ISSUE DATE:
June 18, 2007
DECISION/ORDER NO:
1675

Ontario

PL061020
PL070322

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant:	Greenspace Alliance of Canada's Capital and Sierra Club of Canada
Subject:	By-law No. 2006-380
Municipality:	Ottawa
OMB Case No.:	PL061020
OMB File No.:	R060291

A P P E A R A N C E S :

Parties	**Counsel**
Sierra Club of Canada Greenspace Alliance of Canada's Capital	L. McCaffrey, W. Amos
City of Ottawa	T. Marc, S. Ferrara
1374537 Ontario Ltd. Findlay Creek Properties Ltd.	P. Vice, J. Mesquita, W. Meeds

DECISION DELIVERED BY M.C. DENHEZ AND ORDER OF THE BOARD

This Decision focuses on a four-day Motion to Dismiss, in the latest round of a dispute of almost twenty years over the Leitrim Provincially Significant Wetland (PSW).

1374537 Ontario Ltd. and Findlay Creek Properties Ltd. (developers), two of the Tartan group of companies (Tartan), own land in and near the PSW in the City of Ottawa (City). The subject lands are in two parcels, rezoned for subdivisions – one rezoned by By-law 2006-380, the other by By-law 2007-103. The Sierra Club of Canada and the Greenspace Alliance of Canada's Capital (appellants) appealed both By-law 2006-380 (Board File PL061020) and By-law 2007-103 (Board File PL070322). There is disagreement over the boundary of the PSW, whether the subject lands fall inside that boundary, and ancillary ecological impacts.

The lands were designated for development in Regional and City Official Plans in 1988, 1989, 1997 and 2003. There were 29 separate approvals by senior governments, and six environmental assessments (including federal and provincial). In 1999, the subject lands were rezoned for "Future Growth"; in 2006-7, the two By-laws under appeal proposed to specify the *kind* of development. Usually, zoning by-laws set forth the regulatory scheme for uses and development on land, pursuant to an Official Plan (OP); and appeals usually imply challenges to that regulatory content. These appeals are different: the appellants are not challenging the By-laws so much as the entire premise of developing the subject lands at all. They say that confusion over mapping (dating from 1991) meant that approvals had been issued in error, that the subject lands were largely within a Provincially Significant Wetland (or linked to it), and that all the development foreseen in the appealed By-laws was improper.

The developers, with City support, brought this Motion to Dismiss without a hearing, arguing that it is the appellants who are in error, that all planning grounds have been abundantly addressed and disposed of by the environmental assessments under senior governments, and that the ecological debate is substantively concluded. Even if there were any loose ends (which they deny), then (i) appellants should have raised them years ago, and (ii) the Board lacks jurisdiction to address them today anyway.

The Board has carefully considered all the evidence, as well as the able submissions of counsel. The Board finds that the Motion to Dismiss should be granted, because the appeals do not disclose land use planning ground *upon which they could succeed*. First, the boundaries of the protected PSW, defined by the Province, did not correspond to appellants' assumptions – not because of some "review by all affected parties in the field" as the developers suggested, but because the Province made a conscious *trade-off* – which (whether one agrees or disagrees) was within its jurisdiction to make. Next, the other environmental grounds have already been disposed of, in the six environmental assessments and 29 approvals of other statutory bodies, including senior governments. The Board disagrees with appellants' premise, that the Board necessarily provides an alternate forum for parties dissatisfied with environmental decisions, to revisit those issues before the Board when they were unable or unwilling to contest them before the designated bodies having jurisdiction. Parenthetically, the

Board is also unconvinced that the appellants' argument is in the long-term interest of greening Ontario. The details and reasons are set forth below.

MATTERS BEFORE THE BOARD

The Board had scheduled a four-day hearing on the merits of this matter, to start on May 22, 2007. Instead, the time was taken by Motions:

1. On April 30, 2007, the Board received a Motion from the appellants,

   a) To consolidate the appeals on the two By-laws, currently in Board files PL061020 and PL070322;

   b) To adjourn the hearing, because they needed further information on hydrogeology etc.; and

   c) For disclosure and production of documents on hydrogeology.

2. On May 11, 2007, the Board received a Motion from the appellants, for an Interim Order prohibiting clearing and grading of land.

3. On May 14, 2007, the Board received a Motion from the developers to dismiss the appeals without a hearing under Section 34(25) of the *Planning Act*, because the appeals

   a) did not disclose apparent land use planning grounds upon which the Board could allow all or part of the appeals;

   b) were frivolous and vexatious; and

   c) were made only for the purpose of delay.

   The Motion also called for costs on a substantial indemnity basis.

4. At the outset of the hearing on May 22, counsel for the appellants requested adjournment of the Motion to Dismiss.

5. Later, counsel for the appellants requested amendment of their grounds of appeal, to add the subject of linkages between ecological functions.

