Conflicting court decisions on OMB appeals

November 21, 2007

By Jeff Cowan

Municipalities, developers and other interested stakeholders who have been waiting for greater certainty on when Ontario Municipal Board decisions can be appealed to the Divisional Court will have to wait a little longer.

Two recent decisions of the Divisional Court on motions for leave to appeal OMB decisions show marked differences in approach and outcome. Individually, each decision stands on its own merits; when examined together, however, they reveal a conflict in terms of how and when leave to appeal will be granted.

In both cases, there was no dispute about the test for granting a leave for appeal to the Divisional Court. Specifically, leave to appeal from an OMB decision will be granted only if an applicant can satisfy all of the following tests:

- The proposed appeal relates to a question of law;
- The question of law is of sufficient importance to merit the attention of the Divisional Court; and
- There is reason to doubt the correctness of the OMB's decision.

While the second and third tests are inherently subjective—and it has not been uncommon to have different decisions coming to different conclusions based on different fact situations—the first test should be capable of a more objective determination: is the proposed appeal based on a question of law, or is it really a question of policy?

It is on this law/policy distinction that the two decisions seem to take diverging approaches. What follows is a closer look at the two decisions and the different conclusions that each court reached.

Interpretation of Greenbelt Plan

In *583753 Ontario Limited v. York (Regional Municipality)*, several residential developers wanted to use lands that were protected from settlement under the province's *Greenbelt Plan* for parkland that was required as part of their subdivision approvals. The municipality refused, asserting that any parkland provided as an amenity to a housing development would be actively used; as such, it could not encroach on greenbelt areas under the *Greenbelt Plan*, which were not intended for active parkland uses.

The OMB agreed with the municipality, finding that such parkland would constitute part of a settlement area and, as such, it cannot encroach on Greenbelt lands.

On the motion for leave to appeal, the developers argued that the OMB erred in its interpretation of the *Greenbelt Plan* and that, since the *Greenbelt Plan* emanated from a statute—*Greenbelt Act, 2005*—this interpretation was one of law, not policy.

Justice Brockenshire of the Divisional Court disagreed. He held that while the *Greenbelt Plan* is authorized by statute, it is a collection of policy statements. Interpretation of policy by the OMB cannot constitute grounds for appeal under the three-pronged test set out above. Accordingly, although Justice Brockenshire acknowledged that the correctness of the OMB's decision was "open to serious debate," he held in his 2007 decision that the proposed appeal did not raise a question of law, and the motion for leave to appeal was dismissed.

Queen West development

In *City of Toronto v. 2059946 Ontario Limited*, Justice Lax appears to have taken a very different approach on the law versus policy debate, leading to a different outcome.

The case involved a proposed development in an area of the city known as the Queen West Triangle. The city sought leave to appeal an OMB decision that permitted a high density residential development on one part of the lands designated for mixed use residential and non-residential purposes. The city's position was that the OMB decision was inconsistent with the *Planning Act, Provincial Policy Statements* issued under Section 3 of the *Planning Act*, and the *City of Toronto Official Plan*. The city's concern was that the proposed development did not contain the mix of uses—namely housing and employment—that these statutes, policy statements and plans were aimed at promoting.

In considering the first test of whether leave to appeal should be granted, Justice Lax determined that the interpretation of the *Planning Act, Provincial Policy Statements,* and the *City of Toronto Official Plan* were all questions of law. While neither the *Provincial Policy Statements* nor the city's official plan are statutes, they are both created under the authority of a statute—namely, the *Planning Act.* Relying on the approach taken in a previous Divisional Court decision, Justice Lax concluded that this was enough to find that their interpretation was a question of law. In essence, she held that the board's failure to give due consideration to its policy-making function was itself a question of law:

"At the core of the Board's decision making in planning cases is the determination of the public interest. The Board provides no rationale or analysis to support its conclusion that the projects were in the public interest .The *Planning Act* requires that all planning applications, especially by-law amendments must conform to the Official Plan as a means of ensuring that the practical mechanisms of planning approval are consistent with the planning objective of the community. The Board failed to consider whether the projects are contrary to broad City policies that support a mix of uses as reflected in the Official Plan. The Board Reasons are deficient in justifying its decision and provide no indication that the Board considered this or had regard to whether the projects were consistent with the *Planning Act* and provincial policy.

Taking the reasons as a whole, there is reason to doubt the correctness of the Board's decision."

It is difficult to reconcile Justice Lax's findings with those of Justice Brockenshire, unless one restricts the decision to the legal inadequacy of the OMB's reasons. While Justice Brockenshire acknowledged that the *Greenbelt Plan* was authorized by statute—namely, the *Greenbelt Act, 2005*—he determined that the plan itself was a collection of policy statements, and its interpretation was a question of policy, not law. Unlike Justice Lax, he was not prepared to find that the approach taken by the OMB in considering its policy-making function itself raised a question of law.

In the Queen West Triangle case, Justice Lax went on to find that the other two tests for granting leave to appeal—sufficient importance to merit the attention of the court, and reason to doubt the correctness of the OMB's decision—were also met, and accordingly, leave to appeal was granted. There was some hope that when this appeal was ultimately heard by a panel of the Divisional Court, some greater certainty about the law/policy distinction would emerge so as to provide guidance on future applications for leave to appeal. However, on October 30, 2007 the developer and the city announced they had settled the issue, and the appeal was never heard.

What remains are two decisions with conflicting views on what is law and what is policy, and consequently, on when an application for leave to appeal an OMB decision will be granted.

Deference to municipalities may become common thread

Despite this difference in approach, it appears that there is a also a common thread running between the two decisions namely, deference to the position advocated by the municipality in each case.

While both decisions emphasized the need for deference to the OMB, neither one referred to any principle of deference to policy making at the municipal level. However, the fact is that the end result in each case was that the municipalities gained the restrictions on development that they were seeking. In the end, therefore, the question of whether an appeal is a question of law or policy may depend more on judicial deference toward the specific principles and policies that the municipality is attempting to uphold rather than on a purely objective assessment of the issue itself.

Accordingly, until the Divisional Court does provide greater guidance on the law/policy distinction, municipalities, developers and other stakeholders should take their cue from this common thread of deference to municipal policy. They must also be sure to undertake a careful factual and legal analysis before taking action on a motion for leave to appeal, keeping in mind the conflicting approaches that seem to have emerged. Such an analysis will ensure they are in a better position to assess any settlement opportunities that could further their objectives beyond what a court decision might provide.

For more information or inquiries:

Jeff Cowan

Toronto
416.947.5007

Email:
jcowan@weirfoulds.com

Jeff Cowan is recognized as one of Canada's leading public law litigators.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035