

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 12, 2017

CASE NO(S): MM170025

PROCEEDING COMMENCED UNDER subsection 222(4) of the *Municipal Act*, 2001, S.O. 2001, c. 25, as amended

Appellant: Rob Dobrucki
Appellant: Mark Richardson
Subject: By-law No. BL 17-030 to re-divide the City of Hamilton's Ward Boundaries
Municipality: City of Hamilton
OMB Case No.: MM170025
OMB File No.: MM170025
OMB Case Name: Dobrucki v. Hamilton (City)

Heard: October 19 – 27, 2017 in Hamilton, Ontario

APPEARANCES:

Parties

Counsel

City of Hamilton

Steven C. Ferri, Cindy Yi and Brendan Ruddick

Rob Dobrucki

Self-represented

DECISION DELIVERED BY B.W. KRUSHELNICKI AND PAULA BOUTIS AND ORDER OF THE BOARD

INTRODUCTION

[1] The matter before the Board is an appeal under section 222 of the *Municipal Act* ("the Act") by Rob Dobrucki and Mark Richardson against By-law 17-030 ("By-law") of the City of

Hamilton which establishes revised ward boundaries for the purposes of conducting municipal elections in the City of Hamilton ("City"), a 15-ward boundary configuration.

City Preferred Ward Boundaries

[2] In the days leading up to the hearing, the City had settlement discussions with the appellant Mark Richardson. This led to a resolution of his appeal based on certain agreed revisions to the ward boundaries as they are proposed in the By-law, while maintaining a 15-ward boundary configuration. The settlement was referred to as the "City Preferred Ward Boundaries" at the hearing. At the appeal, the City sought a Board order to revise the By-law to reflect boundaries as agreed to by the City and Mr. Richardson. On the strength of the agreed settlement, Mr. Richardson withdrew his appeal and did not attend at the hearing.

[3] Mr. Dobrucki maintained his appeal against the original By-law and did not support the City Preferred Ward Boundaries Option.

Issues List

[4] Because of the settlement, the Issues List required revising. However, the parties were not in complete agreement on what those issues should be. In addition, Mr. Dobrucki sought to introduce a new option for the Board's consideration, in light of the City Preferred Ward Boundaries Option. The City opposed this request arguing it was prejudicial at this late stage.

[5] Regarding the Issues List, Issues 1, 2 and 4 (as ultimately numbered) were not in dispute, but were modified to appropriately reflect the City's settlement. What remained in dispute, and then became Issue 3 (very similar to Issue 5 in the Procedural Order) was contested on the basis that Mr. Dobrucki had not raised this as an issue in the context of his own appeal. This issue relates to whether the process leading up to the adoption of the By-law was appropriate.

[6] The Board ultimately ruled the issue had been sufficiently contemplated by Mr. Dobrucki's appeal and should remain. However, the original Issue 5 was restated to remove reference to "particularly whether the public comments that were received were (sic) considered by Council". This then became Issue 3.

[7] The issues therefore were the following at the hearing:

1. Do the ward boundaries as set out in the City Preferred Ward Boundaries meet the guidelines adopted by the City for its ward boundary review and set out in Clerk's Report CM15004 ("Hamilton Criteria") to a degree that is acceptable? More specifically, do the City Preferred Ward Boundaries satisfy the following criteria:
 - a. Representation by population;
 - b. Population and electoral trends;
 - c. Means of communication and accessibility;
 - d. Geographical and topographical features;
 - e. Community or diversity of interests; and
 - f. Effective representation;

as those terms are defined in Clerk's Report CM15004 and the relevant case law.

2. If the City Preferred Ward Boundaries are not found to meet the Hamilton Criteria, what is the preferred alternative for the re-division of ward boundaries in the City?
3. Was the process followed by the City in adopting By-law 17-030 appropriate? If the process was not appropriate, what is the appropriate remedy?
4. Is the City required during the public consultation process to provide the public with the geographical information systems (GIS) file extension containing geographical spatial data respecting the City's population growth model in a Shapefile format, if such information was used in the public consultation process undertaken by the City?

[8] Issue 4 is fundamentally a sub-issue of Issue 3 regarding process. However, as it was presented as a distinct issue, the Board treats it as one.

Ward Boundary Options before the Board

[9] The Board had before it a number of alternative ward boundary options, including the City Preferred Ward Boundaries Option, options that had been generated by its consultants and options produced by the appellant Mr. Dobrucki. Initially Mr. Dobrucki wished to present

six options. This was reduced to three, following a request by the Board prior to the commencement of the hearing.

[10] In light of the iterative process that had resulted through the settlement discussions with Mr. Richardson, the Board permitted Mr. Dobrucki to replace what he styled as “Option A” with “Option D (Revised)”. During the hearing Mr. Dobrucki’s options were ultimately referred to as “Option C”, “Option D” and the “15-Ward Option”. The last of these was put forward as an option by the City’s consultant team in its “Final Report”,¹ dated October 11, 2016, leading up to the adoption of the By-law (Exhibit 19, Tabs 1, 2, and 3). The first two were generated by Mr. Dobrucki.

[11] The City Preferred Ward Boundaries and all options presented to the Board by Mr. Dobrucki were 15-ward boundary options, with differing configurations. The fundamental difference in approach was that the City sought to emphasize the existing boundary structure with an overriding goal of protecting the western rural community, in particular, Flamborough. Mr. Dobrucki, by contrast, placed much more emphasis on voter parity, though showed some flexibility on moving from the “ideal” of voter parity to address other factors required to achieve “effective representation” by presenting as an option, if not his favoured option, the “15-Ward Option” referred to in the above paragraph.

Additional Participants and Correspondence to the Board

[12] At the outset of the hearing, several individuals appeared seeking participant status in addition to those who had previously been identified in the pre-hearings. Some sought status as a result of the changes arising out of a settlement. Others advised simply that they had not previously been aware of the ward boundary review until this late date.

[13] The Board granted participant status to all those who sought it. In all cases, except one, the parties did not object. Counsel for the City objected to granting Rachel Barnett, a PhD student at McMaster University, participant status. She sought to introduce some of her research regarding ward boundary reviews and the implications for minority representation.

¹ The use of quotation marks reflects the fact that this proved not to be the final report and “Final Report (Amended)” would follow, dated January 16, 2016.

[14] The City's objection to her request rested on the concern that this late evidence was unknown to the City and therefore it did not have time to properly prepare for it or to provide a "like witness". After some discussion, the Board concluded that Ms. Barnett would be granted participant status and her evidence would be admissible. However, she confirmed that she was not seeking to be qualified as an expert, but rather wished to present as a concerned citizen.

[15] The complete list of participants who presented at the hearing is reflected in Attachment 1 to these reasons.²

[16] The Board also received some correspondence from individuals who did not seek status but wished to make their views known. The Board, as is the usual practice, accepted the correspondence, but it formed no part of the evidentiary record.

Standard of Review

[17] At this juncture, the Board confirms that the standard of review for a decision of council regarding ward boundaries is that of reasonableness, articulated as recently as this year in the Board's decision of *Preston v. Rideau Lakes (Township)*, 2017 CarswellOnt 13703.

[18] The Board also takes guidance in particular from the Board's decision in *Teno v. Lakeshore (Town)*, 2005 CarswellOnt 6386 ("*Teno*"), where the Board stated at paragraph 36 that there must be clear and compelling reasons to interfere with a council's decision. The Board in *Teno* indicated that "if the evidence demonstrates that the decision of the municipality operates to diverge from the overriding principle of voter equity and effective representation, then the Board can only conclude that the Council has acted unreasonably."

Conclusion

[19] For the reasons that follow, the Board concludes that while the process followed by the City for the ward boundary review was appropriate, the City's decision to adopt the City Preferred Ward Boundaries was not reasonable. Flowing from that, based on the evidence

² Not all persons who were granted status ultimately chose to present to the Board.

heard, the Board concludes that the most appropriate ward boundary option is represented by “Option 2” of the Watson Final Report (Amended) – the revised 15-Ward Boundary Option (for reference see Exhibit 14B, Tab 6, pp. 535-539.)

EVIDENCE AND ANALYSIS

[20] The City of Hamilton as currently configured was created in 2001 as a result of the amalgamation of the former City of Hamilton and the five municipalities of the City of Stoney Creek, the Township of Glanbrook, the Town of Ancaster, the Town of Dundas, and the Town of Flamborough. Altogether these had existed previously as the Regional Municipality of Hamilton-Wentworth.

[21] The amalgamation by the *City of Hamilton Act* created a single tier municipality of some 490,000-population governed by a mayor elected at-large and 15 councillors elected by geographic wards closely resembling the eight wards that had existed in the former City of Hamilton plus seven wards for the other former area municipalities. This configuration has remained in place until the present.

