the work and is a party to the agreement with the contractor, it would meet the criteria to be involved in undertaking a work. For the purposes of the following analyses, it is assumed that the municipality will be contracting with an independent contractor, as it will otherwise be directly managing the work and would be directly liable for its actions.

Contractor and Participant Eligibility

The contractor and participant eligibility criteria provided by the working group would appear to be sufficient from a legal perspective. However, in reviewing the pilot project outline, there are two issues that will need to be resolved by the individual municipalities in order to successfully implement this program. First, the municipality should seek counsel from a legal representative before commencing the proposed RFQ process in order to determine the optimal approach for establishing its agreements with the independent contractors, as well as establishing its approach to the management of the relationship(s) with contractor(s) that succeed in the RFQ progress. It is our opinion that in managing the contractor relationship, the municipality should clearly provide that there are no guarantees as to the volume of work from the municipality for those qualified by the RFQ process. Second, the municipality will need to ascertain its method of payment for the energy efficient retrofit projects, as the proposed pilot project currently assumed that work will be done on a predetermined "pricing under an existing contract with the city." As such, it will likely be useful for the municipality to establish a schedule of fees for the various types of work in order to provide such guidance to contractors.

Responsibility for Payment and Quality of the Work

Where the municipality itself is a party to the contract with the independent contractor, it will be responsible for ensuring payment. However, it is possible for the municipality to mitigate its obligations with respect to independent contractor arrangements. The Regulation does not appear to provide specific guidance with respect to contractor arrangements entered into by a municipality. Where a regulation is silent on these issues, one must turn to statutes and the common law for guidance.

The general provision limiting municipal liability in Ontario is set out in section 448 of the *Municipal Act, 2001*:

> 448. (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.
>
> (2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent.

An identical provision is contained in section 391 of the *City of Toronto Act, 2006*. Therefore, the municipality would not be liable for any actions taken in good faith under the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, but the municipality would be liable for torts committed by individuals acting under instructions from a municipality. In the immediate circumstances, the concern for the municipality would be in limiting its exposure with respect to liability for torts of independent contractors.

The *Negligence Act*[21] also alters the common law, setting out [at section 1]:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering lessor damage from such fault or negligence, but as between themselves, in the absence of any contract expressed or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.[22]

The general rule at common law is equally applicable to municipalities as it would be to any other corporation. In such circumstances, an entity that employs an independent contractor is not vicariously liable for damages caused by the negligence of the independent contractor.[23]

Liability may be imposed where the court finds that the work was entrusted to a contractor whom the principal knew or ought to have known was incompetent, or if there was a

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[21] *Negligence Act*, R.S.O. 1990, c. N.1.

[22] *Ibid.* at s. 1.

[23] *Saint John (City) v. Donald*, [1926] S.C.R. 371; *McNeil v. Orillia (Town)*, [1933] O.W.N. 395 at 539 (H.C.); *Little v. Ottawa (City)*, [2004] O.J. No. 1886 (S.C.J.).

failure to adequately supervise the contractor's work in circumstances where it was reasonable to expect that the work would have been supervised.[24]

It will also be important to review the type of improvements that will be constructed on private property. The courts have held that where the work to be done is inherently dangerous or hazardous, the person employing an independent contractor remains equally liable with the independent contractor if the work is performed negligently, on the basis that the employer has an independent duty to ensure that the work is performed in a reasonable manner.[25]

In order to protect itself, a municipality should insert language into any contract with a contractor to ensure that it is the beneficiary or should include hold harmless clauses and contractual indemnification provisions. Such clauses are often included in agreements with independent contractors for the construction of public works and in rental agreements for public facilities.[26] In interpreting such clauses, where there has been a finding of liability on the part of a municipality seeking to rely on an indemnity clause, the courts will look to whether the municipality's negligence was a proximate cause of the plaintiff's damages.[27] Where the negligence was not a proximate cause of the plaintiff's damages, the municipality will be entitled to rely upon an indemnity clause. Even where the courts find that the negligence on the part of the municipality was a proximate cause of the plaintiff's damages, the courts will proceed to determine whether the indemnity agreement should nevertheless apply. The leading case for such a determination is *Canada Steamship Lines v. The King*.[28] The Privy Council adopted the following test:

> 1. If the clause contains language which expressly exempts the person in whose favour it is made...from the consequences of the negligence of his own servants, effect must be given to that provision...
>
> 2. If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the [party seeking the indemnity].
>
> 3. If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence...".[29]

This test was expanded upon in *Fenn v. Peterborough (City)*,[30] where the court held:

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[24] *Green v. Fibreglass Ltd.*, [1958] 2. Q.B. 245.

