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Ontario Municipal Board
Commission des affaires municipales de l'Ontario

ADP -

PL090678

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Mattamy Homes
Appellant: Friends of the Greenspace Alliance
Appellant: Mark Luden
Appellant: Kizell Management Corporation
Appellant: Brookfield Homes (Ontario) Limited
Subject: Proposed Official Plan Amendment No. 77
Municipality: City of Ottawa
OMB Case No.: PL090678
OMB File No.: PL090678

IN THE MATTER OF subsection 17(45) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Motion Request By: Abbott-Fernbank Holdings Inc. and CRT Development Inc.
Purpose of Motion: Request for an Order Dismissing the Appeal by Friends of the Greenspace Alliance, as it relates to certain lands

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Appellant: Friends of the Greenspace Alliance
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Appellant: Brookfield Homes (Ontario) Limited
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APPEARANCES:

Parties

City of Ottawa
The Friends of the Greenspace Alliance
Abbott-Fernbank Holdings Inc.
CRT Development Inc.
Kizell Management Corporation
2129786 Ontario Limited
2087875 Ontario Ltd.
1383341 Ontario Inc.
2128447 Ontario Limited

Counsel* / Agent

T. Marc*
D. Morrow*, J. Lindsay
J. Bradley*
J. Dawson*, M. Yakubowicz*
P. Vice*, D. Meeds*
D. Kelly*

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

1. INTRODUCTION

This Pre-hearing Conference (PHC) heard another Motion to Dismiss an appeal of Official Plan Amendment No. 77 (OPA 77) of the City of Ottawa (the City), for the new 674-hectare Fernbank Community:

- About one third of the area is in the Carp River watershed, north of the Abbott Street road allowance,
- and about two thirds are in the Jock River watershed, south of and including the Abbott Street road allowance.

OPA 77 was supported by the City and several developers. It comprises an “integrated process” linked to the Fernbank Community Design Plan (CDP), and in turn to supporting studies – the Environmental Management Plan (EMP), and the Master Servicing Study (MSS), within the meaning of the Municipal Class Environmental Assessment – one of several Class Environmental Assessments (Class EAs).

However, one Appellant, a community group called the Friends of the Greenspace Alliance (FGA), had filed an appeal concerning flood risk. The question, in this Motion, was the geographic extent of that appeal. Two developers, Abbott-Fernbank Holdings Inc. and CRT Development Inc. (the Moving Parties), argued that:

- the FGA appeal dealt only with the Carp watershed;
- OPA 77 provisions for the Jock watershed were unappealed, hence *in force and effect* under Subsections 17(25) and (27) of the *Planning Act*; so the Board should Dismiss the FGA appeal on lands south of and including the Abbott Street road allowance.

The FGA opposed the Motion. It said its documentation, and the subsequent Issues List, indeed extended to the Jock watershed. It added that wastewater in the Jock watershed was inexorably linked anyway, because it could increase flood risk in the Carp watershed via problems at the Hazeldean Pumping Station (HPS).

The Board has carefully considered all the Affidavit evidence, and the able submissions of both sides. The Board concludes:

1. The FGA appeal dealt, overtly and specifically, with concerns that might lead to “consequent increased flooding risk in the Carp River Valley”. It did not visibly profess to deal with anything else.
2. By statute, parts of the OPA which were *not* the subject of appeal have already come into effect, independently of the volition of the parties or even the Board, which has no choice but to acknowledge that OPA 77 is in force in the Jock watershed – save and except only those OPA factors in the Jock watershed which lead to “consequent increased flooding risk in the Carp River Valley”, under appeal.
3. On the latter point, the Board notes the FGA’s concerns about routing Jock watershed wastewater through the Hazeldean Pumping Station; but the problem is that its appeal – even if *interpreted* to extend to those concerns, would then suffer from overt duplication and redundancy, for two reasons:
 - a) There are already not one but two Environmental Assessments underway, involving that very subject;
 - b) Furthermore, the proper upgrading of the HPS has *already* been incorporated as a precondition for Fernbank development, in the OPA’s relevant documents themselves. “The Hazeldean Pumping Station has to be upgraded before any development can proceed in the Fernbank Community”.
4. The question of the Jock watershed (including wastewater and the HPS) therefore *adds* no planning ground on which the Board could refuse that part of the OPA.

