

ISSUE DATE:

April 26, 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

Appellants: SEE SCHEDULE "1"
Subject: Proposed Official Plan Amendment No. OPA #76
Municipality: City of Ottawa
OMB Case No.: PL100206
OMB File No.: PL100206

APPEARANCES:

Parties

City of Ottawa

Thomas Cavanagh Construction Limited

Friends of the Greenspace Alliance

Ken McRae

Counsel*/Agent

T. Marc*

U. Melinz*

E. Driessen

DECISION DELIVERED BY N. JACKSON AND ORDER OF THE BOARD

Before the Board is a Motion for Directions brought by Thomas Cavanagh Construction Limited ("Cavanagh"), arising from a Decision of the Ontario Municipal Board ("Board") on July 21, 2011. This Decision arose from a two week hearing on the environmental issues arising from a comprehensive review of the City of Ottawa Official Plan by the City of Ottawa ("City"). That comprehensive review resulted in the adoption of Official Plan Amendment 76. Following approval with modifications by the Ministry, 30 appeals were launched, resulting in nine phased Hearings, one of which concerned environmental issues, and in particular, the Flewellyn Special Study Area. The Province was present and called evidence in this phased hearing having regard to the Flewellyn Special Study Area. The Board Decision dismissed certain appeals, accepted modified language and allowed the Cavanagh appeals in part. The Board Order was withheld

pending receipt of a draft order reflecting modifications made by the Board in its Decision.

No appeals were made.

The present Motion for Directions emanates from the attempts by the parties to agree on the form of the language changes in the Draft Order. Many of the modifications are agreed to. Exhibit "B" to the affidavit of Bruce Finlay (Exhibit 5 in this proceeding), lists 26 pages of modified language and mapping, all of which is agreed to except numbers 35, 226(section 4.8.1 - Policy 5D only) and 257. Based upon the affidavit of Bruce Finlay and the consent of the parties, the Board Orders the modifications in the list in Exhibit 5, excepting the references to numbers 35, 226(section 4.8.1 - Policy 5D only) and 257 in dispute under the current Motion for Directions. That list is made Attachment 1 and numbers 35, 226(section 4.8.1 - Policy 5D only) and 257 are crossed out. The final resolution of issues with respect to the identification of components of the Natural Heritage System ("NHS") shall await an Official Plan Amendment and any appeals thereto. On consent this is also Ordered.

The present Motion for Directions deals with the outstanding Order on numbers 35, 226(section 4.8.1 - Policy 5d only) and 257. The motion and affidavit material has been duly served in accordance with directions from the Board. The response of the City is also served with affidavit evidence in support. There are no disputes as to jurisdiction or timeliness. Neither The Friends of the Greenspace Alliance ("Greenspace") nor Ken McRae ("McRae") filed written responses. Both Greenspace and McRae make oral submissions on the numbers in dispute without objection. The Ministry of Municipal Affairs and Housing was served with the motion documentation but makes no written response and does not appear on the return date of the motion.

The Board makes the following findings on the motion:

Number 35

In the hearing there was dispute as to what was referred to as a "form of deeming" in the Planning Act ("PA") process based upon identification of significant wetland boundaries by the Ministry of Natural Resources ("MNR"). The annotated OPA 76 read:

"The policies of this section will also be applied to lands where the MNR has identified new significant wetlands or has revised significant wetland boundaries, regardless of whether new

significant wetlands or significant wetland boundaries are designated in this Plan” (Items 35 and 40 of Exhibit 24).

The Board’s Decision referred to this deeming of wetlands by city witnesses to be interim, yet without a setting of the time. The Board went on to say: “More importantly it seeks to incorporate into the Official Plan the work of the MNR without PA notice under subsection 17, nor public process and appeal rights.” This, the Board ruled, was not consistent with the elaborate city process of identification of Provincially Significant Wetlands (“PSWs”) in the Flewellyn Special Study Area in this same amendment, nor Board and Court case law set out on page 8 of the Decision of July 21, 2011 (Attachment 2). The Board Decision was to modify OPA 76 further to provide for PA process through annual consolidation of new PSWs (intended to include boundary alterations) in public PA processes or in 5 year comprehensive reviews.

