

ISSUE DATE:

**Aug. 22, 2012**



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: 1633799 Ontario Inc.  
Appellant: 3223701 Canada Inc.  
Appellant: 6458513 Canada Inc (Amazon Land Development)  
Appellant: 7089121 Canada Inc.; and others  
Subject: Proposed Official Plan Amendment No. 76  
Municipality: City of Ottawa  
OMB Case No.: PL100206  
OMB File No.: PL100206

**APPEARANCES:**

**Parties**

City of Ottawa

Metcalfe Realty Company Limited

Taggart Group of Companies  
Tamarack Group of Companies  
2226561 Ontario Inc.  
Claridge Homes Corporation

4840 Bank Street Inc.

Jim Maxwell

Paul Johanis

Rondolfo Mion and M&A Rentals

Kellam Dowler

Kanata Research Park Corporation  
J. G. Rivard Limited

**Counsel\*/Agent**

T. Marc\*, C. Enta\* and S. Montreuil\*

L. Townsend\*

S. Zakem\*

P. Webber\* and J. McIninch\*

K. Gibson\*

himself

E. Horner\*

A. Cohen\*, J. Cohen\*

T. Fleming\*

Grace Bell  
Ross Bradley  
1384321 Ontario Limited

G. Meeds\*

6095186 Canada Inc.  
7089121 Canada Inc.

S. Ault\*

**DECISION OF THE BOARD DELIVERED BY N. C. JACKSON AND  
A. CHRISTOU**

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This Decision represents the last phase of nine phases of Official Plan No. 76 (OPA 76). The Urban Boundary hearing was one phase split subsequently into three phases. The Board dealt with quantum and methodology and then issued a Consent Order bringing in approximately 438 gross ha into the Urban Boundary. The Disposition of the location of the further quantum of approximately 412 gross ha previously quantified is for this last phase hearing.

At the commencement Mr. Marc advised of the new position of the Council (Exhibit 1) brought about in part from a calculation error and from a resulting tie in scoring with now three properties ranked by the City. Instead of breaking the tie the Planning and Environment Committee, and then City Council, voted to approve the three tied parcels (9b, 2 and 8a in Exhibit 8) noting that all parcels scoring 48 or higher, would be included together with other above ranked properties in the urban boundary. The effect of Council's Decision adding the three is to increase the quantum of 850 gross ha to approximately 901 gross ha.

Other parties as a result of the Consent Order have withdrawn. They include William Davidson, Mattamy Group of Companies, Minto Communities Inc. and Urbandale.

Greenspace Alliance who took part in the last prehearing conference have withdrawn (Exhibit 4).

Motions were proposed by Richcraft Homes Ltd. (now abandoned) and Jim Maxwell re: the striking of evidence in witness statements.

### **Motion of the City of Ottawa**

The City of Ottawa (City) has continually, throughout this year and a half proceeding, taken positions with Council, which were later advanced in subsequent phased Hearings. Following the Board Decisions on quantum and methodology, the Planning and Environment Committee and Council were asked by City staff to update the assessment of competing parcels to be within the urban boundary and in particular the method of breaking a scored tie. Based upon revisions, three properties were scored with the same point result - 48 points (after applying City criteria). The Planning and Environment Committee and Council in turn passed resolutions after being given staff alternatives, of breaking the tie by adopting the parcel in cumulative total that comes closest to the 850 gross ha, previously ordered by the Ontario Municipal Board (Board). The City resolutions have the effect that in methodology any property scoring 48 points or more will be included in the urban boundary.

Planning Committee and Council chose to allow the addition of the three tied (in score) properties to be within the urban boundary. Planning Committee heard from their legal counsel, their planning official and five members of the public.

Now, at the commencement of this last phase of the urban boundary proceedings, the City brings Notice of Motion in writing (Exhibit 5) with supporting affidavit evidence (Exhibit 6) and statute and case law seeking to resolve Issue 5 in Exhibit 3 (the Procedural Order) from the issues list – that is how to break the tie with the understanding that the City ranking showed the three properties if included would bring the inclusion in the urban boundary to approximately 901 gross ha and in excess of the 850 ordered by the Board in the Phase 1 hearing. Notice was abridged on consent.

The Board has defended its finding of 850 gross ha earlier in these proceedings. At this late stage the Board heard the City Motion and submissions and the position of other parties. Counsel Gibsons' client is below the three parcels according to City evaluation and scoring. He will still call evidence disputing the City evaluation. He takes no position to support or oppose the City Motion. Counsel Fleming is below the three tied properties in City scoring and will also call evidence to dispute the City evaluation. He supports the City Motion. Counsel Townsend, Dempster and McIninch are supportive of

the City Motion and undertake not to dispute the City evaluations of their properties. Counsel Zakem supports the City Motion.

