YOUNG ANDERSON
BARRISTERS & SOLICITORS

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BULLETIN

APPROVING OFFICER LIABILITY

The B.C. Supreme Court has recently confirmed (*Goy v. Sechelt (District)* 2020 BCSC 1242) that a subdivision approving officer exercising authority under Part 7 of the *Land Title Act* cannot be held liable in negligence for a *bona fide* exercise of discretion in approving a subdivision application. This recent case arose from a subsidence incident that rendered uninhabitable a 28-lot residential subdivision bordering Sechelt Inlet on the Sunshine Coast, after several homes had been built and occupied. Owners of the subdivision lots alleged negligence against numerous parties, including the developer of the subdivision, engineers who reported on geotechnical hazards affecting the land being subdivided, the municipality in whose jurisdiction the subdivision is located, and the municipality's approving officer. The amount of trial time that has been estimated to be required in the case, which the Court described as a 'geotechnical disaster', is 100 days.

Counsel for the approving officer succeeded in a pre-trial application to strike out the claim against the approving officer on two bases: the absence of a duty of care to subdivision lot purchasers, based on well-established negligence law principles, and the statutory immunity of the approving officer as a 'local public officer' under s. 738 of the *Local Government Act*. In regard to negligence law, the Court held that the approving officer owed no duty of care to subdivision lot purchasers or their successors in title because, first of all, there was insufficient proximity between the approving officer and the lot owners to put the approving officer under a duty of care in relation to the performance of the subdivision approval function. Rather, the *Land Title Act* contemplated that an approving officer's focus in handling a subdivision application would be a broad one, 'looking beyond the immediate interests of potential occupants in the potential subdivision'. Secondly, negligence law principles don't operate where overriding policy considerations militate against their application. Here, the existence of a private law duty of care to subdivision lot purchasers was held to be incompatible with the discharge of the approving officer's function as regards the public interest, and could lead to indeterminate approving officer liability given that potential claimants who might come forward in relation to any particular subdivision approval (lot purchasers, their successors in title, owners of adjacent lands) would be 'innumerable'. Each of these policy considerations made it inappropriate to recognize a private law duty of care to the lot purchasers.

The other reason that the claim against the approving officer was defeated on a pre-trial application to the Court was that it was plain and obvious that the approving officer came within the definition of 'local public officer' under s. 738 of the *Local Government Act*, which statutorily bars any action for damages against a local public officer (though the *Act* still permits an action for damages to be brought against the officer's employer, on the theory of vicarious liability). Since the statutory definition of 'local public officer' includes municipal employees and municipal officers, the plaintiffs' claim against the approving officer could not succeed. In reaching this

conclusion the Court relied on case law dealing with the statutory nature of the duties performed by municipal officers, as well as the discretionary nature of their respective powers.

The Court's decision to strike out the claim against the approving officer is currently being appealed.

A second important aspect of this decision is the Court's conclusion, on a pre-trial application by the plaintiffs, that the plaintiffs weren't bound by a 'release' of the municipality contained in a s. 219 covenant that the original developer had granted to the municipality as a condition of subdivision approval. The Court concluded that the legislation doesn't specifically authorize a covenantee to include a release in a s.219 covenant, and that, as a result, a release wouldn't bind owners of the burdened lands beyond the original covenantee. This decision casts doubt on whether a release included in a s. 219 covenant will run with the lands, and the practical result is that the plaintiffs' claims against the municipality, as distinct from their claims against the approving officer, may continue.

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