The Corporation of the Town of Fort Erie

MEDIA RELEASE

Ontario Municipal Board Approves Canadian Motor Speedway

Fort Erie, June 6, 2013 - The Ontario Municipal Board has issued its final decision on the Canadian Motor Speedway, clearing the way for the $400 million project to proceed. In March of this year, the Board heard an appeal from the Preservation of Agricultural Lands Society – PALS – that sought a review of the original decision in favour of the development. In its decision issued today, the Board states that PALS *“has not made out a convincing and compelling case or, indeed, any case.”* Therefore the original decision that approved the Canadian Motor Speedway stands and is in full force and effect.

This is great news for the Town of Fort Erie which has been patiently waiting for a decision on this very significant economic development.

Azhar Mohammad, the project’s Executive Director, stated *“I am absolutely pleased with the decision of the Ontario Municipal Board and it is now time to move forward with this world scale project.”*

Mayor Doug Martin echoed Mohammad’s comment. “*I could not be any happier with the Ontario Municipal Board decision and this starts a new page for development in Fort Erie”,* said the Mayor.

In the Town’s opinion the Ontario Municipal Board decision was never in doubt because of the great work completed by the applicant, the Economic Development and Tourism Corporation and Town Planning and Engineering staff.

For more information contact:
Larry C. Adams, CAO, Town of Fort Erie, (905) 871-1600 ext. 2200 or visit the Speedway’s website at www.cdnmotorspeedway.com

niagarafalls review .ca NIAGARA FALLS REVIEW

Canadian Motor Speedway appeal denied.

By Matt Day, Niagara Falls Review
Thursday, June 6, 2013

FORT ERIE - The decision was worth the wait say proponents of the Canadian Motor Speedway.

Fort Erie Mayor Doug Martin was informed Thursday morning that an appeal made to the Ontario Municipal Board regarding the Canadian Motor Speedway was denied, clearing the way for the $400-million project to move forward.

"It's been a long time and a long journey and we're finally glad the decision has come forward," said Martin. "Our next step is meeting with Azhar (Mohammad, executive director of the speedway) to get his team together and the documents together to move forward with the project and put shovels in the ground."

An artist's rendition of the Canadian Motor Speedway.

The decision came almost three months after the environmental group Preservation of Agricultural Lands Society made the appeal following the OMB's original decision in favour of the speedway late last year. The OMB needed to determine whether or not there were any planning or land issues in order for the speedway's ground breaking plans to move forward.

Martin said the OMB's decision was a 17-page document.

STORY IN DEVELOPMENT

ISSUE DATE:

June 06, 2013

PL100362

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant:	Citizens Coalition of Greater Fort Erie
Appellant:	Bryan Kenney
Appellant:	Randolph Paura
Appellant:	Preservation of Agricultural Lands Society (PALS)
Subject:	Proposed Regional Policy Plan Amendment No. 3-2009
Municipality:	Regional Municipality of Niagara
OMB Case No.:	PL100362
OMB File No.:	PL100362

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant:	Citizens Coalition of Greater Fort Erie
Appellant:	Bryan Kenney
Appellant:	Randolph Paura
Appellant:	Preservation of Agricultural Lands Society (PALS)
Subject:	Proposed Official Plan Amendment No. 4
Municipality:	Town of Fort Erie
OMB Case No.:	PL100362
OMB File No.:	PL100363

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant:	Citizens Coalition of Greater Fort Erie
Appellant:	Bryan Kenney
Appellant:	Randolph Paura
Appellant:	Preservation of Agricultural Lands Society (PALS)
Subject:	Proposed Official Plan Amendment No. 63
Municipality:	Town of Fort Erie
OMB Case No.:	PL100362
OMB File No.:	PL100364

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant:	Citizens Coalition of Greater Fort Erie
Appellant:	Bryan Kenney
Appellant:	Preservation of Agricultural Lands Society (PALS)
Subject:	By-law No. 106-10
Municipality:	Town of Fort Erie
OMB Case No.:	PL100362
OMB File No.:	PL101160

IN THE MATTER OF section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended

Request by:	Preservation of Agricultural Lands Society (PALS)
Request for:	A Motion to grant a review of the Board's Decision issued on November 02, 2012

APPEARANCES:

