CITATION: Thomas Cavanaugh Construction Ltd. v. City of Ottawa, 2012 ONSC 3851
DIVISIONAL COURT FILE NO.: 11-1789
DATE: 20120628

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
THOMAS CAVANAUGH CONSTRUCTION LIMITED Moving Party	Marc Labrosse, for the Moving Party
– and –	
CITY OF OTTAWA and FRIENDS OF THE GREENSPACE ALLIANCE Responding Party	Matthieu Charron, for the Responding Party, City of Ottawa Erwin Dreessen, for the Responding Party, Friends of the Greenspace Alliance
	HEARD: May 22, 2012

MOTION FOR LEAVE TO APPEAL
REASONS FOR DECISION

ANNIS J.

Introduction

[1] Thomas Cavanagh Construction Limited ("Cavanagh") seeks leave to appeal to the Divisional Court from an order dated November 25, 2011, of the Ontario Municipal Board ("the Board" or "the OMB ").

[2] The Board dismissed Cavanagh's appeal against Policies 10 and 11 of the City of Ottawa's Official Plan Amendment 76 ("OPA 76") as well as Section 3.7.2 General Rural Area. Only Policy 10, which imposed a moratorium on the creation of any new "country lot subdivisions" pending a "critical review of country lot subdivision policies..." for a five (5) year period, is under consideration in this leave application.

History of the Proceedings

[3] Within the City of Ottawa, a country lot subdivision is a plan of subdivision within the rural area comprised of lots which are 0.8 ha (2 acres) or larger in size. There are extensive rural areas within the City of Ottawa.

[4] The 2003 comprehensive Official Plan of the City of Ottawa, as recommended to the City Council ("Council"), did not permit country lot subdivisions. The policy to permit such subdivisions was inserted by Council on the last day of the debate (April 23, 2003) on the proposed Official Plan.

[5] Greenspace and The Federation of Citizens Associations Inc. ("FCAI") appealed the policy in the 2003 Official Plan which permitted country lot subdivisions to the OMB. A settlement was reached in this appeal in 2006, which resulted in the withdrawal of the appeal. Pursuant to the terms of the settlement, which were publicized, city staff agreed to put an amendment that would prohibit country lot subdivision before Council for its consideration at the next review of the Official Plan. It was left open to staff whether or not its recommendation would be in favour of or in opposition to such an amendment.

[6] In accordance with the terms of the settlement, a policy prohibiting country lot subdivisions was placed in the May 4, 2009 report concerning the proposed OPA 76 which was submitted to both the Committee and the Council. Staff took the position that they would support the community, provided the community's position was consistent with the Provincial Policy Statement. The draft OPA included provisions permitting country lot subdivisions.

[7] The motion providing for country lot subdivisions was adopted at Committee prior to consideration of OPA 76 by Council.

[8] At the Council meeting of May 25, 2009, Policy 10 (and Policy 11) was added to OPA 76. There is no staff recommendation or report related to the moratorium. The amendment was made without any public notice or discussion.

[9] Cavanagh appealed the decision to the OMB. It argued that the City of Ottawa did not have authority pursuant to s. 16 of the *Planning Act*, R.S.O. 1990, c. P.13 (the "Act"), concerning official plans to impose a moratorium on rural subdivision development. The OMB dismissed the appeal.

The Board's Decision

[10] The Board concluded that a moratorium on country lot subdivisions was necessary because more time was required in order to achieve "a balanced approach to complex interrelated planning issues that should be permitted to play out". The Board described this as "a reasonable position amounting to good planning".

[11] The Board concluded that the language in s. 16 of the Act authorized Policy 10. It also rejected the appellant's argument that s. 38 of the Act constrained the ambit of s. 16 to prevent the City from adopting Policy 10. Section 38 could authorize an interim control by-law to prohibit new country lots for a period not to exceed two years.

[12] The essence of the Board's decision characterizing Policy 10 and its interpretation of s. 16 is found in the following passage:

> What there is in the impugned Policy 10 of the Official Plan is a Policy of Pause, in the words of Planner Stegl. That Pause, the Board finds is contemplated in the language of section 16 of the *Planning Act*, where the Act directly references "policies primarily to manage and direct physical change" that the Official Plan shall contain and a description of the "measures and procedures" proposed to attain objectives that the plan may contain. While broad in language, the Board finds a Pause in Official Plan language to be authorized under section 16 of the *Planning Act*.

[13] The Board's rejection of Cavanagh's argument that the ambit of s. 16 must be constrained in light of s. 38 of the Act is primarily contained in the following paragraph:

> The Board agrees there are similarities in the language of section 38 of the *Planning Act* that could have been the basis for some consideration of its use in

> this case. The language "review or study of land use planning policies being authorized by by-law or resolution" and the need to stand back for a second thought are common to the Moratorium and section 38. However, there are significant differences. OPA 76 does not, in the moratorium, prohibit all new country lots. While the subdivision process for new country lots is prohibited in the study period, the consent process is not restricted and new lots continue to be created. Further, lots existing may be developed. There is not, therefore, the type of land-use prohibition during the study as contemplated in section 38 of the *Planning Act*.

