



MUNICIPAL, LAND USE PLANNING, AND DEVELOPMENT LAW BULLETIN

LN Involved in Two Recent Significant Decisions

September 2016

September 20, 2016 marked the release of two significant decisions involving Loopstra Nixon LLP lawyers Daron Earthy, Steven Ferri, and Brendan Ruddick.

Brockville (City) v Municipal Property Assessment Corporation, 2016 ONSC 5752

The first decision was issued by the Ontario Divisional Court in *Brockville (City) v Municipal Property Assessment Corporation*, 2016 ONSC 5752. **Daron Earthy**, representing the City of Brockville, sought and was granted leave to appeal from the decision of the Assessment Review Board denying Brockville's motion for an order pursuant to section 40.1 of the *Assessment Act*, RSO 1990, c A 31 to extend the time for Brockville to appeal certain assessments of a wastewater treatment facility it owns in neighbouring Elizabethtown-Kitley Township ("Township").

As a public body, Brockville makes payments in lieu of taxes for non-exempt property it owns in other jurisdictions based on the value of that property as assessed by the Municipal Property Assessment Corporation ("MPAC"). The assessed value of Brockville's wastewater treatment facility in the Township jumped by 272% between 2002 and 2003, increasing from \$1,271,000 to \$4,726,000, although no physical changes were made to the property at the time. In July 2013, it came to light that MPAC had incorrectly entered the height of one of the buildings on the property as 923 feet rather than the actual 12-foot height of the building. MPAC was entirely responsible for the error, and Brockville had previously been unaware of this error. MPAC did not tell Brockville when the error had been made, but Brockville came to believe that MPAC's error had been made many years earlier, likely dating back to 2003 when the assessment value had experienced a sharp unexplained increase.

Brockville's motion for an order pursuant to s. 40.1 of the *Assessment Act* extending the time for appealing the assessments back to 2003 was denied in a decision by Board Member McAnsh, who based his decision entirely on his conclusion that there was an "absence of evidence" of a palpable error.

Dambrot J., writing for the Divisional Court, reviewed Member McAnsh's decision, found that there was some reason to doubt the legal correctness of the decision, and concluded that the test for leave to appeal had been met. "Frankly, I do not understand how it could be otherwise," wrote Dambrot J., referring to the characterization of the valuation error made by MPAC as a palpable error.

It is significant that Dambrot J. held that like any other fact, the existence of a palpable error can be proved circumstantially. Although there was no admission made by MPAC that such an error had been made for the 2003 through 2012 years, Dambrot J. found that there was "overwhelming evidence" the error dated back to the 2003 tax year.

On the issue of deference, Dambrot J. acknowledged that a discretionary decision by a member of a specialized tribunal as to whether to extend the time to appeal is subject to considerable deference and would only raise a question of law meriting the attention of the Divisional Court in the most exceptional of cases. He found that in this case, the "exceptional" threshold was met, and "...particularly in the circumstances where the existence and nature of the asserted error is within the knowledge of the respondent, which chooses to stand silent...".

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Section 43 Request for Review, OMB Case No. PL111184

In a separate matter, **Steven Ferri** and **Brendan Ruddick**, representing 2203012 Ontario Limited, Blair Building Materials Inc., and CRH Canada Group Inc (“the Appellants”) in the multi-appellant appeal of the Vaughan Official Plan, successfully argued before the Ontario Municipal Board (“OMB”) that a motion brought by Argo Lumber Inc. and Alpa Roof Trusses Inc. (“Requestors”) to review a previous OMB decision should not be granted.

On May 13, 2016, the Requestors brought a motion pursuant to section 43 of the *Ontario Municipal Board Act*, RSO 1990, c O 28 to request a review of an OMB decision issued August 8, 2013, and in particular, a provision in the decision that prohibited any parties from raising land budget arguments at the future hearing of the appeal. However, the OMB’s Rules of Practice and Procedure state that a request for review should not be brought more than 30 days after the issuance of a decision “unless the Chair determines that there is a valid and well-founded reason to extend this time”.

In his decision, S. Wilson Lee, Associate Chair of the OMB, found that there was no valid reason to extend this time, and agreed with Mr. Ferri and Mr. Ruddick’s argument that the late filing of the Requestors’ motion was “fatal” to its request for review. To rescind or review the August 8, 2013 order at this time would not be in the public interest, Associate Chair Lee continued.

Associate Chair Lee also went on to find that had he chosen to set aside the 30-day filing requirement for a request for review, he still would not have granted the Requestors’ motion because it did not meet the “convincing and compelling” threshold for being granted a request for review.

This decision is significant because of its comments with respect to the OMB’s jurisdiction and role in active case management. In their submissions, the Requestors alleged that the OMB acted outside of its jurisdiction by “fettering its discretion and decision making power, through the Provision, in a manner that prevents it from following the mandatory direction contained at section 2.1 of the *Planning Act*.”

Associate Chair Lee disagreed, and stated that the only effect of the August 8, 2013 decision was to limit the arguments that an appellant or party may raise at the hearing. “These kinds of Orders, often referred to as the scoping orders, are intended to facilitate partial approvals of an official plan while, at the same time, they address the relevant matters to be resolved at a hearing. There is a public interest in the active case management of appeals,” wrote Associate Chair Lee. It is in the public interest to ensure issues are focused, parties know the case they must meet, and as a result, the costs and time associated with the disposition of hearings is reduced, he continued.

“It falls within the jurisdiction of the Board to organize the hearing of its appeals, to set hearing procedure and to determine the scope of issues to decide at a hearing to ensure resources are used efficiently and cost effectively,” Associate Chair Lee wrote.

To view the full submissions, please visit the following links:

1. Requestors’ Submissions (pdf)
2. Responding Record from the City of Vaughan (pdf)
3. Responding Submissions from the Regional Municipality of York (pdf)
4. Responding Record from the Appellants (pdf)
5. OMB Decision, issued September 20, 2016:(pdf)