

ISSUE DATE:

Dec. 22, 2010



PL100206

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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

Appellant: Friends of Greenspace Alliance
Subject: Proposed Official Plan Amendment No. OPA #76
(section 4.74)
Municipality: City of Ottawa
OMB Case No.: PL100206
OMB File No.: PL100206

APPEARANCES:

Parties

Counsel*/Agent

City of Ottawa

T. Marc*

Greater Ottawa Home Builders Association
and Thomas Cavanagh Construction Ltd.

U. Melinz* and D. Mast (student-at-law)

Friends of Greenspace Alliance

Amy Kempster. Cheryl Doran and Erwin
Dressen

DECISION DELIVERED BY N.C. JACKSON AND ORDER OF THE BOARD

This is the first Appeal hearing held into the 30 Appeals made to Ottawa Official Plan Amendment 76. Official Plan Amendment 76 is a comprehensive Official Plan Amendment made in a five year Official Plan review under the *Planning Act*. Following modifications made by Approval Authority and then the launching of Appeals, the Board held three Prehearing Conferences respecting process and procedure. Most Appeals were set down for Hearing in 2011. The Friends of the Greenspace Alliance (hereinafter Greenspace) sought an earlier hearing date for its appealed interest in section 4.7.4 Endangered Species. That request made on August 26, 2010 was opposed by the City, but granted by the Board with the hearing to commence on December 1, 2010 for a period up to two weeks in duration. Other environmental appeals were set down for hearings in 2011.

The Greenspace Alliance is an incorporated non profit group that takes an active interest in planning in Ottawa. In addition to the present case respecting Endangered Species, the Alliance has been active in environmental planning on related matters in the past and has other appeals scheduled before this Board. Amy Kempster announced herself as the representative of the Alliance. When differences arose in the Hearing between Kempster as spokesperson and Cheryl Doran, a member of Greenspace and a witness in this hearing, the Board permitted both to question witnesses. As the divergence grew the Board asked that Ms Kempster and Ms Doran confer. On the final day of the four day hearing Erwin Dreessen appeared, apologized, and was at his request granted spokesperson status for the Alliance for the remainder of the Hearing. Mr. Dreessen's questions and final argument were more specific as to issues and the relief sought (Exhibit 27). The Board accepts that Ms Doran's evidence was more wide ranging and was as Greenspace says borne in part from frustration. Ms Doran has a particular interest in endangered species and has sought unsuccessfully to bump up Class Environmental Assessments but has been refused by the Province. Ms Doran expressed interest in Blanding's Turtles, Butternut Trees and Ginseng at different points in the hearing. She was not satisfied with City and Provincial responses to past issues. Such separate issues are not now before the Board. Species are protected under the *Endangered Species Act, 2007* and Regulations pursuant to that Act.

The Board appreciates that the evidence of Ms Doran and her expert witnesses Dr. Frederick Schueler and Dr. Clarke Topp goes beyond the setting of Policy in the Official Plan. Dr. Schueler prepared a paper on threatened Turtles in the Lester Road Wetland, February 22, 2008. That paper was not acceptable to Environment Canada based upon comments Dr. Schueler received. Dr. Topp has undertaken soil analysis, to show the organic nature of soils particularly on lands near the Ottawa International Airport. Dr. Topp has significant experience with moisture content in soils and opines that soils generally in the Ottawa region have organic qualities. He takes issue with City soil mapping in the Official Plan (Schedule K) and expresses doubt with the City definition of organic soils. He opines that organic soils have characteristics that are related to wetland evaluation and in turn the determination of the habitat of Endangered Species. This evidence was in part helpful as background to the determination of language in the Official Plan (section 4.7.4 Endangered Species). Neither expert ventured opinions on the planning language in issue. Dr. Topp's testimony on soils

shown in the Schedule 12 Overlay to the Official Plan will be dealt with, as acknowledged by Mr. Dreessen in later appeal hearings on OPA 76, when other interested appellants and parties are present. Ms Kempster referenced the language changes sought in her opening statement (Exhibit 4) and Mr. Dreessen returned to such specific language changes in his final argument (Exhibit 27).

As to status of the Greater Ottawa Homebuilders Association and Thomas Cavanagh Construction Ltd., both had appealed section 4.7.4 of the Plan respecting Endangered Species but have now changed their position and announced at the commencement of this Hearing their intention to continue in the Hearing as supportive of the City language in section 4.7.4 as modified by the Province. As such they did not call evidence but questioned other witnesses and made submissions.

When the evidence was called on soils near the Airport, the City and the Airport Authority legal counsel, A. Pritchard, spoke to the later appeal hearing in 2011 respecting Airport Lands and the Environment. These submissions served as a reminder that later environmental appeal hearings on OPA 76 were scheduled in 2011 and overlap should be avoided notwithstanding the reference in the current Procedural Order as to soils in error.