The City Motion is clearly opposed by Paul Johanis. The Motion he states results in a change in methodology and to the Phase 1 decision which was based on supply–demand analysis in the planning horizon to 2031. He states there could now be more land than required first in the land budget analysis and then under the Provincial Policy Statement.

Counsel Cohen, Meeds, Ault and Horner support the City Motion.

### **Disposition of the City Motion**

The Board is mindful of the different positions of Council on the quantum of the urban boundary first at the time of adoption of OPA 76 and subsequently. The Board is mindful that through Bill 51 private appeals by landowners on the urban boundary is no longer permitted and that owner concerns are now to be raised in comprehensive municipal reviews under section 26 of the *Planning Act*. Also the Board must have regard for the Council position pursuant to subsection 2.1 of the *Planning Act*.

What is central however to the Board is the public interest. A long contentious proceeding is nearing completion. The most recent Council position seeks to plan for completion and answer an unresolved question related to methodology - the breaking of a tie when that position is not easily resolved. That is particularly so when the result may be a change to methodology previously approved by the Board and quantum approved by the Board.

The Board must treat the public interest as a player in this proceeding. The conduct of the Council even if resulting in different positions has been in the public interest. The present Motion is but a further demonstration of such, notwithstanding earlier inconsistencies.

When hearings are phased it is usually due to their complexity and extent. OPA 76 represents an intensive effort to rewrite most of the Ottawa Official Plan as required by the Provincial Policy Statement. It has been carried out with earnestness by City staff, Council and the public. The quantum was determined first at the request of the City and

parties. That quantum cannot however be strictly separated from methodology and evaluation analysis. The quantum determination remains a part of the same hearing now concluding with evaluation of properties. The Board always reserves the right to govern its proceedings. It is apparent in section 37 of the *Ontario Municipal Board Act* that the Board has jurisdiction and power to make orders necessary or incidental to its powers. In the case of *Ninth River Campground v. Wilmot Township* 2002 Carswell Ont. 7020 Docket PL000835 it was found that the Board could amend its earlier order under the *Ontario Municipal Board Act*.

After reserving on this Motion and reviewing earlier Decisions and Orders on quantum and methodology the Board finds the City Motion succeeds for the following reasons:

There is a logical relationship to the City Council position to break the tie with previous City methodology and quantum. The results are amended methodology and quantum but defensible in the public interest.

The tie resolution was listed as an important issue that the City Council has now weighed in on.

The change to quantum enters a contentious area on which the Board entertained seven weeks of evidence and argument. The Board accepts the current Council position to resolve a matter of long standing. Numbers are important but they should not stand in isolation. Those numbers are in a 2031 planning horizon which must be reviewed in any event every five years. The City has now commenced its next five year review of its Official Plan.

With the success of this Motion a further Consent Order as to methodology and property inclusion in the urban Boundary will follow. Those properties below the three tied properties (Counsel Fleming and Counsel Gibson) and Mr. Johanis will now have their opportunity to contest the City evaluation.

The Board grants the partial Order.

## **Motion 2 Jim Maxwell**

Parcel 1F south - Notice abridged on consent

The Motion of Mr. Maxwell seeks the following:

1. The striking of the peer review by the City conducted on the Maxwell noise study.
2. The adding of connectivity to the list of issues Mr. Maxwell seeks to lead evidence on.
3. The centroid calculation to the mixed use centre to be determined.

## **Finding on the Maxwell motion**

The parties noise experts have met. Counsel Gibson withdraws the portion of the Motion seeking the striking of evidence respecting the City noise peer review.

Connectivity omitted inadvertently from the issues in the Procedural Order is added as an issue on consent.

The centroid calculation to the mixed use centre will be determined through *viva voce* testimony to be called.

The Maxwell Motion succeeds in part and is otherwise dismissed.

Paul Johanis withdrew from the hearing.

Based upon the City Motion aforementioned and the Board decision granting the Motion, the parties proceeded with the Order to amend methodology and inclusion of further property in the urban boundary. That Order was issued.

Member Christou after delivering the Board Decision on the City Motion aforementioned became ill and was not able to continue with this Hearing. Section 11 of the *Ontario Municipal Board Act* permits the remaining panel to complete the hearing. The Hearing

was completed by member Jackson. The parties were consulted. There was no objection.

### **Phase 2B hearing**

Following the City Motion delivered above, the Board considered evidence and argument from Counsel Fleming, Counsel Gibson and Counsel Marc. This case is the subject of a full transcript from court reporters who were able to produce daily transcripts of the previous day's proceedings.

