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PL090678

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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
Subject:	Proposed Official Plan Amendment No. 77
Municipality:	City of Ottawa
OMB Case No.:	PL090678
OMB File No.:	PL090678

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

Parties	**Counsel*/Agent**
City of Ottawa	T. Marc*
Friends of the Greenspace Alliance	D. Morrow* J. Diller (student-at-law)
Kizell Management Corporation	J. Dawson*, M. Yakubowicz*
2087875 Ontario Ltd. 1383341 Ontario Inc. 218447 Ontario Limited	D. Kelly*
2129786 Ontario Limited	P. Vice*

DECISION ON A MOTION TO DISMISS DELIVERED BY S.W. LEE AND JAMES R. McKENZIE AND ORDER OF THE BOARD

This Motion to dismiss is brought pursuant to Section 17(45) of the *Planning Act* for the purpose of dismissing the appeal brought by the Appellant, Friends of the Greenspace Alliance (the "Alliance"). The Motion is brought by Kizell Management Corporation. It is supported by the City of Ottawa and a number of other landowners affected by OPA 77.

The Motion is based on a number of contentions. There is the contention that the Notice of Appeal doesn't contain any reasons which disclose any apparent land use planning ground upon which the Board can allow all or part of the appeal of the Official Plan Amendment. Furthermore, there is the contention that the appeal is frivolous and vexatious and made for the purpose of delay. It is to these contentions that the Board must turn. But first, we must unravel what is OPA 77.

The Background of OPA 77 and the Associated Environmental Instruments

OPA 77 affects an area of lands of approximately 674 hectares, located south of Hazeldean Road and between areas of the existing built urban development known as Stittsville and Kanata in the City of Ottawa. The area in question is known as the Fernbank area.

To understand this Motion, one must appreciate the larger planning context and the Municipality's underlying policy frameworks. Briefly, OPA 77 is the first step towards a community development. It is part and parcel of a Community Development Plan (CDP). Before OPA 77 was adopted by the City, a large portion of the lands in this subject area have been approved for urban development pursuant to an earlier OMB Decision and Order. The OMB in that earlier Decision has indicated its satisfaction that the area in question can be serviced.

OPA 77 is the initial step of a larger design to service and to craft out solutions to the multi-faceted problems to be countenanced by a community evolving towards urbanisation. In keeping with the existing policies in the Ottawa Official Plan and the term of reference of the CDP, an integrated Municipal Class Assessment was conducted with the *Planning Act*. A Master Servicing Plan (MSS) and Environmental Master Plan (EMP) were also prepared and processed in conjunction.

The Fernbank EMP and MSS are part of the process that meets the requirement of Section A.2.7 of the Municipal Class EA for Master Planning, within the Class EA process. The project identified and the Master Plan are to meet the requirement of Section A.2.9 of the Municipal Class EA process. Upon approval of OPA 77, in the words of Section A.2.9, Master Plan or project is considered to be a Schedule A under the Municipal Class EA, i.e. pre-approved.

OPA 77 is therefore an important landmark in this complicated process that has been undertaken for a number of years, all of which had been conducted in full concert with the City. However, in terms of content, the document cannot be any more matter-of-fact and prosaic - it sets out in its schedules for the final touch-ups of the Rural and Urban policies as well as the Urban Cycling Transportation and Urban Road Network.

The Notice of Appeal filed by the Alliance indicates two areas of concerns. Firstly, as disclosed in Issue 1, it relates to concern with respect to the Integrated Process. Secondly, as disclosed in Issues 2, 3 & 4, it relates to the water management and the risks of flooding.

Before the Board launches into the Motion of Dismissal in earnest, we must first address an important question of law raised by Mr. Morrow in relation to Section 17(45)(a)(i) of the *Planning Act*. Because of its central importance, it is crucial to deal with it at this stage of the Decision.

