CITATION: Royal 7 Developments Ltd. v. Vaughan (City), 2018 ONSC 488
COURT FILE NO.: CV-17-131280
DATE: 20180119
CORRIGENDA: 20180124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Royal 7 Developments Ltd.	)	
	)	Brendan Ruddick and Charles M.K.
Applicant	)	Loopstra, for the Applicant
	)	
– and –	)	
	)	
The Corporation of the City of Vaughan	)	Kim Mullin and Bruce H. Engell, for the
	)	Respondent
Respondent	)	
	)	
	)	
	)	**HEARD:** January 12, 2018

REASONS FOR DECISION
(TEXT OF ORIGINAL DECISION HAS BEEN AMENDED – CHANGE APPENDED)

CHARNEY J.:

Introduction

[1] The Applicant, Royal 7 Developments Ltd. (Royal 7), is a developer that owns 3.47 hectares of property in the City of Vaughan (the City). Royal 7 is building five residential high rise towers totalling 1,935 units on this property.

[2] Pursuant to s. 42 of the *Planning Act*, R.S.O. 1990, c.P.13, the City may require that Royal 7 convey land to the municipality for park or other public recreational purposes as condition of development. The City may accept land or payment of cash-in-lieu of land ("cash-in-lieu") to satisfy this requirement.

[3] Royal 7 takes the position that the City cannot "mix-and-match". Pursuant to s. 42(7) of the *Planning Act*, the City must choose between land and cash-in-lieu, but cannot demand a combination of the two.

[4] Royal 7 takes the position that pursuant to Condition 40 of a draft plan of subdivision approval agreed to by the parties and incorporated into an order of the Ontario Municipal

Board (OMB) dated September 4, 2008 (the OMB order), Royal 7's obligation to convey parkland to the City will be satisfied by the conveyance of a parcel of land referred to as "Block 5". Royal 7 has no further obligation to make cash-in-lieu-payments to the City.

[5] The City takes the position that s. 42(7) of the *Planning Act* does not preclude the City from requiring a combination of land and cash-in-lieu, and that the conveyance of Block 5 will not satisfy the City's parkland dedication by-law or Condition 40 of the OMB order.

[6] Accordingly, the dispute in this case turns primarily on the interpretation of s. 42(7) of the *Planning Act* and Condition 40 of the OMB order.

[7] In order to proceed with the development, Royal 7 has made two cash-in-lieu payments to the City, but has made these payments under protest. If Royal 7 is successful in these proceedings it will be entitled to a refund of these payments.

Relief Requested

[8] Royal 7 brings this application pursuant to rule 14.05(3) (d) and (h) of the Rules of Civil Procedure, seeking three related declarations:

a) "A declaration that the conveyance of Block 5" by Royal 7 to the City "in fulfillment of Condition 40" of the draft plan of subdivision approval incorporated into the OMB order "is a condition imposed under s. 51.1 of the *Planning Act*".

b) "A declaration that s. 42(7) of the *Planning Act* applies to the conveyance of Block 5…and therefore no further parkland dedication of land or payment of cash-in-lieu of parkland dedication are required… in respect of the subject subdivision…"

c) A declaration that two cash-in-lieu payments made under protest by Royal 7 to the City were illegally imposed by the City.

[9] While not explicit, there is another declaration implicit in Royal 7's first proposed declaration. As drafted by Royal 7, the first proposed declaration assumes that the conveyance of Block 5 is "in fulfillment of Condition 40". Whether the conveyance of Block 5 will fulfill Condition 40 is actually the central issue in this case.

Jurisdiction of the Court

[10] The City takes the position that the OMB is the proper forum for hearing the legal issues raised in this dispute, and the court should defer to the jurisdiction of the OMB. Royal 7 has pending applications at the OMB in respect of its parkland dedication in accordance with sections 42(10) and (11) of the *Planning Act*. The City argues that the proper interpretation of Condition 40 of the OMB order and the proper interpretation of s. 42 (7) of the *Planning Act* are issues that should first be dealt with by the specialized tribunal

established by the legislature to deal with *Planning Act* disputes between municipalities and developers relating to parkland.

