What's Reasonable? Grounds for Adding Parties

By Michael Polowin and Elad Gafni

Introduction

On January 1, 2007, the *Planning and Conservation Land Statute Law Amendment Act, 2006*, S.O. 2006, c. 23 (better known as "Bill 51") came into force. Bill 51 introduced many significant changes to Ontario's *Planning Act*, R.S.O. 1990, c. P.13, including several reforms regarding hearings at the Ontario Municipal Board ("OMB" or "Board").

Among the many changes, Bill 51 established a requirement for participation in the municipal approvals process – either through oral submissions at a public meeting or written submissions to council – prior to the approval of an official plan, a zoning by-law or a plan of subdivision as a prerequisite to the right to appeal (see ss. 17(24) and (36) regarding official plans; s. 34(19) regarding zoning by-laws; and, ss. 51(39), (43) and (48) regarding plans of subdivision). Bill 51, however, also introduced provisions to permit persons who did not participate in the approval process to be added as parties to a hearing if the OMB determines there are "reasonable grounds" to do so (see s. 17(44.2) regarding official plans; s. 34(24.2) regarding zoning by-laws; and, s. 51(52.2) regarding plans of subdivision).

Since Bill 51 came into force, there have only been a handful of cases dealing with the new party status provisions in the *Planning Act*. In several of these cases, however, the applicants did not satisfy essential preconditions to obtaining party status and therefore the OMB was precluded from fully considering the meaning of "reasonable grounds". In other cases, the OMB did not meaningfully depart from pre-Bill 51 case law. However, in three recent OMB decisions, culminating in *Oakville (Town), Re*, 2010 CarswellOnt 7078 (O.M.B.), the Board turned its mind to the significant changes introduced through Bill 51 and charted a new course forward by setting out a broad list of factors as a test for determining whether "reasonable grounds" exist in any given case. This new test signifies a clear break with pre-Bill 51 jurisprudence and marks the beginning of a true post-Bill 51 environment with respect to the addition of parties.

Background

Oakville (Town), Re concerned a motion for party status by McDonald's Restaurants of Canada Limited, TDL Group Corp., Wendy's Restaurants of Canada, A&W Food Services of Canada Inc. and the Ontario Restaurant Hotel & Motel Association ("Quick Service Restaurants" or "QSR"). The QSR sought to be added as parties to existing appeals of the Town of Oakville's Official Plan ("Town OP") in order to challenge sections that purport to prohibit the development of drive through facilities ("DTF") in association with otherwise permitted uses. Most of the QSR own and/or operate restaurants in Oakville that contain DTF, which are important components of their business models.

On November 10, 2008, the Town adopted By-law 2008-177, an interim control by-law prohibiting DTF on designated properties pending completion of a town-wide drive through facility study ("DTS"), which had previously been directed by Town Council as required by subsection 38(1) of the *Planning Act*. The final DTS report was not produced until April 2010, some eleven months after passage of the Town OP.

Until May 2009, it was the announced intention of the Town that any prohibition of DTF would be dependent on the results of the DTS. Approximately ten months prior to the final DTS report, however,

Town Council adopted the OP in June 2009 via By-law 2009-112. The Town OP contains sections 12.1.7, 13.2.2, 20.5.1, and 25.5.1 that prohibit DTF.

Following receipt of the DTS, Town Council passed Zoning By-law 2010-047 ("DTF By-law") in May 2010. The DTF By-law restricts DTF in the Town in essentially the same areas as set out in the Town OP. The QSR made submissions regarding the DTF By-law before it was passed, and, in June 2010, they filed appeals of the DTF By-law.

A total of fifty-six appeals were originally filed with respect to the Town OP, at least eleven of which appealed the OP in its entirety. In addition, 1137528 Ontario Ltd. ("Swiss Chalet") specifically appealed section 20.5.1 of the Town OP, which concerned DTF. The QSR, however, could not appeal the Town OP because, through inadvertence, they failed to make oral or written submissions prior to Town Council adopting the OP – a prerequisite to an appeal under the *Planning Act*. Nevertheless, since the entire Town OP was subject to appeal, including the sections that concerned the QSR regarding DTF, the QSR brought a motion to be added as parties to the existing appeals of the Town OP. The Town opposed the motion, while Swiss Chalet filed submissions in support of the QSR.

