Divisional Court File No.:
DC-20-00000151-000
LPAT Case No.: PL180842/180843

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

CAMPP WINDSOR ESSEX RESIDENTS ASSOCIATION

Appellant
(Appellant and Moving Party)

- and –

CITY OF WINDSOR, WINDSOR REGIONAL HOSPITAL and 386823 ONTARIO LIMITED

Respondents
(Respondents)

APPLICATION UNDER Section 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1

APPELLANT'S COMPENDIUM FOR ORAL ARGUMENT

May 4, 2020

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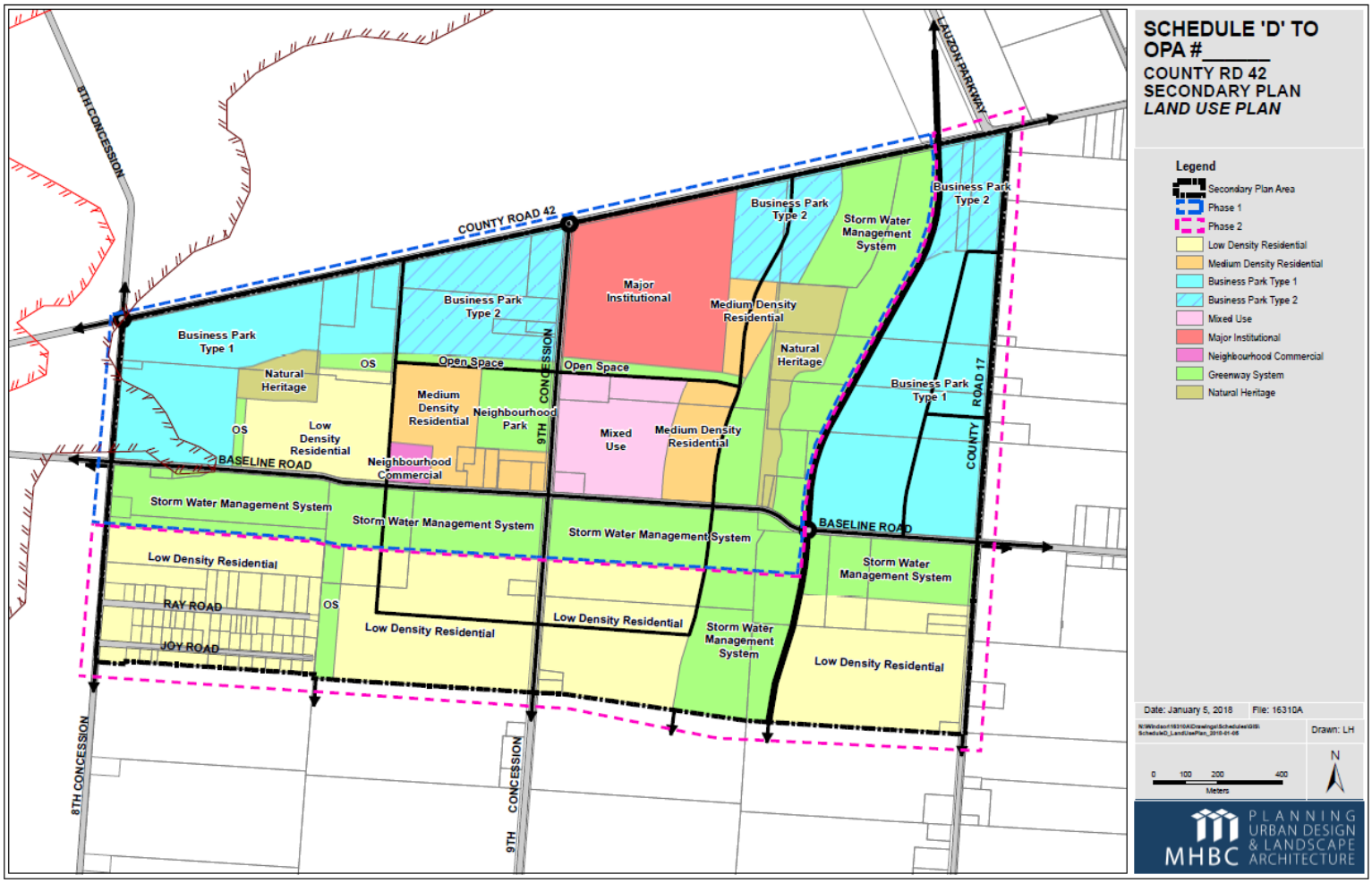
1. The Current Proposal[1]



[1] OP Planning Report, Part 1, at p.14 (handwritten page 1023); CAMPP's Motion Record at Tab 8

2. Tribunal Decision (Legislative Framework - Excerpt)[2]

[10] This Bill 139 matter proceeds under the legislative framework for planning appeals proclaimed on April 3, 2018 involving the *Local Planning Appeal Tribunal Act, 2017* ("LPAT Act") and concurrent amendments to the *Planning Act* ("Act"). Regulations under the more recently enacted Bill 108 confirm that this proceeding continues under the LPAT Act and the *Planning Act* as they read before September 3, 2019.

[11] Section 3(5) of the Act has a longstanding requirement that decisions of a municipality and the Tribunal that affect a planning matter:

> (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
> (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

[12] In this case, the decisions of the City to adopt OPA 120 and to pass the ZBA must be consistent with the PPS. Under the applicable legislative framework, these consistency and conformity tests are expanded to apply to the appeals.

[13] Section 17(24.0.1) of the Act permits appeals of an adopted OPA only on the basis of consistency and conformity, as follows:

> **Basis for appeal**
> (24.0.1) An appeal under subsection (24) may only be made on the basis that the part of the decision to which the notice of appeal relates is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or, in the case of the official plan of a lower-tier municipality, fails to conform with the upper-tier municipality's official plan.

[14] Similarly, in s. 34(19.0.1) of the Act, appellants are required to address the consistency and conformity tests in an appeal to an adopted ZBA, as follows:

> **Basis for appeal**
> (19.0.1) An appeal under subsection (19) may only be made on the basis that the by-law is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan. 2017, c. 23, Sched. 3, s. 10 (5).

[15] Windsor is a single-tier municipality with its own OP. There is no upper-tier OP and no applicable provincial plan. Thus, the sole test for OPA 120 is its consistency with the PPS, and the tests for the ZBA are its consistency with the PPS and its conformity with the City's OP. OPA 120 is an amendment to the OP and, if approved,

[2] LPAT Decision December 3, 2019; CAMPP's Motion Record, Tab 2

becomes part of the OP.

[16] The Tribunal's jurisdiction on the OPA 120 appeals is found in s. 17(49.1) of the Act whereby "the Tribunal shall dismiss the appeal" unless it "determines that a part of a decision … is inconsistent with a policy statement issued under subsection 3(1)" (s. 17(49.3)).

[17] Likewise, the Tribunal's jurisdiction on the ZBA appeal is found in s. 34(26) of the Act whereby "the Tribunal shall dismiss the appeal" unless it "determines that a part of the by-law … is inconsistent with a policy statement issued under subsection 3(1) … or fails to conform with an applicable official plan" (s. 34(26.2)).

[18] In summary, if the Tribunal finds OPA 120 and the ZBA to satisfy the consistency and conformity tests under the Act, the appeals would be dismissed and the City's decision would stand. If the Tribunal finds OPA 120 or the ZBA to not satisfy the consistency and conformity tests, the appeals would be allowed, the instruments would not be approved and would be remitted to the City with an opportunity to make a new decision (s. 17(49.3) and s. 34(26.4)).

[19] While not an explicit test for an OPA or ZBA, s. 2 of the Act assigns an overarching duty to the Tribunal to have regard to matters of provincial interest, as listed in that section, when carrying out its responsibilities under the Act.

3. ***Housen v. Nikolaisen***[3]

Housen *v*. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33

Paul Housen
Appellant

v.

Rural Municipality of Shellbrook No. 493
Respondent

Indexed as: Housen *v.* Nikolaisen

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ on appeal from the court of appeal for saskatchewan

Torts -- Motor vehicles -- Highways -- Negligence -- Liability of rural municipality for failing to post warning signs on local access road -- Passenger sustaining injuries in motor vehicle accident on rural road -- Trial judge apportioning part of liability to rural municipality -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law -- Negligence -- Liability of rural municipality for failing to post warning signs on local access road -- Passenger sustaining injuries in motor vehicle accident on rural road -- Trial judge apportioning part of liability to rural municipality -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals -- Courts -- Standard of appellate review -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- Standard of review for questions of mixed fact and law.

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[3] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (QL); Moving Parties' Authorities, Tab 3, pp. 14-15, paras 33 and 36

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial

review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This

finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing

the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. Here, the municipality cannot have been expected to

have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

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33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).

Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

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36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however,

in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

4. ***Snowden v. Ashfield-Colborne-Wawanosh (Township)***[4]

CITATION: Snowden v. The Corporation of the Township of Ashfield-Colborne-Wawanosh 2017 ONSC No. 6777
COURT FILE NO.: 3071/16
DATE: 2017/11/14

SUPERIOR COURT OF JUSTICE – DIVISIONAL COURT – ONTARIO
RE:

RONALD SNOWDEN
Applicant (Responding party)

AND:

THE CORPORATION OF THE TOWNSHIP OF ASHFIELD-COLBORNE-WAWANOSH
Respondent (Moving party)

BEFORE: Justice I. F. Leach

COUNSEL: G. Edward Oldfield, for the Applicant (Responding party)

Patrick J. Kraemer, for the Respondent (Moving party)

HEARD: March 31, 2017, and by supplemental written submissions

(HEADNOTE NOT AVAILABALE)

General principles

[11] In that regard, general principles applicable to requests for leave to appeal from OMB decisions to the Divisional Court include the following:

[4] *Snowden v. Ashfield-Colborne-Wawanosh (Township*), [2017] O.J. No. 5868 (Div. Ct.)(QL); Moving Parties' Authorities, Tab 8, p. 11, para 11

- An appeal lies from the OMB to the Divisional Court, with leave of the Divisional Court, on a question of law.[9]

- To obtain such leave, the requesting party must establish the following:

o that the proposed appeal raises a question of law;

o that there is reason to doubt the correctness of the decision of the OMB with respect to the question of law raised; and

o that the question of law raised is of sufficient general or public importance to merit the attention of the Divisional Court.[10]

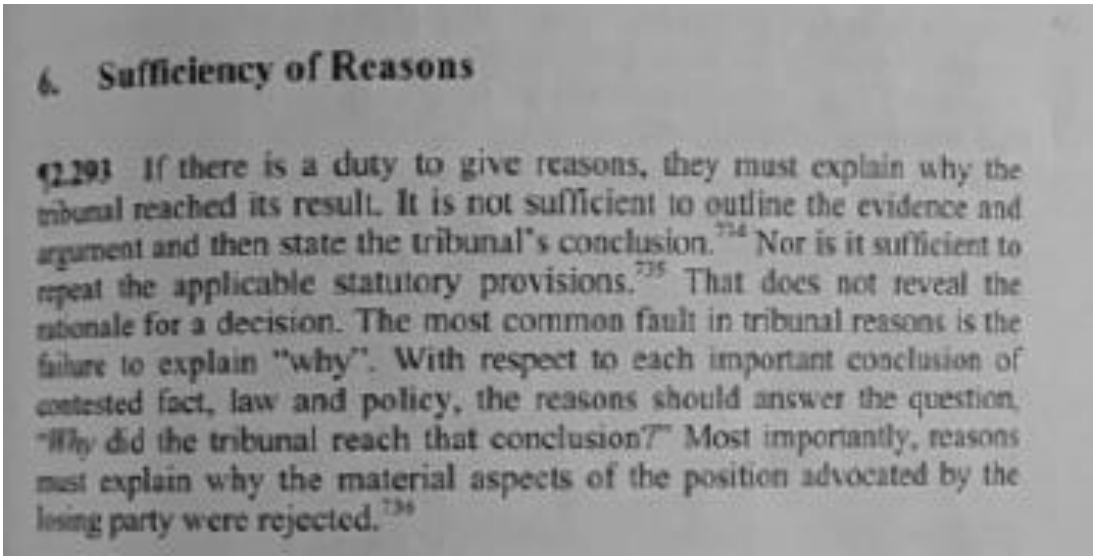
- In making determinations as to whether the proposed appeal raises a question of law:

o It must be remembered that factual findings by the OMB are not only entitled to a very high level of deference,[11] but that factual conclusions by the OMB cannot be appealed to the Divisional Court.[12] Moreover, the Divisional Court only has jurisdiction to entertain appeals from OMB decisions that concern pure questions of law; i.e., questions of law alone. The Divisional Court has no jurisdiction to entertain appeals from OMB decisions in relation to questions of mixed law and fact.[13]

The proper interpretation and application of an Official Plan, and the conformity of a proposed development with an Official plan, are questions of law.[14]

[14] See, for example: Toronto (City) v. 2059946 Ontario Ltd., [2007] O.J. No. 3021 (Div.Ct.), at paragraph 4; Ontario (Legislative Assembly) v. Avenue-Yorkville Developments Ltd., supra, at paragraph 6; and Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd., supra, at paragraph 6.

5. Blake[5]



6. Sufficiency of Reasons

¶2.293 If there is a duty to give reasons, they must explain why the tribunal reached its result. It is not sufficient to outline the evidence and argument and then state the tribunal's conclusion.[734] Nor is it sufficient to repeat the applicable statutory provisions.[735] That does not reveal the rationale for a decision. The most common fault in tribunal reasons is the failure to explain "why". With respect to each important conclusion of contested fact, law and policy, the reasons should answer the question, "*Why* did the tribunal reach that conclusion?" Most importantly, reasons must explain why the material aspects of the position advocated by the losing party were rejected.[736]

[5] Sara Blake, *Administrative Law in Canada*; 6th ed. 2017, Lexis Nexis, Moving Parties' Authorities, Tab 10, p. 101, para 2.293

6. Issue #1 - Emergency Services

a. Relevant Policies

Provincial Policy Statement, 2014

1.2.3 Planning authorities should coordinate emergency management and other economic, environmental and social planning considerations to support efficient and resilient communities.

1.6.4 Infrastructure and public service facilities should be strategically located to support the effective and efficient delivery of emergency management services.

1.1.1 Healthy, liveable and safe communities are sustained by:

(f) improving accessibility for persons with disabilities and older persons by identifying, preventing and removing land use barriers which restrict their full participation in society;

Windsor's Official Plan

Goals: In keeping with the Strategic Directions, Council's land use goals are to achieve:

6.1.6 An integration of institutions within Windsor's neighbourhoods.

Objectives:

4.2.7.3 To encourage emergency services in close proximity to where people live.

4.2.4.2 To encourage development that fosters the integration of all residents into the community.

b. Tribunal Decision (Excerpt)[6]

[61] The OP encourages emergency services in close proximity to where people live (s. 4.2.7.3) and seeks to integrate institutions within the City's neighbourhoods. Campp argues that the ZBA fails to achieve both of these intentions. The Tribunal concurs with Ms. Wiebe's response that emergency services include fire, police, ambulance and other services, as well as an acute care hospital, and that it is not possible for every service to be in close proximity to all residents. The proposed site will provide service to all residents whether nearby, across the City or in the outlying areas served by the WEHS. Again, the hospital site is part of a comprehensively planned growth area of the City that will be connected to adjacent residential, commercial, business park and natural areas.

[6] LPAT Decision December 3, 2019; CAMPP's Motion Record, Tab 2

7. Issue #2 - First Nations Consultation

a. Relevant Policies

Provincial Policy Statement, 2014

1.2.2 Planning authorities are encouraged to coordinate planning matters with Aboriginal communities.

Windsor's Official Plan

10.2.1.14 Consultation with First Nations will take place as part of a development application or detailed planning study.

b. Transcript of Presentation to Windsor City Council on December 21, 2015[7]

Boozhoo and hello Mayor Dilkens and Councillors.

Giniwdewewin Kwe niidishnikaaz, Bkejwanong minwaa Windsor niindoonjibaa, Niin Anishinaabe Kwe

My name is Beth Cook – The Heart Beat Sound a Golden Eagle Makes, I come from Walpole Island First Nation and Windsor, I am a human being and an Ojibwe woman.

I am here to share information on the impacts of funding a mega hospital. I am speaking on behalf of myself, my family and the community of Indigenous Peoples of Windsor-Essex County. The impacts shared tonight by other members of our community tonight are inclusive of Indigenous peoples. We share common concerns.

The Truth and Reconciliation Commission Calls to Action on Health calls upon all levels of government to acknowledge the current state of Aboriginal Health in Canada is a direct result of Indian Residential Schools and to recognize and implement the health-care right of Aboriginal peoples. This includes the recognition, respect and address of the distinct needs of Indigenous peoples who are First Nations – On and Off-reserve, Metis, Inuit and more recently non-status.

In order to address health-care rights, you must improve the health outcomes of Indigenous peoples.

Such efforts would focus on indicators such as: infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence, and the availability of appropriate health services.

Which brings me to the single most important concern and that is for the need for access. The United Nations Declaration on the Rights of Indigenous Peoples Articles 18-24 address the right to access health care, such as prenatal care without discrimination and governments must take the necessary steps to realize this right.

Transportation and timely emergency access is a critical concern to many Indigenous community members. Imagine the barrier to emergency services in the middle of the night for the grandmother that takes the wrong pill and poison control directs them to the emergency. Or, a child that is having an asthma attack and can't breathe. And, especially for our family members that has a mental illness and need immediate assistance. How are families to cope with appropriate health services? The existing health care facilities are adequate to the needs of many.

The LHIN Act addresses the duty to consult aboriginal peoples. Most Indigenous families and Indigenous service providers I have heard from do not have confidence in the funding for a mega hospital.

You must be prudent of these concerns in your decision.
Miigwech and thank you

[7] *Building for the Past*, at p.42; Municipal Record, Written Submissions, Part 2, at pp.39-106 of 113 (handwritten pp. 1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

c. Evidence of City's Consultation with First Nations[8]

☒ WALPOLE ISLAND FIRST NATIONS (J. MACBETH)	☒ CALDWELL FIRST NATION FIRST reception@caldwellfirstnation.ca

[8] OP Planning Report, Part 3, page 31 of 121 (handwritten page 1244); CAMPP's Motion Record, Tab 8

d. Participant Statement[9]

Beth Ann Cook

Boozhoo and Greetings LPAT Tribunal Members,

Giniwdewewin Kwe niidishnikaaz, Bkejwanong minwaa Windsor niindoonjibaa, Niin Anishinabee Kwe.

