CITATION: Her Majesty the Queen in Right of Ontario v. Miller et al., 2014 ONSC 6131
DIVISIONAL COURT FILE NO.: 87/13
DATE: 20141022

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Her Majesty The Queen in Right of Ontario as represented by The Minister of Municipal Affairs and Housing

AND:

Bill Miller, 1049506 Ontario Inc., Bridgeburg Holdings Limited, The Regional Municipality of Niagara and The Town of Fort Erie, Respondents

BEFORE: Harvison Young J.

COUNSEL: *Sara Blake, Glenn Frelick*, for the Applicant

Jeffrey Wilker, David Germain, for the Respondents

HEARD: October 15, 2014

REASONS FOR DECISION

[1] The applicant Her Majesty the Queen in Right of Ontario as represented by the Minister of Municipal Affairs and Housing, (the "applicant") seeks leave to appeal from a decision made by the Ontario Municipal Board ("OMB"). The issue in that decision, dated February 1, 2013 was whether or not the transitional regulation under the *Places to Grow Act 2005*, S.O. 2005, c. 13, as set out in O. Reg. 311/06 ("The regulations") applies to requests that certain lands owned by the respondents Bill Miller, 1049506 Ontario Inc. and Bridgeburg Holdings Limited ("Bill Miller") be included within the urban boundary of the Town of Fort Erie.

[2] The decision, dated February 1, 2013, was made in the context of three appeals to the Board by the Ministry under ss. 17(24) and 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13 from the July 28, 2011 decision of the Regional Municipality of Niagara (the "Region") to:

- Adopt Part 1 of Amendment No. 4-2006 to the Regional Municipality of Niagara's Regional Policy Plan ("RPPA 4")
- Approve Amendment No. 5 to the Town of Fort Erie's new Official Plan ("OPA 5")

- Approve Amendment No. 65 to the Town of Fort Erie's old Official Plan ("OPA 65")

[3] These amendments effectively implemented the expansion of the urban boundary of Fort Erie to include roughly 321 acres of land that had previously been beyond the urban boundary. The land owned by Bill Miller comprises about one third of this land.

[4] The Ministry's position on the appeals, which have not been determined on their merits, is that RPPA 4, RPA 5 and OPA 65 do not conform with the Growth Plan for the Greater Golden Horseshoe, 2006 (the "Growth Plan") pursuant to s. 14(1) of the *Places to Grow Act 2005*, and s. 3(5) of the *Planning Act*, and because they are not consistent with the Provincial Policy Statement, 2005, contrary to s. 3(5)(a) of the *Planning Act*.

[5] The respondents brought a preliminary motion for an order that the Growth Plan does not apply to these requests because they were made prior to June 16, 2006 and were thus "grandfathered" by the transition regulation. The Board agreed, finding that the requests were made before that date, and granted the order sought. The applicant seeks leave to appeal from that decision, submitting that the Board erred in its interpretation of the transitional regulation and particularly in its interpretation of the term "request" in that regulation.

The test for leave to appeal

[6] Subsection 96(1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 provides for an appeal to the Divisional Court on a question of law with leave of a judge of the Divisional Court.

[7] The Divisional Court has developed the following test as articulated in a number of decisions from the Ontario Municipal Board (see: *Toronto (City) v. Dorsay Investments*, 2010 ONSC 3212 (S.C. Div. Ct.)al from a decision of the, (*Spellman v. Essex (Town)* (2003), 20 M.P.L.R. (4th) 280 (Div. Ct.), also reported as *Essex (City) v. Material Handling Problems Solvers Inc.*, [2003] O.J. No. 4619 at para. 3):

1. Does the proposed appeal raise a question of law?

2. If so, is there reason to doubt the correctness of the decision?

3. Does the proposed appeal raise a point of law of sufficient importance to merit the attention of the Divisional Court?

[8] The respondents concede that the matter raises a question of law that is of sufficient general and public importance to merit the attention of the Divisional Court. Accordingly, the only question to be considered is whether there is reason to doubt the correctness of the decision.

[9] The question is whether leave to appeal should be granted with respect to the Board's decision that RPPA 4, OPA 5, and OPA 65 were "transitioned" and therefore should be

permitted to continue as if the GP was not in effect. The core issue is the correctness of the Board's decision that the September 30, 2005 letter with attachments from the Town to the Region constituted a valid "request" under the transition provisions of s. 2(a) of O/Reg 311/06 of the Places to Grow Act.

[10] In answering the question relating to whether there is reason to doubt the correctness of the decision, it has become increasingly clear that the court should take into account the standard of review applicable in the proposed appeal: see, for example, *Toronto (City) v. Dorsay Investments*, 2010 ONSC 3212 (S.C. Div. Ct.) para. 18:

> [A]lthough the decision concerns a question of law and the test for the granting of leave is whether there is good reason to doubt the correctness of the decision, I am conscious that the question engages the policy expertise of the Board and involves the equivalent of their "home" statutes. As such, the Divisional Court owes deference to the Board's decision and the decision would likely attract a standard of reasonableness on the appeal itself.

[11] The transitional regulation as promulgated under the *Places to Grow Act* forms part of the constellation of statutes, regulations and policies that make up Ontario's land use planning regime. Its interpretation therefore engages the policy expertise of the OMB and should be reviewed on a reasonableness standard. In the course of oral argument, Mr. Frelick indicated that he does not take issue with the application of a reasonableness standard but submitted that the Board's decision was neither correct nor reasonable.