The Motion is therefore granted. The details and reasons are set out below.

2. BACKGROUND

2.1 The Overall Scheme

Not surprisingly in this immense project, various designs and approvals were at different stages of advancement.

The area had already received overall approval for development, by Board Order Issued in 2005. However, it was clear that particular attention to hydrology infrastructure would be needed. There had already been two recent floods in the vicinity, and a third occurred on July 24, 2009, just days after this FGA appeal was launched.

Such concerns are usually addressed through the Environmental Assessment (EA) process. The generic statutory framework for individual Environmental Assessments (EAs) is provided at Section 5 of the *Environmental Assessment Act* (EAA). An alternative, however, is offered at section 13, which says the Minister may approve the processing of undertakings as a "class" (Class EA). In Ontario, the Municipal Engineers Association (MEA) requested same for various "municipal infrastructure projects (including roads, water and wastewater projects)", in categories called Schedules, each with specified procedures. This "parent" framework was approved province-wide, and foresees, at Section A.2.9, the prospect of combining procedures for EAA approvals with *Planning Act* approvals, in an "Integrated" process". However, even when a Class EA is underway (whether as part of an "Integrated" process or merely as part of another MEA Class EA), the Minister retains the right to intervene, notably to restore it to individual evaluation under Section 5, instead of as part of a larger grouping. Indeed, the EAA foresees, at Section 16(5), that "any person may request the Minister" to so alter the process.

Here, the MEA's "integrated" approach provided for a Master Servicing Study (MSS), leading to 24 "pre-approvals" – fourteen stormwater projects, eight transportation projects, one watermain project, and one wastewater/sewer project. Other infrastructure projects were being evaluated separately, notably prospective "interim" upgrades at the Hazeldean Pumping Station (HPS), to be followed at a later date by "additional" upgrades. Furthermore, even within the parameters of the "pre-approved" projects, there was a backdrop involving a web of supplementary conditions. One of the experts' Affidavits offered the following undisputed summary:

The MSS is to engineering what the Official Plan is to planning. It is the conceptual step. It is the road map.... Before any construction begins, many processes follow and the approval of many review agencies is required – the Department of Fisheries and Oceans, the MOE and Conservation Authorities, to name a few. Just as one needs an OPA in place to move to the next step of zoning and subdivision approval, so the MSS must be in place to move to the various infrastructure approvals that are required prior to the construction of watermains, sewer pipes and storm ponds.

Counsel for the Moving Parties added that the 24 projects “will then proceed through many additional approval processes before a single pipe can be put in the ground”.

2.2 The FGA Appeal

The FGA’s four-page Notice of Appeal was filed in July, 2009. It focused on overall process, and the impact on Carp flooding. Indeed, it offered its own summary of reasons for the appeal on page 1:

The issues in this appeal relate to the integration of the approval of the Fernbank Class EAs with the Fernbank OPA under the *Planning Act*; the apparent failure of the City to implement a plan in accordance with the Province's recognition of a watershed as the appropriate area from which planning should proceed; the application of inconsistent stormwater management standards; and the consequent increased flooding risk in the Carp River Valley creating health and safety issues.

The word “wastewater” appeared nowhere in that four pages. The word “Jock” did not appear either, except in an oblique comment that the Jock watershed was subject to an “appropriate” stormwater standard.

Independently of the appeal, one of the FGA’s experts wrote personally to the Minister, asking him under EAA Section 16(5) to alter the process. The Minister refused, by letter dated October 22, 2009, insisting that a web of safeguards were already in place, including requirements for various EAA Certificates of Approval (C of A):

You also raised concerns regarding the Fernbank Master Servicing Study and stormwater Class EAs.... The Municipal Class EA contains an “Integration Provision” whereby proponents of Projects or Master Plans can coordinate the planning and approvals processes of the EAA and *Planning Act*, but receive approval under the *Planning Act*. While this approach provides increased flexibility to streamline approvals, proponents are still responsible for accurately reflecting the needs of the Municipal Class EA process in the *Planning Act* application. Proponents are required to prepare a summary of how all the requirements of the Municipal Class EA have been met and provide a copy to the Environmental Assessment and Approvals Branch, Ministry of the Environment (MOE). This has been conducted for the Fernbank project and the summary was submitted to the MOE Eastern Region office in June 2009.