The Motion for consolidation was the only item on which there was consensus. The Board so noted, and finding no objection, ordered consolidation.

The next question was appellants' request to adjourn the Motion to Dismiss. Their counsel argued a lack of time to review the volumes of Motion materials from the developers and City; but it was conceded that service of those materials had been in accordance with the Board's *Rules of Practice and Procedure*. Counsel for the developers added that he had offered the opportunity to cross-examine on that information, which was not acted upon. Counsel for the developers added that this request to adjourn was not according to the Board's *Rules of Practice and Procedure*, but the Board rejected that argument, since all parties knew the request was coming.

Unlike many other Motions to Dismiss, often heard in advance of the hearing on the merits, this Motion was heard on the scheduled start date, i.e., when evidence was supposed to be *ready*. The appellants, however, did not consider themselves ready: their own affidavit (W. Amos, May 16, 2007) referred to "evidence being developed". According to their counsel, however, the missing information was hydrogeological – the "foundational information" for the 29 federal and provincial approvals. There was no mention of other gaps that might hinder their response to this Motion.

Since hydrogeological data *per se* were not part of the Motion materials, the Board was not persuaded that further hydrogeological data would be necessary for the purposes of the Motion, or even germane to the immediate issues at hand. The Board directed that argument of the Motion proceed, with the proviso that *if* further information did become necessary for the appellants in this Motion, the Board would "cross that bridge when it came to it" and revise instructions.

The next matter was the Motion to Dismiss itself. That Motion is being granted. This outcome makes the other motions (adjournment of the hearing on the merits, discovery and production, the Interim Order, and amendment) moot. That leaves the subject of costs. The developers and City remain at liberty to produce a full-fledged

Motion for Costs; but given the Board's findings on how this dispute originated (outlined later), they may wish to consider the merits of doing so. In any event, the Board's *Rules of Practice and Procedure* include the comment that "an order for costs is very rare. Recovery of costs is not standard as in court proceedings".

THE SITE

The subject lands, in the former City of Gloucester (Gloucester, now in the City of Ottawa), are part of a larger rectangle ("the rectangle") bounded by Bank Street to the east and Albion Road to the west. The northern boundary is near Leitrim Road, and the southern boundary is what, in 1988, was demarcated as the Urban Boundary by the then Regional Municipality of Ottawa-Carleton (RMOC or "Region", now amalgamated). Beyond the rectangle, across Albion Road to the west, is wetland; north of that wetland, again west of Albion Road, is a longstanding residential area around Del Zotto Avenue; and west of Del Zotto Avenue is the site of a landfill which closed in 1980.

Most of the rectangle is owned by Tartan. Toward the north, a woodlot called UNA 106 is not owned by Tartan, and is not part of the subject lands; however, the appellants argue that the woodlot *should* have been considered to extend onto Tartan's subject lands. On the eastern side of the rectangle, there is a second woodlot ("UNA 108") on the subject lands, but physically east of the wetland. Tartan labelled its holdings in the rectangle in four segments:

"Core Wetland": Tartan proposes to convey 96+ hectares to the South Nation Conservation Authority (SNC). Its ecological significance is undisputed; what is disputed is its boundary.

"Stage 1": This area on the northeast side of the "core wetland" is not subject to the current appeals.

"Stage 2": This area, on the north side of the "core wetland" and north of "Stage 1", was the subject of appealed By-law 2006-380.

"Future Stage": This area, on the east side of the "core wetland" and south of "Stage 1", was the subject of appealed By-law 2007-103.

In short, the subject lands are “Stage 2” and “Future Stage”. “Stage 1” and the “Core Wetland” are technically not part of these appeals – except that appellants submit that the wetland rightly extends into “Stage 1”, “Stage 2” and “Future Stage”. The appeals also refer to UNA 106, UNA 108, and the closed landfill.

Major works have been completed in the rectangle, apparently under various approvals. These works include a berm around the wetland, and channelization of Findlay Creek. There is also a swale, whose status is disputed. The sewer and water mains for the project, along with the stormwater arrangements, have been completed. Tree conservation Conditions were agreed, with the City, for the subdivisions.

INSTITUTIONAL CONTEXT

The relationship between wetlands, planning and development is complex. Though “swamps” were once disparaged, that was before there was an understanding of their immense significance for biodiversity. Today, Section 2.1.3(b) of the Provincial Policy Statement (PPS) imposes an outright ban on development of significant wetlands in this region, like the ban on development in significant habitat for species at risk. There are also statutory procedures for development *near* ecological assets; those statutory procedures involve many government agencies:

- The federal Department of Fisheries and Oceans (DFO) has statutory responsibility for fish habitat under the *Fisheries Act* (Canada).

