From:	green-news-request@greenspace-alliance.ca on behalf of Erwin Dreessen
To:	green-news@greenspace-alliance.ca; fca-members@googlegroups.com
Subject:	RE: [GA List] OMB hearing this Thursday and Friday [was: OMB Pre-hearing conference on OPA 150]
Date:	Sunday, August 09, 2015 11:20:31 PM
Attachments:	Nott X-Exam excerpts.pdf

What was scheduled to be a 2-day hearing ended at 6 p.m. on the first day. Only counsel for Taggart (Steve Zakem), Walton (Michael Polowin) and the City (Tim Marc) made submissions. The Member (Makuch) reserved judgement so we'll have to wait a few weeks to know the outcome of this ploy to set the timetable for urban expansion.

As expected, no experts took the stand, though Marc had cross-examined witness Wendy Nott for two hours the previous Friday. I learned this only at the hearing and did not have a copy of the transcript, nor did I have paper copies of all the material filed. This made following the arguments between the lawyers very difficult. Tim Marc later sent me the transcript (on which he relied a lot in his argument) and Zakem, after the fact, sent around his voluminous Book of Authorities; nor did I have the two volumes of Polowin's Book in hard copy. (All this material was shared with other Parties more as a courtesy than as a requirement, given that no other Parties were participating in this motion.) I still don't have a copy of another document Polowin produced, with Marc's concurrence, the day before the hearing.

Making sense of it all therefore required a kind of reconstruction using the documents now at hand, guided by my notes.

Zakem and Polowin put forward a surprisingly weak case. Recall:

> **The Motion asked the Board to refuse to approve the OPAs and to direct the City to "complete the 5 year review" on or before August 2017, stipulating (a) a 2036 time horizon; (b) completion of the LEAR review; and (c) completion of the Employment Lands Study.**

Right off the bat, Zakem confessed that asking to repeal a Comprehensive OPA in its entirety was unusual ("pushing the envelope"). Much was made of the fact that OPA 150 undid several of the changes introduced in the previous round (OPA 76, as amended by the Board). Generally, he repeated the arguments found in the Notice of Motion as outlined in my earlier post. He noted that, after the LEAR review was pulled from the OP Review process, it took the City 13 months to write to the Ministry asking for help. "The importance of LEAR cannot be overstated" he declared. On Employment Lands, he faulted the City for not considering the quality of the lands so designated. Mineral aggregates resource designations were also put in question.

Zakem concluded that he had carefully considered whether the relief requested required repeal of OPA 150 and had concluded that its 351 amendments could not proceed.

Polowin made much of the fact that staff early on recommended (and Council agreed) that 2031 was an appropriate planning horizon and that there was no need to expand the urban boundary for residential or employment purposes at this time. And yet, a November 2012 report staff had noted that there was enough land to satisfy requirements to 2036, so why adopt 2031, he wondered -- "Something strange is going on."

Polowin then went through a long list of prescriptive policies in OPA 150, arguing that they are not in accord with what an Official Plan should be. He proceeded to cite 14 cases supporting his argument, with text that sometimes referred to the distinction between an OP and Zoning By-laws as "trite law." All but three predated 1984. He then conceded that the City's Book of Authorities cites other cases to the contrary and that other municipalities' Official Plans also have much prescriptive language -- "They all exceed legal authority!" At that point I had visions of Donald Trump. This argument had nowhere to go.

More case law citations followed to support the argument about the Exclusionary Rule, further to the point of the role of an OP. (Ref. below: "If the law says that something is to be included, the implication is that other things are to be excluded.") However, upon closer examination, the three cases he cited appear to provide very dubious support for the use of this general rule of interpretation in the context of the *Planning Act*.

Marc framed the Motion as amounting to a motion for dismissal without a hearing -- asking that OPA 150/140/141 not be approved is the same as asking to repeal them. He had had Nott agree that there was no known case of an entire OPA (under section 26, *i.e.* an OPA following a 5-year review) having been dismissed.

Five times Marc returned to his key argument: The municipality is the primary decision maker. See e.g. section 2 of the Municipal Act:

> **Purposes**
>
> 2. Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters. 2006, c. 32, Sched. A, s. 2.

The Board is an appeal body. He pointed out that a municipality is fully entitled to change a previous Official Plan amendment (i.e. change what OPA 76 set out). Imho, failure to recognize this was a key weakness in the Movers' argument.

