TAB 8

Interim Control By-Laws: An Update

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I. Introduction and Overview

Interim control By-laws ("**ICBLs**") have been a part of the planning regime in Ontario for nearly thirty years. ICBLs were recommended in the 1977 Report of the Planning Act Review Committee[1] and in the 1979 White Paper on the *Planning Act*[2] and were first authorized by s. 37 of the *Planning Act, 1983*, S.O. 1983, c. 1 (now s. 38). Section 11.12 of the 1977 report states:

> A municipal council should be able to control development on an interim basis when it decides to review or change the existing land use and development policies in a given area. The council may want to do so because it believes it feels it was elected to institute a change in policy, or because it believes circumstances have changed since the zoning was enacted.

Today, Section 38(1) of the *Planning Act,* R.S.O. 1990, c. P.13 (the "***Planning Act***")[3] reads:

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

The *Planning Act* allows a municipality to extend the effective period of an ICBL for one additional year.[4] Section 38 of the *Planning Act* also sets out time frames within which notice and appeals must be given with respect to an ICBL. Subsection 38(3) requires that a municipality give notice of passing of the ICBL to all persons within 120 metres of the affected lands[5] within 30 days of its passing and subsection 38(4) gives the right to any person to whom notice was given to appeal the ICBL to the Ontario Municipal Board (the "**Board**") within 60 days of the passing of the ICBL. Further, subsection 38(7) prohibits an ICBL from being passed in respect of the same land for a period of three years from the date the former ICBL ceased to be in effect.

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[1] *Report of the Planning Act Review Committee*, Government of Ontario, April 29, 1977.
[2] *White Paper on the Planning Act*, Government of Ontario, May, 1979.
[3] *Planning Act,* R.S.O. 1990, c. P.13 [*Planning Act*].
[4] *Ibid.* at ss. 38(2).
[5] See also: O. Reg. 545/06, ss. 9(2).

Where the period of time during which the ICBL is in effect has expired and where the municipality does not pass a new zoning by-law under section 34 of the *Planning Act* based on the completion of the review or study for which the ICBL was passed, the zoning by-law in effect immediately preceding the ICBL comes into effect again. The prior zoning by-law also comes into effect if the ICBL is repealed or if the extent of the area is reduced in size.[6] Where there is an appeal pending for a replacement by-law enacted pursuant to Section 34 of the *Planning Act*, the ICBL remains in effect until the appeal is settled or decided.[7]

In describing the purpose of ICBLs, the Ontario Court of Appeal observed that ICBLs are "an important planning instrument for a municipality. They allow the municipality to rethink its land use policies by suspending development that may conflict with any new policy."[8] The Supreme Court of Canada (the "**SCC**") has commented on the extraordinary nature of the power and its purpose:

> Interim control by-laws are powerful zoning tools by which municipalities can broadly freeze the development of land, buildings and structures within a municipality. The power to enact an interim control by-law has been aptly described as an 'extraordinary one, typically exercised in a situation where an unforeseen issue arises with the terms of an existing zoning permission, as a means of providing breathing space during which time the municipality may study the problem and determine the appropriate planning policy and controls for dealing with the situation'.[9]

While very few cases have reached the higher level courts in Ontario, there have been two important decisions from the Ontario Court of Appeal that provide significant guidance in respect of the forum that should be chosen for a challenge to ICBLs and the principles that govern the evaluation of such by-laws - the 1997 decision of *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (***"Equity Waste Management"***)[10] and the 2002 decision of *Country Pork Ltd. v. Ashfield (Township)* (***"Country Pork"***).[11] This paper will review these key decisions and their impact on the jurisprudence of the Board.

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[6] *Planning Act*, *supra* note 3 at ss. 38(6).
[7] *Ibid.* at ss. 38(6.1).
[8] *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*, (1997), 35 O.R. (3d) 321 (Ont. C.A.) (Laskin, J.A.) [*Equity Waste Management*] at para. 50.
[9] *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, (SCC) (Charron, J.) [*RSJ Holdings*] at para. 27.
[10] *Equity Waste Management*, *supra* note 8.
[11] *Country Pork Ltd. v. Ashfield (Township)*, [2002] O.J. No. 2975 (Ont. C.A.) (Borins, J.A.) [*Country Pork*].

