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Is the Interpretation of an Official Plan a Matter of Fact or a Question of Law?

The Courts Weigh In

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CONTEXTUAL BACKGROUND

1. There is a considerable body of historical case law relating to the issue of what an official plan is (and is not). There is also some jurisprudence relating to the question of whether the interpretation of official plan policy is a matter of fact or a question of law.

2. It is beyond the scope of this paper, and the time limits that govern this presentation, to review the historic changes to the *Planning Act*, relating to official plans and referrals / appeals of official plans and official plan amendments, since the enactment of the *Planning Act* in 1946 (*Planning Act*, S.O. 1946, c.71). We note, however, that the 1994 (Bill 163) and 1996 (Bill 20) amendments to the *Planning Act* made important changes to the manner in which an "official plan" was defined and to the jurisdiction of the Ontario Municipal Board (the "Board") with respect to appeals of official plans and official plan amendments. For the most part, the substance of these mid-1990s changes as they relate to the contents of an "official plan" and to the jurisdiction of the Board relating to official plan appeals, survived the more recent Bill 26 and Bill 51 amendments to the *Planning Act*.

3. Suffice it to say that in reviewing decisions of the Board and the courts, we should keep in mind the definition of "official plan" that existed at the time of the decision and also consider the decision in the context of the jurisdiction of the Board that existed at that time.

4. Accordingly, we will briefly review the provisions in the present day *Planning Act* relating to the contents of an official plan and the jurisdiction of the Board on an appeal (or a transfer) of an official plan or official plan amendment, before we review the recent court authorities relating to the question of whether the interpretation of an official plan is a matter of fact or a question of law.

WHAT IS AN OFFICIAL PLAN?

5. Today's *Planning Act* (R.S.O. 1990, c. P.13 as amended) does not contain a definition of the term "official plan", but instead describes the mandatory and discretionary content of an official plan.

6. Current section 16(1) of the *Planning Act* provides that:

> ***16.(1)*** *An official plan <u>shall</u> contain,* [underlining added]
>
> *(a) goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality or part of it, or an area that is without municipal organization; and*
>
> *(b) such other matters as may be prescribed.*

7. Section 16(1)(a) of the *Planning Act* is framed in mandatory terms and specifies what an official plan "shall contain" as a minimum requirement.

8. The requirement for an official plan to establish "goals", as well as "objectives and policies" was introduced in 1994 (Bill 163) through an amendment to section 16(1) of the *Planning Act*. The Bill 163 amendments also recognized that the goals, objectives and policies are established primarily "to manage and direct", rather than "to provide guidance for".

9. We note that no regulations have been made prescribing "such other matters".

10. In addition to the minimum content of an official plan as set out in section 16(1)(a) above, section 16(2) of the *Planning Act* provides that:

> ***16.(2)*** *An official plan <u>may</u> contain,* [underlining added]
>
> *(a) a description of the measures and procedures proposed to attain the objectives of the plan;*

> *(b) a description of the measures and procedures for informing and obtaining the views of the public in respect of a proposed amendment to the official plan or proposed revision of the plan or in respect of a proposed zoning by-law; and*
>
> *(c) such other matters as may be prescribed.*

11. Again, we note that no regulations have been made to prescribe any further discretionary content of an official plan.

12. The *Planning Act* does not contain any other specific provisions defining or limiting what can or must be contained in an official plan.

JURISDICTION OF THE BOARD ON AN APPEAL OR TRANSFER

13. Prior to 1994, the jurisdiction of the Board relating to official plans was related to the original jurisdiction exercised by the Minister, with the result that the Board and the courts considered the Board as standing "in the shoes" of the Minister or as being the Minister's "alter ego".[1] This is not surprising considering that plans would come before the Board following a referral, without the Minister having made a prior decision on the matter.