[22] In the intervening years the population of the City has increased to 536,917 according to the 2016 census and is expected to increase further to over 630,000 according to estimates prepared for 2026. The wards that were established at the time of amalgamation varied from a population of 15,490 for the rural area of Flamborough (Ward 14) to the largest ward by population, Ward 7 (the central mountain ward) at 56,330. This is a difference of about 40,000 between the lowest and highest population wards or a factor just over 3.6 times. For reference, the average ward size in 2001 was 32,684, but when projected to 2015 by Watson and Associates³ (“Watson”), this “optimal ward size”, as they called it, rose to 37,685.

[23] This disparity between lowest and highest ward populations is reflected in a wide difference among all the wards. It forms a generally observed pattern in which the seven rural and suburban wards (Ward: 9 - Upper and Lower Stoney Creek; Wards 10 and 11 –

³ Watson Associates teamed up with Robert J. Williams, Trust Learning Solutions and ICA Associates Inc. to undertake the Ward Boundary Review. Dr. Williams was also retained to provide evidence for the OMB hearing. All references to Watson and Dr. Williams’ evidence include by extension evidence presented for the consulting team.

Glanbrook and former Saltfleet Township; Ward 12 – Ancaster; Ward 13 - Dundas; Ward 14 – Flamborough; and Ward 15 – Waterdown) are under the optimal ward size while seven of the eight former City of Hamilton wards are all above the optimal. The exception is Ward 1 in the west end of the lower City.

[24] This pattern is well understood, and in the course of the hearing, the Board heard that it was indeed quite intentional, forming one of the founding principles of the amalgamation. As one witness testified – a resident of Freelton, a rural settlement in the far west of the City - the ward structure that was adopted was based on what he called an “agreement”⁴ whereby the residents of the “rural area and the amalgamated towns” would not be overpowered and outvoted by the those living in the City.

[25] On the strength of this agreement, while there would not exactly be parity between the rural and urban areas, a significant number of seats were guaranteed for the amalgamated towns at the council table. Their political status would therefore not be as lop-sided as the population would suggest. There would be seven votes at the council table reflecting the rural/suburban voice and eight representing the former City - plus a mayor accountable to all voters.

[26] This has been the accepted pattern for some time. And for many people it is the preferred pattern going forward. In 2016 with the Ward Boundary Review (“WBR”) well underway, a petition calling for retaining the existing ward boundary system gained 1040 signatures.

[27] However, in the intervening years since amalgamation, the City’s population has continued to grow, and the growth has taken place in a way that has resulted in a further uneven distribution across the City’s wards. While many of the “lower City wards” (Wards 1, 2, 3, 4 and 5), some of which are in the older areas of the City, have declined in population, the “upper City wards” (Wards 6, 7 and 8 - the wards south of the escarpment or as they say in Hamilton “on the mountain”), have all increased in population, in some cases substantially.

⁴ The pattern is in fact established by Ontario Regulation 440/00 passed pursuant to the *City of Hamilton Act*, the statute and regulations that formed the new City.

[28] In the rural and suburban areas, some wards have increased in population (Ward 9 – Stoney Creek; Ward 11 – Glanbrook; Ward 12 – Ancaster; and Ward 15 – Waterdown). These are all associated with developing greenfield suburban areas, while Ward 13 (the Town of Dundas which has reached the physical limits of its growth) and Ward 14 (the rural area of Flamborough) have remained essentially stable.

[29] The resulting disparity in population per ward in 2016 has grown even greater with the smallest ward at about 16,000 and the largest well over 60,000. The overall pattern has also changed. The three City mountain wards (Wards 6, 7 and 8) together are now even more populous (106,280 in total) and the total population of the three western rural/suburban wards (Ward 12 - Ancaster, Ward 15 – Waterdown, and Ward 14 - Flamborough) has grown only slightly to 68,755, or less than two-thirds of the population of the mountain wards.

[30] Looking to the future, it is projected that the pattern will continue to change. According to the City's consultant, Ward 9 - Stoney Creek, Ward 11 - Glanbrook and Ward 15 - Waterdown will continue to grow, resulting in further expected changes in population distribution among the wards.

The Ward Boundary Review

[31] In 2012 the City directed its staff to initiate a comprehensive review of the City's ward boundaries. Terms of Reference were to be prepared for the retention of an external consultant who would review the boundaries and undertake a robust public consultation process. In 2015 Council issued a guideline for the Terms of Reference which established the criteria or principles that would guide the review:

- A. **Representation by Population:** Considering representation by population for every Councillor generally representing an equal number of constituents within his or her respective wards. Given the geography and varying population densities, and characteristics of the City, a degree of variation is acceptable.

- B. **Population and Electoral Trends:** Accommodating for and balancing future increases or decreases in population growth/decline to maintain a general equilibrium in the representation by population until the year 2018 at a minimum.
- C. **Means of Communication and Accessibility:** Arranging ward boundaries by primary and secondary road patterns, railway and public transit access, telephone exchanges, postal codes and servicing capabilities to help foster an identity and neighbourhood groupings.
- D. **Geographical and Topographical Features:** Utilizing geographical and topographical features to provide for ward boundaries and compact contiguous area.
- E. **Community or Diversity of Interests:** Recognizing settlement patterns, traditional neighbourhoods, and community groups (social, historical, economic, religious and political diversities) while, at the same time, not fragmenting a municipality.
- F. **Effective Representation:** Consider an overriding principle of effective representation as described by the Supreme Court of Canada in its decision on the Carter case.

[32] Taken together the Hamilton Criteria, as they became known in the hearing, are an amalgam of principles gleaned from other municipal ward boundary reviews in Ontario as well as case law as reflected by the reference to the Supreme Court of Canada (“SCC”) “Carter” decision, *Reference re Provincial Electoral Boundaries*, [1991] 2 S.C.R. commonly referred to as the “Carter” decision. This was a 1991 decision of the SCC which dealt with the size and configuration of Electoral Districts (“ridings”) in Saskatchewan.

[33] The Hamilton Criteria were to be used by the consultants to guide their thinking and to assist in identifying the tradeoffs that would be necessary between and among competing principles. For instance, it was recognized (and would become an important consideration in the hearing) that the ideal of “optimal representation by population” may not be possible if a “community of interest” is to be protected; or if well-defined geographical features were used to describe a boundary; or if travel times and communication between constituents and representatives were to be considered; or if future population growth were to be

accommodated. In short, a final ward boundaries solution would require numerous judgments and trade-offs between these criteria in order that “effective representation” could be achieved. More on this later.

[34] In 2015, Watson was the successful firm chosen to conduct the WBR. In the initial phases of the process, Watson conducted its preliminary research which reported population patterns for the City and formulated population projections for each of the wards and for the City as a whole up to 2026. At the time that they did this work, they only had available to them the census data for 2001 to 2011. Their population estimates for 2015 and 2026 were based on the 2001 and 2011 census figures.

[35] By the time that the hearing had commenced the 2016 census data were available and Watson was able to update the population data for the wards to 2016 and to make a new estimate for 2018. The 2026 estimates were not recalculated based on the 2018 data.

[36] At certain points in the hearing questions were raised about the population data and the projections. Gary Scandlan, a land economist and witness from Watson, provided detailed explanations of the population data and population projections. These were prepared on an elaborate system of detailed geographical areas generated for each ward based on small scale sub-units which could be projected individually and then alternatively aggregated to formulate several options for each ward structure.

[37] As a very first conclusion - one that will facilitate the balance of the discussion relating to the merits of the various ward options - the Board finds that the population work that was conducted was reliable for the intended practical purpose. The projection methods that were used to assess future ward population distributions were appropriate. They provided detailed geographical distributions of growth and decline across the City based on reasonable trends in household formation and neighbourhood evolution.

[38] Minor discrepancies encountered by Mr. Dobrucki as he worked with the data could be explained mostly as artifacts of the data collection and storage processes, and did not

undermine the veracity of the population analysis as a whole.⁵ Because of this, all parties including the Board have a reliable common data set from which to evaluate ward options and to assess the key considerations of representation by population now and in the future.

Issue No. 4: Disclosure of the Detailed Population Data and Return of the Fee

[39] In the course of undertaking his work to assess the existing ward structure and formulate options both in the early stages of public consultation and later as he prepared to be an appellant to this hearing, Mr. Dobrucki was not given access to the detailed population data generated by, or available to the consultant. This became a sore point and later an issue to be addressed by the Board. Should it have been provided to the public in general and to Mr. Dobrucki in particular, so that it could be used to formulate options and assess the options presented by the consultants?