II. Forum for Challenging an Interim Control By-law

In addition to the Board appeal provided by subsection 38(4) of the *Planning Act*, an ICBL may be challenged to the courts pursuant to Section 273 of the *Municipal Act, 2001, S.O. 2001, c. 25* (“***Municipal Act***”).[12] Section 273 of the *Municipal Act* provides that any person may apply to quash a by-law of a municipality in whole or in part on the grounds of illegality:

> **Application to quash by-law**
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> 273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

An application to quash under the *Municipal Act* can be brought up to a year after the ICBL is passed.[13]

The question of the relative roles of the Board and the courts in challenges to ICBLs has arisen frequently. A number of early court decisions suggested the Board was the appropriate forum for considering the merits of an ICBL rather than the court.[14] However, in the 1992 decision of *839891 Ontario Inc. v. St. Catharines (City)* (“***St. Catharines***”),[15] where unlike the earlier cases, a concurrent appeal was not filed with the Board, the court agreed to hear the application. The court noted that the Board is a more appropriate forum for considering the merits of an ICBL but exercised its discretion to dispose of the application to avoid delay and also because the court considered that the application was properly before it. The court quashed the ICBL for being passed in bad faith after finding that it was unfair and discriminatory and represented an abuse of process.

A wave of applications to the courts to quash ICBLs for bad faith followed.[16] Although *St. Catharines* involved an application where there was no concurrent appeal under the *Planning Act*, the subsequent court decisions did not suggest the Board process should take precedence where there is also an appeal filed under the *Planning Act*. For instance, in the 1997 decision of

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[12] *Municipal Act, 2001,* S.O. 2001, c. 25 [*Municipal Act*].
[13] *Ibid.* at ss. 273(5).
[14] For instance, see: *Blanchfield v. Ottawa (City)* (1984), 27 M.P.L.R. 232 (Ont. H.C.J.) (Saunders, J.), & *715113 Ontario Inc. v. Ottawa (City)* (1987), 63 O.R. (2d) 102 (Ont. H.C.J.) (Henry, J.).
[15] *839891 Ontario Inc. v. St. Catharines (City)* (1992), 90 D.L.R. (4th) 354 (Ont. Gen. Div.) (MacDonald, J.).
[16] For instance, see: *Roman Catholic Episcopal Corp. for the Diocese of Toronto in Canada v. Barrie (City),* [1997] O.J. No. 2536 (Ont. Gen. Div.) (MacKinnon, J.) [*Roman Catholic Episcopal*], *Luxor Entertainment Corp. v. North York (City)* (1996), 27 O.R. (3d) 259 (Ont. Gen. Div.) (Rosenberg, J.) & *1016338 Ontario Ltd. v. North York (City),* 1997 CarswellOnt 3637 (Ont. Gen. Div.) (Gans, J.).

Roman Catholic Episcopal Corp. for the Diocese of Toronto in Canada v. Barrie (City) the court found:

> ... Pending before the Ontario Municipal Board [is] an appeal of this same Interim Control By-law 96-245...
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> The court has authority under Section 136 to quash a by-law for illegality. The Ontario Municipal Board is a statutory tribunal with expertise in planning matters. The application to quash and the applicant's appeal to the Board can both proceed on separate tracks as the court is concerned with procedure and the manner in which the applicant has been treated by the municipality whereas the Board is concerned with planning content ...[17] [emphasis added]

A. *Equity Waste Management*

In the seminal *Equity Waste Management* case, the Board was the forum initially chosen for the challenge of the ICBL. Subsequently, however, the ICBL was challenged by means of a motion to quash under the *Municipal Act* when it became apparent that the Board hearing could not be scheduled within the time frame needed for the developer to fulfill the conditions in its real estate transaction for regulatory approval. The motion judge held that the applicant was in no way restricted from moving to quash in the court, notwithstanding that a Board appeal was pending.[18]

