COURT FILE NO: 10-DV-1612

COURTS OF JUSTICE ACT

DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE FRIENDS OF THE GREENSPACE ALLIANCE

Moving Party

- and -

CITY OF OTTAWA, ABBOTT-FERNBANK HOLDINGS INC.,CRT DEVELOPMENT INC., KIZELL MANAGEMENT CORPORATION, 2129786 ONTARIO LIMITED, 2087875 ONTARIO LIMITED, 1383341 ONTARIO INC., and 2128447 ONTARIO LIMITED

Respondents

MOTION RECORD OF THE FRIENDS OF THE GREENSPACE ALLIANCE

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Abandoned

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MOTION RECORD OF THE FRIENDS OF THE GREENSPACE ALLIANCE

Statement of Facts

1. On July 22, 2009, the Friends of the Greenspace Alliance ("FGA") filed a Notice of Appeal to the Ontario Municipal Board from Amendment No. 77 to the Official Plan for the City of Ottawa ("OPA 77") and its supporting documents, the Master Servicing Study ("MSS") and Environmental Management Plan ("EMP"). FGA is the Moving Party to this application for leave to appeal. The FGA appeal was designated as OMB Case No. PL090678 .

2. The subject matter of OMB Case No. PL090678 is an appeal by the Moving Party from an amendment to the Official Plan of the City of Ottawa (OPA77) permitting the development of certain lands known generally as "Fernbank". OPA77 included an environmental assessment of the

proposed development pursuant to Part II.1 of the Environmental Assessment Act and the integration provisions of Part A.2.9 of the Municipal Engineers Association Class Environmental Assessment document (the "MEA Class EA").

3. Two of the Respondents in the said appeal, Abbott-Fernbank Holdings Inc. and CRT Development Inc. ("the Respondents") filed an application pursuant to sub-paragraph 17 (45) (a) (i) of the Planning Act to dismiss FGA's appeal so far as it relates to a portion of the lands affected by OPA 77, namely lands in the watershed of the Jock River. Sub-paragraph 17(45) (a) (i) of the Planning Act, reads as follows:

> **"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 party if,
>
> (a) It is of the opinion that,
>
> (i) 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 the subject of the appeal could be approved or refused by the Board, "

4. In an order dated March 12, 2010, the OMB granted the said Motion and dismissed the appeal of FGA "specifically as it relates to the land subject to the City of Ottawa's Official Plan Amendment No. 77 south of and including the Abbott Street road allowance".

5. Pursuant to section 43 of the Ontario Municipal Board Act, FGA asked the OMB to review the said decision of March 12, 2010. In an order dated April 21, 2010, the OMB refused FGA's request for review. This application for leave to appeal relates to the decision of April 21, 2010.

6. In dismissing FGA's review request, the OMB made two errors of law as set out in the Notice of Motion for Leave to Appeal:

> (1) The Board refused to apply the said provision in accordance with the principles that govern such provisions in Canada as set forth in the seminal decision of the Supreme

Court of Canada in Hunt v. Carey [1990] 2 S.C.R. 959, especially at paragraph 33 of the Court's reasons in that case.

(2) The Board failed to take into account that the appeal in OMB Case No. PL090678 is also an appeal of the environmental assessment that is part of OPA 77, as noted above. Sub-paragraph 17(45) (a) (i) relates to "land use planning ground(s)" and cannot be applied to dismiss all or any part of the environmental assessment aspects of an integrated process such as the subject matter of the present appeal.

Law and Argument

The first ground of application: Hunt v. Carey

7. As is clearly shown in schedule A to this factum, sub-paragraph 17(45) (a) (i) of the Planning Act is based on, and derives its essential wording from, a rule first promolgated in England in the 19th century, and which has been used as the basis for similar striking out provisions under the rules of court of the provinces of Canada, and the Federal Court of Canada.

8. Rules like sub-paragraph 17 (45) (a) (i) are essentially procedural rules permitting a tribunal to strike out, in whole or in part, proceedings that have no intrinsic merit, i.e. that clearly cannot succeed on their merits.

9. In Hunt v. Carey, the Supreme Court reviews the legislative and jurisprudential history of Rules like section 17(45) (a) (i), both in England and in Canada, and concludes as follows, at page 21 of its reasons:

> "Thus, the test in Canada governing the application of provisions like Rule 19(24) (a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C.O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19 (24) (a)."

10. Pursuant to the Rule in Hunt v. Carey, the OMB, in the present case, should have assumed that the facts stated in the Notice of Appeal could be proved, should not have considered any extraneous documents or matters such as other pending environmental reviews, and should have asked itself whether or not it was "plain and obvious" that the FGA's Notice of Appeal disclosed no apparent

land use planning ground upon which the plan or any part of the plan is the subject of the appeal that could be approved or refused by the board. If it had done so, it would not have dismissed this appeal, insofar as it relates to the Jock River lands.

The second ground: the environmental assessment aspect of this appeal

11. As noted above, OPA 77 and its underlying documents, the MSS and the EMP, resulted from an integrated process pursuant to Section A.2.9 of the MEA Class EA.