My name is Beth Ann Cook-The Heart Beat Sound a Golden Eagle Makes, I come from Walpole Island and Windsor, I am human being and Ojibwe woman.

I write to you to share information on the impacts of the mega-hospital plan which do not align with the City of Windsor's Official Plan and Provincial Policy Statement. I am speaking on behalf of myself, my family, and the community of Indigenous Peoples in Windsor-Essex County. The impacts shared by others and CAMPP are inclusive of Indigenous Peoples as we share common concerns. In addition, there are concerns specific to us as Indigenous Peoples which needed to be considered in the decision-making of Windsor City Council. Instead, there was no consideration of the needs of Indigenous Peoples at all. I spoke as a delegate to the August 13 2018 meeting of Windsor City Council and raised my concerns then as well, to no response.

I wish to participate in the LPAT appeal of the Windsor City Council decisions of 13 August 2018 to show that City Council did not comply with its Official Plan, nor with the Provincial Policy Statement requirements to consult with indigenous peoples, and to make clear that Aboriginal Health will be jeopardized by placing the new hospital in the proposed location.

According to the City of Windsor's Official Plan, "Consultation with First Nations will take place as part of a development application or detailed planning study." (10.2.1.14). Ontario's Provincial Policy Statement also indicates that "Planning authorities are encouraged to coordinate planning matters with Aboriginal communities." (1.2.2)

[9] CAMPP's Motion Record, Tab 15

To my knowledge, the only attempt to consult with indigenous peoples about the proposed mega-hospital plan was in the form of single emails to Walpole First Nation and Caldwell First Nation.

Not only was this not adequate consultation; it was no consultation at all.

There was no follow-up to the emails. No consultations or visits were scheduled. No outreach was done to organizations working with indigenous peoples living in the City of Windsor, including to the Can Am Indian Friendship Centre, although the City of Windsor has collaborated with them in the past (I have been a part of some of this work). There was also no consultation at all with Indigenous communities by the hospital site selection committee, even though their power was delegated by the LHIN which regularly consults with Indigenous Communities on other key health issues.

Many Indigenous families such as mine do not have confidence in the plan for a mega-hospital at the proposed County Rd 42 location. Had an adequate consultation been completed, this would have come to light.

Had adequate consultation with Indigenous Communities been undertaken, significant concerns about the expected impacts on health for our peoples would have come to light.

The Truth and Reconciliation Commission Calls to Action on Health (Calls 18-24) call upon all levels of government to acknowledge the current state of Aboriginal Health in Canada. This is a direct result of the Indian Residential Schools System. There is a need to recognize and implement proper health care rights to Indigenous Peoples. This includes the recognition, respect and address of the distinct needs of Indigenous Peoples who are First Nations-On and off reserve, Metis, Inuit, and more recently non-status.

In order to address health-care rights, you must improve the health outcomes of Indigenous peoples.

Such efforts would focus on indicators such as infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence and the availability of health services.

This brings me to the single most important concern which is the need for access. The United Nations Declaration on the Rights of Indigenous Peoples Articles 21-29 address the right to access health care such as prenatal care without discrimination. Article 29(3), for example, states:

> 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Governments must take the necessary steps to realize this right. In conducting no consultation at all with Indigenous Peoples, none of the concerns specific to indigenous peoples, and none of the ways in which both the TRC and UNDRIP call Canadian governments, including municipalities, to respond, were considered.

There are barriers with transportation and timely emergency access to the proposed mega-hospital site. These are critical concerns of many Indigenous community members living in Windsor-Essex. For example, the grandmother who takes the wrong pill in the middle of the night who is directed by poison control to go to the emergency room may very well not make it there in time if the mega-hospital is developed at the proposed site. Or a child that is having an asthma attack and cannot breathe? Or family members with a loved one that has a mental illness and needs immediate assistance? How are families to cope with services that are not accessible to them? The existing health care facilities are adequate to the needs of many because of how close they are in proximity to the people who need these services the most. The City of Windsor's Official Plan states in chapter 4 "To recognize the needs of the community in terms of shelter, support services, accessibility and mobility." (4.2.3.3) The proposed mega-hospital's location will not be accessible to the community.

Also, for community members residing at Walpole Island, some complex medical care is provided in the hospitals in Windsor-Essex. For example, as I write this my own father is in hospital in Windsor recovering from surgery. Although I recently moved from Windsor back to Walpole Island, caring for my father requires me to stay regularly overnight in Windsor to support him in hospital. With the hospitals' current locations, I can stay with friends in the city or in affordable accommodations in central locations and access the hospitals on foot, by transit or by a short car ride. If the hospital is moved to County Rd 42, both the cost and time will be prohibitive for the kinds of daily support I need to provide.

You must be prudent of these concerns in your decision. Reconciliation requires ongoing relationship-building, communication and consultation. I hope that LPAT will send this important decision for our community back to Windsor City Council so that they may consult meaningfully with indigenous communities before making a plan for the future of our hospital system.

Miigwech and thank you,

Beth Ann Cook

e. CAMPP's Written Submissions (Excerpt)[10]

Issue 23 - Failure to consult with Indigenous communities

ZBLA 132-2018 further failed to fulfil its obligations under PPS policy 1.2.2 and section 10.2.1.14 of Windsor's OP, to consult with affected indigenous communities in the hospital site selection process.

Policy 1.2.2 of the PPS indicates "Planning authorities are encouraged to coordinate planning matters with Aboriginal communities." Policy 10.2.1.14 of Windsor's Official Plan states "Consultation with First Nations will take place as part of a development application or detailed planning study."

No substantive consultation occurred at all with Indigenous communities affected by the decision-making process leading to ZBLA 132-2018.

Indigenous communities affected by ZBLA 132-2018 include Walpole Island First Nation and Caldwell Island First Nation, their members living both on reserve and in Windsor and elsewhere in Essex County, as well as other indigenous peoples living in the City of Windsor.

One email was sent to J. Macbeth at Walpole Island First Nation.[51] It has not been explained why the email was addressed to that recipient. The body of the email provided limited detail as to the nature of the consultation to which WIFN was being invited. No response was received.

There is no evidence of any attempt to communicate directly with the Chief of Walpole Island First Nation.

Likewise, an email was sent to the reception mailbox for Caldwell First Nation,[52] with no response. No follow-up action was taken and no attempt was made to contact directly the Chief of Caldwell First Nation.

According to Statistics Canada, 5565 persons of Aboriginal identity lived in Windsor during the 2016 Census. Yet no attempt was made to contact the Can-Am Friendship Centre or any other group representing the interests of Indigenous persons living in Windsor. This, despite the fact that the City of Windsor has consulted with the Can-Am Friendship Centre in the past on community-based initiatives.

[10] CAMPP Windsor Essex Residents Association Written Summary of Oral Submissions, pp.20-21; CAMPP's Motion Record, Tab 16

Ms. Beth Ann Cook states "To my knowledge, the only attempt to consult with indigenous peoples about the proposed megahospital plan was in the form of single emails to Walpole First Nation and Caldwell First Nation. Not only was this not adequate consultation; it was no consultation at all."[53]

The acts taken by the City of Windsor to consult with indigenous communities must also be read in light of the requirements of the Truth and Reconciliation commission's Calls to Action (TRC), quoted by Cook in her participant statement.[54] These include Call #47, which require municipal governments to repudiate concepts justifying European sovereignty and to reform laws, policies and litigation strategies that continue to rely on these concepts. A consultation process which consists only of sending an email to someone at a First Nation (and not even to the Chief of that First Nation) is inconsistent with a municipal government's obligation under the TRC.

ZBLA 132-2018 is, therefore, inconsistent with policies 1.1.2 of the PPS and section 10.2.1.14 of Windsor's OP in its failure to consult with Indigenous communities.

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[51] *Municipal Record*, PL180842, OP, Tab 9, *Building for the Past: Sandwich South Secondary Plan Amendment & Hospital Zoning*, at p. 1524 (p.30 of the report).
[52] *Ibid.*
[53] Beth Ann Cook, *Participant Statement*.
[54] *Ibid.*

f. Tribunal Decision (Excerpt)[11]

Consultation

[35] Campp asserts that the City failed to consult adequately with Indigenous communities in the preparation of the SP and ZBA. Campp acknowledges that it is not alleging a breach of the legal duty to consult that pertains, for example, to the Province of Ontario, but that the City failed to uphold the spirit and intent of the PPS and OP.

[36] The PPS states,

> 1.2.2 Planning authorities are encouraged to coordinate planning matters with Aboriginal communities.

[37] The OP contains a similar policy:

> 10.2.1.14 Consultation with First Nations will take place as part of a development application or detailed planning study.

[38] The City and WRH respond that three well-attended public information sessions were notified and convened by WRH before submitting the OPA and ZBA applications. After submission, the City displayed the Applicant's studies and applications on its website, published notice of the public meeting in the Windsor Star newspaper, and held a lengthy public meeting, all in accordance with the Act. The City followed its standard practice of notifying departments, groups and agencies by email, including the Walpole Island First Nation and Caldwell First Nation. When comments were not received from the First Nations, a follow-up email was also sent.

[39] For the reasons that follow, the Tribunal is satisfied that the SP and ZBA are consistent with the PPS and that the ZBA conforms with the OP regarding consultation with Aboriginal communities. As argued by the City and WRH, these applications were highly publicized throughout the City. The hospital planning process was extensive and controversial, and by the time planning applications were made, the record suggests that a full understanding of the proposal was widespread.