MOE Eastern Region office reviewed the project file and determined that the appropriate planning process had been followed. The proponents may proceed with the project once the appropriate *Planning Act* approvals are obtained.... I am confident that the MOE is taking utmost precautions before allowing any projects in the Carp River Watershed to move forward to ensure that there is no contravention of my Order. Thorough checks are put in place on the information submitted for C of A applications, and municipal responsibilities and rationales are assessed before the applications are processed.

Thank you for sharing your concerns regarding the above-mentioned projects. These projects are currently undergoing, or already have gone through, appropriate processes....

In December, 2009, the Board heard a PHC Motion by another developer, Kizell Management Corporation, to Dismiss the FGA's appeal without a hearing. At that PHC, it became clear that although the FGA was concerned about flooding in the Carp watershed, it was not raising concerns about stormwater in the Jock watershed. Counsel for the FGA added that his client saw no necessity for a "complete setting aside" of OPA 77; other aspects of the OPA could "go ahead", as long as one "held off on the wastewater and stormwater".

Two of the developers with interests in the Jock watershed (the Moving Parties) then filed the current Motion, on the argument that if the FGA's appeal targeted flood risk in a different watershed (the Carp), such appeal should represent no obstacle to implementation of OPA 77 in the Jock watershed. Their Motion therefore sought to have the FGA appeal Dismissed as it pertained to the Jock watershed.

In January 2010, the City published the *West-End Flooding Investigation 24 July 2009 Rainstorm Event, Phases 1 and 2 – Summary Report*, spotlighting suspected contributing factors to flood risk, including the Hazeldean Pumping Station (HPS):

The high operating levels at some of the stations caused water levels to rise in major trunk sewers further exacerbating sanitary sewer backups. This was particularly the case at the Hazeldean Pumping Station causing flows to back up in the Stittsville and Glamorgan collectors. Phase 3 of the investigation will look into the inlet and overflow performances at the Hazeldean Pumping Station and opportunities for improvements as warranted....

(The Glamorgan area) was the most severely affected by the July 24, 2009 rainfall. Based on information reported, the majority of basement flooding resulted from sanitary sewer backups.... There are a number of factors that appear to have contributed to flooding and sewer backups in this area. Due to the excessive extraneous flows, the Hazeldean Pumping Station operated beyond its rated capacity and the high water level at the station caused flows to backup in the Stittsville and Glamorgan collectors. This would have exacerbated the sewer backups in the Glamorgan area.

The HPS is currently at the centre of investigation, involving not one but two Environmental Assessments (EAs).

3. CRITERIA

The following *Planning Act* provisions outline what is expected in an appeal:

- 17(24) ...Any of the following may, not later than 20 days after the day that the giving of (OP) notice... is completed, appeal all or part of the decision of council to adopt all or part of the plan...
1. A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council....
- 17(25) The notice of appeal filed under subsection (24) must,
- a) set out the specific part of the plan to which the notice applies, if the notice does not apply to all of the plan;
 - b) set out the reasons for the appeal....

Section 17(45) of the *Planning Act* then says that:

...The Municipal Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

- (a) it is of the opinion that,
 - (i) reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board....

In the case of an Official Plan or Official Plan Amendment, the *Act* adds that if a component has not been appealed, then that component takes effect *automatically*:

- 17(27) If no notice of appeal is filed under subsection (24) in respect of all or part of the decision of council and the time for filing appeals has expired,
- a) the decision of council or the part of the decision that is not the subject of an appeal is final; and
 - b) the plan or part of the plan that was adopted and that is not the subject of an appeal comes into effect as an official plan or part of an official plan on the day after the last day for filing a notice of appeal.

