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VIA EMAIL

March 26, 2010

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Dear Sirs and Mesdames:

Re: Section 43 Request for Review
Decision of M.C. Denhez, Issued January 14, 2010
OMB Case No. PL090678

The Board is in receipt of a Request for Review ("the Request") of the above noted Decision issued on January 14, 2010 by Member Denhez ("the Decision"). The Request was filed by Mr. John Dawson, on behalf of his client, Kizell Management Inc. ("Kizell").

The Board invited and received a responding submission from Mr. John Lindsay ("the Response"), on behalf of his client, Friends of the Greenspace Alliance ("FGA") and a reply submission from Mr. Dawson. I have reviewed these submissions in arriving at my disposition of this Request, in accordance with the Board's *Rules of Practice and Procedure*.

The Decision considered a motion filed by Kizell, and supported by the City of Ottawa ("the City") and various landowners, who are represented by the above noted Counsel. The motion was filed pursuant to subsection 17(45) of the *Planning Act*. Kizell sought an order from the Board to dismiss an appeal of the City Official Plan Amendment 77 ("OPA 77"), without the Board conducting a hearing on the appeal. This motion was opposed by FGA, the appellants of OPA 77. In this motion, the Board was asked to decide whether the issues raised in FGA's notice of appeal, are sufficiently meritorious to warrant the Board's adjudicative process.

Subsection 17(45) of the *Planning Act* authorizes the Board to dismiss all or part of an appeal of an Official Plan amendment, without holding a hearing, if the Board is of the opinion that the 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 refused by the Board. There have been a number of decisions of the Board that have considered the exercise of the Board's powers under this section of the *Planning Act*. These cases have confirmed that the Board is entitled at the hearing of the motion, to examine the reasons stated in the notice of appeal, to determine whether they constitute genuine, legitimate and authentic planning reasons (*East Beach Community Association v. Toronto (City)*, [1996], O.M.B.D. No. 1890). The Board may dismiss an appeal, should the notice fail to meet this threshold.

The Request asserts that the Decision is a denial of natural justice as Kizell was denied the opportunity to make submissions on the Issues List that was re-cast by the Member, following the motion. The Request also asserts that the Member made mistakes of fact and law which caused him to misapprehend the motion. These assertions are denied in the Response, which maintains that the Request is an attempt to re-argue the motion to dismiss the FGA appeal of OPA 77. The Response refers to the decision of the Supreme Court of Canada, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and asserts that this decision sets out the applicable test for the Board to adopt in a motion to dismiss under subsection 17(45) of the *Planning Act*. Although this case is not cited in the Decision, the Response concludes the motion failed to meet the threshold set out by the Court (i.e. the "plain and obvious" test), and as such, the Request should be dismissed.

Rule 115.01 sets out that the Chair (or his or her designate) may exercise his or her discretion and grant a request if satisfied that the request raises a convincing and compelling case that the Board violated the rules of natural justice or made an error of fact or law such that the Board would likely have reached a different decision. After careful review of the Decision, along with the Request, the Response, and reply submission, I have determined that I will exercise my discretionary relief and grant this Request on the basis that there is a convincing and compelling case that:

a) the Decision violated the rules of natural justice and procedural fairness; and
b) the Member made an error of fact or law in the Decision, such that the Board would likely have reached a different decision.

Pursuant to Rule 115.01 and Rule 118, I have ordered that the Board rehear the motion filed by Kizell. The Decision, PL090678, remains in force and effect until the disposition of the rehearing of the Kizell motion. I provide further direction below, to all parties, to arrange for the scheduling of this hearing event.

The reasons for exercising my discretion are twofold. Firstly, I am of the view that the Member misapprehended the integration of the approval process under the Municipal Class Environmental Assessment ("Class EA"), with the approval process set out in the *Planning Act*. My second reason is set out in the final paragraphs of this disposition, and it relates to the assertion in the Request that Kizell was denied natural justice, when the Issues List was re-cast by the Member in the Decision.