[40] Coordination and consultation connote discussion which implies a two-way conversation. The City must take reasonable steps to provide notice but cannot force a party to the table. An interested stakeholder bears some responsibility to respond to an invitation to participate whether that invitation arises from direct email, published notice or general knowledge in the community.

[41] The PPS utilizes verbs carefully and intentionally. Part III of the PPS provides instruction on how to interpret positive directives such as "shall" as compared to

[11] LPAT Decision December 3, 2019; CAMPP's Motion Record, Tab 2

enabling or supportive language such as "encourage." The policy in question encourages but does not mandate the coordination of planning matters with Aboriginal communities. The Tribunal finds that, in the circumstances of these community-wide and publicly known issues, the City encouraged full participation of all potential stakeholders. Similarly, through the various channels, the City took reasonable steps to invite First Nations to enter into consultation as contemplated by the OP.

[42] In hindsight, more could have been done to consult local Indigenous communities. Campp raises the Truth and Reconciliation Commission of Canada's directives in support of finding new ways to engage fairly, openly and equally. However, in the case at hand, the statutory requirements for notice were satisfied, and even in the absence of more, the City's efforts at consultation are considered sufficient to satisfy the policies.

8. Issue #3 - Climate Change

a. Relevant Policies

1.1.3.2 Land use patterns within *settlement areas* shall be based on:
a) densities and a mix of land uses which:
1. efficiently use land and resources;
2. are appropriate for, and efficiently use, the *infrastructure* and *public service facilities* which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion;
3. minimize negative impacts to air quality and **climate change**, and promote energy efficiency;
4. support *active transportation*;
5. are *transit-supportive*, where transit is planned, exists or may be developed; and
6. are *freight-supportive*; and
b) a range of uses and opportunities for *intensification* and *redevelopment* in accordance with the criteria in policy 1.1.3.3, where this can be accommodated.

1.8.1 Planning authorities shall support energy conservation and efficiency, improved air quality, reduced **greenhouse gas emissions**, and **climate change** adaptation through land use and development patterns which:
a) promote compact form and a structure of nodes and corridors;
b) promote the use of *active transportation* and transit in and between residential, employment (including commercial and industrial) and institutional uses and other areas;
c) focus major employment, commercial and other travel-intensive land uses on sites which are well served by transit where this exists or is to be developed, or designing these to facilitate the establishment of transit in the future;
d) focus freight-intensive land uses to areas well served by major highways, *airports*, *rail facilities* and *marine facilities*;
e) improve the mix of employment and housing uses to shorten commute journeys and decrease transportation congestion;
f) promote design and orientation which:
1. maximizes energy efficiency and conservation, and considers the mitigating effects of vegetation; and
2. maximizes opportunities for the use of *renewable energy systems* and *alternative energy systems*; and
g) maximize vegetation within *settlement areas*, where feasible.

b. CAMPP's Written Submissions (Excerpt)[12]

Page 2:

PPS policy 1.1.3.2 (a) states:

"Land use patterns within settlement areas shall be based on:
a) densities and a mix of land uses which:
1. efficiently use land and resources;
2. are appropriate for, and efficiently use, the infrastructure and public service facilities which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion;
3. minimize negative impacts to air quality and climate change, and promote energy efficiency;
4. support active transportation;
5. are transit-supportive, where transit is planned, exists or may be developed; and
6. are freight-supportive."

Constructing the proposed development in an agricultural area 13km from the city center is not an efficient use of municipal and provincial resources.

Public expenditure is unnecessarily increased to provide services and utilities to this distant location away from existing municipal services.

Public transportation was contemplated, however, no formal plan nor costings have been done. It is unreasonable to expect that public transit to the proposed development will be substantially better than existing transit services. PPS Policy 1.1.3.2 (a) (5) is not satisfied.

Additionally, although active transportation within the proposed development is contemplated, there is no thorough active transportation plan to link the established footprint of the city to the new development. This contravenes PPS Policy 1.1.3.2.(a) (4) as OPA 120 clearly does not support active transportation as a viable method of transportation to and from the proposed new development.

In Ms. Keesmaat's opinion, "OPA 120 creates a fundamental divergence from the objectives of the Official Plan to create a sustainable city over time. Given an expected on-going slow growth scenario, releasing agricultural land for development will likely result in more vacant properties in the core, add more vehicular traffic, resulting in the inefficient use of existing land and infrastructure."[4]

OPA 120 thus fails to satisfy the standards mandated by 1.1.3 and 1.1.3.2(a) of the PPS.

[12] CAMPP Windsor Essex Residents Association Written Summary of Oral Submissions, page 2; CAMPP's Motion Record, Tab 16

Page 5:[13]

Dr. Rita Haase notes in her participant statement that bringing construction, development, land intensification, and the ongoing costs of maintaining infrastructure in the future in a former agricultural area will likely worsen air quality and increase pollution.[9]

Air quality will also be negatively affected by the increase in motorists travelling to and from the new development by car, rather than walking, cycling or taking public transportation. The Windsor Region Society of Architects (WRSA) report indicates greenhouse gas emissions (GhG) will increase as a result of expanding the established footprint of the City of Windsor, in particular, coupled with the limited availability of transit to and from the new subdivision.[10]

By contrast, the City of Windsor's Community Energy Plan (CEP), passed by Council in 2017, calls for a "modal shift towards Public Transit" and for the City to "Integrate Energy Solutions into Land Use Policies".[11] The CEP also commits to a reduction in GhG emissions and per capita primary energy use of 40% by the Windsor community by 2041.

[13] CAMPP Windsor Essex Residents Association Written Summary of Oral Submissions, page 5; CAMPP's Motion Record, Tab 16

Pages 13-17:[14]

Policy 1.8.1(e) of the PPS states: "Planning authorities shall support energy conservation and efficiency, improved air quality, reduced greenhouse gas emissions, and climate change adaptation through land use and development patterns which: improve the mix of employment and housing uses to shorten commute journeys and decrease transportation congestion."

As Ms. Cheryl Golden states in her participant statement, "the logistics surrounding transportation [to the proposed hospital site are] a nightmare."[35]

Transportation to the proposed site will not be energy efficient, will not facilitate the movement of people and goods, nor address projected needs in any comprehensive way. Realistically, for many years to come, the only reliable and safe travel options between much of the established footprint of the City of Windsor and the proposed new hospital will be private vehicle or taxi. This will cause more transportation congestion and will increase greenhouse gas emissions from additional travel incurred.

As Mr. David Hanna in his participation statement notes, "The plan will cause more unnecessary vehicular trips due to its distance from the city core and the homes of existing employees and patients. The plan will promote more sprawl and automobile ownership."[36]

As expressed in the City of Windsor's Community Energy Plan (CEP), passed by Windsor City Council in 2017, Windsorites spend the most on transportation and transportation based energy (46% at $383.5 M for transportation) and on Gasoline (42% at 348.7M for Gasoline). The

proposed hospital site would see these figures and costs rise as it would demand more driving by Windsorites.[37]

The length and number of vehicle trips to the proposed will be far longer for Windsorites living in the City's central neighbourhoods when compared to the two existing hospital campuses, increasing costs for citizens and making carbon-reduction goals far more difficult to achieve. It will increase traffic congestion, and will increase energy use and greenhouse gas emissions, contributing to, rather than mitigating, climate change.

In proposing a hospital location which will require increased car use, the plan also contravenes provisions specific to both public and active transportation.

Active transportation

The proposed location's distance from established neighbourhoods will force hospital and other workers who currently live within walking or cycling distance to drive to work.

[14] CAMPP Windsor Essex Residents Association Written Summary of Oral Submissions, pp. 13-17; CAMPP's Motion Record, Tab 16

Bike Windsor Essex states:[39]

> The 4000+ staff and countless volunteers and visitors who currently commute to Windsor Regional Hospital, will not be able to choose active transportation to the new hospital site 13 kilometres from Windsor's downtown core — where the vast majority of cyclists reside.

Access routes to Sandwich South along Walker Road and Lauzon Parkway have no safe bicycle or pedestrian infrastructure. E.C. Row Expressway is inaccessible to cyclists and pedestrians. Further, integrated cycling infrastructure to the proposed hospital and new subdivision have not been incorporated into the Active Transportation Master Plan.

The proposed hospital site is likewise not transit supportive: the lengths and number of vehicle trips are not minimized due to the population density of Windsor's central neighbourhoods, especially for those with chronic medical conditions who live within walking distance of one of the existing hospital campuses.

The proposed site is not close to existing businesses and homes, and employees, patients and their families will not have access to the city center's many options for food, clothing and other needs when receiving services at the current site selected for the new hospital.

In his letter to Windsor City Council, urban affairs journalist, Windsor native and University of Toronto lecturer Mr. Shawn Micallef states:

> Instead of injecting many hundreds of well-paid workers into a dense part of the city where they might shop before or after their shifts, or go for lunch at nearby restaurants,
>
> they would be sent off to a self contained campus. On top of those workers, all the visitors to the hospital may linger in the neighbourhoods before and after visiting loved ones.[41]

The day to day to-day needs of local residents will not be met because the proposed hospital site will be beyond reasonable walking distance from Windsor's central neighbourhoods and the housing, services and retail available in them. The hospital will not be integrated into any of Windsor's existing neighbourhoods.