Test for Leave to Appeal

[14] This motion for leave to appeal is brought pursuant to rule 62.02(4)(b) of the *Rules of Civil Procedure* which describes the following ground on which relief may be granted.

> [T]here appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[15] With respect to correctness, the leave court does not have to conclude that the decision is wrong or probably wrong; it is enough to find that the correctness of the decision is open to serious debate: See *Holt v. Anderson* (2005), 205 O.A.C. 91 (Div. Ct.); *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen. Div.), at p. 284.

[16] The proposed appeal clearly involves matters of importance. The Board's decision potentially affects rural lands across the Province and provides municipalities with enlarged powers to prohibit rural land development via Official Plans. Accordingly, only the issue of the correctness of the Board's interpretation of s. 16 of the Act will be considered below.

Policy 10 of OPA 76 and Statutory Provisions

[17] The relevant portion of Policy 10 of OPA 76 reads as follows:

> Moratorium on Country Lot Subdivisions
>
> 10. Notwithstanding policies 6, 7, 8 and 9 permitting the creation of country lot subdivisions and conservation subdivisions, a moratorium is placed on the creation of any new ones, which moratorium shall end at the earlier of five years from the date of adoption of this Plan or the coming into force of an official plan amendment that removes this moratorium and reinstates the existing policies or replaces them with new policies. Any changes will be based upon a critical review of country lot subdivision policies and in particular, the proposal to cluster

country lot subdivisions and will examine, but not be limited to....

Section 16 of the *Planning Act* reads as follows:

> 16. (1) An official plan shall contain,
>
> (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.
>
> (2) An official plan may contain,
>
> (a) a description of the measures and procedures proposed to attain the objectives of the plan;...
>
> (c) such other matters as may be prescribed.

Section 38 of the *Planning Act* reads as follows:

> (1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.
>
> (2) The council of the municipality may amend an interim control by-law to extend the period of time during which it will be in effect, provided the total period of time does not exceed two years from the date of the passing of the interim control by-law. R.S.O. 1990, c. P.13, s. 38 (1, 2).

Analysis

[18] The over-arching issue in this matter is whether what is clearly a collateral measure--imposing a moratorium on land development to provide "breathing room" to develop policies--is properly within the power of a municipality to make in an official plan pursuant to s.16 of the *Planning Act*.

[19] I conclude that there are at least three areas of concern regarding the correctness of the Board's interpretation of s. 16 of the Act resulting in the dismissal of Cavanagh's appeal:

1. The language of s. 16 of the Act.
2. Similar powers to impose moratoriums on land development found in s. 38 of the Act.
3. Characterizing a moratorium of five years duration as the "pause".

The Language of Section 16 of the *Planning Act*

[20] As is pointed out by the moving party, s. 16 provides no explicit authority permitting municipalities to enact moratoriums on land-use development. Instead, the OMB implied such authority from the broad general wording in s. 16(2)(a) that authorizes "measures... to attain the objectives" of an official plan.

[21] I am mindful that the Court of Appeal has given a wide berth to municipalities to include matters in an official plan and that the interpretation of s. 16 cannot be determined solely by a literal application of its terms: see *Toronto (City) v. Goldlist Properties Inc.* (2003), 67 O.R. (3d) 441 (C.A.), at para. 49, "The permissible scope for an official plan must be sufficient to embrace all matters that the legislature deems relevant for planning purposes."

[22] Nevertheless, one cannot ignore the language or the structure of a provision in determining its interpretation. The structure of s. 16 suggests a two step scheme with respect to the contents of an official plan and measures to attain its objectives. Section 16(1)(a) provides for the adoption of the goals, objectives and policies that are required to be contained in an official plan. Section 16(2)(a) provides that an official plan may include measures to attain the plan's objectives.

[23] The Board's construction of s. 16 does not appear to recognize the distinction between a policy and a measure to attain an objective. By its decision, the moratorium on rural land development is characterized as a "policy" (of pause), apparently making up part of the Official Plan under s. 16(1)(a), while also describing it as a "measure" under s. 16(2)(a).

[24] There appear to be further difficulties with respect to the language used by the Board in implicitly describing OPA 76 as a "measure", presumably to attain the "Policy of Pause".

Measures under s. 16(2)(a) are limited to the attainment of the "objectives" in the plan. This suggests that measures would not be available to attain "policies" and "goals" contained in official plans.

[25] This seems to be the case because s. 16(1)(a) broadly encompasses "goals, objectives and policies" that "shall" be contained in an official plan. In contradistinction, the term "objectives" is employed alone in s. 16(2)(a). Standard rules of statutory construction would normally suggest that the Legislature intended "objectives" to have a differentiated meaning from that of "policies" and "goals".