On conforming to the 2014 PPS, he argued that the City has the tools to handle this, as outlined in a memo from John Moser on May 9, 2014. He had had Nott agree that the City did do a thorough employment lands study. On LEAR he noted that, because there was no need to expand the urban boundary at this time, the LEAR review was not a pressing matter. He had had Nott agree that the amendments in OPA 140 and 141 were minor and technical and need not meet the section 26 (Comprehensive Review) consultation and approval requirements. (Nott's counter was that they were corrections to OPA 150 and should therefore have been sent to the Ministry for approval.)

Noting that so many cases cited by Polowin were very old, he distributed a page from an old *Planning Act* -- of uncertain vintage but certainly pre-1980. Decades ago, the *Planning Act* said about Official Plans:

> [s. 1 (h)] "official plan" means a program and policy, or any part thereof, covering a planning area or any part thereof, designed to secure the health, safety, convenience or welfare of the inhabitants of the area, and consisting of the texts and maps, describing such program and policy, approved by the Minister from time to time as provided in this Act;

Compare that to today (underlining added):

> [s.16 (1)] An official plan shall contain, (a) goals, objectives and policies established primarily to

> manage and direct physical change and the effects on the social, economic and natural environment of the municipality or part of it,...

He cited several cases where the OMB had adjudicated prescriptive elements of an Official Plan. Revisiting the long list of Polowin's old cases, he emphasized that the planning context in Ontario had much changed since then. OPs now need to have stronger, more prescriptive language.

He did not counter the argument about what "dealt with" means (refer to my post of April 8 below). In the Movers' mind it means that the OMB can change anything Council "considered" even if it decided not to change anything -- an explosive notion. It's a pity that he remained silent on this (he countered the argument briefly at the end of the pre-hearing conference in April).

In reply, Zakem protested that their motion was not a Motion to Dismiss. He could bring up one case where the OMB had repealed an entire OPA (OPA 72 in Toronto, 2010) on procedural grounds; so surely our substantive grounds should kill OPA 150? Polowin in Reply conceded that his cases were old but said they were often referred to and are still good law.

Some excerpts from Wendy Nott's cross-examination are attached for your amusement. The Questioner is Tim Marc; Ms. Skinner counseled Ms. Nott.

We shall await what Mr. Makuch will make of it all. The outcome is truly unpredictable.

Erwin

From: green-news-request@greenspace-alliance.ca [mailto:green-news-request@greenspace-alliance.ca] **On Behalf Of** Erwin Dreessen
Sent: Tuesday, August 04, 2015 10:23 PM
To: green-news@greenspace-alliance.ca; fca-members@googlegroups.com
Subject: [GA List] OMB hearing this Thursday and Friday [was: OMB Pre-hearing conference on OPA 150]

The City's Reply to the Notice of Motion from Taggart/Walton (see 2- below) consisted of one substantive page (attached) plus Affidavits from City staff -- Bruce Finlay, Ian Cross and Robin van de Lande, each with a thick set of Exhibits.

My previous post (below) did not explicitly state this, but the Taggart/Walton motion is formally about section 26 of the *Planning Act* which sets out what a municipality is supposed to do when it updates its Official Plan Review. The City's Reply says that the OMB doesn't have the jurisdiction to order the City to do a section 26 review because that is not subject to appeal. Now there.

Besides such one-liners, the City does not provide counter-argument, saying that this is best done *viva voce* (i.e., orally) at the hearing.

I expect the testimony of the witnesses (Wendy Nott for Taggart/Walton, the three named above for the City) to be quite brief and the main argument to be between the lawyers. It's a pity because, as my post tried to make clear, the issues (consequences should the Board grant the motion) are quite concerning to all of us: Who rules? Will the City be forced to expand the urban boundary two years earlier

than expected?

Several Parties have indicated they will not participate and only monitor the proceedings. The Alliance expects to remain silent as well, unless I see the City floundering and the other side dominating the discussion. If we comment it will be along the lines of the Comment in my earlier post. This is an attempt to strong-arm Council, setting the agenda for the benefit of land developers. I sure hope the City has strong arguments to counter the notion that the OMB could change anything in the Official Plan even if Council had considered but rejected such a change.

These two key points are bolded in the post below.

