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Development Issues: Rail Corridor Setbacks and CN Guidelines

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Land use development along railway corridors poses a unique set of challenges as it operates within a multi-jurisdictional framework.

Currently, there are no uniform consultation protocols or land-use appeal mechanisms to ensure consistency in planning of development near railways across the country. However, interested stakeholders have developed various guidelines and memoranda of understanding that set out development standards and "best practices" for planning around railway corridors. These standards usually prescribe minimum setback requirements to minimize noise, vibrations and safety issues for sensitive land uses. These standards offer guidance to regulators looking to minimize land use incompatibility caused by development near railway properties.

The ability to enforce these standards varies across Canada and typically depends on whether the provincial and municipal governments have adopted these guidelines in their land use policies and statutory framework. In Ontario, for example, rail companies are notified of any proposed land use changes affecting lands within 300 metres of a railway line. They also have appeal rights to the Ontario Municipal Board (an independent planning tribunal), provided that they meet the other requirements for obtaining party status. Thus, railway companies have the opportunity to enforce these standards by participating in the local planning process.

This presentation provides an overview of the statutory framework and the "best practices" guidelines for mitigating incompatibility between sensitive land uses and railway corridors.

Proximity Issues

Development near railway corridors raises a number of proximity issues, such as:

(a) disputes over noise, pollution and vibrations;

(b) traffic concerns by blocked crossings;

(c) pedestrian and vehicular safety at crossings; and

(d) incompatible land uses (such as transportation of dangerous goods through densely populated neighbourhoods).

Statutory Framework

With few exceptions, railways have no power beyond their rail right of way and cannot control adjacent landowners' land use. [A] federal regulator can cause a railway to address a proximity complaint, but has little or no authority over a municipal authority whose inadequate planning may have led to the incompatible land use situation in the first place.[1]

While railways and rights-of-way are federally regulated, land use planning and development falls within provincial and municipal responsibility.[2] Conflicts often arise between the land uses associated with rail corridors (such as transportation of dangerous goods) and sensitive land uses within proximity (such as residential development). This fragmented jurisdictional framework essentially means that no one level of government has the sole ability to address development issues along the rail corridor.

Federal Requirements Affecting Development Near Rail Corridors

Railway Safety Act

The *Railway Safety Act*[3] requires railway companies to give notice of a proposed railway work to adjacent landowners and the municipality.[4] As part of the approval process, any person receiving such notice may file objections with the Minister of Transport if he or she considers that the proposed railway work would prejudice personal safety or safety of the property.[5] However, there is no reciprocal requirement for municipalities or developers to notify railway companies of proposed development near the railway corridor.

In 1992, Transport Canada issued the *Standards Respecting Railway Clearances*[6] pursuant to the *Railway Safety Act*. These engineering standards apply to all tracks owned or operated on by a railway company and include minimum clearance requirements for structures over or besides a railway track.[7]

Canada Transportation Act

The *Canada Transportation Act*[8] was amended in 2007 to authorize the Canadian Transportation Agency, a quasi-judicial administrative tribunal of the federal government, to resolve complaints regarding noise and vibration caused by construction or operation of railways under federal jurisdiction. A railway company is allowed to create only such noise and vibration "as is reasonable," taking into account its obligations under the statute, operational requirements and the area where the construction or operation is taking place.[9] The Agency is authorized to investigate any noise or vibration complaints.[10] If the Agency determines that the noise or vibration is not reasonable, it may order the railway company to undertake any changes in its construction or operation.[11] The Agency must publish guidelines for making such determinations and must consult with interested parties, including municipal governments, before issuing any guidelines.[12]

Examples of Provincial Requirements
Affecting Development Near Rail Corridor

Planning Act

In 2006, regulations enacted under Ontario's *Planning Act*[13] put in place notice requirements to railway companies for any proposed land use changes within a buffer zone. Railway companies must now be notified of any proposed official plans and amendments,[14] zoning by-laws,[15] plans of subdivision,[16] and consents to sever lands[17] if the proposal affects lands within 300 metres of a railway line. Any person who made submissions at a public meeting or to the local council has a right to appeal the proposal to the Ontario Municipal Board.[18] Thus, railway companies may raise any potential land use compatibility issues with the Ontario Municipal Board.