The Law of Dismissal without a Hearing: Hunt v. Carey & East Beach

On behalf of the Alliance, Mr. Morrow advanced a line of interpretation with respect to the law of Dismissal of the appeal without a hearing. The Subsection in the *Planning Act* states:

> S.17(45) Despite the *Statutory Powers Procedure Act* and subsection (44), 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) 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 approved or refused by the Board,
>
> (ii) the appeal is not made in good faith or is frivolous or vexatious,
>
> (iii) the appeal is made only for the purpose of delay, or
>
> (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
>
> (b) Repealed: 2006, c. 23, s. 9 (10).

(c) the appellant has not provided written reasons with respect to an appeal under subsection (24) or (36);

(d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or

His submissions relate to S.45(a)(i), which is one of the grounds of attack of the Notice of Appeal, albeit there are other grounds of attack stemming from (45)(a)(ii) & (iii).

It is his thesis that insofar as Paragraph 45(a) (i) is concerned, the Board should follow the *ratio* of the Supreme Court of Canada decision of Hunt v. Carey (1990) 2 S.C.R. 959, instead of the seminal case of East Beach v. Toronto (1996) OMDB 1890. He went as far as to say that the East Beach has been wrongly decided and the implication is that all the jurisprudence of the Board since has been tainted. His argument rests on the assumption that Hunt v. Carey addresses a Rule of the Court in British Columbia somewhat similar in wording to Paragraph 45(a)(i). In his view, the Court has held that the test governing such provisions is that one must assume that the facts disclosed in the statement of Claims can be proven. Unless it is "plain and obvious" that they cannot, the statement of Claim cannot be struck down for not disclosing a reasonable cause of action.

In keeping with this logical thread, Mr. Morrow invites the Board to pay no heed to the affidavits filed at this Motion from either side, including his Client's. He submitted to the Board that since these documents filed had not been cross-examined, their value is nil. For that reason alone, he submitted that the Board should discard them. He insists emphatically that the Board should accept the reasons in the Notice of Appeal at face value. In his view, as long as they have the semblance of a planning ground, that is sufficient and the Board should allow a hearing to proceed.

The Board cannot but help observe that even if we were to accept his underlying assumptions, Mr. Morrow has been somewhat cavalier in his interpretation of the wordings in Paragraph 45(a)(i) as compared with the Rules of the Court. The wordings of the two are different. More importantly, the impugned provision indicates no apparent land use planning grounds on which the Board can approve or refuse an Official Plan. The accent here is not just any apparent land use planning grounds, but whether it is

the land use planning ground for which the Plan can be approved or refused. In other words, even if it is related to the realm of the Official Plan, the Board is entitled to ask whether the ground is determinative in the context of an Official Plan. The draftsmanship here is decidedly studied. No student of planning law should gloss over the fact that similar wordings are present for the grounds of dismissal without a hearing with respect to other planning instruments: for zoning by-law as in Section 34(25) and for subdivision as in Section 51(53). The pronounced importance of the instrumental contexts is made abundantly clear as it is laid bare for each of such respective instruments.

However, the central assumption of Mr. Morrow is flawed. It is intellectually perilous, to compare the cause of action in a pleading of a tort action as in Hunt v. Carey with a notice of appeal in the planning context. We find that an appeal to a municipally adopted Official Plan is a right conferred by statute; it is not one comparable to a cause of action based on common law. The right to appeal under the *Planning Act* is not automatic in the sense that it is as-of-right, but has to be based on stringent procedural requirements that one must meet. In fact, an appeal to an Official Plan must be based on the Municipality taking its first step, i.e. the legislative step of adopting the OP. These are not the only reasons why one cannot so readily cross-pollinate from one regime to another. There are more substantive and fundamental reasons at play.

It is a truism but nonetheless important to take note that a land use planning dispute is not confined to a "*lis inter parte*". Planning appeals and the issues involved invariably must address the public interests at large. In Cloverdale v. Etobicoke (1966) 2 OR, 439, Aylesworth J., speaking on behalf of the Court of Appeal, points out that in the consideration of an Official Plan or its amendments, the Board stands in the stead of the minister; the decision it makes is administrative in nature and must transcend the interests of the parties and address the interests of the public at large.