Parties	**Counsel*/Representative**
Preservation of Agricultural Lands Society	John Bacher
Town of Fort Erie	Paul M. DeMelo*
Regional Municipality of Niagara	Stephen Chisholm*
1746301 Ontario Inc.	J. Andrew Pritchard*

DECISION DELIVERED BY VICE-CHAIR JAMES R. McKENZIE AND ORDER OF THE BOARD

INTRODUCTION

[1] On November 2, 2012, Vice-Chair Susan de Avellar Schiller of this Board issued a decision dismissing appeals filed against planning instruments that collectively permit the development of a 65,000-seat motor vehicle racetrack and ancillary uses on

approximately 820 acres in Fort Erie, Ontario. Shortly thereafter the Preservation of Agricultural Lands Society ("PALS"), an appellant of the instruments, filed a Request for Review ("Request"), pursuant s. 43 of the *Ontario Municipal Board Act* ("OMB Act"), to have that decision set aside and a new hearing scheduled. The Request alleges that Vice-Chair Schiller violated the rules of natural justice and procedural fairness, or made an error of law or fact such that the Board would likely have reached a different decision. The Request is addressed in detail below.

[2] The Board's *Rules of Practice and Procedure* ("Rules") set out a process for dealing with such requests. That process codifies both a discretion held by the Board's Chair to review a decision and a test informing the exercise of that discretion. In this case, the Board's Chair directed that the Request be determined by a motion and delegated her authority to this panel for that purpose. A motion hearing was convened and completed on March 21, 2013.

[3] The decision herein sets out the result of that motion and is structured as follows: the sections of Vice-Chair Schiller's decision giving rise to the Request are first set out. That is followed by an articulation of the test against which the Request will be assessed. The respective submissions by PALS as well as the Town of Fort Erie ("Town"), the Regional Municipality of Niagara ("Region"), and the 1746301 Ontario Inc. ("Proponent") are then addressed, followed by the Board's analysis and reasons.

CONTEXT

[4] What comes before the Board in this motion concerns a status denied PALS's planning witness, Dr. Hugh Gayler, during the course of the hearing. PALS had proffered Dr. Gayler as an expert in land use planning matters with the intention of having him testify as an expert so as to provide opinion evidence. Parties opposite PALS—the Town, the Region, the Proponent—challenged Dr. Gayler's qualification as an expert. Following a process wherein the Board first received evidence and submissions on the issue of Dr. Gayler's fitness for qualification and then adjourned for over-night deliberation, Vice-Chair Schiller refused to qualify Dr. Gayler as an expert. Vice-Chair Schiller found that Dr. Gayler possessed the requisite expert knowledge and experience in planning for qualification, but lacked the requisite independence from PALS to sustain such a qualification. Dr. Gayler still testified; his evidence was

admitted, but not accorded expert status. The relevant passages from the decision are as follows:

> [26] PALS called Dr. H. Gayler and wished to have him qualified by the Board to give expert opinion evidence in land use planning matters. Parties opposite objected to the proposed expert qualification. The Board decided to hear Dr. Gayler but declined to qualify him to provide expert opinion evidence. These are the Board's reasons.
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> [27] Qualifying a witness to provide independent expert opinion evidence to the Board requires two key lines of inquiry: whether the witness possesses the necessary expertise and whether the witness is independent. The two lines of inquiry are frequently collapsed into a single reference to qualify a witness as an expert. While that reference may be handy shorthand, it does not remove the necessity to consider both elements: expertise and independence.
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> [28] The decision to qualify a witness is not automatic and no witness possesses a right to qualification. The decision is a discretionary one on the part of the Board in any given hearing.
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> ...
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> [41] On the question of independence...[t]he key in this case is that Dr. Gayler stated explicitly that he was member of PALS, continuously from 1996 to this hearing in 2012, and did so in the c.v. presented by PALS to support the request that Dr. Gayler be qualified to give the Board independent expert opinion evidence. PALS is an appellant and a party in these proceedings.
>
> [42] The Board finds that a witness cannot, at one and the same time, be qualified as an independent expert to give opinion evidence while that same witness is a member of an advocacy group that is an appellant and a party in these proceedings.