Legislation

Subsections 17(44) to (44.2) concern adding parties to an appeal of an official plan or official plan amendment. They provide as follows:

> 17. (44) On an appeal to the Municipal Board, the Board shall hold a hearing of which notice shall be given to such persons or such public bodies and in such manner as the Board may determine.
>
> (44.1) Despite subsection (44), in the case of an appeal under subsection (24) or (36), only the following may be added as parties:
>
> 1. A person or public body who satisfies one of the conditions set out in subsection (44.2).
>
> 2. The Minister.
>
> 3. The appropriate approval authority.
>
> (44.2) The conditions mentioned in paragraph 1 of subsection (44.1) are:
>
> 1. Before the plan was adopted, the person or public body made oral submissions at a public meeting or written submissions to the council.
>
> 2. The Municipal Board is of the opinion that there are *reasonable grounds* to add the person or public body as a party. (emphasis added)

Position of the Parties

The QSR submitted there were "reasonable grounds" for them to be added as parties to the appeals of the Town OP. Given their ownership or tenancy of lands subject to the Town OP, and the importance of DTF to their business models, they argued that not only their interests but more importantly their rights were directly affected by the DTF prohibitions and that no other party could fully protect their rights before the Board. Citing the recent OMB decision in *Baguley, Re*, 2010 CarswellOnt 5075, one of the few post-Bill 51 cases, the QSR further argued that the failure to make submissions is not germane to determining whether reasonable grounds exist.

Given that no other party indicated a strong interest in DTF, the QSR also claimed that granting their motion would further the public interest since they would bring a unique perspective to the appeals. The QSR's absence as parties would preclude the Board from hearing submissions regarding whether Official Plans should contain prohibitions on specific uses, whether the Town OP prejudged the results of the DTS, and whether sufficient land use study had been conducted to justify the DTF prohibitions. The QSR also submitted that if they were granted party status, their portion of the appeal of the Town OP could be consolidated with their existing appeal of the DTF By-law, thereby avoiding a multiplicity of proceedings. In addition, QSR argued that if they were not admitted as parties, they would challenge the Town OP before the Courts, resulting in the same matters being dealt with in two forums, thereby again raising the issue of multiplicity of hearings. Finally, the QSR argued that no existing party would be prejudiced by their party status since given the number of appellants, it was clear that the appeals would be heard in multiple hearings, meaning that no party not interested in the DTF prohibitions would be affected by the existence of hearings on that issue.

In response, the Town submitted that the QSR failed to demonstrate there were "reasonable grounds" to add them as parties to the appeals of the OP. It was particularly critical of the QSR's failure to provide an explanation, other than inadvertence, as to why they did not make any representations regarding the OP prior to its adoption. The Town warned that granting party status to the QSR would set a dangerous precedent since any person seeking party status could simply "sit in the weeds" and not worry about having to explain why it did not follow the appeals process set out in the *Planning Act*.

The Town also claimed there must be something more than simply being affected by or having an interest in an appeal to justify being added as a party, since that described every applicant seeking party status. Moreover, the QSR would be able to adequately address their planning concerns regarding DTF prohibitions through their appeal of the DTF By-law. Finally, the Town suggested that it would be severely prejudiced if the QSR's motion were granted, as the QSR were proposing to bring forward complex and unique issues which would result in hearings with increased scope, length and complexity, thereby causing added delay and expense to the Town and, possibly, other parties.

Ontario Municipal Board Decision

As a preliminary threshold matter, the OMB addressed the Town's argument that the QSR's failure to provide a satisfactory explanation for not having made submissions prior to the adoption of the OP was fatal to their motion. At paragraph 12, the OMB rejected this position on the basis that subsection 17(44.2)2 did not require any such explanation:

> This argument is untenable for one fundamental reason: such a test or precondition is nowhere to be found in the *Act*. If I were to accept the Town's position I would be adding to the statutory requirements of s. 17 without the authority to do so. In my estimation, if such a test were to exist, the legislators would have clearly enunciated it when Bill 51 was finalized.

