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MM120006

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 222(4) of the *Municipal Act*, 2001, S.O. 2001, c. 25, as amended

Appellant: Cindy Pearson
Subject: By-law No. 2011-89
Municipality: Township of Tay
OMB Case No.: MM120006
OMB File No.: MM120006

APPEARANCES:

Parties

Township of Tay

Cindy Pearson

Counsel

P. Peterson

Participant

Theresa Helbig

DECISION DELIVERED BY J. P. ATCHESON AND ORDER OF THE BOARD

This was a hearing in the matter of an appeal filed against the Council of the Township of Tay enacting By-law 2011-89 on December 14, 2011. The By-law provides for a revising of the current ward boundaries within the Township of Tay (Township) as set out on Schedules "A" and "B" to the By-law. The result of the By-law is to create three modified electoral wards in the Township for the purpose of the next municipal election in 2014.

The Board with the consent of the parties granted participant status to Theresa Helbig.

The context

The Township of Tay as it currently exists is the result of amalgamations that occurred throughout Simcoe County in 1994. The amalgamations resulted in an initial nine

member municipal council consisting of a Mayor and Deputy Mayor elected at large and seven Members of Council elected through a ward system with Ward One having three councillors, and Wards Two and Three each electing two Councillors. After the 1996 election some further modifications were made to the municipal boundary and the Council considered modifications to the electoral ward boundaries and the composition of the Municipal Council which resulted in a seven person Council with the Mayor and Deputy Mayor being elected at large and three wards with two councillors being elected from Wards One and Two and one councillor being elected from Ward Three.

In 2009 the Township conducted a review of the ward boundary system prior to the 2010 municipal elections and determined that there were no essential reasons for making any changes to the ward boundaries. The ward boundaries for the 2010 election are set out on a map at Exhibit 2 (Tab 19, p. 224). The three ward boundaries run in a north- south direction from Georgian Bay to the south limit of the Township. Each ward has as its focus an existing settlement area which is found in the north end of the ward along the Georgian Bay shoreline while the southern portion of each ward is generally rural and agricultural in character.

Ward One has as its major settlement area the former Village of Port McNicoll, Ward Two has as its major settlement area the former Village of Victoria Harbour, and Ward Three at the eastern end of the Township has as its major settlement area the area of Waubaushene.

After the 2010 elections the municipal council was presented on September 21, 2011 with a petition from electors lead by a Ms. R. Pratt, requesting a review of the ward boundaries for the 2014 municipal elections. The petition is set out at Exhibit 2 (Tab 7). The substance of the petition is that the current ward system does not provide equality of representation for the residents of Ward Three (the Waubaushene Ward) as shown on Exhibit 2 (Tab 19, p. 224). The petition proffers no alternative to the current system. Ms. Pratt did not appeal By-law 2011-89 nor did she make any submissions to the Board on the appeal filed.

Subsequent to receiving the petition the municipal council at its meeting of September 21, 2011 directed staff to undertake the necessary studies, given wide public notice and schedule public meetings to consider the issue of the ward boundaries all within the

requirements prescribed by the *Municipal Act*. After several staff reports, a public meeting and the consideration of alternative submissions, Council made some minor changes to the ward boundaries which found effect in By-law 2011-89. The substance of the Ward boundary changes as shown on Exhibit 3 was to move a portion of Ward Two in to Ward One in the area of Port McNicoll to reflect potential development. The second change was to move a portion of an existing subdivision along the west side of Sturgeon Bay from Ward Three to Ward Two so that the entire subdivision was within one ward. The ward boundary by-law was subsequently appealed to the Board and is the subject of this hearing.

The evidence and submissions

The Board heard from Ms. Alison Thomas who was qualified to give expert testimony in the field of municipal government administration and organization. Ms. Thomas is the Clerk of the Township and is the author of the various ward boundary reports sent to Council regarding the process to be followed, the criteria to be applied, and the options available to Council with respect to the electoral boundary system for the next municipal election in 2014.

The Board also heard from Ms. Helbig and Ms. Pearson regarding their concerns with By-law 2011-89. The Board noted that these individuals were not represented by counsel and deeply appreciates their very thoughtful presentations found at Exhibits 4 and 5 and their oral submission to the Board. The substance of their representations is summarized as follows:

- a) They do not believe the current ward boundary system provides the electors in Ward Three with an equality of representation.
- b) They believe the all members of Council should be elected at large and that the ward system should be abolished. They believe that the election at large system would foster a Township wide community of interest as opposed to perpetuating communities of interest within the Township based upon the historic settlement areas along the Georgian Bay shoreline.