Mr. Justice Laskin for the Court of Appeal upheld the decision of the motion judge to exercise her discretion to hear the application on the ground of urgency, noting that such decisions should be based on the adequacy of each forum to resolve the dispute. Considerations relevant to the evaluation of adequacy include cost, timing and the unfairness that would be caused by delay. However, Mr. Justice Laskin noted that, in many cases, the appropriate tribunal to review a challenge to an ICBL is the Board and unless the ICBL is being challenged for illegality or the Board is not an adequate forum, the court ought to decline jurisdiction to quash under the *Municipal Act*.[19]

The Court of Appeal observed that a challenge to an ICBL based on an allegation of bad faith demonstrates how the jurisdiction conferred on the courts and the Board cannot be "fitted into

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[17] *Roman Catholic Episcopal , supra* note 16 at paras. 14-15.
[18] *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1994), 22 M.P.L.R. (2d) 167 (Ont. Gen. Div.) (Greer, J.) [*Equity Waste – General Division*] at para. 3.
[19] *Equity Waste Management, supra* note 8 at para. 30.

watertight components."[20] Mr. Justice Laskin commented that the Board, like the courts "has the jurisdiction to consider an allegation of bad faith and is well suited to decide such an allegation, particularly when it is based on the absence of planning rationale for the by-law and the lack of proper planning principles to support the by-law ... often the allegation of bad faith will be part of a more wide-ranging attack on the merits of the by-law."[21]

Although *Equity Waste Management* makes it clear that there are many cases in which the court should decline to exercise its jurisdiction to quash an ICBL under the *Municipal Act*, the decision has been relied on as authority for the proposition that the Board and the courts entertain concurrent jurisdiction over appeals of ICBLs.[22]

B. *Country Pork*

The 2002 *Country Pork* decision of the Ontario Court of Appeal clearly establishes that the Board is the preferred reviewing body for a challenge to an ICBL, especially when planning issues are involved.[23]

At the trial level in *Country Pork*, the owner of a livestock facility concurrently filed challenges of an ICBL under the *Planning Act* and the *Municipal Act*. By agreement between County Pork and the municipality, it was agreed that the Board appeal would be held in abeyance pending disposition of the *Municipal Act* application. The trial judge assumed jurisdiction without any discussion on the question and refused the application to quash. On appeal, the Court of Appeal determined that the parties had misread *Equity Waste Management* as giving the applicant a choice of forum and concluded that the trial judge had erred in failing to decide at the outset whether she should exercise her discretion to hear the application.

The Court of Appeal examined the appeal powers with respect to ICBLs under the *Planning Act* and the powers to quash under the *Municipal Act* and concluded that the *Municipal Act* "is not a vehicle for consideration of the merits of a municipality's decision to pass the by-law, or whether it conforms to proper planning principles."[24] The Court of Appeal did recognize that an

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[20] *Ibid.* at para. 34.
[21] *Ibid.*
[22] For instance, see: *Country Pork Ltd. v. Ashfield (Township),* [2001] O.J. No. 1127 (Ont. Sup. Ct. J.) (Leitch, J.).
[23] *Country Pork, supra* note 11.
[24] *Ibid.* at para. 28.

application to quash under the *Municipal* Act is warranted in situations where an ICBL is based on proper planning principles but is outside of a municipality's jurisdiction and therefore unlawful. However, it found that the legislative intent was for the Board to have exclusive jurisdiction to assess whether the by-laws and resolutions authorizing an ICBL meet the principles of the *Planning Act*.

In remitting the application to quash back to the trial judge to consider whether to exercise her discretion to hear the appeal, the Court of Appeal enumerated a number of criteria to assist the lower court in determining the proper forum for the appeal. Key considerations include whether the attack on the ICBL is predominantly directed to planning principles and the need to recognize the Board's expertise in municipal planning matters as well as its incidental jurisdiction to consider whether an ICBL was passed in bad faith.