In this panel's view, the issues in an appeal of an OPA cannot be held hostage by the parties' whims only. Issues of "land use planning" must be grounded upon the public interests within the four corners of the *Planning Act*. There is a concomitant discipline imposed on every decision-maker, including the OMB. The Board must have regard to the enumerated provincial interests in the Act and municipal decisions; that its own decisions must be consistent with and conforming to the Provincial Policy

Statements (the “PPS”) and the various provincial plans. This web of public interests imposed by the provisions of the *Planning Act* binds and encumbers every player involved, including an appellant to an Official Plan.

In such a context, one must expect that the advancement of a planning ground to an appeal be much more than parroting some planning jargon or donning the disguise or the façade of planning reason. The line of argument advanced by Mr. Morrow reminds us painfully of the aphorism enunciated by Mr. Justice Oliver Wendell Holmes that the life of the law is not logic, but experience. In short, what is said by this Board in East Beach, a decision that has stood the test of time, has a currency and urgency most poignant in light of the recent *Planning Act* amendments:

> The words in these particular provisions, in the context of the Act, cannot be construed that the test set out is less onerous than the test in the former provisions. If they were to be given the plain and natural meaning, the Board should not treat it as if it is a test whether planning language had been deployed in a notice of appeal. The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case. This does not allow the Board to make a hasty conclusion as to the merit of an issue. Nor does it mean that every appellant should draft the appeal with punctilious care and arm itself with ironclad reason for fear of being struck down. What these particular provisions allow the Board to do is seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudicative process.

As for the proposition that the affidavits filed should be ignored, the Board is keenly cognizant that Rule 37 of the Board which deals with the content of the Motion and Subrule (e) allows affidavit materials to be filed. Whether they are cross-examined or not is up to the parties. These affidavit materials form part of the record before the Board for the Motion. What the Board cannot abide is that if a party chose not to take the opportunity to cross-examine, it cannot seize upon its own failure to do so as a ground that the evidence has little reliance value. Additionally, pursuant to section 15 of the *Statutory Powers Procedure Act*, the Board can admit any relevant evidence so long as they are not barred by privileges or other statutory reasons.

In short, the Board concludes that East Beach remains good law. In addition, our findings in the fifth paragraph of this section enables this panel to evaluate whether the

apparent land use planning ground is one that the Board can allow or refuse the OP and whether the grounds are determinative. The Board will take into consideration the evidence as part of the Motion record filed at this hearing. Upon such a footing, this panel will now embark on our analysis.

The Notice of Appeal

As indicated in the earlier paragraphs, the Notice of Appeal filed by the Alliance indicates two areas of concerns in the four issues submitted. Issue 1 relates to concerns with respect to the Integrated Process. Issues 2, 3 & 4, relate to the water management and the risks of flooding.

At the hearing of this Motion, Counsel for the Alliance indicated to the Board that his client is in fact principally interested in having a storm water retention pond that can accommodate a 100 year storm and that there should not be just one sanitary outlet to the Hazelton Pumping Station. If those two items are forthcoming, his client would be content. He indicated that his Client is no longer interested in Issue 1.

In order to give a fulsome analysis of the totality of the defence of the Motion, the Board would take into account both the Notice and what has been submitted at the Motion hearing by Counsel for the Alliance. All aspects of the defence to the Motion would be canvassed and no stone will be left unturned.

After due consideration, the Board concludes that the four grounds cited in the Notice are not ones that OPA 77 should be refused or dismissed. The Board would not accede to the two items requested by Mr. Morrow. Our reasons are set out below.

Issue No. 1: The Appropriateness of Integrated Process

With respect to Issue No.1, the Board's conclusion is pithy. The complaint about the Integrated Process is not worthy of adjudication.

The Integrated Process as set out for the Municipal Class EA, cannot be set aside even if the Board were to allow the hearing to proceed. The Municipal Class EA process is vested with the requisite legality as it has been approved by Order-in-Council No. 1923/2000 as amended in 2007. Equally important to note is that this Integrated Process is the one the City of Ottawa chose to allow the landowners to pursue. The

CDP, EMP the MSS have all been reviewed and endorsed by the City along this chosen path. The Alliance's challenge could not have altered that course in one iota. Nor would the Board alter that course. Mr. Morrow urged the Board to assume the role of the Minister of Environment to challenge the process. This is clearly something that the Board does not have authority to do.

