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MM080065

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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

Application by: Barry Dingwall & Stephen Sainsbury
Subject: Application to dissolve the existing ward structure
Municipality: Town of Kearney
OMB Case No.: MM080065
OMB File No.: MM080065

APPEARANCES:

Parties

Municipality of Parry Sound/Kearney

Barry Dingwall and Stephen Sainsbury

Counsel

E. Veldboom

DECISION DELIVERED BY S. B. CAMPBELL AND ORDER OF THE BOARD

The Application:

On September 26, 2008 a Petition of Electors (the "Petition") (Exhibit # 5, TAB 32) was filed with Council of the Municipality of Parry Sound/ Kearney (the "Town") pursuant to section 223(1) of the *Municipal Act* (the "Act"). That section provides "electors in a municipality may present a petition to the Council asking the Council to pass a by-law dividing or redividing the municipality into wards or dissolving the existing wards". The Petition requested that the existing wards be dissolved.

On November 27, 2008 Town Council passed a resolution that Council deny the Petition (Exhibit # 5, TAB 36).

On December 26, 2008 Barry Dingwall and Stephen Sainsbury, two of the electors who had signed the petition (the "Applicants") filed an application pursuant to section 223(4) of the Act to have the Board dissolve the existing wards. That section

provides “if the Council does not pass a by-law in accordance with the petition within 90 days after receiving the petition, any of the electors who signed the petition may apply to the Ontario Municipal Board to have the municipality divided or redivided into wards or to have the existing wards dissolved”. Section 223(5) provides “the Board shall hear the application and may, despite any Act, make an order dividing or redividing the municipality into wards or dissolving the existing wards...”

The Law:

Section 223 of the Act does not set out criteria for the Board to consider upon an application pursuant to section 223(4). However the Board has developed jurisprudence in this area which will assist the Board in disposing of this matter. A number of decisions by the Board were cited by both the Applicants and the Counsel for the Town. In addition the Board finds that the decision of the Supreme Court of Canada in *The Attorney-General for Saskatchewan v. Roger Carter et al* [1991] 2 S.C.R. 158, to be of particular assistance in this matter. The Board in *Teno v. Lakeshore (Town)*, 2005, Decision/Order No. 2902 described the *Carter* case as being the “seminal case on effective representation”. This panel of the Board agrees with that characterization.

In *Carter* the Court found that section 3 of the *Charter of Rights and Freedoms*, which provides that every citizen has the right to vote in an election of federal or provincial members of parliament, establishes a right to “effective representation”. Such representation “...comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative”.

In the case at hand the concept of “effective representation” is especially germane when one considers the Town’s 2006 election results (Exhibit # 6, TAB 5). The Town has three wards, each of which is represented by two councillors. In the 2006 election in Ward 1 (Town Site) 317 electors chose two councillors, in Ward 2 (Bethune) 912 electors chose two councillors; and in Ward 3 (Proudfoot) 1401 electors chose two councillors.

In *Carter* the Court held that the first condition of “effective representation” is relative parity of voting power. The Court said:

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...

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...

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 interests 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 departures from absolute voter parity in the pursuit of more effective representation...

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. (Emphasis added)

In *Teno v. Lakeshore (Town)* the Board said "in assessing whether ward boundaries should be redivided, the overriding principle is voter parity as cited by the Supreme Court of Canada. Any deviations from voter parity must be justified based on other factors referred to by the Court and by this Board in a manner which supports the notion that in the absence of this deviation, there would be a loss of effective representation". This panel of the Board concurs and finds that "effective representation" and "relative parity of voting power" as described by the Supreme Court of Canada are of primary importance when the Board is called upon to make a decision under section 223 of the Act. Unless the Board has persuasive evidence before it that one of the factors listed by the Supreme Court (geography, community history, community interest, minority representation) should be determinative, the Board must seek "effective representation" and "relative parity of voting power" for all electors.

Evidence:

The Board heard extensive evidence from the Applicant concerning the history of the ward boundary matter in the Town. The issue did not arise as a result of the

Petition to Council in 2008. Rather, in August 2007, individuals who later became petitioners and Applicants, made a delegation to Town Council asking that Council establish a committee to review the ward system (Exhibit # 5, TAB 1). The Ad Hoc Committee to Consider the Ward System (the "Committee") was established by resolution of Council on August 31, 2007, with the Mayor and a Councillor from each ward "to represent Council" and seven electors (Exhibit # 5, TAB 3).

The Board accepts the evidence of Mr. Dingwall, one of the Applicants, and Chair of the Committee, that the Committee worked with determination on the issue before them. Public input was invited and received; consensus was sought and eventually reached. The Mayor remained a member of the Committee throughout its work, although his attendance at meetings was inconsistent. On September 3, 2008 the Committee, after what this Board can only characterize as thorough, transparent and thoughtful work, voted 5 to 1 to "recommend to Council that they replace the present electoral Ward system with an at large electoral system". The Mayor voted in favour of this resolution (Exhibit # 5, TAB 22).

