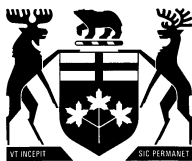


ISSUE DATE:

November 06, 2013



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

MM130053

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

Appellant: Kevin Wiener
Sydenham District Association
Alma Mater Society of Queen's University
Subject: By-law 2013-83 to dissolve existing wards
Municipality: City of Kingston
OMB Case No.: MM130053
OMB File No.: MM130053

APPEARANCES:

Parties

Counsel

City of Kingston

Tony Fleming and Erin Gwynne

Alma Mater Society of Queen's University

J. Michael Hickey

Sydenham District Association

J. Michael Hickey

Kevin Wiener

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

[1] Pursuant to the provisions of s. 222(1) of the *Municipal Act* ("Act"), the Council of the City of Kingston ("City") passed By-law 2013-93 ("By-law") to establish 12 redivided electoral districts for the 2014 municipal election. The Board received three appeals from the By-law pursuant to s. 222(4) of the Act from the following ("Appellants"):

- Alma Mater Society of Queen's University ("AMS")
- Sydenham District Association ("SDA")
- Kevin Wiener

[2] Generally, they were appealing the By-law on the basis that it does not provide effective representation in configuring the new electoral district boundaries because it

excludes post-secondary students from the population counts used to determine ward boundaries.

[3] In addition to the exclusion of post-secondary students from the population counts, the Appellants appealed on the basis that the By-law fails to recognize various communities of interest in the municipality, particularly those represented by the SDA, by splitting the Neighbourhood Association area between newly created Districts 9 and 10. The SDA argues in its appeal that the splitting of Sydenham District results in the removal of the “historic triangle”, the triangle east of Barrie Street, from the district, “demonstrating a complete disregard of the strong community of interest of the SDA, the longest standing neighbourhood association in the City.”

BACKGROUND

[4] On November 20, 2012, Council received Report 12-375 (Exhibit 3, Tab 3), which provided information respecting the review of the City’s electoral district boundaries, including options for the redivision of the existing boundaries. In the preparation of this report, staff used the projected number of electors rather than total population, and excluded post-secondary students from the review process.

[5] Council was of the opinion that, in order to achieve “effective representation”, total population, not just electors, should be the basis for determining distribution across the redivided electoral districts and directed staff to seek advice on how to complete population numbers, including post-secondary students and children and how these might best be reflected in the district boundaries.

[6] A Technical Advisory Team was established to assist City staff, comprised of two staff members from the Ministry of Municipal Affairs and Housing, one faculty member from Queen’s University (“Queen’s”) and one staff member from St. Lawrence College (“St. Lawrence”).

[7] This resulted in Report 13-057 (Exhibit 3, Tab 4), which included Revised Options 1 – 3, redividing the existing electoral boundaries based on 2011 Census population, plus estimates of the post-secondary students living in the redivided districts.

[8] In a public meeting held in January 2013, City staff advised,

students are eligible to vote, there is a responsibility in terms of achieving 'effective representation' to include them, and if they are not included and the City's by-law is challenged on that basis, the by-law may not be approved by the OMB.

[9] A final Report, 13-144, (Exhibit 3, Tab 5) came before Council's April 9, 2013 meeting. The Report contained a recommendation by staff for a Preferred Boundary configuration for the redivided districts – Revised Option 4 -- based on the total 2011 Census population including post-secondary student estimates. On a 7-6 vote, Council passed a motion to redivide the electoral boundaries in accordance with Option 1 contained in Report 13-144, which does not include post-secondary student estimates in the total population counts. Option 1 was the second of two alternate boundary configurations – Revised Option 3A being the first of the alternate configurations -- presented in this report. It was the only one of the three that did not include post-secondary student estimates.

HEARING

[10] George Wallace was qualified to give expert evidence and opinion on land use planning, demographic analysis and ward boundary review on behalf of the City, and Dr. Robert Williams was qualified to give expert evidence and opinion on municipal ward boundaries on behalf of the City.

[11] Wayne Toms, Manager of Information Technology Services and Planning for the Limestone District School Board, appeared as a witness on behalf of the City.