The City position now on language for the Order to implement the Board Decision aforementioned is that where the MNR has identified new significant wetland boundaries or has revised significant wetland boundaries, the City will initiate an Official Plan Amendment, and/or a zoning by-law amendment to recognize the wetland boundaries within 12 months of identification. The City goes on to propose that “in the interim, between identification and designation, the policies of this section will apply to the new significant wetlands and any lands captured by revised wetland boundaries.”

This later interim provision is objected to by Cavanagh. Greenspace and McRae argue for protection before the PA processes. The City is studying a site alteration by-law under the *Municipal Act*. The Board Decision (Attachment 2) reflects existing pre-amalgamation by-laws which the City was reviewing (still under review with workload now referenced).

Board reasons

The July 12, 2011 Board Decision was clear. The City has now remedied the indefinite nature of the deeming with the reference to 12 months and in oral submissions to 6 months. This is, at best, a partial response, but is of assistance to others interested in the preservation of PSWs. The reference to the City deeming of the policies of the Official Plan to apply in the interim is struck for the same reasons set out in the July 12, 2011 Decision. The Board Order is to reflect the change from 12 months to 6 months and the following discussed orally in the motion - “The identification of the boundaries or

revised boundaries of PSWs by the MNR will be considered in any PA process applicable to the property identified by the MNR.”

Cavanagh proposes that policies on significant wetlands not apply where the lands are licensed under the Aggregate Resources Act (“ARA”). The Board has reviewed the provisions of section 66 of the ARA in the July 12, 2011 Decision. The Board prefers the following language: “Council may consider exceptions to designation of new wetlands where the land has current required approvals under the PA or is licensed under the ARA.”

Board Order

It is ordered that Section 3.2.1, Policy 1 is modified by adding:

“Where the MNR has identified new significant wetlands or has revised significant wetland boundaries, the City will initiate an Official Plan Amendment and/or a zoning by-law amendment in accordance with Policy 8 below, to recognize the new wetlands or changes in wetland boundaries within 6 months of identification. The identification by the MNR of new boundaries or revised boundaries PSWs will be considered in any PA process applicable to the property identified by the MNR. Council may consider exceptions to the designation of new wetlands where the lands have current required approvals under the PA or are licensed under the ARA.”

Number 226 (Section 4.8.1 - Policy 5D only)

Under development within flood plains, Cavanagh had sought permission to permit hard surface features. That was rejected by the Board based upon the worsening of a default position in part due to the impermeable nature of suggested uses including basketball or tennis courts and parking areas. The Board Decision of July 12, 2011 specifically adopted the testimony of the City witness Bruce Finlay that Policy 5D permit only “passive non-structural areas which do not affect flood flows.” The language of Policy 5D had gone on to read: “...such as forestry, conservation uses, agriculture and outdoor recreation uses.” The City now proposes to leave in the references to “...such as forestry, conservation uses, agriculture and outdoor recreation uses.” Greenspace sympathizes with Cavanagh regarding possible ambiguity in the “such as” uses cited. Mr. McRae prefers the use of the term “non-hard surface.”

Board reasons

The Board Decision was clear that Policy 5D should end after the word “flows,” in accordance with the testimony of City witness Finlay. It is unusual for the City to resile from the testimony of its witness and then a Board Decision without a section 43 *Ontario Municipal Board Act* application. Official Plan policies are intended to be guides and the subject of consideration without the specificity of a by-law. In any event, the intent of Finlay – and now Greenspace – was to eliminate ambiguity. Policy 5D is modified so that the language after the word “flows” is deleted.

Board Order

Policy 5D is modified to delete the words “...such as forestry, conservation uses, agriculture and outdoor recreation uses” so that it will now read “passive non- structural uses which do not affect flood flows.”

Item 257

This item was based upon a Cavanagh appeal to provide that if lands in private ownership cannot be developed due to conservation and benefit the public as a whole, then the appropriate authority must be prepared to acquire the property. The in-force Official Plan (urban) already provides in section 5 for lands to be acquired if such cannot be developed based upon conservation considerations. The Board Decision agreed with modified language reflecting Official Plan Amendment designations, watershed planning and the results of Environmental Impact Statements (“EISs”), but only if the effect is to sterilize the lands preventing their development. Cavanagh argues that the proposed City language is too restrictive in exclusions from the acquisition policy and in particular, that the policy only apply if the property has no development potential. Cavanagh proposes less exclusionary language and that the duty to acquire can apply if development is restricted on part of the lands in private ownership.

