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WOOD BULL BLOGS

Minor Variances and *Res Judicata*; Joint Board Decision re Quarry Expansion Upheld by Divisional Court; PPS 2014 Now in Effect; Open house on Toronto Development Permit System OP Policies

The following articles are Wood Bull blog posts, originally posted at www.woodbull.ca/blog. Wood Bull LLP comments regularly on developing issues on the Wood Bull blog.

MINOR VARIANCES AND *RES JUDICATA*

Blog posted 30 April 2014, by Sharmini Mahadevan

The Ontario Municipal Board (the "Board") recently considered whether a minor variance application and decision of the Committee of Adjustment refusing the application precluded a subsequent application on the property for similar or the same relief.

Background

In November 2012, the owners of a property at 77 Mason Boulevard in the City of Toronto (the "City") submitted an application to the City's Committee of Adjustment (the "Committee") for two minor variances (the "2012 Application"). One variance requested an increase in lot coverage for the purpose of constructing a cabana, and the second variance sought the conversion of attic space to a habitable third storey.

The 2012 Application was refused by the Committee (the "2012 Decision"). The owners appealed the 2012 Decision to the Board, but later withdrew the appeal, presumably because it had not been filed within the requisite 20 day appeal period.

Subsequently, in May 2013, the owners submitted a new application to the Committee requesting only a variance for a habitable third storey (the "2013 Application").

At the Committee hearing relating to the 2013 Application, the York Mills Heights Residents' Association (the "Association") took the position that the Committee lacked jurisdiction to hear the 2013 Application as it had already been refused by the Committee in the 2012 Decision. Notwithstanding, the Committee heard the 2013 Application and refused it (the "2013 Decision").

The owners appealed the 2013 Decision to the Board. The Association then applied to the Ontario Divisional Court for an order to quash the 2013 Decision on the basis that the Committee lacked jurisdiction to hear the 2013 Application and did not give reasons for accepting jurisdiction. In dismissing the application for judicial review, theDivisional Court noted that, absent exceptional circumstances, a party must exhaust adequate alternative remedies within the administrative process before seeking judicial review.

First Board Proceeding (Decision Issued on 21 February 2014)

At the outset of the Board hearing in January 2014, the Association brought a motion to dismiss the appeal of the owners.

The Association argued that the 2012 Decision was final and binding pursuant to either s. 45(14) or s. 45(15) of the *Planning Act*, and that, as a result, the habitable third storey variance requested in the 2013 Application should not have been dealt with by the Committee. The Association argued that the phrase "final and binding" found in ss. 45(14) and 45(15) is a codification of the principle of *res judicata*.

The owners and the City disagreed with the Association's interpretation of the phrase "final and binding". The City also argued, inter alia, that there is a public policy argument against granting the relief sought by the Association and that the *Planning Act* does not prohibit property owners from applying for minor variances that are the same as or similar to those sought in prior applications.

In the Board's decision issued on 21 February 2014, Member Stefanko discussed the principle of *issue estoppel* and

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noted the three preconditions to the operation of *issue estoppel*:

(a) That the same question has been decided;
(b) That the decision which is said to create the estoppel was final; and
(c) That the parties to the judicial decision were the same persons as the parties to the proceeding in which the estoppel is raised.

In considering the first precondition, Member Stefanko noted that without the benefit of viva voce planning evidence he could not make a determination as to the degree of similarity between the 2012 Application and the 2013 Application. He also commented as follows:

> *… to the extent judicial authority suggests I have inherent and residual discretion to prevent the re-litigation of an issue that has been decided, even when the technical requirements of issue estoppel are not met, I do not believe the facts of this case warrant the exercise of that discretion.*
>
> *I would also note that the Current Appeal is properly considered a de novo hearing before the Board. That statutory appeal is a matter of right under the Act. As such, any abrogation of that right at this stage of the proceeding and under the circumstances of this case should only occur, in my estimation, in the clearest of cases. I am not convinced that this motion falls under that category.*

Accordingly, Member Stefanko dismissed the Association's motion and ordered that the appeal should proceed to a hearing, at which hearing the Board could also determine whether the principle of issue estoppel or any other legal principle would prevent the owners from obtaining the variance being sought.

