COURT OF APPEAL FOR ONTARIO

CITATION: Richmond Hill (Town) v. Elginbay Corporation, 2018 ONCA 72

DATE: 20180129

DOCKET: C63421 and C63422

MacFarland, Watt and Benotto JJ.A.

BETWEEN

The Corporation of the Town of Richmond Hill

Respondent

and

Elginbay Corporation, Zamani Homes (Richmond Hill) Ltd., Haulover Investments Limited, Montanaro Estates Limited, William and Yvonne Worden, Robert Salna and Robert Salna Holdings Inc., and Ontario Municipal Board

Appellants

Earl A. Cherniak, Q.C., Cynthia Kuehl, Ira T. Kagan, David Winer and Alexandra DeGasperis, for the appellants Elginbay Corporation and Zamani Homes (Richmond Hill) Ltd.

Jeffrey E. Streisfield, for the appellants Haulover Investments Limited, Yvonne Worden and Robert Salna Holdings Inc.

Barnet H. Kussner and Kim Mullin, for the respondent the Corporation of the Town of Richmond Hill

Stan Floras, for the respondent the Ontario Municipal Board

Robert G. Doumani, for the intervener the Corporation of the City of Mississauga

Nadia Chandra, for the intervener the Corporation of the Town of Oakville

Andrea Wilson-Peebles, for the intervener the Corporation of the City of Markham

Bruce Engell, for the intervener the Corporation of the City of Vaughan

Heard: September 26 and 27, 2017

On appeal from the judgment of the Divisional Court (Justices Harriet E. Sachs, Ian V.B. Nordheimer and Carolyn J. Horkins), dated September 6, 2016, with reasons reported at 2016 ONSC 5560, 133 O.R. (3d) 686, reversing in part a decision of the Ontario Municipal Board

(Vice Chair Jan de Pencier Seaborn) dated November 5, 2012, with reasons reported at (2012), 74 O.M.B.R. 236.

MacFarland J.A.:

[1] These are appeals, with leave, from a decision of the Divisional Court, overturning in part a decision of the Ontario Municipal Board ("OMB" or the "Board") where, as part of its approval of the Official Plan ("OP") for the Town of Richmond Hill (the "Town"), it imposed a 25 per cent cap on the alternative parkland dedication requirement proposed by the Town. The key issue on appeal is whether the Divisional Court erred in concluding that the OMB's decision imposing the cap was unreasonable. The answer to this question turns on the interpretation of s. 42 of the *Planning Act*, R.S.O. 1990, c. P.13, in particular ss. 42(3) and (4).

[2] As I will explain, I see no reason to interfere with the Divisional Court's decision and thus would dismiss the appeal.

A. BACKGROUND

(1) Statutory Context

[3] The purposes of the *Planning Act* are set out in s. 1.1 of the Act. They include:

> (b) to provide for a land use planning system led by provincial policy;
>
> (c) to integrate matters of provincial interest in provincial and municipal planning decisions; …
>
> (f) to recognize the decision-making authority and accountability of municipal councils in planning.

[4] Under s. 2, the OMB "shall have regard to" a list of 18 matters of provincial interest in carrying out its responsibilities under the *Planning Act*. These matters include the provision of cultural and recreational facilities, and the provision of affordable housing.

[5] When the OMB makes a decision under the *Planning Act* that relates to a planning matter, s. 2.1(1)(a) mandates that it "shall have regard to … any decision that is made under this Act by a municipal council … and relates to the same planning matter".

[6] Section s. 3(5) of the *Planning Act* provides as follows:

> A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,
>
> (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and

> (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. [Emphasis added.]

[7] In accordance with s. 3(5), OMB and municipal decisions affecting planning matters must be consistent with Provincial Policy Statement 2014 ("PPS"), which sets out the overall provincial policy for regulating land use and development. They must also conform to any applicable provincial plans - in this case, the Growth Plan for the Greater Golden Horseshoe ("Growth Plan"). In its submissions before this court, the OMB describes the PPS and the Growth Plan as being "at the apex of [the] planning hierarchy, by virtue of their mandatory imposition directed by subsection 3(5)."

[8] Section 42 is at the heart of this appeal.[1] It permits a municipality to pass a by-law that requires developers, as a condition of development or redevelopment of land, to convey land to the municipality for use as parkland or for other public recreational purposes, or to pay cash instead of conveying land ("cash-in-lieu").

