

Court File No. 027 / 17

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

BETWEEN:

THE GEORGIAN BAY ASSOCIATION

Applicant

and

ONTARIO MUNICIPAL BOARD, MACEY BAY DEVELOPMENTS CORP.,
JEAN DEMARCO and THE TOWNSHIP OF GEORGIAN BAY

Respondents

APPLICATION UNDER section 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

**NOTICE OF APPLICATION TO THE DIVISIONAL COURT
FOR JUDICIAL REVIEW**

TO THE RESPONDENTS


A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date 17-Jan.-17 Issued by  Registrar

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AND TO: **MINISTRY OF THE ATTORNEY GENERAL**

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APPLICATION

1. The Applicant, the Georgian Bay Association (the “GBA”), makes an application for:
 - (a) an Order in the nature of certiorari quashing the decision of the Ontario Municipal Board (the “OMB”), dated September 9, 2015, between Macey Bay Developments Corp. (“Development Corp.”), Jean De Marco (“Ms. De Marco”), and the Township of Georgian Bay (the “Township”) (the “2015 OMB Decision”);
 - (b) in the alternative, an Order declaring the 2015 OMB Decision to be void and of no force or effect;
 - (c) an interim order staying the 2015 OMB Decision pending a final determination of this Application for Judicial Review;
 - (d) an interim order staying the Site Plan Application (as defined below) and any associated reviews, approvals and applications to third party organizations arising out of the 2015 OMB Decision;
 - (e) the costs of this proceeding, plus all applicable taxes; and
 - (f) such further and other relief as this Honourable Court may deem just.
2. The grounds for the application are:

Overview

- (a) The GBA is an umbrella group of 19 cottage associations, representing over 3,200 families along the eastern and northern shores of Georgian Bay. It was formed in 1916 and, since that time, has had a mandate of protecting the water and land resources of the Bay. Many of the cottage associations represented by the GBA are located in the Township;

- (b) The GBA did not receive notice of Development Corp.'s motion underlying the 2015 OMB Decision. This decision related to the application of the trailer park zoning provisions of the 1991 By-law (as defined below) to protected environmental sites;
- (c) The GBA actively participated in the consultations relating to the 1991 By-law (as defined below) and ought to have received notice as an interested party;
- (d) Development Corp.'s failure to provide such notice renders the 2015 OMB Decision void for lack of jurisdiction;
- (e) Moreover, the 2015 OMB Decision was unreasonable and failed to properly consider the factual and regulatory foundation of the matter before the board;
- (f) Independent of any lack of notice, the Ontario Municipal Board has no jurisdiction to create new rights arising out of a spent order made in the context of a 20-year old zoning by-law appeal. Such an extraordinary power is outside any reasonable interpretation of the OMB's powers in connection with appeals of zoning by-laws. The OMB's decision purporting to retroactively change the result of a 20-year old appeal was accordingly patently unreasonable and should be set aside;

Background

- (g) This Application relates to a 165 acre site located in the Township and known as 380 Macey Bay Road (the "Property");
- (h) As described in further detail below, the Property is in the heart of Provincially Significant Wetlands, immediately adjacent to Georgian Bay Islands National Park, and is located within environmental sites protected by the 2014 Policy Statement (as defined below);

- (i) In 1972, the Property was zoned as “Recreational”, which permitted existing use of the property for tents, trailers, and recreational vehicles. A small portion of the Property was used for a trailer park from approximately the 1950s;
- (j) In 1991, the Township enacted its first official plan, which prohibited new trailer parks or the expansion of old ones;
- (k) The same year, the Township enacted a Comprehensive Zoning By-law (the “1991 By-law”), which purported to create a Tourist Commercial Type Two (“CT-2”) zoning designation for a small portion of the Property. This designation purported to allow the continuation of trailer parks to the maximum number that existed prior to September 1991;
- (l) In 1991, the then owner of the Property, Arabian Bloodstock Agency Incorporated (“Arabian Bloodstock”), appealed the 1991 By-law to the OMB, seeking expansion of the portion of the Property zoned for use as a trailer park with the result that the 1991 By-law did not come into force;
- (m) At the hearing in 1996, the OMB conditionally allowed the appeal and permitted an expansion of the zoning to permit a tent and trailer park in all of the areas occupied by the trailer park. However, it withheld its Order expanding the zoning, pending satisfaction of four conditions, including:
 - (i) Determination of all remaining appeals from the Comprehensive By-law and By-law 93-90 [sic];
 - (ii) Submission to the Board of a draft amendment to the Comprehensive By-law satisfactory to the Township and substantially in the form of Exhibit

