Environment and Land Tribunals Ontario

Local Planning Appeal Tribunal

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Tribunaux de l'environnement et de l'aménagement du territoire Ontario

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Ontario

Via Email

May 23, 2018

Ira Kagan
KAGAN SHASTRI LLP
188 Avenue Road
Toronto, Ontario
M5R 2J1

Dear Mr. Kagan:

RE: Section 43 Request for Review
Decision and Order of Member Vincent issued October 18, 2017
OMB Case No. PL160402

The Local Planning Appeal Tribunal ("Tribunal") acknowledges receipt of your Request for Review ("Request") of the Decision and Order of Member Sharyn Vincent issued on October 18, 2017 ("Decision"), in case number PL160402. Your Request is submitted on behalf of the Applicant in this matter, Minaki-on-the-River Inc. ("MOTR") and is filed pursuant to section 43 of the *Ontario Municipal Board Act.* Sections 2 and 35 of the *Local Planning Appeal Tribunal Act* authorize the Tribunal to continue with this matter following the repeal of the *Ontario Municipal Board Act.*

The Tribunal Rules to Dispose of a Request

Rule 25 of the Rules of Practice and Procedure ("Rules") sets out the process to review a decision or order. Rule 25.07 provides that a request may only be granted if it raises a "convincing and compelling case" that one of the listed errors or grounds cited in this Rule is applicable. This Rule reflects the high threshold which has been established by the Board to review a decision.

Background to the Request

The Decision considered the appeals of the decisions of the Minister of Municipal Affairs ("Minister") to conditionally approve two draft plans of condominium that propose to develop a portion of lands located approximately 50km north of the City of Kenora on the Winnipeg River System in the unorganized northern Ontario community of Minaki ("subject lands"). The subject lands, commonly known as the Minaki Lodge, formerly operated as an inn and principal recreational attraction until the main lodge was completely destroyed by fire in 2003.

MOTR applied to the Ministry for approval of two draft plans of condominium in order to create 138 seasonal recreational units and one commercial unit on the subject lands. The proposal is intended to be serviced by a private communal sewage treatment plant ("STP").

The Minister approved the condominium applications subject to conditions. Alex Rheault and Minaki Cottagers Association ("Appellants"), filed two separate appeals of the Minister's decision, pursuant to subsection 51(39) of the *Planning Act.*

The Board convened several prehearing conferences to organize the hearing of these two appeals. A procedural order was issued which identified the issues raised in the appeals. Among the issues identified by the Board were the adequacy of servicing the development proposal, the "sufficiency and appropriateness of the infrastructure" (focused on the STP), the environmental impacts on the Winnipeg River System, the suitability of the draft plan conditions and the impacts on the local First Nation communities.

At the hearing of the appeals, the Board heard expert opinion evidence on land use planning, engineering, and heritage landscapes, which was presented by MOTR, the Ministry and the two Appellants. The Board also heard evidence about the proposal from representatives of Wabaseemoong Independent Nation and Ochiichagwe'Bibigo'Ining Ojibway Nation, along with local business owners and cottagers.

The Decision allowed the appeals, finding that the proposal was not consistent with the Provincial Policy Statement ("PPS"), failed to satisfy the test of good planning, was not in the public interest, and did not satisfy the criteria of section 51(24) of the *Planning Act.* The pivotal issue identified in the Decision was the adequacy of the proposed wastewater services for the development. The Board determined there were insufficient safeguards incorporated into the draft conditions to ensure health, public safety and protection of the environment in the event of a communal STP system failure. In particular, the Board concluded that the draft plan condition, that owners or occupants immediately vacate their units (quoted in paragraph 31 of the Decision and referenced as the evacuation condition) in the event of a STP failure, did not demonstrate the requisite oversight expected for this condominium development in order to be consistent

with the relevant provisions of the PPS, to represent good planning, to be in the public interest and to satisfy section 51(24) of the *Planning Act.*

The Request asserts that the Board exceeded its jurisdiction and made errors of law which had they not been made, the Board would likely have reached a different result. In the alternative, the Request asserts that correspondence from the Ministry of Environment and Climate Change (the "Director" or "MOECC") stating its willingness to amend the Environmental Compliance Approval ("ECA") to require financial assurance for the STP constitutes new evidence. The Request seeks a new hearing, or, in the alternative, an order that the Board exercise its discretion to change, alter or vary the Decision.

Disposition on the Request

I have carefully reviewed the Request and the Decision and concluded that the Request fails to meet the requirements of the Board's Rules to warrant a review of the Decision.

The Request alleges that the Board's sole reason for denying the draft plans of condominium was because the Board was not satisfied with the content of the ECA issued by the Director. The Request argues that the Board does not have any jurisdiction to allow the appeal based on the ECA nor to consider the ECA in the overall evaluation of the proposed development. Further, the Request contends that since the ECA was issued by the Director, it is "deemed at law to be good infrastructure planning and [to] have been made in the public interest" and therefore the Board erred by finding that the draft plans of condominium did not represent good planning.

