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PL081461

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Wyeridge McKellar Developments Inc., Greg Rea, David Generali, Carolyn Kelly, and Frank Pearce have appealed to the Ontario Municipal Board under subsection 38(4) of the *Planning Act*, R.S.O. 1900, c. P.13, as amended, against Interim Control By-law 2008-20 of the Township of McKellar.

OMB File No. PL081461

Greg Rea, David Generali, Carolyn Kelly, Frank Pearce and Henry Beier have appealed to the Ontario Municipal Board under subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Interim Control By-law 2008-26 of the Township of McKellar.

OMB File No. PL081510

APPEARANCES:

Parties

Counsel

Wyeridge McKellar Developments Inc.

D. Trinaistich*

Township of McKellar

B. Teichman*

M. Yakubowicz (student-at-law)

Greg Rea, Carolyn Kelly, Frank Pearce and
Larissa Nowicki, David and Lida Generali

M. L. Sparrow*

Henry Beier

DECISION DELIVERED BY J. P. ATCHESON AND ORDER OF THE BOARD

This was a hearing of the Board in the matter of appeals pursuant to subsection 38(4) of the *Planning Act* with respect to the Council of the Township of McKellar passing of two Interim Control By-laws. The by-laws being By-law No. 2008-20 passed on September 15, 2008 (Board file PL081461) and By-law No. 2008-26 passed on October 6, 2008 (Board file PL081510) which expanded the area covered by the original Interim Control By-law.

The first Interim Control By-law, By-law No. 2008-20, was appealed. Wyeridge McKellar Developments Inc. (Wyeridge), Ms Sparrow's clients, have appealed as well ~~this by-law and were granted on consent party status with respect to the other Wyeridge~~ appeals. By-law No. 2008-20 restricted development within certain zoning categories as defined in the Municipality's Zoning By-law No. 95-12 being the Waterfront

Residential 1 (WF1), Waterfront Residential 2 (WF2), Waterfront Residential 3 (WF3), Waterfront Residential 4 (WF4), Waterfront Residential 5 (WF5) and the Tourist Commercial (C2) Zones.

The second Interim Control By-law, By-law No. 2008-26 expanded the zoning categories under interim control to include the Tourist Commercial Marine (C2M) zone, Tourist Commercial Marine Restricted (C2MR) zone, and Special Provisions sections, 16.05, 16.09, 16.10, 16.11, 16.17, 16.19, 16.27, and 16.36, as set out in Zoning By-law No. 95-12 of the Township of McKellar and was appealed by Ms Sparrow's clients and Mr. Beier.

Both By-laws continue to permit the construction of new single-family dwellings or any accessory buildings or structures on any existing lots of record or on any lots that have been conditionally approved by the land division authority. Similarly, the By-laws do not prohibit any enlargements, repairs, or renovations of existing uses provided that such works do not increase the number of resort units.

Counsel for (Wyeridge), indicated that his client had only appealed By-law No. 2008-20. Ms Sparrow's clients, Greg Rea, Carolyn Kelly, Frank Pearce and Larissa Nowicki, and David and Lida Generali, have appealed this By-law as well as By-law 2008-26. The substance of the appeals of Ms Sparrow's clients was that the Interim Control By-laws should be expanded to include all lands that have frontage on "recreational waterbodies" and that the Interim Control By-laws should not have exempted lands that were granted provisional consent and in particular, lands affected by Official Plan Amendment No. 6.

Mr. Beier who owns property at 581 Centre Road, McKellar, has appealed the second Interim Control By-law, By-law No. 2008-26. He owns land on Lake Manitouwabing that is zoned C2M. He is concerned with his loss of potential development rights resulting from the passage of Interim Control By-law, No. 2008-26. He is also concerned with the process followed by the Municipality in passing of these by-laws and his inability to determine from municipal officials, what uses and future development activities he may undertake on his property while under interim control.

The purpose of the Interim Control By-laws was to place interim control on certain zoning categories within the municipality that regulate waterfront properties on what are termed "recreational waterbodies" within the Township; while the Municipality conducted a study of the planning implications and regulatory requirements it might need, to deal

effectively with certain types of resort and tourist commercial uses that are held under a fractional ownership scheme. The purpose of the proposed study is found in the Council Resolution 08-226 of September 15, 2008 (Exhibit 3, Tab 3), the recital portion of both by-laws and the approved terms of reference for the Planning Study found at Exhibit 3, Tab 9. While the resolution, recitals and final terms of reference vary somewhat in their wording, the intent and purpose of Council was to undertake a planning study to develop Official Plan policies, zoning regulations and to study the land use implications and impacts of fractional ownership schemes of resort type uses.

Mr. Trinaistich, at the commencement of the hearing, requested that a verbatim reporter be available during the hearing in the event he wishes to appeal matters arising from this hearing. The other parties consented to the verbatim reporter. The Board granted Mr. Trinaistich's request to have a qualified verbatim reporter present during the hearing pursuant to Rules 94 and 95 of the *Board's Rules of Practice and Procedure*. The Board will require a copy of any transcript ordered and the recording shall be only for the Interim Control By-law portion of the consolidated hearings.