The OMB Decision

[12] At the heart of the applicant's submissions is its position that the Board's interpretation of the term "request", as it appears in the transitional regulation was wrong and unreasonable because, in its submission, it did not apply the same meaning to the term as is used in the *Planning Act*. In its submission, the *Planning Act* contemplates that a "request" is not made until the supporting documentation has been provided, which was not done until September 26, 2006, after the *Growth Act* came into effect. There is no dispute that the supporting documentation was not submitted before June 16, 2006.

[13] It is clear from the reasons that the Board considered and rejected this submission. It expressly considered this submission at para. 41 of its decision:

> Mr. Wilker argued that s. 2(a) of O/Reg. 311/06 of the *Places to Grow Act* does not direct the requesting party to s. 22 of the *Planning Act*. The latter provides that a person or a municipality requesting an official plan amendment must submit the information prescribed in s. 22(4) and (5) of the *Planning* Act at the same time that it submits the request.

[14] It continued at para. 42:

> The Board finds that the comprehensive package of information listed in the Schedule to O/Reg. 311/06 which is required to complete an application, need not be submitted at the same time as the valid request is made. The Board finds that it is sufficient simply to provide a description of the lands with the request so that the official receiving the request is able to identify both what is being asked and the property to which the asking pertains. In the case of the September 30, 2005, request submitted by the town, the Board finds that the lands in question are adequately identified ...in the Report....

[15] The Board went on to find that the Ministry's interpretation the Transitional Regulation that a "request" was not made until and unless the supporting material was filed was not supported by a plain and simple reading of the "words on the page" (para. 44).

[16] The applicant's position is that the transitional regulations must be interpreted within the framework of the *Places to Grow Act* and the *Planning Act*.

[17] While this is true, it is not clear that the word "request" as used in the *Planning Act* always contemplates that a request is not a valid request without the supporting documentation. Section 22(6) of the *Planning Act*, which provides that until the council or planning board has received the required supporting information and material, it "may refuse to accept or further consider the request for an amendment to its official plan", lends support to the view that a request and the supporting documentation are two distinct steps. At the very least, it supports the argument that the term is not a rigid one which invariably restricts a valid request to one received with the supporting materials.

[18] In any event, and as the respondents submitted before this court, there is nothing in the regulation (as opposed to the *Planning Act*) that specifies that the term "request" is to be understood to contemplate the inclusion of the supporting material. The respondents does not agree that s. 22 of the *Planning Act* must be read this way.

[19] The purpose of the transitional regulation is to grandfather persons who have been "in the mill" (to use the respondents' term) and, out of a sense of equity, to protect them from the unfairness of changing rules within a planning system that is, and must be, dynamic. Their purpose of the transitional regulations, then, has a somewhat different though not inherently contradictory, purpose from the purpose of other planning instruments. Given this purpose, the legislator could easily have stipulated a more restrictive definition of "request" had it wished to do so.

[20] The respondents emphasized the "field specific" nature of the determination that the Board was required to make in this case, and the perils of courts engaging in such determinations. It also emphasized the fact that the determination was made on the basis of an evidentiary record that included considerable planning expertise and affidavit evidence upon

which the applicant did not choose to cross-examine. These are indeed factors that ground the application of the reasonableness standard of review to these decisions.

[21] The Board noted there had been numerous communications between Bill Miller and Town officials between 2002 and 2005, in addition to the Town's letter to the Region with the accompanying report that it found constituted a valid request to amend the Town boundaries to include the Bill Miller lands. The applicant submits that the Board erred in treating this letter as a request.

[22] I disagree. In my view, this was a factual finding and one that was grounded in the context of the longstanding and well known effort of Bill Miller to amend the Town boundaries to include that land. It is entitled to a very high level of deference and I see no basis to doubt the correctness or reasonableness of that finding. In addition, the existence of the long-standing context to the September 30, 2005 letter lends support to the finding that the September 30, 2005 was a request within the meaning of the regulation. If the point of that regulation is to prevent unfairness to someone with respect to whom the rules changes mid-stream, it makes good sense that the history and factual context should count. The letter of September 30, 2005, was not an isolated letter but one that followed a series of events and actions taken by Bill Miller with a view to the expansion of the urban boundary.

[23] I also note that the evidence and the applicant's position was reviewed by the decision of Lynda Tanaka, Chair, dated June 18, 2013. In her decision, she underlined the importance of an appreciation of the context in which the Town processed the proposal for an urban area expansion in applying the transitional regulation. She emphasized the extent of the affidavits from well qualified municipal planners and their importance in appreciating the context for the urban expansion proposal, noting unchallenged statements that the Town

> ...made a clear and unambiguous request to the Region in September 2005 to implement the amendment to the Town's urban boundaries, and to ...include the Miller ...lands within its boundaries.

[24] She concluded that this evidentiary record supported the findings contained in the original decision that the request had been made in September, 2005.

[25] In sum, I see no reason to doubt the correctness or reasonableness of the decision, and the motion for leave to appeal is therefore dismissed.

[26] The parties agree that there should be no order for costs.

Harvison Young J.

Harvison Young J.

Date: Wednesday, October 22, 2014