ISSUE DATE:

October 24, 2013

MM130043

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 222(4) of the *Municipal Act*, S.O. 2001, c. 25, as amended

Appellant:	Councillor Howard Shore – Ward 2
Subject:	By-law No. 2013-29 (Ward Boundary)
Municipality:	City of Markham
OMB Case No.:	MM130043
OMB File No.:	MM130043

A P P E A R A N C E S :

Parties	**Counsel**
Howard Shore	James Morton (Robert Karrass, Articling Student)
City of Markham	Quinto Annibale

DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD

[1] Howard Shore ("Appellant"), Ward 2 Councillor with the City of Markham ("City"), has appealed to the Ontario Municipal Board ("Board") the decision of City Council to give its final approval on March 19, 2013, to re-divide ward boundaries within the City. The purpose of Ward Boundary By-law No. 2013-29 is to re-divide the boundary lines of the City's existing eight wards into the eight-ward configuration as illustrated in Schedule A and as detailed in Schedule B (both schedules attached to the By-law).

[2] Counsel James Morton represented the Appellant, but this counsel was not present at the hearing. Instead, articling student Robert Karrass replaced Mr. Morton at this hearing. Counsel Quinto Annibale represented the City.

Request to Adjourn the Hearing

[3] On September 13, 2013, Mr. Morton advised the Board in writing, that he had a conflict with the scheduled hearing dates and he was requesting that the hearing be adjourned. Mr. Morton cited his required attendance at a criminal appeal matter in the Nunavut Court of Appeal commencing on the second day of this ward boundary appeal hearing, thereby requiring him to travel on the first day owing to the great distance. He wrote that he had expected to participate in that matter by conference call but instead was directed to appear for that matter. Mr. Morton anticipated returning to Toronto only on the penultimate day of this Board's hearing. His letter also stated that he would contact the Board with alternative available dates. The Board denied the request administratively prior to the hearing.

[4] At the hearing, the Board permitted Mr. Karrass to make a further request to adjourn these proceedings. Mr. Karrass reiterated Mr. Morton's conflict and said that Mr. Morton had not anticipated being required to attend at the other matter and that a telephone call to deal with that matter would not have interfered with the Board's process. Although stating that the Appellant would be better represented by Mr. Morton, Mr. Karrass indicated he was prepared to "move forward today" although this would, in his view, prejudice the Appellant.

[5] Mr. Karrass did not know the date on which the Appellant retained Mr. Morton to represent him. However, the Board's files contain various documentation that show Mr. Morton's association with the Appellant and this appeal since the spring of 2013. Mr. Karrass confirmed that Mr. Morton had been "doing some work" on this appeal for the Appellant since at least July 2013. The Appellant's May 3, 2013 letter of appeal to the Board actually lists Mr. Morton as the Appellant's solicitor of record. The Case Coordinator subsequently asked for confirmation of this information on June 7, 2013. On June 27, 2013, Mr. Morton responded to the Board's request for input on the length of the hearing to be scheduled. Mr. Morton advised the Board on July 3, 2013 that "I am confident I will be formally retained" but that he and the Appellant needed to speak. Also on file are copies of July 31, 2013 and August 7, 2013 correspondence showing

one-way communication from Mr. Annibale to Mr. Morton, reiterating requests to know from Mr. Morton, whether the Appellant had retained him formally and the number of witnesses he intended to call. On September 12, 2013, Mr. Morton wrote to the Board advising that he had been retained formally but that he would be unavailable to attend the first two days of the hearing with no details of the reason for his absence included. On September 13, 2013, the next day, details of a criminal appeal requiring his attendance out of province were given as the reason.