- DFO works in cooperation with Environment Canada (EC), under the *Federal Policy on Wetland Conservation* (1991), and the *Canadian Environmental Assessment Act*.

- The Ontario Ministry of Natural Resources (MNR), with its *Guidelines for Wetlands Management in Ontario,* has jurisdiction over the boundaries of wetlands; the Provincial *Wetland Policy Statement*, which came into effect in 1992 under the authority of the *Planning Act*, directs that natural heritage features and areas, including Provincially Significant Wetlands, be protected. MNR also has jurisdiction under the *Lakes and Rivers Improvement Act.*

- The Ontario Ministry of the Environment (MOE) has jurisdiction over water, under the *Ontario Water Resources Act* and the *Safe Drinking Water Act.* MOE also has jurisdiction over environmental assessments under the *Environmental Assessment Act*, which provides for "class environmental assessments" (Class EA) and more specific "individual environmental assessments" (individual EA).

- Various local responsibilities are delegated by DFO and MNR to the South Nation Conservation Authority (SNC), under the *Conservation Authorities Act*. Relevant terms of reference were outlined in *Regulation 724/94*; and

- Municipal governments are expected to specify environmental principles in each Official Plan (OP), which is binding on municipal policy and zoning.

The overall legislative scheme in Ontario is that specialized public agencies handle specialized subjects within their respective areas of expertise. The *Ontario Municipal Board Act,* for example, vests the Board with certain authority in land-use planning matters – but does not constitute this Board as the appeal/review body in other matters such as Certificates of Approval under the *Environmental Protection Act* and/or the *Ontario Water Resources Act*: there are other recourses for those.

HISTORY

In 1988, RMOC's OP drew its Urban-Rural Boundary through the wetland. Lands in the rectangle, including the subject lands and wetlands, were designated "Urban". In 1989, Gloucester adopted its own Official Plan Amendment #10 (OPA 10), redesignating the rectangle for development in accordance with the Region's "Urban" designation. OPA 10 was approved by the Region; and the Board was advised of no appeals on this point affecting either the RMOC's OP or OPA 10 – or any of two subsequent Official Plans which also designated the subject lands "Urban".

The wetland, not previously studied by MNR, attracted attention. In 1989, MNR produced a map outlining boundaries for what it categorized as a Class 1 Provincially Significant Wetland (PSW). That map is referred to as the **1989 PSW map** (Exhibit G to the affidavit of Albert Dugal). Albert Dugal is a botanist, with the Canadian Museum of

Nature at the time. He co-authored an article on the wetland (Exhibit 22), and is one of several individuals, agencies and groups that expressed opinions on the area's future. In 1990, he was one of several environmental clients represented by the Canadian Environmental Law Association (Exhibit 9 to the Affidavit of S. Murphy, City planner) which argued that the matter should be taken to the Board.

Instead, there were multi-stakeholder meetings in 1991 including Tartan, DFO, MNR, SNC, and a collection of environmental interests called the Leitrim Naturalists' Group. Tartan undertook to set aside the "core wetland" for conservation (96 hectares to be conveyed to SNC), and wanted to develop the rest, requiring exact definition of PSW boundaries for legal purposes. There were on-site visits and activities. According to the developers, there was consensus (though not including Mr. Dugal) to redefine the PSW boundaries – to cover less area than the 1989 map, even if one included a recommended thirty-metre buffer. In the words of one lawyer, the PSW "shrank". That "restricted" boundary is on the **1991 PSW map** which, according to the developers, became MNR's official position.

Mr. Dugal disagreed not only with substantive revisions of the wetland boundaries, but also with the proposition that the second (1991) map had ever been accepted by MNR. Appellants said that the first (1989) map had never been rightly superseded, and therefore still represented the correct PSW boundaries.

On the basis of that 1991 map, Tartan proceeded. It categorized its land: one parcel was the wetland to convey to SNC, and Tartan labelled the remaining areas "Stage 1", "Stage 2" and "Future Stage" for development. Tartan needed governmental ecological approvals in two main "mounds" (as one lawyer called them): (a) infrastructure (water/sewer/pipe), and (b) stormwater management. These were ultimately part of an overall "Environmental Management Plan".

In 1992, Gloucester adopted Official Plan Amendment #1 (OPA 1), eliminating roads through the wetland. At the same time, Gloucester also altered the development concept plan, defining "development limits" clearly corresponding to the 1991 map.

Mr. Dugal took his objections to MOE, notably concerning the developers' consultants' report by Cumming Cockburn. He wanted a "bump-up" to designate the

development project for *individual* environmental assessment (as opposed to *class* environmental assessment) under the *Environmental Assessment Act*. MOE consulted MNR, and MOE's first response letter (April 27, 1992, Exhibit 4 to the Affidavit of P. Smolkin, consulting engineer) appeared to reflect a total expectation of development:

> MNR feels that while the data you provided was valid, the Cumming Cockburn study was comprehensive, and compiled in a manner that is consistent with the approach laid out.... It is also felt that many of the remaining concerns will be addressed as part of the planning and approvals processes required for the specific development proposal. These include the Storm Water Drainage Plans, Subdivision Plans and Municipal Water and Sewage Works.