[26] The Supreme Court of Canada has stated "that when interpreting a statute, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute and the intention of Parliament: see *Lexington on the Green Inc. v Toronto Standard Condominium Corp.* No. 1930, 2010 ONCA 751, 102 O.R. (3d) 737 citing *Chieu v. Canada*, [2002] 1 S.C.R. 84. Further, as stated by Ruth Sullivan in *Sullivan* on the Construction of Statutes, 5th ed. (LexisNexis: Markham, Ont., 2008), at p. 209:

> It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan.

[27] Finally, it is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage: *R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 28.

[28] A viable interpretation of s. 16, based on its language and structure suggests that "measures" may only be used to implement objectives after they have been determined. In other words, s. 16 does not appear to authorize measures to maintain or change the status quo in order to develop future policies and objectives for later implementation.

[29] Incidentally, in *Goldlist Properties Inc, supra* at paragraph 49, the Court of Appeal adopted the conclusions of Saunders J. in *Bele Himmel Investments Ltd. v. City of Mississauga et*

al (1982), 13 O.M.B.R. 17, at p. 27 that official plans are intended to "set out the present policy of the community concerning its future physical, social and economic development" (my emphasis).

Section 38 and section 16 of the *Planning Act*

[30] I am further of the opinion that there is reason to doubt the correctness of the Board's decision in rejecting an interpretation of s. 16 that reflects the Legislature's intention in enacting a specific provision that provides for moratoriums on development and constrains their effect to two years.

[31] Section 38 allows a municipality to prohibit land-use development by an interim control by-law in circumstances similar to those contemplated by OPA 76 when it decides "that a review or study [should] be undertaken in respect of land-use planning policies".

[32] A prohibition on development, however, may not exceed two years by the terms of s. 38. Moreover, no further interim by-law can be passed for a period of three years.

[33] The primary and most practical difference in the effect of s. 38 and the plan amendment is that the latter provision would permit a five-year moratorium on development, as opposed to a two-year limit on development by an interim control by-law under s. 38.

[34] The Board rejected Cavanagh's submission that the Official Plan amendment was adopted by the municipality as a mechanism to indirectly achieve a moratorium for five years, which it could not achieve directly under s. 38.

[35] The Board also rejected the submission that the authority to impose a moratorium for five years by implication from the broad wording of s. 16 was ousted by s. 38, which explicitly and specifically provided the same authority to freeze land development.

[36] In addition, Cavanagh argued that s. 38 should be seen as a complete code to deal with temporary prohibitions of development rights, particularly since measures to restrict property rights by interim control by-laws should only be used in very prescribed and limited circumstances. Also, s. 38 includes appeal provisions and very strict timelines during which the freeze may continue.

[37] There are also issues concerning the different roles of official plans and by-laws. Official plans are not statutes. They set out policies and would not normally be intended to have similar regulatory effect as by-laws specifically enacted to deal with land-use issues. See *Goldlist Properties Inc*, *supra*, at para. 49: "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." A specific five-year moratorium on land development seems out of character and out of place in the context of an official plan.

[38] I conclude that serious doubt arises concerning the correctness of the Board's decision which rejects these arguments. The arguments contain much persuasive merit arising not only from concerns about imposing a longer freeze period by an amendment to the official plan, a power that seems quite collateral to the core purpose of s. 16, but also by application of general principles of construction. These principles require the scheme of the entire Act to be considered, particularly when interpreting a broad, and therefore, inherently ambiguous provision such as s. 16.

[39] I also question the soundness of the Board's reasoning in concluding that the "type of land-use prohibition" is different in s. 38 than in the Official Plan because "Policy 10 had not and could not remove *Planning Act* rights regarding the filing of Applications for Subdivision nor Appeals from the failure to act".

[40] It seems illogical to suggest that meaningful rights are unaffected under a policy when practical circumstances would disincline rational individuals motivated by economic gain to exercise them. Such would be the probable outcome in reply to the suggestion that a Country Lot Subdivision application could be filed despite the significant expense this entails and the limited prospects of success in the face of a five-year moratorium in the Official Plan.

A Five Year Moratorium as a "Policy of Pause"

[41] My final comment relates to the Board's characterization of a five-year moratorium on land development as a "pause".

[42] No dictionary definitions were apparently considered on the appeal or on the leave application, but it is highly debatable that a moratorium on land development for five years,

particularly without assurances that future development will be permitted, would ordinarily be described as a "pause".

[43] I think a "pause in the action" or "a pause that refreshes" better demonstrates the ordinary meaning of the word, i.e. a temporary stopping of the activity to be resumed after the pause.

[44] The point is not insignificant because, if a court were to conclude that the Board has, by its interpretation of OPA 76, seriously mischaracterized the moratorium or diminished its consequences, the Board's interpretation of s. 16 would have to be reconsidered using a proper characterization of the amendment provision.

[45] It is not implausible to conclude that even if moratoriums could be imposed as measures to support objectives in an official plan, a term of five years would be considered excessive, bearing in mind the specific limitations on similar measures contained in s. 38.

Disposition

[46] For the reasons described above, leave to appeal this decision of the OMB is granted. Costs of this motion for leave are referred to the panel of the Divisional Court hearing this matter.

Annis J.

Released: June 28, 2012

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