[40] Mr. Dobrucki's position is that these data are vital public information collected and assembled using public funds for a public purpose that merits a high degree of disclosure and transparency. Failure to make the information available raised unwarranted doubts about the conclusions that the consultants reached and deprived the public of the opportunity to play a meaningful role in the analysis and in formulating alternative options.

[41] At the hearing, counsel for the City urged the Board to find that the data were not actually refused and that properly speaking, Mr. Dobrucki could have on his own initiative sought disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA").

[42] The Board does not understand the position that there was no actual refusal. Mr. Dobrucki asked for the data and it was not given to him. By action, this was a clear refusal on the part of the City. The City did not formally respond with a refusal to disclose the information and suggest instead that Mr. Dobrucki should make an MFIPPA request. It simply did not disclose the data. The Board understands Mr. Dobrucki could have made an MFIPPA request

⁵ An exception to this was a question raised about the numerical distribution of the non-permanent, resident post-secondary student population around McMaster University. Not much turned on this in general but it did raise some questions about a revision to By-law 70-030 which moved a part of Ward 1 population, many of whom would be students, into Ward 13 (Dundas). See below.

and the City did not have an obligation to specifically say so. Nonetheless, the Board suggests it ought to have clearly indicated this to Mr. Dobrucki.

[43] The Board ruled at the first pre-hearing conference (“PHC”) that the City was to produce all data in its care and control that was or is being used by the City to formulate its population (which ruling was reflected in the second order following the second PHC).

[44] At the second PHC, which Mr. Dobrucki was unable to attend, counsel for the City advised it was able to provide the data, but it would require some manipulation to ensure it was transferrable. As a cost was associated with this, the City agreed it would transfer the data, but invoice accordingly, should Mr. Dobrucki conclude he wanted it. Mr. Dobrucki ultimately did obtain the data and the Board understands he paid \$610.20 for it.

[45] At the appeal hearing, Mr. Dobrucki requested that should the Board find the data ought to have been disclosed, the Board order that he be refunded for the fee paid.

[46] During his testimony, Robert Williams, who was part of the City’s consultant team, asserted that it was not normally within the scope of the retainer to assist the public in conducting the detailed level of analysis for which the consultants were retained. A ward boundaries review is not, as Dr. Williams explained, a “do-it-yourself exercise” and facilitating citizen-generated options is not within the scope of normal public engagement.

[47] The Board is satisfied that disclosure of the detailed data to Mr. Dobrucki was not onerous, but instead proved to be practical and valuable to this hearing, and almost certainly would have been useful in the public engagement process. For the appeal, it was disclosed in the form of an electronic file and then in hardcopy to the Board as evidence, comprising charts outlining the population summaries for each geographical subunit. Mr. Dobrucki was assisted in managing and studying the data behind the scenes by someone with some expertise in managing data of this kind.

[48] It is doubtful that large volumes of data would be of great interest to the average member of the public in the form that it was provided. However, to the avid citizen who wishes to be engaged and has the time, inclination and the talent to understand it and work with it, it is a valuable public engagement resource.

[49] We conclude that the data were assembled at public expense within a public process that warrants maximum transparency and should be disclosed, subject only to valid concerns, the type of which are addressed through MFIPPA legislation, but which almost certainly do not arise here.

[50] We note that as a general proposition, requiring a member of the public to go through the MFIPPA would seemingly hobble the engaged citizen for no obviously good reason. Going through the MFIPPA process may mean the citizen will not obtain the information at a point when it is most useful, i.e. during the consultation, as MFIPPA processes can take significant amounts of time.

[51] Ultimately, however, we cannot find there is a legal obligation to disclose the data, as a matter of proper process, during the consultation process. However, the Board strongly encourages the voluntary provision of data of this kind for use when requested by the public in future processes of this kind.

[52] Data are, however, not an inherently free public resource, including under MFIPPA, though relief of payment is possible under that scheme. Generally, information has a production cost associated with it and the principle of disclosure does not imply a free disclosure, so long as the cost is not unnecessarily prohibitive. In any event, even if the Board concluded that there was a legal obligation to disclose it, the Board could not identify within its broad jurisdiction the authority to grant an order for reimbursement and therefore, no such order could be issued.

Issue No. 3: Was the process leading up to the adoption of By-law No. 17-030 appropriate?

[53] This is an appeal under section 222 of the *Municipal Act*. Despite the absence of meaningful guidance within the statute for revising municipal ward boundaries, the Board took care to consider the process followed by Council to review the ward boundaries. Mr. Dobrucki raises questions about the process that was followed, by advancing Issue No. 3 in this hearing and in doing so, asking the Board to consider whether an appropriate process was followed by Council and staff.

[54] The Board considered the process followed, including: the provision of notice; the extensive engagement with the public (subject only to its concerns noted above regarding disclosure of the data); the conduct of a debate informed by professional staff and consultant advice; the adoption by by-law of Council's option; settlement discussions aimed at accommodating one of the appellants; and, though post the By-law's adoption, the adoption of the City Preferred Ward Boundaries as presented to this Board.

[55] Mr. Dobrucki raised a particular concern that summaries of information from those participating were provided to City council rather than the original, complete submissions. The Board cannot conclude that this is improper. The City's council has significant volumes of information to review. It is reasonable that the consultant team would be responsible for reviewing and distilling information for Council.

[56] Although it occurred subsequent to the approval of the By-law, there were questions about the settlement with Mr. Richardson which led to the adoption by Council of revisions to facilitate the withdrawal of one of the appeals. Some complained that the settlement was made outside of public scrutiny. However, negotiations to settle a matter once it has reached this kind of adversarial process are often conducted in private. In fact, public scrutiny of settlement negotiations can have a negative effect on the negotiations themselves by encouraging publicly acceptable conduct rather than honest give-and-take negotiations.

[57] What is more important is that the choice to adopt the revisions would invariably become public and are at least after the fact, subject eventually to further public scrutiny and accountability, and that the merits of the revisions that led to settlement can be considered very publicly within this appeal.

[58] Questions did arise from the fact that Council retained consultants at some expense and then chose not to adopt either of the two options proposed by the expert advisors after extensive study, electing instead to make very minor changes to the existing ward configuration. This aspect of the process could certainly lead one to question why council decided to spend significant funds on consultants only to reject their advice. However, taken at its highest, this is not a problem of process, but of the reasonableness of the choice.

[59] The Board agrees with the proposition in *Milani, Re, 2009*, CarswellOnt 7420 at paragraph 54, where the Board notes that ultimately it is council that makes the final decision, and it does not have to rely on an expert's (or in that case, staff's) opinions or advice in arriving at its decision. Council choosing to go a different path from that recommended is not in and of itself a fault in process.

[60] In sum, the Board can make no finding of substantive fault or irregularity with the process that was followed. The Board concludes that the process leading up to the adoption of By-law 17-030 was appropriate.

Issues 1 and 2: Was Council's decision reasonable and if not, what is the most appropriate option for effective representation?

[61] The central issue faced in this hearing is the following: do the City Preferred Ward Boundaries - namely the boundaries as revised by Council in 2016 and then later adjusted to meet the settlement with Mr. Richardson in 2017 – reasonably meet the Hamilton Criteria established by Council and the standards established by the courts? In considering this issue we may also find some assistance in other ward boundary decisions by the Board, in addition to the *Carter* decision.

Effective Representation

[62] In the *Carter* decision, the questions raised were whether the variance in the size of voter populations infringed on the rights of citizens as guaranteed by the *Charter of Rights and Freedoms* ("*Charter*") and if they do not, what circumstances justified variations in voter populations? In other words, is a disparity in population acceptable, and if so, on what basis?

[63] Writing for the court McLachlin J. addresses these questions:

It is my conclusion that the purpose of the right to vote as enshrined in s. 3 of the *Charter* is not equality of voting power per se, but the right to "effective representation." Ours is a representative democracy. Each citizen is entitled to be represented in government . . .

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

But parity of voting, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. . .

Notwithstanding the fact that that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such voter parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute parity in pursuit of more effective representation; the list is not closed.

It emerges then that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this the dilution of one citizen's vote as compared with another's should not be countenanced.

[64] As the case asserts, "effective representation" is the overarching consideration and is achieved from a starting position – specifically of prime importance - of "representation by population" or voter parity with other considerations "taken into account".

[65] The court lists factors such as "geography, community history, community interests and minority representation" which can be held to justify variation from ideal parity, factors which are quite similar to the Hamilton Criteria that were formulated early in the WBR process by Council when providing guidance to the consultants. Departure from voter parity can be justified by reference to other factors to achieve effective representation. But clearly, undue departure beyond what is necessary for effective representation is not acceptable.