[5] The Request advanced nine grounds to support the relief it sought. The Board's Chair concluded that eight of those grounds were an attempt to reargue the matters determined by Vice-Chair Schiller and found that a new hearing was not warranted on those grounds. In her letter dated December 6, 2012, setting out how the balance of the Request would be dealt with, she stated:

> I have determined that the most efficient way to dispose of this Request is to set a date for a motion.... I direct that a new panel be convened to receive oral submissions from all parties, to decide whether a rehearing is warranted pursuant to Rule 115.01(b) and (c). I delegate my authority found in Rule 115.01 to the presiding Member(s) at the motion, to determine whether this Request meets the threshold established by the Rules, for it to be granted.
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> The parties will focus their submissions on one issue which is raised in the Request. The issue is whether the Board improperly excluded opinion evidence when the Board declined to qualify Dr. Gayler to provide expert evidence. It would be helpful if parties could present legal authorities that review how and why a person is qualified to present expert evidence along with the common law duties of an expert. I note a recent decision of Justice Lederman of the Ontario Superior Court of Justice, *Henderson v Risi*, 2012, ONSC 3459 [2012] OJ No 2935 (Sup Ct), which may be a helpful reference point for the parties in this discussion. However, the parties can certainly present or review other authorities.

[6] The only ground upon which the parties were asked to provide submissions related to the decision of Vice-Chair Schiller to not qualify Dr. Gayler, thus establishing parameters for the motion.

TEST

[7] The threshold or test to which the Chair referred is set out in Rule 115.01 of the Rules, which states:

> **115.01 <u>The Exercise of the Chair's Discretion</u>** The Chair may exercise his/her discretion and grant a request and order a rehearing of the proceeding or a motion to review the decision only if the Chair is satisfied that the request for review raises a convincing and compelling case that the Board:
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> ...
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> (b) violated the rules of natural justice or procedural fairness, including those against bias;
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> (c) made an error of law or fact such that the Board would likely have reached a different decision[.]

[8] During the motion, John Bacher, PALS's representative, clarified that PALS was abandoning that ground of the Request alleging error of law, etc. under sub-clause (c). Accordingly, it is only the test as it relates to sub-clause (b) against which the Request shall be assessed, and that may be stated as the question: has the Review convincingly and compellingly demonstrated that the refusal to qualify Dr. Gayler as an expert constitutes a violation of the rules of natural justice or procedural fairness, including those against bias?

SUBMISSIONS

[9] The Request is advanced on three grounds.

[10] First, PALS alleges that Vice-Chair Schiller showed bias toward PALS and Dr. Gayler when she qualified experts called by the Town, Region, and Proponent, but did not qualify Dr. Gayler as an expert. Mr. Bacher submitted that the experts called by the Town and Region were, by virtue of their employment relationship, "in the comparable position to any self-identified member of PALS regarding an inherent bias". He submitted that the experts called by the Proponent were also inherently biased by virtue of having a "paid retainer." The theory underpinning these submissions is that by virtue

of merely being employed or retained by the Town, Region, or Proponent, these witnesses were *de facto* not independent and tainted with bias. Mr. Bacher submitted that they should not have been accorded a status different from that accorded Dr. Gayler. In other words, Vice-Chair Schiller should not have qualified these witnesses. Said Mr. Bacher, that she did so without also qualifying Dr. Gayler is evidence of bias.

[11] Mr. Bacher also took umbrage at PALS being referred to as an advocacy group, (see paragraph 42 of the decision). He submitted that the Town, Region, and Proponent were also engaged in advocacy, thus compounding the bias alleged.

[12] Second, PALS maintains that the challenge of Dr. Gayler should not have been permitted when he was tendered as a witness, and instead should have occurred during prehearing stages when witness statements were exchanged and rebutted. Mr. Bacher submitted that the Town, Region, and Proponent, upon learning about Dr. Gayler's evidence through his witness statement, should have had their planning witnesses bring to light those aspects of Dr. Gayler's opinion evidence they believed were "excessively biased or partisan."

[13] Finally, PALS submits that the case *Henderson v. Risi 2012 ONSC 3459 (S.C.J.)* sustains its claim that Dr. Gayler should not have been denied qualification as an expert. Mr. Bacher submitted that the "basic principles" of *Henderson v. Risi* are "identical to the issues involved in Dr. Gayler's suitability to be qualified as an expert witness." He further submitted that,

> Vice-Chair Schiller's perception of Dr. Gayler's membership in PALS, is similar to what was termed *"institutional bias"* and being *"not independent or impartial"* and showing *"actual bias"*, which was alleged by the Plaintiff Roxanne Henderson in Henderson V. Risi.