On September 11, 2008 Mr. Dingwall, as Chair of the Committee, took the Committee's recommendation to Council. Mr. Dingwall's evidence was that immediately before the Council meeting the Mayor approached him, mentioned concerns he had arising from an article in "Municipal World" magazine and asked Mr. Dingwall to defer the Committee's recommendation. Mr. Dingwall saw no reason to do so; he took the Committee's recommendation to Council.

The result of the September 11, 2008 Council meeting is found in the very brief minutes of Council from the meeting (Exhibit # 5, TAB 30). After Mr. Dingwall reviewed the Committee's work and presented its recommendation, Council, with no questions, debate or discussion, by a vote of 4 to 1 adopted a resolution to refuse the Committee's recommendation. The Board notes that the Mayor, who had voted in Committee in favour of recommending dissolution of the wards now voted against it.

The Board has reviewed this pre-Petition process, not because it is particularly relevant to the decision which it must make on this Application, but because it informs the Board's assessment of the legitimacy of the positions put forward by the Applicants and the Town.

The Applicants have done everything possible to examine the issue of ward boundaries and appropriate representation for electors in the Town. In the course of preparing for this hearing the Applicants sought and reflected the views of the public. These views were consistently expressed, both for and against dissolution of the ward system through the work of the Committee and then the work of the Applicants. The Applicants have also gone to the trouble of retaining Dr. Robert Williams, an expert on Ontario municipal government and electoral politics, to provide the Board with valuable evidence on the issue before it.

The Board must contrast this with the effort made by the Town before this Board. Town Council which established the Committee was under no obligation to accept the Committee's recommendation. Council must always retain its legislative function. However, the fact that the Committee's work was rejected by Council without so much as a moment's discussion or debate, after the Mayor and Councillors were involved in the Committee's work and recommendation does not bear close scrutiny.

The Mayor testified before this Board that he changed his mind between the Committee's vote and Council's vote because of something he read in a "Municipal World" article. During his testimony, the Board specifically asked the Mayor to take the Board through the article which is found at Exhibit # 5, TAB 28, to demonstrate to the Board what was in the article that provoked such a radical change of heart on the issue of ward dissolution. The Mayor replied that he had not read the article in some time and could not enunciate what it was in the article that gave him such concern, except to say that it could cost candidates more to run in an at-large electoral system.

Counsel for the Town, in argument, told the Board that when the Board read the article, the Mayor's reason for concern "would jump out". As the Board told Counsel at the hearing and must reiterate, that is a shocking submission. Rather than have the Mayor, who provided the bulk of the Town's evidence, such as it was, detail what was in the article that caused him and Council to decide that the ward system should not be dissolved, Counsel for the Town expected that Board to read the article and ferret out the reason. With all due respect to Counsel, the Mayor and the Town, that is not "how it works".

The Mayor testified at length on behalf of the Town. He talked about the Town's history, its financial position and the admirable work of its volunteers. However, the

Mayor gave the Board very little evidence on why the existing ward system should be maintained. It seems that the Mayor is concerned that if the ward system is dissolved and Councillors are elected at large, the full time residents of the Town would not be properly represented. Seasonal residents, through their lake associations, would have too much influence. As a result there would no longer be residents willing to be the much needed volunteers.

With respect, such conjecture on the Mayor's part is simply that: conjecture. The Town adduced no evidence to demonstrate that full time residents of the Town would be under-represented in an at-large system. After hearing from many residents of the Town at the public session, the Board understands that many seasonal residents have a great commitment to the Town and its well-being. Many residents, including the Mayor, who began as seasonal residents are now full time residents.

The Town adduced no evidence that any of the factors as set out by the Supreme Court of Canada in the *Carter* case, which might militate against seeking relative parity of voting power are at play in the Town. Clearly, there are a variety of communities of interest, as there are in any town, but no evidence was presented by the Town to demonstrate why the serious lack of voter parity shown in the last election should be continued.

The Board gives great weight to the evidence of Dr. Williams. He is neither a seasonal nor a full-time resident of the Town; he is an expert, qualified by the Board to provide opinion evidence in the area of municipal politics and on ward boundary issues. He has served as an expert witness in eight Board hearings on ward boundary applications. He has been retained as a consultant by a number of municipalities on the issue of their electoral systems.

Filed as Exhibit # 21 was Dr. Williams' witness statement. He reviewed the history of the ward issue in the Town, noting that the pre-petition Committee process "was suitable for a community of this size and circumstance and represents an important commitment by Council, Committee members and the public to seeking a reasonable solution". However, having regard to the outcome of the Committee process, what he termed the "arbitrary action" of Council, Dr. Williams concluded "in the absence of any sound justification from those who voted against the recommendation, the conclusion I reach is that some members of the Kearney Town Council used the

power assigned to them in the *Municipal Act* to protect their own electoral chances". Of course Council's decision on the Committee recommendation is not necessarily relevant to Council's later decision on the Petition, but, as the Board noted above it goes to the validity of the Town's position on this Application.