- c) They contend that the current and proposed ward system disadvantages the residents of Ward Three as the Council does not consider the Waubaushene community's needs and their member of Council is always out voted by the Councillors from the other two wards.
- d) They challenge the use of the Municipal Property Assessment Corporation (MPAC) population figures used by the clerk in the ward boundary studies as opposed to the Census Canada figures in the analysis of Ward populations.
- e) They contend that the population distribution among the ward established by Council fails to completely deal with the principle of equality of representation.
- f) In support of the abandonment of the ward system they rely in part on the fact that an election at large system is in place in the adjoining Municipality of Tiny Township.
- g) They opine that in the alternative to elections at large that the rural areas of the Township do not have equality of representation and as such the rural areas should have a separate ward.

Ms. Thomas was the staff person who prepared the various ward boundary options reports for Council's consideration. It was her evidence that in preparing the alternatives for Council's consideration she attempted to follow the principles presented in her report of October 12, 2011 (Exhibit 2, Tab10) which was adopted by Council. It was her evidence that in preparing the ward boundary alternatives study (Exhibit 2, Tab 12) that she had regard for the following four principles:

1. Representation by population or equality of representation - that voters should be equally represented by having wards with reasonably equal population total or a reasonably equal amount of residents per elected official.

Relative Population Parity- namely that the population of each ward should not be greater or less than 25% of the average population per ward.

2. Communities or Communities of Interest within a ward - one should not break up existing neighbourhood. Ward boundaries should be established on common interest or where there is a strong community connection.
3. Physical features or natural boundaries.
4. Population trends and estimated growth projection.

She pointed out to the Board that the geography of the three bays along the Georgian Bay shoreline and the location along these bays of Port McNicoll, Victoria Harbour and Waubaushene, where unique geographical and human settlement features that assisted in creating the ward boundaries and that the east west boundaries between the wards, were based upon historical concession line. She noted that the variation in population density between the urban and rural areas of the Township resulted in wards having different geographic areas. It was her evidence that for the purpose of ward boundaries options she used the number of electors from the MPAC database of October 2011, as this was the most accurate information available at the time. It was her evidence that her November 9, 2011 report contained an analysis based upon the above noted criteria for the following five options:

1. The existing ward system with amendments;
2. All elected at large (no ward);
3. Five wards (split down Talbot Street);
4. Five Wards (Paradise Point Separate); and
5. Two urban and three rural/urban

Ms. Thomas then reviewed for the Board the population characteristics and elector distribution within the Township. She advised that the population of the Township on October of 2011 according to MPAC was 11,886 persons with the bulk of the population

residing in the three urban settlement areas along the waterfront. She testified that it is expected that 90% of the anticipated population growth from some 50 new homes per year for the next 11 years would occur in the settlement areas of Port McNicoll and Victoria Harbour. This growth is based upon approved development plans as identified by the Township's Planning Director. By all accounts the growth projected for Tay Township is low.

The distribution of electors in the current three wards is found at Exhibit 2 (Tab 12, p 146). They are based upon the October 2011 estimates of MPAC and are as follows:

Ward 14,330

Ward 2.....4,705

Ward 3.....2,851

Total11,886

Ms. Thomas then reviewed for the Board the elector quotient and deviation ranges from that quotient. They are as follows:

Electoral quotient = $11886/5 = 2377$

(population/ No of ward councillors = 2377 person for parity)

Parity range (%)	No of persons(+or-) from 2377	Range of population
+_ 25%.....	594	1783 to 2971 persons
+_20%	474	1902 to 2852 persons

+ - 15%.....	356	2021 to 2733 persons
+ - 10%.....	237	2140 to 261 persons
+ - 5%.....	119	2258 to 249 persons

It was her evidence that to maintain voter parity between the wards some changes would be required. In the case of option 1, the option selected by Council, the changes to the ward boundaries are set out on a map (Exhibit 3). Ms. Thomas testified that the new wards established by this option would fit within the accepted deviation ranges with Ward One, being around 10% of parity, Ward Two, around 5% and Ward Three, around 15% which in her opinion was well within the accepted parity rules, thus meeting the requirement for effective representation. She also opined the proposed modified option one would retain the urban rural mix in all wards and would ensure that the communities of interest remain together. She freely admitted that some of the other options she put before Council would to varying degrees meet the four criteria set out to judge the various electoral boundaries.