[14] Because the parties were specifically directed to *Henderson v. Risi*; because that case was the only authority to which PALS referred and on which it relied in the motion; and because PALS has literally placed all of its hopes on the case, the Board will set out the facts of the case as it understands them from the court's decision because those facts will be drawn upon in the Board's analysis to demonstrate why the case is distinguishable from the matter concerning Dr. Gayler.

[15] Roxanne Henderson ("plaintiff") brought an action against Vivian Risi and Your Community Realty Inc. ("defendants") concerning the bankruptcy of Timeless Realty

Inc. ("Timeless"). The defendants sought to have Brian Mozessohn ("Mozessohn") testify as an expert on their behalf concerning any irregularities in the books, records, and financial statements of Timeless over a specified period. It appears that Mozessohn was retained in his capacity as President of Schwartz Levitsky Feldman Valuations Inc. ("Valuations"), a corporation that provides litigation accounting among other things.

[16] At the same time, Brian Page ("Page") had been designated as the Trustee in Bankruptcy for Timeless. It appears that Page was retained in his capacity as Vice-President of Schwartz Levitsky Feldman Inc. (SLF Inc."), a corporation that provides insolvency restructurings among other things.

[17] Concurrent with their respective assignments and positions noted above, Mozessohn was a senior partner and Page was a partner of the chartered accounting firm Schwartz Levitsky Feldman LLP ("SLF LLP"). They were thus partners in this latter firm.

[18] Valuations, SLF Inc. and SLF LLP were all related companies under the name "SLF Group."

[19] The plaintiff alleged Mozessohn lacked institutional independence from Page, submitting that the corporate association between them raised the possibility of bias in Mozessohn's evidence. Relying heavily on a Newfoundland Court of Appeal case titled *Gallant v. Brake-Patten* 2012 NCLA 23 (CanLII) ("*Gallant v. Brake-Patten"*) that found

> The assessment of ultimate reliability cannot take place at the admissibility stage. To attempt to decide the ultimate reliability of expert evidence at the admissibility stage would be akin to making a final decision before knowing all the facts[,]

Justice Lederman of the Ontario Superior Court of Justice concluded that:

> ...the question of lack of institutional independence on the part of Mozessohn is best left to be a matter of weight and not admissibility. This is re-enforced by the fact that the nature of the bankruptcy of Timeless (and Page's conduct as Trustee) to the matters in issue are not crystal clear at this stage and, therefore, the importance of the connection between Mozessohn and Page requires further contextual assessment.

[20] The Board will return to this passage in its analysis and reasoning because it, too, is central to distinguishing the case from the matter at hand.

[21] Turning to the submissions from the parties opposite PALS, the Town, Region, and Proponent maintain that the decision is 100 percent correct as it dealt with Dr. Gayler, and that PALS's natural justice and procedural fairness rights have not been violated as any consequence of Vice-Chair Schiller's decision to not qualify Dr. Gayler as an expert. Their responding submissions were coordinated, with the Town and Proponent taking the lead and the Region noting its adoption of their submissions.

[22] Paul M. DeMelo, counsel for the Town, submitted that Vice-Chair Schiller accurately sets out the legal principles concerning the qualification of an expert witness: qualification as an expert is not automatic nor does a witness possess any right to be so qualified. He noted that qualification, "requires an analysis of the ability of the individual seeking to be qualified to bring to the proceeding some expertise and special knowledge not possessed by the tribunal, while at the same time ensuring independence." The trier of fact, responsible for such an analysis, possesses an in-built and fundamental discretion: to qualify or not, and to exercise that discretion as an issue of admissibility or as an issue of weight. He drew the Board's attention to a body of jurisprudence (addressed below) that, when woven together, establish the Board's duty to administer justice responsibly by scrutinising prospective expert witnesses seeking qualification so as to ensure that the Board and those who rely on its decisions can have confidence in the evidence upon which those decisions are based.

[23] In *R. v. Mohan*, [1994] 2 S.C.R. 9, Justice Sopinka wrote at paragraph 17, the "[a]dmission of expert evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert."