[66] In the early phases of their research, Watson put the Hamilton Criteria to the public in Round 1 of the public engagement process. Asked which of the criteria were the "highest priority", the public listed "Representation by Population", "Population and Electoral Trends",

“Effective Representation”, and “Communities of Interest”. By contrast, “Means of Communication and Accessibility”, and “Geographical and Topographical Features” proved to be a lower priority in establishing the boundaries, at least in minds of the public.

[67] Applying these other factors, the consultants could then formulate and assess various options based on the degree to which they achieved voter parity but more importantly, how well they achieved effective representation. To quantify this, using a rule of thumb, Watson, like many others who have engaged in a ward boundary reviews in Ontario, set a standard of 25 percent (“%”) variance from the optimal ward boundary population. In his analysis Mr. Dobrucki applied a standard of 10% in some cases, but it was clear that all such standards are little more than hopeful targets and that in even the very best scenarios, where other factors are considered - especially population trends into the future - it is not possible to adhere strictly to a numerical standard.

[68] As Dr. Williams explained on many occasions when questioned about the degree of variance Watson was willing to tolerate, options can be judged at least initially by an adherence to a numerical norm. However, a slavish adherence to population parity without considering other factors that could stand in the way of effective representation, could be inappropriate. All are agreed that the final establishment of ward boundaries is an exercise in tradeoffs and judgment, not arithmetic. It is the identification of the relevant factors, the weight given to them and the exercise of judgment in trading off other important factors against voter parity that is at the heart of this matter.

Options

[69] At the conclusion of Round 1 of the public engagement process, Watson issued an Interim Report which reported on the findings from the first phases of population research and on Round 1 of the public engagement process. It concluded by formulating four groups of options for consideration by the public in the second round.

[70] One option was based on the five recently reorganized Federal Electoral Boundaries. The proposal would be to divide them into three wards each yielding 15 wards. Although

favoured by a few, this option did not seem to gain any real traction through the process. It was not adopted by Council and played little role in the hearing.

[71] A second proposed the pre-amalgamation balance of eight city wards and seven rural/suburban wards. Two sub-options were generated, each with minor variations to the configuration of the wards.

[72] A third and fourth option involving 15 and 16 wards respectively were formulated each generating sub-options with varying boundary configurations.

[73] These options were then taken to the second round of public consultation and a “Final Report” was issued by Watson in October 2015. It concluded that the existing Hamilton ward boundary configuration could not be supported and that “Council should move to change from the status quo.” The existing structure failed in respect to the criteria of “Representation by Population”, “Population and Electoral Trends” and “Effective Representation.” It was successful only on “Geographic and Topographical Features” and, according to the consultants, only partially succeeded in recognizing “Community or Diversity of Interests”.

[74] This alone should have been a distressing report card on the status quo or any option that maintained the essential characteristics of the existing structure. However, as it will become apparent, the existing structure remained remarkably alluring to Council, and despite the poor scoring by the consultants, both Council and their consultants were able in a later iteration to support an option very similar to the status quo.

[75] While recognizing that a large number of people did not actively participate in the consultation process, among the other conclusions arising from the Round 2 consultation was the support shown by the public for the 16-ward Option. Support for the first option – the reworking of the five federal ridings – gained the least support (5%), followed by the “no change” option (7%). The third option – the consultants’ 15-ward option received only 8% and the second option which kept the pre-amalgamation balance of 8 city wards and 7 rural/suburban wards – gained 14%. The 16-ward option held the vast majority of support (this appeared to be about 66 percent), which came as something of a surprise given the

frequent objections raised by some (an apparent vocal minority it seems) to any increase in the size of Council.

[76] Apart from the surprising popularity of the 16-ward option, the conclusion reached by the consultants on the basis of these results was that the popularity of the pre-amalgamation option was an endorsement of the principles “that ‘cultural and historical identities’ must be preserved at the cost of population parity” and that preserving “the provincial solution at amalgamation” should be maintained “so that the interests of the suburbs ‘would not be overwhelmed by the old city.’”

[77] Maintaining the “provincial solution” that was adopted at the time of amalgamation became an important underlying consideration, one that came to occupy a very important if not the most important consideration in the ultimate selection of options.

[78] The Watson “Final Report” proposed two final options for Council consideration: a 15-ward option and a 16-ward option. The 15-ward option scored high on Representation by Population with only Ward 12 (Ancaster) falling below the 25% standard in 2026. Watson reported that the option was “largely successful” on “Effective Representation” and achieved a high degree of “Community or Diversity of Interest.”

[79] The 16-ward configuration added a ward to the City’s mountain wards redressing the imbalance that had existed in that area, and achieved high marks in all the criteria except “Means of communication and Accessibility.” It was not as effective in “Representation by Population” as the 15-ward option with four wards outside the 25% mark in 2015 and three in 2026.

[80] The consultants advised Council that “[t]he two options presented here successfully address shortcomings identified in the present system by providing wards that are better balanced in population now and over the next three elections while accommodating a significant geographic community of interest (rural Hamilton) and various urban neighbourhoods materializing across the City”.

[81] Council did not accept the advice of their consultants and on October 27, 2016 passed a motion providing that Council would forward “any further suggestions that the council members may have for alternative ward boundary model options” to the consultants and that the consultants be directed to compile these options into a consolidated report for consideration by Council.

Council’s Initial Choice: Option 1 from the Final Report (Amended) By-law No, 17-030

[82] In January 2017 Watson issued its “Final Report (Amended)”, or Final Amended Report.⁶ This report recited much of the analysis that had been contained in the October 2016 “Final Report” including a re-offering of the 15- and 16-Ward options that Watson had initially provided following the Round 2 consultations.

[83] However, the 15-Ward option in the Final Amended Report was further revised to accord with comments received from the public. Notably this involved a revision to the boundary between Wards 6 and 9 to better reflect “Community or Diversity of Interests” and a reconfiguration of the City mountain Wards 6, 7, 8 and 14. The mountain wards – as the Board learned – are represented by a number of very strong neighbourhood organizations who have played a meaningful role in the WBR process, articulating a position which protects the relationships that exists among the mountain wards and the neighbourhoods that are located within the wards. Their interest was also made known in the hearing and is addressed later in these reasons.

[84] In the Final Amended Report, the 15-Ward option (as revised) and the 16-Ward option became Options 2 and 3 respectively, and in accordance with the October 27, 2016 direction from Council to compile further council-generated suggestions, a new Option 1 was provided which amounted to a slightly modified version – “minor refinements” as described by the consultants - of the existing 15-ward configuration.

⁶ Exhibit 14B, Tab 6.

[85] Regarding Option 1, the Board concludes that the modifications were little more than tweaks from the existing boundaries: the lines dividing Wards 5, 6, 9 and 10 were basically realigned to follow geographic and transportation features that offered improved demarcation of the wards; a small area of Ward 7 was included with Ward 6; a small area of Ward 12 was moved to Ward 8; an adjustment to Ward 11 moved a small area of Ward 11 to Ward 9; the Ward 10, 11 boundary was moved to align with the escarpment; and a minor reconfiguration of the intersecting lines of Wards 13, 14 and 15.

[86] The consultants examined Option 1 against the Hamilton Criteria. First, they 'ran the numbers' for the 2015 population figures and concluded that, "the net impact is that eight wards fall within 25% of optimal ward size (as opposed to ten wards under the current structure) . . . Seven wards are outside the acceptable range of variation (as opposed to five wards under the existing structure): three (Wards 6, 7 and 8) are above and four (wards 10, 13, 14 and 15) are below. *The modified ward system (i.e. Option 1), therefore, fails to meet the principle of representation by population.*" (emphasis added)

[87] Notably, the three wards that were above the optimal size continue to be City mountain wards and those falling below are the rural suburban wards of East Stoney Creek, Dundas, Flamborough and Waterdown.

[88] Their projection of population to 2026 showed some moderation in the extremes of population disparity with only six wards outside the 25% range. Even so, the consultants concluded that "Option 1, therefore, fails to meet the principle of Population and Electoral Trends."

[89] The consultants continued their analysis of the Hamilton Criteria and concluded that the principle of "Means of Communication and Accessibility" is met but "some of the deficiencies of the existing system" were maintained. The principle of "Geographic and Topographic Features" was also maintained (with the exceptions of Wards 9 and 11). Also with the exception of Wards 5, 9 and 11 where neighbourhoods or communities are "isolated," the principle of "Community or Diversity of Interests" is met.

[90] Their final conclusion regarding Option 1 was that “by 2016, the Population of modified Ward 11⁷ (70,000 people) would have one representative at the Council table, while the combined population of the modified Wards 10, 13 and 14⁸ (also 70,000 people) would have three. *The modified existing ward system, therefore, fails to meet the Effective Representation principle.*” (emphasis added)

[91] Despite this poor report card on Option 1, in February 2017, Council supported Option 1 from Revised Appendix B and approved By-law No. 17-030 which adopted Option 1 from the Consultants’ Final Report (Amended).