12. The Terms of Reference for the Fernbank Community Design Plan of June 27, 2006 gave rise to the community design plan that ultimately led to OPA 77. They specified that such an integrated process should be used and stated as follows:

> "The Environmental Assessment requirements for all projects will be completed through the Master Plan Process (Approach 4) and integrated with the Official Plan Amendment, so that appeals about any of the projects must be directed to the Ontario Municipal Board."

.....

> "Under an integrated approach the MEA Class EA process, consultation and documentation requirements are not diminished and the final review and approval authority (appeal mechanism) for both the MEA Class EA projects and the Planning Act applications is the Ontario Municipal Board, not the Ministry of the Environment." In so stating, the City of Ottawa, the author of the Terms of Reference, was clearly advising the public that the OMB had jurisdiction to review the environmental assessment aspects of OPA 77, rather than the Ministry of the Environment. This view is repeated in the MSS and EMP.

13. The same view was expressed by the City in its Notice of Adoption of OPA 77 and Approval of the EMP and MSS on July6 3, 2009, in the Following terms:

> **"Notice of Appeal**
>
> The Fernbank CDP has been prepared using an integrated planning and environmental assessment process. The Official Plan Amendment is required to implement the

Fernbank CDP. The Transportation Master Plan, Master Servicing Study, and Environmental Management Plan were prepared in accordance with the Planning Act provision of the Municipal Engineers Association Environmental Assessment Process. As such, the Official Plan amendment, Transportation Master Plan; a Master Servicing Study; and an Environmental Management Plan are subject to all normal notice requirements and rights of appeal by any person or public body to the Ontario Municipal Board under the provisions of the Planning Act. As this has been done through the integrated process, the approval under the Environmental Assessment Act is being sought and there will not be a separate process for Part 11 Order ("bump up") requests."

14. However, this view does not appear to be based on any specific provision in the Environmental Assessment Act, the Planning Act or the MEA Class EA. (The latter document has the force of law pursuant to Order in Council 1923 / 2000).

15. On the contrary, although Section A.2.9 of the MEA Class EA specifically states as follows with respect to the integrated process:

> "This Class EA recognizes the desirability of coordinating or integrating the planning processes and approvals under the EA Act and the Planning Act, as long as the intent and requirements of both Acts are met.",

when it discusses appeals, the same Section of the MEA Class EA provides only that:

> "For the final notification to the review agencies and the public, the proponent shall advise the public and review agencies of the ability to appeal **the Planning Act decision** to the Ontario Municipal Board. Once the application is approved or comes into effect under the Planning Act, and the planning for the project has met the requirements of Section A.2.9 of this Class EA, the proponent does not require any additional notice under the Class EA." (Emphasis added).

16. In the above noted passage, by referring to the "Planning Act decision" in its appeal provision, the MEA Class EA arguably excludes an appeal under the Environmental Assessment Act.

However, as noted above, the City of Ottawa has expressed the view that other appeal avenues normally open in environmental assessments, namely those under Section 16 of the Environmental Assessment Act ("Part II Orders"), are not available.

17. This apparent contradiction seems to leave the public, including groups such as the FGA, with no avenue to pursue in order to review the environmental assessment aspects of an integrated process. It is submitted that neither the legislature nor the government could have intended such a result. It is submitted further that it is important for this Court to clarify whether or not the OMB has jurisdiction to consider the environmental assessment aspects of an integrated process pursuant to the Environmental Assessment Act, i.e., whether or not the OMB has the same jurisdiction as the Minister of the Environment in such cases, and whether or not, on the contrary, the normal review provisions forming part of the Environmental Assessment Act continue to apply in the case of integrated procedures such as the present.

18. If, as FGA seeks to argue, the OMB has the necessary jurisdiction (which FGA will submit must be inherent in Section A.2.9 of the MEA Class EA), then the dismissal of all or part of the Planning Act aspect of an appeal such as the present can have no effect on the environmental assessment aspects, which must proceed. Such being the case, the OMB should not and could not have dismissed in its entirety the FGA appeal insofar as it relates to the Jock River Lands. On the contrary, it had no jurisdiction to do so, because it is obligated to consider the environmental assessments aspects of the appeal in addition to the Planning Act aspects.

19. It is submitted that both of the issues outlined above merit the consideration of this Court. They both raise questions of first impression that are fundamental to the jurisdiction of the OMB in appeals under section 17 of the Planning Act.

Respectfully Submitted,

A. David Morrow
of Counsel for FGA

Schedule A

O.25, r. 4 of the 1883 Rules of the Supreme Court

"The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Rules of Civil Procedure, R.R.O. 1990. Reg. 194

21.01 (1) A party may move before a judge,

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

And the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r.21.01 (1).

(2) No evidence is admissible on a motion,

(b) under clause (1) (b), R.R.O. 1990, Reg. 194, r. 21.01 (2).

Planning Act, R.S.O. 1990, c. P. 13

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 party if,

(a) it is of the opinion that,

(i) 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,...