The hearing starts on Thursday at 10 a.m. in the Keefer Room, Heritage Building of City Hall.

Erwin

From: green-news-request@greenspace-alliance.ca [mailto:green-news-request@greenspace-alliance.ca] **On Behalf Of** Erwin Dreessen
Sent: Tuesday, July 14, 2015 12:09 AM
To: green-news@greenspace-alliance.ca; fca-members@googlegroups.com
Subject: RE: [GA List] OMB Pre-hearing conference on OPA 150

(Bolding added)

Here is a further update on two developments regarding appeals of OPA 150, approved by Council back in December 2013:

1- on June 15, the Ontario Municipal Board issued its Decision following the April pre-hearing conference;

2- on July 7, Taggart and Walton delivered their Notice of Motion, asking the Board to refuse approval of OPAs 150, 140 and 141, to order the City to "complete" its 5-year review and to do so before August 2017.

<u>OMB Decision of June 15, 2015</u>

The Board gave the City an unprecedented black eye in this Decision, not just dismissing the City's motion to approve the parts of OPA 150 that it considered "minor and insignificant" but saying:

> "The Affidavit of Bruce Findley [sic], sworn March 17, 2015, upon which the City relies, is not helpful to its case. It contains bold assertions that are not supported by any reasonable analysis and does not offer the Board any kind of opinions upon which it can rely to dismiss parts of the appeal on the grounds relied on by the City." (par. 9)

and further:

> "...it became evident quite early in their submissions that the various policies the City is seeking to have come into force with the partial dismissal of some of the appeals are not "minor and insignificant" to these Appellants." (par. 10)

and

> "The policies that the City is seeking to have come into force through the partial dismissal of the appeals are very much intertwined with other policies under appeal..."

Board Member Makuch then proceeded to give legitimacy to the so-called "threshold issues" (see below) and set out a timetable for serving the Parties with Motion material (July 7), Responses (July 17) and Replies (July 24), prior to a 2-day hearing to be held August 6 and 7, 2015. (These dates were negotiated with the Parties.)

Comment: The chickens are coming home to roost: OPA 150 was approved with undue haste (OPAs 140 and 141 made various corrections), the Ministry approved OPA 150 without a single correction, Legal Services was either unable or unwilling to negotiate with Appellants on scoping their appeals. Now before the OMB, the customary deference to the City's "evidence" has evaporated. I note again that there has been no report to Planning Committee on this whole mess.

Taggart and Walton's Motion

The 12-page Notice of Motion (attached) is followed by an 11-page Affidavit of Wendy Nott (a respected planner) and hundreds of pages of supporting exhibits -- 2 thick binders. **The Motion asks the Board to refuse to approve the OPAs and to direct the City to "complete the 5 year review" on or before August 2017, stipulating (a) a 2036 time horizon; (b) completion of the LEAR review; and (c) completion of the Employment Lands Study.**

Grounds for the Motion include reasoning that the 5-year review was not due until 2017 anyway -- without saying so explicitly, this is based on the idea that five years should be counted from when the previous Comprehensive OPA (OPA 76) came into effect (summer 2012), not from the approval by Council in 2009. Other reasoning includes that the LEAR and Employment lands studies were not completed because the City was in such a hurry; that OPAs 140 and 141 were necessary for the same reason and because the Ministry did not accommodate making these corrections through Ministerial Modifications; and that for OPAs 140 and 141 the City did not meet the public consultation requirements.

The revised Provincial Policy Statement came into effect on April 30, 2014, which happens to be the same date that the Ministry gave Notice of approval of OPA 150. Therefore, Walton and Taggart argue, OPA 150 must be brought in conformity with PPS 2014. (This is based on s. 3(5)(a) of the *Planning Act* which says that decisions of any planning authority must be in conformity with the PPS that is in effect on the date of the decision.)

Another line of attack turns on the words "dealt with" in s. 17(50.1)(b), as explained in my post of April 8 below. Par. 42 of the Notice reads: "Therefore, **the Board has jurisdiction to modify or approve an appeal of a part of an official plan which was not changed or altered by the amendment but was considered by council.**" Not to put too fine a point on the implications of this radical position, the Movers submit that "requests to expand the urban boundary are within the jurisdiction of the Board"; "requests to redesignate lands in the 'Rural Area' are within the jurisdiction of the Board"; and "the Board has the jurisdiction to modify the planning horizon of 2031."

