



Subject: Memorandum re: Skate Park
Prepared by: Patricia De Sario, Town Solicitor
Department: Corporate Services
Date: July 16, 2019

In accordance with the Procedure By-law, any Member of Council may request that this Information Report be placed on an upcoming General Committee or Council meeting agenda for discussion.

Executive Summary

The purpose of this report is to release the attached confidential memorandum dated June 6, 2019 prepared by the Town Solicitor in regard to the Skate Park located at the Aurora Family Leisure Complex.

- Council waived solicitor-client privilege in order to permit the release of the confidential memorandum with redactions to comply with legislation.

Background

On June 25, 2019, Council had a closed session meeting to discuss whether to release a confidential memo dated June 6, 2019 prepared by the Town Solicitor in regard to the Skate Park located at the Aurora Family Leisure Complex. The confidential memorandum contained legal advice and therefore, was subject to solicitor-client privilege. Only Council, as the client, is able to waive this privilege.

Analysis

Council waived solicitor-client privilege in order to permit the release of the confidential memorandum with redactions.

The confidential memo was redacted in accordance with the *Municipal Freedom of Information and Protection of Privacy Act* and other legislation.

Advisory Committee Review

None.

Legal Considerations

None.

Financial Implications

None.

Communications Considerations

None.

Link to Strategic Plan

None.

Alternative(s) to the Recommendation

None.

Conclusions

On June 25, 2019, Council waived solicitor-client privilege in order to permit the release of the attached confidential memo with redactions.

Attachments

Attachment 1 – Confidential Memorandum dated June 6, 2019, as redacted

Previous Reports

None.

Pre-submission Review

None.

Approved for Agenda



Doug Nadorozny
Chief Administrative Officer



Town of Aurora
Corporate Services Department
Legal Services

Confidential Memorandum

Date: June 6, 2019
To: Mayor and Members of Council
From: Patricia De Sario, Town Solicitor
Re: Skate Park Issues

Legal Services has been requested to provide a legal opinion as to whether The Corporation of the Town of Aurora (“Town”) may pursue a claim [REDACTED] as a result of deficiencies noted within in the skate park constructed [REDACTED] during the renovations to the Aurora Family Leisure Complex (“AFLC”). In short, any claim the Town may have had [REDACTED] has expired in accordance with the *Limitations Act, 2002*¹ (“Act”), which requires that claims be commenced within two (2) years of discovery of the loss or damage.² The deficiencies in the skate park were discovered in the spring or summer of 2015.

Background

The Town [REDACTED] entered into a contract for the renovation of the AFLC in November 2013. After delays and various issues associated with the project, the renovations were largely completed at the beginning of 2015 and the facility was opened to the public on February 28, 2015. The skate park appears to have been constructed and completed by the end of October 2014.

From the review of various documents pertaining to this matter, it is apparent that following the winter season of 2015, issues were noted and identified by Town Staff. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]:

¹ S.O. 2002, c. 24, Sched. B.

² *Ibid.* s. 4.

- the skate park has been monitored in the spring of 2015;
- significant cracking was observed;
- that the cause of the cracking was believed to be the retention of water underneath the concrete surface;
- that in some areas the water was not draining properly; and
- that work was believed to have been deficient and should be addressed [REDACTED].

Meanwhile, the contractor continued to complete aspects of the project and address construction related issues well into the fall of 2015. The project was signed off by the Town's architect as being completed on February 2, 2016.

[REDACTED]

In the summer of 2018, an external consultant, Greenview Environmental Management Limited, was retained by the Community Services Department (which now includes the Facilities Division) to investigate the matter and provided a report on August 3, 2018 (the "Consulting Report"). This report noted the following causes of the issue:

- an insufficient layer of free-draining aggregate material to avoid the collection of water underneath the concrete slab,
- an insufficient amount of rebar reinforcement installed in the concrete, and
- concrete not meeting the required strength requirements.

The aforementioned causes is likely attributed to deficient construction methods, negligence and/or failure to follow the design requirements [REDACTED].

Analysis

Given the findings of the Consulting Report, there may have been a valid claim for the Town to pursue when the issues were discovered. However, the Act requires claims to be commenced within two (2) years of discovery.³

³ *Ibid.* s. 4.

The Act has some specific provisions on when discovery occurs, namely on the earlier of (a) the day on which the person with the claim first knew of the loss or damage and (b) the day on which a reasonable person ought to have known of the loss or damage. Once the claim is considered to be discovered, a court action must be commenced within two (2) years. If a court action is commenced after the two-year period elapses, it is normally dismissed by the court without any consideration of the merits on a summary motion.

In reviewing the facts related to the skate park issues, it is obvious that the Town knew or ought to have known that loss or damage had occurred no later than the spring of 2015. [REDACTED]

[REDACTED] It has been established through case law that the extent or the type of loss need not be known and that once some damage has occurred and the responsible party identified, the cause of action would accrue.⁴

Although one could argue that the Town did not actually appreciate the true cause of the problem until the Consulting Report was commissioned in 2018, thus not starting the limitation period clock until that time, such an argument is very unlikely to be successful. It has been generally established through case law that a claimant does not need to be certain that the cause was the defendant's act or omission for the limitation period to begin to run. It generally begins to run once the claimant has *prima facie* grounds to infer that acts or omissions of a party, or parties, have caused the damage.⁵

Conclusion

The skate park appears to have suffered cracking and damages from time of its construction in the fall of 2014. Such damages were identified by staff in the winter and spring of 2015 [REDACTED]. The *Limitations Act* of Ontario bars claims that have been discovered for a period of over two years and the facts of this case suggest that the two period with respect to this matter expired at some point in 2017 or early 2018. Consequently, if a claim was commenced [REDACTED] at this time, it would likely be summarily dismissed with costs against the Town.

⁴ *Williams v. Saskatchewan Government Insurance*, [2008] S.J. No. 841, 71 C.C.L.I. (4th) 125 (Sask. Prov. Ct.); *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, [2012] O.J. No. 1099, 2012 ONCA 156 (Ont. C.A.); *Arcari v. Dawson*, [2016] O.J. No. 5069, 2016 ONCA 715 (Ont. C.A.), leave to appeal refused [2016] S.C.C.A. No. 522 (S.C.C.). C f. *Lipson v. Cassels Brock & Blackwell LLP*, [2013] O.J. No. 1195, 2013 ONCA 165 (Ont. C.A.), revg [2011] O.J. No. 5062, 108 O.R. (3d) 681 (Ont. S.C.J.).

⁵ *Gaudet v. Levy*, [1984] O.J. No. 3312, 47 O.R. (2d) 577 at 582 (Ont. H.C.J.); *McSween v. Louis*, [2000] O.J. No. 2076, 187 D.L.R. (4th) 446 (Ont. C.A.); *Lawless v. Anderson*, [2011] O.J. No. 519, 2011 ONCA 102 (Ont. C.A.); *Kowal v. Shyjak*, [2012] O.J. No. 3420, 2012 ONCA 512 (Ont. C.A.); *Longo v. MacLaren Art Centre Inc.*, [2014] O.J. No. 3242, 2014 ONCA 526 (Ont. C.A.); *Buys (appeal by Dale) v. Frank*, [2017] O.J. No. 216, 2017 ONCA 32 (Ont. C.A.).