

MCMILLAN BINCH LLP

**“2003 Case Law Update”, Annual Institute Program,
Ontario Bar Association – 2004**

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Prepared for The Institute of Continuing Legal Education Ontario Bar Association

January 2004

2003 CASE LAW UPDATE

MUNICIPAL LAW

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Every year has its share of interesting cases and 2003 was no exception. As you can appreciate it is impossible to report on every case decided by either the Ontario Municipal Board or the Courts during the past year, therefore the emphasis of this paper will be to review court decisions that deal with significant municipal issues that have caught the attention of in-house and private practice municipal solicitors.

1. WHAT CONSTITUTES A “COMPLETE APPLICATION”?

***Paletta International Corp. v. Burlington (City)*, [2004] O.J. No. 12 (C.A.), Sharpe J.A., aff’g [2003] O.J. No. 1285, 63 O.R. (3d) 670, 36 M.P.L.R. (3d) 309 (S.C.J.), Lofchik J. *Paletta International Corp. v. Burlington (City)*, [2003] O.J. No. 1285, 63 O.R. (3d) 670, 36 M.P.L.R. (3d) 309 (S.C.J.), Lofchik J., aff’d [2004] O.J. No. 12 (C.A.), Sharpe J.A.**

On December 12, 2003 the Court of Appeal for Ontario rendered its decision on the appeal concerning the procedural rights that arise under the *Planning Act* (hereinafter referred to as the “Act”), where a party applies for either an official plan amendment, zoning change, or approval of a draft plan of subdivision but refuses to provide information required by the municipal council to consider the application.

The respondents, Paletta International Corporation (“Paletta”), filed with the City of Burlington an application for an official plan amendment pursuant to subsection 22(4) of the Act. It was agreed by both parties that all of the information prescribed in subsection 22(4) had been provided to the municipality. Subsequent to filing the application the municipality requested additional information from the applicant pursuant to subsection 22(5) of the Act. The panel hearing the appeal agreed that the municipality’s demand for further information was reasonable and that the information required was relevant to the planning decision the council was being requested to make.

Paletta refused to provide the required information and took the position that they were entitled to proceed directly before the OMB by way of an appeal under subsection 22(6). This is commonly referred to as the “bump up” provision whereby an applicant can appeal its application to the OMB 90 days after the application is filed should council fail to make a decision. Paletta argued that the

90 day period commenced from the date the municipality received the application fee and the information prescribed under subsection 22(4).

The City of Burlington refused to forward a record to the OMB on the grounds that Paletta had not provided the council with the information required under subsection 22(5) of the Act and submitted that until such information was provided, the 90-day period had not started to run.

The Court of Appeal upheld the decision of the application judge. In its decision the Court of Appeal ruled:

“In my view, the Act plainly draws a clear and sharp distinction between prescribed information under s. 22(4) and required information under s. 22(5) and lays down, in specific terms, the remedies available in the event of non-compliance. An applicant must provide the information prescribed under s.22(4) and if the applicant fails to comply, the council can refuse to deal with the application. Once the applicant has provided the prescribed information, the council can require further information under s.22 (5). Should the applicant fail to comply with that demand, the council is entitled to refuse the application but, since ss. 22(6) and (7) establish a 90-day appeal period for decisions from the date the fee is paid and the prescribed information is provided, the council is not entitled to refuse to deal with the application until it receives the required information.”

The court also stated that it could not accept the municipality’s argument that it should regard the omission of any reference in s. 22(6) to the information required under s. 22(5) as a slip of the “legislative pen” that should be judicially repaired. The court commented that “the result may be regrettable from the perspective of a municipal council eager to ensure full public participation, however it appears to be what the legislature intended”.

2. CAN A MUNICIPALITY, IN ITS OFFICIAL PLAN, PROVIDE POLICIES TO LIMIT THE DEMOLITION AND CONVERSION OF RESIDENTIAL RENTAL PROPERTIES IN LIGHT OF THE ENACTMENT OF THE *TENANT PROTECTION ACT*?