[11] Royal 7 takes the position that it brought its applications to the OMB out of an abundance of caution, but that the issues it has raised in this application do not fall within the OMB's jurisdiction under sections 42(10) or (11). It further argues that the OMB has no jurisdiction to grant the declaratory relief requested in this application.

[12] At the outset of this hearing I heard the parties submissions on the issue of whether this matter should be heard by this court or by the OMB. Following submissions on that issue, I reserved my decision on jurisdiction until I heard the submissions on the merits of the application. I was of the view that hearing the merits of the case would assist the determination of the jurisdictional issue.

[13] Having heard the full argument on the merits, I am now persuaded that the court should defer to the jurisdiction of the OMB in this matter in accordance with the Ontario Court of Appeal's decision in *Country Pork Ltd. v. Ashfield (Township*), 2002 CanLII 4157; 60 O.R. (3d) 529 (ON CA)).

Statutory Scheme

[14] In order to understand the reasons for this decision it is necessary to briefly review the statutory scheme that gives rise to the dispute between the parties.

[15] The *Planning Act* provides two alternative mechanisms by which municipalities may secure parkland at different stages of the development process. The first is set out in s. 42 of the *Planning Act*; the second is set out in s. 51.1.

[16] Under s. 42 of the *Planning Act* the council of a local municipality may pass a by-law requiring that as a condition of development or redevelopment of land, land be conveyed for park or other public recreational purposes. Section 42(1) authorizes the conveyance in an amount not exceeding 5% of the land in the case of residential development. Section 42(1) states:

> (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.

[17] In the case of residential development, s. 42(3) permits increased parkland where the developer requests increased density. Section 42(3) authorizes a local municipality to require parkland at an "alternative rate" of up to one hectare for each 300 dwelling units proposed. Section 42(3) states:

> (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.

[18] Sections 42(4), (4.1), (4.2) and (4.3) establish consulting conditions for the passage of a by-law under s. 42(3). There is no dispute that the City fulfilled these conditions before passing the City's parkland dedication by-law.

[19] Section 42(5) provides that land conveyed to a municipality under s. 42 "shall be used for park or other public recreational purposes, but may be sold at any time." This provision is not at issue in this case.

[20] Sections 42(6) is the "cash-in-lieu" provision. Where the municipality imposes the alternative rate of one hectare for each 300 dwellings, requiring the conveyance of land could consume all or most of the property available for development. For example, in the present case, the proposed development totals 1,935 units. The alternative rate of one hectare per 300 dwellings would require a parkland dedication of 6.45 hectares, which is larger than the 3.47 hectare site under development. Accordingly, the legislation authorizes the municipality to accept payment of cash-in-lieu of land.

[21] Pursuant to s. 42(6.0.1) (enacted in 2015), such cash-in-lieu payments are calculated at the reduced rate of one hectare for each 500 dwelling units proposed. Sections 42(6) and (6.0.1) state:

> (6) If a rate authorized by subsection (1) applies, the council may require a payment in lieu, to the value of the land otherwise required to be conveyed.
>
> (6.0.1) If a rate authorized by subsection (3) applies, the council may require a payment in lieu, calculated by using a rate of one hectare for each 500 dwelling units proposed or such lesser rate as may be specified in the by-law.

[22] Pursuant to s. 42(6.0.2), the reduced cash-in-lieu rate of one hectare for each 500 units established in 2015 applies to by-laws enacted before that date. Section 42(6.0.2) provides:

> (6.0.2) If a by-law passed under this section requires a payment in lieu that exceeds the amount calculated under subsection (6.0.1), in circumstances where the alternative requirement set out in subsection (3) applies, the by-law is deemed to be amended to be consistent with subsection (6.0.1).