[9] Under s. 42(1), a municipality may require a conveyance of land not exceeding five per cent of the residential land being developed. Section 42(3) permits a municipality, as an alternative to s. 42(1), to require a conveyance of residential land "at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be specified" by by-law. Section 42(4), which is key to this appeal, imposes the following precondition for adopting an alternative requirement under s. 42(3):

> The alternative requirement authorized by subsection (3) may not be provided for in a by-law passed under this section unless there is an official plan in effect in the local municipality that contains specific policies dealing with the provision of lands for park or other public recreational purposes and the use of the alternative requirement.

[10] Thus, before providing for an alternative requirement in a by-law, a municipality must have an OP "in effect" containing "specific policies" dealing with the provision of parkland and "the use of the alternative requirement."

[11] An OP must contain, among other things, the "goals, objectives and policies" established primarily to manage and direct physical change: *Planning Act*, s. 16(1)(a). An OP is not "in effect" until it has been approved by an "approval authority" (in this case, the Regional Municipality of York). If the approval authority fails to give notice of a decision on the OP within the requisite time period, any person may appeal the OP to the OMB under s. 17(40) of the *Planning Act*. Under s. 17(50), the OMB has the following powers on an appeal:

> On an appeal or a transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan.

[12] Policies in an OP are implemented through various types of by-laws. Under s. 24 of the *Planning Act*, all by-laws must conform to the OP.

[13] While an OP may be appealed to the OMB, it is significant that the *Planning Act* does not provide any right to appeal a parkland conveyance by-law under s. 42.

(2) Chronology and Decisions Below

[14] In July 2010, the Town adopted a new OP. Section 3.1.8. of the OP set out the Town's parkland dedication policies. Among other things, it provided that the required parkland conveyance for residential developments was the greater of (1) five per cent of the proposed development, and (2) one hectare per 300 dwelling units proposed.

[15] Numerous parties appealed the Town's OP. They challenged the Town's parkland dedication policies as set out in s. 3.1.8. of the OP and, in particular, the policy dealing with the Town's use of the alternative requirement under s. 42(3).

(a) Preliminary Motion – 2012 OMB Decision

[16] The Town argued a preliminary motion before the OMB in 2012. It sought a determination that it was not required to justify the use of its alternative parkland dedication rate (i.e., one hectare per 300 dwelling units proposed) as it was a rate prescribed by s. 42(3) of the *Planning Act*.

[17] The Town was not successful on its motion: (2012), 74 O.M.B.R. 236. The OMB summarized its conclusion:

> The Board finds that s. 42(3) of the Act does not preclude a municipality from including (or the Board approving, on appeal) policies in an [OP] that provide for an alternative parkland dedication rate. The Board's conclusion in this regard is based on the evidence and submissions provided in respect of the Town's own review of its parkland dedication policies, Ministry of Municipal Affairs and Housing ("MMAH") Guidelines, precedent, and the Board's jurisdiction to consider [OP] policies that are under appeal. The Board has considered the detailed argument presented by the Town and responding parties and finds that the planning rationale for policy 3.1.8, including s. 3.1.8.2.a.ii [setting out the alternative parkland dedication rate] is an appropriate issue for the hearing.
>
> …
>
> The Board finds that to conclude that the use of an alternative rate can be explored at a hearing, but not the specific rate would … serve no useful purpose and unduly restrict the ability of [those challenging s. 3.1.8.] to test the planning rationale for the Town's policies as they relate to parkland dedication.

[18] And finally:

> If the position taken by the Town is adopted, then there would be no ability or discretion for any municipal Council to set a specific rate in its [OP]. The Board would effectively be directing that specific rates in [OPs] run afoul of s. 42 of the Act.

> Yet, some municipalities have chosen to set out alternative rates in both their [OPs] and implementing by-laws. In those instances, would municipalities be required to amend their [OPs] and remove specific rates? In the Board's view, the Town is urging the Board to adopt an unduly restrictive interpretation of the Act which would result in limiting what can be included in the parkland dedication policies of any [OP]. The provisions of s. 42 of the Act are not that restrictive. Simply put, when read together, s. 42(3) and s. 42(4) do not say that a specific rate cannot be identified in an [OP]. The Board will not read such a restriction into the Act and thereby limit the flexibility of municipalities to determine what detail they wish to provide at the [OP] level. [Emphasis added.]

[19] The Town sought leave to appeal that decision, pursuant to s. 96 of the *Ontario Municipal Board Act,* R.S.O. 1990, c. 028 ("OMBA"), but the Divisional Court dismissed the leave motion as premature: 2013 ONSC 2252, 76 O.M.B.R. 363.