[24] In *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, Justice Binnie wrote at paragraphs 25, 28, and 29:

> 25 Expert witnesses have an essential role to play.... However, the dramatic growth in the frequency with which they have been called upon in recent years has led to ongoing debate about suitable controls on their participation, precautions to exclude "junk science", and the need to preserve and protect the role of the trier of fact—the judge or the jury [or a tribunal such as this Board]. The law in this regard was significantly advanced by Mohan [*sic*]....
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> ...
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> 28 In the course of Mohan [*sic*] and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence

> should be scrutinized at that time it is proffered, and not allowed too easy an entry on the basis that all the fragilities could go at the end of the day to weight rather than admissibility.
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> 29 ...the search for truth excludes expert evidence which may "distort the fact-finding process" (Mohan, [*sic*] at p. 21).

[25] Finally, in *Frazer and Smith v. Haukioja*, [2008] CanLII 42207 (Ont S.C.J), Justice Moore wrote at paragraphs 139 and 140:

> [139] At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality: the court expects nothing more and will accept nothing less.
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> [140] The court endeavors to adjudicate each matter coming before it fairly and free from bias. To the extent that the court must receive and rely upon the expert opinions of others and to the extent that those opinions are tainted, the administration of justice is imperiled.

[26] When asked by the Board how *Henderson v. Risi* squares with this body of jurisprudence, Mr. DeMelo submitted that the latter recognises and reinforces the discretion of a trier of fact by offering guidance, not directives; the result in *Henderson v. Risi* is merely one manifestation of that discretion. Moreover, there is nothing in *Henderson v. Risi* that encumbers or diminishes the exercise of that discretion. *Henderson v. Risi*, he told the Board, does not constitute a rule that others such as the Board must follow; if it were, it would conflict with what the Supreme Court has enunciated. Going further, he asked rhetorically (paraphrasing), 'If *Henderson v. Risi* is binding; that is, if the reliability of a prospective expert witness's evidence is only to be a matter of weight, then why spend any time at the outset of that witness's testimony on the matter of his or her qualification?

[27] Mr. DeMelo also told the Board that it was unfortunate that *Henderson v. Risi* was singled out. Considering how PALS framed its motion, PALS was seduced into focusing only on it without showing any awareness of or regard for the "volumes of case law that came before it."

[28] Finally, Mr. DeMelo submitted that the rules of natural justice and procedural fairness include the right of a party to challenge a prospective expert proffered by a party opposite, including cross-examination of the witness.

[29] Echoing Mr. DeMelo's submissions, J. Andrew Pritchard, counsel for the Proponent, began by telling the Board, "Vice-Chair Schiller has the law right."

[30] Building on Mr. DeMelo's submissions regarding a trier of fact's discretion, Mr. Pritchard submitted that that discretion may be exercised at any time, and the timing as to when it is exercised in a decision entrusted to the trier of fact. Often, he suggested, complete information is not available at the time qualification is sought, (i.e., when a witness is first proffered), and it is for that reason the matter of confidence in the prospective witness's evidence is more appropriately left to weight rather than admissibility. That, he submitted, is what occurred in *Henderson v. Risi*: the relationship between Mozessohn and Page was ambiguous, and therefore Justice Lederman deemed it preferable to learn more about the relationship through the unfolding of the evidence over the course of that trial. In the case at hand, said Mr. Pritchard, Vice-Chair Schiller had a very clear sense of the relationship between Dr. Gayler and PALS, evidenced by the former's self-identification as a member of that organisation and through the tone of numerous statements set out in his witness statement.

[31] Like Mr. DeMelo, Mr. Pritchard directed the Board to jurisprudence that reinforces the discretion held by a trier of fact. Specifically, he pointed to *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297, ("*Alfano*") wherein Justice O'Connor, writing for the Court of Appeal, set out at paragraphs 110 through 113:

> 110 In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in the light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.
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> 111 That said, the court retains a residual discretion to exclude evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding.... If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.
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> 112 In considering the issue of whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a *voir dire* and have regard to any relevant matters that bear on the expert's independence. These may include the expert's report, the nature of the expert's retainer, as well as materials and communications that form part of the

> process by which the expert formed the opinions that will be the basis of the proposed testimony....
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> 113 An appellate court will accord deference to a trial judge's decision to exclude evidence of an expert on the basis that the proposed evidence lacks independence. On reviewing such a decision, an appellate court will look to whether the trial judge applied the proper legal principles and whether the trial judge's conclusion was supported by evidence. Absent such an error, an appellate court will not interfere.