OPA 77 was carried out by the City in conjunction with two master plans that are subject to section A.2.9 of the Municipal Class EA process, referred to as the "integrated" process. These master plans are referred to in the submissions as the Environmental Management Plan and the Master Servicing Study. Upon approval, OPA 77 will apply design criteria for future infrastructure within the Plan area, such as stormwater works. This design criteria is established by the amendment or is found in the two master plans. The Request refers to the confirmation of the Minister of the Environment that section A.2.9 of the Class EA document was correctly followed, meaning that the individual infrastructure projects identified in these two studies will be "pre-approved" should OPA 77 be approved by the Board. The Response does not dispute the procedural requirements of section A.2.9 of the Class EA or the effect of a Board decision should it approve this amendment. As such, the requirement in OPA 77, that there be "no increase in downstream flood risk" will be a mandatory criterion to apply to future development within the area that is subject to OPA 77. Further, the design requirements in the two supporting studies (the Environmental Management Plan and the Master Servicing Study), are also mandatory and will be applicable to the detailed design of the infrastructure necessary to implement the applications for draft plans of subdivision.

The Member appears to have misapprehended the effect of OPA 77 and the supporting studies, finding that approval of the amendment will set the stage for repeated disputes, "appealable" street-by-street, subdivision-by-subdivision. The following paragraphs of the Decision are illustrative of his understanding:

> The experts' Affidavits disclosed a bona fide disagreement about the appropriate geographic area: which flood-related topics, if any, should best be addressed on a *watershed-wide* basis, instead of a *subdivision* basis? And when should they be addressed? The correct geographic area for a planning process of this kind, and its timetable, are quintessential planning questions.
>
> The Board also has an interest in finality. The scheme of OPA 77 is to review water risk on a subdivision basis. The Board has obvious concerns about setting the stage for repeated disputes, appealable "street-by-street, subdivision-by-

> subdivision". Granted, every subdivision has its own characteristics; but there may be benefits – to both the public interest and to the development interest – to attempt a definitive resolution, at least of some *generic* aspects, to reduce the risk of repetitive appeals. (Page 3 of the Decision)
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> ...
>
> More importantly, there is a question of standards. Counsel for KMC argued that OPA 77 incorporated appropriate relevant standards – for now. Further refinement of measures could be expected later, on a "street-by-street, subdivision-by-subdivision" basis, as developers filed their applications. The FGA's expert Affidavits replied that certain work would be more appropriately done immediately to address generic issues allegedly affecting the entire subwatershed.
>
> That involves two basic questions. The first pertains to the appropriate geographic area for the planning exercise – subdivision, subwatershed, or a combination of both. The second pertains to the timetable for the planning process – now, later, or a combination. (Page 11 of the Decision)
>
> ...
>
> Pragmatically, the Board is also mindful of its duty to avoid setting the stage for a proliferation of litigation. If the OPA scheme merely defers water-related challenges to a later date – but provides multiple venues for such challenges "street-by-street, subdivision-by-subdivision," then there is a risk of a multiplicity of such challenges. As a matter of prudence, it appears preferable for all concerned to determine whether *generic* issues can at least be disposed of, as definitively as possible. (Page 12 of the Decision)
>
> ...

It is my view that the intent of the Class EA integrated process is to avoid the "proliferation of litigation" by ensuring a consistent and coordinated approach to development within the area governed by the Official Plan. I note that section 4.7.6 of the City Official Plan, (quoted on page 9 of the Request) states that "the City's commitment to plan on a watershed and subwatershed basis is outlined in section 2.4.3. The City will implement the recommendations of the watershed, subwatershed and environmental management plans through the implementation mechanism of this plan or other appropriate mechanisms". This policy, sets the direction to apply the recommendation of these environmental master plans, upon the approval of OPA 77 as part of the integrated process established by section A.2.9 of the Class EA document.