***Toronto (City) v. Goldlist Properties Inc.*, [2002] O.J. No. 2112 (C.A.), O’Connor A.C.J.O., Morden and Sharpe, J.J.A., , aff’g [2002] O.J. No. 601, 58 O.R. (3d) 232, 157 O.A.C. 67, 26 M.P.L.R. (3d) 25 (S.C.J. (Div. Ct.)), Blair R.S.J., Day and Marchand JJ.**

On October 14, 2003 the Court of Appeal released its much anticipated decision concerning the City of Toronto's OPA 2. By way of background, the City of Toronto, in April of 1999 passed OPA 2, which established a series of policies aimed at preserving, maintaining, and replenishing the supply of rental housing throughout the newly amalgamated City. Among the policies included in OPA 2 are restrictions on conversion unless the vacancy rate for rental accommodation exceeded a specified limit. As well, OPA 2 established requirements for the replacement of demolished rental units when considering redevelopment applications involving the demolition of existing rental properties.

The adoption of OPA 2 followed an important change in provincial legislation governing the conversion of rental properties to condominium ownership. The *Tenant Protection Act, 1997, S.O. 1997, c. 24 ("TPA")*, proclaimed in force in June of 1998 replaced the *Rental Housing Protection Act, 1986, S.O. 1986, C. 26 ("RHPA")*. The TPA introduced a package of protections for individual tenants in the event of demolition, conversion, or repair requiring vacant possession. The protections established generally consisted of notice, compensation, security of tenure and rights of first refusal.

In June of 1999, several property owners, developers, and associations of owners of rental residential property appealed the adoption of OPA 2 to the OMB. On a preliminary motion, decided before it engaged in any review of the planning issues, the OMB ruled that it had jurisdiction to rule on the legality of OPA 2. The OMB found that OPA 2 was illegal and invalid on the following two grounds:

1. OPA 2 falls outside the powers conferred upon the municipality by the *Planning Act*;
2. OPA 2 conflicts with the TPA and therefore is beyond the jurisdiction of the municipality to enact.

The City of Toronto appealed the OMB's decision to the Divisional Court. The Divisional Court held that the OMB lacked jurisdiction to rule on the legal validity of OPA 2 and that OPA 2 was a valid exercise of the City's authority to enact an official plan. The Divisional Court rejected the argument that OPA 2 conflicts with the TPA and upheld the legality of OPA 2.

The responding parties appealed the matter to the Court of Appeal. The issues before the Court of Appeal were as follows:

1. Does the OMB have jurisdiction to rule on the legal validity of OPA 2?
2. If the OMB does have jurisdiction, what is the appropriate standard of review on appeal from its decision to the Divisional Court?
3. Does the City of Toronto have the authority to enact OPA 2?
4. Does OPA 2 conflict with the TPA?

Issue No. 1:

The Court of Appeal held that the Divisional Court erred in holding that the OMB lacked jurisdiction to consider whether the by-law adopting OPA 2 was authorized by the *Planning Act*. The Appeal Court held that the OMB necessarily had the jurisdiction to consider whether OPA 2 was an official plan within the meaning of the term in the *Planning Act* before it could consider the document on its planning merits. The court stressed that the Board does not have a free-standing jurisdiction, as a court does, to determine that a by-law is invalid. Its power is confined to making decisions necessarily incidental to carrying out its responsibilities under s. 17 of the *Planning Act*.

The appeal court held that it was open to the OMB to hold a hearing on the issue of whether OPA 2 was authorized by the *Planning Act* before considering other issues raised. Its decision on this question made it unnecessary for it to go forward with a hearing on the balance of the appeal. This is a practice that is followed, in appropriate circumstances, in courts in cases where a decision one way on a particular issue may result in dispensing the whole proceeding. The appeal court agreed that sections 94 and 136 of the *Ontario Municipal Board Act* confer jurisdiction on the courts to decide the validity of bylaws, however the power is not the exclusive jurisdiction of the courts. The appeal court drew a distinction between the OMB dealing with the validity of a by-law as a free-standing issue, which it believes the OMB cannot do, and making a decision on a question of law as incidental to its administrative function.

Issue No. 2:

The appeal court determined that the standard of review is “correctness” as the OMB’s expertise is not engaged in interpreting a statute.