[6] The Board considered the facts behind Mr. Karrass' request and it dismissed the request to adjourn the hearing. The Board determines that Mr. Morton's association with this file was evident as early as May 3, 2013. He was involved in the setting of hearing dates with the Board and the City and he provided an estimated number of witnesses who he intended to call. Eleven days before the hearing, he wrote to the Board to say that he had a date conflict although he provided no details. Ten days before the hearing, he wrote again and furnished details behind his request, which the Board determined did not warrant the adjournment of these proceedings. At this hearing, the Board's determination remains unchanged. Mr. Morton's professional obligations as part of his business as a counsel cannot supersede the public interest in ensuring that this hearing process is not held up. Without considering the merits of the Appellant's case – details of which Mr. Karrass shared in his submissions and which became relevant to the balance of this hearing event, however – the Board determines Mr. Morton's request to be an unreasonable one by virtue of the prejudice it would cause to the City's preparations for the 2014 municipal election and the adverse impact a delay would cause to the public interest.

[7] Referencing Mr. Annibale's response letter of September 14, 2013, the counsel stated the following:

> Pursuant to s. 222(8) of the *Municipal Act*, 2001, S.O. 2001, c. 25, the Board must render a decision on Mr. Shore's appeal prior to January 1, 2014 in order for the by-law to come into force for the 2014 municipal election. An adjournment of this matter at this time would cause unnecessary delay and jeopardize a decision being rendered within this legislated timeframe.

[8] Mr. Annibale noted correctly that scheduled hearing events of the Board are peremptory and adjournments should not be granted lightly by the Board unless there are unusual or compelling reasons. Supporting this position is the decision of *Silgold Developments Inc. v. RRL Burloak Inc.* 2005 Carswell Ont. 6346, the Divisional Court stated the following at paragraph 11:

> The Board has express jurisdiction to control its order process and authority to grant adjournment pursuant to statutory authority under the *Ontario Municipal Board Act*, rule 65 process requests for adjournment. Adjournments are not granted lightly by the Board. See: *Hamilton (City) Zoning By-law No. 87-57, Re*, [2001] O.M.B.D. No. 367 (O.M.B.) at para 2. The Board dates are peremptory unless there are unusual or compelling reasons. The Board discourages requests for adjournments because they "create delays in the process, lead to inefficiencies and increase costs to the parties and to the Board itself." See: *Kraus v. Toronto (City) Committee of Adjustment*, [2002] O.M.B.D. No. 867 (O.M.B.), Files No. PL020158, VO20070.

[9] The Board determines that Mr. Morton's need to appear at an out of province matter in another jurisdiction for the reason proffered does not constitute unusual or compelling reasons to adjourn this hearing. The Board made Mr. Morton aware of the September 23, 2013 start date by letter dated July 4, 2013. Dates had been canvassed by the Board with Mr. Morton several months before. The Appellant's request to adjourn this matter constitutes nothing more than a scheduling conflict on the part of Mr. Morton and this does not, in the Board's view, justify an adjournment pursuant to Rule 64 of the Board's *Rules of Practice and Procedure*.

[10] To reiterate, the ward boundary comprehensive review process is a significant municipal exercise that leads to the 2014 municipal election. Legislated time frames have been established. The Board finds that an adjournment for anything less than unusual or compelling reasons could jeopardize the 2014 municipal election process. At issue is the public interest in ensuring the process is not delayed for any other reason. Accordingly and for the reasons given, the Board ruled that it would not grant an adjournment as the public interest was not served by delaying the ward boundary matter so that one party's counsel could attend to a private matter in another jurisdiction in another province. For these reasons, the request for an adjournment is not granted.

[11] Pursuant to this ruling, the Board Member met with Mr. Karrass and Mr. Annibale in chambers to share the Board's decision on the adjournment request and to determine the way forward. Mr. Annibale expressed his concern with statements made by Mr. Karrass, which imparted the central thrust of the Appellant's case – an appeal he characterized as 'one of bad faith and uncertainty.' Mr. Annibale next requested that the Board receive submissions in order to dismiss the Appellant's appeal. Mr. Karrass agreed to Mr. Annibale's request to make his submissions with appropriate time allotted by the Board at these proceedings for Mr. Karrass to respond. A thirty-minute break was provided to counsels for them to prepare their submissions. At the resumption of the proceedings and in the interest of transparency and accountability of the process, the Board delivered its ruling on the adjournment orally with succinct reasons which are now amplified in this decision. The Board also explained to those in attendance the City's decision to make submissions that would include asking the Board to dismiss the Appellant's appeal.