C. Aftermath of *Equity Waste Management* and *Country Pork*

It now seems well settled that the Board is the appropriate forum for an ICBL appeal that relates to the planning validity of the by-law, as well as for attacks based on bad faith. However, the SCC decision in *London v RSJ Holdings*[25] illustrates a situation where a *Municipal Act* challenge is the appropriate approach. The challenge in *RSJ Holdings* related to the municipality's decision to carry on its deliberations regarding a proposed ICBL at a meeting closed to the public. The SCC endorsed the decision of the application judge to assume jurisdiction of the motion to quash under the *Municipal Act* on the basis that the application involved a direct frontal attack on the validity and legality of the by-law.[26]

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[25] *RSJ Holdings, supra* note 9.
[26] *Ibid.* at para. 37.

III. Grounds for Challenging an Interim Control By-Law

A. Principles Established in the Board's Jurisprudence

The 1987 Board decision of *Nolan v. McKillop (Township)* (**"Nolan"**)[27] summarizes the principles that had emerged from the Board's previous dispositions in relation to appeals pursuant to Section 37 [now Section 38] of the *Planning Act* as follows:

> 1) That Section 38 must be interpreted strictly in view of the fact that it permits a municipality to negate development rights;
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> 2) That the municipality must substantiate the planning rationale behind the authorizing resolution and the ICBL;
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> 3) That the by-law must conform with the official plan; and
>
> 4) That the authorized review must be carried out fairly and expeditiously.[28]

Subsequently, the 1996 Board decision of *Carr v. Owen Sound (City)* (**"Carr"**)[29] supplemented the four principles with the following two questions:

> 1) Is the situation is sufficiently urgent to require the immediate negation of permitted uses and development rights; and
>
> 2) Are there are effective and less drastic instruments that might have been used by the municipality to achieve the desired end?[30]

Since *Carr*, the Board has from time to time applied all six principles,[31] although the *Nolan* principles have been more consistently applied by the Board.

The clear thrust of the principles enunciated by the Board in *Nolan* and *Carr* is to require a municipality to justify the use of the ICBL power in view of its potential to negate prior development rights. This paper examines whether this remains the appropriate approach today.

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[27] *Nolan v McKillop (Township)* (1987), 36 M.P.L.R. 82 (O.M.B.) (Cole and Owen, Members) [*Nolan*].
[28] *Ibid.* at para. 14.
[29] *Carr v. Owen Sound (City)*, 1996 CarswellOnt 5579 (O.M.B.) (Fish, Member) [*Carr*].
[30] *Ibid.* at para. 18.
[31] For instance, see: *Loralgia Management Ltd. v. Oshawa (City),* 2002 CarswellOnt 3707 (OMB) (Smout and Boxma, Members) & *Paletta International Corp. v. Burlington (City),* [2006] O.M.B.D. No. 355 (Pendergrast, Member).

B. The *Equity Waste Management* Decision

The Court of Appeal decision in *Equity Waste Management* has been interpreted by many as a complete reversal of the *Nolan* and *Carr* principles. In *Equity Waste Management* an ICBL was enacted by the Town of Halton Hills in response to two site plan applications filed with the Town seeking approval for a waste composting facility and transportation truck terminal within a corridor along Highway 401 where the Town wished to establish a prestige industrial gateway on full municipal services. No concern was raised in the municipal staff reports regarding the appropriateness of the projects in light of the municipality's long term strategy for the Highway 401 corridor. However, six days prior to the enactment of the ICBL, the councillors for the Town received a report prepared for the Region of Halton which questioned whether the existing planning policies of the Town would be adequate to prevent development that could undermine the future potential of the corridor for high quality industrial development.

