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A report on the May 9-10, 2006 OMB hearing:

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From: Erwin Dreessen [mailto:erwin_dreessen@...]

Sent: Friday, May 12, 2006 9:02 PM

To: Greenspace Alliance list

Cc: Councillor Clive Doucet; Councillor Alex Cullen; Councillor Diane Holmes; Councillor Georges Bédard; Councillor Peggy Feltmate; Councillor Jacques Legendre

Subject: OMB Environment Hearing, May 9-10, 2006

With Amy Kempster on my side, I spent Tuesday and Wednesday of this week at an Ontario Municipal Board (OMB) hearing to trash out a few unresolved issues in the Official Plan (OP) related to the Environment. This is my report to you. At the end, there is a question. I look forward to your feedback.

We had raised concerns with two sections, s. 3.2.4 on Rural Natural Features, and s. 4.7.3 on Erosion Control (setbacks from watercourses). Our concern with s. 4.7.3 was strictly a wordsmithing matter, where we believed that the use of "Notwithstanding" made exception to more than was intended and could hence lead to misinterpretation and dispute. Our concern with s. 3.2.4 was more substantive: We suggested that development adjacent to a Rural Natural Feature (RNF) should require an Environmental Impact Statement (EIS) and we wanted to strengthen the wording to avoid undefined terms and wishy-washy language. Our specific objectives were endorsed by the Alliance Board at its April meeting.

At the time of the pre-hearing last February, five appellants in addition to the Alliance were listed as participating but by the time the hearing came around all had withdrawn - the last, Sunset Lakes, represented by Paul Webber, days before the hearing. (We were served with their 2-inch Book of Documents nonetheless; good thing neither Amy nor I spent any time wading through it...) So the only active parties were ourselves, the City (in the person of Tim Marc's pupil, Marcia Taggart), and Doug Kelly, representing the Ottawa Home Builders Association (OHBA), in support of the City.

When Taggart gave us the City's 2-inch Book of Documents, I expressed disappointment that we had not been given this earlier (I had gone around the previous Friday, as soon as our Books were ready). Her response: You never asked! I reprimanded her for lack of civility. She was shamed enough to apologize to the Board for not having given us the documents earlier. (Only a Table of Contents is formally required to be served on parties at a set prior date and this had been done.) Still, her snootiness did not end there. On the second day she foolishly questioned whether the excerpts of the Provincial Policy Statements which were in our Book were the real thing, even though the URL was visible at the bottom of the page. The chair's reaction was obvious, it did not raise her stature.

OMB bashers should note that certain legalistic arguments were not raised. Originally, Sunset appealed one policy of s. 4.7.3 and the Alliance was allowed as a party to that appeal back in

2004. So, when Sunset withdrew, did we still have a right to speak to 4.7.3? In a later document, the City, in addition, listed Dell and Brookfield as appellants of other 4.7.3. policies; how the OHBA came to be a party and the key interlocutor with the city on a revamped 4.7.3 remains a mystery to me. Our own original appeal of 3.2.4 was related to our appeal on the country lot estates policy, but that matter only hovered in the background during this hearing. We in effect asserted and obtained the right to "seek relief" at this hearing based on being dissatisfied with the city's responses during consultations and having gotten nowhere when the settlement on these sections came before Committee of Council.

In support of our arguments on s. 3.2.4 we had subpoenaed Chris Gosselin, an environmental planner from the Region of Waterloo whom I had interviewed last September in connection with a city-led workgroup in search of an improved protocol for Environmental Impact Statements. (The workgroup went into suspended mode after the first meeting...) Chris prepared a 3-tab Witness Statement, including a very interesting (rather devastating) report on long-term monitoring of bird populations in areas close to urban development, and a 2003 report from the Environmental Law Institute in Washington, D.C. that attempts a synthesis of best practices on conservation thresholds for land use planners. Earlier I had sent him excerpts from the Ottawa OP and a sample of natural areas described in the 1997 RMOC Natural Environment Systems Strategy (NESS) reports which had become "Rural Natural Features" on Schedule A of the OP.

Our Book of Documents comprised 100 pages. In addition, I had prepared a one-page "Relief Sought" (it's amazing how quickly you pick up the terms that this process is comfortable with) and 12 scenario pages, including examination of Chris and cross-examination of Bruce Finlay, the City's witness. I ended up using almost all of this. In one episode, we brought out what we had prepared by having Amy be the witness (Taggart had complained that she didn't know what "evidence" we would bring to bear on the matter. Forever flexible.)