### **The Fleming case for J. G. Rivard and Kanata Research Park Parcels 1CW and 1CE**

The last City scoring of September 1, 2011 for these lands was 46 points, two below the 48 cut off. Counsel Fleming seeks two additional points on criterion 11 for connectivity. He asserts access on three sides of his property (excluding the train tracks) that would give him two points where the City determination was zero for connectivity. In the alternative Mr. Fleming asserts an earlier City evaluation whereby his property was split into east and west halves wherein the west half was scored 50 and the east 41. His argument is that the west half at a score of 50 should be included in the urban boundary and the east half at a score of 41 not be included at this point in time.

### **The case on connectivity for Parcels 1CE and 1CW**

Connectivity is one of 16 criteria approved by this Board in Phase 2A to serve as the methodology to determine properties for inclusion in the Ottawa urban boundary. All 16 criteria have points awarded based upon explanatory language. Points total 88 at maximum for all criteria.

Criterion 11 is entitled Connectivity to the Community. Its purpose under the title description is stated to be the ability to connect is available or can be planned. The possible score is up to four points. That scoring is made up of the following:

- 4 points - good-totally unobstructed in all directions;
- 3 points – less than good-partial obstruction in one direction;
- 2 points – medium-unable to connect in one direction;
- 0 points – poor- obstructions in two or more directions.

Testifying on this criterion for the City was Ian Cross, land use planner, Murray Chown land use planner and John Riddell, engineer for the Appellants Kanata Research Park and J.G. Rivard. Mr. Chown asserted that the score for this criterion ought to have been two points instead of the zero points that Mr. Cross spoke to in his interpretation. Mr. Riddell spoke to servicing this parcel with a view to explaining whether it ought to have been split into sections 1C east and west.

The parties and their witnesses agree that Parcel 1C is fully obstructed by a railway line to the east. To the south and west are lands 1B and 1D that are now by Board Order to be within the Urban Boundary. It is accepted and agreed that the lands to the south and west can be planned to provide connectivity with respect to Parcel 1C. The view of Mr. Cross is that connectivity to the north of Parcel 1C is partially obstructed and that with the fully railway obstruction to the east there are obstructions in two directions justifying a score of zero.

To the north of Parcel 1C is an estate lot subdivision Registered Plan 4M-849. Hedge Drive could provide access to Parcel 1C. However Hedge Drive has not been fully constructed in the manner of the rest of the subdivision and has a 1 ft reserve. The Registered Plan of Subdivision states the streets are hereby dedicated to the Corporation of the City of Ottawa as public highways. The evidence of Mr. Cross is that the road connection to Hedge Drive from Parcel 1C is not likely to be opened based upon his belief that the residents of estate lot subdivision would object to the opening of the road and that there might be unacceptable traffic impacts on the estate lot subdivision. The evidence of Mr. Cross is that as result there is no connectivity to the north. Planner Chown for the Appellants testified that there was a partial obstruction to the north as the land is not completely unobstructed in the manner of the lands to the west and south. Mr. Marc for the City argues that either a full obstruction or partial obstruction to the north has the same effect and warrants a score of zero.



### **Finding on Parcel 1C**

The methodology is an evaluation of relative merits of various candidate areas. How other parcels were treated for connectivity evaluation is relevant.

Parcel 6C abuts an estate lot subdivision with an existing road connection at the boundary considered by the City as a partial obstruction and with a score of three.

Parcel 1B scored two points as unable to connect in one direction. Parcel 1B abuts Subdivision 4M-1326. The City considered connectivity to block 277 which was taken as an open space block as railway buffer. Mr. Cross conceded that connectivity is most likely pedestrian/cycling and a potential bridge connection over Shirley's Brook (south west corner). The Cross score for 1B was two considering a partial obstruction on block 277 and southwest corner flood plain and a full obstruction on the railway line.

The City position on 1C is not consistent with its scoring on other parcels aforementioned. Even if the City scored 1CW, as argued by counsel Marc, with zero for connectivity but with 50 total, that also is inconsistent.

The connectivity of Parcel 1C to the north is through Hedge Drive. That is a dedicated road allowance even if not fully assumed by the City. The Registered Plan supported by section 26 of the *Ontario Municipal Act* makes it clear that Hedge Drive is a public highway as shown on a registered plan of subdivision.

Evidence of witness Chown and with cross examination of witness Cross confirmed that more traffic will flow south from the estate lot subdivision than north, that the estate lot subdivision residents would likely have the benefit of emergency access alternatives, and the benefit of a signalized intersection and pedestrian /cyclist access to the south.

