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DATE: 20001219
DOCKETS: C33545 and C33549

COURT OF APPEAL FOR ONTARIO

FINLAYSON, LABROSSE and WEILER JJ.A.

BETWEEN:

DEREK RUSSELL Respondent (Appellant) –and– SEAN SHANAHAN, KATHERINE SHANAHAN, ELAINE TRIGGS, DONALD TRIGGS, NANCY McFAYDEN JOHN McFAYDEN, LARRY CLARKE, JOAN CLARKE and CITY OF TORONTO Appellants (Respondents) –and– ONTARIO MUNICIPAL BOARD (Intervener)	Stephen Diamond, for the appellant Derek Russell Leo F. Longo, for the respondents Shanahan, Triggs, McFayden and Clarke Leslie Mendelson and William Hawryliw, for the respondent City of Toronto Leslie McIntosh, for the Ontario Municipal Board Heard: October 31 and November 1, 2000

On appeal from the judgment of the Divisional Court (Madam Justice Jean L. MacFarland, Mr. Justice Lee K. Ferrier and Mr. Justice Warren K. Winkler) dated August 10, 1999.

FINLAYSON J. A.:

[1] Derek Russell ("Russell") and the Ontario Municipal Board (the "Board") appeal separately the judgment of the Divisional Court setting aside the decision of a panel of the Ontario Municipal Board (the "Review Panel") dated September 3, 1998, and restoring an earlier decision of another panel of the Ontario Municipal Board (the "First Panel") dated December 16, 1997. The Ontario Municipal Board was represented at the hearing before the Divisional Court pursuant to s. 96(2) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 (the "*Act*") and limited its submissions to jurisdictional issues.

Facts

[2] In 1995, Russell purchased a vacant ravine lot on Glen Road in Rosedale for $50,000 with the intention of building a home. To build a home, Russell needed to obtain a building permit from the City of Toronto. He applied for a permit on July 26, 1995. His plans and drawings complied with all the applicable zoning by-laws, but he needed City Council's approval pursuant to the City's ravine control by-law. The day after Russell made his application, the City's Land Use Committee directed the Planning Commissioner to conduct the study of four Rosedale properties located on the ravine. Russell's property was one of the four lots under study. On August 14, 1995, City Council enacted Interim Control By-law 1995-0550, prohibiting all uses on the four lots for one year.

[3] On December 23, 1996, the Planning Commissioner provided a report to City Council recommending that the existing residential zoning be retained for the four properties studied, allowing single unit homes to be built. City Council rejected the recommendation and retained outside planning consultants. On July 14, 1997, the outside consultants' report was enacted by City Council in the form of a new ravine control by-law (Ravine Impact Boundary By-law 1997-0369) that effectively prohibited any construction on Russell's lands. The purported intention of the by-law was to protect ravines from development. The three other vacant Rosedale properties were likewise affected.

[4] Another Rosedale property owner, Vera Dickinson (who had owned a vacant ravine lot on Beaumont Road for 36 years) and Russell, appealed to the Board under the provisions of the *Planning Act,* R.S.O. 1990, c.P.13, as amended,for exemptions from the new by-law. There was a three-week hearing during which twelve experts were called. Opposing the appeals were the City and several Rosedale ratepayers.

[5] The First Panel dismissed the appeals, finding that there was no reason to exempt the appellants from the application of the by-law, which had been enacted "for a valid planning purpose, to protect ravines from development". Russell and Dickinson sought a review of the First Panel's decision by a Review Panel of the Board pursuant to s.43 of the *Act*. Section 43 provides: "The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it."

[6] After a one-day hearing, the Review Panel granted the review application on the basis that the First Panel had ignored the long standing policy of the Board in dealing with this type of zoning by-law, which was first set out in its decision *Re Township of Nepean Restricted Area By-law 73-76* (1978), 9 O.M.B.R. 36 at 55:

> This Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved. We do not wish or intend to depart from that general principle and we hope the solution suggested will

> allow the township to achieve its goals and at the same time be fair to the land-owner.

The Review Panel accordingly allowed the appeals and amended the by-law to exempt the two applicants' properties.