(b) Appeal of s. 3.1.8. – 2015 OMB Decision

[20] The appeals related to s. 3.1.8. proceeded before the OMB over a number of months. The OMB accepted the Town's position on all of the issues that remained in dispute between the parties other than the issue of the alternative requirement.

[21] The Town proposed some modifications to s. 3.1.8., which included policies on a number of issues related to parkland dedication – for example, land uses exempt from any conveyance/cash-in-lieu requirement; lands not accepted as part of land dedication and factors to be considered in determining whether all or part of a conveyance could be satisfied by a payment of cash-in-lieu. Notably, the Town proposed modifications to s. 3.1.8.a.ii. as follows:

> For residential *development* the greater of the following:
>
> > 5% of the land proposed for residential development; or
> >
> > up to 1 hectare of land for each 300 dwelling units proposed for residential development, as may be specified by by-law in accordance with section 42(3) of the *Planning Act*. [Underlining added to indicate changes this provision.]

[22] The Board articulated the positions of the parties as follows:

> The focus of these appeals is the use of the alternative requirement (also referred to as the "alternate rate") as a condition of residential development. The difference between the parties revolves around whether the Town's OP should specify not only the first component of the alternate rate of 1 hectare ("ha") of land for each 300 dwelling units proposed) … but go further and include policies which prescribe a second component of the alternate rate, referred to as a "lesser rate". The alternative requirement and any "lesser rate" must be specified in a by-law pursuant to s. 42(3) of the Act and the Town has a parkland dedication by-law in effect for this purpose.

> However, the Act also stipulates that the alternative requirement may not be provided for in a by-law unless there is an [OP] in effect "that contains specific policies dealing with the provision of lands for park or other public recreational purposes and the use of the alternative requirement" (s. 42(4)). The parties have divergent positions on the level of detail required in the [OP] setting out these "specific policies" and the "use of the alternative requirement." [Those challenging s. 3.1.8.] submitted that there is evidence to support a "lesser rate" and the details should form part of the Town's OP. Otherwise, the stipulation of a lesser rate (if any) would be left to the parkland dedication by-law, for which there is no right of appeal under the Act. [Emphasis added.]

[23] In addition to arguing about the level of detail to be included in the OP, those challenging s. 3.1.8. argued that the proposed alternative requirement would discourage high-density development and threaten affordable housing – both important goals of the PPS and the Growth Plan.[2] They proposed a sliding scale and a cap on the amount of land required to be conveyed.

[24] The OMB noted the Town's desire for flexibility (which the Town argued it had through its parkland dedication by-law), whereas the developers who challenged s. 3.1.8. sought more certainty with respect to the costs associated with providing parkland whether by dedication or cash-in-lieu. The Board concluded "that as a minimum the parkland policies must include a sufficient level of detail to provide some level of certainty with respect to the magnitude of the parkland requirement." It went on to note that "the extent to which the Board should go in fixing a particular rate will depend on the quality of the evidence, the planning merits and rationale provided to support a particular rate and most importantly, an assessment of what constitutes the correct balance between the competing interests."

[25] The OMB was not prepared to require the Town to include a detailed sliding scale as part of its policies in relation to parkland dedication rates. It instead added the following language to s. 3.1.8.3.:

> a. For residential *development*, the Town may specify in a by-law enacted pursuant to section 42(3) of the *Planning Act*, a sliding scale for parkland dedication requirements, having regard to the proposed size of dwelling units, types of dwelling units, density of the development and/or the number of occupants per dwelling unit. [Italics in original.]

[26] The OMB then went on to consider whether a cap ought to be imposed. The Board concluded that a cap would have the effect of providing sufficient policy direction at the OP level with respect to the magnitude of any parkland dedication. On the basis of the evidence before it, the OMB concluded:

> A cap at 25% provides some room for the Town to implement a sliding scale by by-law and provides some certainty for landowners that is not reflected in the Town's proposed 3.1.8.3 which reflects the maximum alternative requirement of "up to 1 ha per 300 units."

> In my view the policies as modified by the Town, coupled with the addition of a revised policy direction that includes a 25% cap and an acknowledgement that a sliding scale may be implemented by by-law, provides both transparency and guidance going forward. This approach is consistent with the requirements of the PPS, conforms to the Growth Plan (and other applicable provincial plans) and strikes a balance between the competing interests.