Mr. Trinaistich then raised the issue of whether the Board had the jurisdiction to entertain the appeals raised by Ms Sparrow's clients that seek to expand the area subject to the Interim Control By-laws and collaterally to expand the geographic extent of the land use planning study currently underway. Mr. Trinaistich's submissions are found at Exhibit 2, the substance of which was that the Board does not have the jurisdiction to order the Council to expand the geographic area of its Interim Control By-laws and correspondingly, the scope of the planning study. Counsel for the Township took no position with respect to the matter of the Board's jurisdiction with respect to the appeals raised by Ms Sparrow's clients other than to say that the Township was opposed to expanding the areas under interim control.

Ms Sparrow on the other hand, asserts that there are legitimate and compelling planning grounds to expand the area under interim control, that her client's appeals have been known for some time, and that they have fully complied with the Board's procedural direction for this hearing. She asserts that her clients have retained professional planning advice, have exchanged witness statements as required by the Board, and that the motion brought by Mr. Trinaistich is without foundation and contrary to the Board's *Rules of Practice and Procedure*.

The Board, after considering the submissions, made the following findings. No clear case law was presented indicating that the Board did not have jurisdiction to hear the appeals as submitted nor that the Board's jurisdiction was any different than that of the Council. The parties have prepared for the hearing pursuant to the Board Procedural Order of December 10, 2008. The Board finds that no prejudice would result to Mr. Trinaistich's clients in proceeding with the hearing as directed by the Board, as his client's lands were already covered by the original Interim Control By-law. His client's appeal is not prejudiced by the expansion sought by Ms Sparrow's clients. The Board, with the benefit of the fullness of a hearing, will make a determination regarding the appeals raised by Ms Sparrow's clients.

During the course of the hearing, two letters (Exhibits 12 and 14), were delivered to the Board, opposing the appeals of Ms Sparrow to expand the areas under interim control on the basis that the identified properties in the letters, were not affected by the current Interim Control By-laws and for the Board to expand the By-laws without hearing from these property owners, would be unfair since they were not parties to the appeals. The Board gave copies of these letters to the parties present and advised that it would hear any submissions the parties wished to make in this regard during closing argument.

THE CONTEXT AND HISTORY

The Board will provide a brief contextual history of the Official Plan for the Township of McKellar and the applications of Wyeridge, which form part of the rationale being put forward for both the imposition of Interim Control By-laws by the Township and form as well a portion of the basis for the appeal brought by Wyeridge.

The Official Plan of the Township of McKellar found at Exhibit 3, Tab 1, was finally approved by the Ontario Municipal Board on August 23, 1996, and includes five amendments to the parent document. On April 3, 2004, the Township of McKellar held a public meeting to consider the need to update this Official Plan. The conclusions of a planning report prepared by Mr. Jackson dated April 16, 2004, and the resultant public meeting was that there was no need to revise the Township's Official Plan at that time.

On May 4, 2007, Wyeridge filed a rezoning application, after almost a year of pre consultation with Mr. Jackson and other Municipal officials and after making presentations to the Council, to rezone a 28 hectare vacant parcel of land with about 2,200 metres of shoreline on Lake Manitouwabing from Waterfront 2 (WF2) to Tourist

Commercial (C2), to allow for a 55 unit fractional ownership resort type development. Council passed a resolution on May 31, 2007, deeming the application complete for the purposes of holding a public meeting as prescribed by the *Planning Act*. This resolution was passed after Council heard deputation from the developer at a meeting with the Council on May 22, 2007, and after considering a report from its planner, Mr. Jackson. The first public meeting regarding the Wyeridge application was held on June 28, 2007 at which time Wyeridge presented its proposal and some residents expressed concerns regarding the development. Following this meeting the applicant, Wyeridge, continued to submit documentation in support of its proposal and the Township retained independent consultants to undertake peer reviews of certain studies commissioned by Wyeridge, all at Wyeridge's expense. During the fall and winter of 2007-2008 documents continued to be exchanged between the Township and Wyeridge. On May 14, 2008, Counsel for Wyeridge filed an appeal under subsection 34(11) of the *Planning Act* on the basis of Council's refusal to enact a Zoning By-law Amendment within the timeframe prescribed by the *Planning Act*. In spite of this appeal, Counsel for Wyeridge invited the Council to continue its deliberations on his client's proposal.

The Township held a second public meeting concerning the Wyeridge application on July 28, 2008. The Township Council at that time had the benefit of several technical reports and their peer reviews. No planning appraisal was forthcoming from at this meeting. A number of residents continued to express concerns at this meeting about the application and made deputations to the Council on August 18, 2008 and September 2, 2008, requesting that Council deny the rezoning request.

On September 12, 2008, three days before Council passed the first Interim Control By-law, Wyeridge filed a formal site plan application with the Township for their project.

Council at its public meeting of September 15, 2008, received the rationale report of Mr. Jackson dated September 11, 2008, regarding the Wyeridge project which recommended the imposition of Interim Control. This report was subsequent to an in camera meeting Mr. Jackson had with the Council in August 22, 2008, to consider legal advice regarding the pending litigation with respect to Wyeridge's Zoning appeal.

The Reeve of the Township at a Council meeting of September 2, 2008, declared that something will be coming forward on the Wyeridge rezoning application at the September 15, 2008 Council meeting.

On September 11, 2008, Mr. Jackson delivered his report recommending that:

1. The Township should authorize its planner to initiate the necessary study to provide recommendations for its recreational waterbodies for immediate implementation into its Official Plan and Zoning By-law, and
2. The Wyeridge McKellar Developments Inc. application is before the Ontario Municipal Board. In order that the results of this study can be considered in the public process and the resultant approved policy can then inform the assessment of this application, Council should enact an Interim Control By-law to provide the necessary time.