The proposed hospital site is beyond Windsor's established neighbourhoods and, therefore, will not be integrated as envisioned by Section 6.1.6. Keeping a major employer downtown, and the significant provincial investment which will accompany this project, is clearly better for downtown businesses and the revitalization of the City center. Removing the two existing hospitals from the established footprint of the City will also see, at minimum, some employees relocate their residences to be closer to the proposed site.

Pedestrian and cycling access to the proposed hospital site would not be easily accommodated for those citizens living in or near the present City centre. Access to Sandwich South by bicycle or on foot from neighbourhoods north of E.C. Row Expressway is bisected by airport land which lies between. Access routes leading to Sandwich South are not engineered for safe active transportation. Bike Windsor Essex notes that "The current roads from almost all neighbourhoods to the proposed hospital site would be dangerous for anyone not driving a car, including travelling across the E.C. Row Expressway which effectively blocks off all the available routes for safe passage.[42]

The proposed hospital site will not be easily accessible to vulnerable residents in central neighbourhoods who do not drive. Wards 2,3 4 and 5 are also Windsor's lowest income wards. Income is well-established to be inversely correlated to health outcomes, as corroborated by the Erie St. Clair LHIN in this illustration of what they describe as a Social Deprivation Index: Key areas with a high concentration of social deprivation include Windsor West and Windsor City Centre.[43] Residents of these Wards, also the farthest from the proposed location, will be the most affected by the lack of active and public transit access to the hospital.

Ms. Keesmaat indicates in her affidavit that "to support walking, cycling and transit, the hospital must be sited in a location that readily provides excellent mobility choice related to these options. Integration with the existing urban fabric of the city would be the most strategic, effective, and cost-effective way to do so."[44]

Therefore, ZBLA-132 2018 is inconsistent with the PPS, 2014 policies 1.6.3(a)(b), 1.6.7.1, 1.6.7.4, 1.6.7.5, 1.8.1(e) and fails to conform to policies 3.2.3.1, 4.2.1.6, 4.2.3.2, 6.1.6, 6.6.1.2,

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[41] *Appeal Record*, PL180842: G(a) "Written Submissions not included in Enhanced Municipal Record-Shawn Micallef" in "Other Relevant Documents and Materials".
[42] Bike Windsor Essex, *Participant Statement*.
[43] *Municipal Record*, PL180842, OP, Tab 9, *Building for the Past*, at p.1504 (p.17 of the report).
[44] Affidavit of Jennifer Keesmaat, at para. 25.

c. Documents

Windsor Region Society of Architects: Community Energy Plan[15]

Windsor's Community Energy Plan – June 2017 – Summary

Windsor's Community Energy Plan of June 2017 provides guiding principles that are intended to demonstrate global leadership and create a competitive and economic advantage for Windsor. It aims to create a more sustainable community with smart energy systems and land use planning promoting compact developments, greater opportunities for walking, cycling and public transportation which the Mega-Hospital proposed location totally contradicts.

The energy plan lists 'Energy Planning Districts' with the bulk of Windsor's population residing far from the proposed Mega-hospital site. It shows that the city spends most on transportation-based energy at 46% which would clearly increase with this needless sprawl without a justifiable population increase. It lists the consideration of creating a special purpose 'Multi-Utility Company' to integrate smart networks providing electricity, district heating, cooling, water and waste water management and distribution services, which are highly inefficient when catering to sprawl without the population to utilize it fully and effectively.

The most critical aspect of the proposed Mega-Hospital location is the hope for a city-scale District Energy System to supply a network of heating and cooling to replace individual furnaces, boilers

and chillers in buildings. These networks allow all sources to be mixed together creating lower cost, lower emissions and added reliability which recover waste heat while creating a larger economy of scale for these assets. There are a few district energy systems currently in place in the city now, one of which is in the urban core. If the Mega-Hospital was included these efficiencies could be increased and further developed much more economically and effectively for more facilities giving Windsor that energy competitive edge it so desires. The proposed Mega-Hospital site is actually working contrary to the district energy initiative.

Windsor's Community Energy plan – 2009 - Summary

Integrate Cycling Infrastructure Page 26 (reference 2009 Windsor Community Energy Plan). Integrate Cycling Infrastructure. Developing municipal cycling infrastructure is important in helping to achieve Ontario's vision of becoming Canada's premier cycling province (ref Integrate Cycling Infrastructure Page 26). More and more people are choosing cycling as their preferred way to get around. By developing cycling infrastructure, Windsor can support and encourage the growth of cycling while simultaneously reducing both corporate and community emissions. The balance of the report dealt with Continuing to Improve Operations, Maintenance, and Monitoring to reduce energy consumption.

[15] Written Submissions, Part 1, *Windsor's Proposed Mega-Hospital Site Review Report*, Windsor Region Society of Architects at pp.34-36 of 110 (handwritten pp. 1367-1369); CAMPP's Motion Record, Tab 8 at Tab 9

As local Architects and associate design professionals wanting to contribute to the ongoing dialogue, a review of available information specific to best practices, planning and community policies were tested against the proposed hospital location based on the following:

- Ontario Provincial Policy Statement
- City of Windsor Brownfield Redevelopment Strategy
- City of Windsor Environmental Master Plan
- Windsor's Community Energy Plan of June of 2017
- Hospital and Health Care Facilities Precedent Studies
- CSA Z8000-11, Canadian Health Care Facilities (HCF)-Reaffirmed 2016

Each research item presented important information towards the WRSA Mega-Hospital Site Review Committee's collective understanding and evaluation of the proposed Mega-Hospital site. These documents contained a pattern of information about the need for compact neighbourhoods, community development, sustainability, and generally did not recommend green field development.

Windsor's Proposed Mega-Hospital Site Review Report, Windsor Region Society of Architects at page 28 of 110 (handwritten page 1361); CAMPP's Motion Record, Tab 8, Written Submissions, Part 1, Tab 9.

According to the Environmental Commissioner of Ontario's Annual Energy Report, **"transportation is Ontario's largest source of greenhouse gas emissions and typically is the largest energy use.** In 2014, the transportation sector consumed 36 per cent of Ontario's energy."63 **In Windsor, the transportation sector accounts for 26 per cent of the energy used, 36 per cent of GHG emissions and 46 per cent of the energy costs.**

There are three key actions to curb transportation GHG emissions at the community level: (1) support the shift to shared and public transit; (2) adoption of electric vehicles and alternative fuels such as compressed natural gas, biodiesel, and hydrogen; and **(3) land use policies that promote mixed use, compact urban form and promote active transportation options such as walking and cycling.**

Windsor's Proposed Mega-Hospital Site Review Report, Windsor Region Society of Architects at page 60 of 110 (handwritten page 1393); CAMPP's Motion Record, Tab 8, Written Submissions, Part 1, Tab 9.

City of Windsor Climate Change Adaptation Plan[16]

Continual Improvement of the Climate Change Plan

While these short-term actions may help reduce Windsor's vulnerability to current events and future climate change scenarios, the City also needs to develop on-going strategies that will continue to address the changing climate over the long-term. As the science of climate change continues to advance and the knowledge outlining the most effective ways to reduce climate change impacts develops, the City must continuously look at enhancing the resiliency of the community using the best available knowledge. The following strategies should be undertaken to ensure that the City of Windsor continues to be a leader on adaptation well into the future:

1. Incorporate climate change adaptation into city policies and high level plans;
2. Create internal mechanisms to 'ask the climate question' for new major infrastructure projects;
3. Monitor climate change, evaluate the effectiveness of adaptation strategies and adjust as needed (adaptive management);
4. Use best available science to analyze how the climate is changing locally and how this may impact the community;
5. Routinely review the City of Windsor's vulnerability to climate change;
6. Continuously conduct risk assessments to identify priority impacts requiring adaptation actions,
7. Engage the public, business and other stakeholder groups.

[16] OP Appeal Record, City of Windsor Climate Change Adaptation Plan at p.27 of 36; CAMPP's Motion Record, Tab 11

CAMPP: Dependence on cars is a key contributor to carbon footprint[17]

Rather than promoting multimodal transport, CR42SP will increase dependence on cars. It will perpetuate a 20th century mode of travel that is a key contributor to our carbon footprint.

The increase in aggregate commute distance described earlier will increase road usage. It will also diminish the likelihood of people choosing active transportation (transit, cycling or walking).

