

ISSUE DATE:

April 2, 2014



PL110080

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

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: 1541179 Ontario Ltd. and Lea Silvestri Investments Ltd. (jointly)
Appellant: 1589805 Ontario Inc.
Appellant: 2140065 Ontario Inc.
Appellant: 2163846 Ontario Inc. and others
Subject: Proposed Official Plan
Municipality: Regional Municipality of Waterloo Region
OMB Case No.: PL110080
OMB File No.: PL110080

APPEARANCES:

Parties

Counsel

Regional Municipality of Waterloo ("Region")

Brian Duxbury,
T. David Marshall and Adam Lazier

Activa Holdings et al ("Activa")

Tom Friedland and Ian Andres

Mattamy Development ("Mattamy")

Denise Baker

2163846 Ontario Inc. ("216")

Robin-Lee Norris

Township of Wolwich ("Township")

Eileen Costello

DECISION DELIVERED BY J. E. SNIEZEK AND S. J. STEFANKO AND ORDER OF THE BOARD

INTRODUCTION

[1] The purpose of this Prehearing Conference ("PHC") was to organize the procedural matters associated with a motion ("Board's Motion" or "its Motion") brought

by the Ontario Municipal Board (“Board”) to determine whether there was a reasonable apprehension of bias on the part of this panel when we presided over the first phase of the appeals to the proposed Region of Waterloo (“Region”) Official Plan and rendered our decision (“Decision”) on January 21, 2013. The statutory authority for the Board to proceed with this PHC and motion is specifically found in s. 41(1) and (2) of the *Ontario Municipal Board Act* (“OMBA”) which read as follows:

When Board may act

41. (1) The Board may, of its own motion, and shall, upon the request of the Lieutenant Governor in Council, inquire into, hear and determine any matter or thing that it may inquire into, hear and determine upon application or complaint, and with respect thereto has and may exercise the same powers as, upon any application or complaint, are vested in it.

Power to act from time to time

(2) Any power or authority vested in the Board under this or any other general or special Act may, though not so expressed, be exercised from time to time, or at any time, as the occasion may require. R.S.O. 1990, c. O.28, s. 41.

[2] Before embarking on a discussion of the events that occurred at the PHC, we will provide, albeit briefly, certain background information, to assist in understanding the context of this proceeding.

BACKGROUND

[3] The Board previously directed that the appeals to the Region’s proposed official plan would be resolved in phases. The Decision followed a five-week hearing (“First Phase”) on the issues raised in the initial phase of the appeals. In paragraph 11 of the Decision, we described the fundamental issue in the First Phase as:

...how much of an urban boundary expansion (“Urban Boundary Expansion”) for the Region is required so as to accommodate the population and employment forecasts set out in Schedule 3 and to meet the Growth Plan Targets.

[4] We stated in paragraph 12 that:

This fundamental issue gives rise to the following subsidiary issues:

- a) What land, if any, should be excluded from the Designated Greenfield Area under s. 2.2.7.2 of the Growth Plan when measuring the Density Target?
- b) Which land budget should be preferred?

[5] The Decision therefore focused on the amount of land (“Take Outs”) to be excluded from the Designated Greenfield Area and which of two land budgets presented should be preferred.

[6] After determining the specific Take Outs and the preferred land budget, we indicated our intention that the parties would fuse together our determination with respect to the Take Outs and the land budget to arrive at the net developable area for purposes of the Urban Boundary Expansion. That exercise, to our knowledge, has not been done by the parties and, as a result, the Decision remains incomplete in that respect.

[7] Following the issuance of the Decision, the Board learned, *inter alia*, that the Region commenced an application for judicial review (“Judicial review Application”) alleging a reasonable apprehension of bias on the part of this panel, on the basis that we attended a Board training session on April 3, 2012, which dealt with the Growth Plan for the Greater Golden Horseshoe. A number of outside speakers were invited to that session including Jeannette Gillezeau. She was a witness for one of the appellants in the First Phase.

POSITIONS OF THE PARTIES

[8] At the outset of this PHC, Mr. Duxbury made it known that he is appearing on behalf of the Region “under protest”. He advised that, in his opinion, the PHC should not have been initiated. He requested that the Board not proceed because the Region intended to seek an order from the Ontario Divisional Court prohibiting the Board from hearing its Motion.

[9] The Region relies upon *Canada (Attorney General) v. Berrywoods Farms Inc.* [2006] O.J. 7987 in support of its position. That case involved various applications filed by Berrywoods Farms Inc. (“Berrywoods”) seeking planning approvals to develop a subdivision. When the relevant municipalities failed to make a decision on the Berrywoods’ applications, Berrywoods appealed to the Board.