Dr. Williams considered the Town's present ward system in light of "effective representation" as characterized by the Supreme Court of Canada in the *Carter* case. He considered the 2006 election results, noted above, to determine whether there was "relative parity of voting power" in the Town. These results demonstrated to him that there was no such "relative parity".

Using these results, Dr. Williams demonstrated that an "optimal" ward would include 877 voters (total electorate of 2,630 divided by 3 wards). Only Ward 2 with 912 voters was "optimal", while Wards 1 and 3 were outside "optimal" range. Dr. Williams concluded "the status quo is not equitable".

In considering the decision of the Supreme Court of Canada in the *Carter* case, Dr. Williams noted that some "degree of 'deviation from absolute voter parity' would be acceptable since factors like 'geography, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic'". Therefore Dr. Williams said "...in setting rules to elect the council in a municipality that covers large, thinly populated territory (like the Town) it makes sense to 'trade-off' population and geography, both for campaign purposes, but also for the on-going representational role that councillors play between elections".

Having regard to the fact that 95% of the electorate of the Town is found in Wards 2 and 3, which represent 95% of the Town's area, Dr. Williams opined that "the present wards have not 'traded-off' population and size but have combined them. That is, the present configuration features a small ward with an unacceptably low population and large areas with substantial populations rather than wards where density and area are traded off, an arrangement sustained by the *Carter* decision". Dr. Williams concludes "the status quo does not provide effective representation".

Finally, Dr. Williams considered whether the current ward system appropriately represents "communities of interest". The Board heard evidence, especially from the Mayor about the differences between the Ward 1 permanent residents and the Ward 2

and 3 seasonal residents, arguably “communities of interest”. Dr. Williams opined that “the idea of entrenching a permanent resident – seasonal resident division as the basis for an entire ward configuration is inappropriate”. Dr. Williams, considering the historical basis for the ward boundaries (township boundaries) said that the “present ward boundaries symbolize ‘communities of interest’ that probably no longer have any relevance in the daily lives of the majority of electors in the municipality. To the extent that the present ward boundaries perpetuate pre-amalgamation municipal boundaries that are largely irrelevant in the contemporary municipality, the status quo cannot be deemed a viable electoral arrangement”.

The at-large electoral system which would replace the ward system is, on the evidence, the system preferred by municipalities with similar characteristics to the Town and in geographical proximity to the Town. The Applicants drew the Board’s attention to Exhibit # 5, TAB 39, the 2006 Election Results of the Amalguin Region (in which the Town is located). The region is comprised of 19 municipalities; only Kearney has a ward system. Dr. Williams noted in his witness statement that all other Amalguin municipalities had abandoned the ward system in favour of at-large elections. He quoted a comment from the CAO/Clerk of one of these municipalities who said that one of the objectives of a change in the electoral system was “to get the community to think as one”. Certainly the Town adduced no evidence to show that at-large voting systems in neighbouring, similar municipalities have resulted in some community of interest being denied fair representation. Considering the at-large systems, Dr. Williams opined that “...an electoral system that perpetuates long-defunct component municipalities when those boundaries reflect no demonstrable difference in the demographics or the service responsibilities of the municipality is of questionable value. An at-large system in a small municipality can make a positive contribution to community building”.

Board’s Findings:

Based on the evidence, particularly the results of the 2006 municipal election and the opinion of Dr. Robert Williams, the Board finds that the current ward system in the Town allows neither for relative parity of voting power nor effective representation. The Supreme Court of Canada made it clear in the *Carter* case that any electoral system which “dilutes a citizen’s vote unduly...runs the risk of providing inadequate representation”. The ward system in the Town is currently such a system. The vote of

an elector in Ward 1 carries disproportionate weight when compared to the vote of an elector in either Ward 2 or Ward 3.

The Board finds, following the reasoning of the Supreme Court of Canada in the *Carter* case and this Board in *Teno v. Lakeshore (Town)*, that such a deviation from voter parity may only be justified if factors like geography, community history, community interests or minority representation are relevant. As noted above, the Town adduced no convincing evidence to demonstrate that any of these factors are in play in the Town. The Mayor apparently fears that permanent residents of the Town will not be adequately represented in an at-large system, but the Town presented no evidence to justify this fear.

Voter parity and effective representation are governing principles of Canada's democratic electoral system at all levels; federal, provincial and municipal. On an application pursuant to section 223(4) of the *Municipal Act* the Board must be cognizant of these principles. The Board finds that the Applicants have demonstrated that the current ward system fails to facilitate voter parity and effective representation. The Town has not demonstrated that there is any reason to perpetuate such a system.

The Board grants the Application and orders that the existing wards of the Town be dissolved.

This is the Order of the Board.

"S. B. Campbell"

S. B. CAMPBELL
VICE CHAIR