[7] Russell's neighbours and the City appealed only the Russell decision, with leave, to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of "manifest error" on the part of the First Panel, the Review Panel was not entitled to substitute its own opinion. Specifically, MacFarland J. for the court stated:

> We are of the view that all the questions posed for the opinion of the court must be answered in the affirmative. Even if the effect of the by-law was to sterilize the lands owned by the Respondent Russell the Board erred in overturning the Hearing Board decision for that reason. The *Planning Act* clearly gives the municipality the right to pass the by-law in question and there is clear authority that such right does not carry with it a corresponding obligation to pay compensation absent bad faith on the part of the municipality or specific statutory obligation to this effect. As was stated by Estey J. in *The Queen in Right of the Province of British Columbia v. Tener et al.* [(1986), 17 D.L.R. (4th) 1 at 7], a decision of the Supreme Court of Canada,
>
> > Ordinarily in this country . . . compensation does not follow zoning either up or down.
>
> In its hearing decision, the Board applied the existing authority to the facts as it found them and in our view it did so correctly. It is not open to the Board in a section 43 review to substitute its opinion for that of the Board which heard the matter on the merits over a three-week hearing save in exceptional circumstances.
>
> It is apparent that the Board on review simply preferred an approach other than the approach taken by the Hearing Board. This does not, in our view, constitute "manifest error" on the part of the Hearing Board which did as it is obliged to do in weighing the public and private interests and in result favoured the public interest over the private interest of Mr. Russell.

[8] The Divisional Court also faulted the Review Panel's decision on the basis that it failed to consider s.24 of the *Planning Act* dealing with an amendment to an official plan:

> There is nothing in the Board's decision to indicate whether it considered the effect of its decision in relation to the mandatory

provision of s. 24(1) of the *Planning Act*. The decision in this respect is simply silent and in the face of the mandatory requirement of subsection 1, that is not sufficient. The Board is obliged to consider this aspect and it did not do so and fell into error.

Relevant Statutory Provisions

Ontario Municipal Board Act

43. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

Planning Act

24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with if the amendment comes into effect, and the by-law shall be conclusively deemed to have conformed with the official plan on and after the day it was passed if the amendment come into effect.

(4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect.

34. (1) Zoning by-laws may be passed by the councils of local municipalities:

. . .

3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,

ii. that is a significant corridor or shoreline of a lake, river or stream, or

iii. that is a significant natural corridor, feature or area.

Issues

(1) Did the Divisional Court err in holding that it was not open to the Review Panel of the Board to substitute its opinion for that of the First Panel of the Board under s.43 of the *Act*?

(2) Was the Review Panel correct in ruling that the First Panel had made a manifest error?

(3) Was it necessary for the second panel of the Board to hold a hearing to determine that the by-law as amended was in conformity with s. 24(1) of the *Planning Act*?

Analysis

Issue 1: Did the Review Panel have jurisdiction under s.43 to substitute its opinion?

[9] In my opinion, the Divisional Court failed to appreciate the distinction between the statutory authority of the Review Panel to rehear or review its own decisions under s.43 of the *Act* and the self-imposed directive of the Board on the exercise of that power.

[10] The Board has developed a general policy with respect to the exercise of its wide plenary power under s.43. In Practice Direction 12, dated October 31, 1997, the Board stated that it would exercise its power under s.43 in two main circumstances. The first, under Part A, is to

correct "typographical or clerical errors and minor omissions". The second, in Part B, where the Board sets out three "reasons for review" in addition to minor errors. They are an "allegation of fraud", "new evidence" and "failure of natural justice or material failure of fact or law".

[11] In *Canada Mortgage and Housing Corp. v. Vaughan (City)* (1994), 31 O.M.B.R. 471 (O.M.B.), the Board set out its jurisprudence with respect to s. 43 at pp. 474-475:

> The jurisprudence of the board in this regard has been most clear. The past decisions indicate that we are reluctant to grant a s. 43 review unless there is a jurisdictional defect, or where there has been a change of circumstances or new evidence available, *or where there is a manifest error of decisions* or if there is an apprehension of bias or undue influence. While the list may not be exhaustive and the board's discretion should not be fettered unduly on an *a priori* basis, there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effects on public and propriety interests, our decisions should be well-considered and must have some measure of finality. If a motion is launched on grounds other than those enumerated, it should be to the Divisional Court which has either the competence and the authority to overturn our findings of fact and law. It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions. [Emphasis added.]

[12] The question whether s.43 empowers a review panel to rescind the decision of an earlier panel based on the misapplication of a planning principle was considered by a single judge of the Divisional Court on an application for leave to appeal from a decision of the Board in *St. Catharines (City) v. Faith Lutheran Social Services Inc.* (1991), 4 M.P.L.R. (2d) 225 at 236 (Gen. Div.). There, White J. held:

> Section 42 [now s. 43 of the *Act*] contemplates the Board reviewing its own decision in the event that it is satisfied that in any previous decision it has misinterpreted the facts, or wrongly assessed them; that is, that it has misinterpreted the planning evidence, or wrongly assessed the planning evidence, or failed to apply good planning policy in the entire matter.
>
> [T]he Board had full jurisdiction to grant a rehearing of the decisions of Mr. Cole on the basis that Mr. Cole had misapprehended the planning evidence, and had given a decision that reflected bad planning policy. The wisdom of that policy is entirely a matter for the Board. It is not the type of matter that a court is equipped to deal with. . . .