- 33, which includes within the proposed CT-2 exception zone all and only the lands within the “draft site plan boundary” on Exhibit 19;
- (iii) Execution by the proponent and the Township of a site plan agreement, including a site plan substantially in the form of Exhibit 19; and
 - (iv) Submission to the Board by counsel for the proponent of written confirmation of the issuance of certificates of approval for the sewage disposal system, and approval by the MNR of the environmental impact assessment prepared by the proponent’s biologist.
- (n) At the time of the 1996 OMB Decision, the policy of the OMB was apparently to destroy its files after 10 years;
- (o) By early 2010, the above conditions had not been fulfilled and the Minister of the Environment, in conjunction with the Township, closed the trailer park;
- (p) In or around November 2010, the first condition was satisfied by the Township Council executing a site plan agreement for the construction of 82 residential homes;
- (q) The second condition remained outstanding;
- (r) Accordingly, the 1996 OMB Decision has never become final;

Zoning and Use of the Property after the 1996 OMB Decision

- (s) The area surrounding the Property had been designated as a Provincially Significant Wetland in 1994 (i.e., two years prior to the 1996 OMB Decision);
- (t) The Property is immediately adjacent to the Georgian Bay Islands National Park and, in 2004, became part of a UNESCO World Biosphere;

- (u) In 2007, the *Endangered Species Act, 2007*, S.O. 2007, c.6 came into force. This statute protects plants and animal species native to the Georgian Bay coast, including those that live in the wetlands surrounding the Property;
- (v) A clearing of the Property by the then owners commenced in mid-2010;
- (w) In August 2010, the Property was purchased by a new owner, Macey Bay Realty Inc. (“Realty Inc.”).
- (x) In November 2010, a site plan agreement pursuant to the 1996 OMB Decision between Realty Inc. and the Township was registered against the Property, changing the use of the Property to 82 residential homes. All debris relating to the prior existing trailers was removed in late fall 2010;
- (y) This new use was opposed by members of the Township community, but approved by Council;
- (z) Realty Inc., after clearing the Property, constructed a sales office and two model homes in early 2011. The balance of the property was unused and over time essentially returned to its natural state;
- (aa) In August 2012, the Property was purchased by Development Corp.;
- (bb) In 2013, the Township passed a new Official Plan, which prohibited the creation of new trailer parks and enlargement of the old ones (the “2013 Official Plan”);
- (cc) In November 2014, the Township passed a new zoning By-law (the “2014 By-law”), which limited the number of trailer parks to those legally existing on the date the By-law was passed. In the case of the Property, there were none;
- (dd) The same year, the Province of Ontario issued the Provincial Policy Statement, 2014 under section 3 of the *Planning Act*, R.S.O. 1990, c. P.13 (the “2014 Policy

Statement”). The policy statement restricts development and site alteration adjacent to Provincially Significant Wetlands in the region surrounding the Property. All decisions that affect planning made after April 30, 2014 must be consistent with the 2014 Policy Statement;

- (ee) In November 2014, Development Corp. and Ms. DeMarco each brought appeals before the OMB. Development Corp.’s appeal relates to the 2014 By-law. Ms. DeMarco appeal relates to the 2013 Official Plan and the 2014 By-law;

The 2015 OMB Decision

- (ff) In August 2015, approximately 20 years after the date of the 1996 OMB Decision, Development Corp. brought a motion, styled as a “motion for directions”, to the OMB seeking to amend the unfulfilled conditions set out in the 1996 OMB Decision;
- (gg) The motion was served only on the Township and Ms. DeMarco and not any other interested party involved in the 1991 By-law;
- (hh) Pursuant to Rule 106 of the OMB *Rules of Practice and Procedure* (the “OMB Rules”), a condition imposed by the OMB “shall be satisfied [...] within a reasonable time. If the condition is not so satisfied, the Board may reopen the hearing event from which the decision was issued”;
- (ii) Development Corp.’s request to amend the conditions was based, in part, on the loss and/or destruction of critical exhibits that were integral to the 1996 OMB Decision;
- (jj) Ms. DeMarco opposed the motion for directions and brought a cross-motion seeking, among other things:
 - (i) an Order that the motion be dismissed as an abuse of process; or

- (ii) in the alternative, that after the passage of nearly 20 years since the 1996 OMB Decision, the OMB was functus with respect to this matter;
- (kk) Ms. DeMarco drew to the OMB's attention the fact that parties with material interest in the subject matter of the motion were not before the OMB and had not been served;
- (ll) Ms. DeMarco further submitted that:
 - (i) Development Corp.'s request to amend was, in part, in respect of a condition that had already been fulfilled by the site plan agreement between Realty Inc. and the Township, which was registered against the Property in November 2010;
 - (ii) a 20 year time lapse for the fulfillment of the remaining conditions imposed by the OMB ought not to be considered "reasonable" under Rule 106;
 - (iii) as a result of the significant passage of time, the 1996 application to extend the portion of the Property zoned for use as a trailer park under the 1991 By-law ought to be dismissed or deemed retroactively abandoned, with the effect that the trailer park use is permitted only pursuant to the 1991 By-law if that continued;
 - (iv) Development Corp.'s request to amend the conditions set by the 1996 OMB Decision constituted "development" under the 2014 Policy Statement and was therefore prohibited;
 - (v) Development Corp.'s motion constituted a significant re-zoning and ought to have been brought pursuant to the appropriate procedures under the OMB Rules, including adequate notice to all interested parties;