14. The language of the *Planning Act* between S.O. 1983, c.1 and the 1994 (Bill 163) amendments provided as follows:

> ***Former section 17(15)***
>
> *The Municipal Board may make any decision that the Minister could have made.* [originally enacted as section 17(18) of S.O. 1983, c.1]

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[1] See for e.g. *Re Cloverdale Shopping Centre Ltd. and Township of Etobicoke* (1966), 57 D.L.R. (2d) 206, 1966 CarswellOnt 103, [1966] 2 O.R. 439, (C.A.); *Re Town of Grimsby Official Plan and Certain Implementing Restricted Area (Land Use) By laws* (1974), 4 O.M.B.R. 158 (O.M.B.); *Re Toronto - Metro Centre* (1974), 2 O.M.B.R. 5 (O.M.B.); *Re Borough of Scarborough Official Plan Amendment 373* (1976), 5 O.M.B.R. 348 (O.M.B.); *Allarco Developments Ltd. et al. v. Town of Ancaster* (1980), 10 O.M.B.R. 353 (O.M.B.).

15. The 1994 amendments to the *Planning Act* deleted former section 17(15) of the *Planning Act* and replaced it with the following specific reference to the nature of the relief that the Board could confer:

> ***Former section 17(42)***
>
> *On an appeal or a referral, the Municipal Board may approve all or part of the plan as an official plan, make modifications to the plan and approve the plan as modified or refuse to approve all or part of the plan.*

16. The reference to "an appeal or a referral" was changed to "an appeal or a transfer" in the 1996 (Bill 20) amendments.

17. The 1996 amendments also introduced a further change to the jurisdiction of the Board through the repeal of former section 63(2) which read as follows before the 1994 (Bill 163) amendments:

> ***Former section 63(2), before Bill 163***
>
> *Where a matter is referred to the Municipal Board under this Act, the approval or consent of the Board has the same force and effect as if it were the approval or consent of the Minister or the council of a municipality.*

and as follows between 1994 and 1996:

> ***Former section 63(2), between Bill 163 and Bill 20***
>
> *If a matter is appealed or referred to the Municipal Board under this Act, the approval or consent of the Board has the same effect as if it were the approval or consent of the Minister, approval authority, the council of a municipality or a planning board.*

18. Following the 1996 amendments to the *Planning Act*, an appeal often comes to the Board after a decision has been made by the Minister or other approval authority. Accordingly, any consideration of older authorities relating to the powers of the Board should be considered in the context of the *Planning Act* provisions that existed at that time.

19. The current *Planning Act* provides as follows with respect to the powers of the Board on an appeal or a transfer of an official plan or official plan amendment:

> ***17.(50)*** *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.*

20. In other words, the Board is no longer "standing in the shoes of the Minister"; it is authorized to make an independent decision on the appropriateness of the Ministerial or other approval, subject to the consideration of other relevant provisions of the *Planning Act*, such as section 2.1.

INTERPRETATION OF AN OFFICIAL PLAN - RECENT JURISPRUDENCE

21. There has been considerable discussion in the past weeks about the recent judgment of the Court of Appeal in *Niagara River Coalition v. Niagara-on-the-Lake (Town)*[2] issued on 10 March 2010. Recent discussion has included insights provided by three judges of the Superior Court at the 8 April 2010 Municipal Law dinner programme, and an article in the April 2010 issue of *The Digest of Municipal & Planning Law*[3] by Kenneth Hare and Benjamin Ries.

22. The matter before the Court of Appeal in *Niagara River Coalition v. Niagara-on-the-Lake (Town)* arose from a successful application to quash a by-law authorizing a licence agreement, pursuant to section 273 of the *Municipal Act, 2001*, S.O. 2001, c.25.

23. Briefly, the facts as set out in the Court of Appeal decision involve the use of a dock owned by the Town of Niagara-on-the-Lake ("NOTL") by Niagara Gorge Jet Boating Ltd. ("Jet Boat") pursuant to a licence agreement. The licence agreement in question was

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[2] 2010 CarswellOnt 1332, 2010 ONCA 173 (Ont. C.A.)

[3] (2010) 4 D.M.P.L. (2d), April 2010, Issue 16, page 1.

the third over a period of time commencing in 1993. A by-law authorizing the third licence agreement was passed by NOTL on 11 February 2008.[4]

24. The application, brought by Niagara River Coalition, to quash the by-law was successful on 21 May 2009. The application judge quashed the by-law following his determination that the use of the dock under the third licence agreement did not conform to the NOTL Official Plan and hence was contrary to section 24(1) of the *Planning Act*.[5] Section 24(1) of the *Planning Act* provides as follows:

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

25. The decision of the application judge was appealed to the Court of Appeal by NOTL. In allowing the appeal and setting aside the decision of the application judge, the Court of Appeal held that Jet Boat's operation was permissible as an "Existing Non-Complying Use", and accordingly conformed to the NOTL Official Plan.[6]

26. We would like to draw attention to the following matters dealt with by the appellate court in its reasons. They are:

(a) The discussion regarding the admission and reliance by the application judge of evidence by the former planner of NOTL who was responsible for drafting the NOTL Official Plan.