Mr. Dugal also wrote to MNR. MNR's response of March 22, 1993 (Exhibit 2 to the Affidavit of P. Smolkin) was unequivocal about the absence of adverse impact:

> In the case of Leitrim, the principle of development for the OPA #10 area was established through the planning process prior to the wetland being identified and evaluated. As you are aware, the Ministry made the decision not to object to urban development within OPA #10 but also noted that wetland values would be protected as much as possible through further studies.
>
> To date, a master drainage plan and concept plan has been approved for Leitrim OPA #10 area. As these documents were prepared for the purposes of guiding future development and the MNR was part of the approval process, we will not be in a position to object to subsequent subdivision plan applications within OPA #10 area which are consistent with the master drainage plan or concept plan….
>
> On the basis that the master drainage plan demonstrates that wetland values and functions on any portion of the Leitrim Wetland outside of the Leitrim OPA #10 area and also on the portion of the Leitrim Wetland which the developer has agreed to protect within the approved urban area, will not be adversely affected as a result of development, the approved master drainage plan meets the requirements of the Environmental Impact Study for development of "adjacent lands".

In July 1993, the Minister of Environment formally responded to Mr. Dugal's bump-up request (Exhibit 5 to the Affidavit of P. Smolkin). Its conclusion about the thoroughness of the ecological analysis appears clear:

> The planning process completed to date has resulted in the identification of a development scenario that all those government agencies and ministries involved are satisfied will not impair the ability of the remaining protected portion of the wetland to function.... Mitigation measures have been proposed to ensure that any adverse impacts are minimized as much as possible. The result is, in my view, a reasonable balance between environmental preservation and development. The final development scenario and the preferred stormwater management alternative are the result of a cooperative planning process involving all of the parties mentioned above.... The documents included in the *Planning for Leitrim* study, the Master Drainage Plan and the Environmental Analysis, were reviewed by this Ministry's Southeast Regional Office, MNR, the South Nation River Conservation Authority, the City of Gloucester, RMOC, The National Capital Commission (NCC), and DFO. The information presented provides sufficient detail to evaluate the viability of the various development options and stormwater management alternatives.

MOE's response was not judicially reviewed or appealed – nor were any of the subsequent decisions by MOE, MNR, DFO or SNC on this subject.

Mr. Dugal then made a second request for a bump-up, for the project's water and wastewater proposals. The formal response by the Minister of Environment in September 1995 (Exhibit 8 to the Affidavit of P. Smolkin) was the most unequivocal yet:

> MNR advised that the proposed development and stormwater management ponds will have a very limited impact on the wetland. There will not be any significant level of watertable drawdown…. All agencies have agreed the information provided in the Environmental Study Report is sufficient to proceed to the next level of detailed design.

In 1996, a federal environmental assessment (EA) responded to an RMOC request on infrastructure: RMOC had asked the National Capital Commission (NCC) for an easement across federal lands for a feedermain to service the area. Although the easement ultimately proved unnecessary, the NCC undertook the EA under the federal *Environmental Assessment and Review Process Guideline Order* (EARPGO). As stated in a later DFO report (*Environmental Assessment Screening Report for Creek*

Reconstruction, Stormwater Management, Findlay Creek, City of Gloucester, Exhibit 13 to the Affidavit of P. Smolkin), the relevant federal agencies appeared satisfied:

> It was DFO's advice and opinion that if baseflows from the wetland did not change significantly and water temperatures improved, water quality would be addressed, fish habitat losses compensated for, and a long-term monitoring plan and remedial measures implemented, the effects of the project on fish and fish habitat would be insignificant or mitigable with known technology. Environment Canada (EC) also provided advice to the NCC at that time as part of the EARPGO assessment. It was EC's opinion that the proposed mitigation measures and monitoring for the stormwater management system would substantially address any concerns within their area of responsibility. The NCC's environmental assessment was completed in March, 1996. It was determined that the storm drainage system for the Leitrim development area would not have adverse environmental impacts and any anticipated impacts could be mitigated with known technology.

In 1997, RMOC adopted a new OP, again outlining the subject lands as “Urban”, with the wetlands in accordance with the 1991 map.

In 1999, Gloucester rezoned the subject lands for “Future Growth”. This was only one of eight by-laws adopted for this project, all of which relied overtly on the 1991 boundary – and none of which were appealed, until the last two became the subject-matter of this hearing.