I find that this ground is an attempt to re-argue the merits of the appeals disposed of the Decision. The Board, in carrying out its *Planning Act* jurisdiction, is not required to find that a proposal is consistent with the PPS simply because an ECA has been issued. There is more to the good land use planning and consistency with the PPS than just deferring to an instrument issued by the MOECC. In paragraphs 37 and 38 of the Decision, the Member acknowledges and explains her role in considering the appeals of the draft plans of condominium. In paragraph 37 the Member states that the Board is not in a position to look behind the granting of the ECA, and that the MOECC is the public guardian of the environment. However, the Decision then goes on to state the Board must be satisfied the proposal is consistent with the servicing hierarchy outlined in ss. 1.6.6.2 to 1.6.6.5 of the PPS.

I find no error in that analysis. Environmental matters and planning matters are not entirely separate issues. Good land use planning includes adequate protections for the environment, public safety and health. The Decision recognizes that the ECA is not under appeal but that the Board must nonetheless satisfy itself that the proposal is consistent with the applicable provisions of the PPS, which include infrastructure matters that have environmental, safety or health implications.

The Board was legislatively mandated to assess the draft plans of condominium against the applicable provisions of the PPS. The PPS does not state that the Board must simply approve a proposal because an ECA has been issued. Subsection 3(5) of the *Planning Act* provides that a decision of the Board "in respect of the exercise of any authority that affects a planning matter" shall be consistent with the PPS. Accordingly, it fell within the jurisdiction of the Board to assess the two draft plans of condominium against the PPS. The Decision specifically considered the relevant provisions. Section 1.6.6 sets out policies related to municipal or private communal sewage services and outlines the hierarchy of preferred services. The PPS requires that these systems are to be "sustained" and provided in a manner that is "feasible, financially viable and complies with all regulatory requirements." The following provisions, as quoted in paragraphs 38 of the Decision, set further details for appropriate infrastructure planning. Based on these provisions, the Decision concluded that the draft plans were not consistent with the PPS. This finding is supported by the conclusion in the Decision that the proposed evacuation condition was not a proper safeguard to ensure the protection of public health or the protection of the environment.

I have no reason to interfere with that finding and find no error of law in respect of it. I also wish to point out that sections 2 and 51 (24) of the *Planning Act*, also require the Board is to have regard to the adequacy and efficiency of the provision of wastewater services in the consideration of whether to grant draft plan approval of a plan of condominium. The Board made no reviewable error in finding that the proposed draft conditions, and specifically the evacuation condition, did not provide sufficient protection of public health or the environment as a basis to allow the appeals. Accordingly the Board did not err in law or exceed its jurisdiction by assessing whether the draft plans of condominium satisfied sections 3(5) and 51(24) of the *Planning Act,* following the issuance of the ECA.

I should also add that the Decision does not as alleged, deny the development solely because the Board was not satisfied with the ECA. The Board denied the development because the applicable planning tests were not met.

I have also taken note of the alleged error of law concerning the Decision's conclusion regarding section 1.6.6.3 of the PPS, which the Request alleges "is not applicable". While the Request states that this section "is the specific section which the Board finds there is a lack of consistency", it is clear from the decision, at para. 38, that the Board was "not satisfied that the proposed use of communal infrastructure is consistent with the servicing hierarchy" outlined in several sections of the PPS, not just section 1.6.6.3. Moreover, the applicability of s. 1.6.6 as a whole was put into play by the parties (see para. 20 of the Decision). Importantly, it was the Ministry (the approval authority in areas outside organized municipalities) that argued that it essentially occupied the role of a municipality for the purposes of s. 1.6.6.3 such that it would have the same authority as a municipality to allow the use of private services under that section (see para. 21).

The Request fails to take note of the fact that, if the Decision had agreed with the argument that section 1.6.6.3 was not applicable in areas without an organized

municipality, then the Applicant would have been worse off in that there would have been no authority for the Minister to approve a private system where public services were absent. I find no error in the Board's acceptance that section 1.6.6.3 was relevant given the role akin to a municipality that is played by the Minister in areas where there is no organized municipality. As a result of this issue having been raised by the parties, the Decision reasonably addressed section 1.6.6.3 as well as the sections that relate to that section in addition to the overall issue of whether the "development is appropriate to the infrastructure planned or available" – an issue that is not unique to the PPS but also is an important aspect of "good planning", the "public interest", and section 51(24) of the Planning Act. It is important to note that the Decision does not rest solely on the conclusion that there is a lack of consistency with the PPS, but also concludes that the proposal does not represent good planning, is not in the public interest and does not satisfy section 51(24) of the Planning Act (see paras. 45-46). Thus, even if there had been an error in the Decision regarding the applicability of one or more sections of the PPS, that would not have affected the result. To conclude on this point, I do not find that there was an error of law "such that the Board would have likely reached a different decision" in respect if the Decision's treatment of the PPS.

