

Ontario
Municipal
Board

Commission des
affaires municipales
de l'Ontario



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September 12, 2007

Ms. Linda McCaffrey
Sierra Legal Defence Fund
Environmental Law Clinic
Faculty of Common Law
University of Ottawa
57 Louis Pasteur Street, #540
Ottawa, ON K1N 6N5

Dear Ms. McCaffrey:

**RE: Section 43 of the *Ontario Municipal Board Act*
Decision by M.C. Denhez and Order of the Board
Issue Date: June 18, 2007, Decision/Order No. 1675
OMB File R060291, OMB Case Nos: PL061020 and PL070322**

I have now completed my consideration of the request for review filed on July 3, 2007 with respect to the above referenced Decision (the "Decision") issued by the Ontario Municipal Board (the "Board") on June 18, 2007.

I have considered, *inter alia*, the following documentation as well as the record of proceedings before the Board:

- the request for review dated June 28, 2007, and received by the Board on July 3, 2007;
- the Submission on the Request for Review dated June 28, 2007, and received by the Board on July 3, 2007;
- the Affidavit of William Amos, sworn June 28, 2007, and received by the Board on July 3, 2007;
- the responding submissions of 1374537 Ontario Limited and Findlay Creek Properties Ltd., dated August 3, 2007, and received by the Board on August 7, 2007;

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- the responding submissions of the City of Ottawa, dated August 3, 2007, and received by the Board on August 7, 2007;
- the reply submissions of Greenspace Alliance of Canada's Capital and the Sierra Club of Canada, undated, and received by the Board on August 17, 2007;
- the Board Decision issued June 18, 2007.

Your review request is based on the assertions that:

- the Board violated the Rules of Natural Justice when refusing to adjourn the Hearing and the Motion to Dismiss pending disclosure by Ottawa and Tartan of geotechnical and hydro geological data in their possession or under their control;
- the Board did not apply the statutory test contained in subsection 34(25)(a)(i) of the *Planning Act* when determining whether or not to grant the Motion to Dismiss;
- the Board erred when determining that the principal reason for dismissal was the existence of a series of approvals by Municipal, Provincial and Federal agencies;
- the Board erred when relying upon irrelevant approvals issued by the Ministry of the Environment and the Department of Fisheries and Oceans, who had regard to their statutory mandate which did not include the consideration of Ottawa zoning by-laws to the Ottawa OP 2003 and the PPS 2005;
- the Board erred when it implied that it was finding as fact that the Appellants could not succeed because they did not appeal the historic environmental and municipal approvals;
- the Board erred when it directed its mind to the irrelevant consideration of whether it was convinced that the Appellant's argument was in the best interest of greening Ontario;

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- the Board erred when it concluded that the allegation that the zoning by-laws did not conform to PPS 2005 which prohibited development in or adjacent to significant wetlands in Ecoregion 6 could not succeed by treating the Motion to Dismiss as a Hearing on the Merits and founded its Decision on a letter written in 1995 by the Minister of the Environment. The Board found that the Ministry of Natural Resources had made a "deal" with Tartan;
- the Board erred when it misstated the evidence of W. Amos and attributed to Counsel certain inappropriate comments that were never made by Counsel;
- the Board erred when it appeared to conclude that the Appellants could not succeed because their list of experts did not include a land use planner.

For the reasons that follow, in the exercise of my discretion under section 43 of the *Ontario Municipal Board Act*, I will not direct a review motion as provided for in Rule 117 of the Board's Rules of Practice and Procedure (the "Rules").

The submissions requesting a review do not, in my opinion, meet any of the tests in Rule 115 of the Board's Rules necessary for granting a motion to consider a re-hearing. Particularly, the Member's Decision either does not have the alleged error or if such an error possibly exists, it is not one that would materially affect the Decision.

Rule 115 of the Board's Rules allows, in addition to other independent reasons, the Board to hear a motion for review if the reasons provided in the request raise an arguable case that the Board acted outside its jurisdiction. I have reviewed the Member's Decision and the submissions and, in my opinion, the Member did not violate the Rules of Natural Justice and Procedural Fairness when he refused to adjourn the Motion to Dismiss pending the disclosure of hydro geological data (submissions regarding geotechnical data were not mentioned during the Motion). The Decision is clear that the Member was not convinced that such data was crucial for the Appellant to argue the Motion to Dismiss before the Board. It is clear that the Member recognized that there is a very high standard to be applied for an adjournment and after hearing the Appellant's full argument and submissions on Procedural Fairness, the Member properly applied this standard and decided that the threshold had not been met.

The Member's Decision, in its analysis, was consistent with the standard present in section 34(25)(a)(i) of the *Planning Act*. The paraphrasing of the standard is, in my opinion, substantially identical to the test present in the *Planning Act*.

