CITATION: DeMarco v. Macey Bay Developments Corporation, 2016 ONSC 3262
DIVISIONAL COURT FILE NO.: 489/15
DATE: 20160517

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Jean DeMarco, Applicant

AND:

Macey Bay Developments Corporation, Respondent

AND:

The Township of Georgian Bay, Respondent

AND:

The Ontario Municipal Board, Respondent

BEFORE: Thorburn J.

COUNSEL: *Jean DeMarco*, appearing in person

Jonathan Lisas, Zain Nagi & Mary Bull, for the Respondent, Macey Bay Developments Corporation

Kim Mullin, for the Respondent, the Township of Georgian Bay

Stan Floras, for the Respondent, the Ontario Municipal Board

HEARD at Toronto: May 2, 2016

ORDER

RELIEF SOUGHT

[1] The Applicant, Jean DeMarco, is the owner of a property in the Township of Georgian Bay, Ontario. The Respondent, Macey Bay Developments Corporation owns a 165 acre site that partially fronts onto Georgian Bay ("the Property").

[2] The Applicant seeks leave to appeal an order of the Ontario Municipal Board (OMB).

THE FACTUAL BACKGROUND

[3] The Property was zoned recreational pursuant to a 1972 bylaw. There had been a small trailer park on the Property from the 1950s to the 1990s.

[4] In 1991, the Township zoned a portion of the Property for use as a trailer park.

[5] In 1996, the owner appealed to expand the area for use as a trailer park. On appeal, the OMB allowed an expansion of the zoning to permit a tent and trailer park in all of the area occupied by the trailer park as of that time. This was done based on the historic use of the Property. The OMB withheld its Order expanding the scope of the tent and trailer park pending satisfaction of four conditions. They include:

a. determination of the remaining appeals,

b. submission of a draft amendment bylaw,

c. execution of a site plan agreement by the owner and the Township, and

d. submission to the OMB of a Certificate of Approval for Sewage Disposal System and an Environmental Impact Assessment by the Ministry of Natural Resources.

[6] The last three conditions (which primarily relate to sewage and environmental issues) were not satisfied.

[7] Sometime later, the trailer park closed.

[8] Although the trailers have been removed, there continue to be a number of man-made structures on the Property that were present when the Property was a trailer park including canals, an inground swimming pool, roads, bridges and walkways, three houses, a number of docks, electrical wiring, water supply and sewage disposal infrastructure above and below ground.

[9] A new owner purchased the site in 2010. The new owner initially sought to construct homes on the property, but building did not proceed beyond the construction of a sales office and two model homes.

[10] The Respondent bought the property in August of 2012. It sought to re-establish a 180 unit trailer park.

[11] In 2014, the Township passed a new zoning bylaw by which it purported to allow a trailer park on the site under the same conditions, notwithstanding that the property was no longer being used as a trailer park.

[12] The Respondent served a Motion for Directions on July 31, 2015 requesting amendments to the 1996 OMB Order because some of the four original conditions could no longer be satisfied because certain exhibits referenced in the 1996 decision were lost or destroyed, and because the roles of certain authorities responsible for the matters dealt with by the conditions of approval had changed.

[13] The Applicant sought to dismiss the Respondent's Motion.

[14] The Township took no position except to say that it was important to understand the status of the 1996 Order.

[15] In August 2015, the Respondent brought a Motion for Directions pursuant to Rule 106 of the OMB *Rules of Practice and Procedure* ("*OMB Rules*"). Rule 106 provides that a condition must be satisfied within a "reasonable time" and if it is not, the Board "may reopen the hearing event from which the decision issued".

[16] The Respondent sought an order that would amend the second and third conditions to refer to a 1995 site plan and to amend the fourth condition to require the Township, rather than the Ministry of Natural Resources (MNR), to approve the Environmental Impact Assessment as that power had since been delegated to the Township by MNR. The order was sought to enable the Respondent to meet the four conditions.

[17] The Applicant opposed the Motion for Directions.

[18] After hearing evidence from all parties, including expert evidence, OMB Board Member, Taylor, held that,

> [33] The Board finds that in 1996 a full and open public hearing was held and the Board Member heard the evidence of the parties and rendered a decision in accordance with the evidence that was heard.
>
> [34] The Board accepts the evidence of Mr. Lehman [expert for the Respondent] and Mr. Robinson that the conditions proposed in the Motion if allowed would be consistent with the PPS [Provincial Policy Statement].
>
> [35] The Board notes that a further Board hearing is set ... at which time the appeals of the Township's new official plan and new zoning by-law will be heard. The parties will have the opportunity at that time to contest those planning instruments.
>
> [36] Accordingly the Board does not find the Motion for Directions to be an abuse of process, nor does it find that it is *functus* in this matter.
>
> [37] The Board finds that Rule 106 allows for a "reopening" of a hearing event, but not a "rehearing" as is found in the original Cross Motion pleadings at paragraphs 5(d), 6, and 7.