The OMB then turned to consider what constitutes "reasonable grounds" for adding a person as a party to an appeal. The Board acknowledged that an exhaustive list of factors was impossible to formulate, but held that it was "equally clear … that there are a number of obvious factors when considering the application of subsection 17(44.2)2" given that the subsection is "clearly remedial in nature and precise in its direction." (para. 13)

The six "obvious factors" identified by the OMB are listed below, along with the application of each factor to the circumstances of the QSR motion for party status:

(1) Prior Appeal

The OMB held that a prerequisite to being added as a party to an appeal is an existing appeal in relation to the section or policy which is sought to be challenged – in other words, party status cannot be granted if doing so would create a new appeal (para. 13). In support, it cited the OMB decision of *Kanata Research Park Corp., Re*, 2008 CarswellOnt 6850, wherein the Board "denied the request [for party status] because the portions of the By-law which the persons sought to challenge had not been appealed by any other party." (para. 14)

In the case at hand, "there were 11 appeals of the Town OP in its entirety along with an appeal by Swiss Chalet of one of the specific policies which the QSR wish[ed] to [challenge]." (para. 15) As a result, "[t]he granting of party status to the QSR would not … be initiating or creating a new appeal." (para. 15)

(2) Public Interest

The OMB held that the degree to which the public interest will be advanced by granting party status is a relevant factor (para. 13). It specifically addressed the QSR's argument that, from a public policy perspective, the Town OP "is flawed in terms of DTF because numerous relevant studies have not been prepared by the Town and Official Plans should not specifically prohibit uses." (para. 16)

With respect to the lack of planning studies, the OMB found that "such flaws do indeed exist" and that "not only did Town Council not have the DTS … but other relevant studies were also conspicuous by their absence." (para. 16) In regards to an Official Plan prohibiting specific uses, the Board noted that it was "not [its] role on this motion to rule on the merits of any policy in the Town OP." (para. 16) However, it conceded that "there appears to be jurisprudence dealing with the QSR submission on this point" and cited both the Court of Appeal in *Goldlist Properties Inc. v. Toronto (City)* (2003), 44 M.P.L.R. (3d) 1,232 D.L.R. (4th) 298 at paragraph 49 (Ont. C.A.) and the OMB decision of *Ontario (Minister of Municipal Affairs & Housing) v. Ottawa (City)*, 2006 CarswellOnt 5860 at paragraph 69 (O.M.B.) as supporting the QSR's position.

(3) Prejudice

The OMB accepted the Town's argument that the degree of prejudice, if any, suffered by the municipality or another party to the proceeding is germane to granting party status (para. 13). However, it found the Town's submissions that it would be prejudiced by a longer hearing and having to commission certain studies to have "a hollow ring to them" (para. 17):

> The Town's submission that it is being prejudiced, disregards, in my view, what is more or less standard procedure and what is normally expected of a municipality in these circumstances. Any increase in the length of the hearing will be relatively modest and any additional study expense would be incurred not because the QSR were added but rather because the studies were not completed in the first instance. (para. 17)

(4) Direct Interest

A person seeking party status must have a direct interest in the policy sought to be challenged (para. 13). In support, the OMB cited the decision of *Baguley, Re*, one of the rare post-Bill 51 cases, wherein a person seeking party status to an appeal of a zoning by-law pursuant to subsection 34(24.2)2 of the *Planning Act* was successful because he owned land and operated businesses affected by the by-law

and therefore displayed "a genuine concern about the effect of [the by-law] on his two business operations." (para. 18)

In the case at hand, as noted previously, the QSR own and/or operate several restaurants in Oakville that contain DTF. The OMB held that "[t]he Town OP proposes to radically change the nature of [the QSR's] businesses," and therefore the QSR's "interest could not be more direct." (para. 19)

(5) Multiplicity of Proceedings

The OMB held that avoiding a multiplicity of proceedings is desirable and will militate in favour of granting party status (para. 13). With respect to the QSR's situation, the Board held that it would be unfair for the QSR to proceed with the appeal of the DTF By-law without also addressing the DTF prohibitions in the Town OP:

> The fact is that if I were to dismiss this motion, policies 12.1.7, 13.2.2 and 25.5.1 would, no doubt, become law. Accordingly, when the appeal of the DTF By-law is heard, the QSR would be placed in the unenviable position of having to reconcile their arguments with s. 24 of the *Act* [which states that where an OP is in effect, no by-law shall be passed that does not conform therewith]. This, in my opinion, would prove to be a difficult task and one the QSR should not be forced to face. By granting party status, I would expect that the issues raised in the DTF Appeal would be properly subsumed in this proceeding by consolidation or otherwise. In that way, the need for an additional hearing would be obviated. (para. 20)