In 2001, the Minister of the Environment responded (Exhibit 9 to the Affidavit of P. Smolkin) to a third bump-up request by Mr. Dugal, on the Stormwater Management and Environmental Study Report and Pre-Design. The Minister’s letter declared:

> An individual environmental assessment is not required. The proposed project has undergone the planning process for Schedule "C" projects under the Class Environmental Assessment for Municipal Water and Wastewater Projects (Class EA). As for the requirements of the Class EA, alternatives were identified and evaluated in terms of their effectiveness to minimize adverse impacts to the natural environment and adjacent private lands.

A copy was sent to Tartan, with a covering letter from the Minister (Exhibit 10 to the Affidavit of P. Smolkin):

> The ministry is satisfied that all significant environmental concerns have been appropriately addressed, or will be appropriately addressed, through further studies and the acquisition of necessary approvals.

In 2002-3, the City rezoned “Stage 1” for various kinds of development. Although “Stage 1” is not part of this appeal, significant parts lie within the same area claimed to be wetland under the 1989 map. The Board was advised of no appeals on point. Also in 2002-3, Tartan applied to MOE for various Certificates of Approval for water and sewage works, along with Permits To Take Water. Eleven were obtained. There were two further such approvals in 2004, five in 2005, and four in 2006.

In 2003, the City adopted its current OP, again outlining the subject lands in the “Urban” category, and illustrating the wetlands in accordance with the 1991 map.

In 2003, DFO dealt with another federal EA, in response to the possibility of harmful alteration, destruction or disruption of fish habitat (HADD) from the proposed external storm system. DFO concluded (Exhibit 14 to the Affidavit of P. Smolkin):

> The project is not likely to cause significant adverse environmental effects subject to the implementation of specific mitigation and compensation measures.

Next, in 2003, SNC considered the proposed stormwater outlet. It concluded:

> After reviewing the submitted application and supporting documents, the staff at (SNC) have determined that the above-noted project is allowable…. Based on the information provided, we have concluded that your proposal will not result in the harmful alteration, disruption or destruction of fish habitat if appropriate mitigation measures are implemented. The conditions listed above, if incorporated into the project, should alleviate any potential harmful impacts to fish habitat.

In 2004, the project was amended to move the stormwater pond. This triggered a second federal EA over HADD, with the conclusion that

> The environmental impacts of this undertaking have been reviewed by (DFO) in accordance with the *Canadian Environmental Assessment Act.* This review concluded that the project is not likely to cause significant adverse environmental effects if the mitigation and compensation measures specified are implemented.

In 2005, Mr. Dugal's fourth bump-up request was turned down on jurisdictional grounds.

The Appeals

In the two appeals, the appellants raise several grounds, summarized and consolidated below. The citations are to paragraphs in "Appeal 1" (first Notice of Appeal, of By-law 2006-380, or in "Appeal 2" (second Notice of Appeal, of By-law 2007-103).

	Grounds of Appeal	**Citation**
A.	This is development inside a Provincially Significant Wetland, whose true boundaries have been misunderstood.	Appeal 1, par. 1, 4 Appeal 2, par. 1
B.	The project has adverse environmental impacts (water levels, plants, peat etc.).	Appeal 1, par. 1, 4,5, 6, 7, 8, 9 Appeal 2, par. 1, 4, 7, 8, 9
C.	There is a threat from the closed landfill.	Appeal 1, par. 5
D.	There is an improper direct threat to UNA 108, and an improper indirect threat to UNA 106.	Appeal 1, par. 2 Appeal 2, par. 2, 3, 4, 5, 6
E.	There is a threat to species at risk.	Appeal 1, par. 2, 3, 4 Appeal 2, par. 2, 3, 4, 7
F.	There is a threat to forest cover, and the project does not "develop with nature".	Appeal 1, par. 2 Appeal 2, par. 5, 6

G.	There has been a lack of enforcement, notably of Conditions to previous approvals.	Appeal 1, par. 7

The Notices of Appeal contain no assertion that the works digress from the governmental approvals, except for the swale: it is alleged that the swale was approved by MOE ("inappropriately"), but not DFO, as it should have been.

In support of the above contentions, the appellants proposed to rely exclusively on environmental evidence, with experts in botany (Mr. Dugal), hydrology, soils, reptiles, amphibians, birds, fish, mercury, ecology, climatology and endocrinology. No land-use planners were on their proposed witness list (Affidavit of W. Amos, May 16, 2007).

Observations

(i) Wetland Boundaries

There are very different views on how this dispute originated.

The Board is reminded of Louis St. Laurent's complaint that administration of northern lands was "in an almost continuing state of absence of mind." Counsel for the appellants argued a similar scenario for Leitrim. She did not argue that the wetlands had been part of some Kafkaesque conspiracy, but rather that a combination of self-serving consultants' reports (pandering to clients' interests), along with inert bureaucratic reluctance to probe beyond those reports, had spawned misunderstandings about the PSW, which needed to be set straight.