It is noteworthy that the only instrument before the Board is OPA 77. The Class EA process does not require our benediction as it is a self-approval process. It is considered complete as long as the process and protocols have been followed with an abiding punctilio. The authority upon which the Board is empowered to act stems from the *Planning Act*. The Board does not have the jurisdiction or the incidental powers pursuant to the *Environmental Assessment Act* to effect changes to the EA process. Nor should we do so in light of what the City had chosen. There is no question that the by-product of the approval of OPA 77 translates to a pre-approval of the Master Plan and the projects of the Class EA. However, the Board cannot change such a by-product unless it has the legal tool to do so.

On that ground alone, we find that Issue 1 cannot be regarded as a legitimate issue for adjudication.

Parenthetically, there is a misapprehension on behalf of the Alliance as to the nature and the substance of the Integrated Process. The process ushered by the approval of OPA 77 is not the end. It is only the beginning of a larger and deeper discourse. In fact, at this stage, any decision maker, let alone the Board, is not in any position to mandate a 100 year storm management pond or the number of outlets to the Hazelton Pumping Station. In fact, it would be highly inappropriate and premature for any decision-maker to make any enunciation with respect to the finalization of these infrastructure outcomes.

The Board also notes that on July 21, 2009, shortly before the launching of the Appeal by the Alliance, Mr. Cooper, one of the affiants for the Alliance had written to the Hon. John Gerretsen, the Minister of the Environment arguing that the Integrated Process should not be allowed. The Minister refused to accede to such a request. Mr. Dawson pointed out that the Alliance maintained that issue steadfastly even after the denial of the request. Right up to the hearing of this Motion, it has maintained that issue,

knowing full well the untenable nature of that request. It is, in Mr. Dawson's submission, a conduct that bespeaks of and can be described as "frivolous and vexatious".

In our view, such intransigence is futile and wasteful. Mr. Morrow attempted to dissociate the conduct of Mr. Cooper from the Alliance. In our view, it is somewhat disingenuous. However, in view of our earlier findings, the Board does not need to consider whether the course of conduct of one affiant can be attributed as "frivolous and vexatious" conduct for his client.

Simply put, Issue 1 is an issue not worthy of adjudication.

Issues 2, 3 & 4: The Storm Water Management and the Risk of Flooding

With respect to Issues 2, 3, & 4, all of which are related to storm water management and the risk of flooding, some overall conclusions can be drawn by the Board:

1. The CDP, EMP and the MSS set out a criterion of no proposed development resulting in the increase in downstream flood risk. At this level of the Master Planning, there is no more that can be done to meet that Criterion. Amidst the queries and misgivings filed in the affidavit evidence of the Alliance, what shows is that the Alliance wants proof be available to show that the Criterion can be met now. Adherence to that criterion can only be assessed when a development arises; when streets and their gradients are designed; when storm management infrastructures are conceived. If the development or a facility offends that criterion, that development or facility will not be allowed. In short, the Alliance asks the wrong questions.

2. We also find that the Alliance seems to have come to an understanding or, more accurately, a misunderstanding that once the Master Plan comes into effect, no change to the MSS or the EMP would ever be possible. In short, the Alliance sees the process as immutable and fixed whereas the opposite is true. The EMP and MSS both provide for a mechanism for amendment. Minor change does not require any amendment; however, major change requires an addendum to Municipal Class EA. In practice,

when new facets of the flood management call in question the fundamental validity of the MSS or the EMP, including the Criterion, the amendment will be required.

3. The success of the Appeal raised by these three issues would set quite a trap for the City. These lands have been urbanised and the next step in the planning process is how they are to be serviced. What is being sought ultimately by the Alliance would only result in the method of implementation being remitted back to council whereas council had already spoken decisively as to the manner and process of implementation. This can become tautological and circular. Remember as well, this process is not just about storm water management. It addresses many aspects of community building. If the appeal on these grounds is successful, the City of Ottawa may find itself not being able to implement the effective land use in a manner it had chosen. In the Motion material, Mr. Dawson has singled out this aspect as reasons that the Appeal is made only for the purpose of delay. To prove this point, this panel finds that the evidence of either the subjective motivation or the circumstantial evidence ascribing such motives should be required. The Board is not prepared to ascribe such expressed calculations and foresights to the Alliance in the absence of some such evidence although its action does have such unintended effects.