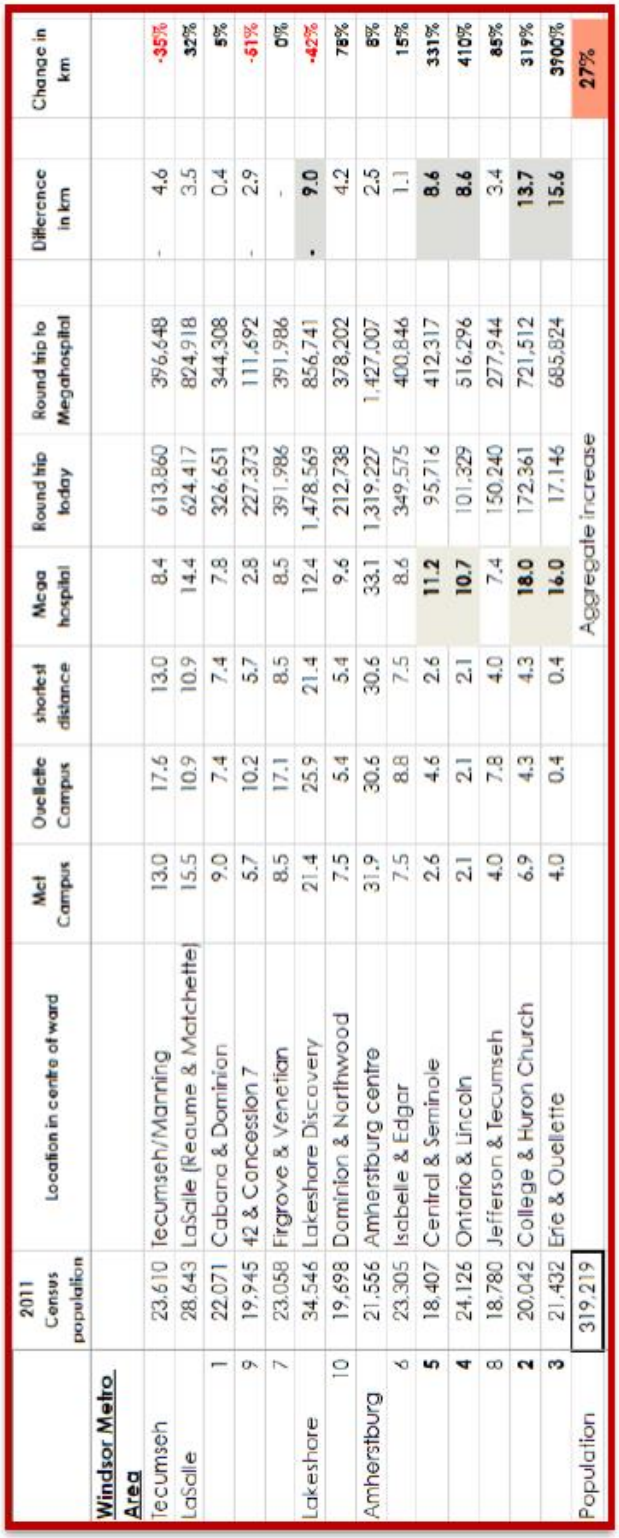
7.2 Heat Island Effect

The increased roadways and acres of surface parking (no parking structures) and low density housing associated with CR42SP will add to the city's heat island effect and attendant risks to the health and well-being of Windsor's residents.

Windsor's Environmental Master Plan describes the urban heat island effect (UHIE) as the temperature difference between urban and surrounding rural areas. Furthermore:

[17] *Building for the Past*, at p. 28; Municipal Record, Written Submissions, Part 2, at pp. 39-106 of 113 (handwritten pp. 1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

Calculations showing 27% increase in commute distance[18]



	2011 Census population	Location in centre of ward	Mel Campus	Ouellette Campus	shortest distance	Mega hospital	Round trip today	Round trip to Megahospital	Difference in km	Change in km
Windsor Metro Area										
Tecumseh	23,610	Tecumseh/Manning	13.0	17.6	13.0	8.4	613,860	396,648	- 4.6	-35%
LaSalle	28,643	LaSalle (Reaume & Malchette)	15.5	10.9	10.9	14.4	624,417	824,918	3.5	32%
1	22,071	Cabana & Dominion	9.0	7.4	7.4	7.8	326,651	344,308	0.4	5%
9	19,945	42 & Concession 7	5.7	10.2	5.7	2.8	227,373	111,692	- 2.9	-51%
7	23,058	Firgrove & Venetian	8.5	17.1	8.5	8.5	391,986	391,986	-	0%
Lakeshore	34,546	Lakeshore Discovery	21.4	25.9	21.4	12.4	1,478,569	856,741	**- 9.0**	-42%
10	19,698	Dominion & Northwood	7.5	5.4	5.4	9.6	212,738	378,202	4.2	78%
Amherstburg	21,556	Amherstburg centre	31.9	30.6	30.6	33.1	1,319,227	1,427,007	2.5	8%
6	23,305	Isabelle & Edgar	7.5	8.8	7.5	8.6	349,575	400,846	1.1	15%
5	18,407	Central & Seminole	2.6	4.6	2.6	**11.2**	95,716	412,317	**8.6**	331%
4	24,126	Ontario & Lincoln	2.1	2.1	2.1	**10.7**	101,329	516,296	**8.6**	410%
8	18,780	Jefferson & Tecumseh	4.0	7.8	4.0	7.4	150,240	277,944	3.4	85%
2	20,042	College & Huron Church	6.9	4.3	4.3	**18.0**	172,361	721,512	**13.7**	319%
3	21,432	Erie & Ouellette	4.0	0.4	0.4	**16.0**	17,146	685,824	**15.6**	3900%
Population	319,219					Aggregate increase				**27%**

[18] *Building for the Past*, at p.43; Municipal Record, Written Submissions, Part 2, at pp. 39-106 of 113 (handwritten pp. 1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

Windsor Environmental Master Plan[19]

Goal C – Responsible Land Use

❖ To enhance our community through naturalization, reforestation, park and urban planning, densification and community initiatives.

Land use planning measures should be such that the full potential of available land is reached in a sustainable way. While it is essential to allot land to housing, industry and education, there needs to be sufficient green space and improved road connectivity for all road users. Use of unused or vacant land should enhance the quality of life for residents, for example, through urban farming, creation of green space, or by building developments to support the economy. This process of repurposing or redeveloping land is known as land recycling, and it facilitates social and economic vitality and sustainability. It helps address the issues of urban sprawl and climate change by increasing density, reducing dependence on automobiles and increasing green space. Efficient land use techniques help preserve natural heritage and enhance ecological diversity and service. Healthier natural systems provide ecological services such as purification of water and air, pollination of plants and increased recreational opportunities to the benefit of human health.

Objective C1: Encourage in-fill and higher density in existing built areas

Lead: Planning
Assist: Windsor Essex County Health Unit, Windsor Essex Economic Development Corporation

Actions:

- Promote concentration, encourage adaptive reuse of buildings, especially heritage buildings in core areas. These buildings already have infrastructure in place: streets, sewers, schools, transit.
- Identify opportunities for higher density development to support alternatives to driving (transit, cycling, walking, etc).
- Examine current policies and by-laws; provide incentives for infill/higher density; set minimum density requirements.
- Design commercial and residential land use to maximize access to public transit.
- Support the existing Brownfields Redevelopment Strategy and implement its work plan.
- Continue the implementation of community improvement plans to encourage investment in older neighbourhoods.
- Monitor the success of the Brownfield Redevelopment Community Improvement Plan. Focus on beautification and renewal of existing built areas.

Indicators:

- Population Density in the core area of Windsor
- Number of Records of Site Condition filed (indicator of how many brownfields are being repurposed)

[19] OP Appeal Record, Windsor Environmental Master Plan at p.30 of 36; CAMPP's Motion Record, Tab 11

Participant Statements (Excerpts)

Krysta Glovasky-Ridsdale[20]

> Placing the only hospital in a location that can only be accessed by vehicular transport increases emissions, and compounds our dependence on fossil fuels. Our current hospital locations are close to existing neighbourhoods and are walkable by many or accessible by public transit. This is a step backwards when facing an aging citizenry, higher number of those living in poverty, and an increasing population plagued by chronic health issues. The decision to place a hospital there and to build a new housing development where no infrastructure exists is also inconsistent with the **Provincial Policy Statement, 2014**, which promotes land use patterns that minimize the length

Rita Haase, Ph.D., MEd[21]

> Supporting the hospital plan as proposed would contravene the PPS, OP, and the MOECC's vision, which "is an Ontario with clean and safe air, land and water that contributes to healthy communities, ecological protection, and environmentally sustainable development for present and future generations."[3] To adopt the Ministry's vision is particularly important for our region since the residents of Windsor and Essex County already face amounts of air and water pollution that are above Ontario's average due to industrial exposure and cross-border traffic.[4] Windsor City Council needs to reconsider the re-zoning in consideration of the PPS, OP, and Ontario's Climate Change Action that all promote environmentally sound planning, including: cycling infrastructure, mixed-use designs, protections of green space and farmland, reduction of urban and sprawl, and emissions reduction.
>
> I have attached three appendices with particularly relevant sections that City Council must consider from the Climate Change Action Plan, OP, and PPS.

[20] Krysta Glovasky-Ridsdale, *Participant Statement;* CAMPP's Motion Record, Tab 15
[21] Rita Haase, Ph.D., MEd, *Participant Statement*; CAMPP's Motion Record, Tab 15

Robert Harris[22]

year. These potential devastating impacts of city development must be considered by City Council as we are facing a climate change crisis caused by extremely high energy consumption. The recent United Nations Intergovernmental Panel on Climate Change report called for a 45% reduction in greenhouse gas output in just 12 years time in order to avoid catastrophic climate impacts. Even if all the homes in this new development were so-called net zero energy homes (which is extremely unlikely), the embodied energy required to build them would cause a huge net rise in energy consumption at exactly the time when we approach the tipping point for runaway global warming.

[22] Robert Harris, *Participant Statement*; CAMPP's Motion Record, Tab 15

d. Tribunal Decision (Excerpt)[23]

[54] The following sections of the PPS are the focus of these issues.