The Notice dwells at great length on the idea of exclusivity: If the law says that something is to be included, the implication is that other things are to be excluded. Noting that s. 16(1)(a) of the *Planning Act* prescribes that official plans shall contain "goals, objectives and policies established primarily to manage and direct physical

change and the effects on the social, economic and natural environment of the municipality or part of it..." the Movers conclude that "the Legislature did not intend to allow an Official Plan to regulate or prohibit specific land uses." (Par. 53) Prohibiting any use is a zoning by-law matter, they say (citing case law from 1978 to 1999).

Further case law on the application of this "exclusionary rule" all appears to be in the context of private OPAs, not a Comprehensive City-initiated OPA such as OPA 150.

Comment. Taggart and Walton, silently supported by most other developers (see my post of April 8), are playing a daring high stakes game here. They seek to get a jump start on expansion of the urban boundary, making it happen in 2017 instead of at the next 5-year review which would normally be concluded in 2019. (Developers playing a key role in the LEAR Advisory Committee is part of the game plan.)

Their legal reasoning is not for us mere mortals to counter, though some counters are obvious. E.g., it is hard to fault Council for not having OPA 150 conform to PPS 2014 and it seems patently unreasonable to expect it to do so instantaneously -- municipalities have three years to achieve conformity, I believe. Of course the OMB is bound by s. 3(5)(a) like anybody else -- the solution here is an undertaking to achieve conformity in some reasonable time frame, not for the Board to do it for them of for the Board to require the City to do so in a hurry.

Another is that s. 26(1) of the *Act* says that the municipality shall revise its OP "not less frequently than every five years after the plan comes into effect..." -- nothing prohibits it from doing it more frequently as indeed the City has done, keeping to a schedule of 5-year reviews counting from Council approval. (I'm speculating that other cities do so as well.)

This is just one instance of a general pattern here: The City is treated as a nullity, we'll get our way at the OMB, let's push the City aside.

Finally, it is difficult to see where they're going with their line that an Official Plan should not prohibit or allow specific land uses, as that is the key function of OPs.

The City's bluff is being called here. We'll see how they'll fight back. Meanwhile the elected officials and most certainly the citizens stand on the sidelines.

Erwin

From: green-news-request@greenspace-alliance.ca [mailto:green-news-request@greenspace-alliance.ca] **On Behalf Of** Erwin Dreessen
Sent: Wednesday, April 08, 2015 10:25 PM
To: green-news@greenspace-alliance.ca; fca-members@googlegroups.com
Subject: [GA List] OMB Pre-hearing conference on OPA 150 comes to an early end [was: not the Duffy trial]

What was intended to be a 4-day hearing came to an end at 3:15 on the second day, today. The City did not get the motion it had planned for, which would have brought into force a large proportion of the 351 items comprising OPA 150 (and much of OPAs 140 and 141 as well -- together comprising the end result of the Comprehensive 5-year Official Plan Review), by implication dismissing portions of many of the 32 appeals.

Essentially the process got hijacked by Taggart and Walton, and to a lesser extent Trinity and Claridge, with only Alan Cohen (representing 10 clients), in a brilliant 10-minute contribution, offering a counterweight. Paul Webber (the other dean of municipal lawyers in this town) played by his own book, pleading for Sunset Lakes' development in Greely. The other lawyers kept as quiet as possible.

Taggart and Walton (represented by Steve Zakem and Michael Polowin respectively) put doubt in the presiding Member's mind whether the City had done what the *Planning Act* had required them to do. Where was the Employment Lands study, they asked; where was the LEAR review (update of the status of agricultural lands); is it ok to have a planning horizon of less than 20 years? There are reasonable answers to each of these questions and others, but the question that topped them all in audacity was: Does the Board have jurisdiction to add urban land?

Most of these questions turn on an interpretation of two words in section 17 of the *Planning Act*:

<**Powers of O.M.B.**
(50) On an appeal or a transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan. 1996, c. 4, s. 9.
Same
(50.1) For greater certainty, subsection (50) does not give the Municipal Board power to approve or modify any part of the plan that,
(a) is in effect; and
(b) was not dealt with in the decision of council to which the notice of appeal relates. 2006, c. 23, s. 9 (13).>

The hijackers wanted "dealt with" to mean that Council considered something. So if Council considered the question whether there was a need for more urban land (and rejected it, as they did), that would be enough to give the Board jurisdiction to add urban land anyway.