Issue No. 3:

The Court of Appeal ruled that given the overall framework of the *Planning Act* there is a strong statutory support for the City’s authority to adopt OPA 2. The legislature and the then Minister of Municipal Affairs and Housing have both

made it clear that attending to the housing needs of its residents is a matter requiring the attention of a municipality in the exercise of its statutory authority.

The appeal court further stated that its decision on this issue was strengthened by recent jurisprudence that has emphasized the importance of enhancing local decision-making and avoiding narrow and technical readings of municipal powers. The appeal court referred to the Supreme Court of Canada's decision in *114957 Canada Ltee (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, wherein the Supreme Court of Canada ruled that the courts should accord municipal powers a liberal and benevolent interpretation, and that only in the clearest of cases should a municipal by-law be held to be ultra vires.

Issue No. 4:

The Court of Appeal agreed with the Divisional Court that the OMB erred in concluding that there was an invalidating conflict between OPA 2 and the TPA. The appeal court ruled that by repealing the RHPA and introducing the TPA, the legislature removed the RHPA restrictions on conversion of rental buildings and introduced the TPA scheme of rights for individual tenants. The purpose of the TPA is the protection of the rights of tenants, not the enhancement of the rights of property owners or developers. The TPA confers no positive rights on property owners or developers with respect to the conversion or demolition of rental buildings. The Court of Appeal further held that the TPA is silent on the subject of whether a municipality may, through its planning process, introduce its own regulations or controls in this area. Accordingly, the appeal court ruled that it saw nothing in the TPA that precludes the city from including in its official plan, policies aimed at restricting the conversion or demolition of rental buildings.

The appeal court noted that the OMB's decision was rendered prior to the Supreme Court of Canada decision on *Spraytech*. That decision makes it clear that, assuming the matter falls within municipal competence, a municipality is free to establish policies and standards more restrictive than those established by provincial legislation. *Spraytech* establishes a strict "impossibility of dual compliance" test, derived from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, to determine whether there is a conflict between a municipal by-law and provincial legislation. A conflict rendering a by-law invalid arises only when one enactment compels what the other forbids. On this test the Court found it was clear that restrictions on conversion or demolition imposed on the owners of rental properties as a result of OPA 2 do not conflict with the legal protections afforded tenants under the TPA.

3. CAN A MUNICIPALITY PASS AN INTERIM CONTROL BY-LAW WITHOUT THE BENEFIT OF NEW STUDIES?

***Joia Investments Inc. v. Collingwood (Town)* (23 December 2003), Toronto 662/02 (S.C.J. (Div. Ct.)), Dunnet, Epstein, C. Campbell JJ.**

On December 23, 2003 a three-member panel of the Divisional Court upheld the decision of the OMB to permit an interim control by-law passed pursuant to section 38 of the *Planning Act*, prohibiting the use of the Appellant's land for the otherwise permitted use of a golf course.

In this case the Town of Collingwood approved an interim control by-law based on the Town planning staff reports that were completed before the interim control by-law was approved by Council. The appellant landowner argued that the OMB erred in law in allowing the Town to use an interim control by-law as a device for the Town to buy time to bring its planning instruments, based on planning studies already conducted, into conformity with already approved plan. The appellants submitted that this was beyond the powers permitted in section 38 of the *Act*. Further the appellant argued that since the Town had already decided that it did not want golf courses as a permitted use under its zoning by-law, there was no purpose to be served by the implementation of an interim control by-law.

In considering the issue, the OMB asked itself where it was appropriate, on an interim basis, to interfere with property rights under an older zoning by-law and official plan when a newer upper tier plan had been approved to implement newer provincial policy. The OMB held that the Town was actively endeavouring to bring its own planning documents into conformity with the official plan of the County of Simcoe, and therefore sought to "consider the suitability of the zoning and ensure that proposed projects are compatible with the long-range planning objectives of the Town and the County."

On appeal, the appellant argued that however laudable that objective may be, it could not be accomplished with an interim control by-law without the commissioning of new studies.

The Divisional Court held that it was satisfied that in the exercise of its discretion, the OMB did not err in upholding the interim control by-law. In its reasoning the OMB stated that it was satisfied that the Town had conducted itself in a responsible way in the circumstance. The Town was in the midst of an intensive, open public planning process endeavouring to bring their land use policies into conformity with the County Official Plan, especially in relation to environmentally sensitive lands. The Board found that this was an important time of planning transition within the community and that avoiding reckless or hasty development

decisions during this crucial period was paramount. The Divisional Court concluded that the OMB's decision was not unreasonable under the circumstances.