Moreover, applications for development permit approval under the *Planning Act* must include a sketch showing the approximate location of "all natural and artificial features" including railways.[19]

Ministry of the Environment Noise Assessment Criteria

In 1997 Ontario's Ministry of the Environment published the LU-131 on *Noise Assessment Criteria in Land Use Planning* ("**LU-131**"). The LU-131 guideline outlines the position of the Ministry on noise criteria for planning of sensitive uses, in support of the Provincial Policy Statement under the *Planning Act* and in accordance with the Ministry's Guideline D-1 on *Land Use Compatibility*.[20]

The Ministry implements the guidelines in LU-131 by providing comments to relevant agencies on development applications and planning documents that are circulated to the Ministry.[21] The publication is also intended to assist municipalities in policy preparation and decision-making in the local land use process.[22] For example, as part of the development approval applications municipalities may require developers to complete noise impact and feasibility studies in accordance with these guidelines.

The publication specifies procedures for establishing sound levels on the site of proposed noise sensitive land uses due to transportation sources, including railway sources. It also provides suggested conditions for requiring a noise feasibility study. The requirement for a feasibility study may be defined in terms of setback distance from the noise source. The guidelines recommend that a feasibility study be undertaken where the proposed lands are within 100 metres from a Principal Main Railway Line right-of-way, or 50 metres from a Secondary Main Railway Line right-of-way.[23]

Ministry of the Environment Guidelines on Compatibility Between Industrial Facilities and Sensitive Land Uses

In 1995 Ontario's Ministry of the Environment published Guideline D-6 on *Compatibility Between Industrial Facilities and Sensitive Land Uses*.[24] This document encourages adequate buffering of incompatible land uses by setting out guidelines for determining compatibility setback requirements. For example, the recommended minimum separation distances between a Class III industrial facility and a residential land use is 300 metres.[25] A Class III industrial facility is defined as "a place of business for large scale manufacturing or processing, characterized by: large physical size, outside storage of raw and finished products, large production volumes and continuous movement of products and employees during daily shift operations."[26]

At the Ontario Municipal Board, CN has taken the position that rail yards are a Class III industrial facility.[27] Under this classification, the Ministry guidelines also recommend a noise feasibility study for any sensitive land use proposed within 1,000 metres of a rail yard right-of-way.[28]

CN Guidelines for Rail Corridor Setbacks

As the Ontario Municipal Board noted in one decision,[29] since 1983 Canadian Pacific Railway ("**CPR**") and CN have utilized a combination of setback and berm in establishing appropriate separations between residential uses and railway corridors.[30] However, the Board also acknowledged that these requirements had never been formally adopted by the railways, the Province of Ontario or the City of Toronto. CPR and CN rely on these guidelines to determine adequate mitigation to adverse impacts resulting from derailment, spills, noise and vibration.[31]

CN and CPR established these guidelines in their *Policy on the Environmental Protection of New Residential Development Adjacent to Railways: Recommended by CN and CP Rail*.[32] The policy addresses situations where new residential development is proposed to be built adjacent to railway rights-of-way. The document suggests minimum berm and setback requirements based on the classification of railway lines.

A typical rail classification system defines rail operations as follows:[33]

(a) Main Line (Principal or Secondary): volume generally exceeds 5 trains per day, high speeds, frequently exceeding 80 km/h,

crossings, gradients may increase railway noise and vibrations

(b) Branch Line: volume generally less than 5 trains per day, slower speeds usually limited to 50 km/h, trains of light to moderate weight

(c) Spur Line: Unscheduled traffic on demand basis only, slower speeds limited to 24 km/h, short trains of light weight

Tables 1a and 1b from the *CN Rail and CP Rail Land Use Guidelines* summarize CN and CPR land use requirements.[34] The complete tables are available in the download version of this publication.