The above provisions affect the statutory jurisdiction of the Board; but where the Board has jurisdiction, and is exercising that jurisdiction for an MEA "Integrated" process, the guiding principles were described by the Board in ***Westhill Redevelopment Co. Ltd. v. Aurora (Town)***, Issued September 16, 2009:

The Class EA undertaken... is one integrated with the *Planning Act* process as set out in Section A 2.9 of the MEA. Once the *Planning Act* approval is given and the EA requirements met, the project would be considered pre-approved. Parenthetically, this Board, in considering any proposal either under the *Planning Act* or in an integrated proceeding such as the MEA proceeding, has a positive obligation to consider the environmental, ecological, public health and safety impacts as well as natural resources conservation and improvement implications. In the present case, that duty is imposed on the OMB at least by virtue of two statutory sources. One source is a positively binding one, stemming from Section 3(5) (a) of the *Planning Act* which refers to the Provincial Policy Statements (P.P.S.). The said provision obligates and mandates the Board, in exercising the authority, to make decisions that shall be consistent with all the stated PPS policies. The other source stems from the Provincial Interest as defined by Section 2 of the *Planning Act*. The Board shall have regard for these interests by way of the statutory obligation. Accordingly, in the consideration of a proposed development involving private communal sewage system and storm water management and the permit to take water, the OMB, if appeal before it were to be had, is duty-bound to adhere to these various objectives and requirements with abiding punctilio.

4. OBSERVATIONS AND FINDINGS

4.1 The Appeal as Stated

The Board must first enquire as to what is within its jurisdiction, and what is not. The question of whether to apply the MEA Integrated process, or instead an EAA Section 5 individual EA process, was already determined by the Minister. The Board was shown no authority empowering the Board to overrule the Minister on that count.

Next, it was suggested the FGA's entire appeal was moot, and should be beyond the jurisdiction (or at least attention) of this Board, because no submissions had been made to Council in the corporate name of the FGA. By that argument, the FGA was disqualified as an appellant under Section 17(24)(1). The FGA's Agent took exception to that suggestion, saying it had not been raised in a multiplicity of PHC's, and was now being raised without proper notice. Counsel for the City observed that various ecological coalitions had gone under various names (like the "Carp River Coalition") from time to time, but that aside from the current controversy over geographic scope, the City had felt misled by neither the substance nor the principals behind those concerns, and was not making an issue on that count. On a purposive reading of Section 17(24)(1), the Board sees no reason to disagree with the City's perspective.

The question of whether the appeal actually does extend to the Jock watershed is a different matter. The statutory wording at Subsection 17(27) is unequivocal:

If no Notice of Appeal is filed... in respect of all or part of the Decision of Council..., the Decision of Council *or the part of the Decision that is not the subject of an appeal* is final; and the Plan *or part of the Plan* that was adopted and that is not the subject of an appeal comes into effect...

Here, said Counsel for the Moving Parties, a Notice of Appeal was filed without a single word to denote that it extended either to wastewater or to lands in the Jock watershed. The FGA pointed to sentences here and there (e.g., "the City is already currently engaged in litigation arising from flooding issues in the above watersheds") adding that references to the plural created an inference that more than one watershed was involved in the appeal. The Board is quite unconvinced; such parenthetical allusions offered no indication of what was under appeal. Next, the FGA's Agent said that even if the Notice of Appeal had not mentioned the Jock or wastewater, there were passing references in supporting materials, which one could look to, for the real content of the appeal. The Board finds two problems with that argument. First, there are already two banker's boxes of supporting materials from parties; the notion that the thrust of an appeal could be buried in such a plethora of materials represents, at the least, a lack of transparency. By the FGA's reasoning, the subject-matter of an appeal could become as unpredictable as it was encyclopedic. That is not, in the Board's view, what the *Act* ever intended. More importantly, the *Act* is explicit:

- It does not refer to supporting materials, but to the Notice of Appeal itself; and
- According to the Notice's plain wording, the appeal itemized four pages of concerns which could lead to "*consequent increased flooding risk in the Carp River Valley*". Nothing in the Notice suggests subject-matter *other* than what could lead to "*consequent increased flooding risk in the Carp River Valley*".