The Request also takes issue with the lack of additional reasoning regarding the criteria of section 51(24). In light of my conclusion above, I find no error in that regard because the pivotal issue identified by the Board in the Decision cuts across the PPS and the other applicable tests in this case (i.e., good planning, public interest and section 51(24)). There was no need in the Decision for additional reasons to support the conclusions reached in paras. 45 and 46 because they would be the same as those for the PPS – i.e., that the proposal failed to demonstrate that the "development is appropriate to the infrastructure planned or available". I find that the Decision understood the pivotal question before it and analyzed and disposed of it through all applicable lenses (i.e., the PPS, good planning, public interest and section 51(24)). There was no error of law in that regard.

The Request also submits that the Board made errors of law by basing its review of the appeals and the ECA on non-statutory documents, namely, the *D-5-2 Application of Municipal Responsibility for Communal Water and Sewage Services* and *F-15 Financial Assurance Guideline*. The Request argues these policy documents are intended to guide the MOECC and were misapplied or not applicable.

I do not agree with the assertion that the Board misapplied the above noted guideline, or erroneously based its review on this guideline in addressing the pivotal issue identified in the Decision. The Board took note of the provisions in the guideline that discuss how financial assurances provided to a public authority with oversight responsibilities may be considered acceptable to address potential environmental threats in the event of a communal STP system failure. In my view, this concept is well understood in infrastructure planning. The Board can refer to subdivision agreements required as a condition of draft plan approval pursuant to subsection 51(24) of the *Planning Act*, in which financial securities are routinely posted with a public authority to ensure the adequate provision of works necessary for environmental protection. In my

view, the Board made no error in referencing these guideline documents for assistance, particularly when the posting of financial securities is a common condition in subdivision approvals. In any event, the Board's reference to these guideline documents was not the determining factor. The Board allowed the appeals after finding that the development proposal and the conditions of draft approval fail to satisfy the criteria of subsection 51(24) of the *Planning Act* - and not the above referenced guideline.

The Request also refers to the fact that the Decision is "only 11 pages in length and the basis for the Decision was restricted entirely to a single issue" and that not all of the issues raised at the hearing are discussed in the Decision. A tribunal is not required to address every issue in a decision and the adequacy of a decision is not measured by the number of pages. Here, the Decision specifically identifies that there is a "pivotal" issue (paragraph 27). The Board then focuses its analysis on that issue in light of the relevant provisions of the legislation and PPS. There is no error in such an approach.

Lastly, the Request asserts that following the release of the Decision there is now new evidence to warrant a review of the Decision. The Request submits that correspondence from Director Fariha Pannu of the MOECC advising MOTR that the Ministry is agreeable to amending the ECA to include conditions for financial assurance represents new evidence warranting a review of the Decision pursuant to Rule 115.01(e).

Case law of the Board has established that the threshold for admitting new evidence following a Decision is high, given the need for finality in its decisions. The test for admitting new evidence is stated in *Brown v. Toronto (City) Committee of Adjustment*, [2005] O.M.B.D. No. 143, 49 O.M.B.R. 299:

> "New evidence" to support a review of a Board decision is generally characterized as evidence not available or anticipated at the time of the hearing that becomes available after the hearing has concluded, is credible and had it been available at the time of the hearing would have affected the final decision.

In applying this test I am first tasked with determining whether there is new evidence that was not available or could not have been anticipated at the time of the hearing. MORT certainly had sufficient notice that there were concerns raised by the Appellants about the adequacy of infrastructure and the necessary environmental safeguards. This is evident by the issues set by the Board in the procedural order, a number of which are quoted earlier in this disposition. MORT could also reasonably anticipate that the maintenance and operation of the private communal STP would be a necessary component of any discussion with respect to the criteria set out in the PPS and in sections 2 or 51(24) of the *Planning Act*.

Consequently, I have no basis to conclude that new correspondence from the Director falls within the meaning of new evidence that was not anticipated at the time of the hearing. I refer back to my earlier comments that proponents of development regularly post financial securities as conditions of approval necessary to protect the public

interest in support of their development applications. I cannot find that the provision of financial securities in a proposal seeking 138 residential recreational condominium units and 1 commercial condominium unit could not be anticipated. I have to respect the finality of Board decisions in my consideration of a Request and specifically in my application of Rule 25.

The principal of finality would be undermined if the Board were to reopen cases simply to consider meetings and correspondence by those affected by the decision, including how they might have conducted themselves differently with the benefit of hindsight. This is not new evidence that would merit disturbing the outcome of a lengthy hearing.

For all of these reasons, the Request is dismissed and the Decision remains in force and effect. Finally, please note that I have copied this disposition to the counsel listed below who received the original Request.

Yours truly,

Jerry V. DeMarco
Executive Chair

Cc: Mr. David Bronskill, counsel for the appellants
Ms. Janice Page, counsel for the Ministry of Municipal Affairs