Request for the Board to Dismiss the Appeal

[12] In the course of his submissions on the adjournment matter and in response to questions from the Member, Mr. Karrass informed the Board that if the hearing proceeded, the Appellant would call no expert witnesses to challenge the by-law. He added that the only testimonies on which the Appellant would rely on would come from four or five private citizens whose evidence would be quite short and limited to their concerns with the ward boundary review consultative process. He also emphasized that these residents would not speak to the merits of the ward boundary options presented in the consultant's report but rather to the lack of options (to increase the number of wards) presented during the public meetings (only eight wards instead of the possibility of nine or ten wards). Mr. Karrass submitted that the report author, consultant Dr. Robert J. Williams ("consultant"), had not fulfilled his mandate under the terms of reference to consider more than eight wards. Mr. Karrass called this a procedural issue as the consultant should have presented other options as well as the eight-ward models but he did not. These facts became relevant to Mr. Annibale's request to the Board that it dismiss the Appellant's appeal. Mr. Annibale submitted that the matters of the terms of reference – a contractual matter between the City and its

consultant – were *ultra vires* in respect of the Board's jurisdiction. The Board considered the submissions of both counsels and makes the following findings.

[13] Mr. Karrass stated the Appellant's concerns clearly: the consultative process and the resulting report were flawed because, in only offering options related to an eight-ward configuration, the public did not obtain a complete picture from the City's ward boundary exercise. Specifically, the process deviated from the terms of reference as established for the consultant's exercise.

[14] To support his submissions, Mr. Karrass requested that the Board permit the Appellant to provide *viva voce* evidence to the Board as part of his submissions. On consent, the Board granted the request. The Appellant, who has represented the City's Thornhill Ward (Ward 2) since December 1, 2010, restated the submissions of Mr. Karrass as outlined above. He also testified that City planning staff had included a recommendation at the outset that the consultant was to include a scenario that included retaining the status *quo* number of councillors as well as scenarios that would add additional councillors. He said that City Council accepted this approach as well as had an expectation that community consultation would occur (which it did) through a two-phased process that would include four public meetings in the community to feed into the interim report. The Appellant alleged that only part of the consultant's mandate was fulfilled, which was the presentation of a choice of options that invariably maintained the status quo in respect of the number of ward councillors. Without pursuing alternatives, community input was not complete because the community was never fully informed.

[15] At the first phase public meeting in Thornhill, the Appellant noted that, in responding to a question from the public, the consultant said that an additional councillor could be added but that he had not been directed to pursue that research or option. Without examining all of the options, the process was flawed, therefore and the public was unable to make an informed decision about ward boundaries. The Appellant acknowledged in questioning from his student counsel that the City's passage of the by-law, based on the preferred option of retaining eight wards, could be valid in form but he added that it cannot be legitimate as the process to examine a wide range of scenarios for municipal representation had not been followed.

[16] Important to the Board's determination on this procedural matter was the Appellant's statement to the Board – in responding to a question from Mr. Karrass – that he did not take issue with the by-law and its resulting distribution, which maintained the existing number of wards; rather, he alleged that the consultant had only partially followed the City's terms of reference and thus other options that might have been brought forward, discussed, shared with citizens during the public meeting process and possibly favored over the chosen option, were not provided.

[17] The Board is guided by Rule 56 (a) of the Ontario Municipal Board's *Rules of Practice and Procedure* whereby "A Board Member may dismiss a proceeding without holding a hearing event if (a) satisfied that the Board is without jurisdiction to hear the application…" The Board derives its statutory authority to consider a ward boundary appeal from s. 222(4) of the *Municipal Act*, 2001:

> Within 45 days after a by-law described in subsection (1) is passed, the Minister or any other person or agency may appeal to the Ontario Municipal Board by filing a notice of appeal with the municipality setting out the objections to the by-law and the reasons in support of the objections. 2006, c. 32, Sched. A, s. 96(1).

