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Lawyer questions OMB's jurisdiction;

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The city's lawyer questioned whether the Ontario Municipal Board has jurisdiction in hearing an appeal by Nyon Oil over a piece of property between Hwy. 140 and the Welland Canal.

Bruce Engell, representing the City of Port Colborne, told OMB chairman Joseph Sniezek that it was the city, not Nyon Oil, who made the applications for zoning changes on Feb. 15, 2005 to allow the company to develop 300 hectares of property. If an applicant for zoning changes withdraws those changes, Engell questioned why the OMB

would be involved in the first place. As such, he said the OMB may not have jurisdiction in the issue at all.

"The evidence ... shows the applicant withdrew the application. Where that leaves the board with respect to jurisdiction, I submit you don't have any in that aspect because the applicant withdrew," Engell said during a preliminary hearing Wednesday to determine if an OMB appeal recently filed by Nyon Oil would proceed.

But Nyon's lawyer James Ayres objected, calling Engell's comments regarding the OMB's jurisdiction "trial by ambush."

He said if the city was planning to raise the question of jurisdiction during the hearing, Nyon should have been informed. And if the OMB itself had any doubts about whether or not it had jurisdiction in the matter, then it should have informed Nyon about those doubts "prior to my client going to the expense of this hearing today."

The fact that the preliminary hearing was being held, Ayres added, clearly demonstrates that the OMB has accepted jurisdiction in the issue.

Ayres called it "inherently unjust for my friend to be raising jurisdictional issues at this point in time. The board has accepted jurisdiction."

Citing documentation dating back to the start of the decade, including letters between his client and city staff, affidavits by city hall employees and politicians, and city reports, Ayres argued Nyon was the applicant and the city was acting as its agent when it made the applications for zoning changes.

"Nyon fully participated in the application process. Nyon provided information and participated in the open house," and the company "attended all of the meeting with the city," Ayres said.

"We're saying, in any event, Nyon is the person who

requested" the amendments.

"Throughout the application process Nyon was, and was treated by the city as the proponent of the applications."

For that reason, he said Nyon was the applicant "and therefore has a statutory right to appeal."

Ayres described the relationship between the city and Nyon as "similar to that of a public-private partnership."

He cited letters between then city chief administrative officer Robert Cotterill and the company as evidence, which stated that the letter itself would be considered acceptance of agreements between the parties.

"I submit to you that if the board accepts the arguments of the city, the purposes of the appeal provisions of the planning act would be rendered meaningless, as there would be no one with any right to appeal the city's decisions to the board," Ayres said.

"As a result of the foregoing, the board should give the appeal provisions of the planning act a broader interpretation so that it doesn't unnecessarily deprive persons of their rights."

Ayres said the procedure the city followed when it scrapped its applications for zoning changes is in itself grounds for appeal. "The zoning bylaw was dealt with unjustly," he said. "There was no notice that it would be considered at the special council meeting ... it wasn't advertised, public notice wasn't given that it would be considered at the special council meeting, and then all of the sudden following the special council meeting there's a notice of refusal of the zoning bylaw. I think that in itself would warrant the board to have jurisdiction over the matter and to have an appeal."

While the city conceded that Nyon was the proponent of the project and the developer, Engell said the city was the sole applicant for the zoning changes in question.

Despite all the documentation discussed by Ayres to support his client's claim, Engell said there are really only two relevant documents -- the application for zoning changes and for official plan amendments the city made to the region in 2005, and the agreement of purchase and sale a year later.

The application itself, Engell said, made no mention of Nyon. The city, as a public body, was also not

required to pay for the zoning changes and amendments, he added.

"At the time, sir, there were no binding agreements between the two parties," he told Sniezek.

The "only binding agreement between" was made 11 months after the application was submitted, and that was the agreement of purchase and sale for the land in question.

Other documentation was merely discussion and intent, "but at that point there were signatures."

That agreement, in which Nyon would purchase the property from the city for \$1,100 an acre, was contingent on many stipulations including that zoning changes would be in place before Nyon took possession of the property, and that the company would not pay the city for the property or any of the consultant fees or studies until after it took possession.

The city has spent more than \$800,000 on the failed project so far.

The OMB gave no indication of when the decision would be made, although Sniezek asked for a box to cart away all the documentation he would need to sift through in the weeks ahead to make his decision.

"It won't fit in my briefcase," he said.

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