[32] On the subject of requests arising under s. 43 of the OMB Act, Mr. Pritchard also directed the Board to a case entitled *The Roehampton Corporation v. Toronto (City of)*, Ontario Municipal Board, May 14, 2004, Decision/Order No. 0897, ("*Roehampton*") wherein in the Board wrote at page 2:

> The task before the reviewing panel is not an appeal, as this panel is not empowered by law to conduct an appellate function; it is strictly an analysis as to whether there are sufficient reasons for us to put aside the decision. In so doing, we are governed by a body of jurisprudence consistently requiring the most scrupulous and careful approach, as a rehearing pursuant to section 43 of the *Ontario Municipal Board Act* is a remedy that is at once rare and extraordinary. In the case of *C.M.H.C. v. Vaughan* (1994) 31 O.M.B.R. 474 (O.M.B.), I have reviewed the *raison d'être* of the provision and the vigilance that must be required. These enunciations have been incorporated by reference in the judgment of *Russell v. the City of Toronto* (2000) 52 O.R. (3d) Ct. of Appeal, p. 15:
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> > The jurisprudence of the Board in this regard is most clear. The past decisions indicate that we are reluctant to grant a s. 43 review unless there is a jurisdictional defect, or where there has been a change of circumstances or new evidence available, or where there is a manifest error of decisions or if there is an apprehension of bias or undue influence. While the list may not be exhaustive and the Board's discretion should not be fettered unduly on an *a priori* basis, there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or insubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effects on public and propriety interests, our decisions should be well-considered and must have some measure of finality.... It never has been nor would it ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.

[33] Mr. Pritchard submitted that these statements have been codified in the language of Rule 115.01 requiring a review to be substantiated with "convincing and compelling" justifications.

[34] With this foundation of submissions now in place, the Board turns to its conclusions.

ANALYSIS AND FINDINGS

[35] Has the Request convincingly and compellingly demonstrated that the refusal to qualify Dr. Gayler as an expert constitutes a violation of the rules of natural justice or procedural fairness, including those against bias? Based on the analysis and reasons set out below, the Board finds that the Request does not satisfy this test and it is accordingly denied. Pursuant to Rule 116, the decision remains in force and effect.

[36] Beginning with Mr. Bacher's indignation toward PALS being referred to as an advocacy group, the Board notes a confusion brought on by his submission that PALS is, "...not an advocacy group but rather an educational one which on occasion advocates for the protection of farmland in Ontario." If one advocates, whether occasionally or routinely, one is advocating. If the advocating is done by more than one, then that number may be fairly called an advocacy group as a term of convenience. Moreover, whether the Town, Region, and Proponent were engaged in advocacy is a moot point. Taking the plain meaning of advocacy to be the pursuit and/or support of a cause or goal, it is arguable that they were, but nothing turns on that because, as discussed next, the independence element of qualification exists as a countervailing measure. It was not any characteristic of PALS as an organisation that undermined Dr. Gayler; it was his lack of independence from the mandate and expressed goals of the organisation. The Board, therefore, is not persuaded that Vice-Chair Schiller's use of the term advocacy group only in reference to PALS reveals bias.

[37] With respect to Mr. Bacher's submission that the expert witnesses called by the Town, Region, and Proponent are themselves biased given their respective employment relationships, the Board finds this to be entirely without basis or merit, and nothing more than casting aspersion in an attempt to manufacture a perception of bias in Vice-Chair Schiller's decision. Of those experts, those who were professional planners were Members of the Ontario Professional Planners Institute ("OPPI" or "Profession") and held the Registered Professional Planner ("RPP") designation. Given that RPPs appear regularly before the Board, judicial notice is taken of the Profession's *Code of Practice* and *Standards of Practice* which require a primary duty to the public interest and the principles of sound planning, including an obligation to exercise independent professional judgment. The Profession is ever-vigilant about ensuring that its members are independent, seen as independent, not beholden to the organisation

whose name appears on their remuneration cheque. It is for that reason that a professional planner seeking expert qualification will only accept a retainer or support a proposal after an independent exercise of due diligence. Indeed, that exercise is often the first thing queried when the witness is presented for qualification because it goes directly to undergirding independence and satisfying that component of qualification confirmed by Vice-Chair Schiller. Such professional obligations and practices have been ignored by PALS in its suggestion that Dr. Gayler, who is neither a member of the OPPI nor an RPP, should have been accorded the same status as the planners proffered by the Town, Region, and Proponent. That Vice-Chair Schiller treated those planners differently is not evidence of bias against PALS because those planners started with a different status than Dr. Gayler.

