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Embee Properties Limited et. al.

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Introduction

This case summary illustrates how a landowner may strategically gain control over an otherwise unwieldly planning process. If the right circumstances exist to invoke a Joint Board consolidated hearing under the provisions of the *Consolidated Hearings Act* ("**CHA**"), any hearings that may proceed within the same land area covered by the CHA might be precluded from proceeding.

The CHA provides the opportunity to issue a Notice of Undertaking ("Notice") where hearing approvals are required or may be required under two or more of the *Scheduled Acts*. The purpose of this statute is to bring all required approvals together under one tribunal at one hearing to streamline the approval process, eliminate duplication and avoid conflicting decisions. In this particular case, the Niagara Escarpment Commission ("NEC"), as a proponent to an undertaking involving the *Niagara Escarpment Planning and Development Act* ("NEPDA") and the *Ontario Planning and Development Act* ("OPDA"), chose not to issue Notice. Instead, it decided to proceed towards a hearing under the NEPDA for proposed Niagara Escarpment Plan Amendment No. 71 ("NEPA 71") without consolidating a related approval under the OPDA [Parkway Belt West Plan Amendment No. 78 (PBWP Amendment No. 78)].

A Notice was subsequently issued by landowners within the area affected by proposed NEPA 71 (as proponents) under the CHA. In the end, the effect of this Notice precluded the Hearing Officer (who was appointed by the NEC to hear, determine and make recommendations on NEPA 71) from holding his hearing for any of the lands affected the Notice.

Particulars of the Case

In the Municipal and Planning Law Client Bulletin (February 2003), we reported on the judicial review of an Order of the Hearing Officer appointed under the NEPDA [*Embee Properties Limited et. al. v. Niagara Escarpment Commission et. al.* (Superior Court of Justice Divisional Court, December 11, 2002)].

Following this decision, the applicants filed three amendment applications seeking a special study area ("**SSA**") designation on a portion of the lands proposed to be covered by NEPA 71. Since more than one hearing was required or may have been required, before different tribunals on the applicants' amendment applications, a Notice was given. This invoked the provisions of the CHA. A Joint Board was subsequently established and a prehearing conference was held.

The lands subject to the proponents' SSA undertaking were the same lands affected by proposed NEPA 71. At a Joint Board prehearing conference, the NEC and other public agencies brought a motion to dismiss the proponents' appeals or, in the alternative, obtain an Order that the proponents' applications be deferred to the original deciding authority for a hearing.

The Joint Board dismissed the motion and concluded that there were important triable issues that merited a hearing. Suggestions that the proponents' motives amounted to "venue shopping" and an abuse of process were rejected by the Joint Board.

The Joint Board was also required to determine, under the circumstances, the relationship between sections 20 and 24 of the CHA as they apply to NEPA 71 and the proponents' SSA undertaking. Sections 20 and 24 of the CHA are set out below:

In the Act,...

"undertaking" means an enterprise or activity, or a proposal, plan or program in respect of an enterprise or activity.

20.(1) Where a proponent of an undertaking gives notice under section 3 to the Hearings Registrar, no person acting under any Act specified in the Schedule or prescribed by the regulations shall hold in respect of the undertaking a hearing specified in the notice or in any amendment to the notice.

(2) Subsection (1) does not apply where the notice under section 3 is withdrawn in accordance with section 6.

24.(1) This Act does not apply in respect of an undertaking in relation to which, before the day referred to in section 3, a hearing has been commenced under an Act set out in the Schedule or prescribed by the regulations.

(2) Despite subsection (1), the tribunal holding the hearing mentioned in subsection (1), upon application with notice by a party to the proceedings, may order the proponent of the undertaking to give to the Hearings Registrar the written notice mentioned in subsection 3(1).

(3) Upon the making of the order, this Act applies in respect of the undertaking.

The public agencies argued that the hearing on NEPA 71 had commenced, within the meaning of subsection 24(1) of the CHA, before a Hearing Officer for which six prehearing conferences were held and that NEPA 71 constituted an undertaking under the provisions of subsection 24(1) of the CHA. The proponents urged the Joint Board to find that, to the extent there was an overlap between NEPA 71 and the proponents' SSA undertaking, section 20 of the CHA precluded the Hearing Officer from dealing with that portion of the NEPA 71 lands, which were part of the Proponents' SSA undertaking, in any hearing to be held by the Hearing Officer.

While the Joint Board concurred that two undertakings existed, only the proponents' SSA undertaking was recognized, as it was the only one subject to Notice as required under the CHA. In particular, the Joint Board found that the undertaking referred to in subsection 24(1) of the CHA only pertained to the NEC's undertaking which was not the subject of a consolidated hearing (because the NEC had chosen to proceed with two distinct and separate hearings). Accordingly, subsection 24(2) did not apply because the NEC, as a proponent of the NEPA 71/PBWP No. 78, had not filed a Notice under the CHA and no order had been issued.

Section 20 of the CHA applied only to the Proponents' SSA undertaking since the requisite notice under section 3 was given to the Hearings Registrar. Under the circumstances, section 20 operated in a manner that precluded the Hearing Office (and any other tribunal) from proceeding with a hearing under any of the Scheduled Acts in relation to the Proponents' SSA undertaking.

The Motion was dismissed and a further prehearing conference was ordered to be scheduled forthwith. In accordance with the provisions of the CHA, the City of Burlington and Region of Halton have jointly filed an application asking that Cabinet reverse the Joint Board's decision. As well, the NEC, City and Region have sought a judicial review of it.

Summary

With the right factual circumstances, the CHA proved to be a valuable opportunity for landowners to pursue heir property right interests with a creative strategy to eliminate a multiplicity of hearings and have one tribunal hear their full argument on the issues they sought to address.

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