(b) What is an official plan?

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[4] 2010 CarswellOnt 1332, 2010 ONCA 173 (Ont. C.A., at para 2.

[5] *Id* at para 4.

[6] *Id* at para 5. We note that the Court of Appeal appears to have used "non-complying" interchangeably with "non-conforming" in the decision.

(c) Is the proper interpretation of an official plan a question of law or a factual matter?

27. With respect to the first matter, the Court of Appeal generally agreed with the appellant that it was improper for the application judge to have admitted and relied upon the evidence of the former planner to "fill in the gaps" in the language of the NOTL Official Plan[7]. The Court also accepted the thrust of the appellant's submissions that the application judge ought to have applied accepted rules of construction of legislation when interpreting the text of the NOTL Official Plan.[8]

28. However, and this brings us to the second matter that we wish to highlight, the Court did not agree with the appellant's perspective that an official plan is akin to legislation. In disagreeing with this approach, the Court noted as follows:

> *As stated by this Court in* Goldlist Properties Inc. v. Toronto (City) *(2003), 67 O.R. (3d) 441 (Ont. C.A.), at para. 49:*
>
> > *[I]t is important to bear in mind that the purpose of an official plan is to set out a framework of "goals, objectives and policies" to shape and discipline specific operative planning decisions. An official plan rises above the level of detailed regulation and establishes the broad principles that are to govern the municipality's land use planning generally. As explained by Saunders J. in* Bele Himmel Investments Ltd. v. City of Mississauga et al. *(1982), 13 O.M.B.R. 17 at 27:*
> >
> > > *Official plans are not statutes and should not be construed as such. In growing municipalities … official plans set out the present policy of the community concerning its future physical, social and economic development.*
> >
> > *In our view, it is essential to bear in mind this legislative purpose when interpreting scope of authority to adopt an*

[7] *Id* at paras 40 to 42 and 54.

[8] *Id* at paras 41 to 42.

> *official plan. The permissible scope for an official plan must be sufficient to embrace all matters that the legislature deems relevant for planning purposes.*[9]

29. The third matter dealt with by the Court of Appeal and of particular relevance to today's discussion is whether the proper interpretation of an official plan is a question of law or a matter of fact. In unequivocal terms, the Court confirmed the recent jurisprudence of the Divisional Court that "the proper interpretation of an official plan is not a factual matter to be decided based on opinion evidence from planners, but rather a question of law".[10]

30. In its reasoning on this point, the Court of Appeal commented as follows:

> *While administrative tribunals have an ability under s. 15(1) of the* Statutory Powers Procedure Act, *R.S.O. 1990, c. S.22, to admit evidence that would otherwise be inadmissible in a court of law, I am not persuaded that it is appropriate to do so where the interpretation of an official plan is at issue. I find the words of Bouck J. in* Capital Regional District v. Saanich (District) *1980, 24 B.C.L.R. 154 (B.C. S.C.), at para. 47, to be apposite: "The [municipality] must set out in its official … plan what it is trying to do. When it fails in its purpose, others cannot fill in the gaps because they are then placing themselves in the position of the [municipality] which alone is responsible for the decision."*
>
> *It is clear that official plans are not legislation, and where interpretation is necessary, it is a question of law that must be determined on the basis of the documents that comprise such plans. In this instance, the application judge relied on opinion evidence that was inadmissible to determine the scope and meaning of the language used in the Plan.*[11]

31. The strong message that can be taken from the Court of Appeal's decision in *Niagara River Coalition v. Niagara-on-the-Lake (Town)* is that the interpretation of an official

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[9] *Id* at para 42.

[10] *Id* at para 43.

[11] *Id* at paras 44 and 45.

plan is a question of law, and, accordingly, the responsibility to interpret such a document cannot be abdicated by the decision maker.