Chris traveled on Monday and that night Amy and I met with him over dinner and a 3-hour meeting to prepare for the next day. Bill Royds joined us briefly, bringing cheques for a total of \$375.00, our cost for this subpoenaed witness. Chris chose to stay at the Y and travel by bus, knowing how scarce our funds are.

The afternoon before the Hearing, Marcia Taggart proposed by e-mail to call Bruce to the stand first, to give some non-opinion evidence. I resisted this as irregular, unnecessary and possibly unfair. When it was proposed to the chair, I was able to express these concerns again. Bruce's introduction went ahead but chair and others were put on guard.

Amy and I heaved a sigh of relief when the Member appeared, as it turned out to be Marc Denhez. He began by stating, in the interest of transparency, that he was a former member of the Alliance as well as a former member of the OHBA. No-one objected to his presiding over the hearing.

Through Chris' testimony we were able to demonstrate that Rural Natural Features comprise lands of significant ecological value, including Provincially rare species; that the boundaries of the areas of significance are uncertain; that the OP designations can cover more or less land than

is shown in the best available maps, those of the NESS; that knowledge of the areas is spotty, suggesting further precaution when development is proposed; and that an EIS can be appropriately scoped so that preparing them does not impose an undue burden on owners wishing to engage in development adjacent to land designated RNF.

The City's and OHBA's cross-examination got nowhere. My sweetest moment came when Taggart asked him whether he had seen these NESS reports and maps before the previous night (knowing we had met then), whereupon he could truthfully answer he had received them two weeks earlier.

Bruce Finlay's one-page advance rebuttal in his Witness Statement was weak and illogical and this was duly exposed in cross-examination. The City's best defence was that other parts of the Plan call for studies when development is proposed, e.g. section 4.7.2 (Protection of Vegetative Cover), 4.7.1 (Integrated Environmental Review), certain policies applicable to General Rural Areas (s. 3.7.2), and policy (9)(a) of 2.3.5 (Greenspaces), on increasing forest cover. The chair pointedly probed Finlay on the question what the practical difference was between any of these requirements and a scoped EIS. We suggested to call a spade a spade, in the interest of clarity and certainty.

During a break, the Chair ordered us to come up with wording that would explain what the "Notwithstanding" phrase referred to. Having agreed that all parties shared the same intent (even Webber said this before he took his leave within the first half-hour of the Hearing), it took us all of five minutes. To me, this vividly illustrates how inept the City is in resolving differences between parties. We had just wasted two hours of the Board's time.

On whether the undefined words "adverse impact" should be replaced by the expression "negative impact" as defined in the Provincial Policy Statements, the Board ruled that the PPS definition, even the improved version in the 2005 Statement, has its problems and ordered the parties to come up, by July 31, 2006, with a definition of "adverse impact," just like Waterloo had done. When the term is defined, he noted, then the wishy-washy sentence we wanted stricken would become superfluous.

He reserved judgement on whether an EIS is required for developments adjacent to RNFs.

I paste in below: a post-hearing e-mail to Mr. Kelly, and (with his permission) Chris Gosselin's next-day letter & my reply.

Chris Szpak and Bill Royds worked on the OP Appeals Committee in earlier days (negotiations with the City), along with Amy and myself; Gert Dreessen served dinner, drove Amy and me around, printed the Witness Statement binder and the Book of Documents and made numerous scans of documents.

This was not a hearing on a major, basic-principle or big-picture issue. Our objectives were deliberately moderate. Bigger, more complex issues would require a proportionate effort - witnesses in various disciplines, citation of precedents, etc.

The next hearing in which the Alliance is involved starts July 4. The question there will be whether country lot subdivisions should be allowed in Rural Ottawa. The compromise we have put forward is that they should not be allowed in Rural Natural Features. Tim Marc has told us flat-out that the developers would not accept this but we are not sure that the option has ever been put to them and there have been no meetings between the parties. The City will have to hire an outside consultant to defend its case as staff had recommended against allowing any further country lot subdivisions. We intend to subpoena (by then ex-employee) Ned Lathrop as a witness, but that will not be enough to make our case.

Now my question:, which I ask readers to carefully think about: Whether we win or lose, was it worth it to go to all this effort? By asking the question, you may guess that I have my doubts. I look forward to your considered response. It will help determine whether we go ahead with the July 4 hearing.