Second Board Proceeding (Decision Issued on 24 April 2014)

The appeal was heard by the Board in March 2014. At the outset, the Board dealt with the question of whether issue estoppel or the principle of *res judicata* applied in this case.

In concluding that the appeal was not prevented from going forward by reason of *issue estoppel* or *res judicata*, the Board held that the phrase "final and binding" found in ss. 45(14) and 45(15) of the Planning Act is not a codification of the principle of *res judicata*, which would operate to bar the owners from applying to the Committee, and on appeal to the Board, for the relief sought.

The Board went on to note that:

> *… the phrase "final and binding" is very meaningful as it is meant to provide a measure of certainty and reliability to applicants, whereby they may proceed with an application for a building permit and construction with the comfort that the approval is effective. The phrase "final and binding" cannot and should not be interpreted to stifle the planning process …, nor is it intended to forever preclude subsequent applications on the property for similar or the same relief.*

The Board also commented that this was not a case of persistent and groundless proceedings before the Board, as the owners were exercising their statutory right of appeal in a matter that had never been adjudicated before the Board. The Board noted that it was always open to it to use its inherent powers to dismiss a case where an appellant has persistently and without reasonable grounds commenced proceedings before the Board that constitute an abuse of process.

In arriving at its conclusion that the appeal was not prevented from being heard because of *issue estoppel* or the principle of *res judicata*, the Board also relied on its extensive knowledge of the planning process in Ontario and noted the following difference in proceedings before Committees of Adjustment and the Board:

> *… Committees of Adjustment are not bound to follow the rules of natural justice or procedural fairness as these are now referred to. Committees when assessing applications before them often rely on submissions and materials from various sources and applicants are not given a full opportunity to put to test the reliability of these materials and/or submissions or to fully rebut these. There is no*

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> *inherent right in an applicant to test these submissions through cross-examination or other means. This is in sharp contrast to the process used by this Board, which is duty bound to apply and the rules of procedural fairness in the hearing of appeals that come before it.*
>
> *The Planning Act obligates the Board to hear the appeal and determine its outcome on the merits of the evidence adduced and the Board should not limit an applicant's right without clear wording in the legislation which limits those rights.*

The Board then proceeded to hear the appeal on its merits. After considering the evidence, the Board allowed the appeal and authorized the variance for a habitable third storey as it was satisfied that the 2013 Application met the four tests under s. 45(1) of the *Planning Act*.

JOINT BOARD DECISION RE WALKER AGGREGATES DUNTROON QUARRY EXPANSION UPHELD BY DIVISIONAL COURT

Blog posted 12 July 2013, by Mary Bull

On June 17, 2012, after a lengthy hearing, the Joint Board released its decision approving the proposal by Walker Aggregates Inc. to develop an expansion to its existing quarry in the Township of Clearview near the village of Duntroon. The Joint Board was comprised of three members (two Members of the Ontario Municipal Board and a Vice-Chair of the Environmental Review Tribunal) and its decision included a majority and a minority decision.

The Niagara Escarpment Commission brought an application for judicial review of the Joint Board Decision. The Divisional Court decision dismissing the Niagara Escarpment Commissions application for judicial review was released on July 10, 2013 (*Niagara Escarpment Commission v. The Joint Board,* 2013 ONSC 2497). In dismissing the application for judicial review, the Divisional Court held that the decision of the majority reveals no legal error and is reasonable, given the governing legislation and policies and the evidence before it.

The Divisional Court made a number of findings regarding application of the policies of the Provincial Policy Statement ("PPS") and the Niagara Escarpment Plan to aggregate extraction and the protection of natural heritage features.