Appeals

[92] Following the adoption of By-law No. 17-030, appeals were received from Mark Richardson and Rob Dobrucki as reported at the very outset of this decision. Mr. Richardson claimed (in his letter of appeal) that Council ignored its own Guidelines (the Hamilton Criteria), ignored its own consultants and ignored public information and public comment received. He also charged Council with “Self-dealing” and “Bad Faith”, but these issues did not advance to the hearing. Mr. Richardson’s preferred boundary configuration was Option 2 from the Consultants’ Final Amended Report which we would recognize as the most recent version of the Consultants’ 15-ward option.

[93] Mr. Dobrucki’s appeal is focused more on the issue of representation by population and his approach both during the consultation process and in the hearing, was to advance alternative options which, from his perspective, better reflected population parity among the wards. At one point he proposed to bring to the Board’s attention some six options, but was persuaded by the Board as a practical matter to concentrate on a smaller number of options.

[94] He eventually proposed three options, two of which were generated by him (Option C and Option D, with some technical assistance and support) plus the 15-Ward Option initially advanced by Watson in the Final Report. That 15-Ward Option was later revised and

⁷ Glanbrook

⁸ Ward 10 – East Stoney Creek; Ward 13 – Ancaster; and Ward 14 – Flamborough.

appeared as Option 2 in the Final Amended Report. As noted above, Option 2 was the option supported by Mr. Richardson, prior to reaching a settlement with the City.

Settlement with Richardson

[95] The settlement became known as the City Preferred Ward Boundaries Option, resulting in an amendment to the configuration adopted in By-law No. 17-030. It is this version that the City supported at the hearing, and which the City's consultants also supported. In sum, the City's counsel asked of the Board that it incorporate the City Preferred Ward Boundaries into an order which would amend By-law No. 17-030.

[96] The revisions from the By-law 17-030 version are shown in Exhibit 14B, Tab 21 and are as follows:

1. Ward 11 is reconfigured on its northwest by shifting a sliver of land along the south side of Rymal Road to Wards 7 and 8;
2. a northeastern area of Ward 11 east of Ward 10 and below the escarpment is moved from Ward 11 to Ward 10;
3. a portion of Ward 11 east of Ward 9 (Stoney Creek above the mountain) is joined with Ward 9;
4. in the northwest of the City a portion of Ward 14 that had been placed with Waterdown (Ward 15) was returned to Ward 14; and
5. Two small areas of Ward 1 (Lower City "west end") were transferred to Ward 13 (Dundas).

[97] This last modification involving a transfer of portions of Ward 1 to Ward 13 became the subject of objection by several people, notably residents of the Ainslie Wood neighbourhood in Ward 1 from which the transfer is made and as importantly, representatives⁹ of the McMaster University students living in the area.

⁹ Chukky Ibe, President of the McMaster Students Union provided valuable evidence to the Board.

[98] In other respects, the City's Preferred Ward Boundaries Option does yield an improvement over the version originally adopted in By-law 17-030. The Board is able based on data in Exhibit 14B, Tab 21, to conclude that the principle of Representation by Population is moderately better met by the settlement. In 2018, five wards would be outside the 25% guide (three over, two under) and in 2026 only three (two under, one over) would be outside the 25% mark.

[99] The changes resulting from the settlement discussions addressed only a few of the other failings identified by Watson when they assessed Option 1 (the original By-law 17-030 Option). For instance, there are some apparent improvements to the configuration in the east end of the City relating to Wards 9, 10 and 11, but these are also present in other options that more directly improve the overall configuration.

[100] Ultimately, the central questions for the Board are: Has the City advanced an option that is reasonable when considering the Hamilton Criteria and the case law which establishes a requirement for effective representation? And if it has not, which is the most appropriate of the other options? In reference to this second issue, we have Mr. Dobrucki's proposed Options C and D and the initial 15-Ward option from the Final Report as references. We also have all the options otherwise presented by the consultant team, including Options 2 (the revised 15-Ward Option) and 3 (the 16-Ward Option), which were presented in the Final Amended Report.

Was Council's Decision Unreasonable?

[101] The test of effective representation consists of the application of judgment and trade-offs among several often competing, factors. In this case, the factors have been explicitly identified are listed as the six Hamilton Criteria as we have been calling them. In considering the application of these criteria, it is fair to say that they are not of equal value. We have already established, based on the SCC *Carter* decision, that "effective representation" has an overarching value and is the principal consideration which is informed by the application of the other criteria.

[102] The *Carter* case also establishes that “Representation by Population” and “Population and Electoral Trends,” which together we have been calling “population parity” (both in the immediate future and for foreseeable future), is the starting point for considering the configuration of geographical wards. Population parity also has some preeminence among the factors to be considered.

[103] In *Carter*, the court said that “deviations from voter parity may be justified on the grounds of . . . effective representation. Beyond this the dilution of one citizen’s vote as compared with another’s should not be countenanced.” In other words, when formulating a ward system that achieves effective representation, one begins with parity and should only stray from a standard of parity if it is necessary to achieve or maintain effective representation. Effective representation is not an excuse for ignoring population parity; on the contrary, it is one of the reasons that we must strive for parity.

Rural Voice as Community of Interest

[104] In this hearing it became clear that the main trade-off was between voter parity and “Community of Interest”, and in particular, one community of interest, the rural interest; and even more specifically, the western Hamilton rural interest. This was certainly reflected in the public consultation process as documented by Watson, but also became clear in the evidence before this Board.

[105] “Community of Interest” is offered as a means of ensuring that certain identified groups or specific categories of citizens who live in a certain geographical area “have a voice” or are “represented at the council table.” The *Carter* decision supports this by referring to “community interests” and “minority representation.”

[106] The City proffered William Freeman to provide expert evidence in support of the City Preferred Ward Boundaries Option. Dr. Freeman is a sociologist, historian and writer with a special interest in the City of Hamilton. He lived and studied in the City for a time and has written about the history and politics of the City from a sociologist’s perspective. He was called upon to present his views of the issues late in the WBR and when doing so, was

directed to restrict, and did restrict, his review and comments to the west end of the City, specifically Wards 12, 13, 14 and 15.¹⁰ His work involved original research, some of it conducted years ago as a student and academic, a review of the literature, a review of the materials and the record for this hearing, and interviews with elected officials for the wards that he studied.

[107] Mr. Dobrucki objected to qualifying Dr. Freeman as an expert in the “area of history of Hamilton and sociology”. Based on cross-examination by Mr. Dobrucki, it was clear to the Board that Dr. Freeman did not have a sufficient grasp of more recent, presumably relevant, history regarding amalgamation of Hamilton. He was unaware of a Flamborough referendum prior to amalgamation. He also could not answer questions that would be expected of an expert sociologist about the percentage of visible minorities in Hamilton today, noting he had not lived in Hamilton since 1986.

[108] Mr. Ferri suggested that the more recent history was not the purpose of his evidence, but rather it was to speak to the evolution of Hamilton through earlier times to today, and to discuss the sociological evidence of how “we got here today.”

[109] The Board determined it would reserve its decision on this matter and make a final determination on Dr. Freeman as an expert in light of the evidence presented. Ultimately the Board concluded that Dr. Freeman’s knowledge in the history and sociology of Hamilton was not as helpful as it could have been for the purposes of a ward boundary review exercise and in any event, the evidence had limited value.

[110] Dr. Freeman’s evidence was an amalgam of historical summary, community insight, political analysis and reports of his conversations with the interview subjects. This last matter of research was fraught with hearsay, but proved interesting if only marginally reliable. His accounts of conversations with elected officials were summary in nature and general, and often they reflected opinions by elected officials about what the public thought, usually supporting his own insights. Undoubtedly, elected officials have valuable insights into their

¹⁰ The City in its materials only provided ward boundary profiles for these wards. The Board permitted Mr. Dobrucki to introduce the remaining wards boundary profiles, created by the City of Hamilton, into evidence.

community, and Dr. Freeman was able to discern the relevant points to convey to the Board, but it is asking a lot to rely on opinions - especially public opinion - summarized and filtered through two sources.

[111] Dr. Freeman's conclusions were supportive of the City's Preferred Ward Boundaries Option and critical of Mr. Richardson's preferred option, Option 2, and of Mr. Dobrucki's Options D and C. For reasons that are unclear to the Board, the initial 15-Ward Option which Mr. Dobrucki continued to advocate for was not commented upon by Dr. Freeman. In any event the 15-Ward Option advocated for by Mr. Dobrucki and the revised 15-Ward Option known as Option 2 were similar.