32. Leaving aside the broad sweeping nature of the Court of Appeal's comments, we note that recent jurisprudence of both the Board and the Divisional Court is generally consistent with the appellate court's approach to the interpretation of official plans and the role of the decision-maker in interpreting such documents.

33. A series of recent decisions of the Divisional Court over the past two years indicates that the interpretation of an official plan is a question of law that is properly left to the Board member. We will commence this review of recent decisions with the decision of the Divisional Court on the hearing of the appeal in *Re Romlek Enterprises*[12]. As indicated in *Re Romlek Enterprises*:

> *The proper interpretation of the Official Plan and the Secondary Plan is not a factual matter to be decided based on opinion evidence from planners, but rather a question of law (*Toronto (City) v. 2059946 Ontario Ltd., *[2007] O.J. No. 3021 (Ont. Div. Ct.) at para 4). The Board member was required to interpret these documents himself. The interpretation he accepted, that the density limit would not apply to the mixed residential use proposed, is not consistent with and is not a reasonable construction of the words of the Secondary Plan.*[13]

34. Similarly, in *R & G Realty Management Inc. v. North York (City)*[14], the Divisional Court, after finding that the interpretation and application of the *Planning Act* and related planning documents, specifically the City's Official Plan and Provincial Policy Statement 2005, involve questions of law,[15] indicated that:

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[12] (2009), 61 M.P.L.R. (4th) 256, 250 O.A.C. 368, 2009 CarswellOnt 3108 (Ont. Div. Ct.)

[13] *Id* at para 34.

[14] (2009), 63 O.M.B.R. 25, 254 O.A.C. 66, 63 M.P.L.R. (4th) 192, 2009 CarswellOnt 4717 (Ont. Div. Ct.)

[15] *Id* at para 6.

> *The Board is not entitled to simply accept the opinion of an expert before it and adopt it as the opinion of the Board without stating its reasons for doing so:* Romlek Enterprises, Re, *[2009] O.J. No. 2232 (Div. Ct.) at para 34. That is particularly so when there is no evidence cited by the Board to support the opinion, clear evidence cited by the Board contradicting that opinion, and no reason given for preferring the testimony of one witness over the other.*[16]

35. In dismissing a motion for leave to appeal brought by the Region of Niagara and the City of Niagara Falls in *Re Ontario (Ministry of Municipal Affairs and Housing)*[17], Karakatsanis J. indicated as follows:

> *Interpretation of an official plan raises questions of law. Official plans must conform to provincial policy and plans. It follows that the interpretation of a provincial policy or plan is also a question of law. Such questions of law engage the policy expertise of the Board and attract a standard of reasonableness. The application of the provincial plan to the specific facts may however raise questions of mixed law and fact.*[18]

36. It appears that these recent cases stand for the principle that the interpretation of a policy document, such as a policy statement or an official plan, is a question of law within the exclusive domain of the Board, although the application of a policy document to the specific facts in hand may raise questions of fact or mixed questions of fact and law. Accordingly, the courts appear to be making a distinction between questions of law and matters of fact, rather than between statutes and policy documents.

37. We do not read these cases as suggesting that the Board cannot hear opinion evidence from planners. Rather these recent cases stand for the proposition that, in the end, it is the Board member who should have the final say with respect to the interpretation of statutes and policy documents such as an official plan, policy statement or provincial plan. It is not a question of evidence, but rather a question of interpretation.

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[16] *Id* at para 37.

[17] (2009), 63 O.M.B.R. 407, 2009 CarswellOnt 7473 (Ont. Div. Ct.)

[18] *Id* at para 7.

38. Accordingly, whether the language at issue is found in a statute, such as the *Planning Act*, or in a policy document, such as an official plan, policy statement or provincial plan, it is up to the Board to apply its specialized expertise and interpretive skills with respect to the interpretation of these documents which are within its domain.

39. In determining that the interpretation of an official plan is a question of law, it does not appear that the Divisional Court is attempting to attribute a status to an official plan other than that of being a policy document. In this regard, these recent decisions of the Divisional Court are not inconsistent with older authorities such as *Bele Himmell Investments Ltd. v. Mississauga (City)*[19], where the Divisional Court made a distinction between legislation and official plan policy in finding that "official plans are not statutes and should not be constructed as such"[20]. The Divisional Court in *Bele Himmell*, also recognized that:

> *It is the function of the Board in considering whether to approve a by-law to make sure that it conforms to the Official Plan. In doing so, the Board should give to the Official Plan a broad liberal interpretation with a view to furthering its policy objectives.*[21] [underlining added]

40. The recent decisions of the courts do not suggest that official plans are not policy documents or that they should be given a narrow interpretation. What the courts are saying is that the question of interpreting an official plan is one of law and that the appropriate person to interpret an official plan is the Board member himself or herself. This responsibility should not be abdicated to or replaced by expert opinion evidence.