[23] Pursuant to s. 42(15), the municipality must place all such cash-in-lieu payments into a special account that can only be spent on the acquisition of park or other public recreational purposes.

[24] Sections 42(6.1) provides that where a cash-in-lieu payment is required, no building can be constructed on the land proposed for development unless payment, or arrangements for payment, have been made.

[25] Section 14(12) provides that if there is a dispute regarding cash-in-lieu payments, "the owner may pay the amount required by the municipality under protest". As indicated above, Royal 7 has made two cash-in-lieu payments under protest in this case.

[26] Sections 42(10) and (11) permit either the land owner or the municipality to apply to the OMB to determine disputes arising with respect to cash-in-lieu payments and payments made under protest. These provisions are central to the jurisdictional issue raised by the City. They provide:

> (10) In the event of a dispute between a municipality and an owner of land on the value of land determined under subsection (6.4), either party may apply to the Municipal Board to have the value determined and the Board shall, in accordance as nearly as may be with the *Expropriations Act*, determine the value of the land and, if a payment has been made under protest under subsection (12), the Board may order that a refund be made to the owner.
>
> (11) In the event of a dispute between a municipality and an owner of land as to the amount of land or payment of money that may be required under subsection (9), either party may apply to the Municipal Board and the Board shall make a final determination of the matter

[27] Section 51.1 of the *Planning Act* provides an alternative mechanism for a municipality to obtain parkland when the developer seeks approval of a plan of subdivision. The wording of the two provisions is substantively similar, but the process is different. Both provisions permit the municipality to collect cash-in-lieu of the property to which it would otherwise be entitled. Under s. 42, a bylaw must be passed. Section 51.1 does not require a municipal by-law, but permits the municipality to obtain parkland or cash-in-lieu by means of conditional approval of the plan of subdivision. Another significant distinction between the two provisions is the valuation date. The valuation date under s. 51.1 is the date of subdivision approval when the lands have a lower value then the later development stage provided under s. 42.

[28] The OMB explained the relationship between s. 42 and s. 51.1 in its decision in *Mavis Valley Developments Inc. v. Mississauga (City)*, 2003 CarswellOnt 960, at paras. 71, 76, 78:

> It is clear that the purpose of both sections is to provide a mechanism for the municipalities to obtain parkland and recreation facilities either

> through the dedication of land or through the collection of money. Section 51.1 provides the mechanism to do so when approvals are sought to subdivide land, and Section 42 provides the mechanism to do so during the process of developing on land.
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> …
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> Applying the principles of statutory interpretation that the words must be read in context and that the interpreter is to look at the scheme and organization of the legislation, the Board finds that the word "development" in Section 42, must be read as something distinct from the process of subdividing land. Any other interpretation raises the question as to why there would need to be two sections addressing the dedication of parkland. Furthermore, the two sections provide distinctly different means of obtaining the parkland. In the case of Section 42 a by-law must be passed. Under Section 51.1 parkland or cash-in-lieu is obtained by means of a condition of approval.
>
> …
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> In Section 42, the trigger for such a conveyance or payment is development — or the construction of a structure on the land. In Section 51.1 the trigger for such a payment or conveyance of land, is a conditional approval for the division of land.

[29] Royal 7 takes the position that the City, and Condition 40 of the OMB order, required the parkland conveyance as a condition of subdivision pursuant to s. 51.1 of the *Planning Act*.

[30] The City takes the position that it is relying only on s. 42 of the *Planning Act* and its by-law as the source of its authority for the conveyance of land and to collect the cash-in-lieu.

Background Facts

[31] Before considering s. 42(7) of the *Planning Act* it will be helpful to review some of the background facts that brought the parties to this dispute.

[32] The City's parkland dedication by-law was first enacted in 1990, and provided that for residential development, parkland must be conveyed or cash-in-lieu paid at the rate of 5% of the land, or at the option of the City, at the rate of 1 hectare of land for each 300 dwelling units. In 2012 the City enacted a by-law which provides for high density residential development at the alternative rate of one hectare per 300 dwelling units. The by-law provides that the City will accept a cash-in-lieu payment of $8,500 per unit as of August 1, 2013.