(6) Historical Background

As a final consideration, the OMB held that the historical background of the policy sought to be challenged was a relevant factor in determining a motion for party status (para. 13). In the immediate case, the Board found that "it [was] clear that a thorough examination of drive through facilities was a work in progress which did not culminate until April, 2010, some 10 months after the adoption of the Town OP." (para. 21) Moreover, the Board rejected the Town's argument that the QSR were well aware of the Town's position with respect to DTF prior to the adoption of the Town OP containing the DTF prohibitions: "It is, in my view arguable that the specific DTF policies which Town Council adopted in June, 2009, were unanticipated and more an eleventh hour event, than not." (para. 22)

Having considered the six "obvious factors" for determining whether "reasonable grounds" exist to add the QSR as parties to the appeals of the Town OP, the OMB concluded that the circumstances warranted granting the QSR's motion (para. 23).

Discussion

As noted above, Bill 51 significantly amended Ontario's *Planning Act* with respect to, *inter alia*, appeals to the OMB. Prior to Bill 51, the *Planning Act* was silent with respect to adding parties, likely because any person could appeal an official plan, zoning by-law or plan of subdivision. It should be noted, however, that the OMB could dismiss an appeal without a hearing if it was of the opinion that the appellant did not provide a reasonable explanation for failing to participate in the municipal approvals process (see former s. 17(45)(b) regarding official plans; former s. 34(25)(a.1) regarding zoning by-laws; and, former s. 51(53)(b) regarding plans of subdivision).

Pre-Bill 51 applicants seeking party status typically sought relief pursuant to section 38 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, which remains in force today, and which grants the OMB "all such powers, rights and privileges as are vested in the Superior Court of Justice with respect to the … addition or substitution of parties." Applicants also commonly invoked Rule 4 of the OMB Rules of

Practice and Procedure, which provides that "[t]he Board may follow the *Rules of Civil Procedure*, where appropriate." Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 establishes conditions for a person to move for leave to intervene as an added party.

The pre-Bill 51 case law reflected the lack of a clear directive in the legislation with respect to adding parties to an appeal at the OMB. As a result, a consistent test was never articulated in the jurisprudence for determining motions for party status, as exemplified in the following cases concerning the OMB. In *Barrie (City) Zoning By-law 85-95, Re* (1987), 20 O.M.B.R. 95 at 96 (O.M.B.), the OMB held there must be a "logical reason to add someone as a party" and that the request "should be timely." *Hart v. 240953 Developments Ltd.* (1979), 8 M.P.L.R. 149 (Ont. Div. Ct.) held that party status should be granted where "the nature of the interest claimed and the nature of the effect the proceedings are likely to have on claimants … is direct," (para. 17) while acknowledging that "other considerations" may be relevant on a case by case basis (para. 18). In *Toronto (City) v. 1133373 Ontario Inc.* (2000), 16 M.P.L.R. (3d) 101 at paragraph 8 (Ont. Div. Ct.), the Divisional Court affirmed an OMB decision requiring an applicant to illustrate that they bring "a new perspective to the public interest factors" at play in an appeal. And finally, *Lafarge Canada Inc. v. 1341665 Ontario Ltd.*, 2004 CarswellOnt 1507 (Ont. Div. Ct.) directed that "the impact on the proceeding and the contribution of the individual or entity seeking to be added as a party" were important factors, and that "a private interest in the outcome of the proceeding … alone is not determinative." (para. 11)

Since Bill 51 came into effect, there have only been a handful of cases involving the new provisions in the *Planning Act* regarding adding parties. In some of these cases, however, the facts negated the opportunity for the OMB to expound a test for "reasonable grounds". For example, as noted above, the application for party status in *Kanata Research Park Corp., Re*, *supra*, was precluded since party status was sought with respect to sections of the by-law that were not under appeal (para. 28). In *Doug Owen Construction Ltd. v. Waterloo (City)*, 2009 CarswellOnt 4310, 62 O.M.B.R. 410, on the other hand, the application was frustrated in that the applicant asserted only "generalized concerns [which did] not rise to the requisite standard of genuine, triable issues with a clear nexus to the matters before the Board." (para. 34)

In other post-Bill 51 cases concerning party status, however, the OMB did not meaningfully depart from pre-Bill 51 case law. In *Millford Development Ltd., Re*, 2009 CarswellOnt 985 (O.M.B.), for example, the OMB simply cited *Black's Law Dictionary* for a definition of "reasonable": "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view …" (para. 19) Similarly, in *Mack v. Dysart (Municipality)*, 2009 CarswellOnt 566 (O.M.B.) the OMB denied party status on the basis that the planning evidence that the applicant sought to introduce could come through one of the existing parties and therefore the applicant did not add a unique perspective to the hearings (para. 9).