[25] Boghosian, *supra* note 1 at §2.218.

[26] *Ibid.* at §2.220.

[27] *Ibid.* at §2.221.

[28] *Canada Steamship Lines v. The King*, [1952] 2 D.L.R. 786 (P.C.).

[29] *Ibid.* at 796.

[30] *Fenn v. Peterborough (City)* (1979), 104 D.L.R. (3d) 175 (Ont. C.A.); aff'd (1981), 129 D.L.R. (3d) 507 (S.C.C.).

> ...[T]his clause does not state in clear and unambiguous language that [the third party defendant] is to indemnify the City against the results of the City's own negligence or of negligence for which it is responsible in law. Without such clear language, an indemnity clause ought not be construed as conferring a right of indemnity for loss occasioned by one's own negligence... We think the same rule applies to negligence of another for the results of which one is in law responsible.[31]

The jurisprudence on this topic seeks to determine whether there has been negligence on the part of the municipality and whether its negligence is independent of the third party who is potentially liable. Where the municipality's negligence is merely one of omission, such as failing to adequately supervise an independent contractor, failing to detect and correct the contractor's mistakes, or approving the contractor's substandard work, the municipality's negligence will not disentitle it from relying on a hold harmless or indemnity provisions in its favour.[32] Alternatively, where a negligent act of the municipality contributed to the plaintiff's loss independently of the third party's negligence, the municipality will not be permitted to transfer liability onto the third party by virtue of an indemnity and hold harmless clause.[33]

While any claim brought against the municipality by an unsatisfied property owner would be a suboptimal outcome for the pilot project, an indemnity and hold harmless clause will permit a municipality to mitigate its liability with respect to negligence claims resulting from the work undertaken by an independent contractor. While these clauses indemnify the municipality through contractual means, they will also meet property owners' needs by ensuring a right to seek a remedy from the independent contractor for any action that may be brought.

Completion of Work

Where the municipality itself is a party to the contract with the independent contractor, it will be responsible for payment to the contractor upon the completion of the work. As demonstrated above, where a municipality's negligence is merely one of omission, such as failing to adequately supervise an independent contractor, failing to detect and correct the contractor's mistakes, or approving the contractor's substandard work, the

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[31] *Ibid.* at 218.

[32] *Kitchener v. Robe & Clothing Co.*, [1925] S.C.R. 106 at 113; *Toronto (City) v. Lambert* (1916), 54 S.C.R. 200 at 206-207; *Butler v. Grand Trunk Pacific Railway Co. Ltd.*, [1940] 3 D.L.R. 544 at 549; *McFall v. Vancouver Exhibition Association*, [1943] 3 D.L.R. 39 at 41 and 49-50 (B.C. C.A.); *Glintz v. Belleville (City)* (1925), 29 O.W.N. 134 at 135; *Marsh v. Warren Bithulithic Ltd.*, [1987] O.J. No. 66, 48 M.V.R. 124 (H.C.); *Cowichan Valley School District No 79 v. Lloyd's Underwriters, Lloyd's, London*, [2003] B.C.J. No. 1964 (B.C. S.C.).

[33] *Fenn v. Peterborough (City)* (1979), 104 D.L.R. (3d) 175 (Ont. C.A.); aff'd (1981), 129 D.L.R. (3d) 507 (S.C.C.). See also *Sutton v. Dundas (Town)* (1908), 17 O.L.R. 556 (C.A.); *Ottawa (City) v. Ottawa Electric Railway Co.*, [1936] 3 D.L.R. 301 (Ont. C.A.); *Gilbert v. Georgetown (Town)*, [1950] O.W.N. 455 (H.C.); *Gertsen v. Metropolitan Toronto (Municipality) (No. 2)* (1973), 43 D.L.R. (3d) 504 (Ont. H.C.); *Cowichan Valley School District No. 79 v. Lloyd's Underwriters, Lloyd's, London*, [2003] B.C.J. No. 1964 (B.C. S.C.).

municipality's negligence will not disentitle it from relying on a hold harmless or indemnity provisions in its favour.[34] Therefore, where the municipality has included a hold harmless or indemnity provisions within its agreement, it would be possible for the municipality to rely upon an independent contractor's assertion that it has completed the work without concern for additional liability. However, as was discussed in the "Participant-Managed Work Flow" analysis, the municipality may choose to engage in additional oversight to ensure the adequate completion of the task, weighing its appetite for risk (through potentially greater liability in confirming the adequacy of the work) against its desire to ensure compliance with the program.