[33] The history of the development of this property dates back to 2000. For the purposes of the jurisdictional issue I can begin in 2008. In that year the City and the previous owners of the property (Royal Empress) reached a settlement with respect to a proposed draft plan of subdivision. The City's internal reports and the correspondence between the City and Royal Empress indicates that the City intended that any agreement contain a provision that parkland be dedicated "and/or" cash-in-lieu be paid, in accordance with the *Planning Act* and the City's approved "Cash-in-lieu of Parkland Policy".

[34] On May 26, 2008 the OMB held a hearing to approve the settlement between the City and Royal Empress. On September 4, 2008, the OMB issued its final order approving draft plan of subdivision. The draft plan of subdivision was approved subject to the conditions of draft plan approval set out in Attachment 3 of the Order. Attachment 3 had the consent of all parties.

[35] One of those conditions – Condition 40 – is the subject of this application. Condition 40 provides:

> 40. The Owner shall convey Park Block 6 to the City free of all encumbrances for parkland dedication and will be credited for this dedication as per the parkland dedication requirements under the Planning Act.

[36] Condition 40 makes no reference to either s. 42 or s. 51.1 of the *Planning Act*.

[37] Royal Empress transferred the property to Royal 7 on January 31, 2011. There is no dispute that Condition 40 is binding on Royal 7. Indeed, Royal 7 relies on Condition 40, taking the position that the conveyance of Part Block 6 (now Block 5) satisfies that condition without further payment of cash-in-lieu.

[38] In June, 2011, Royal 7 applied for site plan approval for the first residential tower of the proposed development, consisting of 353 units. In December 2012 Royal 7 sought a building permit to begin construction of the first residential tower. The City advised Royal 7 that in order to obtain a building permit it would have to make its cash-in-lieu payment for the first tower.

[39] Royal 7 made this payment under protest on December 10, 2012, and, on that same day, counsel for Royal 7 applied to the OMB under sections 42(10) and (11) of the *Planning Act* to have the OMB determine the dispute between the parties and have the payment refunded.

[40] In June 2014, Royal 7 sought a building permit to begin construction of the second residential tower, consisting of 351 units. To obtain this permit, Royal 7 again made the cash-in-lieu payment under protest to the City. On June 25, 2014, counsel for Royal 7 made a second application under sections 42(10) and (11) of the *Planning Act* to have the OMB determine the dispute between the parties and have the payment refunded. Counsel asked that this second application be consolidated with and heard together with the December 2012, application.

[41] It is not clear from the record why no hearing dates have been scheduled by the OMB.

[42] In June 2017, Royal 7 wished to proceed with the third phase of its development, being towers three and four. To obtain a building permit, Royal 7 was required to make its cash-in-lieu payments for those towers. On June 16, 2017, Royal 7 and the City entered into a Letter of Credit Agreement with respect to the required cash-in-lieu payment.

[43] Royal 7 then served the City with this application on June 16, 2017.

[44] To date, the combined cash-in-lieu payments and letters of credit paid under protest by Royal 7 equals $11,749,300 for 1,565 units.

Section 42(7) of the *Planning Act*

[45] This brings us to 42(7) of the *Planning Act*, enacted in 1994. It provides:

> (7) If land has been conveyed or is required to be conveyed to a municipality for park or other public purposes or a payment in lieu has been received by the municipality or is owing to it under this section or a condition imposed under section 51.1 or 53, no additional conveyance or payment in respect of the land subject to the earlier conveyance or payment may be required by a municipality in respect of subsequent development or redevelopment unless,
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> (a) there is a change in the proposed development or redevelopment which would increase the density of development; or
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> (b) land originally proposed for development or redevelopment for commercial or industrial purposes is now proposed for development or redevelopment for other purposes.