Counsel for the developers took vocal exception. Their preferred scenario was that in December 1991, there was a "review by all affected parties in the field", and that with the exception of Mr. Dugal *et al*, "all parties had reached agreement regarding the proposed (new) boundary". This made it sound like the new boundary was the scientific result of closer on-site ecological analysis… in December.

In the Board's view, however, the paper trail corroborates neither of those scenarios. Instead, the ministerial letter of September 1995 refers overtly to a *trade-off*:

- That on one hand, MNR *knowingly* abandoned a fifth of the wetland – a part deemed "altered", "unstable", and outside the wetland's "core area"…

- *…In return for* an overall scheme to include creation of new linked habitats, notably along the creek and around the proposed stormwater pond.

This apparent arrangement, which the Board calls "**the deal**", is clear from the Minister of Environment's letter to Mr. Dugal (Exhibit 8 to the Affidavit of P. Smolkin):

> MNR indicated that Findlay Creek in the area of the proposed channel works is presently a degraded system with highly altered unstable habitats. This area will be re-constructed using the principles of natural channel design resulting in a high-quality coldwater stream.... MNR advised that while a portion of the wetland will be lost, the large majority of the wetland (four-fifths), including the ecological core area, will be preserved and turned over to a public agency. While the stormwater works will intrude into the wetland area, the amount of wetland habitat created by the stormwater works will effectively balance the area lost. MNR is satisfied with the necessary compromise.

That is not indicative of a continuing state of absence of mind: it is indicative of a conscious executive decision at the Ministry.

The MOE letter above is also consistent with the view that it is the *1991* map that represents MNR's definitive opinion on the protected PSW, not the 1989 map.

That view is repeated in the affidavit of Jennifer Boyer, environmental planner for SNC. She provided what she called a map (Exhibit E to her affidavit) of "the location of the Wetland based upon the official MNR mapping", consistent with the 1991 map. She also provided her own composite map (Exhibit J to her affidavit) of the boundaries of the PSW and proposed development areas, and allowing for a thirty-metre buffer:

> Using the official MNR Base Map for the Significant Wetland, I overlaid it with the plan of subdivision and scaled off the Significant Wetland with the 30 metre buffer. I concluded that the development is not within the Significant Wetland nor the 30 metre buffer. I am satisfied that the depiction of the boundary of the Significant Wetland on Exhibit J as the first broken line south of Findlay Creek Drive is

accurate.

To suggest that this opinion was erroneous, said counsel for the developers, was to say that "SNC can't read its own maps".

In fairness to the appellants, history has indeed recorded instances where other agencies couldn't read their own maps. However, even assuming that possibility, the appellants have an evidentiary problem: if the above agencies were all incorrect and the *real* PSW boundaries were those on the *1989* map instead (i.e., MNR never changed them), then why didn't the appellants simply call on MNR to say so at this hearing? An MNR statement, that the boundary was in one location or another, would have provided compelling proof; but MNR was not even on the appellants' witness list.

The Board finds that the appellants' argument, that the proposal falls within a PSW, is not (to use the words of the *Act*) "a planning ground on which the Board could allow all or part of the appeal". Whether development falls within a PSW is indeed a "planning ground"; but to say that in this case, reliance on the 1989 map is a matter "on which the Board could allow all or part of the appeal" would fly in the face of:

- Official Plans which had been duly adopted – and not appealed on that point,
- an unmistakable pattern of Provincial assessments and approvals, and
- statements of the Provincial Government, most notably the 1995 ministerial letter to Mr. Dugal about “the deal”. The Board finds nothing in the materials to contradict that ministerial opinion – nor even any visible plan in the appellants’ materials to make the attempt.

It is undisputed that definition of protected PSW boundaries is the prerogative of MNR, beyond the jurisdiction of the Board to redefine. It matters little whether anyone else – including the Board – were to consider the deal ecologically astute and creatively opportune on one hand, or a cynical sellout on the other: it is MNR’s decision to make. Ontario also identifies legal recourses for those dissatisfied with MNR’s position; here, those recourses were not used, and in any event, the appeal process to this Board is not one of them.

The Board therefore sees no substantive or jurisdictional authority on which to suppose that the appellants' perception of PSW boundaries might be a ground on which the Board could allow all or part of the appeal.

