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DATE: January 21, 2011

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MESSAGE: Please see attached endorsement.

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CITATION: The Friends of the Greenspace Alliance v. Ottawa (City), 2011 ONSC 477
COURT FILE NO.: 10-DV-1635
DATE: 20110121

SUPERIOR COURT OF JUSTICE – ONTARIO
(DIVISIONAL COURT)

RE: THE FRIENDS OF THE GREENSPACE ALLIANCE, Applicants

AND:

CITY OF OTTAWA et al, Respondents

BEFORE: HACKLAND R.S.J.

COUNSEL: *A. David Morrow*, for the Applicants
Beth Turner, for the Respondent City of Ottawa
Phillip Sanford and *John Dawson*, for the Respondent Kizell Management Corporation
Douglas B. Kelly, for the Respondent 2087875 Ontario Limited

HEARD: January 19, 2011

ENDORSEMENT

[1] The applicant The Friends of the Greenspace Alliance (FGA) seeks leave to appeal from the Order of the Ontario Municipal Board (OMB) dated June 17, 2010 (the decision).

[2] The matter before the OMB was FGA's appeal against the City of Ottawa's proposed Official Plan Amendment (OPA 77). OPA 77 approved for future development purposes certain previously undeveloped lands in the western area of the city. The lands in question are in a flood plain area and counsel for FGA explained to the court that his client's over-riding concern has always related to the possibility of storm water flooding and water and sewage damage risks associated with flooding in relation to potential future development in the area.

[3] Prior to any hearing on the merits, the respondent Kizell Management Corporation (Kizell) moved under s. 17 (45) (a) (i) of the *Planning Act* to dismiss FGA's appeal on the basis that the reasons set out in FGA's notice of appeal could not form the basis for refusing approval of the Official Plan Amendment. The OMB granted Kizell's motion and dismissed the appeal.

It is from that order that leave to appeal to the Divisional Court is sought. Section 17 (45) (a) (i) of the *Planning Act* provides:

> **Dismissal without hearing**
>
> (45) Despite the Statutory Powers Procedure Act and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any part if,
>
> (a) it is of the opinion that,
>
> the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is subject of the appeal could be approved or refused by the Board, ...

[4] The parties agree that the test for obtaining leave to appeal to the Divisional Court is that the applicant must show that there is a point of law decided by the OMB that is of sufficient importance to merit the attention of the Divisional Court and that there is reason to doubt the correctness of the OMB decision.

[5] FGA's first argument is that the OMB erred in law by going behind the Notice of Appeal and deciding, after reviewing evidence filed on the motion, that FGA's appeal could not succeed. The submission is that the motion was treated by the OMB in a similar fashion to a summary judgment motion under the Rules of Civil Procedure. FGA argues that on the authority of the decision of Supreme Court of Canada in *Hunt v. Carey* [1990] 2 S.C.R. 959, a case dealing with a challenge to pleadings in a civil action, the OMB should have assumed the facts in the Notice of Appeal to be true, not considered or allowed evidence on the motion and then asked the question whether or not it was "plain and obvious" that the Notice of Appeal disclosed no apparent land use planning ground on which OPA 77 could be refused.

[6] I am of the opinion that this argument is without merit. I am unaware of any decision applying *Hunt v. Carey* to an administrative tribunal. That case dealt with a pre-trial challenge to pleadings between two private parties in a civil proceeding, which is an entirely different environment to that of the OMB. In reference to s.17 (45) (a) (i) of the *Planning Act*, there is a consistent line of OMB decisions over a period of 17 years, which have interpreted this section as creating a screening process to prevent appeals proceeding to potentially lengthy and complex

hearings where there is no chance of success. The civil procedure analogy is with the summary judgment rules which serve the same purpose and which mandate an evidentiary review to assess whether a trial is warranted. The OMB was entitled to review evidence on the motion. The OMB's internal procedures in this complex and specialized area of the law must be accorded maximum deference. I view the procedural treatment accorded FGA on this motion as reasonable and necessary to accomplish the objective of the section i.e. avoidance of hearings on appeals that cannot succeed.

[7] FGA's second ground for seeking leave to appeal was that the OMB erred in law in its conclusion that the environmental concerns forming the basis for the FGA's appeal could not, from a land use planning perspective, form the basis for the OMB refusing to approve OPA 77. This conclusion is the product of an analysis by the OMB of the entire statutory scheme involving the environmental aspects of Official Plan Amendments in the context of the *Planning Act* and the *Environmental Protection Act*. Significantly, in argument before this court, counsel for FGA conceded that the OMB decision was likely correct but that because the City of Ottawa had misled FGA about its appeal route for the environmental issues of concern to them, the OMB should have been prepared to entertain the appeal in any event. I would not give effect to this argument. It was not established before this court nor argued before the OMB that FGA had been somehow misled by the City and even if it were so I would not see that as a basis for expanding the OMB's jurisdiction to reject an Official Plan Amendment. I see no error of law on the OMB's ruling that FGA's appeal grounds could not form a basis for rejecting OPA 77 in light of an analysis of the applicable legislation and the procedures followed by the City.

[8] Lastly, FGA argues that its concerns about the adequacy of the guidelines in OPA 77 for storm water management ponds should have been seen by the OMB as grounds on which they might disapprove OPA 77. I am of the opinion that the OMB was correct in its observation that on a proper understanding of the 'integrated process' followed in this matter, there would be ample opportunity in the future to deal with the engineering details of matters like the size of the holding ponds and related engineering issues. An example offered in argument by counsel for Kizell was that if and when a developer in the future put forward a subdivision agreement, the design for the holding ponds involved would need to be compliant with OPA 77 guidelines, which require that any development must not increase the risk of flooding. If City approvals did

not respect this guideline in OPA 77, then redress should be available in the context of the approval of the subdivision agreement. In any event, I think the OMB was correct in ruling that concerns about the adequacy of holding ponds was not a basis on which they could reasonably consider allowing FGA's appeal against OPA 77.

[9] In summary, the court is of the opinion that the OMB made no error of law in dismissing FGA's appeal under s. 17 (45) (a) (i) of the *Planning Act* and accordingly the motion for leave to appeal to the Divisional Court is dismissed.

[10] The respondent Kizell is awarded its costs of this motion for leave to appeal which I fix in the sum of $5,000 payable forthwith by FGA. It follows that I do not accept FGA's position that no costs should be ordered because there is arguably a public interest aspect to this motion for leave to appeal.

Hackland R.S.J.

Mr. Justice C.T. Hackland

Date: January 21, 2011