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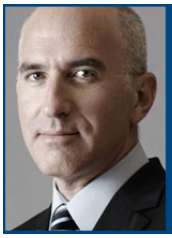
Conflicting court decisions on OMB appeals

By Barnet Kussner and Jeff Cowan, as published in Novae Res Urbis - GTA Edition, November 21, 2007

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.



Barnet Kussner
Partner
416-947-5079
bkussner@weirfoulds.com

Jeff Cowan
Partner
416-947-5007
jcowan@weirfoulds.com

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.

Duty to consult with First Nations: A municipal obligation?

By M. Jill Dougherty

M. Jill Dougherty

416-947-5058
jdougherty@weirfoulds.com

The Canadian federal government and all provincial governments have a duty to consult with the First Nations before taking any steps that may infringe on aboriginal or treaty rights which are claimed or have been established. The case law on this point is clear. What isn't so clear is whether the duty to consult with the First Nations applies to municipalities when making land-use or other decisions that may impact these rights.

Duty to consult explained

The aboriginal and treaty rights of the aboriginal people of Canada are protected under Section 35(1) of Canada's *Constitution Act, 1982*. Courts have held that when there is any possibility that these rights may be infringed, the federal or provincial government involved has a duty to consult with the affected First Nations group. This duty to consult exists with respect to established aboriginal or treaty rights and in situations where such rights have been claimed but are not yet determined or established. It exists independent of any statutory provision which may require consultation with First Nations or other public bodies or individuals.

Consultation must be carried out in good faith, with the goal of addressing the concerns that affected First Nations may have – and reconciling interests where possible. But the scope of this duty and the extent of consultation required will depend on the circumstances, including:

- the seriousness of the potential impact on rights;
- the extent to which the First Nation has asserted a claim to such aboriginal and treaty rights which may be affected, and the status of the claim;
- the merit or strength of the claim; and
- whether the aboriginal or treaty rights potentially affected are already existing or established, or simply claimed but as yet undetermined.

If the **potential** impact on rights is minor, the scope of the consultation can reflect this. For more substantial impacts, the nature and scope of the consultation will be broader and more intensive.

While the Crown is not under a duty to reach an agreement during **such** consultations, it has a duty to consult in good faith and maintain the "honour of the Crown" in reconciling the interests of the Crown and First Nations in the matter at stake.

Duty at the municipal level

Like the federal and provincial governments, municipalities also have the power to make decisions that may impact aboriginal or treaty rights. But municipalities are not Crown entities – they are created by provincial statute, not constitutional authority. Are they bound by this same duty to consult? While the Supreme Court of Canada has concluded that third parties (such as, for example, a corporation which is not a government agency) are not responsible for discharging the Crown's duty to consult and accommodate, it has not specifically commented on the obligations of municipalities and the question is still unsettled.

One recent British Columbia Court of Appeal decision, *Gardner v. Williams Lake (City)* 2006 B.C.C.A.307, suggests that the Crown's duty to consult may not extend to municipalities. However, the *Gardner* case did not involve any claimed aboriginal or treaty rights and cannot be treated as a definitive ruling on the duty to consult with First Nations.

In the *Gardner* case, the city was contemplating by-law amendments on a parcel of land to accommodate the building of a retail store. An area resident claimed that the consultation process in advance of the by-law change was inadequate.

While the process in that case was related to consultation required under a provincial statute and did not involve aboriginal or treaty rights, the Court referred to the scope of the duty to

consult in cases where such aboriginal rights were concerned. In her reasons, Justice Saunders stated that "Local governments … are the creatures of the provincial legislature, bound by their provincial enabling legislation. This case, therefore, does not engage the honour of the Crown or the heightened responsibility that comes with that principle in cases engaging Aboriginal questions."

Factor rights into decision making

Since the question of whether duty to consult applies to local governments has not been directly settled by a court dealing with a potential aboriginal rights infringement, municipalities would be wise to bear this in mind and seek legal advice on their option when making a decision which may affect First Nations' interests. There may also be situations where consultation is a preferred and cost-effective step, even if it is not legally required.

Putting new municipal accountability measures into action

By Kim Mullin

Kim A. Mullin
Partner
416-947-5066
kmullin@weirfoulds.com

Major amendments to the *Municipal Act, 2001* took effect on January 1, 2007. One of the key changes was the introduction of accountability provisions that give municipalities the power to create new positions to help ensure that good governance is maintained by local council and boards.

While these powers are permissive and not mandatory, the new positions – Integrity Commissioner, Ombudsman, Auditor General, and Lobbyist Registrar – can play key oversight roles as municipalities begin exercising the new and broader powers of autonomy that the *Municipal Act* now provides.

Here's an overview of each of the four positions.

Integrity Commissioner
Municipalities can now establish codes of conduct for council members and members of local boards. The Integrity Commissioner is an independent officer responsible for seeing that the code of conduct is properly applied and that the behaviour of councillors and board members is ethical. The Commissioner can also conduct inquiries into any alleged breaches of the code of conduct.

Ombudsman
The Ombudsman's role is to independently and impartially investigate recommendations, decisions or acts done in the course of the municipality's administration that have had an impact on any person or group of people. The investigations are carried out in private, and the Ombudsman reports directly to council.

Auditor General
The Auditor General helps council hold itself and its administrators accountable for the oversight and spending of public funds, and for the achievement of value for money in municipal operations. The municipality itself specifies the duties that are assigned to the Auditor General.

Lobbyist Registrar
The *Municipal Act* provides municipalities with significant scope in terms of dealing with people who lobby public office holders. The municipality can define who a lobbyist is, require lobbyists to file returns to a lobbyist registry, establish a code of conduct, suspend or revoke registration and prohibit former public office holders from lobbying for a specified time period after they leave.

The Lobbyist Registrar carries out functions assigned by the municipality in an independent manner and is responsible for the lobbyist registry and, upon request, making inquiries to ensure compliance with it.

Consider your options

There are a variety of ways to establish some or all of these integrity functions within a municipality. Whatever integrity functions you are considering, be sure to explore the different options available to you and get the professional advice you need to ensure you find the structure that's best for your municipality.

WeirFoulds has extensive experience advising and acting for municipalities. We understand the accountability and governance issues faced by municipalities and how to address them. If you are considering the creation of one or more of these positions, we can help you before, during and after the establishment of these positions, and offer ongoing advice to the people appointed to these positions to help them carry out their duties.

Kudos

Congratulations to George Rust-D'Eye on receiving the Ontario Bar Association's Award of Excellence in Municipal Law, 2007.

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The Exchange Tower, Suite 1600
130 King Street West, P.O. Box 480
Toronto, Ontario, Canada M5X 1J5
Tel: 416-365-1110 Fax: 416-365-1876
www.weirfoulds.com

WeirFoulds LLP
BARRISTERS & SOLICITORS