(ii) Other Ecological Dimensions

The appellants' case also rests on allegations of damage to water levels, flora and fauna, landfill leachates, species at risk, forest cover, and ecological enforcement. Judging from appellants' affidavit material, the case being "developed" shows every indication of direct substantive attack on ecological findings by senior governments – what counsel for the developers called a "collateral attack on the approvals they (the appellants) were unable or unwilling to challenge directly" (a characterization not contradicted by appellants' counsel). Indeed, the Notices of Appeal and appellants' affidavits recite a long list of alleged shortcomings in the six assessment processes:

- The Environmental Management Plan, which was central to several assessments, was "seriously flawed" (Appeal 1, par. 6)

- The recent flow study was "flawed" (Appeal 1, par. 6).

- Issuance of the Certificate of Approval for the swale was "inappropriate" (Appeal 1, par. 9)

- "It is clear that any further construction activity such as filling, bulldozing, clearcutting and drainage works may cause irreparable harm to the wetland". (Affidavit of A. Duval, May 9, 2007).

- The federal assessment of impacts of the landfill was "seriously flawed" (Appeal 1, par. 5).

- Counsel for the appellants sought to challenge the "foundational information" underlying the 29 federal and provincial approvals.

- "The ecological function of this adjacent land has not been evaluated and it

has not been demonstrated that there will be no negative impacts on the natural features or on their ecological functions" (Affidavit of W. Amos, May 16, 2007).

- "The stormwater management plan does not ensure that the quality of water that supports aquatic life and fish habitat is not adversely affected" (Affidavit of W. Amos, May 16, 2007).

Normally, those dissatisfied with environmental approvals can challenge them in the normal legal way, e.g., by taking MOE Certificates of Approval to the Environmental Review Tribunal (a body specialized in the subject-matter) under Ontario's *Environmental Bill of Rights*. Here, the challenge is instead presented to the Board, on the apparent *premise*

- that since the Provincial Policy Statement (PPS) and the City's Official Plan (OP) contain numerous references to environmental quality,

- those references could therefore offer a basis for appellants to raise environmental arguments, *independently* of assessments already concluded under federal and provincial approval processes:

> The true matter in issue in this Appeal is the conformity of the zoning by-laws to the Ottawa Official Plan 2003 and the Provincial Policy Statement 2005. Historical approvals are of minimal relevance (Appellants' Response to Motion).

By that reasoning, any decision of senior governments could be rendered ineffectual – sometimes years after the appeal period had lapsed – by merely challenging the latest municipal implementation, via the device of an appeal to the Board. That device, by this reasoning, would allow parties to argue environmental issues before the Board, that they have been unable or unwilling to argue before environmental appeal bodies (established by statute for that specific purpose) or before the courts at the time. If this were so, a Board Member could halt a project approved by federal and/or provincial

Ministers, negate the outcome of federal or provincial environmental assessments, and/or reopen ecological debates that others had thought closed for years.

That premise was challenged by counsel for the developers:

> Nearly 30 separate environmental approvals have been issued…; every one relates to an undertaking either completed or in the process of implementation….
>
> The appeals invite the Board to conclude that every regulatory authority that has reviewed the Project over the past eighteen years has been incorrect in its analysis, issued approvals improperly, and failed to adequately enforce its home legislation.
>
> The appellants voiced objections to the Project unsuccessfully for each of the six environmental assessment processes, both federal and provincial; none of the EA decisions or approval processes were judicially reviewed or appealed.
>
> Without exception, all of the specialist agencies and regulatory authorities that reviewed the Project and issued approvals have determined that the Project will not cause significant adverse environmental impacts to matters under their jurisdiction, and that existing environmental impacts will not adversely affect the Project.
>
> The Appellants' concerns have been exhaustively reviewed on many occasions prior to commencement of this Appeal, within the appropriate fora, and found to be fully addressed.

Appellants' premise, said counsel for the developers, would mean "no finality" to decisions of environmental/planning authorities – or even of senior governments.

The Board heard no authority supporting the appellants' premise. The closest case was ***Elders v. Grey*** **(County), [2001] OMBD 1152**, where the applicant/proponent of a golf course applied for OP redesignation and rezoning of a Rural area. The municipality agreed, but a competitor appealed to the Board, claiming the need for environmental assessments, e.g. for fish habitat and other factors normally under DFO or the local Conservation Authority. The applicant and the municipality responded with a Motion to Dismiss without a hearing.

The applicant had already done several studies, with more to do (notably for DFO and the Conservation Authority). However, the Motion to Dismiss was not granted, and the Board Member at the time ordered that the hearing on the merits proceed:

> Evidence relating to whether the Official Plan requires an Environmental Impact Study under the particular circumstances needs to be examined at a full hearing. I make these findings cognizant of the fact the applicants have completed a myriad of studies in order to satisfy the municipality and various government agencies relating to the application.

Counsel for the appellants took comfort that there may still be subsisting planning grounds (e.g., ecology) even when "applicants have completed a myriad of studies". However, the Decision's next sentences clarify *which* studies were being referred to – and which studies were *not* to be duplicated:

> The Board finds that the study *re: Fish Habitat* and the required approval by (DFO) in concert with the Conservation Authority needs no further evidence, as the Board usually requires approval by the applicable government agencies and such undertakings prior to receiving Board approval…. To require further evidence here would probably not add to protection measures by DFO.