[19] Board Member, Taylor, determined that the interpretation of the words "reasonable time" in Rule 106 must be considered in the context of the changes in circumstances, if any, and the policy regime. He determined that the Respondent acted in a diligent and forthright fashion since taking ownership and, while the trailers were gone, the Property remained relatively unchanged.

[20] The Board approved the amended conditions.

[21] Thereafter, on October 7, 2015, the Applicant issued a request that the OMB review its decision pursuant to section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, s. 43 ("*OMB Act*"), which provides that "[t]he Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it."

[22] The OMB declined to review its decision. It cited Rule 115.01 of the *OMB Rules*, which provides that the Chair may grant such a request only when it raises a "convincing and compelling case" as the Board strives for finality. The OMB reiterated that Rule 106 allows for a "reopening" of a hearing, not a rehearing of the merits of an earlier decision.

POSITIONS OF THE PARTIES

[23] The Applicant raised a number of different arguments in her factum, but in oral submissions she indicated that her argument rests on the claim that the Board failed to properly consider Rule 106.

[24] The Applicant claims that in accordance with Rule 106, conditions must be satisfied within a "reasonable time" or the Board must reopen the process. The Applicant claims that the motion was brought 20 years after the 1996 conditional Order was granted. Since that time, the property has not been used as a trailer park and there has been a complete change in the use of the property.

[25] She notes that after the property was sold in 2010, the owner sought to build homes on the property and did in fact build a few homes. The property was sold to the Respondent in 2012.

[26] Twenty years exceeds any reasonable interpretation of the words "reasonable time". For these reasons, this matter should not have been treated as a "minor clerical motion" and the hearing should have been reopened.

[27] The Applicant claims that the interpretation of Rule 106 is a question of law, the interpretation is a matter of public importance and leave to appeal should therefore be granted.

[28] The Respondent claims that the Applicant has raised no legal issue of public importance and therefore leave to appeal should not be granted.

[29] Rule 106 is a discretionary provision specifically provided to address issues within the expertise of the Board.

[30] The Board heard evidence from witnesses for all parties regarding the use of the land, the possibility of continued use as a trailer park, the facilities still available on the property to enable continued use as a trailer park and due diligence on the part of the Respondent to address the three outstanding conditions.

[31] Moreover, this is simply an interim Order. A further Board hearing has been set for January 2017, at which time the appeal of the Township's new official plan and new zoning

bylaw will be heard. The parties will have the opportunity at that time to contest those planning instruments.

THE TEST FOR OBTAINING LEAVE TO APPEAL TO A PANEL OF THE DIVISIONAL COURT

[32] Pursuant to Rule 62.02(4)(b), in order to obtain leave to appeal to the Divisional Court, the Applicant must establish that:

a) the proposed appeal raises a question of law;

b) there is good reason to doubt the correctness of the decision of the OMB with respect to the question of law; and

c) the question of law is of sufficient general or public importance to merit the attention of the Divisional Court.

(*Maxwell v. Ottawa (City)*, 2012 ONSC 7224, [2012] O.J. No. 6020 (Div. Ct.), at paras. 6-9 and *Humanics Universal Inc. v. Ottawa (City)*, 2013 ONSC 2846, 307 O.A.C. 304 (Div. Ct.), at para 8.)

[33] The Court must be satisfied that "there is some good reason to doubt the correctness of the Board's decision on a question of law." (*Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.*, 2013 ONSC 715, 303 O.A.C. 223 (Div. Ct.), at para. 15).

[34] The *OMB Act* provides that only a question of law can be appealed to the Divisional Court. (*McGregor v. Rival Developments Inc.* (2003), 174 O.A.C. 297 (Div. Ct.), at para. 32.)

THE STANDARD OF REVIEW

[35] The standard of review of a decision of the OMB was summarized by the Divisional Court in *Bernard Homes Ltd. v. York Catholic District School Board* (2004), 188 O.A.C. 115 (Div. Ct.), at para. 10:

> Questions of law that engage the expertise of the OMB, such as the interpretation of its own statute, attract a standard of reasonableness. Questions of law of a more general application for which the OMB can claim no special expertise are to be reviewed on a standard of correctness.

[36] The OMB has a specialized role and expertise in adjudicating land use matters. A high degree of deference is therefore owed to its decisions as the court does not have such expertise in land use planning decisions. (*Minto Communities Inc. v. Ottawa (City)* (2009), 313 D.L.R. (4th) 419 (Ont. Div. Ct.), at para. 16.)

ANALYSIS AND CONCLUSION

Did the Board Consider Rule 106?

[37] The *OMB Rules* are enacted pursuant to the *OMB Act* and s. 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

[38] Under the *Statutory Powers Procedure Act*, the Board, as an administrative tribunal exercising a statutory power of authority, maintains absolute jurisdiction and control over its own procedure and has the power to determine its own procedures and practices and make its own procedural orders. (*Menkes Lakeshore Ltd. v. Toronto (City)* (2007), 228 O.A.C. 1 (Div. Ct.), at para. 30).