[27] The OMB ordered that the underlined words, imposing a cap on the amount of land to be conveyed, be added to s. 3.1.8.a.ii.:

> ii. up to 1 hectare of land for each 300 dwelling units proposed for residential *development*, as may be specified by by-law in accordance with section 42 (3) of the *Planning Act*, provided that in no case shall the amount of land required to be conveyed for park or other public recreational purposes exceed the equivalent of 25% of the land proposed for *development*. [Italics in original; underlining added.]

[28] It is this cap that was at issue before the Divisional Court and is at issue on these appeals.

(c) Appeal from OMB – 2016 Divisional Court Decision

[29] The Town was granted leave to appeal to the Divisional Court on two questions of law: 2016 ONSC 1673. The two questions were as follows:

> 1. Did the [OMB] err in law by determining that it had the authority to modify Policy 3.1.8 of the Town of Richmond Hill [OP] by approving a policy which imposes a lower maximum alternative requirement than “1 hectare per 300 dwelling units”?
>
> 2. If the answer question #1 is no, did the Board err in law in modifying Policy 3.1.8 by capping the alternative requirement based on a percentage of the land area to be developed, rather than the number of units to be developed?

[30] A unanimous panel of the Divisional Court answered the first question in the affirmative and accordingly there was no need for it to answer the second question.

[31] All of the parties agreed that the applicable standard of review was that of reasonableness.

[32] The Divisional Court described the issue before it in the following language:

> The principal issue … is the OMB’s interpretation of s. 42 of the *Planning Act* and, in particular, its conclusion that s. 42(4), either alone or in conjunction with s. 17(50), authorized the OMB to impose a cap as part of its approval of the policies of the municipality, relating to the alternative requirement, that are required to be part of the municipality’s [OP].

[33] A municipality, the court noted, had two options for residential developments: the five per cent default rate or the alternative requirement. In the court's view, two things were clear from the legislation. First, a municipality can decide which of the alternatives it will employ and the rate, up to the legislated maximum, it will require from the developer. Second, the mechanism by which the municipality decides both the alternative and the rate to be used is the passing of a by-law – a by-law which is not subject to any right of appeal to the OMB.

[34] The court noted that, under s. 42(4), the only pre-condition to the use of the alternative requirement is that the municipality must have an OP that sets out the policies that will guide its use of the alternative requirement. Policies, stated the court, serve to outline, in broad strokes, how a body expects to approach a given topic. They are not rigid rules, formulas or equations. There is a difference between policy and decision-making.

[35] The court identified two flaws in the OMB's ultimate decision that it could fix a particular rate.

[36] First, the OMB had assumed that it had the authority to fix a particular rate, but provided no explanation of the source of that authority. While those challenging s. 3.1.8. were attempting to fill the OMB's gap in reasoning with s. 17(50) of the *Planning Act*, that provision did not assist them:

> Unquestionably, s. 17(50) gives authority to the OMB to approve, reject, or modify, an [OP]. That authority presumes, however, that the [OP] is engaged. Section 17(50) does not assist in determining whether a municipality must include in its [OP] the rate it intends to use for the alternative requirement.

[37] The second flaw in the OMB's decision was that the OMB had effectively taken unto itself the task of fixing individual rates in individual municipalities through the guise of its authority to review an OP:

> … [I]t reads into the very general language of s. 42(4) a specific authority that appears, on its face, to be inconsistent with the intent of ss. 42(1) and (3). It effectively abrogates the role that the Legislature clearly intended municipalities would perform and instead bestows that role onto itself. And in doing so, the OMB finds authority to establish a maximum rate for the alternative requirement that is different from the maximum provided by the Legislature in the statute.

[38] The Divisional Court concluded that there was no statutory uncertainty and, indeed, the OMB had not pointed to one. Accordingly, there was no possibility of competing reasonable interpretations. The OMB's interpretation was unreasonable.

[39] While the OMB could not impose a rate, it still had a role in the application of the alternative requirement by an individual municipality. The OMB, the court noted, is required to ensure that municipal policies regarding the alternative requirement are appropriate, effective and accord with provincial policies.

[40] In this case, if the OMB had a legitimate concern about how the implementation of the Town's policy might affect high-density development, it could have given a direction to the

Town that the Town's implementation of its by-law must not unduly restrict high-density development.

[41] The Divisional Court set aside the OMB's decision to impose the 25 per cent cap and remitted the matter to the OMB.

B. DISCUSSION

(1) The Parties on the Appeal

[42] There are two groups of appellants on these consolidated appeals. The first group, the Haulover appellants, includes Haulover Investments Ltd., Yvonne Worden and Robert Salna Holdings Inc. The second group, the Elginbay appellants, includes Elginbay Corporation and Zamani Homes (Richmond Hill) Ltd. I will refer to the Haulover appellants and the Elginbay appellants collectively as the "Appellants".