Copies of Mr. Jackson's report were posted by the Township on a website under its control and copies of the report were e-mailed at that time to Counsel for Wyeridge.

It was at the September 15, 2008 meeting, that Council passed the first Interim Control By-law. Mr. Trinaistich was present at this meeting and made submissions on behalf of his clients to reconsider the Jackson report prior to passing of the first Interim Control By-law. Some residents were present at this meeting and made submissions to Council on the Wyeridge project. Mr. Jackson was also present to respond to his report. Council at a subsequent meeting received submissions by residents and amended the Interim Control By-law with a second by-law on October 6, 2008, which added to the zoning categories under interim control. Mr. Beier filed an appeal to this By-law as it included his property.

THE EVIDENCE

The Board, during the course of this six-day hearing, heard from the following witnesses.

Mr. John Jackson is a qualified land use Planner who acts as the planning advisor for the Township of McKellar, a position he has held since 1990. Mr. Jackson is the author of the Township of McKellar Official Plan presently in force and effect and is as well the author of the planning rationale report (Exhibit 4 Tab 5), that recommended the passing of an Interim Control By-law so that the Township could develop a new policy framework to judge the Wyeridge proposal and its planning and social impacts on "recreational waterbodies" within the Township.

Mr. Edward Davidson, a qualified land use planner, was retained by Ms Sparrow's clients in December of 2008, to review the Interim Control By-laws, and to assist them in their appeals to expand the scope of these By-laws. Mr. Davidson is the spouse of Ms Sparrow and with her owns property on Lake Manitouwabing.

Mr. Shane Boggs, the Clerk Administrator of the Township of McKellar gave evidence under summons by Mr. Beier.

Mr. Reg Moore, the Chief Building Official and By-law Enforcement Officer of the Township, gave evidence under summons by Mr. Beier.

Mr. Robin Smith, a qualified professional Engineer and one of the principals of Wyeridge McKellar Developments Inc., gave evidence regarding the activities of and the substance of the Wyeridge proposal and his concerns regarding the impacts of the Interim Control By-law on the Wyeridge project.

Mr. James C. Dymont, a qualified land use planner, was retained by Wyeridge in October 2006, to assist them in seeking an approval for its Tourist Resort Commercial development proposal on Lake Manitouwabing.

The Board will give as a summary of what it perceives to be the key evidentiary components provided by the key witnesses before it makes the requisite findings on the matter. This will form the basis of the findings that the Board makes beginning on page 12 of this decision. These components are somewhat detailed as the varying concepts and opinions placed before the Board by the various witnesses are significant and important. The reader of this decision must therefore focus on both areas of the decision (THE EVIDENCE, and FINDINGS AND CONCLUSIONS). This is done for the sake of the ease of readability so that the findings of the Board can be easily discerned.

The substance of Mr. Jackson's evidence with respect to the imposition of interim control was that the Township's Official Plan currently in place, did not contemplate year round tourist resort uses that could result from a fractional ownership scheme and that the Official Plan as originally drafted, has no effective planning policy regime in place with which the Township could judge the social and planning impacts that could result from such developments as that being proposed by Wyeridge.

Mr. Jackson stated that the current Official Plan had no *Planning Act* Section 37 policies which he opined, could assist in regulating certain aspects of a development

such as Wyeridge's and that in his opinion, this policy option should be reviewed and amendments to the Official Plan incorporating Section 37 provisions, should be considered. He proffered this opinion to Wyeridge's consultant, Mr. Dymont in a letter dated October 15, 2007, and found at Exhibit 4, Tab 17.

Mr. Jackson confirmed that his firm had been retained by the Township to

"study and report on the land use implications of fractional ownership and similar resorts and to provide recommendations for Official Plan policies and zoning by-law amendments based on the analysis. Recommendations shall include, but are not limited to, criteria for the determination of desirable uses and densities and policies for the implementation thereof."

Mr. Jackson further advised the Board that the terms of reference for the study had been approved (Exhibit 3, Tab 9) and that the study was underway with a direction from Council to have the study completed within the year.

It was Mr. Jackson's opinion that the two interim Control By-laws passed by the Township, provided adequate public protection while allowing the Township time to study the planning and social impacts resulting from the new forms of development that could result from fractional ownership schemes within the Township.

When Ms Sparrow presented Mr. Jackson with Exhibit 8, a map showing additional areas her clients felt should be covered by interim control, he opined that the Official Plan Amendment No. 6 lands were appropriately regulated, that the lands shown in blue on Exhibit 8, were zoned WF3 Waterfront and EP Environmental Protection zone and that the lands shown in orange on the same exhibit being Lot 26, Concession 10, were zoned RU Rural and EP Environmental Protection. It was his evidence that the zoning on these properties was such that there was little likelihood that any development could go forward without a rezoning and a full planning review as was the case of the lands covered by Official Plan Amendment No. 6.