The following appeared witnesses on behalf of the AMS and the SDA:

- Eril Berkok
- Paul Young
- Ken Ohtake
- Iain Reeve
- Jim Neill
- William Glover

[12] The following spoke as Participants at the hearing, all opposing the By-law:

- Matthew Gventer
- Joyce MacLeod-Kane
- Frank Dixon
- Sergio Sismondo
- Roger Healey

- Claude Sherren
- Floyd Patterson
- John Grenville
- Don B. Rogers
- Liz Schell
- Morgan Davis
- Joe Hawkins

[13] All but Mr. Gventer, who supported Option 3A, and Mr. Hawkins, who wanted to dispense with the ward system and go to a general vote, were in favour of Revised Option 4.

[14] Bruce Todd, also listed as a Participant, was unable to attend the hearing because of illness. His witness statement is contained in "Participant Statements" (Exhibit 8). He, too, opposed the By-law.

[15] Mr. Wiener, a second-year law student at Queen's, did not call any witnesses, but was most effective in his examination and cross-examination of witnesses appearing on behalf of the other three Parties.

FINDINGS

[16] The seminal reference in the establishment electoral boundaries is that of the Supreme Court of Canada in its decision *Reference Re: Provincial Electoral Boundaries (Sask)*, [1991] 2 S. C. R., known as *Carter* ("*Carter*"), the surname of the respondent in the matter. In *Carter*, the Court determined that:

The purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R....elected representatives function in two roles – legislative and what has been termed the "ombudsman role."

[17] Interestingly, Justice McLachlin, who drafted *Carter*, went on to quote Canada's first Prime Minister, Sir John A. Macdonald, who walked the very streets of Kingston that are the subject of this hearing. Acknowledging the prime importance of the parity of voting power, Justice McLachlin states that it is not the only factor to be taken into consideration in ensuring effective representation. She turns to Macdonald who, in

introducing the *Act to re-adjust the Representation in the House of Commons* in 1872, “recognized this fundamental fact”:

... it will be found that ... while the principle of population was considered in a very great extent, other considerations were also held to have weight: so that different interests, classes and localities should be *fairly* represented, and that the principle of number should not be the only one.

[18] At the time Macdonald crafted that statement, Queen’s was more than three decades old, and its students were undoubtedly already making their presence felt in Kingston.

[19] The population of the City according to the 2011 Federal Census is 123,363 people. In Information Report 13-057 to Council, staff, having contacted the three post-secondary institutions in Kingston, estimated the total number of post-secondary students to be 26,864. This includes 20,364 at Queen’s, not counting non-credit and part-time students, 5,200 full-time students at St. Lawrence, and 1,400 at the Royal Military College. Together, they total 21.78% of the population of the City.

[20] The justification for not counting these students seems to have been consistent throughout the exercise: they do not vote and, as a result, their inclusion would dilute the vote in wards without, or with a limited, post-secondary student population. In his final submission to the Board, counsel for the City stated,

parity in voting power is the principle test to determine whether a municipal electoral system creates effective representation. The fact that post-secondary students do not participate in municipal elections in any meaningful numbers is not in dispute; the dispute is whether this fact is relevant to the issue before the Board.

[21] But, is parity in voting power “the principle test” to determine a municipal electoral system? *Carter* puts considerable weight on “effective representation” which maintains that “each citizen is entitled to be *represented* in government.”

[22] The City argues that post-secondary students can still vote if they register to vote. The Act does give them this right. But, if they are not counted as residents of the City, does this send the message that their vote doesn’t count? Or is somehow less important?

[23] And what about other residents of Kingston who do not or cannot vote, including children who cannot, and the poor, who tend not to? Why are they counted when post-

secondary students are not? This was a question raised by more than one witness and participant at the hearing.

[24] Students are usually away from their post-secondary institutions when the census is taken. In fact, as was pointed out at the hearing, they are often the census takers. That does not mean that they do not live, study, work and contribute to the community for the nine months of the year that they are there. It does not mean that they do not use City services, have no issues to bring to their local government, and do not create issues for others to bring to their local government. The elected representative is not simply the representative of those who voted, or of those who voted for him or her, but of all the residents of his or her ward. All of this, too, the Board heard from witnesses and participants. It was, as well, implied in the evidence of the expert witnesses.