Sounds outrageous? It is.

Tim Marc, counsel for the City, was clearly outgunned by his learned colleagues. Near the very end of the proceeding he just managed to establish that both an OMB decision and a decision of Divisional Court had concluded that "dealt with" means "decided." He even had to remind the others that, for sure, a part of the Official Plan that is "in effect" is outside the jurisdiction of the Board to modify on appeal. Simply incredible.

The back story, I fear (apart from the insatiable greed of the local developer-landowner class), is that Legal Services failed to come to reasonable terms with the appellants on scoping of their appeals. He referred to "many discussions" having taken place over the 16 months since Council approved OPA 150 back in December 2013 but he had little to show for that this week.

The Member, R. Makuch, is reserving his decision on accepting or rejecting the Taggart et al. countermotion, while the City's motion is held in abeyance. This will take several weeks. If he accepts the motion there will be a first phase hearing to consider all these questions. Later, or if he rejects the motion, there will have to another pre-hearing conference to accomplish what such sessions are meant to do: Bring into force what is not contested, identify the issues, set out the schedule of

hearings and dates leading up to it.

Even without this kink in the road, the expectation was that the actual hearings would get under way in the second quarter of 2016, the Board being short of Members. It will have been two and a half years or longer after Council's decision before OPA 150 (or what is left of it) will fully come into effect.

Oh, there was no opposition to Ecology Ottawa becoming a Party for matters related to Complete Streets.

Besides us, the only other appellants not represented by counsel are a single rural landowner ***[ED:]***, the Metcalfe and District Citizens Association ***[ED:]*** and Civic Hospital Neighbourhood Association. Where is the rest of the community to provide a counterweight to this madness?

After the meeting broke up, I spoke with Tim Marc, urging him to respond to our repeated offer to settle our little appeal -- something he has failed to do to date. He was pretty bashful about what he has in front of him in the coming weeks and months.

This whole (now failed) strategy was conceived by Legal Services alone, by the way. A report to Council, originally planned for March 10, never happened.

Erwin

From: green-news-request@greenspace-alliance.ca [mailto:green-news-request@greenspace-alliance.ca] **On Behalf Of** Erwin Dreessen
Sent: Monday, April 06, 2015 4:55 PM
To: GA List
Subject: [GA List] not the Duffy trial

A 4-day pre-hearing conference about the 32 appeals to the Ontario Municipal Board of Official Plan Amendments 150, 140 and 141 gets under way tomorrow starting at 10 a.m. in the Keefer Room at City Hall.

The Greenspace Alliance appealed four of the 351 items comprising OPA 150. They relate to changes to Schedules L1/2/3 to reflect the results of Nick Stow's natural landscape linkage analysis. (That analysis was performed as part of the terms of settlement with the Alliance in the previous round of comprehensive revisions of the Official Plan.)

Until today the City had signaled that is would seek to dismiss our appeal but this morning they changed their position. This may have less to do with our resistance than with the fact that two developers also protested.

We have identified seven other items for which we will seek Party status should they go forward to a hearing as the City proposes. The most important of those is the item on prohibition of future country lot subdivisions. In all but one of the seven items we will support the City. (The exception is the OP's stipulation that new lots in villages have to be at least 0.4 ha [1 acre]. We will argue that lots can be smaller if the City abandons its fixation with big pipes and allows communal sewage treatment solutions.)

I will also act as agent for Ecology Ottawa. If the City gets its way, the policy on Complete Streets would come into force but the width of the right-of-way at Main Street would go to a hearing. There is a distinct possibility that, over the City's objection, the policy itself will go to a hearing as well. Either way, Ecology Ottawa will seek to be a Party.

While the purpose of a pre-hearing conference is to end up with a Procedural Order setting out the issues, timetables etc., there are likely to be initial skirmishes brought on by Taggart and Walton who, incredibly, argue that the urban boundary is at issue. To my mind, their motions to that effect are an abuse of process because the law is crystal clear: OPA 150 did not change the urban boundary so that cannot be appealed. They'll try anything, I guess.

(Silent) cheering sections are welcome.

Erwin