[13] In the case at bar, the Review Panel considered the First Panel to have committed a "manifest error" by placing "the public interest uppermost in [its] mind" and by failing to apply the planning "principle" concerning "down-zoning" developed in the Board's past policies and jurisprudence which require a balancing of public and private interests when considering whether to approve zoning by-laws.

[14] The Divisional Court erred in ruling that s.43 of the *Act* did not permit the Review Panel to substitute its decision for that of the First Panel. To say that the Review Panel has the power to review an earlier decision without the ability to reconsider it amounts to no power at all. In *Re Merrens and Municipality of Metropolitan Toronto* (1973), 33 D.L.R. (3d) 513 at 526 (Div. Ct.), Lacourcière J. referred to the following passage in Reid, *Administrative Law and Practice* (1971), at p. 103:

> The power to reconsider decisions is peculiar to tribunals. It is not found in the law-courts. Its existence is the consequence of a general lack of provisions for appeal, particularly on questions of fact, from tribunals, and of the regulatory nature of most tribunals. In both respects the tribunals differ from the courts. The power to reconsider thus appears to be an appropriate means both for the correction of errors in the absence of an appeal and to permit adjustments to be made as changes in the regulated activity occur. The importance of such a power has been recognized by the courts.

[15] On the whole, courts have been mindful of the uniqueness of the power of review in administrative proceedings and have been loathe to interpret the power narrowly. For example, the Divisional Court has repeatedly stressed the wide nature of such powers and has refused to read them down: *Merrens*, *supra*, *St. Catharines*, *supra*, and *Hall v. Ontario (Ministry of Community and Social Services)* (1997), 154 D.L.R. (4th) 696.

[16] This court in *Commercial Union Assurance v. Ontario Human Rights Commission* (1988), 47 D.L.R. (4th) 477 (C.A.) held that the power of reconsideration under the Ontario *Human Rights Code* is to be interpreted widely in order to prevent injustice. In their endorsement, Lacourcière, Zuber and McKinlay JJ.A. wrote at p. 497:

> We do not agree with counsel for the appellants that the broad power of reconsideration which results in a final decision requires that new facts be established: see *Re Merrens and Municipality of Metropolitan Toronto* [*supra*]. The power is important and may be the only way to correct errors where no right of appeal is provided, or to allow for adjustments even if circumstances remain unchanged. That is the meaning to be given to the maintenance of the integrity of the administrative process.

[17] The above language with reference to analogous sections in the statute governing another administrative tribunal is helpful to our analysis of the *Act* in the case in appeal.

[18] My own view is that the Divisional Court in the instant case interpreted s. 43 in a manner which is neither supported by the legislation nor by the weight of judicial authority. Section 43 confers a broad jurisdiction on the Board for its review authority which is in contra distinction to the narrow right of appeal to the Divisional Court provided in s. 96 of the *Act*. Section 96 provides:

> 96.(1) 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..

[19] This narrow right of appeal supports an interpretation of the Board's reconsideration powers, which is significantly broader than that stated by the Divisional Court. That court did not appear to appreciate that the requirement that an applicant for review show a "manifest error" in the decision of the panel under review is an internal guideline of the Board, not a requirement of s.43 of the *Act*. The Board has seen fit to explain in Practice Direction 12 the circumstances under which it would exercise its powers on a review under s.43 of the *Act* and expanded on those guidelines in *Canada Mortgage and Housing Corp., supra* to say that it will correct errors on review where there is a manifest error. In my view it is up to the review panel to determine on the facts of each case when manifest error has occurred. Similarly, there is nothing in s. 43 of the *Act* that prevents a review panel from "substituting its own opinion" for that of the original panel. In holding otherwise, the Divisional Court departed from established case law.

[20] In the end, the Divisional Court committed its own manifest error by substituting its opinion for that of the Review Panel. In doing so, the Divisional Court entered into a policymaking role that is outside its jurisdiction. Moreover, the Divisional Court focussed solely on the jurisdiction of the City to enact the by-law in dispute and failed to address the jurisdiction of the Board on a review of an appeal by affected property owners under the *Planning Act* from the City's exercise of that jurisdiction. One of the functions of the Board, acknowledged countless times by the courts, is to make and apply policies. In that regard, the Board is very different from a court. Here, the Review Panel applied a policy to a set of undisputed facts and on that basis granted the relief requested by Russell. The effect of the decision by the Divisional Court was to strip the Board of its policy-making role.