[25] Mr. Wallace, a former Director of Planning for the City, who is currently employed as the Senior Special Projects Manager for the City, and who was responsible for the preparation of the three main reports to Council respecting the boundary configurations, reviewed each of the reports for the Board, the most relevant of which is Report 13-144 (Exhibit 3, Tab 5), the final report.

[26] It was in this report that Revised Option 4, which includes counting post-secondary students, was recommended by staff as the preferred boundary option. This option was based on the total 2011 Census population. This option was the preferred option, because, in the words of the report, reiterated by Mr. Wallace at the hearing it is consistent with Council's directions as well as the premise of "effective representation".

[27] It also achieves an equitable distribution of population across all the redivided districts and provides for distinct boundaries that recognize existing and future growth areas and should therefore be sustainable through the 2018 election. The report also states that this option provides for population distribution that is significantly better than the existing district boundaries.

[28] Further, with this option "all neighbourhood association areas remain intact except for the portion of the existing Sydenham District north of Union Street and west of Albert Street that becomes part of Williamsville."

[29] Under this option, the “historic triangle” east of Barrie Street remains part of Sydenham District.

[30] The report states that Option 1, which does not count post-secondary students, and which is the option selected by Council, is also “consistent with the premise of ‘effective representation’”. It does not reconcile how both options can be “consistent with ‘effective representation’ or indeed define what is meant by “effective representation.”

[31] While Option 1 leaves most neighbourhood association areas intact, that is not true for the oldest of these, Sydenham District, which is split at Barrie Street between Districts 9 and 10.

[32] Option 1 is the preferred option of the trustees of the Limestone District School Board. The Board, however, is ultimately free to determine its own electoral districts, which do not have to be coincidental with the City’s.

[33] Dr. Williams, professor emeritus in the Department of Political Science at the University of Waterloo and now a consultant on electoral boundary matters, held, in the Board’s view, somewhat contradictory opinions. In his peer review of the staff reports (Exhibit 5), Dr. Williams stated at various times:

The number of post-secondary students eligible to vote in each district is not captured in either the Census or MPAC data and is therefore ignored, While it may be difficult to make an accurate determination of the student population ... this should not be the basis for leaving this sector of the community out of the determination of the electoral system.

Furthermore, the notion that they can be basically ignored in this exercise because they are not voters is unsound.... The *Municipal Elections Act* (and the Charter for that matter) would not condone the failure to take account of any other section of the community just because it does not vote – for religious, linguistic or other grounds.

In reality, there are three overlapping but distinct populations in any municipality: electors, taxpayers and residents. The determination of electoral district boundaries should involve the last group....

The possibility that Council ‘decides not to include the post-secondary student population estimates as part of the total population counts for the redivided districts’ is addressed but the advisability (or otherwise) is conveyed tactfully by making an option based on excluding the post-secondary student population an ‘alternative’.

[34] In an e-mail to Councillor William Glover, who represents Sydenham District, dated November 20, 2012, Dr. Williams, wrote, “the way post-secondary students are counted is another conundrum ... but I would object strongly to the notion that they can

be basically ignored in this exercise because ... they don't vote anyway" (Exhibit 6, Tab16).

[35] In an e-mail to Councillor Glover, dated April 10, 2013, Dr. William states,

I am also a bit uneasy about the claim that 'this decision could be easily defended at the OMB because I don't think that is what we argued; the process could be defended, but the design of a system that deliberately ignores a segment of qualified electors would not be easy to defend (Exhibit 6, Tab 18)

[36] Yet Dr. Williams defended it anyway. He told the Board that he changed his opinion when he realized that other votes would be diluted if the students were counted. Yet, he was fully aware of this when he told Councillor Glover that "the design of a system that deliberately ignores a segment of qualified electors would not be easy to defend" and when he wrote that the determination of electoral district boundaries should involve the "residents" as opposed to just the electors or taxpayers.