I am satisfied that the Request establishes that there is a convincing and compelling case that the Member misapprehended the integrated approval process, set out in the Class EA document, along with the policy framework established by OPA 77. This misapprehension is likely to have affected the Member's analysis of whether the notice of appeal disclosed authentic planning reasons. The Member concluded that the scheme of OPA 77 is to review water related risks on a street-by-street or subdivision-by-subdivision basis, as opposed to establishing principles and criteria, for the entire Plan area. The Member fails

to adequately explain this conclusion, particularly given the confirmation of the Minister of the Environment that section A.2.9 of the Class EA was correctly followed. The Class EA document clearly sets out that the purpose of this integrated process is to ensure a coordinated approach to planning and environmental approvals. The finding of the Member in the Decision that the approval of OPA 77 will lead to multiple venues for challenge appears to be a misapprehension of the integrated Class EA process. This misapprehension of both fact and law is of such import that it would likely result in the Board reaching a different decision.

I recognize that the Response maintains that the Request is an attempt to re-argue the motion that was heard by the Member. I appreciate that many of the points raised in the Request were brought to the attention of the Member at the hearing of the motion. However, Rule 115.01 allows me to exercise my discretion to grant the Request, when there is a convincing and compelling case that there is an error of law or fact such that the Board would likely have reached a different decision. In my view, this is not akin to re-argument of the motion. It has to do with the misapprehension of the Member in the first instance.

I also note that the Response maintains that the Request should fail, since it does not refer to the judicial test for summary dismissal. I am satisfied that the Board has established jurisprudence pursuant to subsection 17(45), which sets out the factors to consider in a motion to dismiss. This jurisprudence is not addressed in the Response.

The Request also asserts that there is a denial of natural justice as Kizell was not offered the opportunity to present submissions on the Issues List that was re-cast by the Member following the motion. The Request asserts that the "The re-cast Issues List is inextricably linked to the totality of the decision and Order". The Response counters that this Decision is not a final order and that the Board has the jurisdiction to amend the issues at any time (or as the Response states "the issues are never engraved in stone").

Although I agree with the Response, that it is open to a party in the context of a further prehearing conference or hearing event, to propose a modification to the Issues List, I must also recognize the nature of this hearing event that is the subject of the Decision. This Issues List was re-cast after the hearing of a motion to dismiss an appeal (subsection 17(45) of the *Planning Act*). The moving party (Kizell) was seeking an order to dismiss the FGA appeal of OPA 77. The Board was not conducting a hearing event to scope or refine issues, nor was the Board hearing a motion and receiving submissions to determine the relevancy of certain issues prior to finalizing a procedural order. This moving party has found itself in a different position, after filing its notice of motion, in respect of the issues to address in this proceeding. In my view, this raises a convincing and compelling case that the Board violated the rules of natural justice. A party has a right to know the case to be met, and in my view, Kizell should have been provided the opportunity to present submissions on any decision to re-cast issues, as is asserted in the Request. A party should not be expected to have a different set of issues and case to be met, after filing and attending a motion to dismiss an appeal without a hearing.

Given my disposition, I have determined that the most expeditious way to proceed with the Request is to direct a rehearing of the motion filed by Kizell before a different panel of this Board. By this letter, I am directing all parties to contact the Board Planner, Mr. Martin Stefancyzk, to arrange a date to rehear this motion. It is the Board's preference to schedule the earliest available date in the Board's calendar for this rehearing of the motion. It is my expectation all Counsel will cooperate in that regard. At this time, I do not see the need for any of the parties to file additional materials for the hearing of the motion.

The Board is also familiar with the recent disposition of the same Member issued on March 12, 2010, relating to a motion to dismiss the FGA appeal of OPA 77 for lands within the Jock River Watershed. That motion was granted and that decision and any supporting or responding motion materials, may also be referred to in this rehearing, should any of the parties wish to refer to this documentation. I recognize the March 12, 2010 Decision finds that the notice of appeal failed to raise issues with respect to the lands within the Jock River Watershed. Consequently, OPA 77 remains in effect on these lands. It is to be noted that this disposition to grant this Request does not in any way affect or alter that finding or any other finding or order in the March 12, 2010 Decision.

Should any of the parties see the need to file new materials, then I suggest that they contact the Board Planner to suggest that the Board convene a teleconference call to determine whether dates should be set to exchange any additional submissions. This completes my disposition of the Request. The Board Planner may also be contacted should any additional issues arise out of this disposition.

Yours truly,

S. Wilson Lee
Executive Vice-Chair

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