[46] Section 42(7) has been considered by the OMB. In *Mavis*, the OMB explained the origin and purpose of s. 42(7) as follows (at paras. 72 and 73):

> As a response to the decision in *Tradmor Investments Ltd. v. Mississauga (City)* (1994), 21 M.P.L.R. (2d) 64 (Ont. Div. Ct.),…the relationship between these two sections [sections 42 and 51.1] was clearly stated in Section 42(7) cited above. That section provides that if land or money has been collected for parkland purposes, during the division of land, no additional land or payment may be required by the municipality in respect of the development of that land pursuant to Section 42, unless there is an increase in density or a change in the proposed use.
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> Section 42(7) establishes several things in defining the scheme of the legislation in this regard. It recognizes that the overall development process is a continuing one, which may include the division of land as well as, at a later date, the construction of structures on that land. It

> establishes that the municipality has the option of obtaining land or cash for parkland when land is divided, but that it cannot then again collect at a later stage, unless there is a change in use or density from what was proposed at the stage of dividing the land. Finally, it acknowledges that parkland or cash in lieu thereof can be collected pursuant to Section 42, where there has been a prior division of land, provided that collection was not made at the previous stage…

[47] Section 42(7) was also considered by the OMB in *Briarwood Developments Ltd. v. Georgina (Town)*, 2017 CarswellOnt 16112, where the OMB stated (at paras. 26 - 28):

> Section 42(7) is unambiguous… If a prior conveyance or payment has been made or is owing in respect of parkland for a particular property, then no additional conveyance or cash-in-lieu payment is to be required unless, (1) the redevelopment increases density (s. 42(7)(a)); or (2), the redevelopment involves lands previously used for industrial or commercial purposes and is now proposed to be developed for other purposes (s. 42(7)(b)).
>
> The purpose of this section… is to "avoid double dipping", i.e. paying for or conveying parkland in the past should be accounted for.
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> The evidence before the Board is that no prior payment has ever been made in respect of the Subject Lands. There was no evidence that a conveyance had previously been made either. As a result, s. 42(7) of the Act cannot apply. The full amount of the 5% of the value of the land was due and owing.

Positions of the Parties

[48] Royal 7 argues that as a result of this 1994 amendment, municipalities were no longer permitted to take parkland in a two-stage process – once at the subdivision stage (s. 51.1), and again at the development stage (s. 42). Accordingly, most municipalities adopted a policy of taking only at the building permit stage pursuant to s. 42 since the land values were higher at that stage.

[49] Royal 7 argues that the City is trying to continue to apply the two-stage process for taking parkland, but cannot do so because of s. 42(7) of the *Planning Act*. There is no dispute that the exceptions in s. 42(7) (a) and (b), which permit the two-stage process in limited circumstances, do not apply in this case.

[50] Royal 7 takes the position that whatever the City hoped to accomplish in its negotiations with Royal Empress, the legal obligations of Royal 7 are set out in Condition 40, which was incorporated into the OMB order. Royal 7 argues that Condition 40 means that the City has decided to require the conveyance as a condition of subdivision pursuant to s.

51.1 of the *Planning Act*, rather than pursuant to its by-law under s. 42. Royal 7 argues that, based on a plain reading of Condition 40, the conveyance of Block 5 fulfills its parkland conveyance obligations under s. 51.1, and Royal 7 has no obligation to make additional cash-in-lieu payments under s. 42. Nothing in Condition 40 expressly states that Royal 7 will have to make a future cash-in-lieu payment.

[51] Royal 7 further argues that any other interpretation of Condition 40 would be inconsistent with s. 42(7) of the *Planning Act*, which authorizes municipalities to accept the conveyance of parkland **or** accept cash-in-lieu, but not both or any combination thereof. Pursuant to Condition 40, the City chose to accept the conveyance of Block 5, and it is precluded from requiring cash-in-lieu payments in addition to the land.