In particular, the Divisional Court held that the majority did not err in finding that: (i) the PPS test of "no negative impact" provides a more definitive and rigorous test for the protection of the natural environment than the Niagara Escarpment Plan policy requirements of "protection" and (ii) in meeting the PPS tests, that the provisions in the NEP regarding natural heritage will also generally be met.

The wooded area on the property was considered a significant woodland and part of a much larger significant woodland which extended well beyond the property boundaries. The proposal was to remove the significant woodland within the extraction area and to extensively reforest lands within the extraction area and adjacent to the larger significant woodland. The Divisional Court found that in assessing the impact on natural heritage features, the majority was correct in considering the impact on the natural heritage features as defined by their ecological characteristics and functions, and not by property ownership. The Divisional Court agreed that in assessing the impact of the proposal, the majority correctly considered the impact on the larger significant woodland, in conjunction with the extensive reforestation proposed.

The Divisional Court also found that the Niagara Escarpment Commission's approach to carve out passages from the majority reasons and to view them in isolation is not a proper approach to review of a tribunal's decision. Rather, the Divisional Court found that the reasons must be read as a whole and in the context of the record, citing the decision of the Supreme Court of Canada in Newfoundland and *Labrador Nurses' Association v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paras. 14-15. The Divisional Court went on to find that when the majority reasons are read as a whole, and the isolated passages are seen in context, it is evident that the majority gave effect to each of the relevant planning documents and the governing legislation.

Mary Bull was co-counsel for Walker Aggregates Inc. A full-version of the Divisional Court decision is available at www.woodbull.ca

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PROVINCIAL POLICY STATEMENT, 2014 NOW IN EFFECT

Blog posted 30 April 2014, by Yvonne Choi

The Provincial Policy Statement, 2014 (the "PPS, 2014") is now in effect, as of April 30, 2014. It replaces the Provincial Policy Statement that was issued in March 2005 (the "PPS, 2005").

For planning matters commenced on or after January 1, 2007, land use decisions made on or after April 30, 2014 must be consistent with the PPS, 2014. This includes decisions of municipal councils, local boards, planning boards, ministers of the Crown and ministries, boards, commissions and agencies of the government, including the Ontario Municipal Board.

For convenience purposes, Wood Bull LLP has prepared tables comparing the PPS, 2005 with the new PPS, 2014 , available on our website: http://tinyurl.com/PPS2014Tables

UPDATE - OPEN HOUSE 9 JUNE 2014 - CITY OF TORONTO DRAFT DEVELOPMENT PERMIT SYSTEM OFFICIAL PLAN POLICIES

Blog posted 14 May 2014, by Valeria Maurizio

On April 10, 2014 the Planning and Growth Management Committee decided to hold an open house on June 9, 2014 to hear comments from the public on the draft Development Permit System official plan policies, and to host a statutory public meeting on a proposed official plan amendment for a development permit system on June 19, 2014.

The Committee also directed that staff report back on how Community Planning Boards may be included in the implementation of Development Permit System and that staff report back with a list of the areas of the City suitable for initial implementation of the Development Permit System based on the criteria outlined in staff's report of March 26, 2014.

For a copy of the decision and further information please visit:
http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.PG32.10

WHAT IS THE DEVELOPMENT PERMIT SYSTEM?

It is an optional land use planning tool available to municipalities, introduced by the Province of Ontario (*Planning Act* s.70.2, *City of Toronto Act* s.114.1, O.Reg 608/06). Key features:

- Streamlining: Combines zoning, minor variance and site plan into one approval process
- Flexibility: allows for discretionary uses, subject to identified criteria; allows for variations from development standards, within specified limits
- Conditions of Approval: Municipalities have the ability to impose a range of conditions on the issuance of a development permit

To date, only the Township of Lake of Bays, the Town of Carleton Place, and the Town of Gananoque have implemented the development permit system, through adopting an official plan amendment and passing a development permit system by-law. The City of Brampton has approved an official plan amendment and by-law for implementing a development permit system for a pilot district in the downtown area, which has been appealed to the Ontario Municipal Board by local landowners.