Other Industry and Government Initiatives

In 2003 the Federation of Canadian Municipalities and the Railway Association of Canada entered into a three-year Memorandum of Understanding to address proximity issues. The "Community-Rail Proximity Initiative" aims to "build common approaches to the prevention and resolution of issues when people live and work in close proximity to railway operations".[35] The initiative was renewed for two more years in January 2007 and an open-ended memorandum of understanding was signed in 2009.[36]

The initiative established a report on *Proximity Guidelines and Best Practices* outlining "model development guidelines, policies and regulations" for municipalities and railways.[37] As a result of this initiative, other jurisdictions have followed suit; for example, the City of Edmonton amended its zoning by-law to incorporate setback and berm requirements as conflict mitigation between residential land uses and abutting railway rights-of-way.[38]

Summary

The various "best practices" guidelines offer directions to local governments looking to minimize land use incompatibility caused by development near railway properties. These policy guidelines offer some consistency in this multi-jurisdictional framework that governs planning of new development along railway corridors.

1 Transport Canada, *Chapter 7: Proximity Issues*, online at <http://www.tc.gc.ca/eng/tcss/rsa_review/chapter7-394.htm> (citing CN, "Railway Safety in the Community," Submission to the Railway Safety Act Review Panel (June 27, 2007) at 17).

2 *Ibid*.

3 RSC 1985, c 32 (4th supp).

4 *Ibid*, s 8(1).

5 *Ibid*, s 8(2).

6 TC E-05, online at <http://www.tc.gc.ca/eng/railsafety/standards-tce05-233.htm>.

7 *Ibid*, ss 3.1 & 4.

8 SC 1996, c 10.

9 *Ibid*, s 95.1.

10 *Ibid*, s 95.3(1).

11 *Ibid*, s 95.3(2)

12 *Ibid*, s 95.2.

13 RSO 1990, c P19 [*Planning Act*].

14 *Official Plans and Plan Amendments*, O Reg 543/06, cl 3(9)7.

15 *Zoning By-laws, Holding by-laws and Interim Control By-laws*, O Reg 545/06, cl 5(9)11.

16 *Plans of Subdivision*, O Reg 544/06, cl 4(8)10.

17 *Consent Applications*, O Reg 197/96, cl 3(9)5.

18 *Planning Act supra* note 13, ss 17(24), 34(19) & 51(39). Any person may appeal a decision granting consent under s 53(19).

19 *Development Permits*, O Reg 608/06, Sched 1, s 24.

20 Ontario Ministry of the Environment, *Noise Assessment Criteria in Land Use Planning Publication LU-131* (October 1997) at 1 [*LU-131*].

21 *Ibid*, s 1.2.1.

22 *Ibid*, s 1.2.2.

23 Ontario Ministry of the Environment, *Noise Assessment Criteria in Land Use Planning: Requirements, Procedures and Implementation* (October 1997), s 4.2.1.

24 Ontario Ministry of the Environment, *Guideline D-6: Compatibility Between Industrial Facilities and Sensitive Land Uses* (July 1995) [*Guideline D-6*].

25 *Ibid*, s 4.3.

26 *Ibid*, s 2.0.

27 *Re Windsor (City) New Official Plan*, [2002] OMBD No 244 at para 17.

28 *Ibid*, *Guideline D-6 supra* note 24, s 4.1.

29 *Himel v Toronto (City)*, [2003] OMBD No 768.

30 *Ibid* at para 12.

31 *Ibid*.

32 (May 1986).

33 Earth Tech Canada Inc., *Final Report: Proximity Guidelines and Best Practices (Prepared for The Railway Association of Canada and The Federation of Canadian Municipalities)* (Markham: August 2007) at 7.

34 Tables from Envision Freight, online at <http://www.envisionfreight.com/tools/pdf/CN-CP_Guidelines.pdf>. Envision Freight is a website developed as part of the National Cooperative Freight Research Program (NCFRP) in the United States.

35 *Railway/Municipality Proximity Issues Information Base* (2010), online at <http://www.proximityissues.ca/english/AboutJoint.cfm>.

36 *Ibid*.

37 Earth Tech Canada Inc. *supra* note 33 at 4.

38 Envision Freight, *Fact Sheets: Canada's Proximity Issues Website* (2010)