Issue 1 and 2- Significant Habitat

Key to the language changes in section 4.7.4 of the Official Plan is an understanding of background. Section 4.7.4 had been in the 2003 Ottawa Official Plan now involved in the five year review mandated under the *Planning Act*. Since the adoption of the Ottawa Official Plan in 2003, two major Provincial Initiatives were passed; the 2005 Provincial Policy Statement (PPS) and the *Endangered Species Act*, 2007. The Ottawa Official Plan review now in Policy references both new initiatives. Greenspace favours the reference to habitat from the *Endangered Species Act* but opposes the reference by Ottawa to Significant Habitat from the PPS in the Official Plan. Greenspace asks that the word "Significant" be deleted from section 4.7.4.

Significant with the word habitat implies, says Greenspace, perhaps a higher degree of habitat than if the word habitat is used without the modifier significant. The Board agrees with that position, if those words are considered by themselves without reference to their context. The *Endangered Species Act* is a statute that can stand on its

own. It is comprehensive legislation which in its 46 pages establishes protected species and provides offences for killing of the species and damaging or obstructing the habitat of the species. Penalties under the Statute can range up to \$2,000,000.00. The Official Plan is not a statute and is to be construed as a Policy document. As such the Policy document may reference the statute in a descriptive or informative manner. The Ottawa Plan references the 2007 *Endangered Species Act* and speaks to significant habitat as being protected under the *Endangered Species Act* and the Policies of the Official Plan. Wildlife habitat is generally to be protected through the environmental policies of the Official Plan. Section 4.7.4 is entitled "Protection of Endangered Species" and is included in section four of the Plan entitled "Review of Development Applications".

The Plan references Significant Habitat of Endangered and Threatened Species as identified by:

- a) Regulations made under the *Endangered Species Act, 2007*;
- b) An Environmental Impact Statement in areas where there is potential for significant habitat to exist; or,
- c) Other studies as approved by the City and Ministry of Natural Resources (MNR) (e.g. subwatershed studies or environmental management plans).

It is clear that Environmental Impact Statements (EIS) will be used to identify significant habitat and that such will be reviewed by the MNR who will identify the extent of the significant habitat. No development or site alteration is permitted in significant habitat, nor is development or site alteration permitted within 120 metres of significant habitat unless the ecological function of the adjacent lands is evaluated and the EIS demonstrates no negative impact on the significant habitat of endangered and threatened species or on its ecological functions.

The incorporation of the *Endangered Species Act* and its regulations for habitat into the Official Plan have the effect of balancing the terms general habitat from the statute and significant habitat in the Plan, particularly when the important decisions on habitat are made by the same approval body, the MNR.

But more important why has the City chosen to use the word Significant Habitat in its Official Plan aside from the context and incorporation by reference of the *Endangered Species Act*? The City although empowered by various provisions of Bill 51 to amend the *Planning Act*, is still an entity subject to Provincial Policy - now more than at the time of the adoption of the 2003 Official Plan. Section 3(5) of the *Planning Act* states that a decision of Council that affects a planning matter shall be consistent with the policy statements of the Province. The same section references the Ontario Municipal Board whose decision shall also be consistent with the policy statements of the Province.

The Provincial Policy Statement (PPS) 2005 references the same "shall be consistent test" in the exercise of planning authority. It states that the PPS addresses a Policy led planning system. This has been interpreted that the consistency test applies down the chain through Official Plans as the prime means of implementation of the PPS.

What does the 2005 PPS say about endangered and threatened species? Section 2.1.3 of the PPS states development and site alteration shall not be permitted in:

- a) significant habitat of endangered and threatened species;

Significant is used in many sections of the PPS and is defined in the PPS having regard to the section and context in which it is used. There seven different meanings for Significant as defined in the PPS Paragraph b of the Definition of Significant applies to endangered and threatened species:

- b) in regard to the habitat of endangered species and threatened species, means the habitat as approved by the Ontario Ministry of Natural Resources that is necessary for the maintenance, survival, and/or the recovery of naturally occurring, or reintroduced populations of endangered species or threatened species, and where those areas of occurrence are occupied or habitually occupied by species during all or any part (s) of its life cycle;

The Board notes that this definition does take the reader back to habitat itself and habitat approved by the MNR.

The PPS in policy 4.6 states its policies represent generally minimum standards and that planning authorities can go beyond the minimum standards unless doing so would conflict with a policy of the PPS. This is further amplified in the definition section of the PPS respecting Significant which reads: "Criteria for determining significance for the resources identified in sections (c) – (g) are recommended by the Province, but municipal approaches that achieve or exceed the same objective may also be used." Since (b) respecting habitat of endangered and threatened species is not included in the list whereby exceedance is permitted, it is logical to conclude that the Province wants its policy on significant habitat of endangered species and threatened species followed closely.