[52] The City argues that s. 42(7) does not, nor was it intended to, prevent the municipality from accepting land, cash-in-lieu, or any combination thereof that complies with the alternate rate permitted by s. 42(3). The purpose of s. 42(7) of the *Planning Act* is to ensure that past conveyances of parkland or cash-in-lieu payments are accounted for and that municipalities are not able to "double dip" by taking parkland contributions twice. The City is not "double dipping" by taking parkland contribution twice; the parkland and cash-in-lieu sought by the City is that required by the by-law passed in accordance with s. 42(3). The City has not received any parkland under s. 51.1 of the *Planning Act*. Had it intended to act under s. 51.1, it would have done so at the subdivision stage rather than waiting for Royal 7 to apply for a building permit.

[53] Further, Condition 40 provides that upon conveyance of Block 5, the owner "will be credited" for the conveyance in accordance with the requirements of the *Planning Act*. It does not provide that the property conveyed is full satisfaction of the parkland dedication requirements of the *Planning Act*.

[54] There is a dispute between the parties whether Block 5 is .201 hectares or .39 hectares. Either way it falls substantially short of the 6.45 hectares prescribed by the City's parkland dedication by-law. The City argues that parkland dedication is made for the public benefit, and any interpretation of Condition 40 of the OMB order or s. 42(7) of the *Planning Act* that obligates Royal 7 to dedicate only a fraction of the prescribed parkland would lead to an unreasonable result and is inconsistent with the public interest.

General Powers of the OMB

[55] The final statutory provisions relevant to the jurisdictional issue are sections 35 to 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 (OMB Act). These provisions establish the general jurisdiction and powers of the OMB:

> 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.

> 37. The Board has jurisdiction and power,
>
> a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act;
>
> …

Analysis

[56] The issues raised in this application relate to the interpretation of the parkland dedication provisions of the *Planning Act*, and an order made by the OMB in relation to those provisions.

[57] Pursuant to s. 36 of the OMB Act, the OMB has exclusive jurisdiction in respect of all matters in which jurisdiction is conferred by, *inter alia*, the *Planning Act*.

[58] Section 35 of the OMB Act gives the OMB "jurisdiction to decide in a proceeding, for the purpose of carrying out its mandate, … the scope of its jurisdiction in that proceeding": *Toronto (City) v. Goldlist Properties Inc.*, 2003 CanLII 50084; 67 O.R. (3d) 441, (C.A.) at para. 23. The OMB's decision in this regard is subject to judicial review by the Divisional Court.

[59] Even if the Superior Court has concurrent jurisdiction to hear this matter, the Ontario Court of Appeal decided in *Country Pork* that the court must consider whether it should hear the application or defer to the jurisdiction of the OMB. This is consistent with a long line of cases that hold that parties should not be permitted to circumvent the administrative process by seeking relief in the Superior Court rather than before the specialized tribunal established by the legislature to deal with the subject matter.

[60] In *Country Pork* the Court of Appeal stated (at paras. 32-33):

> The OMB is a tribunal that has expertise in municipal planning. In cases where the court is asked to assume jurisdiction over matters that the legislature has assigned to administrative tribunals, there is a strong policy argument in favour of the court deferring to the jurisdiction of the tribunal in favour of protecting the integrity of administrative mechanisms set up by the legislature. Where the court is an alternative forum to a tribunal provided in a comprehensive legislative scheme, considerable judicial deference is to be given to that scheme and the expertise of the tribunal before the court exercises its discretion to assume jurisdiction… Were an individual, in circumstances such as this case, free to choose whatever forum he or she wished in order to attack