4. WHAT CONSTITUTES A LEGAL NON-CONFORMING USE AND WHAT IS THE STANDARD OF REVIEW FOR A COURT APPLICATION PURSUANT TO SECTION 25 OF THE *BUILDING CODE ACT*.

***Rotstein v. Oro-Medonte (Township)*, [2002] O.T.C. 1011, 34 M.P.L.R. (3d) 266 (S C.J.), Howden J.**

The issue of what constitutes a legal non-conforming use was the subject of the December 2002 decision of Mr. Justice Howden of the Superior Court of Justice. Many of you will remember that Mr. Justice Howden, sat as a member of the OMB prior to his court appointment.

In the case before him, Mr. Justice Howden had to decide whether the continuing use of the upper level of a boat house for residential purposes constituted a legal non-conforming use. By way of background, in approximately 1970 a large estate property was divided into three lots. The first lot contained the main house. The second lot, immediately adjacent to the lot with the main house, contained a two-level boathouse and a gatehouse. The third lot was vacant until a Viceroy home was built in 1985.

The two severed lots were sold in 2002 to Debra London and David Beaton. Following a hearing before the local Committee of Adjustment, Ms. London was permitted to sever off the gatehouse and its immediately adjacent land. In August 2002, Ms. London then applied for a building permit for a new house to be built on the 2 acre retained portion of the London lot that contained the boathouse.

The zoning by-law for the municipality expressly states that development on a lot will be restricted to one dwelling unit. The applicants, owners of the lot with the main house, applied to the Courts pursuant to section 25 of the *Building Code Act* from the decision of the Chief Building Official ("CBO") to issue a permit to allow the new structure. The applicants stated that the presence of two buildings designed to permit human habitation on the property will, contrary to the Township's Zoning by-law, adversely impact upon their right to the quiet use and enjoyment of their property.

The Township took the position that the use of the boathouse did not qualify as a "dwelling unit" as defined by the by-law. The Township's counsel characterized its use as in the nature of occasional sleeping accommodation in the summertime,

which use has occurred virtually every year since 1960; as such the Township accepts it as a protected legal, non-conforming use.

Mr. Justice Howden stated that, “In my view, the primary issues in this case center on the meaning and definition of legal non-conforming use and whether that status was lost either by cessation of use or by intensification resulting from the severance and upgrading of the septic connection from the boathouse”.

In rendering his decision, Mr. Justice Howden ruled that generally, decisions based on law or jurisdiction should attract a “correctness standard” and those arising from a factual base within the expertise of the CBO should be reviewed on a standard of “reasonableness”. This standard of review in the case of the CBO is unavoidable in view of the statutory parameters within which the CBO is bound to act in making a permit decision under section 8 of the *Building Code Act*. As to the *Building Code Act*, the CBO receives training in its use, however, it is limited in that a CBO is not trained in law or statutory interpretation. On the other hand, in dealing with the Building Code, the CBO is acting close to the core of his/her specialized knowledge and experience. He concluded that the standard will vary depending upon the remoteness or closeness of the issue in question to one of “law” within the court’s area of expertise or of “fact” within the CBO’s more specialized ambit of knowledge, training and experience.

Mr. Justice Howden ruled that zoning by-laws should be interpreted in their ordinary and plain meaning in light of the by-law as a whole and the policy and basis within the Official Plan. As a fact, the court found that the continuous use of the boathouse’s upper level for occasional seasonal overnight accommodation for the owners’ family or guests was established on a balance of probabilities as a continuing legal non-conforming use from well before the enactment of the 1974 zoning by-law.

The 1997 by-law contained provisions limiting a lot in the SR (Seasonal Residential) zone to one dwelling unit and forbidding human habitation in a boathouse. The 1997 by-law specifically provides that “non-complying buildings and structures” are protected. It recognizes that some buildings or structures were in place on the effective date of the by-law and do not comply with rear yard setback or “other regulatory provisions”. These non-complying buildings and structures are recognized as “legal non-conforming buildings”.

