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Ontario Municipal Board

Commission des affaires municipales de l'Ontario

MM090016

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IN THE MATTER OF subsection 223(4) of the *Municipal Act*, S.O. 2001, c. 25

CLERK'S OFFICE

Application by: Jim McPherson and Lyle McBurney
Subject: Application to restructure the existing ward structure
Municipality: County of Prince Edward
OMB Case No.: MM090016
OMB File No.: MM090016

APPEARANCES:

Parties

Counsel*/Agent

Corporation of Prince Edward County

W. Fairbrother*
J. Gibb-Sabini*

Jim McPherson and Lyle McBurney

J. Legate

Participants

Paul Lang

Peter Sztuke

Monica Alyea

Hugh Sonnenberg

John Hill

DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD

Lyle McBurney and Jim McPherson ("the Appellants") petitioned Prince Edward County ("the Municipality") to reconfigure its existing ward boundary structure from 10 wards to 6 wards. The Appellants also wished to change the composition of Council to

two councillors per ward in their proposed 6-ward structure. The Municipality did not make a decision and Messrs. McBurney and McPherson made an application pursuant to subsection 223(5) of the *Municipal Act* to have this Board determine the matter. They were informed at the outset of the hearing that pursuant to this subsection of the *Act*, the Board's jurisdiction on this appeal did not provide for changes to Council composition.

In a nutshell, the Appellants' case was primarily based on the premise that representation by population should be the main, if not the only, criterion to apply. According to the Appellants, their proposed 6-ward structure would effectively divide the Municipality into 6 relatively equal portions based on population. The Appellants seek to invoke a system that provides for almost absolute voter parity.

The Board heard from 16 witnesses which included 7 lay witnesses on behalf of the Appellants; 4 witnesses on behalf of the Municipality which included the only expert who provided opinion evidence on the matter of ward boundary adjustments and related processes; and 5 participants. The hearing took nine days.

The Board determines that the appeal by Messrs. McBurney and McPherson is dismissed and their application is denied. The reasons follow. For ease, this decision is divided into segments reflecting the issues raised at the hearing.

Reverse Onus:

The Appellants argued that although their appeal and their 6-ward proposal brought the matter before this Board, the Municipality still had an obligation to justify the existing 10-ward structure. Consequently, should the Municipality fail to fulfill that obligation, the Appellants argued that they should be entitled to have their proposal accepted. In other words, the onus was shifted onto the Municipality rather than the Appellants. The Board cannot and does not agree with this proposition. Established case law has consistently held that it is the Appellant who bears the onus to present clear and persuasive evidence concerning his or her appeal. (See for example Re City of Kingston Ward Redivision, (1994) 30 O.M.B.R. 268 at 296.) In this case, it was Messrs. McBurney and McPherson who were required to present compelling evidence

to support their proposal, not the Municipality to defend its existing structure. The Appellants needed to identify exact boundary lines and ward adjustments. They did neither. They were to present evidence on how their proposal would achieve effective representation and in doing so, specifically address the criteria enunciated by the Supreme Court of Canada in its decision *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (hereinafter referred to as the "Carter decision"). They did not present such evidence. In this case, the Appellants failed to discharge their onus.

Effective Representation Criteria:

Messrs. McBurney and McPherson each testified in support of the proposed 6-ward structure but admitted that neither actually created the concept. Mr. Gary Mooney was the author of the proposal. He also testified. No witness on behalf of the Appellants adequately addressed the criteria, other than representation by population, to achieve effective representation. The Carter criteria, as it was referenced during the hearing, is outlined by the Supreme Court wherein it stated:

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Sir John A. Macdonald in introducing the Act to re-adjust the Representation in the House of Commons, S.C. 1872, c. 13, recognized this fundamental fact (House of Commons Debates, Vol. III, 4th Sess., p. 929 (June 1, 1872)):

... it will be found that, ... while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principle of numbers should not be the only one. [underlined emphasis added by the Board]

Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, votes move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interest and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in Dixon, *supra*, at p. 414, that "*only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed.*" (Carter decision, paras. 50 to 55)