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With regard to the Appellant's assertion that the Motion was in essence a Hearing on the merits, after reviewing the Decision and the submissions, it is clear that the Member heard the Motion in an appropriate manner. The Member made his decision on the Motion, as is appropriate in the circumstances, after reviewing evidence presented to support each of the allegations in response to the grounds of appeal. Hearing evidence of this nature does not constitute a Hearing on the merits.

When granting the Motion, the Member clearly did not base his decision on a series of prior approvals from Municipal, Provincial, and Federal agencies. By asserting this fact, the Appellant has misunderstood and misstated the Member's Decision. The Member dismissed the appeal after concluding that the grounds of appeal disclosed no apparent land use planning grounds upon which the Board could allow all or part of the appeals and not base on the existence of prior approvals. The Member stated, supported by the evidence presented, that the principle basis for the decision to dismiss was a conscious "trade off" the province made regarding the boundary of the Provincially Significant Wetlands. The review of past approvals only confirmed for the Member that every Appellant allegation had been addressed and provided information regarding the grounds of appeal.

The Member did not err when he considered prior approvals by the Ministry of the Environment and the Department of Fisheries and Oceans. Although these approvals were based on statutory authority and did not consider conformance of the zoning by-laws with the Official Plan and the Provincial Policy Statement, these approvals are relevant as they are a single element in a larger series of elements that established, for the Member, a history where the Appellant raised environmental concerns in other forums and had them dismissed as unfounded. It was appropriate for the Member to consider these prior approvals as he was not relying on the approvals but only considering them as a factor in his conclusion regarding environmental impact and with that consideration, conformity with the Official Plan and the Provincial Policy Statement.

The Appellant has misstated the Decision by interpreting the Members statement that "a decision of senior governments could be rendered ineffectual-sometimes years after the appeal period has lapsed-by merely challenging the latest municipal implementation, via a device of an appeal to the Board" as a finding of fact that the Appellants could not succeed as the Appellants did not appeal the historic environmental and Municipal approvals. In my opinion, after reviewing the Decision and the submissions, the Member did not make this finding of fact and therefore did not err. The Board was merely confirming that it is not the forum to challenge such approvals and then concluded that the Appellants could not succeed, not due to their failure to appeal prior approvals but due to the approvals showing that the allegations of environmental impact are without merit.

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With regard to the Member considering whether the Appellant's argument was in the long term best interest of the greening of Ontario, after reviewing the Decision and the submissions, I have concluded that, as this consideration was not the deciding factor for the Member when reaching his conclusion, this consideration of the Member's, if an error, is not an error of such a nature that without the error the Board would likely have decided differently.

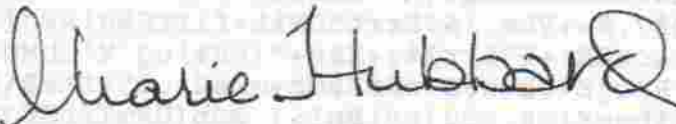
The Member, in my opinion, did not, as submitted by the Appellants base his decision regarding the wetland boundary issue on a 1995 Minister of the Environment letter which suggested that a deal had been reached with Tartan establishing a mutually acceptable wetland/development boundary. It is clear from the Decision that the Member considered other evidence on this issue and made a decision, as he has authority to do in the exercise of his discretion, based on the evidence submitted.

Regarding the Appellant's submission that the Member misstated two statements of evidence within Mr. Amos' Affidavit and attributed statements to the Appellant's Counsel that were never made, it is my conclusion, after considering the submissions and reviewing the Decision that any errors, if they exist in this regard, are not of such a nature that without such error the Board would likely have reached a different Decision as these statements by the Member were not pivotal to the Member's Decision.

The Member, in my opinion, did not base his decision that the Appellants could not succeed due to the fact that the Appellants did not have on their list of experts, a land use planner. This assertion is a misstatement of the Decision. The Member did not prejudice the Hearing. The Member only made one reference to the lack of a land use planner in his Decision and that reference was not of a pivotal nature to the Member's Decision. On reading the Decision as a whole it is clear that the Member considered whether or not there existed any evidence of environmental harm due to the fact that he was receptive to considering the possibility that any possible environmental harm would cause conformity problems with the Official Plan and the Provincial Policy statement, thus creating the planning grounds on which the motion could be denied.

I will, therefore, not direct a motion for review and the Decision will remain in full force and effect.

Yours truly,



Marie Hubbard
Chair

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cc: Mr. Tim Marc
Ms. Stacey Ferrara
Mr. J. Peter Vice, Q.C.
Ms. Jennifer Mesquita
Mr. D. Gregory Meeds