COURT FILE NO.: DC06-0065ML
DATE: 20070209

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	)	
	)	
NIAGARA ESCARPMENT COMMISSION	)	Mr. Dennis Brown, Q.C. and Ms. Julia Evans, for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
PALETTA	)	Mr. Scott Snider and Ms. Shelly Kaufman, for Paletta
REGIONAL MUNICIPALITY OF HALTON	)	Mr. Jeffery Wilker and Mr. Peter Daillesboust, for Regional Municipality of Halton
CITY OF BURLINGTON	)	Mr. John Hart and Ms. Angela Broccolini, for City of Burlington
CONSERVATION HALTON	)	Conservation of Halton, Self-Represented
Respondent	)	
	)	
	)	**HEARD:** January 8, 2007

REASONS FOR JUDGMENT

Dawson J.

Nature of the Application

[1] The Niagara Escarpment Commission seeks leave to appeal to the Divisional Court from a decision of the Ontario Municipal Board dated June 22, 2006. The application is brought pursuant to section 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, which states as follows:

> Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law.

[2] Pursuant to this section the Court has held that in order to obtain leave the applicant must show:

(a) that there is reason to doubt the correctness of the decision of the Board with respect to the question of law proposed as the basis of the appeal; and,

(b) the question of law must be of sufficient importance to merit the attention of the Divisional Court.

These principles are discussed in *Toronto Transit Commission v. Toronto (City)*, [1990] O.J. No. 2049 (Div. Ct), and *Vaughn (City) v. Rizmi Holdings Ltd*. [2003] O.J. No. 2953 (Div. Ct).

[3] Applying this test, and for the reasons that follow, I conclude that leave to appeal should be granted. In doing so I keep in mind that the standard of review to be applied by the Divisional Court when reviewing a decision of the Board is reasonableness with respect to questions of law that engage the expertise of the

Board, and correctness with respect to questions of law that are of general application and for which the Board has no special expertise: *London (City) v. Ayerswood Development Corp*., [2002] O.J. No. 4859 (C.A.) In determining whether there is reason to doubt the correctness of the Board's decision I need not be convinced one way or the other. However, the applicant must show that the correctness of the Board's decision is open to serious debate: *Vaughn (City) v. Rizmi Holdings Ltd*., *supra*.

The Chronology of Relevant Events

[4] In March 1994 Paletta International Corporation submitted a draft plan of subdivision proposing the development of 24 rural estate lots on a 32 hectare property it owned. That land was within an "Escarpment Rural Area" under the Niagara Escarpment Plan (NEP). At that time rural estate plans of subdivision were permitted under the NEP and under the Official Plans of the Region of Halton and the City of Burlington. There was no requirement for a development permit to be issued pursuant to the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N. 2 (NEPDA), prior to the submission of the draft plan of subdivision.

[5] On March 15, 1994 the Region advised Paletta that its draft plan was incomplete and requested that Paletta provide a signed clearance letter from the

City. Then on June 15, 1994 revisions to the Niagara Escarpment Plan came into effect. Pursuant to those revisions low density plans of subdivision such as that submitted by Paletta were no longer a permitted use. Therefore an amendment to the NEP was required, for such a proposal.

[6] Subsequently there was a good deal of delay by both Paletta and the Region in dealing with the matter. The details are unimportant to resolution of this application.

[7] On September 9, 1998 Paletta requested that the Region refer its draft plan to the OMB under s. 51(15) of the *Planning Act*, R.S.O. 1990, c.P.13. That subsection provides that upon request, the referral "shall" be made unless in the Minister's opinion, the request is not made in good faith, is frivolous or vexatious or is made only for the purpose of delay. The subsection goes on to indicate that where the referral is made the Board "shall hear and determine the matter." All parties agree that the Region acts as the Minister's delegate to make such referrals. There is no suggestion that Paletta's request for referral was frivolous or vexatious or made for the purpose of delay.

[8] Although the Region ultimately made the referral, that did not occur until March 27, 2000 after further prompting by Paletta. In the meantime, on December 22, 1999 amendments to the NEPDA came into effect. Section 24(1),

(2) and (3) of the existing *Act* were repealed. Most significantly a new s. 24(3) was enacted. That new subsection provides that "no approval, consent, permission or other decision" that is required by an Act in relation to the development of land shall be made with respect to lands subject to development control under the NEPDA, unless the development is exempt under the regulations, or a unless a development permit has been issued under the Act. It is common ground that the lands in question are not exempt. Paletta had not applied for a development permit as that was not required at the time its application was submitted.

[9] In January 2006 the Region, the City and the Commission brought a joint motion before the O.M.B. for an order dismissing the draft plan of subdivision without a hearing, or in the alternative for an order adjourning the proceedings until Paletta had filed applications with the Commission to amend the NEP and to obtain a development permit. Under this alternative position it was submitted all matters should be referred to a Joint Board constituted under the *Consolidated Hearings Act*, R.S.O. 1990, c.C.29. One of the arguments advanced by the Commission was that in view of the amendment of s. 24(3) of the NEPDA the Board no longer had jurisdiction to deal with the matter as the land was not exempt and the Commission had not issued a development permit to Paletta.