He confirmed on questioning from the Board that he was satisfied that there was no need to expand the areas under interim control and that in his opinion, the lands subject to Official Plan Amendment No. 6 and the associated provisional consent conditions, would adequately control any new uses. He confirmed that Official Plan Amendment No. 6 was not presently in force and effect. He noted that if Official Plan Amendment No. 6 was not approved, the provisional consent applications subject to it would not be approved as well. He argued that in this case, the underlying zoning would

continue to apply and in his opinion, this zoning would provide adequate control to prohibit the form of development the Township wishes to restrict by the Interim Control By-laws while conducting its planning review. He freely admitted under cross-examination that nothing in the Interim Control By-laws would prohibit existing uses from being held under or converted to a fractional ownership scheme. He also freely admitted that when he considered the Wyeridge rezoning application in 2007, he proffered the opinion that an Official Plan Amendment to the current Official Plan was not needed in order to consider the application to rezone the property for a tourist commercial use and that he was aware of the fractional ownership concept being proposed by Wyeridge.

Mr. Davidson in his evidence supported the need for the Interim Control By-laws on the grounds that the planning policies in the Township of McKellar Official Plan and the regulations in the Township Zoning By-law are non-existent when it comes to dealing with the issues associated with the use of year-round resorts operating under a fractional ownership scheme. He supports and endorses the evidence of Mr. Jackson that the Official Plan planning policy and zoning regulation regimes in place, are not adequate to assess and deal with this new form of development within the Township. It was his opinion that the current Official Plan would need to be amended if the Wyeridge proposal was to go forward. He proffered that all lands abutting "recreational waterbodies" regardless of their zoning designation, should have been placed under interim control. In particular, he referred to the lands set out in Exhibit 8 as well as lands in Lot 35, Concession 7, in Exhibit 25.

He confirmed under cross-examination that the lands in Lot 35, Concession 7, were in fact Crown lands and on this basis, he had no concerns. Similarly, he expressed no concerns with the use of single-family dwellings being proposed for the lands associated with Official Plan Amendment No. 6. His concern seemed to be with the process of evaluation associated with Official Plan Amendment No. 6 and the associated provisional consent, as well as the fear that if these approvals fail and the lands revert to their previous zoning, there could be a gap in the areas under interim control protection.

He proffered that the area under interim control and the study area need to be co-terminus and that in his opinion, there was no planning rationale to exclude any of the lands shown on Exhibit 8.

In supporting the need for the Interim Control By-laws Mr. Davidson noted that:

1. The Ministry of Municipal Affairs and Housing has consistently suggested that the Township undertake a review of its Official Plan to address current Provincial Policies and the recent Amendments to the *Planning Act*.
2. The lake capacity and density provisions of the Official Plan are outdated and inconsistent.
3. The Township Official Plan provides no policy directions for more recent forms of development such as fractional ownership, time share or condominium proposals and that the consideration of these forms of development should be based on land use polices established to guide their development.

The concern raised by Mr. Beier dealt primarily with the manner and method used by Council to pass the Interim Control By-laws and in particular By-law No. 2008-26, and his inability to satisfy himself as to what he might be able to do with his trailer park tourist resort while under interim control. Much of his questioning of Mr. Boggs and Mr. Moore revolved around these two issues. On questioning from the Board, Mr. Beier confirmed that all of his conversations with the Township officials had been verbal to date and that he had not as yet made any formal building permit application to the Township. The evidence of Mr. Jackson in this regard is that Mr. Beier could modify the configuration of his use on the proviso that the number of resort units was not increased and that the other aspects of his business were not restricted by the Interim Control By-law. The Chief Building Official for the Township was less forthcoming in his testimony.

The Board then heard from Mr. Smith who reviewed and confirmed the activities of Wyeridge in its attempts to secure the rezoning approval for its 55-unit fractional ownership tourist resort project on Lake Manitouwabing. He proffered that Wyeridge from the inception of the project had proceeded in good faith, had met all the requests of the Township for studies, had conducted its own open house in July of 2007, had paid for independent peer reviews of its work, and that the peer reviews resulted in a favourable response to their work and to the proposed project.

He characterized the September 15, 2008 Township Council meeting as a "secret meeting" in that the agenda did not divulge that Council might consider the passage of an Interim Control By-law. He freely admitted that Council heard deputations from

Wyeridge's solicitor to reconsider the matter and that Wyeridge was provided by e-mail with a copy of Mr. Jackson's September 11, 2008 report, prior to the Council meeting.

He contended to the Board that Township Council's actions in passing the Interim Control By-law was done in bad faith, did not represent sound planning and was patently unfair to Wyeridge. It was his position that the Wyeridge proposal was in conformity with existing Official Plan policies as confirmed by Mr. Jackson in his May 22, 2007 report and concurred with by Wyeridge's own planning consultant, Mr. Dymment.

He believes that the sole purpose of the actions of McKellar Council in passing the Interim Control By-law that effects Wyeridge's property, was to frustrate the plans of Wyeridge and to delay making a decision on the Wyeridge project and that by doing this, Township Council was acceding to the wishes of residents opposed to the ~~Wyeridge project without any valid planning reasons.~~

His evidence to the Board was that to date Wyeridge had soft cost expenses in excess of \$150,000.00 associated with the rezoning application. It was his position that the economic hardships resulting from the time delays to Wyeridge far outweigh any public benefit that would be attained from halting the Wyeridge project and that the land use planning study contemplated by the resolution in support of the Interim Control By-law, could proceed with the development of future land use and Official Plan policies without stopping the Wyeridge project. He freely admitted under cross-examination that Wyeridge had only a conditional offer to purchase the subject property, which under certain conditions would permit Wyeridge either to extend the agreement or to walk away from it.