Factually the court found that the boathouse had been upgraded during the years. Mr. Justice Howden stated that the Courts have found that increased intensity of use within the same types of use have generally been allowed, but not beyond the point where it amounts to a difference in kind. Both proximity or remoteness of any new activity to historic usage and seriousness of neighbourhood impacts must

be considered within a balanced consideration of private and community interests. He concluded that although the boathouse has been upgraded, its protection remains limited to seasonal and occasional usage by the owners' family or guests. He does however state that improvement and renting of the boathouse as a residential apartment would not be protected, nor would installation of heating, insulation and cooking facilities so as to create a permanent or seasonal dwelling without the necessary public approval process.

The appeal of the permit was dismissed.

5. DOES THE OMB HAVE THE JURISDICTION TO COMPEL A MUNICIPALITY, AGAINST ITS WISHES, TO ASSUME A LANE AND/OR SERVICES?

***Mattamy (Rouge) Ltd. v. Toronto (City)*, [2003] O.J. No. 4829 (S.C.J. (Div. Ct.)), O'Driscoll, Then and Cullity JJ.**

On May 29, 2003, the OMB, with the consent of the parties issued Order 0702. By that order, the OMB agreed to state a case to the Divisional Court under section 94 of the *Ontario Municipal Board Act, R.S.O. 1990, C. c. O. 28* as to whether the OMB has the jurisdiction to compel a municipality, against its wishes, to assume a "lane" and /or "services".

A total of five questions were submitted by the OMB for the opinion of the Divisional Courts as follows:

- (a) Does the Ontario Municipal Board (the "Board") have the jurisdiction and power to order the City, contrary to its wishes, to assume a public lane constructed within a plan of subdivision approved by the Board, pursuant to section 51 of the *Planning Act, R.S.O. 1990, c. P. 13*, as amended, and dedicated to the City upon registration of the said plan of subdivision, pursuant to section 57 of the *Surveys Act, R.S.O. 1990, c. S. 30*, as amended?
- (b) Does the Board have the jurisdiction and power to order the City, contrary to its wishes, to accept all municipal services constructed within the aforesaid public lane, in accordance with the engineering drawings approved by the Board prior to final approval of the plan of subdivision by the Board, pursuant to section 51 of the *Planning Act*?
- (c) In the alternative, does the Board have the jurisdiction and power to order the City, contrary to its wishes, to accept all municipal services constructed within a private lane in accordance with engineering drawings approved by the Board prior to final approval of the plan of subdivision and to accept

- the necessary servicing easements approved by the Board within the said private lane?
- (d) Does the Board have the jurisdiction to order the City, contrary to its wishes, to take title to lands shown as public lanes by the subdivider on a draft approved plan of subdivision upon registration of the said plan?
 - (e) Does the Board have the jurisdiction to order the City, contrary to its wishes, to execute a subdivision agreement or site plan agreement which includes clauses regarding the assumption of roads and services in order to give effect to its decision approving a plan of subdivision.

By way of background, the applicant applied to the City of Toronto for approval of a draft residential plan of subdivision. The plan of subdivision included certain “laneways” with right-of-way widths of 10.5 metres (34.45 feet). The laneways were shown as public streets. It was the applicant’s intention that the laneways would be assumed by the City. Although the city was supportive of the proposed plan of subdivision, the City opposed assuming the 10.5 metres laneways as the existing city standards require a width of 18.5 metres (60.696 feet). In its affidavit material, the City asserted that providing adequate space in the public road allowance ensures high quality municipal infrastructure for the pavement, sidewalks, boulevard snow storage, parking needs, trees, utilities, street lighting and other street furniture such as transit shelters, mailboxes etc. It therefore argued that if the applicant cannot meet the City’s standard width it required that the laneway be privately owned as permitted under the *Condominium Act*.

The City argued that if the OMB were to find that the roadways are suitable from a planning engineering and public safety standpoint, the OMB has no jurisdiction to order the City to assume the 10.5 metre laneways and/or services.

