

Ontario Court of Appeal Decision Means More Independence for Ontario Municipalities Over Parkland

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By

In a long-awaited decision released on January 29, 2018, a 3-judge panel of the Ontario Court of Appeal unanimously upheld a Divisional Court decision confirming the rights of municipalities to determine how much parkland they require from developers as a condition of development approval under the *Planning Act*.

WeirFoulds represented both the Town of Richmond Hill and the City of Vaughan in this important decision confirming that the Ontario Municipal Board (OMB) has no authority to limit the rates at which municipalities can require developers to convey land for parks or other public recreational purposes.

Section 42 of the *Planning Act* is the primary means by which Ontario municipalities acquire land for parks or other public recreational purposes. It provides that as a condition of development approval, municipalities can pass by-laws requiring the conveyance of land, or the payment of “cash in lieu” of land, to be set aside for parks and recreational facilities.

The standard rates prescribed by section 42 are based on a percentage of the land to be developed and typically apply to low-density development, such as traditional subdivisions. In the case of residential development, the maximum that can be required under the standard rate is 5% of the area of land to be developed. For higher-density development such as apartments and condominiums, section 42 provides for alternative rates based on the number of units proposed. The prescribed rates are 1 hectare for each 300 units in the case of parkland conveyance, and (as of 2015) 1 hectare per 500 units in the case of cash-in-lieu – or, in both cases, “such lesser rate as may be specified in the by-law” enacted by the municipal council. These are commonly known as the “alternative rate” or the “alternative requirement”.

Unlike zoning by-laws, there is no right to appeal a section 42 by-law to the OMB or its soon-to-be successor, the Local Planning Appeal Tribunal (LPAT). However, section 42(4) requires, as a pre-condition to the enactment of a such a by-law, that the municipality have an official plan in effect that contains specific provisions dealing with the provision of parkland “and the use of the alternative requirement”.

In 2010, the Town of Richmond Hill adopted a comprehensive new official plan for the municipality. The official plan contained specific policies dealing with the provision of parkland and, among other things, the use of the alternative rate.

The Town’s official plan was subsequently appealed to the OMB by numerous landowners. Many of the appellants sought to have the OMB modify the Town’s parkland policies by imposing an upper limit (i.e. a “cap”) on the alternative rate, at an amount less than what section 42 of the *Planning Act* authorizes. In 2012 the Town brought a motion before the OMB seeking a determination that it did not have the authority to impose such a cap as a matter of official plan policy; however, in a preliminary ruling the OMB held that it did have that authority, and on that basis it proceeded to hold a hearing which took place over many months in 2013.

Ultimately, in its decision released in 2014, the OMB determined that in Richmond Hill's case there should be an overall cap on the alternative rate – namely, 25% of the land to be developed or its cash equivalent. Citing concerns about the need to provide certainty and transparency and to ensure compliance with Provincial policies respecting intensification and affordable housing, the OMB concluded that this cap “constitutes the correct balance between competing interests”.

The Town was concerned that the OMB decision would severely hamper its ability to provide parks and recreational facilities at the service levels mandated by its Parks Plan, which was developed by Town Staff and approved by Town Council in 2013 following an extensive stakeholder consultation process. Accordingly, the Town subsequently sought and obtained leave to appeal the OMB's decision to the Divisional Court. Four other municipalities (Markham, Mississauga, Oakville and Vaughan) intervened in the Court proceedings in support of Richmond Hill.

In a unanimous decision released in September 2016, a 3-judge panel of the Divisional Court overturned the OMB's decision. The Court held that the OMB did not have the legal authority to impose a cap on the alternative rate as a matter of official plan policy. The Court further held that in purporting to do so, the OMB adopted “an unreasonable interpretation of its statutory authority” and wrongly restricted “the Town's use of a mechanism expressly granted to municipalities by the Legislature”.

The landowners subsequently appealed the Divisional Court's decision to the Ontario Court of Appeal. However, in its unanimous decision released on January 29th, the Court of Appeal panel dismissed the appeals and upheld the decision of the Divisional Court. The Court of Appeal agreed with the Divisional Court that there was only one reasonable interpretation of section 42, and that by adopting an unreasonable interpretation the OMB “did indirectly what the legislature prohibits it from doing directly – namely, compelling the Town to limit itself to a rate which is less than the statutory prescribed rate”. The Court further noted that under section 3(5) of the Planning Act, a municipality was under the same obligation as the OMB to ensure that its use of the alternative rate was in compliance with Provincial policies, including those dealing with intensification and affordable housing.

This decision has significant implications for other municipalities across Ontario – particularly Vaughan and Markham, both of which currently have their official plans under appeal before the OMB.

WeirFoulds Partner Barnet Kussner represented the Town of Richmond Hill before the OMB and in both Courts. WeirFoulds Partner Bruce Engell acted for the City of Vaughan as an intervener before the Divisional Court and the Court of Appeal.

[The full Ontario Court of Appeal decision can be viewed here.](#)

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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