41. Although the decision in *Bele Himmell Investments Ltd. v. Mississauga (City)* was made at a time when the Board was "standing in the shoes of the Minister", and not in today's context where the Board is an appellate body with an independent review role, the

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[19] 1982 CarswellOnt 1946, [1998] O.J. No. 1200 (Ont. Div. Ct.).

[20] *Id* at para 22.

[21] *Id* at para 22.

essential nature of an official plan as a policy document has not changed, nor has the approach to interpreting an official plan.

42. It is noteworthy that the language in *Bele Himmell Investments Ltd. v. Mississauga (City)*, with respect to giving an official plan a "broad liberal interpretation" is not dissimilar to the liberal rules of construction provided in section 64(1) of the *Legislation Act, 2006*, S.O. 2006, c.21, Schedule F[22] with respect to the interpretation of a statute or regulation:

> ***Rule of liberal interpretation***
>
> ***64.(1)*** *An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.* [underlining added]
>
> ***64.(2)*** *Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.*

43. Whether the question of interpretation involves a statute, a regulation or a policy document such as an official plan, policy statement or provincial plan, it appears that a consistent approach is being taken in Ontario that such documents shall be given a "broad" / "large" and "liberal" interpretation.

44. The Board has also recently considered its responsibility with respect to the interpretation of an official plan in *Home Depot Holdings Inc. v. Toronto (City)*[23], which involved a rehearing ordered by the Board Chair pursuant to section 43 of the *Ontario Municipal Board Act*. In considering its responsibilities in the context of evidence provided by planners, the panel of the Board on the rehearing referred to the recent enunciations of the Divisional Court and commented as follows:

> *Before this panel embarks on a detailed analysis, we are mindful not to succumb to the option of adopting a version of interpretation*

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[22] Included in the *Access to Justice Act*, S.O. 2006, c.21 as Schedule F. The *Access to Justice Act*, S.O. 2006, c.21 also provided for the repeal of the former *Interpretation Act*.

[23] (2009), 63 O.M.B.R. 134, 2009 CarswellOnt 6661 (O.M.B.).

> *proffered by a planner at a hearing as our own. Ours is a finding of law, based on our analysis of the texts of the Official Plan and the Growth Plan within the proper statutory framework and guided by the relevant jurisprudence. The planning opinions provided by the experts at the hearing cannot be determinative, albeit they would help to give a context, illuminate landscape without which one may grope in the dark and contribute to our appreciation of the nuances of planning. As Sir Winston Churchill said somewhat whimsically but truthfully in another context, experts should be kept "on tap and not on top". In short, the planners' views are a means to an end, and not an end in itself. In this respect, we are keenly cognizant of the enunciations by the Divisional Court in recent cases.*[24]

45. Although leave to appeal was sought and granted recently by the Divisional Court in *Home Depot Holdings Inc. v. Toronto (City)*[25], the Divisional Court agreed that "the interpretation of various statutory instruments and policies" is a "question of law".[26] Sachs J. also cited the Board's own reasoning that its finding "is a finding of law, based on … [the Board's] analysis of the texts of the Official Plan and the Growth Plan within the proper statutory framework and guided by the relevant jurisprudence"[27].

46. In assessing whether there was good reason to doubt the correctness of the Board's interpretation, Sachs J. indicated that he "must be satisfied that the decision is open to serious debate"; he did not need to conclude that the decision is wrong or probably wrong.[28] What is noteworthy is that the court specifically addressed the distinction between the test at the leave stage from that on the actual appeal by stating that:

> *The threshold determination at the leave stage is different from the standard of review assessment by the panel hearing the appeal. The panel hearing the appeal may well decide the question of law*

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[24] *Id* at para 24.

[25] 2010 CarswellOnt 1782, 2010 ONSC 1669 (Ont. Div. Ct.)