[18] And: "The Board shall hear the appeal and may, despite any Act, make an order affirming, amending or repealing the by-law. 2001, c. 25, s. 222 (7)." The Board has the authority to adjudicate all matters related to this municipal process.

[19] However, the Appellant failed to articulate concerns with the by-law; rather, his concerns were with the alleged, partially-fulfilled consultant's mandate, leading to a flawed instrument. The Appellant seeks from this Board an Order that would in effect, find that the consultant retained by the municipality should have undertaken a complete re-examination of the representation and composition of Council. With the validity of the process that resulted in passage of the by-law at the heart of the Appellant's appeal – not the by-law itself, which the Appellant agreed in his testimony might be an appropriate representation of the eight-ward option – the Board was obligated to review the evidence presented in order to determine whether the requested relief is an appropriate remedy for the Board to order.

[20] In setting out the terms of reference for the ward boundary review exercise, the City established its criteria or guiding principles to evaluate the municipality's electoral system (see "Interim Report 2012 Ward Boundary Review", November 2012, Exhibit 1, Tab 16, p. 9 and p. 165). Mr. Annibale referenced a previous decision of this Board – *Teno v. Lakeshore (Town)*, 2005 Carswell Ont 6386 ("*Teno*") – to establish that the City had made relevant considerations for its proposed electoral model for ward boundaries through relevant criteria as listed at paragraph 26, among these: equitable distribution, respect for identifiable communities of interest; utilization of the natural, physical boundaries; and service to the larger public interest of all electors as opposed to the interest of a small group. The consultant prepared two reports: the aforementioned November 2012 interim report and the February 2013 "Final Report 2012-2013 Ward Boundary Review" (Exhibit 1, Tab 22). The reports echo the principles (albeit in different words) espoused in the *Teno* decision: consideration of representation by population; protection of communities of interest and neighbourhoods; consideration of present and future population trends; consideration of physical features as natural boundaries; and the overriding principle of "effective representation."

[21] With these guiding principles established in the terms of reference for the consultant's interim and final reports, the Board was satisfied that there is clarity of purpose in the City's direction to the consultant in undertaking the ward boundary review process. In reviewing both the interim and final reports, the Board observed that the consultant furnished the General Committee with four options in his interim report – all designed to elect eight City Councillors as mandated in the report to General Committee, which set out the ward boundary review process. Referencing that report, the consultant acknowledged that the report "anticipated the possibility that additional options to increase the size of council from the current eight local wards" would be included" as a means to retain two wards in Thornhill. Although not specifically asked to do so, the consultant tested this concept of more than eight wards through population indicators in Table 4 of the interim report (p. 44 and p. 200). The consultant's findings in this regard are relevant to this decision:

> The Interim Report does not, then, include nine- or ten-ward alternatives; the 2012 Ward Boundary Review will not do so unless council specifically directs that it wishes to add the composition of council question to this Review. For one thing, the analysis presented so far suggests that a viable eight-ward design is available. For another, there is no guarantee that additional nine- or ten-ward options will be any better at "ticking all of the boxes" associated with the guiding principles than the eight-ward options.

[22] The consultant provided considerations for the City on increasing the number of ward councillors, including addressing the matter at the outset:

> …rather than as a way to get around what some may perceive as undesirable consequences resulting from the application of the guiding principles. Furthermore, sound governmental practices suggest that considerations such as cost, workload and council operations…should be carefully addressed in conjunction with – or as foundations for – an adjustment to the composition of council rather than as consequences of a change to the electoral system.

[23] The consultant also provided a recommendation to Council that subsequently factored into Council's decision to pursue the eight-ward configuration: "It may very well be that a strong case can be made for a change in the composition of Markham Council (either an increase or a reduction)" wrote the consultant, "but this Review was not designed to provide that evidence nor to undertake the analysis."