Mr. Dymment reviewed for the Board his involvement in the Wyeridge project, his planning opinions regarding the need for the Interim Control By-laws and their impact and validity on the Wyeridge project. His comments on the impacts on Wyeridge are very similar to those of Mr. Smith's. Mr. Dymment opined that fractional ownership was a form of land tenure and not a land use that the Township could regulate through Section 34 By-laws. He opined that there was nothing in the two Interim Control By-laws that would restrict the conversion of the ten or so zoned tourist commercial properties to a fractional ownership format. He endorsed Mr. Jackson's opinion as set out in his report of 2007 that the Wyeridge proposal would be in conformity with the existing policy regime as found in the current McKellar Official Plan and noted that Wyeridge has

completed all of the relevant studies demanded by Mr. Jackson pursuant to Section 16.2.3. of the McKellar Official Plan.

He further opined that at the end of the Interim Control process, Wyeridge should be entitled to have its project evaluated under the current policy regime (Clergy Principal) and that on this basis, the Interim Control By-law passed by Council and imposed on Wyeridge, was merely a delaying tactic that was patently unfair to his client.

He offered the opinion that the use of interim control was an extraordinary measure to be taken by a Municipality and should only be used in situations where a development could occur as of right under existing zoning regulations. In his opinion, interim control should not be used when a municipality continues to have appropriate regulatory control available to it under Section 34 of the *Planning Act* and has designated the activity as a matter to be placed under site-plan control. He sees no need for Section 37 Official Plan Policies as his client has offered to meet all of the Township's requests through a development agreement with the Municipality. He also put forward the proposition that the 55-unit development being proposed by Wyeridge was well within the density limits of the current C2 zone and that on this basis Section 37 agreements would or should not apply.

He further opined that the actions of Council in passing the Interim Control By-laws were contrary to the growth policies set out in section 6 of its current Official Plan and in particular section 6.4. Mr. Dymont under cross-examination admitted that the current McKellar Official Plan had no policy regime in place for dealing with the planning issues associated with fractional ownership. When confronted under cross-examination with Official Plan and Zoning By-laws, that he had authored for other municipal jurisdictions, he admitted that these documents had planning policies in place to deal with planning issues associated with and that could result from fractional ownership forms of development.

FINDINGS AND CONCLUSIONS

The Board, after carefully reviewing the evidence, the exhibits filed and the submissions made by the parties makes the following findings.

The Board, at the outset, wishes to make it clear that the findings the Board makes in this decision apply only to the appeals of the Interim Control By-laws. The Board is making no findings with respect to the Zoning By-law and Site Plan appeals of

Wyeridge nor is the Board making any findings relating to the matters that are the subject to Official Plan Amendment 6 of the Township of McKellar beyond their implications as they relate solely to the two Interim Control By-laws under appeal. There are other forums in place to adequately deal with planning merits and issues associated with these proposals at an appropriate time.

The power of a municipality to pass an Interim Control By-law is set out in Section 38 of the *Planning Act* and for purposes of clarity and reference, this section of the *Planning Act* is reproduced in this decision as follows:

Interim control by-law

38.(1)Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

Extension of period by-law in effect

(2)The council of the municipality may amend an interim control by-law to extend the period of time during which it will be in effect, provided the total period of time does not exceed two years from the date of the passing of the interim control by-law. R.S.O. 1990, c. P.13, s. 38 (1, 2).

Notice of passing of by-law

(3)No notice or hearing is required prior to the passing of a by-law under subsection (1) or (2) but the clerk of the municipality shall, in the manner and to the persons and public bodies and containing the information prescribed, give notice of a by-law passed under subsection (1) or (2) within thirty days of the passing thereof. R.S.O. 1990, c. P.13, s. 38 (3); 1994, c. 23, s. 23 (1).

Appeal to O.M.B.

(4)Any person or public body to whom notice of a by-law was given under subsection (3) may, within sixty days from the date of the passing of the by-law, appeal to the Municipal Board by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection. R.S.O. 1990, c. P.13, s. 38 (4); 1994, c. 23, s. 23 (2).

Application

(5) If a notice of appeal is filed under subsection (4), subsections 34 (23) to (26) apply with necessary modifications to the appeal. 1996, c. 4, s. 23.

When prior zoning by-law again has effect

(6) Where the period of time during which an interim control by-law is in effect has expired and the council has not passed a by-law under section 34 consequent on the completion of the review or study within the period of time specified in the interim control by-law, or where an interim control by-law is repealed or the extent of the area covered thereby is reduced, the provisions of any by-law passed under section 34 that applied immediately prior to the coming into force of the interim control by-law again come into force and have effect in respect of all lands, buildings or structures formerly subject to the interim control by-law. R.S.O. 1990, c. P.13, s. 38 (6).

~~**Where by-law appealed**~~

(6.1) If the period of time during which an interim control by-law is in effect has expired and the council has passed a by-law under section 34 consequent on the completion of the review or study within the period of time specified in the interim control by-law, but there is an appeal of the by-law under subsection 34 (19), the interim control by-law continues in effect as if it had not expired until the date of the order of the Municipal Board or until the date of a notice issued by the secretary of the Board under subsection 34 (23.1) unless the interim control by-law is repealed. 1994, c. 23, s. 23 (3).