[38] Turning to the timing of the Town's, Region's, and Proponent's challenge of Dr. Gayler's qualification and Mr. Bacher's submission that they should not have done so earlier than they did, there is simply nothing in the Rules nor in any authority either stipulating or even suggesting a specific time or point at which a challenge of a witness must be executed. That the Town, Region, and Proponent elected to challenge Dr. Gayler at the time he was presented to the Board is a decision each was entitled to make as an element of exercising its own natural justice and procedural fairness rights to challenge a witness, recognising the Board's powers and discretion to qualify or not. Given the nature of the Request, the Board finds it curious that PALS would advance denial of natural justice and procedural fairness as a basis for sustaining the Request. In any event, when the challenge was launched has nothing whatsoever to do with investigating the bias alleged against Vice-Chair Schiller.

[39] With respect to PALS's reliance on *Henderson v. Risi*, the Board finds that it is not the *coup de grâce* Mr. Bacher and others sympathetic to PALS perceive or understand it to be. The case is clearly distinguishable. In relying exclusively on that case, PALS has attempted to appropriate what was a court's exercise of a discretion to negate Vice-Chair Schiller's exercise of the same discretion.

[40] Before differentiating *Henderson v. Risi* from the matter at hand, the Board notes that PALS has not contested the principle of discretion; at no point has PALS submitted that a trier of fact does not have a discretion to exercise when it come to the qualification of an expert witness. The theory that PALS has advanced in this motion is

that Vice-Chair Schiller exercised that discretion in a biased manner and that alleged bias constitutes the violation of the rules of natural justice and procedural fairness. This is the only discernable theory because PALS has also not pointed to any other natural justice or procedural fairness rule or right as a basis for sustaining the Request.

[41] Turning then to differentiating *Henderson v. Risi*, in that case there were three legal entities in which Mozessohn and Page were involved. Each was engaged for his respective task and charge through different firms. Moreover, the third firm in which they were partners was not involved in the litigation. Justice Lederman's decision does not include any discussion of their relationship beyond a matter-of-fact recitation of their respective employment arrangements. Indeed, the decision does not contain anything to suggest that Justice Lederman even had information beyond simply knowing who worked where and which firm did what. The nature of their relationship was patently ambiguous, as Mr. Pritchard submitted, and it was that condition that in all probability led Justice Lederman to state, "the connection between Mozessohn and Page requires further contextual assessment." It is reasonable to infer from this statement that Justice Lederman did not, at the time he was being asked to rule, have a sufficiently rich or perhaps any appreciation of the relationship between Mozessohn and Page. It is understandable, therefore, why he concluded as he did: it appears that he did not have any sense of the colour of the relationship between Mozessohn and Page in order to assess the impact of their relationship, if any, on the Mozessohn's evidence.

[42] In the case at hand, there are not three separate albeit related legal entities; there is only one: PALS. And in this case, the relationship between PALS and Dr. Gayler was not ambiguous. It was clear: clear from Dr. Gayler's self-identification and admission of membership in PALS; and clear from the tone of his witness statement.

[43] Both the Town's and the Proponent's written submissions articulate multiple examples of language employed by Dr. Gayler that belie both his and PALS's claim that he was independent of the organisation. By way of illustration, examples include:

> [From section 1:] If land is to be removed from prime agricultural areas, [the Provincial Policy Statement stipulates] that it should be used for 1) limited non-residential uses. What constitutes "limited" no doubt is a judgment call, <u>but an 827 acre proposal being called "limited" defies belief to the point of being vulgar</u> [emphasis added].
>
> ...