Given that the Appellants were not represented by someone with legal training, and that individual candidly explained that this hearing was the first OMB hearing he had ever done, the Board outlined the nature of the evidence that the Appellants were required to present with specific reference to the Carter criteria. Nevertheless, such evidence was not presented. For example, in response to the Board's request of Mr. Mooney to address the criterion of minority representation, his answer was anecdotal at best stating that this community is quite homogeneous and as such, that criterion was addressed. Concerning the criterion of community history, Mr. Mooney stated that this criterion had been properly addressed given that the proposed 6-ward structure included the historical names of the areas rather than using a number reference. He was forthright with his admissions under cross-examination that he was not familiar with the Carter decision at the time he prepared the proposal and as such, did not turn his mind to the criteria when developing the proposal.

In contrast to the Appellants' evidence, the Municipality called Brian Donaldson who was qualified and accepted by the Board as an expert able to provide opinion evidence in matters concerning ward boundaries and their adjustments. Mr. Donaldson worked with the Ministry of Municipal Affairs and Housing at the time when many

municipalities across the Province were restructured, including this one. He provided a thorough review of how the existing 10-ward structure in Prince Edward County came into existence. His retainer for this hearing was to review ward structures in other municipalities and conduct a comparison (Ex. 14). His research revealed a number of other municipalities with variations from absolute parity which were greater or less than 25%. He opined that such deviations were acceptable when other factors like geography, community history, community representation and minority representation were considered. The Appellants maintained a firm belief that a deviation beyond 25% was just not permitted and any deviation beyond 25% was a violation of their rights under the *Canadian Charter of Rights and Freedoms*, ("the Charter") being Part I of the *Constitution Act, 1982*, with specific reference to section 3 of the *Charter*. This conclusion was derived from their interpretation of the Carter decision. Quite simply, the Board determines that the Appellants' interpretation of this case was in error and unfortunately, much of their evidence was premised on this flawed understanding.

The Board finds that Mr. Donaldson's testimony and opinions were unshaken, credible and sound. The Board relies upon them in order to arrive at its decision.

December 31, 2009 Deadline:

The Appellants made it clear from the outset that they required affirmation of their 6-ward proposal by this Board by December 31, 2009 in order that the changes could be made effective for the next municipal election. This would have been the case had the Board accepted the proposed changes. What the Board finds particularly illuminating were answers given by Mr. McPherson during cross-examination by Mr. Fairbrother. Mr. McPherson stated unequivocally that the 6-ward system was "a good idea if it can be implemented in time" and he clarified for the Board that what he meant was "by the end of this calendar year." Without hesitation, he testified that "if it can't, then it's not a good idea." The timeframes associated with the issuance of this decision should not be the foundation for whether the 6-ward proposal is or is not a good idea. Such testimony referencing the urgency of the matter suggests to the Board that this was one of the driving factors behind the Petition and its appeal. The Board determines that in this instance, moving with such haste has resulted in a proposal based on a

simplistic mathematical approach without proper regard to the factors of effective representation.

Progressing with such speed would have also meant that the public would be denied proper and adequate consultation. Quite specifically, the hearing concluded on November 26, 2009. The Board was informed by Ms Victoria Leskie, Clerk of the Municipality, that the last scheduled date for a Municipal Council meeting was December 15, 2009. Assuming the Board granted the relief sought by the Appellants, in order for Council to pass a by-law to implement the Appellants' desire to change Council composition to be congruent with the proposed 6-ward structure, notice would be required. The Municipality's Procedural By-Law requires such notice to be given two weeks hence, which means December 1, 2009. Therefore in order to meet the Appellants' preferred deadline, the Board would be required to prepare and issue its decision and the Municipality prepare and provide notice of the requisite by-law within 2 business days following the conclusion of the hearing.