- (vi) the trailer park that existed prior to the 1996 OMB Decision ceased to exist in early 2010 and therefore did not qualify for the exemption created by the 2014 By-law for trailer parks that existed prior to September 2006;
- (mm) The Township took no position on the motion or cross-motion;
- (nn) The GBA did not receive notice of this motion and therefore was not a party to the proceeding;
- (oo) The OMB essentially allowed the Development Corp. motion and dismissed Ms. DeMarco's cross-motion, finding (among other things) that:
 - (i) with respect to the lapse of reasonable time, it is not simply the passage of time that is determinative. The OMB must also consider the context, including changes in circumstances and the policy regime;
 - (ii) the purpose of Development Corp.'s motion was to implement the original intent of the 1996 OMB Decision by modifying conditions of approval; and
 - (iii) the parties would have an opportunity to contest the 2013 Official Plan and the 2014 By-law at a hearing scheduled before the OMB in September 2015 (which was ultimately re-scheduled to January 2017);
- (pp) On May 2, 2016, Thorburn J. dismissed Ms. DeMarco's appeal from the 2015 OMB Decision;
- (qq) On November 17, 2016, Development Corp. submitted a site plan application, which was finalized over several subsequent weeks (the "Site Plan Application");

The OMB did not have Jurisdiction to make the 2015 OMB Decision

- (rr) Development Corp.'s motion was not properly before the OMB. It constituted a substantive request to amend the zoning and use of the Property following significant changes in the regulatory landscape, and the concurrent alleged lack of

fulfillment of the long-outstanding conditions, over a nearly 20 year period. Such relief required adequate notice to interested parties, including the GBA, and a reasonable opportunity to respond;

- (ss) Development Corp. failed to comply with the appropriate procedural requirements under the OMB Rules;
- (tt) The OMB therefore did not have jurisdiction to hear and determine Development Corp.'s motion;

The OMB's Reasons for the 2015 OMB Decision Failed to Rely upon a Reasonable Factual Foundation

- (uu) The OMB erred in directing that all issues could be canvassed at a future hearing before the OMB relating to the 2013 Official Plan and the 2014 By-law;
- (vv) Development Corp.'s motion sought amendments to conditions imposed in relation to the 1991 By-law. Both the 1996 OMB Decision and the 2015 OMB Decision are in respect of the 1991 By-law, which is separate and distinct from the 2013 Official Plan and the 2014 By-law;
- (ww) Consequently, the 2015 OMB Decision could be relied upon as a final determination purporting to allow the Property to be zoned for use as a trailer park under the 1991 By-law, without any consideration of the conflicting provisions in the 2013 Official Plan and the 2014 By-law;
- (xx) Moreover, Development Corp.'s motion was premised upon the position that the Property's historical use as a trailer park should be permitted to continue, notwithstanding that the use had changed to residential homes in 2010 putting an end to the trailer park use;

- (yy) The evidence at the motion unequivocally demonstrated that the trailer park used ended in or around early 2010 and the property was to be used for an entirely different purpose (i.e., 82 residential mostly single family homes).
- (zz) The 2015 OMB Decision was therefore patently unreasonable and fails to properly consider the factual and regulatory foundation of the matter before the OMB;

The 2015 OMB Decision and the Site Plan Application must be Stayed pending final determination of this Application

- (aaa) The impact of the 2015 OMB Decision and resulting Site Plan Application has significant and irreparable consequences for the Township, its community members, and protected environmental sites;
- (bbb) Any attempt by the OMB to enforce or permit Development Corp., the Township, or other third parties to implement or act in accordance with the 2015 OMB Decision, including completion of the Site Plan Application and any associated reviews, approvals, and applications to third party organizations, prior to a consideration of the jurisdictional and procedural grounds raised in this Application warrants an interim Order under section 4 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, staying:
 - (i) the 2015 OMB Decision pending final determination of this Application;
and
 - (ii) the Site Plan Application and any associated reviews, approvals, and applications to third party organizations.
- (ccc) sections 2, 4, 6(1), 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;
- (ddd) rules 14, 38, 57, 68 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

(eee) such further and other grounds as counsel may advise.

3. The following documentary evidence will be used at the hearing of the application:

- (a) the record of the 2015 OMB Decision (to be filed by the OMB);
- (b) the Affidavit of Robert Duncanson (to be delivered); and
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court permit.

January 17, 2017

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Applicant -and- ONTARIO MUNICIPAL BOARD

027/17

Respondent

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW**

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