4. Mr. Morrow is emphatic in his criticism that there is no overseer over the course of the storm management for the community. It is a far cry from the truth. Every facility for storm management in this Community will require Certificates of Approval pursuant to the *Ontario Water Resources Act*. Major outputs to water courses require similar approvals. Fisheries and aquatic habitats will have protections under federal jurisdictions. Fill permits will require the approval of the Conservation Authorities as the latter authorities have flood control regulations and mechanisms. Subdivision controls mandate circulation to a host of governmental agencies and for municipal inputs and approvals. The MOE, the Conservation Authorities will have their jurisdictional controls and rights to object. They can intervene or impose conditions in this process. All these

processes will also have the requisite appeal mechanisms, which allow the hearings and scrutiny by at least three independent tribunals for the respective appeals. Lest one forgets, there is the “storm water site management plan” that is called for when specific site designs are on the horizon. As to the concerns to the waste waters, upgrade to the Hazelton pump station which lies outside the Ferndale Community is under another track of review and approval process. The Glen Cairn storm flooding is under the third track of review. The Board notes parenthetically in the affidavits filed by Mr. J. Riddell, measures in these other tracks to improve and upgrade both the facilities and cost-sharing measures will be made.

5. Two technical concerns have been raised in the Notice of Appeal relating to CDP target and consistency of SWM standards applied in the implementation of the Fernbank CDP. On both of these aspects, Mr. Riddel has adequately indicated the lack of foundation. These are not matters worthy of an adjudicative process. With respect to the first, the Board notes that the Appellant has confused “Run-off” with flow that impacts flood levels. With respect to the second, the Board is satisfied that the difference between the 40,000 cu. metres and 75,000 cu. metres from the two models is slight in the context of the overall flood volume. This panel notes that Mr. Morrow had not made any submissions with respect to the affidavits filed by Mr. Riddel, in order to sustain, modify or refine the reasons filed in the Notice.

Overall Recaps & Conclusions

In this Motion, the Board did not take a narrow approach that OPA 77 addresses only the traditional land use matters such as use designations, cycling paths and road patterns and as such, the storm water management concerns cannot be raised to defeat the amendment. Mr. Dawson has been at pains to remind us of the obligations incumbent on the Board and we are equally punctilious in observing them at a unique Motion such as this. There is the Integrated Process and since the Board does have a positive duty to address the protean and ubiquitous concerns of the environment, pursuant to the PPS and the provincial interests, we have entertained all aspects of the

issues outlined in the Appeal. Nonetheless, we are ever mindful of the jurisdictional boundaries at this Motion, and indeed, at a hearing, if a hearing were to proceed.

The Board has in essence in this Decision dealt with both the *Planning Act* and the Integrated Process concerns, both from the standpoints of legality and substance.

All the issues raised in the Notice are found to be without adjudicative worth.

A large portion of the misapprehension of the Alliance stems from the fact that it fails to appreciate that the pre-approval of the Master Plan or the projects is only a foretaste of things to come. A huge amount of processes are to be unfolded and there are numerous windows of opportunities for the third parties to intervene. Many hurdles and governmental interventions are available through the official channels as we have outlined which will be at the disposal of the City. A pre-approval of the Master Plan and the associated projects is only an approval in the Assessment sense, not in relation to designs and outcomes, let alone to developments. Lest we forget, the very Criterion relate to downstream flood risk is a working Criterion. Like the major tenets of the EMP and MSS themselves, it is subject to Addendum to the Municipal Class EA, if the need were to arise.

For all the reasons enumerated in this Decision, the Board therefore Orders the Motion be allowed and the Appeal be dismissed without a hearing.

"S.W. Lee"

S.W. LEE
EXECUTIVE VICE-CHAIR

"James R. McKenzie"

JAMES R. McKENZIE
VICE-CHAIR