[112] Dr. Freeman's critique focused on two things: the reliance by Mr. Dobrucki on keeping all wards within 10% (Option C) or 25% (Option D) of the average ward size; and secondly, the way in which rural interests were ignored in order to achieve these mathematical targets. It was Dr. Freeman's clear opinion as it pertained to the principle of "Communities of Interest", that "the rural/urban divide is the most important."

[113] In short, he concluded that Mr. Dobrucki had not struck the correct balance between community of interest and population parity, because he ignored the communities of interest of the people living in the western area of Hamilton specifically, in order to achieve an ideal of mathematical parity.

[114] In fairness Dr. Freeman accepted Dobrucki's treatment of Ward 12 (Ancaster) – a ward that has traditionally consisted of both urban and rural residents – and concedes that this is a viable ward that has functioned well since amalgamation. Because he did not include any of the eastern wards in his analysis, he could not offer an opinion on the mix of urban and rural interests that are present in Wards 9, 10, and 11. In fact he acknowledged only in passing that there are other wards in which the mix of urban and rural is, or may be working well.

[115] To be sure, Dr. Freeman's focus is on protecting the rural voice of Ward 14 - as this is the only strictly rural ward – from being divided and combined with Waterdown, Dundas or Ancaster. His objection to the appellants' options is centred on the division of existing Ward

14 and the alliance of the divided portions with Dundas and Waterdown (Options C and D) or Ancaster (Option 2). In each of these scenarios, Dr. Freeman concludes that the rural voice would be diminished by being divided and included with adjacent urban or suburban populations. For Dr. Freeman this would be a “violation of the principle of effective representation.”

[116] Rural and urban voters have different interests, according to Dr. Freeman. Urban and suburban voters are concerned with transit, intensification and urban services among other things. Rural voters are interested in the agricultural industry, rural land use and groundwater issues. Effective representation of the issues of interest to rural and urban voters requires that they are exclusively represented in order to have a voice on council. Although the pattern of mixing rural and urban voters is common and successful in other wards, this principle does not appear to have the same importance in those wards according to Dr. Freeman, at least not sufficient importance to include those wards as part of his study.

[117] Dr. Freeman also references the historical communities of Waterdown, Dundas, Ancaster and Flamborough. These communities, he asserts, have built up over the years forming bonds that should not be separated or joined with others. In the face of amalgamation, the only defense of such communities of interest as they have evolved through history is to ensure they have their own individual representation.

[118] Dr. Freeman, ultimately with the support of Dr. Williams, advanced this principle of protecting the rural voice even in the face of the population disparity that results, and by doing so, is able to support the selection by council of the City Preferred Ward Boundaries Option.

[119] In the current ward structure, the disparity is reflected by the 2016 census population for Ward 14 of 16,214, less than half the optimal size for a ward (35,794) and a population of 60,801 in Ward 7 or 1.7 times the optimal size. The ward structure proposed in By-law 17-030 would make little change to this pattern.

[120] The City's Preferred Ward Boundaries results in slightly less disparity between the smallest and the largest wards. Using the 2016 census figures, Ward 15 would be 21,652 compared to an optimal ward population of 35,794 (60% of the optimal size) and the largest,

Ward 6, would be 49,537 (1.4 times the optimal size). The relationship between the smallest ward population and the largest in 2016 would be 2.3 times and in 2026 it would 2.2 times.

[121] From a population parity perspective, the City's Preferred Ward Boundaries is preferable over the existing ward structure and the structure proposed by the By-law, but even so would still result in 6 wards outside the 25% range in 2016 and four wards outside the range in 2026.

[122] The Board also noted that the effect of the City's Preferred Ward Boundaries was to provide greater voting power to citizens with much greater wealth relative to downtown wards.¹¹ Dr. Williams acknowledged this was indeed the effect, though not an intended outcome.

[123] Dr. Freeman and Dr. Williams made reference (as did counsel for the City in final submissions) to a ward boundary case with many similarities to the Hamilton case, *Ottawa (City) v. Osgoode Rural Community Association*, 2003, CarswellOnt 1887 (the "Ottawa" case). In that case the amalgamated City of Ottawa was undertaking a ward boundary review similar to the one before the Board in Hamilton. It took place much sooner (2003) after amalgamation (2001) than Hamilton, but had a basic similarity in that there existed in that case a "social contract" (as it was called) similar to the implied agreement in the Hamilton amalgamation whereby the rural community of interest would be protected by the establishment of exclusively rural wards with lower populations that would ensure a rural voice on council.

[124] The protection of the rural voice in Ottawa had resulted in population disparities between wards of approximately 33%, well above the standard of 25% commonly used. In the Ottawa case, the council proposed to address the disparity and revise the boundaries by combining rural and suburban interests. The rural community concluded that this did not protect the exclusively rural band of wards on the outer ring of the amalgamated city and appealed the decision of council to the Board.

¹¹ As one example, Ward 14 2010 data indicates an average income of \$106,724 against an average income of \$76,742 for the City. Ward 3, by contrast, has an average income of \$43,340

[125] The Board in that case ruled that in the interest of effective representation in the unique circumstance of Ottawa at that time, the disparity was warranted by the need to protect a rural interest. The Board concluded that when considering the relationship between population parity and community of interest in Ottawa, the council had not struck the correct balance, relying too much in that case on the principle of representation by population and too little on protecting the rural interest.

[126] For Dr. Freeman the protection of the rural voice in Hamilton warrants the continuation of at least one ward that is exclusively rural. This is paramount to achieve effective representation for the rural interests in that ward and presumably for the rural voice in other wards.

[127] For Dr. Williams and the Watson team this realization came late in the process they led. The Watson Final Report concluded firmly that the status quo as represented by the second option or the “Pre-Amalgamation Balance” – the option which protected Ward 14 - does not work in light of the fact that “one of the key priorities for the review was to address population inequities.” In the Final Amended Report in which the council-based option which only modestly revised the status quo (Option 1), Watson concluded that this “modified existing ward system . . . fails to meet the Effective Representation principle.”

[128] In both the Final Report and the Final Amended Report the option that supported the continuation of Ward 14 as a single, exclusively rural ward was the 16-Ward Option. However, in that option, the balance on council is tipped by adding a ward to the former Hamilton City area (giving it 9 wards) without adding to the rural suburban wards (remaining at 7 wards). Despite its protection of Ward 14, and despite its popularity in the public engagement process, this option was never apparently favoured by council, nor was it commented on by Dr. Freeman.

[129] At the February 1, 2017 General Issues Committee meeting of the City, Dr. Williams, in reference to Option 1 in the Final Amended Reported stated,

These were in effect changes around the edges, that didn't really address the core issue. The gap between the largest and smallest might have shrunk a little bit, but there is still a huge gap there. I am not saying there should not be a gap. I

think the reality of Hamilton is there will be some kind of gap just because of the nature of the City, there will be some gap. This brings it in a bit closer, but does it really change the pattern? I don't think it is significant enough.

[130] Despite this original view, in the end, the Watson team was able to revise their conclusion and support the City Preferred Ward Boundaries Option. On examination, Dr. Williams stated in response to this quote being put to him, "I would not use this characterization for the matter before the Board".

[131] During his examination, Dr. Williams was asked, "Has your opinion with respect to communities of interest evolved since you wrote the [Final Amended Report]?" He responded that the Option 2 scenario is the one that the team built around trying to meet the guiding principles. There was a lot of emphasis on electoral trends and population. He commented that the major change in the City's Preferred Ward Boundaries scenario was that it gives much more weight to the community of interest principle and less weight to population trends. Finally, he stated now he realized that it is possible to give community of interests – the rural interest – a higher priority and still have a system that is plausible and does a reasonably good job. While it was not as good as Option 2 on population, he considered it acceptable.

[132] In his concluding evidence on direct examination, Dr. Williams suggested that the process of identifying and advancing ward boundary options could have benefitted from more involvement by Council in the generation of the options and that it should have been more of an interactive learning process between Council, the public and the consultants. As it was, Council took, or was given, a more "hands off" approach and their involvement came later. Council's choice of options for By-law 17-030 reflected the importance of maintaining the community of interests that were reflected in the existing structure as modified by council and then by settlement with the appellant Mr. Richardson, rather than the options generated by the consultants.

[133] Ultimately, the Board does not accept the revised opinion in support of the City Preferred Ward Boundaries. It is very difficult to reconcile the revised opinion with the original view that Option 1, and ultimately the Preferred Ward Boundaries, amounted to more than changes around the edges that unreasonably failed to address the core issue of voter parity and its implications for "effective representation".

[134] The Board concludes that it was not reasonable for the City to adopt Option 1 in the form of By-law 17-030 and ultimately, the slightly altered Preferred Ward Boundaries, as it did so on the overriding concern of protecting western rural interests. In so doing, voter parity was insufficiently addressed and other communities of interest were effectively ignored, as we further explore now.