As noted above, however, three recent OMB cases, culminating in *Oakville (Town), Re*, have charted a new course in light of the Bill 51 amendments. The first of these decisions was *Baguley, Re*, *supra*, which concerned a Mr. Baguley who had participated in the planning process of the zoning by-law at issue but only through a business owners group and not in his own capacity. Mr. Baguley conceded that he could not appeal the by-law, but sought party status instead. The Town opposed the motion on the basis that his failure "to act on his concerns in accordance with Subsection 34(19)" by making submissions was "cavalier", and "chastised Mr. Baguley for not offering any satisfactory reason or explanation why he neglected to fulfill those responsibilities necessary to legitimate an appeal under Subsection 34(19)2." (para. 13) Furthermore, the Town argued that Bill 51 transformed the OMB into a true "appeal body" (para. 12), and as a result Mr. Baguley's failure to participate disentitled him from raising "any planning reason or rationale as a reasonable ground" to be added as a party (para. 13).

The OMB rejected the Town's arguments and granted Mr. Baguley party status. With respect to Mr. Baguley's failure to make submissions, the OMB held that what he should have done or neglected to do in order to become an appellant was irrelevant (para. 20) and nothing in the *Planning Act* stipulates that

"a reasonable ground under 34(24.2)2 must include a cogent explanation for why Subsection 34(19) was not made use of in the first instance" (para. 25):

> Once a legitimate appeal is established under Subsection 34(19), in turn giving rise to the conditional opportunity available under Subsection 34(24.2)2, then that is the end of relying on Subsection 34(19); it has absolutely nothing to do with the exercise of evaluating the merits of a request made under Subsection 34(24.2)2. It is difficult for this Board to find here that conduct allowed by the *Planning Act* somehow offends its intent. (para. 21)

The OMB also dismissed the submission that an applicant is barred from relying on planning reasons as grounds to be added as a party since the *Planning Act* did not expressly or impliedly require that subsection 34(19) is "the only place for raising planning grounds." (para. 25)

Similarly, in the recent OMB decision of *Kanata Research Park (KRPC), Re*, 2010 CarswellOnt 5693, the Board held that "the right to be added as a Party is not excluded by the failure to appeal." (para. 6) In this case, the applicant did make submissions in the planning process regarding urban boundary issues in an official plan amendment but chose not to appeal based on representations from the City of Ottawa that future urban boundary expansions could be considered as part of the next City 5-Year Official Plan review (para. 5). The applicant changed its mind, however, after seeing the urban boundary issue was in play as a result of twenty appeals on that issue. Since the timeframe for appealing the official plan amendment had expired, the applicant sought to be added as a party to the existing appeals. One of the twenty appellants challenged the motion for party status based on the applicant's failure to appeal within *Planning Act* timelines.

As noted above, the OMB rejected the view that the applicant's failure to appeal was fatal to its request for party status:

> The Appeal section and the section permitting the addition of Parties are not linked directly in a manner that one would see that the failure to Appeal is fatal to the later request for Party status. Rather the Legislature has chosen to add the Party section when the Appeal section was strengthened through the need to make representation prior to appealing. (para. 6)

The OMB decisions in *Baguley, Re*, *Kanata Research Park (KRPC), Re* and *Oakville (Town), Re* represent a clear break with pre-Bill 51 jurisprudence and the beginning of a true post-Bill 51 environment for the addition of parties. Culminating with the decision in *Oakville (Town), Re*, a clear and cogent test has now been articulated for determining whether there are "reasonable grounds" for adding a party to an appeal in any given case. Approximately three and a half years after the Bill 51 amendments regarding party status came into force, it can now truly be said that the legislative changes have manifested in the case law.

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