[43] The Town is the respondent on this appeal. The OMB, which has a statutory right to participate in this appeal, is also a respondent but its submissions are limited to its jurisdiction, role and mandate under the *Planning Act*, and the applicable standard of review.

[44] Finally, four municipalities were granted intervener status: the City of Vaughan, the City of Markham, the Town of Oakville and the City of Mississauga. Each of the interveners supports the Town's position.

(2) Standard of Review

[45] As noted above, the standard of review was never in question before the Divisional Court. All parties agreed that the standard was reasonableness; where the parties parted ways was on the application of that standard.

[46] As will be made clear in my discussion below, I am satisfied that, contrary to the Appellants' submissions, the Divisional Court did not fail to accord the OMB's decision sufficient deference. In my view, there is no reason to interfere with the Divisional Court's conclusion that the OMB's decision was unreasonable.

[47] The Divisional Court referred to the Supreme Court's decision in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895. At para. 33, the Supreme Court noted:

> … [T]he resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* — not the courts — to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise". [Italics in original.]

[48] But the Supreme Court went on, at para. 38, to state:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance…. In those cases, the "range of reasonable outcomes"… will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it. [Citations omitted; emphasis added.]

[49] As I have noted, the Divisional Court concluded that there was no "statutory uncertainty" giving rise to the possibility of competing reasonable interpretations.

(3) No Jurisdiction to Impose Cap/ Set Rate

(a) Interpretation of ss. 42 and 17(50) of the *Planning Act*

[50] The Appellants submit that the Divisional Court erred in interpreting s. 42 and effectively ignoring s. 17(50) of the *Planning Act*.

[51] In particular, the Elginbay appellants submit that the Divisional Court erred (1) in concluding that the OMB was limited to providing general guidance, given the requirement in s. 42(4) that no by-law can be passed unless there is an OP in effect with specific policies on the use of the alternative requirement, and (2) in finding that s. 17(50) does not provide the OMB with jurisdiction to cap the maximum alternative requirement below the statutory maximum.

[52] Similarly, the Haulover appellants submit that the Divisional Court erred (1) in finding that the language of s. 42 was limited to only "one single reasonable interpretation" and that s. 17(50) was not relevant to the interpretive exercise, and in failing to afford the OMB judicial deference as it was required to do, and (2) in failing to appreciate that the municipality's role in respect of OP policy was limited to that of proposing OP policy whereas approval of that policy is for the exclusive jurisdiction of the OMB by virtue of s. 17(50).

[53] Together, the Appellants argue that the Divisional Court's interpretation up-ends the legislated planning hierarchy. They say that the role of the OMB is clear given that s. 42(4) of the *Planning Act* requires that an OP be "in effect" and that the OP have "specific policies". An OP must be approved by an approval authority, such as the OMB, before it can be in effect. To be approved, the OP must comply with provincial policies, including the PPS, and while s. 2.1(1) of the *Planning Act* requires that the OMB "have regard for the decisions" of a municipality, it is required to ensure that a municipality's OP is consistent with provincial policy. In the Appellants' submission, the requirement that an OP be in effect prior to any by-law being passed indicates that the legislature intended for there to be OMB scrutiny, including scrutiny of the rate, at the OP approval stage.

[54] I do not accept these submissions.

[55] I begin with the trite observation that the OMB is a creature of statute: it can do only what the legislature has empowered it to do through various statutory provisions. And the

converse of that of course is that it cannot do what it has not been empowered to do or do that which has been given by legislative authority to another.

[56] Thus, as the OMB's jurisdiction is a matter of statutory interpretation, it will be helpful here to set out the relevant parts of s. 42:

> (1) As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes.
>
> …
>
> (3) Subject to subsection (4), as an alternative to requiring the conveyance provided for in subsection (1), in the case of land proposed for development or redevelopment for residential purposes, the by-law may require that land be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be specified in the by-law.
>
> (4) The alternative requirement authorized by subsection (3) may not be provided for in a by-law passed under this section unless there is an official plan in effect in the local municipality that contains specific policies dealing with the provision of lands for park or other public recreational purposes and the use of the alternative requirement.

[57] Before turning to these provisions, the Divisional Court reviewed the proper approach to statutory interpretation. As has been oft repeated, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing Elmer A. Driedger in the *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983).