As noted above, the ICBL challenge proceeded under the *Municipal Act* rather than by way of an appeal to the Board pursuant to the *Planning Act* due to timing constraints that precluded a timely disposition by the Board. The motions judge in the Ontario Court – General Division found that the ICBL had been passed in bad faith and quashed the ICBL. In her reasons, Madam Justice Greer stated that, "the passage of such interim control by-laws must be used sparingly, and only under great urgency, given its unbridled power and given that there are no checks and balances against its abuse."[32] The court placed weight on the absence of a planning report indicating a need for further professional study of the area. Further, the court noted the significant local opposition in particular to the Equity Waste Management development, that a number of council members were concerned about re-election in an impending municipal election, and suggested that Town staff had attempted to "clothe the [ICBL] with planning principles after the fact."[33]

On appeal, the municipality argued that the Board has exclusive jurisdiction to hear the appeal of the ICBL and that the trial judge erred in finding bad faith. The Court of Appeal overturned the trial judge's decision, holding that the finding of bad faith was unreasonable.[34] In his reasons,

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[32] *Equity Waste – General Division*, *supra* note 18 at para. 24.
[33] *Ibid.* at para. 27.
[34] *Equity Waste Management, supra* note 8.

Mr. Justice Laskin undertook a detailed review of the history behind the Legislature's enactment of Section 38 and the purpose of providing a municipality with "an important planning instrument" that allows the municipality "breathing space to rethink its land use policies by suspending development that may conflict with any new policy."[35] The Court of Appeal quoted from the lower court decision in *715113 Ontario Inc. v. Ottawa (City)*,[36] where the court found that the public interest in reviewing current zoning in an area takes precedence over the private rights of affected landowners to use their lands freely. No reference was made to the principles developed by the Board in *Nolan* and *Carr*.

The Court of Appeal noted that the only statutory condition to the passage of an ICBL is a by-law or resolution directing a review or study of land use policies[37] and that the role of the court is limited to ensuring that the municipality did not exceed its powers or exercise those powers in bad faith.[38]

In the end, the Court of Appeal found the approach of the trial judge too interventionist, suggesting there should have been a more deferential approach to the review of municipal powers. A number of the observations by Mr. Justice Laskin are instructive:

- There is no limitation that an ICBL must be used sparingly and only under great urgency. The safeguard against abuse is the requirement for a study, the right to appeal to the Board and the two year time limit on the duration of the by-law.
- There is no need for a municipality to have a planning report in hand before passing an ICBL. While a recommendation for an ICBL might be expected to come from the planning department, the municipal councillors are entitled to take their own view.
- The enactment of an ICBL is legislative and not a judicial function. It is proper and in the public interest for councillors to take into account the views of their residents. However, bad faith may be found where it is demonstrated that a group of residents is appeased for reasons of the councillor's self-interest.
- Those challenging the by-law have the onus to prove bad faith on the part of the Council. The responsibility of the municipality is to discharge the evidentiary burden to put the planning justification for the by-law before the court.

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[35] *Ibid.* at para. 50.
[36] *715113 Ontario Inc. v. Ottawa (City)*, 1987 CarswellOnt 1043 (Ont. H.C.) (Henry, J.).
[37] *Equity Waste Management, supra* note 8 at para. 51.
[38] *Ibid.* at para. 54.

C. Board Jurisprudence Since *Equity Waste Management*

Many have considered the Court of Appeal decision in *Equity Waste Management* a game changer that dramatically raised the bar for those seeking to challenge ICBLs. While the decision is often cited in Board decisions as standing for the proposition that a municipality need do no more than direct a study or review of its planning policies, the Board has at times continued to apply the principles from *Nolan* and *Carr* and to find reasons to distinguish *Equity Waste Management.*

The 2006 Board decision in *Paletta International Corp. v. Burlington (City)* (***"Paletta"***)[39] involved an ICBL passed ostensibly to review the appropriateness of the City's planning policies respecting properties in proximity to GO stations in light of the then draft Growth Plan policies that would call for intensification in such locations. The Board found that the ICBL did not represent an appropriate use of the power given under Section 38 of the *Planning Act* and that the ICBL was not enacted on the basis of a legitimate planning rationale. The Board concluded that the City's underlying intent was to stop a Wal-Mart development and bolster the City's case in an upcoming hearing respecting the developer's private appeals of its applications for official plan amendment and rezoning.[40]