The above reflects clear Board intent to defer to those specialized statutory agencies in their areas of jurisdiction, and to avoid duplication. The Board sees no support, in the *Elders Case*, for the notion that Board proceedings can somehow replace, supersede, or otherwise displace, the findings of those agencies.

Various exhibits described how every appellant allegation had been addressed in approvals by DFO, MNR, MOE and SNC. One exhibit alone, the federal *Environmental Assessment Screening Report for Creek Reconstruction, Stormwater Management, Findlay Creek, City of Gloucester* (Exhibit 13 to the Affidavit of P. Smolkin), addressed essentially all of the issues raised by the appellants; and the Board has been given no reason to believe that the other numerous assessments and reviews were any less methodical. Indeed, with the single exception of the swale (mentioned later), appellants did not even contradict the proposition that all their other concerns had been the subject of one study after another, under the supervision of senior governments.

The appellants' empty-handedness extended even to information that should have been easy for them to substantiate. For example, the Notices of Appeal allege the presence of one animal species and one tree species at risk: Blanding's turtle and a “grove” of Butternut. However, the appellants could not point to a single sighting of Blanding's turtle within many kilometres of the subject lands. According to appellants' own Exhibit 21, the closest sightings were on the opposite side of the Rideau River west of Manotick, and at the eastern edge of the City in the Mer Bleue Wetland. Evidentiary matters were not much better concerning Butternut. Mr. Dugal's article (Exhibit 22) said that he had seen Butternut in the wetland, but the Notice of Appeal says that it is in UNA108; in either case, one would think that a “grove” of Butternut could not be so elusive: substantiation would have been helpful – a corroborative sighting, or a photo – but there was nothing of the kind. Furthermore, although Mr. Dugal's article had been considered and cited during at least one federal environmental assessment, and although the topic of species at risk was addressed, the EA ultimately disclosed no particular concerns on that account.

As for the swale, the appellants alleged that it had not been approved by DFO; but that allegation is contradicted by the DFO report of June 27, 2006 (Exhibit 15 to the Affidavit of P. Smolkin), in which DFO's second HADD approval clearly references it.

In short, in contrast to the volumes of official findings, the Board again found nothing to support the appellants’ contentions of environmental damage, that might be a ground on which the Board could allow all or part of the appeal.

For good measure, there are policy dimensions. As mentioned, the developers' counsel argued that if appellants' premise were accepted, it would explode the notion of finality to any environmental decision, and that this was against public policy.

Here, the appellants' apparent intent was to extend stricter environmental protection than the original processes/approvals provided. However, their premise cuts both ways. If the Board agreed to downplay previous environmental assessments and decisions of senior governments, what Pandora’s box would it open? Would there be a single wetland or other ecological asset in Ontario that could be considered safe? As counsel for the appellants pointedly repeated, developers usually have more resources than environmental NGO’s; so what would stop any developer from declaring that

- since the very first operational provision of the PPS – Section 1.1.1(a) – calls for "efficient development", then *ipso facto*,

- every protective decision could similarly be revisited by the Board, the minute a municipality incorporated it (or re-incorporated it) into an OP or by-law, as an attempt to pre-empt “efficient development”?

In this scenario, the developer could then demand and challenge the "foundational information" on which senior governments made their protective decisions; and on the basis of purported conflict with the PPS (along with any references to "efficient development" in the local OP – all purported "planning grounds"), the developer could call on the Board to approve subdivisions almost anywhere, notwithstanding "protected" status.

Under that scenario, which the Board considers the inexorable corollary of the appellants' premise, the outcome could be as disastrous to the appellants’ interests as it was chaotic. It would be the antithesis of the word "planning".

CONCLUSION

On a Motion to Dismiss, the test set forth at section 34(25)(a)(i) of the *Planning Act* is whether

> the reasons set out in the notice of appeal do not disclose any apparent land use planning ground *upon which the Board could allow all or part of the appeal....*

After six environmental assessments, four Official Plans, numerous By-laws and 29 environmental approvals, the Board was not convinced by the appellants that their appeals had the wherewithal – either substantively or procedurally – to contradict the overt ecological findings of specialized statutory agencies acting within their areas of jurisdiction. For both jurisdictional and substantive reasons, these are not matters upon which the Board could allow all or part of the appeals.

The Motion to Dismiss is granted. The appeals (against By-law 2006-380 and By-law 2007-103) are dismissed under subsection 34(25) of the *Planning Act*. It is so Ordered.

"M. C. Denhez"

M. C. DENHEZ
MEMBER