The OMB Chair ruled in a section 43 review request on a similar case involving the same applicant that although the Board approved the site plans appealed to it, as it was obligated to do, nothing in that approval requires the City of Toronto, either by implication or expressly, to assume the lanes set out on the site plans as public highways or to declare those lanes as public highways.

Counsel for the City argued that the decision whether or not to assume a highway, road or lane, shown on a registered plan of subdivision is a decision that is within the exclusive prerogative of the municipality. Further the City’s counsel submitted that post January 1, 2003, as a result of section 31(1) and (2) and (4) of the *Municipal Act, 2001*, land may only become a “highway” as a result of a by-law having been passed by the municipality and not as a result of activities of the municipality or any other person in relation to the land, including the spending of

public money by the municipality. Further, Counsel for the City argued that the applicant failed to cite any authority under the *Planning Act*, or any other statute for the proposition that the OMB has the jurisdiction to require the City, against its wishes, to assume a road or laneway shown on a registered plan of subdivision.

The panel of the Divisional Court answered “No” to each of the five questions asked and stated as follows:

“The OMB, a statutory administrative tribunal, has only the jurisdiction conferred on it by the Legislature - it has no inherent jurisdiction. Counsel for the Applicant has not persuaded me that the OMB is clothed with any jurisdiction under the *Planning Act*, the *Surveys Act* or the *Municipal Act, 2001* that would enable it to make any of the orders set out in the five questions submitted to the Court”.

Lastly the Court stated that it did not believe that the issue was “merely subsidiary” or “ancillary” to the OMB’s general administrative functions assigned to it by the Legislature.

6. IS WATER TAKING A LAND USE?

***Grey Association for Better Planning v. Artemesia Waters Ltd.*, [2002] O.J. No. 4660, 62 O.R. (3d) 200 (S.C.J. (Div. Ct.)), McNeely, Carnwath and Czutrin JJ., rev’g [2001] O.M.B.D. No. 852 (O.M.B.), R.J. Emo, leave to appeal O.C.A. granted April 9, 2003.**

Artemesia Waters Ltd. and Douglas Hatch own land in the Township of Artemesia in the County of Grey. Artemesia Waters obtained a permit to take water from the land pursuant to Section 34 of the *Ontario Water Resources Act, R.S.O. 1990, c. O.40*. In May 2000, Artemesia Waters and Hatch applied to the County and the Township to amendment of the Official Plan and Zoning By-law to permit the extraction, storing and loading of water on to transport trucks. The municipality refused to amend its Official Plan and Zoning By-law.

Artemesia Waters and Hatch appealed this refusal to the OMB. The OMB ruled that the taking of water was legally permitted so long as the water-taking was in accordance with the “Permit to Take Water” pursuant to the *Ontario Water Resources Act*. The OMB ruled that based on the evidence of a land use planner, the taking of water was not a use of land for which the OMB had jurisdiction and that the Board would only consider matters relating to the storage and loading facility.

The Grey Association for Better Planning (“GABP”) sought a leave to appeal to the OMB’s decision. In granting the leave request, Belleghem J. suggested that the following three questions required consideration by the Divisional Court as follows:

- a) Is Water-taking a use for land within the meaning of the *Planning Act*?
- b) If so, would the OMB be required to consider an amendment to the By-law?
- c) Does the existence of a Water Taking Permit under the *Ontario Water Resources Act* override the OMB/Municipality’s obligation under the *Planning Act* to apply the water taking provisions set out in Section 5.3.3 of the Grey County Official Plan?

The Divisional Court ruled that the OMB was in error. The Court stated that:

“The proper interpretation of the word “use of land” in the *Planning Act* is a question of what is to be decided by the Board itself and not an issue of fact to be decided on the basis of an Affidavit of the planner.”

The Court ruled that the taking of water as proposed by the private applicant was a use of land within the meaning of the *Planning Act*. The operation that was before the Board was the taking, storage and loading of water on a particular piece of land. The entire operation constituted a single use of land and the question before the Board was whether the entire operation, including the taking of water, should be a permitted use. In deciding that the “taking of water” was not a use of land and in confining the subsequent hearing to issues related to the storage and loading of water, the OMB was refusing to consider an essential, “if not the most essential”, aspect of the appeal before it.