[21] In a leading text on local government law, Rogers, *Law of Canadian Municipal Corporations*, 2nd ed., vol. 2, the following statement is made in connection with the power of the Board to approve by-laws at p. 1502:

> Generally speaking, the Ontario Board has absolute discretion in giving or withholding its approval, and its decisions on applications for approval are not reviewable by the Divisional Court. For the most part its decisions involve questions of policy within its discretion with which the court will not interfere. In the exercise of its discretion where no statutory direction is given as to the matters which the Board is to consider when dealing with a question, then it

must be taken that the legislature has left it entirely to the Board's discretion.

Issue 2: Manifest error

[22] The Divisional Court erred in its interpretation of the reasons of the Review Panel. The Review Panel did not, as the Divisional Court suggests, refuse to approve the by-law because it thought that the City could not sterilize the lands in question without providing compensation to the owners. The First Panel's decision was reversed because it did not apply a long standing Board policy that it will not approve a by-law that has such an effect unless the municipality in question can justify such a drastic result within the guidelines set out in earlier decisions of the Board.

[23] The Review Panel found that the entirety of the Dickinson premises and a good portion of the Russell premises would be rendered unfit for development by the by-law. It said:

> The Board finds that the effect of this by-law on the applicants of the motion is profound and inexorably devastating. The underlying residential rights of both these properties will be effectively removed and these two properties will be, for all intents and purposes, completely sterilized. [The Review Panel cites the proposition from *Re Township of Nepean* at p. 55, that "if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved."]
>
> This oft-quoted dicta of Mr. A. J. L. Chapman, Q.C. [in *Re Township of Nepean*]is the best enunciation of the Board's long standing tendency to ensure that privately owned lands will not be transformed to public purposes such as open-space or park by zoning instruments unless there is a concomitant commitment on behalf of the municipality to expropriate or to acquire the lands in question. This rule, like many traditional rules of the Board, must be subject to a number of exceptions. We will deal with the exceptions later.

[24] The Review Panel then reiterated its "strongly held belief" that planning decisions must not allow the concerns of the public good nor private interests to become the exclusive and singular goals, but rather the Board should be motivated by its time honoured experience that planning is often a delicate balancing between these "two noble and sometimes competing objectives". This policy recognises that planning decisions, no matter how benevolent or farsighted their intent, can easily become "an unwitting and unquestioning tool to extinguish or debilitate the proprietary interests of an owner".

[25] Far from stating that a municipality cannot sterilize or "down-zone" private property

without providing for compensation, the Review Panel asserted that the municipality can re-designate or re-zone for the public benefit to arrest a trend that is harmful or undesirable:

> Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation. In the present case, we have not heard from the counsel from the City or from Mr. Longo that development of the applicants' lands will attract or invite such considerations.

[26] The Board was not taking issue with the ability of the municipality to pass such a by-law. Rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. This was completely within its jurisdiction under s. 43 to do so.

Issue 3: Section 24 of the Planning Act

[27] When City Council adopted Ravine Impact Boundary By-law No. 1997-0369, it imposed building restrictions on ravine lands encompassing some 170 Rosedale properties. The by-law was designed to indicate precisely where residential development will be permitted. Russell and Dickinson were denied building permits because of the effect of the building constraints in the by-law. They appealed to the Board under s.38(4) of the *Planning Act* and asked for exceptions for the two residential properties. It was these appeals that were heard by the First Panel.

[28] Section 24(1) of the *Planning Act,* provides that no public work shall be undertaken and no by-law shall be passed, and "except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith". The First Panel heard the appeals and was very much alive to the need that the Ravine Impact Boundary By-law and the exceptions sought by Russell and Dickinson comply with the Official Plan. It expressly said so. However, after considering all the evidence taken over three weeks, particularly the extensive presentation by Russell, the First Panel declined to grant the exceptions and dismissed the appeals. It is common ground that in doing so it found that the by-law was in conformity with the Official Plan.

[29] The Review Panel reviewed the same evidence as the First Panel. It granted the application for a review under s.43 of the *Act,* allowed the appeals under the *Planning Act* and amended By-Law 1997-0369 "so that the applicants lands are exempted". The suggestion that the Review Panel was not similarly aware of the need to find that the by-law as amended was in compliance with the Official Plan is to suggest that it was not aware of the basic provisions of the *Planning Act*, notably s.24(4), that "where an appeal is taken and ... the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan...." As is apparent, it is not necessary for the Board to make an express finding of compliance.

Disposition

[30] For the above reasons, I would allow the appeal, set aside the judgment of the Divisional Court and order that judgment be entered restoring the decision of the Review Panel. The appellant Russell is entitled to its costs of the appeal, including the motion for leave to appeal, and of the hearing before the Divisional Court.

Released: DEC 19 2000
GDF

Signed: "G.D. Finlayson J.A."
"I agree J.M. Labrosse J.A."
"I agree K.M. Weiler J.A."