As support for the Board's interpretation of Significant Habitat, the Board has reviewed the Natural Heritage Reference Manual of the Province. The second edition is dated March 18, 2010 post the *Endangered Species Act*, 2007. The purpose of this Manual is to guide the implementation of the natural heritage policies of the PPS 2005. The Manual states it is to be consulted in matters before the Ontario Municipal Board. The Manual describes in some detail the meaning of Significant as it pertains to the habitat of endangered species and threatened species. The Manual admits some differences but maintains: "the habitat protection provisions for threatened and endangered species under the *Endangered Species Act* and the PPS are very similar and are intended to work together. The area identified as significant habitat for endangered and threatened species under the PPS and the area identified as habitat using the general definition of habitat under the *Endangered Species Act* are meant to be the same. Thus the same area will be delineated or described when the MNR are carrying out responsibilities to which either definition applies."

Mr. Dreessen notes that that there is timing that involves the later coming into effect of part of the ESA with regulations. He cleverly points to the timing of later OP reviews and inconsistency that may result. The Board does not agree with such alleged inconsistency and in any event must follow section 3(5) of the *Planning Act* that municipalities and the Ontario Municipal Board must ensure decisions are planning instruments which are consistent with policy statements that are in effect on the date of the decision. Mr. Dreessen has made representations to the Province respecting "Significant" in the PPS review now underway. That is the proper forum for the Greenspace concerns with "Significant".

The Board notes it was the intention of Greenspace to call City biologist Amy MacPherson if not called by the City. She was called by the City and then very comprehensively questioned by Greenspace. She has spent considerable time in the development of City policies including the EIS Manual. Her responses were straightforward and direct as to the meaning and applications of the policies in issue. The Board as did Greenspace, places some reliance on her testimony on the interpretation and workability of section 4.7.4 and in particular the word Significant.

The Board concludes the City has taken a cautious but prudent approach of referencing the term Significant Habitat in its Official Plan Update - OPA 76. The Board finds the City's approach to be consistent with the PPS and good planning that will work in conjunction with the *Endangered Species Act*. To refer only to the *Endangered Species Act* would not be consistent with the PPS in the manner contemplated by 3(5) of the *Planning Act*.

Issue 3

The ESA provides: No person shall damage or destroy the habitat of an endangered or threatened species. Greenspace would add to Policy 5 the requirement of a building permit under the *Building Code Act*. It is agreed that the City Official Plan is limited to development based upon the provisions of Policy 5. No development or site alteration as defined in section 4.7.8 will be permitted in significant habitat of endangered and threatened species. It is trite to say that the *Building Code Act* is a free standing statute that deals specifically with the issuance of building permits and on what basis permits may be refused. Regulations under the Building Code list what is applicable law under which permits may be withheld. At the present the Official Plan and the *Endangered Species Act* are not listed as applicable law for consideration by the Chief Building Official.

Mr. Dreessen astutely argues there are three references in the Official Plan to building permits

- 4.8.1. Development on the flood plain requires written permission from the Conservation authority prior to the issuance of a building permit .

- 4.8.4 Where a Record of Site Condition has been made a condition of planning approval, a building permit may be issued on a phased basis....
- 4.4.2.2 In the severance process development on private wells must be supported by a well inspection report in conjunction with the building permit process

These references are descriptive of process and conditions that may be imposed for severances under section 51 of the *Planning Act* or legislation such as the *Conservation Authorities Act* or Provincial Environmental Legislation. It is apparent that the *Endangered Species Act* on its own creates an offence for destruction of habitat of endangered or threatened species.

In so far as the City is dealing with development it is necessary to consider the extent of the relief sought by Greenspace since building permits may include even interior work on a dwelling. If the nature of the development has been considered, then the legal basis needs to be considered and whether the type of work sought to be authorized under a building permit application is indeed development. Development as defined in the PPS means “the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act* but does not include infrastructure....”

The City, in planning for endangered species has included proposed controls under Review of Development Applications. Therein is the necessary relationship with development and controls under the *Planning Act*.

Greenspace is right that a building permit may not amount to development under the *Planning Act*, but that fundamental requirement cannot be remedied without a basis in law. The Greenspace language respecting building permits is not authorized at law and is not good planning without a *Planning Act* and PPS basis.

Issue 4

Amend Schedule R3 Amendment to Schedule K) respecting organic soils.

The Board finds that this relief is best covered in airport and environmental issues scheduled in 2011. This is a legitimate planning issue but not determinative in any way of Endangered Species. The City witness Dr. Stowe does not admit the relationship claimed of extensive organic soils to wetlands and endangered species when there have been alterations over time through human activities. The Ontario Wetland Evaluation provides that soil mapping is not to be definitive but may be general guide to the location of wetland boundaries. Dr. Stowe does admit the failing of a city definition for organic soils (from slope stability guidelines). This definition is not in the Official Plan but will be reviewed by the City. Greenspace will be permitted to raise soil mapping concerns in the 2011 Environmental Hearings on OPA 76. There is be disclosure of Provincial mapping relied upon.

Conclusion and Order

For the above reasons the Greenspace appeal to section 4.7.4 respecting Endangered Species is dismissed.

So Orders the Board.

“N.C. Jackson”

N.C. JACKSON
MEMBER