[10] In its June 22, 2006 decision the OMB dismissed the joint application and ordered that the matter proceed to a hearing before the Board.

Is There Reason to Doubt the Correctness of the Board's Decision?

[11] As just mentioned the position of the Commission and the other joint applicants before the Board, was that as a result of the December 22, 1999 amendments to the NEPDA, the OMB no longer had jurisdiction to deal with the matter.

[12] Paletta took the position that once it made a bona fide request to have its draft plan referred to the Board it had a vested right, in the sense that it was indefeasibly entitled to a hearing before the Board, pursuant to s. 51(15) of the *Planning Act*. Paletta argues further, that on a correct application of the law of statutory interpretation, its vested right to a hearing before the Board could not be ousted by the 1999 amendments to the NEPDA. Paletta points to the fact that its request for a referral to the OMB preceded the statutory amendments in question by some 15 months. While the referral was not made until after the amendments, that was due to improper delay by the Region, which the Commission ought not be permitted to take advantage of.

[13] As can be seen from this brief summary of positions, the Board's jurisdiction to order a hearing was squarely raised on the motion before the Board. Of some significance is the fact that the resolution of that question depended on the application of the general law of statutory interpretation to the

effect of the amendments. Notably, it was not a question that arose under the Board's own statute.

[14] In its reasons, the Board did not consider or make reference to principles of statutory interpretation, and in that regard did not consider whether Paletta had acquired a vested right to a hearing immunizing it from the effect of the change in the law. The Board instead made extensive reference to the principles developed in its own decisions to deal with situations where "planning policies" had changed between the time an application was made and the time the Board was called upon to make a decision. The cases discussed in this regard were *Clergy Properties v. Mississauga (City)*, 1997 CarswellOnt 5385 (Div. Ct.), leave to appeal refused January 28, 1998, and *James Dick Construction Ltd. v. Caledon*, [2003] O.M.B.D. No. 1195 (O.M.B.). As I say, those cases deal with the Board's approach when a policy has changed. They do not deal with the issue of the Board's jurisdiction being altered by statutory amendment. I conclude that there is reason to doubt the correctness of the Board's decision because it failed to properly address the basic jurisdictional issue raised before it.

[15] Paletta argues that I should dismiss the application for leave to appeal on the grounds that it had a vested right to a hearing, and that if the law of statutory interpretation had been properly applied the result would necessarily have been

the same: it would be entitled to a hearing, just as the Board ordered. The difficulty with this argument is that it seeks to place me, on a leave application, in the place of a panel of three judges of the Divisional Court. The proper place for this argument is before the full panel who will hear the appeal.

[16] The Commission also argues that the Board erred by finding that there was a valid application for subdivision in the first place. The Commission points to the letters written by the Region to Paletta advising it that the application was incomplete. The alleged deficiencies were never remedied. The Board found that there was an adequate application to meet the requirements of validity. On this point I am inclined to think that the Board was dealing with a matter within its own expertise. Therefore the standard of review is reasonableness, not correctness. This was also a question about which considerable evidence was led before the Board. The resolution of the issue turned in part on factual determinations, and I do not see this as a question of law alone. However, as leave is granted at large, the Commission is free to consider whether to raise this point on the appeal.

Is the Matter of Sufficient Importance to Merit the Attention of the Divisional Court?

[17] Paletta argues that this branch of the test has not been met because this is a “one off” case. There is no evidence of any other similar cases that have yet

to come before the Board. Therefore the matter is of no general importance. Paletta also notes that due to the delay in this case, the Board ordered that "good planning" requires that at its hearing the Board will consider the appropriateness of a rural plan of subdivision based on current circumstances, and not on circumstances as they existed at the time of application. Paletta submits that these features defeat the Commission's arguments that it is of public importance to determine how the provisions of the NEPDA enacted in 1999 apply to applications for development made or in progress prior to their enactment.

[18] I conclude that this is a matter that is of sufficient importance to merit the attention of the Divisional Court. This case deals with the proper approach to the determination of the nature and extent of the OMB's jurisdiction, particularly in circumstances where the Board's jurisdiction may be affected by the enactment or amendment of statutory provisions that affect the Board collaterally. Given the significant impact decisions of the OMB can have on the development of real property in Ontario, questions concerning the proper approach to determine the scope of its jurisdiction are deserving of the Divisional Court's attention. This issue is tied in to developing jurisprudence on the interrelationship of statutes designed to protect the natural environment, and more generally designed to deal with all aspects of land use. In the result, I conclude this is a matter of some importance beyond the interests of the parties.

[19] Both branches of the test for leave having been met, leave to appeal to the Divisional Court is granted.

[20] Costs are reserved to the panel hearing the appeal.

DAWSON J.

Released: February 9, 2007

COURT FILE NO.: DC06-0065ML
DATE: 20070209

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NIAGARA ESCARPMENT COMMISSION

Appellant

- and –

PALETTA, REGIONAL MUNICIPALITY OF HALTON, CITY OF BURLINGTON, and CONSERVATION HALTON

Respondents

REASONS FOR JUDGMENT

DAWSON J.

Released: February 9, 2007