The Board acknowledged that the only statutory condition to be met by a municipality is that it must have directed a study or review but observed that there would be no purpose to the appeal right granted under subsection 38(4) of the *Planning Act* if the only factual matter to consider is whether the one statutory requirement has been met.[41] Accordingly, the Board applied the principles from *Nolan* and *Carr* and found that the City had not identified a valid planning rationale for the ICBL nor had it demonstrated that there was sufficient urgency to warrant the imposition of an ICBL. Finally, the Board observed that the City had available to it the less severe option of refusing the Wal-Mart applications. The Board found, therefore, that the City had failed to meet the second of the *Nolan* principles and the two *Carr* principles and repealed the ICBL.[42]

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[39] *Paletta International Corp. v. Burlington (City),* [2006] O.M.B.D. No. 355 (Pendergrast, Member).
[40] *Ibid.* at para. 21
[41] *Ibid.* at para. 12.
[42] *Ibid.* at paras. 14-16.

The *Paletta* decision considered the *Equity Waste Management* decision and found compelling differences between the facts of the two cases. In particular, the Board was not convinced that the draft Growth Plan was the factor that galvanized the City to act, given that two months had elapsed between a staff report respecting the City's ability to achieve its intensification objectives and the enactment of the ICBL.[43] Rather, the Board characterized the use of the draft Growth Plan as "a convenient rationale for a resolution intended to stop Wal-Mart" rather than the catalyst for a study.[44] The Board noted its jurisdiction to decide upon allegations of bad faith but found it unnecessary to consider this question, having determined that the City had failed to use its powers under Section 38 appropriately.[45]

In some recent decisions, however, the Board has struggled with whether *Equity Waste Management* means that the principles from *Nolan* and *Carr* are no longer applicable.[46] There has been a clear reluctance to limit the inquiry on an appeal under the *Planning Act* to whether the municipality has directed a study, so the tendency of the Board in these situations has been to apply the *Nolan* and *Carr* principles alongside the much less stringent criteria that have been assumed to emanate from *Equity Waste Management.*

In fact, as the carefully nuanced decision in *Paletta* demonstrates, the *Equity Waste Management* decision does not stand for the proposition that an ICBL will be upheld so long as a municipality merely meets the single statutory condition of directing a planning study. Had that been the case, there would have been no reason for the Court of Appeal to delve into the detailed planning history that led to the enactment Halton's Hill's ICBL and to examine the legitimacy of the municipality's planning rationale for its study.

Equity Waste Management should be seen as supplementing rather than replacing the *Nolan* and *Carr* principles, as it provides guidance as to the factors to be considered in assessing whether an impugned ICBL was passed in bad faith. Moreover, it is abundantly clear that the sufficiency of the planning justification for the ICBL will form a key consideration whether the attack on the

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[43] Note that, in contrast, the Regional study in *Equity Waste Management* was delivered only six days prior to the enactment of the impugned ICBL.
[44] *Paletta, supra* note 39 at para. 63.
[45] *Ibid.* at para. 65.
[46] For instance, see: *Pricewaterhouse Coopers Inc. v. Amherstburg (Town)*, [2008] OMBD No. 1033 (S.J. Sutherland, Member) at paras. 39-40 & *Wyeridge McKellar Developments v. McKellar (Township)*, 2009 CarswellOnt 3297 (J.P. Atcheson, Member) at para. 82.

ICBL is based on an allegation of bad faith or the municipality's use of its ICBL power. While the onus to prove bad faith may be on the party attacking the by-law, the ultimate outcome of most challenges will depend on the ability of the municipality to demonstrate that there is a legitimate planning basis for the suspension of the prior zoning by-law.

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