The FGA's Agent added, however, that allusions to wastewater were also to be found in the first Issues List attached to a Board Order, constituting at least tacit acknowledgement (and arguably an Order) that the topic was part of the appeal. That argument overlooks not only the fact that an Issues List cannot override the *Planning Act*; but also that the following was inserted in the Issues List and Order by consent:

The parties have agreed, among themselves, that the identification of an issue does not constitute any admission of relevancy by any party not

identifying that issue. The onus of demonstrating the relevancy of any issue and, if relevant, the weight to be ascribed to such issue to the matter before the Board remains with the party identifying the issue.

Finally, the Agent for the FGA cited cases where Courts permitted appeals to proceed in other legal topics, notwithstanding shortcomings in the original Notice of Appeal, *if* (in the words of Lord Denning M.R. in ***Howard v. The Secretary of State for the Environment, (1974) All E.R. 644***) "the defects can be remedied later on".

The problem is that the defect here cannot be remedied later on. Statutorily, the ship has already sailed. Since no Notice was filed except for features leading to "consequent increased flooding risk in the Carp River Valley", it means that whatever the personal preferences of the parties (or even the Board), that part of the OPA which was *not* the subject of appeal has already come into effect by operation of law. An identical outcome occurred in the Board case of ***Ottawa (City) Comprehensive Zoning By-law 2008-250 (Re), Issued November 5, 2008***:

There is a difference in this respect in the *Planning Act* as to Official Plans under section 17 of the *Planning Act* and a zoning by-law under section 34. Unappealed sections of an Official Plan come into force by operation of Law....

That Decision added, for good measure: "The Board cannot create a proper appeal". Subject to two caveats below, the Board finds nothing in the Notice of Appeal to prevent the OPA from coming into effect automatically, in the Jock watershed.

4.2 The Hazeldean Pumping Station

The first caveat pertains to the FGA's argument that wastewater in the Jock watershed is indeed an issue involving "consequent increased flooding risk in the Carp River Valley" – at least to the extent that such risk was aggravated by problems at the Hazeldean Pumping Station. The HPS is the identified destination for Jock watershed wastewater under the MSS. If overloading the HPS was a potential factor in previous floods, how could further demands on that station (including new Jock watershed wastewater) *not* add to that risk?

Some lawyers suggested this question was inappropriate, because the HPS was outside the 674-hectare Fernbank area, and not *directly* part of the OPA. The FGA replied that the City and developers were trying to "piecemeal" the process, contrary to the EAA and related texts from the Ministry of the Environment (MOE). Indeed, the FGA

treated the entire OPA as a kind of Trojan Horse, involving not only a flawed overall scheme, but also individual “pre-approvals” of various measures bearing risk in their own right, as well as the risk of significant factors falling between two chairs.

In response, the Board is mindful of the advice in the *Westhill Redevelopment Case* about its “positive obligation to consider the environmental, ecological, public health and safety impacts”. Indeed, Counsel for the Moving Parties herself referred to the “duty of the Board to be satisfied of due diligence”. The *West-End Flooding Investigation Summary Report* described the HPS at length, in terms which could reasonably give rise to concern.

However, in applying the statutory test for this Motion under Section 17(45)(a)(i), and allowing every benefit of the doubt, the problem is still this: *even if* one accepted the FGA premise that Fernbank development should be put on hold until the future of the HPS is determined – *including the future of Jock watershed wastewater* – does that offer an “apparent land-use planning ground” upon which the OPA or part of the OPA might be refused by the Board?

Not if that development is *already* on hold – several times over. The FGA's argument would have been more compelling, if no provision had been made to evaluate the HPS capacity to absorb Jock wastewater, avoid overloading, and hence avoid contributing to flood risk. However, far from skirting that challenge, the OPA and related documents codify it. As explained in the Affidavit evidence of the engineer John Riddell,

The MSS provides that the Hazeldean Pumping Station has to be upgraded before any development can proceed in the Fernbank Community.... The upgrade to the Hazeldean Pumping Station is a City project that is identified in the City's Infrastructure Master Plan and also, like Fernbank, is required to be approved through appropriate Class EA processes.