[58] Applying this approach, the Divisional Court first looked at the words used by the legislature in s. 42 and made the following observation:

> Both s. 42(1) and s. 42(3) refer expressly to the municipality establishing "by by-law" the rate that will be charged to a developer. Neither subsection refers to the rate being set by the OMB nor… does the OMB have any right of review over the contents of the by-law. Further, neither subsection requires that the rate to be charged be included in the municipality's [OP]. The subsections mention only the by-law. Further s. 42(4) does not contain any express requirement that the rate to be charged to a municipality must be included in its [OP] …
>
> Indeed the plain wording of s. 42 leaves the decision as to the rate to be applied in each instance to the municipality to decide by by-law.

[59] The only proviso to this authority bestowed on the municipality is found in s. 42(4) – there must be an OP "in effect" in the municipality and it must contain "specific policies dealing with the provision of lands for park or other public recreational purposes and the use of the alternative requirement."

[60] Section 42(1) provides the default rate for residential development: the municipality may by by-law require a developer of residential land to convey land in an amount not exceeding five per cent to the municipality for parkland. That is a specific power given to the municipality, which it is authorized to implement by by-law – a by-law not appealable to the OMB.

[61] If one then moves to s. 42(3), the alternative to s. 42(1) is proposed. It is not a standalone section but part of s. 42 and it says that, as an alternative to conveying, for park purposes, five per cent of the land to be developed, the by-law that s. 42 (1) authorizes the municipality to make and that is not appealable to the OMB may require "that land be conveyed … at a rate of one hectare for each 300 dwelling units proposed or at such lower rate as may be specified in the by-law." Again, the section clearly speaks of the rate – whether 5 per cent or one hectare per 300 units or less – being specified by by-law. In my view, the OMB effectively interpreted s. 42(3) as if it read "or at such lesser rate as may be specified in the OP", which is at odds with the clear wording of s. 42(3).

[62] The Appellants make much of the fact that s. 42(4) refers to "specific policies" and not simply "policies". The suggestion is that "specific policies" must include the specific alternative parkland dedication rate to be imposed. On my reading, the wording of s. 42(4) does not support that interpretation.

[63] Section 42(3) uses the word "rate" twice: "at a rate of one hectare for each 300 dwelling units" and "at such lesser rate as may be specified in the by-law" (emphasis added). In contrast, s. 42(4) does not use the word "rate". Instead it mandates that the OP include "specific policies … dealing with the use of the alternative requirement" (emphasis added).

[64] As a matter of statutory interpretation, it is presumed that the legislature uses words in a consistent way: Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law Inc., 2007), at p. 167. Thus, the same words are presumed to have the same meaning, and, conversely, different words are presumed to have a different meaning.

[65] Had the legislature intended that the municipality include the rate in its OP one would have expected it to have used the word "rate" in s. 42(4). By way of example, as the Divisional Court suggested, the words "including the rate that the municipality will require under that alternative" could have been added to the end s. 42(4). Instead, while the legislature chose to qualify the use of the word "policies" with the adjective "specific", it failed to specify that the rate was a necessary component of the specific policies.

[66] The Appellants make the point that the OP containing the specific policies must be "in effect", which means that the OP must have been approved by an approval authority. They rely on the OMB's general approval/ modification /rejection powers when matters come before the Board by way of appeal to give it authority to impose the rate under s. 42(3). In particular, they point to s. 17(50), which I repeat for ease of reference:

> On an appeal or a transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan.

[67] Admittedly, the OMB has broad powers on appeal to approve, modify or refuse to approve all or part of an OP under s. 17(50). The Appellants also point to the OMB's powers under other sections, such as ss. 35, 36 and 88 of the OMBA:

> 35. The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact.
>
> 36. The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.
>
> 88. Upon any application to the Board, the Board may make an order granting the whole, or part only, of the application, or may grant such further or other relief in addition to, or in substitution for, that applied for as to the Board may appear just and proper as fully in all respects as if the application had been for such partial, other, or further relief.

[68] In light of these provisions, there can be no question that for matters within its jurisdiction the OMB has very broad powers. In my view, however, none of these provisions bestows jurisdiction on the OMB to set the rate under s. 42(3).

[69] As a matter of statutory interpretation, there is a presumption of coherence – it is presumed that the provisions of legislation are meant to work together as part of a functional whole: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), at §11.2. As Professor Sullivan explains, "[t]he parts are presumed to fit together logically to form a rational, internally consistent framework".

[70] In this case, we have s. 42, which deals with the conveyance of land for park or recreational purposes and which falls under Part V entitled "Land Use Controls and Related Administration".