[37] The Board feels that Dr. Williams was correct in his analysis right up to the point where he found he could support Option 1 as reasonable, which he did at the Board. He was, in the Board's view, on the wrong side of his own argument.

[38] The City argues that the Board must show deference to the decision of the municipal council. With this, there can be no argument. The Board does not lightly interfere with that decision unless "there are very clear and compelling reasons to do so." (*Niagara Falls By-law 2002-097*, [2002] OMBD No. 1074).

[39] In this instance, the Board does believe "there are clear and compelling reasons to do so." The Board finds that the Council, in a 7-6 vote, acted unreasonably in adopting an option that does not count more than 20% of the City's population when determining electoral districts. Whether that population votes or does not vote is not the issue. *Carter* determined that effective representation, as well as voter parity, is a key principle upon which electoral boundaries should be determined, and that there are instances when effective representation trumps voter parity:

Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation.

Factors like geography, community history, community interests and minority representation many need to be taken into account

[40] Certainly post-secondary students represent community interest as well as a community of interests and minority representation. It is not good enough to suggest, as the City has, that their issues can be represented at the City by AMS any more than an individual resident of Sydenham District should rely upon the SDA to represent his or her issues at Council. For that, the citizen would turn to his or her councillor. So, too should the student. The councillor is ombudsman as well as legislator.

[41] To suggest, as the City has, that the elimination of student numbers when determining ward boundaries is defensible because the issues brought to the councillors by the students are “manageable” does not take into account the issues brought by the other residents of the ward because of the presence of the students.

[42] The Board heard from six councillors, past and present. Five of these commented on the fact that they did or do spend no small amount of time interacting with the students. To ignore this fact, to ignore the thousands of additional residents for whose representation at Council they have responsibility, is, in the Board’s view, patently unfair to these councillors, and potentially lessens their ability to provide effective representation. As former councillor, Joyce MacLeod-Kane told the Board, “When you do not count students as residents you ignore reality, you discourage them from voting and you leave the city councillors who represent the areas where students live with a lot more work than the other councillors who in reality are representing more people. That is not fair.” Ms. Macleod-Kane was one of those “other councillors”, who represented the Countryside District from 2006-2010.

[43] The fact that the City does not, at the moment, have an absolutely accurate count of the number of post-secondary students can surely be remedied with the co-operation of the post-secondary institutions by the time of the 2018 election. In the meantime, there is, in the Board’s view, a reasonably acceptable count.

[44] The fact that no other municipality housing a post-secondary institution, or institutions, as was outlined by Mr. Wallace (Exhibit 3, Tab 6), counts post-secondary students in determining municipal ward boundaries is not, in the Board’s view, an argument against so doing. Several of these municipalities have not had a ward boundary review in many years. In those that have, the counting of post-secondary

students was never raised as an issue. It has been in this instance. Because something has not been done, does not mean that it should not be done.

[45] Ken Ohtake, chairperson of the SDA, in supporting Revised Option 4, strongly recommended Revised Option 4 be further revised to restore the area bounded by Albert Street, Union Street, Sir John A. Macdonald Boulevard and Johnson Street back to Sydenham District.

[46] The Board accepts SDA's position that this would restore a community of interest that was fragmented in separating the area from Sydenham District.

[47] The Board concludes, on the basis of the evidence before it at the hearing, and for the reasons outlined in this decision, that Council acted unreasonably in adopting Option 1 and in adopting By-law 2013-83, based upon Option 1. The Board also finds that Revised Option 4, for the reasons outlined in this decision and in Report 13-144 meets the criteria for boundary reconfiguration in the City of Kingston.

DISPOSITION

[48] The Board orders that the appeals of the Alma Mater Society of Queen's University, the Sydenham District Association and Kevin Wiener against By-law 2013-83 are allowed and that Preferred Revised Option 4 further revised to restore the area bounded by Albert Street, Union Street, Sir John A. Macdonald Boulevard and Johnson Street back to Sydenham District, replaces Option 1 in the redividing of the electoral district boundaries within the City of Kingston.

"Sylvia Sutherland"

SYLVIA SUTHERLAND
MEMBER