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RSCs: To ask, or not to ask?

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The redevelopment of brownfields, and in particular the use of the Record of Site Condition in the remediation process, has sparked increased discussion and interest in the relationship between environmental regulation and land use planning. This is not really a new phenomenon—environmental standards and processes have long overlapped with land use planning requirements. Environmental concerns about ownership, planning and responsibility for sewage and water services; approval and planning for waste facilities; and the approval and control of water takings are but some of the areas where this has happened in the past.

The tool known as the Record of Site Condition (RSC) was added to the *Environmental Protection Act* in 2001. This built on existing environmental site assessment practice dating from the mid-1990s, as well as Ministry of the Environment (MOE) guidelines setting out suggested standards that municipalities could use when permitting more sensitive property uses.

Clarifying the definition of RSC

The RSC is a document prescribed by regulation that certifies the state of the environmental condition of a property at a specific time. It is filed on a public registry—the Brownfields Environmental Site Registry (BESR)—by a "qualified person," such as an environmental engineer, and must be based on environmental assessment(s) of the property concerned. The qualified person must certify that at a particular point in time the property meets applicable standards for a stated use (in some cases this can be an individual standard developed for the particular property with MOE concurrence, and is known as a risk assessment). If necessary, a site clean up will have been done prior to filing the RSC, and in some cases ongoing measures will be required to ensure the standards are maintained.

The filing of a RSC is mandatory wherever a property changes to a more environmentally sensitive use. Since categories of property "use" vary from municipality to municipality, use is not defined by municipal zoning. Instead, the environmental legislation defines seven types of property use. For practicality's sake, property use definitions in O. Reg. 153/04 are aligned with occupancy types in the Building Code.

Because RSCs provide certification relating to, and knowledge about, the environmental condition of properties, there can be a useful tool for developers, property owners and municipalities seeking certainty, regardless of whether or not there is a change to more sensitive use as defined by the environmental legislation.

Over 700 Records of Site Condition have been filed on the BESR since O. Reg. 153/04 came into force in October, 2004. It is clear that municipalities, developers and other interested parties have been defining and redefining planning practice in this emerging area, particularly as it relates to brownfield redevelopment.

The RSC as a Planning Tool

While filing a RSC is mandatory prior to a change to a more sensitive use under environmental law, the same is not true of decisions under the *Planning Act*. Despite the absence of explicit requirements in the *Planning Act* allowing municipalities to require the filing of a RSC, municipalities and others have been quick to use them in a planning context beyond those situations (changing to a more sensitive use) required by the *Environmental Protection Act*.

Some of these RSCs would have been filed voluntarily by property owners, perhaps because a RSC provides limited liability protection from environmental orders to the current and future property owners (making RSCs an integral part of the brownfield redevelopment process in Ontario for this reason alone).

RSCs have also been required as a condition of municipal planning approvals. For example, municipalities may decide to use RSCs to ensure environmental concerns are being addressed when they are asked to approve a land use planning application. The information underlying a RSC may assist a municipality in identifying whether or not major infrastructure changes are needed, provide assurance that a development project may be appropriate, or help lead to the conclusion a proposal is simply untenable.

So, when is it appropriate for municipalities to ask for a RSC? Part of this question can be answered by understanding when a RSC *cannot* be requested. A RSC cannot be a requirement for the issuance of a building permit where no change of use is contemplated. The *Environmental Protection Act* and O. Reg. 153/04 describe the types of uses, what uses would be considered "more sensitive," and, therefore, what changes in use would trigger the requirement that a RSC be provided before the issuance of a building permit (deemed "applicable law" under the Building Code Act, 1992). For example, if the applicant wants to modify or expand an existing commercial facility, the need for a building permit does not trigger the need for a RSC.

Similarly, a RSC cannot be required to be provided as a condition of site plan approval. Section 41 of the *Planning Act* identifies a number of conditions that a municipality may require, and a RSC is not one of them. So, for example, if a proponent is proposing an activity that fits within the existing official plan and zoning provisions and requires only site plan approval and a building permit to proceed, a RSC cannot be required unless a change to a more sensitive use (as defined by O.Reg. 153/04) is proposed.

Beyond these situations, municipalities do have the freedom to ask for RSCs as part of other planning approvals, provided there is a reasonable planning rationale for this type of documentation to be required. The Provincial Policy Statement states that contaminated sites *shall be remediated as necessary prior to any activity on the site* [emphasis added]. Therefore it is up to municipalities to determine where in the process this kind of assurance is necessary, and for what use or activity. For example, a municipality might require a RSC as part of the "additional information" for a planning approval. Or, if a municipality has an incentive program in place within a Community Improvement Plan, it may use a RSC as an eligibility criteria in order to tie longer-term tax incentives to the successful remediation of land.

Requiring a RSC in Land Use Planning?

While the RSC process can provide on-site liability benefits to property owners, in some cases it can also represent a significant investment of both time and money. Developers, land owners and financiers frequently acknowledge the value of a municipal host that is knowledgeable about the RSC process and its implications on the bottom line of a project as a critical element in their continued interest in a proposal. There is therefore a real need for every municipality to approach brownfield redevelopment and the requirements of the RSC with a balanced perspective.

As with many emerging issues in land use planning practice, perhaps the best approach to the question of whether or not a RSC should be required is identifying a strategy to deal with that question well before it comes up on a site-specific application. This is a debate that each municipality will inevitably need to resolve for itself. Although potentially contaminated lands can be brought back into productive use, this won't happen

if RSCs are required in situations where most would see them as unnecessary or overly cumbersome requirements that outweigh the potential benefits of a project.

At the same time, municipalities are responsible for having regard for the health and safety of their communities, as directed by the Provincial Policy Statement and the *Planning Act*. In reviewing and approving planning proposals, there will be legitimate reasons and legislative authority where a RSC—with its formalization of environmental site assessments and required certifications by a qualified person—can provide important information to help the municipality decide whether the environmental condition of land is appropriately matched to a community's expectation for that area, even if that information may preclude certain types of economic (re)development altogether.

In determining whether a RSC is the appropriate and necessary planning tool in a given situation, first and foremost municipalities need to be clear about what they are asking for, and why. For example, the municipality may want to ask itself what the RSC will accomplish. Is the situation one in which there is a real possibility that environmental conditions may affect the proposed use of the property? Or is this a situation, such as the installation of a new loading dock or the expansion to a building for an existing use, in which the changes proposed realistically have little or no prospect of environmental issues having an effect on the intended use?

While the environmental conditions of a site will often be a relevant factor to be considered in land use planning decisions, municipalities should be clear about what information the RSC is intended to provide that can aid those decisions, as well as what standards are expected. A RSC filed stating the site is suitable for industrial uses or commercial uses provides different information and involves a much different set of skills, resources and requirements on the part of proponents from one that states the site is suitable for a more sensitive use. Is the municipality seeking to use the RSC solely to certify that a property meets the provincial standard? Can the site meet a site-specific risk-assessed standard? For which proposed use is the proponent being asked to meet the standard, and for what rationale?

Finally, it is important for municipalities to be as clear as possible about when and why the RSC will be required. At what stage of planning approval, for example, is it most appropriate that the RSC be used? Too early, and initiative and investment opportunities may disappear; too late, and environmental risks and challenges may be greater.

In the end, answering these questions, and developing clear internal protocols and transparent official plan policies as to when and where a municipality will be using the RSC as a planning requirement, can go a long way to providing the clarity and certainty necessary to all participants for successful and sustainable brownfield redevelopment.

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