Mortgage Issues

We appreciate the concerns raised by the Canadian Bankers Association ("CBA") and acknowledge that the proposed private LIC program could put homeowners/borrowers in an unexpected default position under most lenders' standard charge terms for residential mortgages. We appreciate that almost all lenders obtain covenants from their borrowers with respect to additional borrowing that could result in charges against the property or that might impair the priority of the lender's charge. We recommend that the private LIC program include a requirement that the borrowers obtain and provide a consent form to their existing lenders holding registered charges against the property in question.

If lender consent is obtained, this documentation could be provided either through correspondence addressed to the municipality or evidence of the registration of an amendment to the registered charge documenting the lender's approval of the financings pursuant to the private LIC program. It is our expectation that the lenders would require information on the particulars of the funds to be provided (total amount and payment terms) and the details of the project to be financed to ensure that the equity available to the lenders will not be impaired by the work carried out under the retrofit program. We also anticipate that the lenders may also seek renewed information on the creditworthiness of their borrowers. We recommend working with the CBA to address their concerns and seeking input on the process for borrowers.

General Issues/Observations

We understand that the Clean Air Partnership and CHEERIO have contemplated the issue of private LIC funding in respect of residential dwellings/properties and not in the context of commercial or industrial properties. We caution, however, that if private LIC funding is ever contemplated for any private parties in the commercial marketplace municipalities must be conscious of section 106 of the *Municipal Act, 2001* (and the complementary provision in the *City of Toronto Act, 2006*). Section 106 prevents municipal corporations from giving an unfair advantage to any manufacturing business or other industrial or commercial enterprise through an anti-bonusing prohibition.[35] There is no fixed definition of manufacturing business, other industrial and commercial enterprise

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[34] *Supra,* see note 30.

[35] Stephen Auerback and John Mascarin, *The Annotated Municipal Act* (loose-leaf), 2d ed (Toronto, Ontario: Carswell, 1990), volume 1 at MA3-252.

within section 106, as such these terms could include multi-residential properties/buildings. The language of the anti-bonusing provisions is very in scope with respect to the entities that may not be bonused.

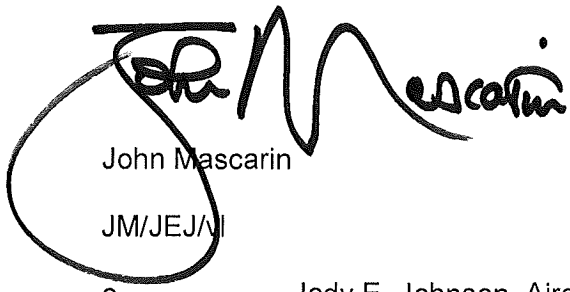
While section 106 prohibits bonusing even if it is done in good faith to advance the interests of the municipality and its citizens, it is to be interpreted restrictively, in the sense of conferring an obvious advantage, so as not to unduly restrict public-private joint ventures.[36] Therefore, agreements with private enterprise that secure a certain public benefit within an arrangement conferring benefits on both sides may not always run afoul of section 106.[37] Given the broad and undefined scope of the prohibition each circumstance may be unique and we advise that any municipality considering extending private LICs to owners of multi-residential properties obtain independent legal advice if they have any concerns in relation to section 106.

We trust the foregoing addresses the issues you have raised. We caution that each municipality considering the implementation of program for local improvements on private property should obtain independent legal and financial advice to ensure that its particular program, information to property owners, agreements and by-laws meets the requirement of the Regulation.

Should you have any questions, please do not hesitate to contact the undersigned.

Yours very truly,

AIRD & BERLIS LLP



John Mascarin

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[36] *1085459 Ontario Ltd. v. Prince Edward County* (2005), 14 M.P.L.R. (4th) 1 at 13, 77 O.R. (3d)114 2005 CarswellOnt 3750 (Ont. S.C.J.)

[37] *Uptown Community Improvement Plan: 2000, Re,* 20 M.P.L.R (3d) 149 at 17, 2001 CarswellOnt 1522 (O.M.B).