> the validity of an interim control by-law on the grounds that it is contrary to proper planning principles, the result would be to undermine the intention of the legislature that all appeals from municipal planning decisions on Planning Act grounds be determined by the OMB… [citations omitted]
>
> Therefore, had the application judge been asked to exercise her discretion whether to assume jurisdiction or to defer to the OMB, it would have been necessary for her to consider the following circumstances:
>
> > -- the attack on the interim control by-law was predominantly on Planning Act principles;
> >
> > -- unlike the attack on the by-law amending the official plan in Toronto, this was not "a direct frontal attack on the underlying validity and legality" of the by-law;
> >
> > -- incidental and necessary to the OMB's determination of whether the by-law should be quashed on Planning Act principles, which is within the OMB's jurisdiction, it could properly consider whether the by-law was passed in bad faith and in breach of natural justice;
> >
> > -- the intention of the legislature expressed in the statutory scheme in the Planning Act vesting exclusive jurisdiction in the OMB to review municipal by-laws and resolutions on the basis of proper planning principles;
> >
> > -- the expertise of the OMB in the field of municipal planning law;
> >
> > -- the policy that requires judicial deference to a statutory scheme vesting an administrative tribunal with jurisdiction to resolve disputes within its area of expertise.

[61] Considering the relevant factors set out above, it is my view that this is a case in which the Superior Court should defer to the expertise of the OMB.

[62] The first question is whether these issues fall within the application provisions in sections 42(10) and (11) of the *Planning Act*. For ease of reference I will repeat those provisions here:

> (10) In the event of a dispute between a municipality and an owner of land on the value of land determined under subsection (6.4), either party may apply to the Municipal Board to have the value determined and the Board shall, in accordance as nearly as may be with the *Expropriations Act*, determine the value of the land and, if a payment has been made under protest under subsection (12), the Board may order that a refund be made to the owner.

> (11) In the event of a dispute between a municipality and an owner of land as to the amount of land or payment of money that may be required under subsection (9), either party may apply to the Municipal Board and the Board shall make a final determination of the matter

[63] Royal 7 argues that s. 42(10) has no application to this dispute because s. 42(10) only permits an application if the dispute relates to the value of land. The dispute in this case, it argues, does not relate to the value of land, but to whether **any** cash-in-lieu payment may be required. If Royal 7 is successful on its argument that the City cannot "mix-and-match" by requiring a combination of land and cash-in-lieu, then the value of the land is not relevant.

[64] While the position that it is not required to make any cash-in-lieu payment is Royal 7's primary argument, the valuation date for any cash-in-lieu payment appears to be an alternative argument. As I understand its position, Royal 7 also argues that the City elected to take parkland at subdivision under s. 51.1 (when property values were lower) and cannot now take parkland under s. 42, which values the cash-in-lieu at the higher property value of the building permit stage (see paras. 39 and 40 of Royal 7's factum). If this argument were accepted, then any cash-in-lieu payment that is permitted would be valued at the lower subdivision stage.

[65] One possible outcome of this case is that Royal 7 is unsuccessful on the "mix-and-match" argument, but successful on the argument that any cash-in-lieu must be calculated on the s. 51.1 valuation date and not at the development/building permit stage. In my view, any dispute over valuation date relates to the value of the land and falls within the OMB's exclusive jurisdiction to consider the value of the land in an application under s. 42(10).

[66] Section 42(11) does not apply directly to this proceeding. While the dispute relates to the amount of land and payment of money, it is not one that arises from the application of subsection 42(9) of the *Planning Act*. Nonetheless, the combination of sections 42(10) and (11), together with the OMB's broad jurisdiction under sections 35 and 37(a) of the OMB Act, indicate that issues relating to disputes between the land owner and municipality in relation to the amount of land or payment of money required under the parkland dedication provisions of the *Planning Act*, are within the OMB's broad jurisdiction over *Planning Act* matters.

[67] If the specific dispute does not otherwise fall within the jurisdiction of the OMB, I find that the interpretation and implementation of its own order is necessarily incidental to the exercise of the OMB's powers pursuant to s. 37(a) of the OMB Act. The central issue in this case is the interpretation of an order of the OMB. Given the OMB's general expertise in *Planning Act* matters, and its specific expertise in relation to the application and implementation of the parkland dedication provisions in the *Planning Act*, it is only logical that the OMB be given the first opportunity to interpret its own order in relation to these provisions. The OMB had the jurisdiction to make Condition 40 of its order, and it

is necessarily incidental to "the exercise of the powers conferred upon the Board" that the OMB have the jurisdiction to clarify or interpret its own order.

