Town Of Richmond Hill Successfully Defends Parkland Decision At Divisional Court

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Municipalities across Ontario have reason to celebrate as a recent landmark decision by the Divisional Court may generate millions of dollars for parkland at the cost of the development industry.

In *Richmond Hill (Town) v. Elginbay Corporation*,[1] the Divisional Court considered whether the Ontario Municipal Board (the "OMB") has the authority to set the alternative rate for the conveyance of parkland in a municipality's official plan. The Court concluded that the OMB did not. By imposing a cap on the alternative rate in the Town of Richmond Hill's official plan, the Court held that the OMB overstepped its jurisdiction and unnecessarily fettered the discretion of the Town to make its own decisions, contrary to the intent of the Legislature.

In addition to striking a balance between the OMB's role in reviewing and approving official plans and a municipality's discretion in making its own planning decisions, the Court's decision adds to the current debate on whether official plan policies can be prescriptive.

Background to the *Richmond Hill* Decision

Under the *Planning Act* (the "Act"), municipalities are required to review their official plans at least once every five years.[2]Before a municipality can pass by-laws requiring parkland at an alternative rate as a condition of development (“parkland dedication by-law”), the Act requires an official plan to contain specific policies dealing with the provision of parkland and the use of the alternative requirement.[3]

As part of its most recent official plan review exercise, the Town adopted policies that set the alternative rate for parkland conveyance for residential development. The Town's parkland policies set the upper limit of the alternative rate, leaving the possibility of a lesser rate to be specified by the parkland dedication by-law. Of note, the alternative rate set by the Town is 1 hectare per 300 dwelling units, which is the maximum alternative rate permitted under the Act.[4] It is also important to recognize that unlike zoning by-laws, there is no right to appeal a parkland dedication by-law to the OMB.

Several developers appealed the Town's parkland policies to the OMB. The developers argued that the lack of specificity for the lesser rate will effectively discourage high-density residential development and threaten affordable housing targets, contrary to Provincial policy.[5] Instead of leaving the determination of the lesser rate to the parkland dedication by-law, the developers argued that the parkland policies should include a "sliding scale" based on density and unit type and 15% "cap" on the amount of land required to be conveyed using the alternative rate. In response to the concerns raised by the developers, the OMB imposed a 25% cap on the use of the alternative rate in Town's parkland policies.[6]

Divisional Court Appeal

The Town appealed the OMB's decision to the Divisional Court with the support of four GTA municipalities.[7] On appeal, the Court was asked to determine two questions of law:

1. whether the OMB erred in law by determining that it had the authority to modify the Town's parkland policies and impose a lower maximum alternative requirement than 1 hectare per 300 dwelling units; and
2. if the answer to question 1 is "no", whether the OMB erred in law by capping the alternative requirement based on a percentage of land to be developed, rather than the number of units.

In response to the first question, the Divisional Court held that it was clear that the Legislature had bestowed the authority to determine the alternative rate on municipalities and not on the OMB. After reviewing the legislative scheme, the Court held that the fact that a municipality may **choose** to include a specified rate in its official plan does not mean that a municipality **must** include a specified rate, failing which the OMB may impose a rate. In coming to this conclusion, the Court observed that the wording of the Act expressly left the decision as to the alternative rate to be applied in each instance to the municipality through the passing of a parkland dedication by-law. The only precondition to the municipality passing this by-law is that it must have policies in its official plan that relate to the alternative rate, which the Town has provided in this case.

The Court concludes that the OMB's decision was not only unreasonable on the face of the plain wording of the Act, but also inconsistent with the broad powers granted to municipalities in making planning decisions affecting their citizens as intended by the Legislature.[8] Having determined the first question in the affirmative, the Court did not answer the second and sent the matter back to the OMB for further determination.

Why the *Richmond Hill* Decision Is Important

In our view, aside from determining the main issue on appeal, the *Richmond Hill* decision is notable for three reasons.

First, the Court in its reasons clearly distinguishes matters that are reserved for municipalities from those matters that are reviewable by the OMB. Although the Court recognized that the Act grants the OMB the authority to approve and modify official plans, this authority does not extend to everything that may be included in or related to those policies. Specifically, the OMB has a role in ensuring that those policies are

appropriate, effective and in accordance with Provincial policies. However, the actual implementation of the policies is an action reserved for municipalities (in this case, through the passing of a parkland dedication by-law).[9]

Second, instead of simply remitting the decision back to the OMB, the Court provides some guidance as to appropriate policy modifications if the OMB had legitimate concerns regarding the impacts of the Town's parkland policies on high density development. For example, the Court noted that the OMB could direct that the Town, in implementing its policies through its by-laws, must not unduly restrict high-density development.[10] This suggests that while details regarding implementation are more appropriately reserved for municipalities, the **impacts** of such implementation may be addressed through official plan wording.

Third, critical to the Court's decision is its interpretation of the word "policy" in an official plan. In holding that the imposition of a 25% cap (or any cap for that matter) is not a "policy direction", the Court made the following findings:

- Policies are not specific action items. They are general guidelines providing a broad overview of how the municipality will approach its task.
- Policies are not rigid rules that command a certain result. They are not formulas or equations into which data can be entered and a result certain obtained.
- There is a difference between policy and decision-making.[11]

The Court's interpretation of the word “policy” in *Richmond Hill* is at odds with the recent practice of municipalities of adopting more prescriptive policies in their official plans. The Court's decision also appears to deviate from recent Divisional Court and OMB decisions that have held that policies in an official plan can be prescriptive in appropriate circumstances to support good planning decisions: see *Ottawa (City) v 267 O'Connor Ltd.* and *Shoreline Towers Inc. v Toronto (City)*.[12] Instead, the Court's approach is more consistent with the oft-cited passage in *Goldlist Properties Inc. v Toronto (City)*, where the Court of Appeal held that 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."[13]

The developers are seeking leave to appeal from the Divisional Court's decision. If leave is granted, both municipalities and developers alike would benefit from the Court of Appeal's clarification on the interpretation of the word "policies" in this context.

[1] 2016 ONSC 5560 ("*Richmond Hill*").

[2] See subsection 26(1). Note that effective as of July 1, 2016, the review period is 10 years for a “new” official plan.

[3] See subsection 42(4).

[4] At the time of the OMB's decision the maximum alternative rate was 1 hectare per 300 dwelling units. Effective as of July 1, 2016, the maximum alternative rate is now 1 hectare per 500 dwelling units if the municipality is seeking cash-in-lieu of parkland.

[5] Decision issued January 15, 2015 for OMB Case No. PL110189 at para 33.

[6] *Ibid*. at para 45. Note that the OMB refused to impose a sliding scale but directed that additional criteria be added to the parkland policies indicating that the Town may, at its discretion, specify by by-law a sliding scale.

[7] Also see leave to appeal decision at *Richmond Hill (Town) v. Elginbay Corporation*, 2015 ONSC 4979.

[8] *Richmond Hill* at para 48.

[9] *Richmond Hill* at paras 56 to 57.

[10] *Richmond Hill* at para 58.

[11] *Richmond Hill* at paras 29 and 37.

[12] See 2016 ONSC 565 at paras 21 and 29 and Decision issued August 30, 2016 for OMB Case No. PL130885 at para 338.

[13] 67 O.R. (3d) 441 at para 49.

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