Under cross examination Ms. Thomas was questioned whether it might not be more appropriate from the perspective of voter parity to have all councillor's elected at large. It was her uncontradicted opinion that this would give the best voter parity but while voter parity is very important, it is not the sole criteria for determining ward boundaries and that other issues such as effective representation, community of interest, geography, community history and anticipated population growth should also be taken into account and that one should look at what is best for the Township and not simply a pure mathematical solution.

She also noted that when Council met on December 14, 2011 to make its final determination of the ward boundary issue it had all of the submissions from the public meeting and additional correspondence from residents and in fact had nine options for electoral boundaries before it as set out in her staff report of December 14, 2011 (Exhibit 2, Tab16). In this report she assessed all of the options proposed against the four criteria (effective representation, community of interest, physical features and population growth) as set out in her initial report discussed earlier in this decision. A full assessment based upon these criteria was available to Council for all of the nine

options in her report of December 14, 2011. It is clear from her analysis that several of the ward boundary options would meet the criteria set out in her report, and these findings were available to the municipal Council and the public when Council made its determination of the ward boundaries on December 14, 2011 for the next municipal election.

Council's determination to adopt Option One and pass By-law 2011-89 was carried on a 5 to 2 recorded vote.

Findings

The Board after hearing the submissions and carefully reviewing all of the evidence finds the public hearing process by the Township following the receipt of the petition for a review the electoral ward boundaries, exceeded and more than met the requirements of the *Municipal Act*. The appellant and the participant argued that the Council after hearing submissions at the formal public should have adopted the no ward election-at-large system option. It is noteworthy that neither the appellant nor the participant at the November 16, 2011 public meeting made any representation regarding the no ward election at large option to the municipal council.

The Board's jurisdiction in the matter is clear as set out in Section 222(7) of the *Municipal Act*, which states that:

The Board shall hear the appeal and may despite any *Act* make an order affirming, amending or repealing the By-law.

The Board after a fair, full and complete hearing of the evidence on the appropriateness or lack thereof of the proposed ward boundaries will render its decision in accordance with its authority under the *Municipal Act* and accepted legal precedence. The seminal decision in this regard is *The Supreme Court of Canada in Reference re: Provincial Boundaries (Sask.)* [1991] 2 S.C.R. 158.

The Court has held that effective representation is one of the tests that should apply in considering electoral areas. The tests prescribed by the Court consist of several factors. However, the actual composition of the Council is not one of them.

The issue before the Board is whether the By-law provides for effective representation within the context of Tay Township as prescribed in *The Supreme Court of Canada in Reference re: Provincial Boundaries (Sask.)* [1991] 2 S.C.R 158.

The Board finds that there is no credible data, put forward by the appellant or the participant which would support their allegations that By-law 2011-89 breaches the directions found in the Supreme Court decision cited earlier and they offered no credible alternative other than to say that the Board should prefer a no ward election at large system with all members of council being elected at large. Clearly this choice would provide voter parity but would ignore any consideration of existing communities of interest and provides no guarantee that the electors in the Waubaushene area would have any direct representation on Council as those running for election must only be a resident of the municipality. Clearly such an electoral system would favour the population centres of Port McNicoll and Victoria Harbour and could result in many areas of the Municipality being without any effective local representation.

Council engaged in a process designed to gain public input in a variety of ways. There was not a rush to judgement. The public was heard and their submissions were considered. It is also clear from the final report of the Clerk that several of the nine options to a varying degree would meet the four criteria identified by the clerk and as prescribed by the Court *Reference re: Provincial Boundaries (Sask.) supra*

The Board, after a careful reading of the evidence, finds that the opportunity to consider all of the alternatives was available to the members of Council and that merely because Council determined to continue the three ward system, albeit in a slightly different configuration to meet changing population dynamics, is not grounds in and of itself for the Board to overturn Council's decision, especially when the option selected meets the four criteria found in the Supreme Court rulings cited earlier in this decision.