The MSS for the Fernbank Community provides for a future additional upgrade to the Hazeldean pumping station, in addition to the proposed interim upgrade.

This was reiterated by Counsel for the Moving Parties:

The Hazeldean Pumping Station has to be upgraded before any building permit is issued in Fernbank. These upgrades are being reviewed by a separate environmental approval process. This project is not one of the projects to be pre-approved with the enactment of OPA No. 77.

So if the Board were to explore whether Jock watershed wastewater and/or the HPS contributed to flood risk in the Carp watershed, to what extent would that overtly

duplicate the evaluations currently underway in two Environmental Assessments, within the realm of expertise of the MOE? More importantly, what would be the point of a Board refusal of the OPA, to prevent development, when the OPA *already* prevents development in the absence of a satisfactory outcome to the proposed HPS upgrade?

Even if viewed in the most sympathetic light, the FGA appeal – as it relates to Jock watershed wastewater – is redundant. Proper upgrading of the HPS has *already* been incorporated as a prerequisite for Fernbank development, in the OPA's relevant documents themselves. The question of the Jock watershed flowing to the HPS therefore *adds* no planning ground on which the Board could refuse that part of the OPA.

4.3 Interdependency of Instruments

The second caveat pertains to another aspect of the FGA appeal which, this time, was unequivocal. There were repeated references to the need for "integration" and "interdependency" of EAs, to be viewed on a watershed-wide basis.

To be clear, that subject-matter is unchanged by the current Decision. Indeed, it is not impossible that parenthetical comments will be made about the Jock watershed, for purposes of comparison or otherwise – *if* they are relevant to perceived OPA shortcomings which bear a "consequent increased flooding risk in the Carp Valley".

5. CONCLUSION

The Board disposes of the above matters as follows. The Board finds that:

- the Notice of Appeal of the Friends of the Greenspace Alliance, against Official Plan Amendment No. 77 of the City of Ottawa, specifically addressed subject-matter which might lead to "consequent increased flooding risk in the Carp River Valley". The Notice of Appeal did not denote subject-matter under appeal, *other* than the above.
- Under Subsection 17(27) of the *Planning Act*, the parts of OPA 77 which were not the subject of appeal came into effect on the day after the last day for filing a Notice of Appeal.
- The lands subject to the City of Ottawa's Official Plan Amendment No. 77

south of and including the Abbott Street road allowance, being in the Jock watershed, are not part of the Carp River Valley. They were therefore never subject to the appeal, *except* to the single extent that those OPA provisions for the Jock watershed might represent a “consequent increased flooding risk in the Carp River Valley”.

- The question before the Board, on this Motion under Subsection 17(45) pertaining to the part of OPA 77 covering the Jock watershed, was therefore whether the above single connection constituted “an apparent planning ground” upon which that part of OPA 77 might be refused by the Board.
- The FGA’s argument, that there was a connecting planning ground, was pivoted on the concern that Jock wastewater might overload the Hazeldean Pumping Station, thereby increasing flood risk in the Carp River Valley.
- That concern, whatever its intrinsic merits, was already being addressed in the documents under appeal, which provided that no development would proceed unless and until the Hazeldean Pumping Station was upgraded, under the umbrella of not one but two Environmental Assessments.
- So *even if* the Board were to accept the contention by the Appellant FGA, that development should not proceed in the Jock watershed unless and until one has conclusively discarded the prospect of wastewater overload adding to “increased flood risk in the Carp River Valley”, that adds no apparent land-use planning ground on which the Board could refuse the OPA, since that proviso is already incorporated into the relevant instruments.

The Motion is granted. Pursuant to Subsection 17(45) of the *Planning Act*, the Board dismisses the appeal of the Friends of the Greenspace Alliance, specifically as it relates to the lands subject to the City of Ottawa’s Official Plan Amendment No. 77 south of and including the Abbott Street road allowance.

It is so Ordered.

“M. C. Denhez”

M. C. DENHEZ
MEMBER