Other Communities of Interest

[135] The focus on the protection of the rural interest and the continuation of the agreement that set the balance of power between the former City and the rural/suburban wards was challenged by the appellants in this matter as well as some of the presenters who the Board heard from in evening and morning sessions held specifically to hear evidence from the public. To be sure, there was a diversity of opinion offered including, as mentioned above, support for the continuation of the status quo, the protection of the rural wards and support for the balance that had been struck between the City and rural/suburban wards when Hamilton was amalgamated.

[136] However, some of the presentations raised the issue of protecting these values in the face other community and minority interests that were not considered during the process in the lead up to the adoption of By-law 17-030 or ultimately the City Preferred Ward Boundaries. Representatives of the lower City wards spoke of the need to take advantage of this ward boundary review to refresh the arrangement between the City and its rural/suburban wards so that other equally legitimate interests which may not be as apparent as the geographically rural areas, are effectively represented.

[137] As Rob Fiedler of the Beasley Neighbourhood Association argued, By-law 17-030 and the City's Preferred Ward Boundaries Option do little to address the issue of equality of representation for wards like his which are active in the preparation of Secondary Plans aimed at permitting intensification and revitalization of urban wards. His plea to the Board is that if their voice "has been effectively diluted as a result of the compromise made at amalgamation, this is the time to correct that."

[138] Ms. Barnett, who presented her work on ward boundary reviews in the context of minority interests,¹² advanced the proposition that the protection of the rural interests at the expense of inner city wards has the potential effect of reducing the influence of visible minorities in the electoral process. The dilution of the voting power of city wards where many if not most visible minorities reside, has the effect of reducing their effective representation. Ms. Barnett's research in several Ontario cities including Hamilton, demonstrated that where there is disparity in ward population populations, the votes of visible minorities are more often the ones that are diluted.

[139] In the Hamilton ward structure, lower city Wards 2 and 5 have visible minority populations of 27% and 20.5% respectively compared to the City's overall percentage of 15.7% visible minority status. By contrast the wards with lower populations whose rural or suburban status is proposed to be protected – Wards 13, 14 and 15 – each have visible minority populations of 6.3, 3.0 and 6.1% respectively. Ms. Barnett's analysis suggests that visible minority populations in the lower city wards may be more poorly represented than non-visible minority voters in the rural suburban wards.

[140] Ms. Barnett reminds the Board that in the *Carter* case, the court specifically states that effective representation requires that "(f)actors like geography, community history, community interests and *minority representation* may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic" (emphasis added). It is reasonable to conclude that this refers as much to protection of *visible* minority representation in urban wards as it does to protection of the rural minority representation.

[141] Dr. Williams, when questioned by the Board about how minority interests are dealt with, indicated that in all the years that he had been doing this, minority interests were simply not taken into account. When asked why this is the case, he speculated that this is because they do not fit into a particular more distinct geographical area in the same way that rural communities do.

¹² Ms Barnett did not seek to be identified as an expert, but did provide as part of her presentation a copy of an academic paper co-authored with Karen Bird entitled "Effective Representation for Whom? Visible Minorities and Ward Boundary Review in Ontario Cities", presented at the Canadian Political Science Association Annual Conference, May 29 to June 1, 2017.

[142] In response to the evidence of Ms. Barnett, the City did proffer some evidence to analyze the implications for visible minority interests under the City's Preferred Ward Boundaries scenario. The Board accepts that, best as the City could do with the data it had available, an improvement to minority interests may well occur under this scenario over time. But this is not the issue. The issue is that it was simply not considered to be a relevant consideration throughout the process when the scenarios were being developed and considered. In the Board's view, this led to an over-emphasis on the protection of western rural interests as a community of interest, at the expense of other communities of interest.

[143] Others who challenged the principle of protecting rural/suburban interests pointed out that this can have important implications for taxation and the support of infrastructure. Don McLean is a resident of Stoney Creek located in one of the suburban wards, an informed observer of City Hall, and a critic of the ward boundary review. He is critical of the way that the City Preferred Ward Boundaries Option was adopted, beginning in his words with a "back of the envelope" exercise followed by a closed-door settlement. His complaint is that the settlement agreement follows the same logic that was used to create the existing structure, a structure in which "the rural/suburban area got seven wards for one-third of the population." He supported the 16-Ward option.

[144] Mr. McLean's substantive complaint rests with the claim that because of the ward structure, the City of Hamilton is "burdened" (as he described it) by an urban/suburban split that supports an area rating system of property taxation. According to Mr. McLean, rural and some suburban areas pay proportionately less for services like transit, resulting in lower taxes for areas of the City where the highest incomes and largest land holdings are located. Policies such as this are perpetuated according to Mr. McLean by a ward structure in which "division trumps fairness."

[145] Finally, the Board heard testimony regarding the transfer of portions of Ward 1 to Ward 13. This transfer was the result of the discussions that took place between the City and Mr. Richardson when they arrived at the settlement which became the City Preferred Ward Boundaries Option. The objection to the proposed change was made by several people,

notably residents of the Ward 1 from which the transfer is proposed including importantly representatives of the McMaster University students living in the area.¹³

[146] The Board was persuaded by residents¹⁴ of the area that the proposed revision arising from the settlement discussions would sever a functioning neighbourhood known as Ainslie Wood neighbourhood, and negatively impact the representation that ought to be afforded to the student population, a community of interest whose effective representation has previously been confirmed by a decision of the Board (*Kingston (City) By-law 2013-83, Re, 2013 CarswellOnt 15531*).

[147] Furthermore, in doing so, it would displace from the ward a significant student population, effectively re-positioning them from an area in which a large student population exists in proximity to the McMaster University main campus, and placing that population in Ward 13, Dundas which has a much smaller concentration of students and is more accurately characterized as one of the former suburban towns.

[148] The Board did not hear compelling evidence in support of this revision affecting Ainslie Wood. Dr. Williams gave some evidence regarding this change, in which he first speculated that a “change had been made in the boundary, but beyond that I did not probe into that.” Later in cross-examination he stated, “We did not tamper with that as an entity. I don’t know how the City defines it. We certainly didn’t try to move a part of it or the whole thing.” Finally, he agreed that the City’s Preferred Ward Boundaries did split this community.

[149] It appeared to the Board that the consultant team did not really understand that this split had occurred as a result of the settlement. Nor did they apparently understand or consider any consequences that may flow from it, while professing it could support the reworked boundaries as appropriate.

[150] The Board regards this re-configuration of Wards 1 and 13 as an unreasonable error which divides a community of interest without apparent justification, in contravention of one of

¹³ *Supra*, FN9

¹⁴Tordis Coakley, representing the Ainslie Wood Community Association, provided very persuasive evidence of the community interest that is represented by this portion of Ward 1 and the difficulties this change would cause.

the important principles. As a result, this revision will not find its way into the final configuration settled upon by the Board.

[151] What this body of evidence illustrates is that there are other interests, including minority interests and the interests of students to name a few, that have not been accounted for through the review.

The Most Appropriate Option: Option 2 – the Revised Watson 15-Ward Option

[152] Having reviewed the entire body of evidence, the conclusion of the Board is that the ward boundary review came to be dominated by a concerted mandate to preserve, first, the agreement set at amalgamation that maintains a split of urban versus suburban/rural interests, and second, the rural minority interest reflected in maintaining Ward 14 (Flamborough) as an exclusively rural ward.

[153] Both of these priorities have been sustained on the basis that they protect communities of interest in the face of significant disparities in ward populations. In other words, the trade-off that has been accepted by the City and supported by their consultants is that representation by population (which protects against vote dilution) will continue to be sacrificed in order to achieve traditionally defined communities of interest.

[154] On the other side is Mr. Dobrucki who takes the approach that mathematical parity is a greater priority, as it gives effect to representation by population. His analysis begins with the goal of achieving a ward boundary structure in which no ward is more than 10% more populous than the optimal ward population. This was his first choice of ward boundary options which permits a minimum of variation from the optimal.

[155] Mr. Dobrucki's willingness, however, to consider and accept other options including the 15-Ward option initially advanced by Watson (which was later revised), displays some willingness to accept an accommodation that would acknowledge many of the characteristics of the existing ward structure. These include elements of the Hamilton Criteria that recognize "geographical and topographical" features and reflect "access and communication" issues, which together have made the existing ward structure somewhat acceptable.

[156] Having taken account of the range of options now before it, the Board concludes that the most appropriate ward boundary option is represented by “Option 2” of the Watson Final Report (Amended) – the revised 15-Ward Boundary Option (for reference see Exhibit 14B, Tab 6, pp. 535-539.)