The methodology already in criterion 14 (potential conflicting land uses) has assessed a penalty of four points for proximity to an estate or country lot.

As a result the Board finds connectivity to the north through Hedge Drive. The Board does not see this as a full obstruction. It appears as a planned connection unobstructed.

Rather at worst it is a partial obstruction as per the evidence of witness Chown. The Board does not agree that a partial obstruction should be considered without some point credit as was applied in Parcel 1B and Parcel 6C.

Parcel 1C is awarded two points for connectivity bringing its point total to 48 sufficient for inclusion in the urban boundary. The appeal of Rivard and Kanata Business Park is to this degree allowed.

There is no need to deal with the secondary alternative position of the split in 1C and then the merge by the City.

### **The case for James Maxwell Parcel 1FS**

The Maxwell case is in part an issue with process. Complaints are:

1. Initially the City grouped the Maxwell lands with Metcalfe Realty lands to the north in Parcel 1F. Maxwell claims disenfranchisement as representations were with Metcalfe. Metcalfe settled for inclusion of Parcel 1B abandoning its main Parcel 1F in this round of Official Plan review.
2. In the first two City reviews in January and March of 2009 Parcel 1F including the Maxwell lands was scored.
3. The National Defence Connaught Shooting Range made written representations in the spring of 2009 raising noise issues. As a result of this representation the City screened out the Maxwell lands as done with incompatible landfills so that there was no scoring.
4. Maxwell raised this exclusion for what is now the Maxwell lands Parcel 1FS. Maxwell through his Counsel argued the noise issue insisting the City undertake the noise study. When the questions put to other witnesses confirmed his onus he changed his position to request that he be permitted to file the noise study. The Board in the Phase 2A decision found incompatibility based upon noise and refused to adjourn the final phase hearing date of July

- 3, 2012 and referred to the new round of Official Plan review. Maxwell agreed to undertake the noise study and file it with the City prior to the current hearing date. The issue phrased in the procedural order was whether with respect to noise the Maxwell lands were unsuitable for residential development. That was to be determined first and if the finding was made as to suitability for residential development, then the Maxwell lands would be evaluated and scored.
5. The City conditional evaluation of Maxwell prior the final phase of the hearing was for 41 points. Consultant witnesses met as required by the Board. The City adjusted its score adding:
    - a) One point under Engineering for Depth to Bedrock(Criterion 15); and
    - b) One point for accessibility to arterial and collector road (Criterion 5).
  6. During the current hearing waste water experts met as directed. The City adjusted the waste water score adding four points.
  7. The revised City score for Maxwell now totalled 47, one short of the cut-off at 48.

In the hearing over two weeks counsel Gibson called witnesses in acoustical engineering Joshua Foster and Vincent Ferraro as a panel, planner Tony Sroka, legal assistant Nicole Salloum, Mr. Maxwell himself and land economist Brett Ifill. The City objected to the Ifill testimony in this phase of the hearings. Based upon limited references to quantum the Board permitted the testimony ruling relevance could best be determined with some testimony. That testimony was of limited relevance and the Board finds it to be non-determinative. The Board accepts the generality of efficient use of servicing within area 1 with its component parts. The City witnesses were Ian Cross planner, briefly Bruce Finlay land use planner and Hazem Gidamy, acoustical engineer.

The remaining scoring issues are criterion 7 accessibility to existing or planned retail/commercial focus and criterion 11 connectivity to the community.

**Criterion 7 accessibility to existing or planned retail/commercial focus**

This criterion description is Distance to a Mainstreet or Mixed-Use Centre. The average is 4.8 km.

The scoring is to be:

- 0 points more than 7.4 km
- 1 point - 6.1 to 7.7km
- 2 points - 4.9 to 6.0km
- 3 points - 3.7 to 4.8km
- 4 points - 2.5 to 3.6km
- 5 points - 0 to 2.4 km

Total possible is 5 points

The City scored this Appellant as zero based upon a distance of 8.2 km from the Maxwell lands to the Main Street designation in the Secondary Plan policies applicable to the Kanata Town Centre, being a mixed use centre under the primary Official Plan. The Appellant measured distances to either 5.95 km (two points) or 6.17 km, (one point). The Board prefers the City evidence notwithstanding confusion with the terms Mainstreet and Main Street. The Mainstreet (traditional or arterial) referenced in the criteria is not applicable as the closest planned retail/commercial focus. Rather the Secondary Plan speaks to Main Street as a distinct designation within the Mixed Use Centre as the planned retail/commercial focus. This would have been difficult to follow even for practitioners but was the subject of an e-mail follow up prior to the hearing that clarified the matter for another planner testifying for an Appellant. The knowledge of the policy framework and credibility of witness Cross is preferred to witness Sroka. The City score on this criterion is upheld.