Prohibition

(7) Where an interim control by-law ceases to be in effect, the council of the municipality may not for a period of three years pass a further interim control by-law that applies to any lands to which the original interim control by-law applied.

Application of s. 34 (9)

(8) Subsection 34 (9) applies with necessary modifications to a by-law passed under subsection (1) or (2). R.S.O. 1990, c. P.13, s. 38 (7, 8).

In considering the appeals of Ms Sparrow's clients to expand the area under interim control, the Board finds that there is adequate protection under the existing Interim Control By-laws. In fact, some of the lands they seek to have included in the area under interim control are Crown Lands with little likelihood of development. Mr. Davidson, Ms Sparrow's own witness, concurred in this regard.

The Board, in considering the other lands identified by Ms Sparrow and shown on Exhibit 8, prefers and accepts the evidence of Mr. Jackson that the current zoning provides adequate control and that the further development of any of these lands to a form of development precluded by the Interim Control By-laws, would require a rezoning application.

The Board does not adopt the proposition that the geographical area covered by the Interim Control By-laws and the study currently underway must be identical from a geographic perspective. The terms of reference for the study (Exhibit 3, Tab 9) must and do deal with the issues that instigated the imposition of interim control and may result in new planning policies and regulatory regimes that go beyond the geographic areas currently under interim control.

The Board in this regard accepts and adopts the evidence of Mr. Jackson that ~~adequate control exists and that there is no need to expand the area of interim control~~ at this time.

The Township's position with respect to the letters opposing the change to the areas under interim control being put forward by Ms Sparrow's clients, was that for the Board to act in such a manner would be unfair and a denial of natural justice as those writing the letters were not opposed to and were not affected by the Interim Control By-laws and had not sought and were not parties to the appeal and would have no appeal rights to this Board, if it agreed with Ms Sparrow's submissions.

The question of the Board's jurisdiction to modify Interim Control By-laws raised by Mr. Trinaistich at the commencement of the hearing based upon the Board finding that the Interim Control By-laws should not be changed as requested by Ms Sparrow's clients, makes the question of the Board's jurisdiction to do so moot.

The Board has carefully reviewed the minutes for the Council meetings leading up the passing of the first Interim Control By-law and the evidence of Mr. Jackson and Mr. Boggs. There is no compelling evidence that Council acted outside of its jurisdiction as set out in Sections 38(1) and 38(3) of the *Planning Act*. The evidence is that the Township posted Mr. Jackson's planning report on the website under municipal control and in fact, Mr. Jackson e-mailed a copy of his report to the Counsel for Weyeridge on the Friday before the Council meeting of September 15, 2008. It is equally clear from Exhibit 30, that many local residents were aware of Mr. Jackson's September 11, 2008 report. This was a concern raised by Mr. Beier in his submissions.

If the September 15, 2008 Council Meeting was a "secret meeting" as alleged by Mr. Smith in his evidence, it was a very well and widely known "secret".

The *Planning Act* in this regard is quite clear that there is no requirement for Council to give any prior notice of its intent to pass an Interim Control By-law. That the Township determined to give limited notice of this potential action while not common, is not precluded by the legislation, did not prejudice any party now before the Board, and in the Board's finding, was within the Council's discretion. The mere fact that a clear notice of Council's intent to consider passing an Interim Control By-law at the meeting of September 15, 2008, was not declared on the meeting's Agenda document does not, in the Board's findings, negate the By-laws.

Similarly, there is no evidence before the Board that the Township failed in any way to meet its obligations for the giving of notice of the passing of the Interim Control By-laws as prescribed by subsection 38(3) of the *Planning Act*.

Counsel for Wyeridge in his submissions inferred that the Interim Control By-law affecting his client was improperly passed and that the meeting held in camera on August 22, 2008 was improper and was not held to receive legal advice on the pending litigation of the Wyeridge appeal, but instead was to give Mr. Jackson his "marching orders" to prepare an Interim Control By-law. Counsel for the Township submitted that legal opinions regarding the litigation were provided to Council at this meeting. The Board heard no compelling evidence to support Mr. Trinaistich's assertions that this in camera meeting was improper. That being said, there are other avenues available to Wyeridge to quash the Interim Control By-laws if it believes them to have been improperly passed.

The Board in considering the concerns raised by Mr. Beier, can clearly understand his concerns and frustrations for through no fault of his own, his property has been caught by the Interim Control By-laws as have some ten other tourist commercial zoned properties in the Township. The Board accepts his assertions that he has always complied with municipal regulations and has acted in good faith as a good citizen and businessman in the conduct of his business and as such, the Interim Control By-law in his case, are unwarranted. No evidence was submitted to contradict these assertions.

The Interim Control By-law in effect limits the expansion of Mr. Beier's tourist resort facility as it relates to new additional tourist resort units. In all other respects he is

unaffected by the By-law. The Board can also understand his frustration in not being able to get a clear determination from the Township as to what he might be able to do with his property during the interim control period. He freely admitted to the Board that all of his communication to date with the Township have been verbal in nature and that to date he has not submitted a formal building permit application. It may be that the lack of precision in explaining exactly what he wishes to do that has resulted in an inconclusive response by Township officials. It is clear to the Board from the evidence of Mr. Jackson that the only restriction the Interim Control By-law would place on Mr. Beier's operation beyond the current zoning regulations, is the restriction to limit the number of new resort units in relation to the number of resort units currently on his property. Until Mr. Beier submits a formal application, it is difficult to accurately determine the impact, if any, the Interim Control By-law may have on what he intends to do in the near term. This is clearly the same condition that would apply to all the other properties currently zoned for resort operations now under interim control. It is the Board's finding that this is not an undue hardship upon which the Board should amend By-law 2008-26 to exclude Mr. Beier's property. The Board heard no compelling evidence adduced by Mr. Beier through his submissions or witnesses that the Township acted improperly when it passed the second Interim Control By-law affecting his property.