With respect to the second question the Divisional Court held that the OMB would be required to consider an amendment to the by-law. The Divisional Court ruled that the original application to the municipality and the subsequent appeal to the Board covered the entire operation of the respondents, being the extracting, storage and loading of water. This, therefore, is the application that was before the Board and it is the application that is to be considered in a new hearing.

The third question posed by Belleghem J. was whether the existence of a Water Taking Permit under the *Ontario Water Resources Act* overrides the OMB obligation under the *Planning Act* to apply the water taking provisions in Section 5.3.3 of the Grey County Official Plan. The Divisional Court held that there is no necessary conflict between the provisions of the *Ontario Water Resources Act* and the *Planning Act*. Those Acts govern the activities of the respondents but each does so from a different perspective and for a different purpose. The Court then

concluded that it will be either up to the OMB, on the whole of the evidence at the new hearing to decide whether amendments to the Official Plans and by-laws should be directed and if so, what those amendments should be.

The Divisional Court's decision was appealed by Artemesia Waters and was scheduled to be heard by the Ontario Court of Appeal on Wednesday, December 10, 2003. On Tuesday, December 9, 2003, the GABP sent notice to the Court of Appeal stating that, on consent of all parties, they agree to the request of the applicant to abandon the appeal.

7. WHAT IS RATEABLE OCCUPATION FOR THE PURPOSE OF REALTY TAXATION?

***Mount Sinai Hospital v. Municipal Property Assessment Corp.*, [2003] O.J. No. 4295 (S.C.J.), Karakatsanis J.**

Mount Sinai Hospital and University Health Network sought declarations before the Divisional Court that part of the parking garage owned and operated by Ontario Power Generation (OPG) is exempt from realty taxes pursuant to section 3.6 of the *Assessment Act, R.S.O. 1990, c. A. 31* as land used and occupied by a public hospital receiving aid under the *Public Hospitals Act*.

The Municipal Property Assessment Corporation (MPAC) took the position that the hospitals are not in occupation of the garage as the use by the hospitals does not oust the over-riding occupation and general control of the garage by OPG. The hospitals submitted that their agreements with OPG give them occupation and control over their portion of the garage.

By way of background, the hospitals do not lease a specific part of the garage, however, each paid for the construction of a portion of the garage and is entitled to use a fixed number of parking spaces. With the exception of a number of spaces physically segregated for doctors of Mount Sinai, the hospitals' parking spaces are not segregated or fixed. The hospitals are issued the requisite number of parking passes and they determine the staff, patients or visitors entitled to use whatever spaces are available in the entire garage. OPG owns and manages the property. The hospitals are entitled to the revenues from their allotted number of spaces less the expenses.

The Divisional Court agreed that the intent of section 3(1)(6) of the *Assessment Act* was to free public hospitals from the burden of municipal taxation so that they may devote their financial resources to furnishing the public service they are created to provide. While an exemption from taxation is to be narrowly construed, the legislative intent and purpose of the exemption must be kept in mind. The onus of proving that they occupy the land is on the applicants.

The court determined that four criteria must be established in order to meet the test of rateable occupation. The Divisional Court was satisfied that the hospitals had actual occupation, being the right of exclusivity in relation to the spaces they leased for the purposes of parking for the hospital. As the hospitals are entitled to the profit from the spaces, the court determined that they therefore participate in the revenue and must pay the associated operating and capital costs.

Where there is more than one occupant of the premises, the court looks to the paramount occupancy as the party liable for tax assessment. Three main considerations apply. The first is the physical presence on the land. The second applies to any controls imposed by one occupant of the other occupant's use of the land and the purpose and effect of those controls. The third criteria is the relative significance of the activities carried out on the land relative to the primary business of each occupant. In applying those principles the court was satisfied that the hospitals and OPG were all physically present on the land. The hospitals are present on their portion of the land through those employees, patients or visitors designated by the hospital to park there. OPG's additional presence is related to its management responsibilities.

Secondly, OPG imposes rules and regulations upon those using the parking facilities, however, these are rules and regulation would likely be imposed by any operator of a parking facility and are necessarily incidental to managing the parking garage. In the court's view, the occupancy of a manager or operator is subordinate to those on whose behalf it is managed.

