

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANTHONY KALUZNY

Plaintiff

- and -

SARINA KALUZNY

Plaintiff

v.

TOWN OF GRIMSBY

Defendant

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**REASONS FOR JUDGMENT**

BEFORE THE HONOURABLE JUSTICE D. PARAYESKI  
on June 19, 2015, in HAMILTON, Ontario.

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APPEARANCES:

T. Green

Counsel for the Plaintiffs

M. Broadhurst

Counsel for the Plaintiffs

T. Richardson

Counsel for the Defendant

P. Maloney

Counsel for the Defendant

(i)  
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**Legend**

(ph) - Indicates preceding word has been spelled phonetically.

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

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1.  
REASONS FOR JUDGMENT  
Anthony and Sarina Kaluzny v. Town of Grimsby

FRIDAY, JUNE 19, 2015

R E A S O N S F O R J U D G M E N T

5 PARAYESKI, J. (Orally):

10 THE COURT: Anthony and Sarina Kaluzny seek leave to appeal to the Divisional Court two ruling released by the Ontario Municipal Board (hereinafter "the OMB") on September 26<sup>th</sup>, 2014. The background may be summarized as follows: The Kaluznys are landowners in the Town of Grimsby. The Town passed a bylaw, which, amongst other things, designates part of the Kaluznys' lands as an environmental protection or conservation zone and as being subject to a hazard overlay. Usage in those areas so affected are restricted in some degree.

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20 Following passage of the bylaw, the Town received four appeals to the OMB including one advanced by the Kaluznys'. In response, the Town brought two preliminary motions. The first motion by the Town asked the OMB to dismiss the Kaluznys' appeal on the grounds that their notice of appeal did not disclose any apparent land use planning ground upon which the OMB could allow all or part of an appeal. The second motion brought by the Town asked for an order from the OMB approving the balance of the bylaw that was not under appeal.

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30 The OMB released its decisions in respect of these

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5 two preliminary motions on September 26<sup>th</sup>, 2014. The decisions dismissed the appeal by the Kaluznys' and granted the order sought in respect of approving that part of the zoning bylaw not under appeal. I shall refer to these later as "the motion to dismiss" and "the motion to approve".

10 The OMB's decision at paragraph 32 of its ruling, makes the determination that the Kaluznys' appeal from the Town's bylaw as put forth in their materials, and then the argument of their then counsel did, "Not demonstrate any apparent land use planning grounds upon which the Board, if it conducted a full hearing of the appeal, could allow the appeal in whole or in part."

15 The OMB, at paragraph 29 of its decision, points out that careful examination of the relevant appeal letter disclosed nothing "outlining any concerns that their", and I believe that's a grammatical error, so I have bracket [sic.], "might be construed as errors in the zoning placed on the Kaluznys' property that would give the Board cause to believe that there was a zoning error in either the text or the mapping of the new comprehensive zoning bylaw number 14-45, which is what is meant by the initials NZBL in the decision that might result in the Board allowing their appeal in whole or in part."

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30 At paragraph 30 of its ruling, the Board goes on

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to observe that it could not find and did not hear any submissions that the zoning placed on the Kaluzny lands was not consistent with the provincial policy and was not in conformity with the Region of Niagara's and the Town's Official Plans. The Board accepted the testimony of the Town's planner that the bylaw, in fact, implements the Town's Official Plan. The OMB addressed these types of issues because they are the issues that constitute the kinds of apparent land use planning grounds upon which the Board could allow all or part of an appeal under the provisions of the *Planning Act*.

Paragraph 27 of the Board's decision summarizes what was before it as follows: The representative for the Kaluznys' at no time made any meaningful submission to the Board that the zoning being proposed for her clients property was defective from the land use planning perspective. Her clients merely do not believe that the municipality has jurisdiction to regulate their lands through a zoning bylaw. The lack of jurisdiction on the part of the Town, the Kaluznys argued and argue, flows from the rights and reservations described in the Crown patent granted to a predecessor in the Kaluznys' title to those lands.

At paragraph 38 of the OMB's decision, the Board finds, "That the interpretation of the Crown letter patent and its relationship to the Town's

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5 authority to pass a zoning bylaw that regulates private lands under section 34 [of the *Planning Act*] are beyond the Board's jurisdiction. It is established law that in order to be granted leave to appeal, the party or parties seeking it must show:

10 (a) the proposed appeal raises a question of law;  
(b) there is a good reason to doubt the correctness of the decision with the OMB with respect to the question of law raised; and  
(c) the question of law raised is of sufficient, general or public importance to merit the attention of the Divisional Court. The tests for entitlement to leave are cumulative.

15 With great and genuine respect to Mr. Green's materials and arguments, I am of the view that the question of law before me, in this context, is whether the OMB was correct in determining that what it was really being asked to adjudicate upon by means of the appeal was within its power to do so and not whether the Crown patent precludes a municipality from an acting bylaws that limit an owner's right to use his or her land subject only to the common law. Either question is a question of law. Thus the first test is met.

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30 The OMB's powers principally flow from the *Planning Act*. Case law indicates that I must be conscious of the fact that the OMB has expertise in both planning matters and with respect to what

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has been called its "home" statute, i.e. the *Planning Act*.

I defer to the Board's interpretation of its powers, and, in so doing, finding that it does not have jurisdiction to determine the Crown patent issue described above. Accordingly, there is no good reason, in my view, to doubt the correctness of the decision of the OMB with respect to the jurisdiction question, which I believe to be the real question at issue. Thus the second test is not met.

With regard to the third test, while I certainly agree that there is general interest and public importance in there being a determination of what I have called the "Crown patent issue" as described above, that, as I have said repeatedly, is not the genuine question of law before me. Accordingly, in my view, granting leave to the Divisional Court would be improper with respect to the motion to dismiss. That would only compound the problem created by the Kaluznys' having raised the Crown patent issue in the wrong forum in first instance by bringing it before the OMB. The proper forum, in my view, is the Superior Court of Justice on notice to, at the very least, the province. I agree that what is really being raised by the Kaluznys' is indeed a constitutional issue. Its connection to land use is merely collateral. The land use aspects are not those properly addressed or addressable by the OMB.

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The Kaluznys' materials and arguments before me do not directly address or attack the OMB's decision on the motion to approve, and I assume that this is because, in context, that decision is of little or no practical import.

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For these reasons, the motion for leave is dismissed, and I shall now hear from counsel with respect to the issue of costs.

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CERTIFICATE OF TRANSCRIPT  
*EVIDENCE ACT*, subsection 5(2)

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I, Debbie Soucy, certify that this document is a true and accurate verbatim transcription produced to the best of my skills and ability of the recording of Town of Grimsby v. Anthony and Sarina Kaluzny in the Superior Court of Justice held at 45 Main St. E., Hamilton, Ontario, taken from Recording CD#4799 604 20150619 095145 10 PARAYED.dcr, which has been certified in Form 1 by M. Mitchell.

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Date

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Debbie Soucy (ACT#4774617227)  
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