In considering the assertions of Mr. Smith that the actions of the McKellar Council in passing the Interim Control By-laws would cause an economic hardship to his company, that would outweigh any public planning benefit, the Board would note that Mr. Smith is a skilled and knowledgeable individual with respect to land development. The land development business is a high risk, high reward activity and that until a final approval for a project has been achieved, there is no certainty of an application's outcome. The conditional offer that Weyeridge has on the subject property on Lake Manitouwabing is clear evidence that Weyeridge understands the risks associated with the development approval process. The assertion of economic hardship is not a reason for the Board to overturn the Interim Control By-law that affects his property.

The Board can understand the assertions of Mr. Smith and his planner Mr. Dymont that the actions of Council in passing the Interim Control By-laws appear unfair in light of their almost two years of effort to secure an approval of their project. However, ~~the authority granted to Municipal Councils under subsection 38(1) of the *Planning Act*,~~ is dramatic and intended to give a Municipal Council some breathing time to consider its planning policies. The simple fact that Mr. Jackson's concerns about the

project were not articulated aside from his letter suggesting the need for Section 37 Official Plan policies until September 11, 2008 and that Council did not determine its course of action (Passing of Interim Control By-law 2008-20) until September 15, 2008, does not in the Board's review of the evidence, constitute a condition of bad faith that would warrant overturning the Interim Control By-laws. Council considered submissions from Counsel for Wyeridge, local residents, and its planner as late as September 15, 2008, before making its final decision to pass the Interim Control By-laws.

It is the finding of the Board that the Municipal Council, after considering all sides, made its decision to pass the Interim Control By-laws in the public interest of the McKellar community and that it had before it the appropriate planning rationale required by the *Planning Act* to sustain this action.

In this regard it is instructive to consider the reasoning of Mr. Justice Laskin in the Court of Appeal decision *re Equity Waste Management of Canada et al. and the Corporation of the Town of Halton Hills* where Mr. Justice Laskin states, "Interim control by-laws are, therefore, an important planning instrument for a municipality. They allow the municipality to rethink its land use policies by suspending development that may conflict with any new policy." He quotes Henry J. in *715113 Ontario Inc. v Ottawa (City)*:

A by-law enacted under this provision is authorized for the purpose of protecting the public interest in suitable zoning of the area in question and takes precedence over the right of affected landowners to use their lands freely.

Mr. Justice Laskin continues, "Before passing an interim control by-law, a municipality must meet only **one statutory condition** (emphasis added). Under s. 38(1) of the *Planning Act*, it must have a by-law or resolution directed that a review or study be undertaken in respect of land use planning policies in the municipality or any defined area of it.

It is the Board's finding that the Township complied with this statutory condition as articulated by Justice Laskin in *Equity Waste Management of Canada et al. and the Corporation of the Town of Halton Hills* before passing the Interim Control By-laws under appeal.

Furthermore, it has been held by the courts and this Board that the duty and the obligation to protect the public interest vests with the Municipal Council. The actions of Ms Sparrow client's, Wyeridge, and to a lesser degree Mr. Beier, reflect a divergent but informed self-interest. However, it is the Board's findings that the public interest needs of

the Township to review its planning policies and regulations as they relate to new forms of land ownership and their resultant development impacts on the natural and physical resources of the community, outweigh the private interest of these Appellants. Further, the Board finds that the Township Council acted in accordance with the requirements of Section 38 of the *Planning Act* and in the public interest when it passed the Interim Control By-laws.

Mr. Trinaistich in his submissions referred the Board to *Paletta International Corp. Burlington (City)* where Member Pendergrast refers to the 1987 Board decision *Nolan et al v. Township of McKillop* and "the well-established practice of evaluating such by-laws with reference to the following four principles" that this decision first articulated, namely:

1. That Section 38 (then Section 37) of the *Planning Act* must be interpreted strictly in view of the fact that it permits a municipality to negate development rights;
2. That the municipality must substantiate the planning rationale behind the authorizing resolution and the interim control by-law;
3. That the by-law must conform with the Official Plan; and
4. That the authorized review must be carried out fairly and expeditiously.

Board Member Pendergrast added that, "in addition to these criteria, the Board on other occasions has also assessed interim control by-laws in terms of urgency and need, and quotes a Board decision in *Carr v. Owen Sound* which asks, "Are there effective and less drastic instruments that might have been used by the municipality to achieve the desired end". This is a proposition opined by Mr. Dymont in his evidence.