1.1.1 Healthy, liveable and safe communities are sustained by:

a) promoting efficient development and land use patterns which sustain the financial well-being of the Province and municipalities over the long term;
b) accommodating an appropriate range and mix of residential …, employment …, institutional … and other uses to meet long-term needs;
c) avoiding development and land use patterns which may cause environmental or public health and safety concerns;
d) …
e) promoting cost-effective development patterns and standards to minimize land consumption and servicing costs;
f) improving accessibility for persons with disabilities and older persons by identifying, preventing and removing land use barriers which restrict their full participation in society;
g) ensuring that necessary infrastructure … and *public service facilities* are or will be available to meet current and projected needs; and
h) promoting development and land use patterns that … consider the impacts of a changing climate.

1.1.3.2 Land use patterns within *settlement areas* shall be based on:

a) densities and a mix of land uses which:

1. efficiently use land and resources;
2. are appropriate for, and efficiently use, the *infrastructure* and *public service facilities* which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion;
3. minimize negative impacts to air quality and climate change, and promote energy efficiency;
4. support *active transportation*;
5. are transit-supportive, where transit is planned, exists or may be developed; and

b) a range of uses and opportunities for intensification and redevelopment …

1.2.3 Planning authorities should coordinate emergency management and other economic, environmental and social planning considerations to support efficient and resilient communities.

1.6.3 Before consideration is given to developing new *infrastructure* and *public service facilities*:

a) the use of existing *infrastructure* and *public service facilities* should be optimized; and

b) opportunities for adaptive re-use should be considered, wherever feasible.

1.6.4. *Infrastructure* and *public service facilities* should be strategically located to support the effective and efficient delivery of emergency management services.

1.7.1 Long-term economic prosperity should be supported by: …

c) maintaining and, where possible, enhancing the vitality and viability of downtowns and mainstreets;

…

e) promoting the redevelopment of *brownfield sites*;

[23] LPAT Decision December 3, 2019; CAMPP's Motion Record, Tab 2

[63] Several PPS policies are applicable to this SP and ZBA regarding mobility:

> 1.6.7.1 *Transportation systems* should be provided which are safe, energy efficient, facilitate the movement of people and goods, and are appropriate to address projected needs.
>
> 1.6.7.4 A land use pattern, density and mix of uses should be promoted that minimize the length and number of vehicle trips and support current and future use of transit and *active transportation*.
>
> 1.6.7.5 Transportation and land use considerations shall be integrated at all stages of the planning process.
>
> 1.8.1 Planning authorities shall support energy conservation and efficiency, improved air quality, reduced greenhouse gas emissions, and climate change adaptation through land use and development patterns which:
>
> a) promote compact form and a structure of nodes and corridors;
>
> b) promote the use of *active transportation* and transit in and between residential, employment (including commercial and industrial) and institutional uses and other areas;
>
> c) focus major employment, commercial and other travel-intensive land uses on sites which are well served by transit where this exists or is to be developed, or designing these to facilitate the establishment of transit in the future;
>
> ...
>
> e) improve the mix of employment and housing uses to shorten commute journeys and decrease transportation congestion;

e. Other Possible Hospital Locations[24]

3.6 Proof of increased commute distance
The map below shows the locations of the 15 sites with the highest accessibility scores that were considered as a location of the new acute care hospital.

The top-scoring site, located on Tecumseh Road at Lauzon (the so-called GEM site), also received the top score on accessibility.

In contrast, the County Road 42 site scored 70%.

Had the top-scoring GEM site, in an established neighbourhood and equidistant from EC Row, been selected for the new hospital, aggregate commute distances would be shorter than those that will be endured by residents if CR42SP is approved.

Unlike County Road 42, the GEM site would have met Windsor's Official Plan requirements for Transit Supportive Design and Active Transportation.

[24] *Building for the Past*, at p.18; Municipal Record, Written Submissions, Part 2, at pp.39-106 of 113 (handwritten pp. 1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

9. Issue #4 – Conflicting Expert Evidence

a. Tribunal Decision (Excerpt)[25]

[57] The Tribunal finds that the SP is consistent with the PPS. It comprehensively plans for the City's growth, as justified by the needs analysis reviewed above, and provides for a mix of uses, densities, modes of transport, and a fiscally responsible approach to the phasing and costs of municipal services, from transit to greenspace to storm water management. The supporting studies respect the notion of optimizing existing infrastructure by allocating anticipated growth to developable parcels of land within the built-up areas of the City, including brownfields. The Tribunal agrees with Ms. Nwaesei that the PPS does not prioritize brownfields redevelopment over greenfields. In this case, both are required to meet the land needs for residential and employment uses in the City over the planning period to 2036.

[25] LPAT Decision December 3, 2019; CAMPP's Motion Record, Tab 2

b. Documents

City of Windsor Employment Projections, 2008[26]

Table 6: New Employment at Fixed Places of Work in Windsor (Base Case)

Sector	New Employment (2007-2026)
Manufacturing	4,545
Other Industrial Related	2,705
Population and Business Services	9,410
Institutional	4,460
Primary	20
Total	21,140

Source: EDP Consulting

[26] OP Appeal Record: EDP City of Windsor Employment Projections & Employment Land Needs Analysis, 2008, at p.13 of 36; CAMPP's Motion Record, Tab 11

Windsor Population projections, 2008[27]

Windsor's Projected Population

Under the Reference Scenario, by 2026 the population of Windsor City is predicted to rise to 256,000, and by 2031 it is expected to reach 267,700. Under the Reference Scenario, Windsor City's average annual growth will slow to 0.33% over the next 5 years from 2006 to 2011. After 2011 the annual growth rate will increase to the 1% range annually.

Table 6: Population Growth, City of Windsor, 2006-2031, Reference Scenario[2]

Year	Population	5-Year Change	5-Year % Change	Annual Growth Rate
2006	216,473			
2011	220,037	3,564	1.6%	0.33%
2016	230,985	10,948	5.0%	0.98%
2021	243,055	12,070	5.2%	1.02%
2026	256,034	12,979	5.3%	1.05%
2031	267,670	11,636	4.5%	0.89%

Source: Lapointe Consulting Inc.

[27] OP Appeal Record, LaPointe Consulting: Windsor-Essex and City of Windsor Population and Housing Projections 2006-2031, page 17 of 36; CAMPP's Motion Record, Tab 11

Uncertainty in 2008 Projections[28]

> The Windsor economy is currently undergoing substantial change as it adjusts to restructuring in the automotive manufacturing sector and its ripple effect throughout other sectors and the ongoing shift toward a service economy. As such, there is significant uncertainly in projecting long term future economic conditions and employment in Windsor until the local economy stabilizes, which will be beyond the time frame of this study. In this context, it will be particularly important to revisit these employment projections and lands needs analysis as part of the next Official Plan Review in 2013.

[28] OP Appeal Record: EDP City of Windsor Employment Projections & Employment Land Needs Analysis 2008, at p.15 of 36; CAMPP's Motion Record, Tab 11

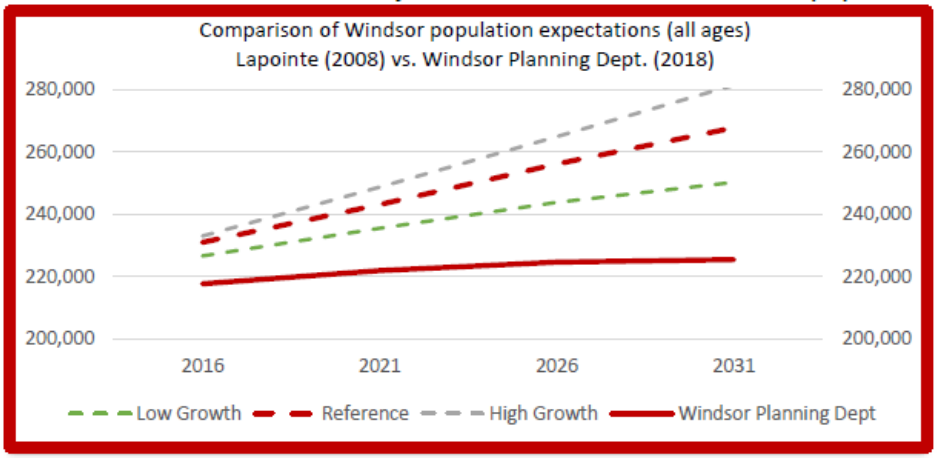
Comparison of Windsor Population Expectations 2008 vs 2018[29]

Though the Planning Department updated its overall *population expectations* in 2018, the *employment growth* data in CR42SP is based entirely on outdated population projections from the 2008 Lapointe report that uses data from the 2006 Census.

Even Lapointe's *Low Growth* scenario materially overestimates Windsor's future population:

Source: City of Windsor (2018), Lapointe (2008), and EDP (2008)

Yet CR42SP sticks with its 2008 *Base Case* of 21,140 new jobs through 2031.



This would represent an 8.5% increase to today's working age population (assuming a 100% labour participation rate), which is at odds with Ministry of Finance expectations of a decline.