[10] Before the Berrywoods’ appeal was heard by the Board, Transport Canada and the Greater Toronto Airports Authority launched an application for judicial review seeking, among other things, a declaration that the planning approval applications of

Berrywoods were nullities and of no effect by reason of the Greenbelt Protection Act (“GPA”).

[11] The Court held that the planning approval applications were indeed nullities since a portion of the land in question was protected as rural and agricultural land by the GPA. Accordingly all steps and decisions taken by the municipalities to process the applications were quashed and the Berrywoods’ appeal was not heard by the Board.

[12] Mattamy, 216 and the Township all advised that they were not taking a position on the Board’s Motion. Activa, on the other hand, was supportive of the action taken and was of the view that the Board’s Motion should be heard. According to Activa, among other things, the Board clearly has jurisdiction to entertain its Motion, this panel was never given the opportunity to respond to the allegations raised in the Judicial Review Application, the Board’s Motion may very well reduce the need for future legal proceedings and, this panel continues to remain seized of the matters raised in Phase 1.

ANALYSIS

[13] We cannot accede to the position of the Region at this prehearing for a number of reasons.

[14] First, in our view, the Berrywoods case relied upon by the Region has absolutely no bearing on the matter before us and is clearly distinguishable.

[15] In Berrywoods, the Court dealt with legislation which directly affected the lands which were the subject matter of the planning approval applications filed. It considered whether the specific language of the GPA prevented the applications from going forward. The Court did not, in any way, address the issue of a reasonable apprehension of bias nor did it consider whether the Board could bring its own motion in the face of an outstanding judicial review application with respect to a previous Board decision. In fact, in Berrywoods there was no motion brought by the Board whatsoever. In our view, there is simply no relevant connection between the case at hand and Berrywoods.

[16] Second, there is however, in our opinion, clear and compelling jurisprudence directly on point which validates the action taken by the Board in its Motion. The Ontario Court of Appeal in *Cedarvale Tree Services Ltd. and Labourers’ International Union of*

North America, Local 813, [1971] 3 O.R. 832 addressed the issue of an administrative tribunal continuing its proceedings in the face of a motion for an order of *certiorari* or prohibition. At paragraph 27, Arnup, J.A. stated:

It is also clear that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an Order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction.

[17] Accordingly, there is indeed appropriate authority to allow the Board to proceed to a determination of the motion it has commenced.

[18] Third, s. 41 of the OMBA provides the requisite statutory authority for the Board's Motion.

[19] Fourth, there is not, in our opinion, any prejudice to the Region if the Board's Motion proceeds.

[20] Fifth, there are practical benefits for this panel to make a determination with respect to the Board's Motion. For one thing, a decision may eliminate the need for any subsequent judicial review altogether. And, for another, and at the very least, the evidentiary record for the Divisional Court, on the return of the judicial review application, will be supplemented by the record from this proceeding. In that way, the Divisional Court will, in our estimation, have all available information before it.

[21] Sixth, no motion was brought by the Region in this proceeding, although invited to do so, alleging a reasonable apprehension of bias on the part of this panel in relation to the First Phase.

[22] And finally, this panel is still seized of Board file number PL110080.

DISPOSITION

[23] Based on all of the foregoing, it is ordered that the Board's Motion shall be heard on **June 4 and 5, 2014**, commencing at **10 a. m.** at the:

**Board's Offices
655 Bay Street, 16th Floor
Toronto. ON M5G 1E5**

[24] The Board also heard submissions from counsel with respect to filing dates and the submission of materials to be adduced at the motion. The Board was satisfied with the schedule recommended by the parties, which has been prepared in further detail, and is attached to these reasons as Attachment "1". It is therefore further ordered that this attachment will govern the submission of materials which the parties may file in addition to the information furnished by the Board for this prehearing.

"J. E. Sniezek"

J. E. SNIEZEK
MEMBER

"S. J. Stefanko"

S. J. STEFANKO
VICE CHAIR

ATTACHMENT "1"

- a) Region's evidence to be filed by February 28th
- b) Activa's responding evidence, as well as any affidavits from Ms. Gillezeau and/or Mr. Mathew, to be filed by March 21st
- c) Region's reply evidence to be filed by April 4th
- d) Examinations to be completed during the week of April 7th-11th
- e) Region's written argument to be filed by May 9th
- f) Activa's responding argument to be filed by May 23rd
- g) Region's reply argument to be filed by May 30th
- h) Motion hearing to occur on June 4th and 5th