Erwin

post-hearing correspondence

Dear Mr. Kelly:

On behalf of the Greenspace Alliance of Canada's Capital, I wish to thank you first of all for having gotten our witness to the bus station in time. It was a great relief to him, and to us, and most graceful of you.

I also thank you for retracting before the Board your initial objection that we were bringing forward issues after supposedly having agreed to the changes to s. 3.2.4 of the OP the City put forward. You later became aware of our clearly expressed remaining concerns and realized that the City had misrepresented our position to you.

The City's apparent inability to genuinely bring parties together and resolve differences was vividly illustrated on the matter of "Notwithstanding Policy (3)" in s. 4.7.3. By sitting around the table we had this matter resolved in literally five minutes! Two hours of the Board's time was wasted.

It is my hope that, as per Order of the Board, we similarly will be able to come to a resolution on the meaning of "adverse impact" by July 31. We cannot let the City again play divide & mismanage. I am ready to meet with you at a mutually convenient time to start the discussion.

I have always believed that nature protection and development need not be incompatible. I am with Mr. Denhez when he opined that we have more in common than would appear seeing us arguing before the Board.

Last fall, the City initiated a Workgroup on reform of the EIS protocol. The group is chaired by Deborah Irwin but its work was put on hold after the first meeting, due to other City priorities. I represented the Alliance on this group -- and it was for its benefit that I sought out Mr. Gosselin

last September. My pleas for development industry representation have gone unheeded so far. Perhaps you or some of your clients would consider participating. If you wish, I can send you my report to the group on my interview with Mr. Gosselin.

Regards,

Erwin Dreessen

Hi Erwin,

I trust you are now basically finished with the hearing.

Mr. Kelly got me to the bus a couple of minutes before it left, and I got home at 1:30 this morning. I am now waiting to go down to the Council Chamber in a few minutes to see what I hope will be the glorious culmination of the Environmentally Sensitive Landscapes Amendment. We got a glowing lead editorial in The Record this morning, and to counter-balance it, a few nasty surprises from some wealthy landowners who waited till the eleventh hour to raise new objections. Seventeen delegations had registered as of last count, so it may be a long evening. Anyway, I am so glad I was able to get back in time.

I wanted to say to you before I was literally rushed out of town (happily sans tar and feathers) that I thought you did a really professional job in representing the Greenspace Alliance at the hearing. You were meticulously prepared and conducted yourself with great dignity, and obviously had the respect of the Chair. I hope that my testimony will be of use to Mr. Denhez as he makes his ruling. On my way out of town, I felt pretty positive about it. The cross-examination went quite easily compared to some I have experienced. I hope I didn't leave major gaps that the other parties were able to exploit in their closing arguments. All in all, it was an interesting experience, and one I would not have missed.

Whether you win or lose on the appeal, I really sense that you have won the respect of City staff, and that they will take the Alliance seriously in future dealings with you. Please let me know the outcome when the decision is rendered.

It was great working with you, Amy, and Bill. Take care, and all the best to you and Gert,

Chris

Christopher Gosselin,
Manager of Environmental Planning,
Planning, Housing, and Community Services Department,
Regional Municipality of Waterloo,
<coordinates snipped>

Hello Chris,

Thank you for your kind words but, most of all, on behalf of the Greenspace Alliance of Canada's Capital, my sincerest thanks for your testimony. It was as helpful as we could have wished it. As the expression goes, your evidence "could not be shaken" and it was remarkable that on the following day, the City (lawyer and planner), Mr. Kelly and the Board Member himself (as well as we ourselves, of course) repeatedly referred to your testimony in positive terms, as in "As Mr. Gosselin so clearly illustrated yesterday..." etc.

This reflects your utter professionalism, your scrupulous speaking only from what you know and your highly effective presentation skills.

We also greatly appreciated your going to extra lengths to save us money by choosing to travel by bus, despite the long ride and your long legs!

As I related to you by phone today, we have already won in part, having resolved one wordsmithing issue almost on the spot (thereby vividly demonstrating the City's shortcomings in its ability to reconcile differences) and being ordered by the Board to come up with a definition of "adverse impact" by July 31. Mr. Denhez noted that, if "adverse impact" is defined, then that last (wishy-washy) sentence in the policy would become superfluous and could be stricken, as we had proposed. I certainly will keep you apprised of the outcome and of the Board's decision regarding the adjacency issue.

In gratitude,

Erwin Dreessen