In response to these obstacles, the Appellants suggested that either public notice be waived entirely and/or the Municipality schedule a special sitting later in the month. Gaining an extra 10 days or so given that Christmas and Boxing Day fall in December does not obviate the shortcomings of inadequate public consultation. The Board relies on Mr. Donaldson's testimony wherein he stated that the views of the residents are "absolutely essential not just to get it right but to ensure legitimacy of the process." Even witnesses called by the Appellants did not want to detour from proper public consultation. Mr. Duncan Fischer stated firmly that he wanted "a process which is consultative and transparent" and that the "public should be consulted on such an important issue such as this." The Board concurs with these sentiments. To suggest a waiver of public notice as required by the Municipality's Procedural By-Law on a matter of importance such as this would surely undermine the validity of the process and the Board will not support such an approach.

Referendum Process:

Ms Leskie informed the Board that the Municipality had been in the process of preparing a question as a referendum on the issue before the Board but curtailed that

process due to the subject appeal. This decision will not recount each meeting of Council or Committee wherein the issues of ward boundary structure and council composition were addressed. Suffice it to say, the Municipality was well into a process to address this issue and included in their alternatives for consideration was a 6-ward structure. The Municipality argued that the appeal was launched prematurely and that the Municipality should have been provided with an opportunity to complete its process. The Board agrees.

Deficiencies in the Substance of the Petition:

Mr. McBurney testified that he did much of the "leg-work" in disseminating and collecting signatures for the Petition. He testified that he had input into the actual language of the Petition and of the 6,000 copies made, he gathered 619 signatures. There were two components to the Petition: firstly, to divide the county into roughly 6 equal wards based on population and secondly, to have 2 councillors per ward. He was not able to explain how many of the signatories sought one or both components of the Petition, and if only one component, which one. As stated earlier, the only matter before the Board is the ward boundary issue. The Appellants did not go back to those who signed to clarify their position. Therefore the Board is left with uncertainty as to how many of the 619 really sought a 6-ward structure.

Further the Petition had no map attached to it. Therefore when signing the Petition, a signatory may not have known exactly where the ward boundaries were proposed to be. That, in and of itself, may have had an impact on whether someone would support the Petition. Again the Board is left with uncertainty regarding support for the proposal.

Some of the witnesses called by the Appellants testified that they supported an at-large scheme and not necessarily a 6-ward structure. For examples, Mr. Bonter stated that an at-large system would work and that he wasn't coming forward at this proceeding to support "any particular proposal." Mr. Ray Best indicated clearly that he "would prefer an at-large system" and that he supported "Council's decision to go to a referendum at the next election." Again the Board can only conclude that while there may be individuals seeking change from the existing ward system, that change may or

may not result in a 6-ward structure. This will be determined once the Municipality has concluded its public consultation process.

Interference with Council's Actions:

The Municipality relies on previous OMB decisions (Wagar v. London, [2005] OMBD No. 1329; Roberts v. Orillia, [2005] OMBD No. 1462) which suggest that the Board should show deference to Council's actions in this matter on the basis that their proposed next step, namely to proceed to a referendum, is reasonable, responsive and consultative. Further the Board concurs with the Municipality's suggestion that there was no compelling evidence presented at this hearing that would justify the Board interfering with Council's preferred process. On the totality of the evidence presented at this hearing, the Board cannot find anything to suggest that Council's process to date is unreasonable or inappropriate. In fact, the survey results prepared by Mr. Mooney and presented to Council on behalf of the Concerned Citizens of Prince Edward County indicated that a majority of those canvassed believed a referendum was an appropriate and necessary step and should be pursued.

Disposition and Order:

For the foregoing reasons, the Board dismisses the appeal and denies the application to reconfigure Prince Edward County into 6 wards as proposed by the Appellants.

THEREFORE THE BOARD ORDERS that the appeal is dismissed and the application is denied.

This is the Board's Order.

Costs:

The Municipality has put the Appellants on notice that the Municipality reserves the right to seek costs pursuant to Rule 96 of the Ontario Municipal Board Rules of Practice and Procedure. As explained to the Parties at the conclusion of the hearing, the Parties are required to comply with the requirements indicated in the Board's Rules and which are located on the Board's website available for public access.

"J. V. Zuidema"

J. V. ZUIDEMA
VICE-CHAIR