[71] Section 17(50) falls under Part III of the *Planning Act*, which is entitled "Official Plans". It is a more general provision, setting out the OMB's powers on appeal (or transfer) of an OP.

[72] An interpretation that best reconciles these provisions is one that gives meaning to both. In my view, the Appellants' proposed interpretation does the opposite. It gives to the OMB the power to set the rate, even though s. 42 provides that where a municipality determines to use the alternative requirement that it will do so by way of a by-law that is not appealable to the OMB.

[73] In contrast, the Divisional Court's interpretation gives effect to both provisions. It respects the legislative direction that the rate under s. 42(3) be a matter for the municipality, and also the requirement under s. 42(4) that there be an OP in effect that contains specific policies dealing with the use of the alternative requirement. Its interpretation maintains a role

for the OMB in reviewing an OP that includes specific policies relating to parkland dedication. For instance, as the OMB acknowledged in its November 2012 decision, it could examine policies dealing with issues such as the need for inter-connected parks and urban open space system; the criteria governing the imposition of cash-in-lieu of parkland dedication; the types of land that are eligible to be dedicated as parkland; and the criteria governing dedication in the cases of development for both residential and commercial purposes.

[74] This interpretation, which recognizes the role of municipalities and the role of the OMB, helps resolve a tension recognized by the Divisional Court. On the one hand, municipalities desire flexibility and the ability to change the by-law rate without the need for an onerous and costly OP amendment process. On the other hand, developers desire certainty as to their exposure under s. 42. While developers may take issue with the maximum set by s. 42(3), they have certainty in knowing their maximum exposure, which is prescribed by s. 42.

[75] The Appellants contend that this interpretation turns the planning hierarchy on its head. They describe the PPS and the Growth Plan as being the apex of the planning hierarchy since an OP must comply with applicable provincial policy statements and conform to growth plans, and a municipality's by-laws must conform to its OP.

[76] To the contrary, the Divisional Court's decision respects that the legislature is at the very apex of that hierarchy. The legislature has given the exclusive authority to the municipality to determine whether it will use the default rate or the alternative requirement and the rate, up to the legislated maximum, it will employ and the only proviso to the use of the latter is that there be an OP in effect containing specific policies dealing with the provision of parkland and the use of the alternative rate.

[77] The OMB also submits that an interpretation of s. 42 that allows it to cap the statutory rate is necessary for it to ensure consistency and conformity with provincial policies and growth plans and, in particular, those that deal with intensification and affordable housing. But to suggest that the OMB is the only entity with a duty to ensure such compliance ignores s. 3(5) of the *Planning Act*, which imposes the same obligation on municipalities.

(b) OMB's Approval Powers v. Powers of Municipality

[78] The Elginbay appellants raise a further issue: did the Divisional Court err in determining that the OMB's powers were different and lesser than the Town's adoption powers respecting the Town's OP such that the Town alone could self-impose a specific parkland dedication rate? They submit that it is a long-standing principle of planning law that the OMB can make any decision that the Town is authorized to make.

[79] The Haulover appellants similarly argue that if a municipality can ask for a cap through the adoption of its OP then so can the OMB as the approval authority pursuant to s. 17(50) and s. 88 of the OMBA.

[80] The Appellants refer to a number of decisions on this point, including *Mississauga Golf and Country Club Ltd. (Re)*, [1963] 2 O.R. 625 (C.A.), and *Cloverdale Shopping Centre Ltd. v. Township of Etobicoke*, [1966] 2 O.R. 439 (C.A.).

[81] In *Mississauga Golf*, the golf and country club applied to the Toronto City Council and requested it to amend the city's OP and a zoning by-law so as to change the designation of certain lands from residential to commercial. The City refused the club's application. The matter went to the OMB and then came to this court on a stated case. One of the questions before this court was whether the OMB had the jurisdiction to make an order directing amendment of the by-law in terms other than those applied for, creating a classification not provided for in the zoning by-law. It was argued that the OMB was limited to dismissing the appeal or directing that it be amended in accordance with the country club's request for amendment to the municipal council. This court rejected that argument, at pp. 629-630:

> In the circumstances prevailing, s. 30(19) gives the Board power to "direct that the by-law (the zoning by-law) be amended in accordance with its order". These words coupled with the very broad provisions of s. 87 of the *Ontario Municipal Board Act* leave no doubt that the Board in acting pursuant to s. 30(19) is not fettered as the appellant submits here. On the appeal to the Board, the Board is exercising an original jurisdiction and may direct the council to do anything a council could have done in dealing with the application to it, even if this departs from the strict terms of the relief requested in the application.
>
> …
>
> In exercising the powers conferred on it under s. 30(19) of the *Planning Act*, the Board has jurisdiction to direct that amendments be made to the zoning by-law other than those sought in the application for amendment made to the municipal council provided that such amendments so directed are otherwise within the competence of the municipal council acting under s. of the *Planning Act* even if such direction entail a zoning designation not theretofore provided in the zoning by-law. [Emphasis added.]