[39] Rule 106 of the *OMB Rules* provides as follows:

> A Condition Imposed in a Board Decision shall be satisfied by the date set by the Board. If the date is not set by the Board, a condition shall be satisfied within a reasonable time. If the condition is not so satisfied, the Board may reopen the hearing event from which the decision issued.

[40] Rule 106 provides that the OMB "may" (not must) reopen a hearing event from which a decision was issued if a condition is not met within a reasonable time. In other words, the OMB may exercise its discretion and decide whether or not to reopen a hearing event. There is no requirement to do so.

[41] The Applicant sought to have a rehearing of the 1996 decision including reconsideration of findings previously made by the Board.

[42] The OMB considered the evidence before it and heard from witnesses for all of the parties, including expert evidence, in order to determine whether to reopen the hearing.

[43] Rule 106 does not require the OMB, when considering whether conditions have been fulfilled, to rehear all of the evidence and submissions in the original hearing. In *Best v. Grey (County)*, [2009] O.M.B.D. No. 612, at paras 17-19, a condition requiring a haul route agreement was not fulfilled within the time specified by the OMB. The OMB found that the circumstances had changed with respect to the haul route agreement and reopened the hearing to consider the specific condition, but it did not rehear the entire matter.

Was the Finding a Reasonable Finding of Fact?

[44] The OMB found as a fact, based on evidence set out in the Lehman affidavit (an expert retained on behalf of the Respondent), that although the trailers that were on the property in 1996 had been removed from the property, the land still contained the necessary facilities such as electrical, water and docks to service a trailer park.

[45] The wording of Rule 106 allows *but does not require* the OMB to reopen a hearing event from which the decision issued.

[46] The OMB's decision was a reasonable finding of fact based on the evidence presented to it. As a result, deference is owed.

Is this a Matter of Broad Public Significance such that Leave to Appeal should be Granted?

[47] This case does not involve matters of broad significance which transcend the interest of the parties.

[48] As noted in *Zellers Inc. v. Royal Cobourg Centres Ltd.* (2001), 156 O.A.C. 133 (Div. Ct.), at para. 18, "[p]rocedural complaints, even if valid, are not matters for the Divisional Court unless, of course, they amount to a denial of natural justice." In this case, the Applicant was consulted on the date for the motion for directions, informed of the substance of the motion and given time to prepare.

Conclusion

[49] The OMB is a specialized tribunal. When the Applicant challenged the Motion for Directions, the OMB heard evidence from all parties and made a reasonable finding of fact. The OMB found that the Respondent had acted within a reasonable time in this context and allowed the Respondent to amend the second and third conditions to refer to a 1995 site plan and to amend the fourth condition to require the Township, rather than Ministry of Natural Resources (MNR), to approve the Environmental Impact Assessment. The matter involved no matter of broad public interest. Deference is owed to the finding of this specialized tribunal.

[50] Finally, I note that in 2014 a new bylaw was passed that all parties are now challenging. The new bylaw would allow a tent and trailer park that is different in scope from the current arrangement.

[51] The appeal of this new zoning bylaw will be heard in January 2017. This decision by the OMB is simply an interlocutory decision to help with the zoning appeal. The zoning appeal is the proper forum to address whether the land use should be permitted to revert to a trailer park. The Applicant will be able to make full submissions to the OMB at that time.

[52] For the reasons set out above, there was no error of law and no palpable and overriding error of fact. Leave to Appeal is therefore denied.

Costs

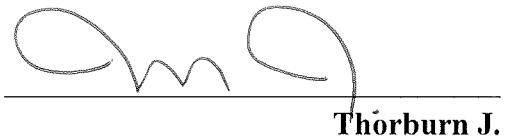
[53] Ms. DeMarco suggests that given that there is very little case law regarding the interpretation of Rule 106, this is a novel issue and therefore no costs should be awarded.

[54] Mr. Lisus, for the Respondent, seeks costs in the amount of $20,000 for this attendance and Ms. DeMarco's prior request to seek an adjournment, which was denied.

[55] Neither counsel for the Township nor counsel for the OMB seeks costs.

[56] In my view, a costs award payable to the Respondent is appropriate.

[57] Given the factors set out in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), especially the governing principles of reasonableness and proportionality, the reasonable expectation of the parties, the volume of material filed, the complexity of the matter and the Respondent's success on this motion, partial indemnity costs to the Respondent Macey in the amount of $10,000 is appropriate.



Thorburn J.

Released: May 17, 2016

CITATION: DeMarco v. Macey Bay Developments Corporation, 2016 ONSC 3262
DIVISIONAL COURT FILE NO.: 489/15
DATE: 20160517

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

Jean DeMarco

Applicant

– AND –

Macey Bay Developments Corporation

– AND –

The Township of Georgian Bay

– AND –

The Ontario Municipal Board

Respondents

ORDER

Thorburn J.

Released: May 17, 2016