**Connectivity in the methodology is described above in the Parcel 1C as a criterion**

Parcel 1FS is scored by the City as zero for connectivity. The City allows for connectivity to the north and to the south with partial obstruction by ponds and natural features. To the west is the Ottawa Central Railway considered by the City to be a full obstruction. To the east is the Connaught Range considered to be a full obstruction by the City.

The Appellant seeks planned connectivity on all four directions.

The Board agrees with the City as to connectivity to the north and south. From reviewing the evidence such would be unobstructed. The Board agrees with the City that to the east the National Defence Connaught Shooting Range, despite some limited public activities during certain limited times, is a full obstruction substantially fenced off with barbed wire and warning signs for good reason - 2.5 million shots, 800 grenades and intermittent skeet shooting - all numbers being annual. This finding on the Connaught was not disputed by Counsel Gibson at the conclusion of his argument. The Board finds that the railway is not the same barrier to Parcel 1FS as other parcels due to past permissions under and over the railway for Maxwell agricultural use (Sroka testimony). The Board considers that status to be evidence of connectivity that needs to be clarified. Subject to clarification from the Ottawa Public Railway as to past and future connectivity, it is possible for connectivity to the west. At this time the Board finds full obstruction on one side to east. All this is subject to the pre-emptory condition precedent noise evaluation finding to follow.

**Noise evaluation**

The general conclusion of the Appellant witnesses is after taking readings and finding exceedances with Provincial Noise Guidelines respecting the Connaught range in particular, that the Maxwell property can be developed for residential purposes with similar constraints of noise mitigation and inclusion of warning clauses as required of other adjacent properties which would be subject to the same impulsive noise levels as the Maxwell property. While the report and evidence of the Appellant are intended to be

pre-feasibility or as to feasibility, the Appellant evidence does not go far enough to describe the attenuation necessary to permit residential development and meet Provincial Guidelines.

The evidence of Hazem Gidamy is preferred from experience in the field with firearms and with the Provincial Ministry of the Environment as acknowledged by counsel for the Appellant, and from his graphic description of the significance of the exceedances. The exceedances from the rifle range were 67 DBAI from the outdoor requirement of 50DBAI and outside bedroom window 45 DBAI (MOE LU131 and NPC-205). When the Appellant witnesses measured sound from the range, grenades were not in use. The Appellant witnesses estimated the grenade sounds as 96 DBAI whereas the City expert with more related experience estimated 107DBAI. Mr. Gidamy was adamant that those grenade explosions in addition to the shooting, if taking place at the same time, would be very difficult to buffer, if at all. The Appellant noise report itself stated that barriers were not expected to reduce impulsive noise levels below 50DBAI for outdoor areas of the Maxwell property. In *Re Hawk Ridge Homes Inc.* OMB PL101098 June 18, 2012 it was held that if a noise level is predictable, the words “so infrequent” from Provincial standard LU-131 do not apply to permit a higher sound level (100DBAI standard). The attenuation is best at source where Mr. Maxwell was not able to get details of timing of activities. The Board has no desire to rely on warning clauses or window thickness given the dire consequences of the Gidamy testimony even if that has been the standard in other subdivisions (given adverse effect under the Provincial Policy Statement and *Environmental Protection Act*).

The Board can understand the Appellant wanting to push ahead when his property is a logical extension of the current urban boundary. He has not however satisfied the Board that is appropriate in terms of noise to do so now. This finding is made based upon the evidence and the earlier caution that it may be prudent to take the time in the next five year review now commenced by the City to provide some detailing of how the significant attenuation of sound necessary could be accomplished. At the same time further work with the Ottawa Public Railway to firm up past approvals for crossing and confirm possible future connectivity would be vital. At this point in time, despite earnest efforts, the Board must dismiss the Maxwell appeal on this basis. There is now however a

public record of how improved the scoring has become and could be improved upon in the next Official Plan review now underway.

Based upon the City evidence of Bruce Finlay, the Board modifies on consent Official Plan Amendment No. 76 as set out in Exhibit 54.

The Board will await details from the City, Metcalfe Realty and Simon Fuller in respect of the designation of certain islands within the Ottawa River to be based upon Notice of Motion and affidavit material.

The Board will withhold its Order pending receipt from the City of the final document with mapping and the form of the Final Order for issuance. The dismissal of the Maxwell appeal is to be in the Order in the context of this Decision.

“N C. Jackson”

N. C. JACKSON  
VICE CHAIR

“A. Christou”

A. CHRISTOU  
MEMBER