[68] Indeed, page 3 of the OMB's order expressly states: "In the event that there are any difficulties implementing any of the conditions of draft plan approval…the Board may be spoken to." The parties have clearly met with some difficulty in implementing Condition 40, and the OMB should be their first recourse.

[69] The interpretation of s. 42 generally and s. 42(7) in particular, as well as the interaction between s. 42 and s. 51.1, and the policy reasons for these provisions, are all matters in which the OMB has developed expertise, as indicated by the several OMB decisions referenced above.

[70] In addition, notwithstanding Royal 7's position that s. 42(7) does not permit the municipality to "mix-and-match" land and cash-in-lieu, counsel on both sides of this case have indicated that developers and municipalities commonly agree to a combination of land conveyance and cash-in-lieu, and this practice is condoned by the OMB (although the OMB has not expressly ruled on its legality), (see for example: *Great Land (Yonge 16th) Inc. v. Richmond Hill (Town)*, 2014 CarswellOnt 3106, 83 OMBR 131, at para. 45). This suggests that the interpretations at issue in this application have significant practical and policy implications that are beyond the ken of the court, and would benefit from the OMB's expertise in the field of municipal planning law. See: *City of Toronto v. 1095909 Ontario Limited*, 2012 ONSC 1344 at paras. 7-9.

[71] Finally, Royal 7 argues that the relief it seeks – three declarations – is available only from the Superior Court (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 97). The OMB has no jurisdiction to grant the declarations sought.

[72] While technically correct, this argument ignores the fact that while the relief sought by Royal 7 is dressed up as a declaration, the ultimate relief sought is the refund of the $11 million dollars paid or promised under protest, and the OMB has the express authority to order a refund of money paid under protest (s. 42(10)).

[73] Courts considering the jurisdiction of administrative tribunals to grant relief are more concerned with the substantive remedy sought than the formal title given to it. The question is whether the tribunal has the jurisdiction to grant an "effective remedy" in the matter before it: *Moore v. British Columbia*, 1988 CanLII 184, (BC CA) at pp.16-17. In *Weber v. Ontario Hydro*, [1995] 2 SCR 929 at para. 57, the majority of the Supreme Court of Canada confirmed the holding of the British Columbia Court of Appeal in *Moore*, stating:

> Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* … declined to exercise that [court's residual] jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be

> avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".

[74] A finding by the OMB that Condition 40 of the OMB order "is a condition imposed under s. 51.1 of the *Planning Act*", and that "no further parkland dedication of land or payment of cash-in-lieu of parkland dedication are required" is, in essence, no different than a declaration to the same effect given by the Superior Court. An OMB order that the cash-in-lieu payments made under protest by Royal 7 must be refunded is just as effective as a Superior Court declaration that the "payments were illegally imposed by the City".

Conclusion

[75] Based on the foregoing, without deciding the merits of the application, the application is dismissed on the basis that the OMB is the more appropriate forum to determine the issues in question.

[76] If the parties cannot agree with respect to the issue of costs, the respondent is to provide written submissions, not to exceed three pages in length plus a costs outline and any relevant offers to settle, within 30 days of the release of this decision. The applicant will have 20 days thereafter to respond on the same terms.

Justice R.E. Charney

Released: January 19, 2018

CITATION: Royal 7 Developments Ltd. v. Vaughan (City), 2018 ONSC 488

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Royal 7 Developments Ltd.

Applicant

– and –

The Corporation of the City of Vaughan

Respondent

REASONS FOR DECISION

Justice R.E. Charney

Released: January 19, 2018

Amendment

1. Paragraph [36] has been amended to reflect '**Condition 40**' (not Condition 7).