Board reasons

The July 12, 2011 Decision referenced the acquisition to be triggered by the sterilization of the lands. The attempt by Cavanagh to extend this language to “sterilization of part of

the lands” and to exclude restriction based upon provincial legislation or policy, goes beyond the Board Decision. The City language allowing for acquisition as a result of designation of Natural Environment Area or as part of the Natural Heritage System as demonstrated in an EIS, such that there is no development potential, captures the intent of the use of the term “sterilization” in the July 12, 2011 Decision. The Board agrees with the submissions of the City, as supported by Greenspace and McRae, that the intent of such acquisition is when the lands cannot be developed. When a development is possible, even when some lands are environmentally sensitive so as to require consideration in a development scheme following an EIS, the development process of the City should have the opportunity to address the environmental concerns in conjunction with a development approval required under the PA. This does not mean a dedication to the public can be forced, but as Greenspace submits, other avenues can be explored, particularly when the affect is not that no substantial development can occur.

Board Orders

The Board Orders the language of section 5.2.1, Policy 5C be modified by deleting policy 5C and substituting the following therefore:

C. “Except for those lands that are identified as flood plain, steep or unstable slopes, significant wetland, or significant habitat of endangered or threatened species, the city will acquire land that is in private ownership at the request of the landowners under the following conditions:

- The land is designated Natural Environment Area or Urban Natural Feature by this Plan;
or
- An EIS identifies the land as being part of the City’s Natural Heritage System in the urban or rural area and clearly demonstrates that none of the development as defined in Policy 4.7.8, that is otherwise permitted under the Official Plan and is not otherwise constrained by any legislation or regulation, cannot occur without negative impact on the natural heritage system or its functions, then the area on which development cannot occur is to be acquired.”

The Cavanagh motion is allowed, in part, as reflected in the directions Ordered above.

The Board so Orders

“N. Jackson”

N. JACKSON
VICE-CHAIR

Schedule “1”

COUNSEL*/AGENT	PARTY
Tim Marc* Bruce Engell*	City of Ottawa
Michael Polowin*	Metcalf Realty Kanata Research Park Simon Fuller 7089191 Canada Inc. 1633799 Ontario Inc. 3223701 Canada Inc.
Steven A. Zakem*	Taggart Realty Management Inc. Taggart Investments Inc. Tamarack (Queen Street) Corporation Tamarack (Nepean) Corporation Tamarack (Nepean South) Corporation 2226561 Ontario Inc.
Mark R. Flowers*	Mattamy (Mer Bleue) Limited Mattamy (Tenth Line) Limited Mattamy (Trim) Limited
Ken McRae	Ken McRae
Alan Cohen* Douglas B. Kelly* Ursula Melinz*	Greter Ottawa Home Builders Association (GOHBA) Riverside South Development Corporation (RSDC) Minto Communities Inc & South Nepean Development Corporation (SNDC)
Douglas B. Kelly* Ursula Melinz*	Thomas Cavanagh Construction Ltd. Karson Holding Inc. (In association with Greg Winter, Novatech Engineering)
Alan Cohen*	Arnon Corporation
Steven Cunliffe	Idone, Epscon Limited
Janet E. Bradley* Emma Blanchard*	Richcraft Homes James Maxwell Castor Creek and Airport Golf Lands Limited Gib Patterson Enterprises and Gib Patterson Claridge Homes Corporation
R. Boxma* I. Schacter*	The Ministry of Municipal Affairs and Housing
Amy Kempster	Friends of the Greenspace Alliance
A. Pritchard*	Ottawa Macdonald Cartier International Airport
J. Farber*	Trinity Properties Holdings Ltd.
R. Mahoney	Walton Development and Mining
Dr. Ranjit Perera	Humanics Universal Inc.
R. Brockelbank	The Federation of Citizen Associations of Ottawa Carleton
M. Chown	Rondolfo Mion and M&A Rentals
Paul Johonis	
William Davidson	
S. Belle-Isle	