> [From section 8:] A Special Policy Area, rather than an urban-area boundary expansion, is simply a clever device to get around i) the need for a municipal comprehensive review which an boundary expansion would require; and 2) the further embarrassment of yet another 300 acre urban-area boundary expansion to the east on the North Bridgeburg area [emphasis added].
>
> ...
>
> [From section 11, and in reference to a 1981 case before the Board in which PALS and other development interests were on opposing sides:] PALS has continued to be the lone wolf on many similar occasions; for example, while it lost the battle for the 500 acre expansion of east Font Hill on some of Canada's best agricultural land, it won the war when the Greenbelt and Places to grow legislation was passed...some six years later [emphasis added].
>
> Now PALS is left to defend the subject area in Fort Erie (albeit not alone), emphasizing and endorsing the Province and Region's own policies that the Province is unwilling to defend on this particular occasion, and the Regional and local staff and politicians seem only too glad to circumvent in their rush to defend the age-old 'any growth is good growth' syndrome [emphasis added].

[44] What is apparent to this panel is a tone reflective of a polemic. It is certainly not the tone this Board expects and requires from a dispassionate, independent expert, nor is it the tone one would anticipate after considering the arc of jurisprudence to which Mr. DeMelo took the Board.

[45] As a consequence, the Board cannot countenance the submission by Mr. Bacher that the "basic principles" of *Henderson v. Risi* are "identical to the issues involved in Dr. Gayler's suitability to be qualified as an expert witness." The issues are not identical. Justice Lederman and Vice-Chair Schiller were, at the time they each exercised their discretion, operating at opposite ends of the what-do-I-know-about-the-relationship-I'm-being-asked-to-scrutinise spectrum: the former had little if any knowledge of the Mozessohn-Page relationship; the latter had considerable insight into the Gayler-PALS relationship. Justice Lederman, adopting the reasoning espoused in *Gallant v. Brake-Patten*, preferred waiting to exercise that discretion. Vice-Chair Schiller felt no such compulsion.

[46] Vice-Chair Schiller did not come lightly or hastily to the decision to refuse Dr. Gayler expert qualification. The process over which she presided afforded PALS a full opportunity to lead evidence and make submissions. In fact, while PALS had every opportunity to have Dr. Gayler testify on the subject of his independence and challenged qualification, it elected to not call him. Instead, it called Gracia Janes, its Secretary/Treasurer, to speak to the issue of Dr. Gayler's membership in PALS.

Appreciating the magnitude of what was at stake for PALS as an appellant, Vice-Chair Schiller adjourned to give herself a full opportunity to deliberate over-night on the discretion she was being called upon to exercise, thus ensuring that all parties' respective rights and interests were not given short-shrift. The process, as it was described by Mr. DeMelo and Mr. Pritchard, both of whom participated, very much mirrored a *voir dire* as described in *Alfano*. There was no evidence in this motion that the process in any way procedurally handicapped PALS's ability to call evidence or make submissions.

[47] Finally, revisiting the core of the test against which the Request is to be assessed and bearing in mind the enunciations set out in *Roehampton*, a compelling case is one that is so attractive as to be overpowering and irresistible; one that leaves the Board thinking 'I am constrained from considering any other path;' one that simply leaves no option but to grant the relief sought. A convincing case, likewise, is one that brings the Board to thinking, 'I am moved, I am sold, I am induced to commit to what you want me to do.' There can be no shades of gray at the end of it; there can be no remaining ambiguity blurring a request. None of what PALS has advanced in this motion has moved the Board to such thinking.

[48] At the same time, a request cannot be found to be convincing and compelling if, following submissions, the Board cannot identify which natural justice or procedural fairness rules or rights have been violated, or what was procedurally prejudicial. A request cannot be found to be convincing and compelling if the Board itself has to make connections that the requesting party has not made or rely on extrapolations about bias that are at best speculative and abstract. A request cannot be found to be convincing and compelling if, to arrive at the destination sought by the requesting party, the Board is left to fill in gaps or make assumptions. And finally, a request cannot be found to be convincing and compelling if the Board, at the end of it all, is left with two equally attractive paths or a single path that is more attractive than the path desired by the requesting party.

[49] Based on the foregoing analysis, the Board finds that PALS has not made out a convincing and compelling case—or, indeed, any case—that Vice-Chair Schiller violated the rules of natural justice and procedural fairness, including those against bias when she refused to qualify Dr. Gayler as an expert. As Mr. Pritchard succinctly put it,

she got the law right; and she did what she was empowered to do in a transparent, even-handed manner.

ORDER

[50] The Board orders that the Request is denied. The decision dated November 2, 2102, remains in full force and effect.

"James R. McKenzie"

JAMES R. MCKENZIE
VICE-CHAIR