[26] *Id* at para 24.

[27] *Id* at para 24.

[28] *Id* at para 25.

> *was one within the unique expertise of the Board, and that the standard of review applicable to the Board's decision is reasonableness. This reasonableness standard requires a court to assess the "process of reasoning used" by the Board to reach its decision and to consider whether the Board's interpretation "was within the range of reasonable interpretations of the statutory provisions in issue (*Investment Dealers Assn. of Canada v. Taub *(2009), 98 O.R. (3d) 169 (Ont. C.A.) at para 30.). Thus, on appeal, it is not enough for a court to conclude that it would interpret the provisions at issue differently than the tribunal.*[29]

47. This distinction had been blurred in some recent leave applications where the leave judge recognized that the threshold on a leave application is that there must be some reason to doubt the "correctness" of the Board's decision, but then went on to apply a "reasonableness" standard as the test for the leave application.[30] The reasonableness standard was applied by the Divisional Court in these leave applications on the basis that deference is owed to the Board on questions of law involving the application of statutes and policies that are within the particular expertise of the Board.

48. It is apparent that the recent jurisprudence of the courts has helped to clarify the function of the Board with respect to the interpretation of official plans. This recognition of the Board's function is also commensurate with the Board's responsibilities under today's *Planning Act* in hearing appeals and interpreting policy based documents such as policy statements, provincial plans and official plans.

49. Recognition of the Board's role in interpreting these policy documents does not mean that the Board cannot hear opinion evidence relating to official plan policy. It means that in the end it is up to the Board to apply its interpretive skills and decide on the correct interpretation of official plan policy.

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[29] *Id* at para 26.

[30] See for e.g. *R & G Realty Management Inc. v. North York (City)* (2009), 59 M.P.L.R. (4th) 148, 62 O.M.B.R. 58, 2009 CarswellOnt 1324 (Ont. Div. Ct.) at para 6; *SmartCentres Inc. v. Toronto (City)* (2009), 63 O.M.B.R. 129, 2009 CarswellOnt 7507 (Ont. Div. Ct.) at para 9; *Re TDL Group Corp.* (2009), 256 O.A.C. 142, 2009 CarswellOnt 7168 (Ont. Div. Ct.) at para 22.

THE ROLE OF EXPERT WITNESSES

50. As the recent Divisional Court cases, and more recently the Court of Appeal's judgment in *Niagara River Coalition v. Niagara-on-the-Lake (Town)*[31] have considered the question of the role of an expert witness in their discourse relating to the proper interpretation of official plan policy, we will take a brief, additional moment to address this matter.

51. The rules for the admission of expert opinion evidence were clearly enunciated by the Supreme Court of Canada in the oft-quoted case of *R. v. Mohan*[32]. As set out in *R. v. Mohan*, the admissibility of expert opinion evidence depends on the application of the following criteria:

(a) The evidence is relevant to some issue in the case;

(b) The evidence is necessary to assist the trier of fact;

(c) The evidence does not violate any exclusionary rule; and

(d) The witness is a properly qualified expert.[33]

52. It is the second criterion stated in *R. v. Mohan* that is relevant to our consideration today, namely whether the expert opinion is necessary in the sense that it provides information that is likely to be outside the experience or knowledge of the decision maker.[34] In considering this criterion, the Supreme Court cautioned that:

> *There is … a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of*

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[31] 2010 CarswellOnt 1332, 2010 ONCA 173 (Ont. C.A.).

[32] (1994), 114 D.L.R. (4th) 419, 71 O.A.C. 241, [1994] 2 S.C.R. 9, 1994 CarswellOnt 66

[33] *Id* at para 17.

[34] *Id* at paras 22 to 23.

> *fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.*[35]

53. In applying these principles to Board proceedings in the context of the recent jurisprudence of the courts, it would seem that an expert witness should provide assistance to the Board in areas that are outside the Board's specialized experience and knowledge, without taking over or replacing the Board's role in interpreting statutes and policy documents that are within the Board's expertise and domain.

54. There is no question that the expert witness continues to play an essential role in establishing whether, on the facts, relevant policies in an official plan or other policy document have been satisfactorily addressed; it is in the area of the interpretation of the language of the policies that care must be taken and the Board's interpretative role respected.

[35] *Id* at para 24.