The appellant alleges that with only one representative from Ward 3 the electors in that area do not have equality of representation. The more compelling evidence is that there is vote parity that it is well within accepted deviations (up to 25%), and that the other factors, namely, community interest, geography, historical settlement area, and anticipated population growth within the Township, also played a part in the municipal Council's determination.

The Board is also satisfied after hearing the testimony of Ms. Thomas that the use of MPAC statistics is appropriate for the purpose of establishing the populations within the various areas of the municipality.

Clearly the matters of Council composition and Ward boundaries are linked. Insofar as it is difficult to understand the implications of a decision on the ward boundaries without having some understanding of how Council representation may occur. It is only common sense that Council and the ratepayers would want an understanding of the impacts of its decision on ward boundaries as it might affect the composition of the Council, whether be it by membership or multiple voting allocations to certain members of Council, in order to ensure that there is equality of representation.

The Board's jurisdiction as cited earlier is found at section 222(7) of the *Municipal Act* and is restricted to the matter under appeal, namely, the propriety of the ward boundaries. The matter of the Council composition is not before the Board beyond the consideration of whether the ward boundaries as set out in By-law 2011-89 will result in equality of representation for the electors of the Township.

The determination of ward boundaries is anything but a simple arithmetic calculation. *The Supreme Court of Canada in Reference re: Provincial Electoral Boundaries (Sask.) supra* considered the issue of electoral boundaries and determined that a variance in the size of the voter population among constituencies does not infringe rights guaranteed by the Charter of Rights and Freedoms. The right to vote enshrined in section 3 of the Charter is not equality of voting power per se but the right to "effective representation". Appropriate weight must be given to voter equity, but factors such as geography, community history, community representation and minority representation must also be considered.

The Board finds that there is no credible data, put forward by the appellant, which would support her allegations that By-law 2011-89 breaches the directions found in the Supreme Court's decision.

While it is true that there is a variance in the number of electors estimated for Ward Three, within the options selected by Council the disparity is within an acceptable range. It is equally true from the evidence that Wards One and Two are the areas designated growth areas in Tay Township in the future, and that growth within the Waubaushene

area is to be restricted. These are planning decisions made by the Township based upon provincial policy, and a variety of other reasons that are not before the Board. If the concept of one representative per ward or two representatives per ward was imposed as a solution, the variance in equality of representation would increase and would become worse over time as the growth areas of the Township continue to expand while the area of Waubaushene remains stagnant in its future growth.

In the Supreme Court of Canada case, Justice McLachlin stated that effective representation cannot be achieved without taking into account countervailing factors like geography, community history, community interest and minority representation.

The Board finds that the Council of Tay Township had regard to all relevant factors and has not breached the directions of the Supreme Court of Canada when it enacted By-law 2011-89.

The Board notes that several options considered by the Municipal Council would have met the criteria set out by the Courts, and could have been employed by the Municipal Council. However the only option put forward by those in opposition to By-law 2011-89 was the no ward election at large option. The Board heard no compelling testimony that this system is to be preferred to the system selected by the Municipal Council. Nor does the Board conclude from the testimony received that this option would respect the communities of interest found within this amalgamated community or the location of the anticipated population growth. The election at large system could result in less equality of representation for those electors in the Waubaushene Ward area. It is clear from Ms. Pearson's photographs (Exhibit 4) that there is a strong community of interest focused around the area of Waubaushene just as there is in other parts of the amalgamated municipality. The Board is hard pressed to see how an election at large system would reflect the communities of interest so clearly articulated by Ms. Pearson in her testimony and shown on her photographs of the Waubaushene community.

The Board can find no compelling evidence that the Municipal Council has not followed the requirements of the *Municipal Act* and the directions of the Supreme Court of Canada in arriving at a ward boundary system that is fair and meets the specific needs of their local community. While there were other options that might have met the criteria the Board heard no compelling testimony that the other options should to be preferred

over the ward boundary option selected by Municipal Council. The Board without compelling evidence to the contrary will defer to the local knowledge and determination of the Municipal Council that resulted from a full review of the various ward boundary options available to them.

In conclusion and for the reasons set in this decision, the Board Orders that the appeal of Cindy Pearson against By-law 2011-89 of the Township of Tay is dismissed and in accordance section 222 of the *Municipal Act*, the Board affirms By-law 2011-89 of the Township of Tay.

The Board so Orders.

“J. A. Atcheson”

J. P. ATCHESON
MEMBER