Mr. Trinaistich urged the Board to infer that Mr. Jackson's epiphany to the deficiencies in the McKellar Official Plan so late in the development review process of the Wyeridge project, was not motivated by strong legitimate planning concerns but was instead a mere reaction to local resident pressure and that the Board should infer similar motives to the Township Council actions of September 15, 2008. It is clear to the Board that the Wyeridge project was the catalyst behind the passing of the Interim Control By-laws. However, in the Board findings that there is no compelling evidence that either Mr. Jackson or the Municipal Council acted outside of their obligations and duty to protect the public interest as they saw it.

It is also the Board's finding that the time delays of three to five years articulated by Mr. Smith and Mr. Dymont that could result from the imposition of the Interim Control By-law to their client's project while realistic do not constitute a hardship beyond that contemplated by the legislature when it passed subsections 38(6) and 38(6.1) and are not grounds for the Board to overturn the Interim Control By-laws. The urgency or need for a decision by Wyeridge is motivated by private gain and not the long-term public interest of the Township.

The Board does not accept the assertions of Mr. Dymont that Section 37 policies if in place would not apply to the Wyeridge proposal. It is clear in the Board's mind that the rezoning being sought is an increase in density over what the current zoning on the property would permit and could trigger a Section 37 agreement if the Township had such policies in place and that this would give proper authority in part to some of the agreements contemplated by the Township and Wyeridge during their discussions.

The Board was urged by Mr. Trinaistich to accept the evidence of Mr. Dymont that the Interim Control By-laws were not in conformity with the existing Official Plan, as they would freeze development for a significant period of time over a significant portion of the Township. However, a full reading of the Official Plan and particularly Section 6.4 makes it clear that the primary concern of the Township as expressed in its Official Plan is that "new development should be evaluated on the basis of any impacts on the natural and physical environment" and that new development or the rate of growth in the Township is secondary. The Board is satisfied on this basis alone that the Interim Control By-laws under appeal are in conformity with the existing Official Plan.

It is the Board's finding based upon the preponderance of the evidence that developing new planning policies and tools to properly evaluate new forms of land use resulting from new ownership schemes in the Township of McKellar and their impacts on the "natural and physical environment", is exactly what the Township Council intended to do when it passed the Interim Control By-laws and that this is an appropriate planning rationale behind the authorizing resolution and the Interim Control By-laws.

It is the conclusion of the Board in this case that the four principles enunciated in *Nolan et al v. Township of McKillop* and expanded in *Carr v. Owen Sound* have been met in spite of the direction by Justice Laskin in *Equity Waste Management of Canada et al. and the Corporation of the Town of Halton* that the only legislative condition a

municipality must meet in passing an Interim Control By-law is that "it must have a by-law or resolution directing that a review or study be undertaken in respect of land use planning policies in the municipality or any defined area of it." The Board finds that this condition has been met by the Township.

The Board in considering the proposition put forward by Mr. Dymont that the imposition of the Interim Control By-laws would have no long term effect as his client's project would ultimately have to be considered under the current planning policy regime in place (Clergy Principal), prefers and adopts the logic enunciated by Board Member Jackson in *Petro-Canada Asset Management and Runnymede Developments Corp. V. Ajax (Town)* when he states:

The nature of the breathing space is set out in section 38(6) of the *Planning Act* which provides that the zoning in effect prior to the passing of the **Interim Control By-law** will come into effect again after the expiry of the **interim control period** (breathing room) if Council has not passed a new zoning by-law consequent on the review or study within the breathing room space. The *Planning Act* accordingly preserves the priority of Zoning passed in the period of the breathing period and if passed in that period the prior zoning does not come back into effect unless the new zoning which has its own notice requirements is appealed and is defeated on the appeal.

The breathing room is further legislated by an amendment to section 38, in 1994, whereby, in section 38(6.1), if the new Section 34 By-law passed in the **interim control period** is appealed, and that Appeal is heard subsequently outside the breathing space of the **interim control period**, the Legislature has extended the **interim control breathing space** – it continues as if it had not expired until the date of the OMB order on the new zoning by-law. This protection for the new zoning is statutory and must be strictly followed until the new zoning is approved or rejected. When the new zoning implements a new Official Plan Amendment it makes no sense to move back to the prior OP for evaluation. In this regard, in the context of new zoning and an Official Plan Amendment flowing from the breathing space of an interim control period, the Clergy Principle does not apply or put another way, the new policies must be evaluated first and should they fail, then there is reversion to the policies of the former Official Plan and former zoning by-law.

It is the conclusion of the Board that the breathing space referred to by Member Jackson is warranted in this case, and that the Interim Control By-laws passed by the Township of McKellar are an appropriate intervention in the normal planning process of the Township and that at the conclusion of the breathing space provided by the Interim Control By-laws, that the planning review process for Wyeridge's project could be considered under a new and different planning policy framework as articulated by Member Jackson.

Accordingly and for the reasons contained in this decision:

1. The Board Orders that the Appeals of Ms Sparrow's clients, Greg Rea, Carolyn Kelly, Frank Pearce and Larissa Nowicki, and David and Lida Generali to Interim Control By-law No. 2008-20 and By-law No. 2008-26 of the Township of McKellar, are dismissed.
2. The Board Orders that the Appeal of Mr. Henry Beier to Interim Control By-law 2008-26 of the Township of McKellar, is dismissed.
3. The Board Orders that the Appeal of Wyeridge McKellar Developments Inc. to Interim Control By-law No. 2008-20 of the Township of McKellar, is dismissed.

This is the Order of the Board.

"J. P. Atcheson"

J. P. ATCHESON
MEMBER