Finally regarding the relative significance of the activities carried out on the land to the primary business of each occupant, the court concluded that each of the three parties required parking for the operation of its primary business. Therefore OPG has given up the right of its occupation in relation to the hospitals' portion of the garage and it does not have the paramount occupation. The court granted an order declaring that as public hospitals, Mt. Sinai Hospital and University Health Network, were therefore exempt from taxation pursuant to section 3 of the *Assessment Act*.

8. DOES THE CITY OF TORONTO HAVE THE AUTHORITY TO PASS A BY-LAW PURPORTING TO REGULATE THE USE OF PESTICIDES WITHIN ITS BOUNDARIES?

***Croplife Canada v. Toronto (City)*, [2003] O.J. No. 4828 (S.C.J.), Somers J.**

Croplife Canada, a trade association which includes pesticide producers made application to the Superior Court of Justice of Ontario to quash the City of Toronto By-law No. 456-2003, being a by-law regulating the use of pesticides within the boundaries of the City of Toronto on the basis that it was ultra vires the

municipality. The City alleged that its authority to pass the by-law is pursuant to section 130 of the *Municipal Act, 2001*. Section 130 states that a municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality.

The applicant argued that the City was improperly attempting to use the limited residual jurisdiction in section 130 to engage in matters of environmental regulation, which regulation is properly reserved to senior levels of government. The applicant argued that the introduction of the words "...or any other Act" into section 130 of the new *Municipal Act* requires the court to look specifically to other enactments of the provincial or federal governments which deal with the same subject. This is in contrast to section 102 of the earlier *Municipal Act*, which excluded only those matters "not specifically provided for by this Act".

The applicant contended that the province protects the environment through the provisions of the *Environmental Protection Act, R.S.O. 1990, chap. E-19*. The Court held that it did not believe that the by-law is a matter of environmental regulation stating "close consideration of its wording makes it clear that it is aimed primarily at matters of health, safety and the well being of the city's inhabitants."

The applicant relied upon a number of cases, specifically *Morrison v. Kingston, [1982] 4 D.L.R. 740 (Ont. C.A.)*. In this case the City of Kingston passed a by-law purporting to licence coin operated amusement machines such as "cranes, slot machines and other devices". Its stated purpose was that these amusement devices were not to be located in restaurants, tobacco shops, pool rooms, bowling alleys and the like, and it prohibited anyone under the age of 16 from keeping or playing said devices. The Court of Appeal held that the municipality had "no universal power of legislation" and that gambling, health and morality were matters already governed by other legislation. The City attempted unsuccessfully to justify the by-law under the general licensing power because it was aimed specifically at matters of health, safety and morality. The Court of Appeal held that these matters were already regulated by the *Public Health Act* and matters of morality by the *Criminal Code*.

The Court agreed that while the Morrison decisions and other similar cases have not been overruled, the more recent approach by the courts to a consideration of the extent and scope of the power of the municipalities in the enacting of by-laws has moved towards a greater deference to the elected municipal body. Municipal by-laws are presumed to be validly enacted and are not subject to review on the basis of alleged unreasonableness. The most recent case on point deals with alleged provincial/municipal conflict in the case of *114957 Canada Ltee et al v.*

Hudson (Town), [2001], 200 D.R.L. (4th) 419 (S.C.C). The Court quoted Madam Justice L'Heureux-Dube as follows:

“The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that lawmaking and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs to local distinctiveness and to population diversity.”

Counsel for the applicant argued that the Hudson case is distinguishable from this case in that municipalities in Quebec had been granted the power to regulate pesticides and their use pursuant to the residual jurisdictions found in the *Quebec Cities and Town Act*, R.S.Q. chap. C-19. The only restriction on the residual jurisdiction was the requirement that the by-law not conflict with any other act or law. The Supreme Court of Canada ruled that it did not and was, therefore, *intra vires*. The Toronto by-law by contrast, must be argued under section 130, which means that more must be shown to confirm that there is no conflict between the by-law and other legislation.

The Court ruled that although other statutes deal with pesticides, their manufacture, licencing, packaging and use, but in no instance do they do so in a manner which conflicts with this by-law. The Court ruled that the application be dismissed as the by-law was *intra vires* the City of Toronto.