[24] At the December 18, 2012 Council meeting, the consultant's report was formally received by Council, which moved, among other things, that "Council direct staff to obtain public input on the [Report] and Council's preferred option D including an examination of minor modifications to realign the City's ward boundaries as outlined in this report…" In his position as Ward 2 Councillor, the Appellant moved that the consultant "be directed to report back to General Committee as soon as possible on additional options to realign the City of Markham's ward boundaries, which may include options to increase the size of Council." The motion was defeated. The consultant made reference to the result of that motion in the February 2013 final report (Exhibit 1, Tab 22, p. 4 and p. 342) noting:

> The idea of increasing the size of Markham's municipal council by adding additional wards was raised and endorsed by some members of the public during consultations both before and after the submission of the Interim Report, primarily as a way to retain two wards in Thornhill. However, a motion on December 18 directing staff to report back to Council with additional options to realign the City of Markham's ward boundaries including "options to increase the size of Council" was defeated.

[25] Also in his final report, the consultant set out his rationale for balancing the preferences of single communities and the most vocal residents in the context of the guiding principles from which the consultant did not waver (at p. 43 and p. 381): "…the case for setting aside the principles to concede this wish [that revised ward boundaries would reduce representation from that one community] was never made." He added: "persuasive evidence or a reasoned argument framed on the guiding principles was not offered."

[26] On March 19, 2013, Council met and received the consultant's final report, accepted its contents and recommendations for the ward boundaries, passed the by-law and directed staff to implement the selected ward boundary configuration. Unwilling to accept the findings of the consultant, the Appellant launched another failed motion to increase the number of wards from eight to ten and that the Thornhill area be represented by two ward councillors. The Appellant's motion was ruled out of order by the meeting Chair.

[27] The Board is satisfied that the consultant addressed alternative ward boundary configurations as evidenced above. This is the Appellant's single issue and he has failed to provide persuasive reasons for the Board to intervene in adjudicating the validity of the subject by-law. The Appellant's testimony was directed to alleged deficiencies with the consultant's mandate and not with the decision of Council to adopt By-law 2013-19. The Appellant even acknowledged that this by-law has some merit, based on the underlying study presented to Council. As a result of these findings, this Board determines that it can exercise its powers to dismiss the appeal, as requested by the City, by an order akin to a nonsuit order of this proceeding.

[28] Notwithstanding the decision of Council to pursue an eight-ward configuration for the ward boundary process, established at the December 18, 2012 Council meeting, there is no evidence that the directions given to the consultant somehow thwarted his review process, skewered the results of his work or resulted in a flawed by-law. Moreover, the Appellant does not question the validity of the by-law or the option the City chose. Had the Appellant articulated deficiencies with the By-law, then this Board

would have decided to hear from all interested persons and the City. As already cited, the consultant turned his mind to the concept of increasing the number of wards. By extension, City staff-produced overhead slides for the public meetings, evidenced in Exhibit 1, examined an increase in the number of wards by setting out the annual operating costs associated with increasing the number of ward councillors by 1 and 2 persons – valid considerations in Council's eventual decision to retain the eight-ward configuration.

[29] The Board has found unpersuasive the Appellant's argument – proffered in support of his appeal – that Council did not provide options to increase the number of councillors. The limited evidence presented in this portion of the hearing establishes persuasively for the Board that the consultant did undertake that work and the resulting eight-ward configuration, supported by contextual and background information in the documentation before the Board, reflects such considerations. What is more, the Board determines the Appellant's line of argument to be unpersuasive in respect of the purposes at hand. The Appellant has failed to provide grounds and evidence worthy of the adjudicative process.

ORDER

[30] The City's request to dismiss the appeal is allowed. The Board further provides a judgment to dismiss this appeal for the reasons given.

"R. Rossi"

R. ROSSI
MEMBER