[157] The Board did not seriously turn its attention to a 16-ward option, not because it was a poor option to consider, but because neither the appellants nor the City suggested it should be considered. The one way in which all the parties seemed to agree was that a 15-ward option was acceptable as a means of achieving effective representation.

[158] At the very outset, the Board considered that the proper approach to arriving at a ward boundary solution that was *Charter* compliant in accordance with the *Carter* decision is that the over-arching aim is “effective representation.” This begins from an initial position that is based on representation by population – population parity – but then must take account of, and be adjusted by other factors that are key to effective representation.

[159] The Hamilton Criteria formulated at the very outset of the WBR constituted a serviceable list of the considerations that must be made, but the criteria were not completely helpful in themselves in determining the priorities and process for arriving at the appropriate balance between the criteria where they conflicted with one another or where they were not completely complementary. As a result, the selection of the City’s Preferred Ward Boundaries emphasized one community of interest without having any apparent regard for the others.

[160] This has led to an over-arching emphasis on the protection of an exclusively rural ward as a means of protecting a rural voice on council. While such protections may have been appropriate in the unique circumstances of Ottawa in 2003, it is open to review and reconsideration years after amalgamation. Similarly, the maintenance of a founding compromise that favoured rural representation on council in order to make amalgamation acceptable to those opposing it at the time, should not be considered a permanent solution, especially in the face of ongoing changes in population numbers and the character of the population.

[161] At some point it is legitimate to enquire whether maintaining disparity can be justified. As the SCC concluded, “. . . deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. *Beyond this the dilution of one citizen’s vote as compared with another’s should not be countenanced*” (emphasis added). At some point, arrangements that have held for a long time warrant reconsideration to ensure effective representation is maintained in the face of change.

[162] The Board has previously supported this in *Teno* where it concluded, at paragraph 45, “based on an analysis of the disparities in voter representation that now exist and will continue to worsen . . . the Board finds that it is untenable, and contrary to principles set by the Supreme Court of Canada to allow the current system to continue. While it may please the long term residents of the municipality to maintain the existing ward boundaries, which reflect the historic townships which have been amalgamated, it is clearly doing a disservice to the new residents of this community, and is unfairly diluting the rights of these new citizens to voter parity.”

[163] The 15-ward boundary choice of Option 2 strikes the appropriate balance. It achieves a high degree of population parity without slavishly adhering to some mathematical ideal. It retains several of the characteristics that permitted the existing system to function, including recognition of geographic and topographic features (notably the escarpment, waterways, major highways), and considerations of access and communications based on the transportation communication systems.

[164] It includes features of the settlement with Mr. Richardson including a division of the wards in the east end (notably Wards 9, 10 and 11) in a way that improves on the awkward configuration of the current Ward 11.

[165] It includes improvements on the original 15-Ward Option contained in the Final Report, including most notably the re-working of the boundary between Wards 6 and 9 to reflect more accurately the configuration of the communities on the east mountain between the Albion Falls area of Ward 6 and Upper Stoney Creek area of Ward 9. Watson supported these changes as a result of persuasive interventions by members of the public at the second round of engagement.

[166] Option 2 does not include the unfortunate re-configuration of the Ainslie Wood neighbourhood discussed earlier and keeps intact the strong community ties within the neighbourhood including relationships within the significant McMaster student community.

[167] Option 2 also reconfigures the mountain wards (Wards 6, 7, 8, and a re-worked Ward 14) to reflect population growth in the area, and to accommodate the change to Wards 6 and 9.

[168] Finally, the Board acknowledges that Option 2 will re-configure Wards 12 and 13 and replace former Ward 14 by splitting it along Highway No. 8, and placing the northern portion with the Town of Dundas and the southern portion with Ward 12 which now comprises Ancaster and the rural area to the south. The effect is to create a larger version of the combined rural/suburban Ancaster Ward 12 and a new combined suburban/rural ward of Flamborough and Dundas. The other northwestern ward, Ward 15 which combined the part of Flamborough northeast of Highway 6 with Waterdown, has existed and functioned well for some time.

[169] Though urged upon the Board by the City's witnesses and counsel, there is insufficient evidence to suggest that the differences between the eastern rural wards and western rural wards warrant a different treatment, such that the eastern rural areas are effectively represented when combined with suburban interests, but the western rural areas are not.

[170] The Board is satisfied that the rural voice and the community of interest that is represented in these wards will continue to enjoy effective representation in these newly configured rural/suburban wards. By all accounts, Ward 12 has functioned well as a combined ward, developing over time a strongly integrated rural and suburban population that has been well represented since amalgamation. Similarly, Waterdown and its Flamborough component have been well represented.

[171] These examples are proof of the fact that anyone representing a ward with a very significant rural component must take account of the values and views of those in the rural area. In the past, rural residents of the wards that include within them suburban areas have enjoyed effective representation and the Board is confident that this will continue in the future

and that it will apply equally to the newly configured Ward 13 as it has to the previously configured Wards 12 and 15.

Residents' Concerns with Change: Ward 8

[172] At this point, it is appropriate to acknowledge the participation of several residents of Ward 8 and to address the concerns they raised with changes that they feared may take place to their ward. The Board heard for instance, from two residents,¹⁵ one from the Gilksen neighbourhood and the other from the adjacent neighbourhood of Gourlay. They described how their neighbourhoods have worked together in the way that communities do, to organize social events and operate youth sports leagues among the neighbourhoods. Their neighbourhoods are strong and they do not want ward changes to alter the fact that they are in the same ward and work successfully with the same councillor.

[173] Similarly, the Board heard from three distinguished gentlemen¹⁶ who represented the Chedoke Bocce Club, an enthusiastic sporting organization devoted to providing a program of physical activity and a place of fellowship for residents of several of the west mountain neighbourhoods. They, too, did not want to see any change in the configuration of Ward 8. Others supported these concerns.

[174] The Board had very serious regard for the testimony of those who spoke for the residents of Ward 8, but concluded that the proposed Option 2 would not have the effects that the residents feared. The mountain neighbourhoods are organized on the basis of large residential blocks which developed south from the Escarpment once the mountain accesses from the lower City were constructed. They are formed by the intersection of several arterial roads, and each neighbourhood has a strong sense of identity based on very clear boundaries.

[175] The Board observes that while the neighbourhoods are well developed and have formed strong relationships with one another, and together form a large part of Ward 8, the re-configuration resulting from Option 2 will not sever any of the neighbourhoods, but some

¹⁵ See the evidence of Randy Chapple, on his behalf and on behalf of Karen Marcoux and Shawn Boecker, for Gilksen and Gourley Park Associations.

¹⁶ Joe Munisteri spoke on behalf of himself and his friends Ralph Iorio and Biagio Ciccant.

may be separated from others by a line that places them into different wards, where they had previously been in the same ward.

[176] The Board does not share the apprehension held by the residents who came forward, that being in a different ward for the purposes of voting and representation will diminish the vitality and strength of these neighbourhood organizations. Representation will change but it will not be diminished by the re-configuration. Indeed, the beneficial effect is that the voting power of the current electors of Ward 8 will increase. In the past the votes of this ward and other mountain wards, have been undervalued (“diluted” to use the word used by the SCC in the *Carter* case) in the electoral process. With the addition to the mountain wards of a fourth seat, the council will better represent the population of the area, enhancing one of the variables that contributes to effective representation.

ORDER

[177] The Board allows the appeal. The City is ordered to amend By-law 17-030 to reflect Option 2, as represented in the Watson Final Report (Amended), dated January 16, 2017.

[178] The Board so orders.

“B.W. Krushelnicki”

B.W. KRUSHELNICKI
EXECUTIVE CHAIR

“Paula Boutis”

PAULA BOUTIS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
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ATTACHMENT 1

Participants Appearing in Order of Appearance

1. Tordis Coakley on behalf of the Ainslie Wood Community Association
2. Rosemary Lukosius
3. Anne Flanagan
4. Randy Chapple on his behalf and on behalf of Karen Marcoux and Shawn Boecker, for Gilkson and Gourley Park Associations
5. Susan Creer
6. Colleen Wicken on behalf of the Bonnington Buchanan Mohawk Southam Neighbourhood Association
7. Georgina Beattie
8. Joe Munisteri on his behalf and on behalf of Ralph Iorio and Biagio Ciccant
9. Mike Borrelli on his behalf and on behalf of Alexandria Anderson, for Beasley Neighbourhood Association
10. Roman Sarachman
11. Don McLean
12. Chukky Ibe on behalf of the McMaster Students Union
13. Rachel Barnett
14. Gwenn Todd
15. Rob Fiedler
16. Maureen Wilson
17. Peter Hutton