[82] This case is distinguishable. It involved a challenge to a zoning by-law appealable to the OMB, which is not the case here, and dealt with the question of whether the OMB could grant relief "even if this departs from the strict terms of the relief requested in the application", which is not in issue in this case.

[83] *Cloverdale* involved an appeal from a decision of the OMB allowing an amendment to the OP for the Township of Etobicoke. One of the issues before this court was the OMB's jurisdiction to approve the amendment. The court described the issue, at p. 448:

> Under these various provisions it, of course, falls to be determined, as the very crux of the matters in issue in this appeal, whether the functions of the Municipal Board in determining the question of an amendment to an [OP] proposed by council are precisely those of the Minister when the matter has been referred to the Board by the Minister under s. 34 or whether those functions are different in their nature and, perhaps, as a corollary to this consideration, whether the functions of the Board are different in their nature when considering an amendment to an [OP] proposed by council (ss. 12, 14(1)) as contrasted with an amendment proposed by some entity other than council (s. 14(3), (4), (5)), and again, whether the functions of the Board

when considering an original zoning by-law or a by-law amending a zoning by-law (s. 30(9), (10); are different from those when considering a proposal to amend a zoning by-law (s. 30 (19)) by some entity other than council.

[84] Based on its interpretation of the relevant provision, this court concluded that the Board's duties were the same as those of the Minister and that the duties of the Board when considering a zoning by-law enacted by council or a zoning by-law "amending" proposal emanating from a private entity were identical. The court also concluded that the Board's powers to modify an OP were broad.

[85] This court's decision in *Cloverdale* turned on an interpretation of the statutory provisions in question. The case did not involve the interpretation of s. 42 or any provision similar to s. 42.

[86] More generally, the Appellants' argument on this point fails to recognize that as a creature of statute, the OMB stands in the shoes of the municipality only with respect to matters within the OMB's own statutory jurisdiction. In other words, the Board's power to act as the original decision maker could have acted does not confer on the OMB the power to interfere in specific circumstance where the legislature has limited its ability to do so.

(c) OMB's Decision Was Unreasonable

[87] In conclusion, I agree with the Divisional Court's conclusion that the OMB's interpretation of s. 42 was unreasonable. The OMB erred in concluding it could take unto itself, as part of its statutory power to consider OP appeals, an authority that that the legislature has specifically given to municipalities. By adopting an unreasonable interpretation of s. 42, the OMB did indirectly what the legislature prohibits it from doing directly – namely, compelling the Town to limit itself to a rate which is less than the statutory prescribed rate.

(3) Additional Guidance

[88] The Appellants submit that the Divisional Court failed to give the OMB the guidance it requested. In my view, the reasons of the Divisional Court speak for themselves and no additional guidance should be necessary. The OMB will carry out its duties as it has always done but do so without exceeding its authority by imposing a cap below the ceiling prescribed by s. 42(3) or otherwise dictating the rate. In para. 58 of its reasons, the Divisional Court offered suggestions that the OMB might consider in its review of alternative requirement policies.

C. DISPOSITION OF APPEALS

[89] For these reasons, I would dismiss the appeals.

[90] I would order the Elginbay appellants to pay costs to the Town in the amount of $20,000 and the Haulover appellants to pay costs to the Town in the amount of $14,000. These costs, which include costs of the leave motions and appeals, include disbursements and HST. The interveners sought no costs and none are awarded. No costs are payable by or to the OMB.

Released: January 29, 2018 (“D.W.”)

“J. MacFarland J.A.”

“I agree. David Watt J.A.”

“I agree. M.L. Benotto J.A.”

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[1] Section 42 has recently been amended but those amendments post-date the decisions under appeal and so they are not in issue in these appeals.

[2] It is argued that the greater the density, the greater the land value. Since cash-in-lieu is determined by the parcel’s fair market value, an increase in density drives an increase in the amount of cash-in-lieu payable and produces a result whereby sites with greater density pay more cash-in-lieu per unit. This, it is argued, has a negative impact on intensification and affordable housing.