[29] *Building for the Past*, at p.6; Municipal Record, Written Submissions, Part 2, at pp.39-106 of 113 (handwritten pp. 1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

MHBC Background Report County Road 42 Secondary Plan (Excerpt)[30]

[30] OP Planning Report, Part 1, at p.125 of 126 (handwritten page 1134); CAMPP's Motion Record, Tab 8 at Tab 8

MHBC Background Report County Road 42 Secondary Plan (Excerpt)[31]

Contents

[31] OP Planning Report, Part 2, at p.1 of 78 (handwritten page 1136); CAMPP's Motion Record, Tab 8 at Tab 8

List of Figures

Appendices

MHBC Background Report County Road 42 Secondary Plan: Growth Management Analysis (Excerpt) [32]

7.0 Growth Management Analysis

7.1 Supply and Demand for Residential Lands

In the preparation of the County Road 42 Secondary Plan, it is necessary to determine the implications of the land use designations on the overall growth management strategy for the City. The City of Windsor Planning Department has provided population projections for consideration as part of this project. The 2015 City projections included a high growth scenario, a low growth scenario and a reference scenario, which reflected the midpoint both between the high and low growth scenarios. Since completing the 2015 projections, the City has received the 2016 Census Canada Statistics for City Population and Housing. These statistics indicate that the 2016 population of the City was very close to the high growth scenario at approximately 217,716 persons. As a result, the City is currently reviewing its growth scenarios to consider a higher growth rate than what had been projected in 2015.

The PPS (s.1.1.2) requires municipalities to designate sufficient land to accommodate their projected growth for up to a 20-year period. Therefore, we have utilized a 2016 to 2036 growth period. For the purposes of this assessment, we have utilized the City's 2015 high growth scenarios for the years 2016 to 2036 since that scenario most closely matched the actual Census Canada 2016 statistics. **Table 1** summarizes the population growth.

Table 1: Windsor Potential Growth Scenario

Year	2016	2021	2026	2031	2036
2015 Projection (Planning Dept)	217,716	221,955	224,677	225,466	225,466
Growth (5 year increments)		4,240	2,722	789	NIL

The overall population of the City is anticipated to grow by approximately 7,750 persons between 2016 and 2036. It is possible as a result of an aging demographic that the population of the City may decline slightly between 2031 and 2036. For the purposes of this analysis we have assumed no growth in the 2031 – 2036 period. It is noted that reduced population does not mean reduced housing units since reduction in family size increases demand for housing.

[32] OP Planning Report, Part 2, at p.58 of 78 (handwritten page 1193); CAMPP's Motion Record, Tab 8 at Tab 8

Current 15-Year Employment Growth Forecast 2016-2031[33]

Figure 2

EDP Employment Forecast	
Base Case - 2016	120,700
Base Case - 2031	141,840
Employment Grow th 2016-2031	21,140

EDP Forecast by Sector	Jobs
Manufacturing	4,545
Other Industrial Related	2,705
Popn & Business Services	9,410
Institutional	4,460
Primary	20
Total	21,140

[33] OP Written Submissions, Part 2, Altus Letter, August 9, 2018, at p.7 of 113 (handwritten page 1450); CAMPP's Motion Record, Tab 8 at Tab 9

Altus Letter, August 9, 2018[34]

Additional Information for Item No. 9.1 & 9.2

Altus Group

August 9, 2018

Mayor Dilkens and Windsor City Council
Members of the Planning, Heritage & Economic Development Standing Committee (PHED)
350 City Hall Square West
Windsor, Ontario, N9A 6S1

Dear Mr. Dilkens and Windsor City Council,

Re: **Reply to CAMPP Submission to the to the Joint Meeting of the PHED and City Council, August 13, 2018**
Our File: **P-5893**

Altus Group Economic Consulting was retained by Windsor Regional Hospital to review the residential and employment land needs analysis contained within the MHBC Background Report for the County Road 42 Secondary Plan dated January 2018, and respond to concerns raised by other stakeholders.

Review of MHBC Residential Land Needs Analysis

My practice involves undertaking land budget analyses, and growth management studies. It is my opinion that the MHBC analysis in the Background Report is generally reasonable and supportable. The approach taken by MHBC in estimating the residential land needs conforms with the methodology in Ministry of Municipal Affair's *Projection Methodology Guideline*:

1) Obtain population projection for municipality;
2) Determine average number of people per household and apply this to obtain a projection of households;
3) Look at recent housing construction for housing mix, and apply to housing need to estimate projected need by housing type;
4) Make (if appropriate) a further adjustment in respect of vacancies, replacement and a market contingency factor; and,

[34] OP Written Submissions, Part 2, Altus Letter, August 9, 2018, at pp.1-8 of 113 (handwritten pp. 1444-1451); CAMPP's Motion Record, Tab 8 at Tab 9

5) Estimate the amount of additional land needed using assumed densities.

While we agree with the methodology taken by MHBC, we understand that the breakdown of the 2016 Census data was not available at the time the report was prepared. Our peer review updated the MHBC analysis to use the 2016 Census data breakdown that has since been released, and to introduce inputs in a different order. Therefore, we have re-created the MHBC estimate of land needs using the following modified inputs:

- The 2016 population and households used as a starting point to meeting the 2036 projections are based off the 2016 Census data, rather than the estimates used in the City's 2015 projections;
- The decline in population in existing households is based off 2016 Census data specific to Windsor, rather than for Ontario as a whole;
- The persons per unit (PPU) factors, both on an overall City-wide basis and by unit type have been updated based on 2016 Census data; and
- We have estimated the unit mix to be achieved on a City-wide basis before allocating a share of units to infill (10%), rather than vice versa.

Our modified projection is shown in Figure 1 attached to the end of this memo. With these adjustments to the inputs to the MHBC residential land need analysis, our approach results in a residential land need of 234.74 hectares, rather than the 133.56 hectares identified in the MHBC report. As such, in our view, the MHBC analysis represents a conservative projection of land needs for future population. We are in agreement with MHBC's finding that there is more than enough demand for residential land to justify the land use designations in the Secondary Plan area.

Review of MHBC Employment Land Needs Analysis

In our opinion, the approach taken in the MHBC report is a reasonable one for calculating employment land needs and have replicated this approach in our analysis. The approach is as follows:

1) Obtain employment projection for municipality;
2) Determine employment growth by sector;
3) Review the trends in jobs accommodated on employment lands and determine the employment growth expected on employment lands;
4) Make a further adjustment for vacancies and unsuitable lands; and
5) Estimate the amount of additional land needed using assumed employment density.

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However, two inputs were slightly modified in our peer review approach:

- Under Step 4, the deduction we made for total unsuitable lands used is only 73.7 hectares, as per the City's mapping of natural heritage features and hazards, rather than double-counting those 73.7 hectares and applying a second 5% deduction for a "suitability factor"; and
- We applied the vacancy factor to the City-wide vacant supply of land, rather than the net employment land demand.

Our analysis is shown in Figure 2 attached to the end of this memo. With these updates, our approach results in an employment land need of 172.55 gross hectares, compared to the 143.51 hectares estimated by MHBC in their Background Report. In our opinion, the MHBC analysis represents a conservative estimate of employment land need.

Review of CAMPP Submission

I have reviewed the August 13, 2018 submission by "Citizens for an Accountable Mega-Hospital Planning Process" ("CAMPP") entitled "Building for the Past: Sandwich South Secondary Plan Amendment & Hospital Zoning", and provide the following responses to some of the statements made in their report:

"CR42SP is missing key demographic data" … "CR42SP includes no analysis of aging trends."

The MHBC Background Report is based on the City's 2015 projections which builds upon demographic data and projections related to age, births, deaths, migration etc. Demographic detail would, therefore, be embedded within the projections.

We have reviewed the age profile data for the City and the region as a whole, and have found that the City is a fairly average community from an age profile perspective, as the proportion of seniors (age 65+) in the City (17.6%) is less than the share of seniors in Essex County municipalities such as Kingsville (20.0%), Essex Township (19.7%), Tecumseh (19.1%), Leamington (18.1%) and Amherstburg (18.1%), and is only greater than LaSalle (15.3%) and Lakeshore (14.8%).

The CAMPP analysis does not provide any analysis of the number of seniors throughout the regional area - while 38,300 seniors (age 65+) live in the City, another 32,100 seniors live elsewhere in the County as well.

Further, the number of seniors in the County has grown, and is likely to continue to grow significantly:

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- Based on Census data, the County has seen a far greater amount of population growth over the 1996-2016 period (growing by 29,108 persons, compared to 19,494 persons in the City), and the number of seniors in the County has grown from 16,775 persons aged 65+ as of 1996 to 32,145 persons as of 2016, an increase of 92%. By contrast, the number of seniors in the City has grown by 9,445 persons, or an increase of 33%.Overall population in the County is projected to grow by 30,745 persons between 2016 and 2031 (*Essex County Official Plan*).

While aging population is an issue worth consideration, it is as much (if not more) of an Essex County issue as it is a City of Windsor issue.

"The employment growth data in CR42SP is based entirely on outdated population projections from the 2008 Lapointe report"

The City has recently received employment projections on a City-wide basis in the 2015 City-wide Development Charges Background Study and in the 2018 Sandwich South Development Charge Amendment Background Study, the latter of which projected 10,977 new jobs in Sandwich South. This data confirms the scale of the employment projections contained in the MHBC Background Report.

"CR42SP uses the [EDP and Lapointe] data without reconciling it to the Ministry [of Finance's] 2018 population projections"

Based on my experience, it would be unusual for a municipality to reconcile its population projections to those of the Ministry of Finance. The preamble to the Ministry of Finance's report states that the projections "do not represent Ontario government policy targets or desired population outcomes, nor do they incorporate explicit economic or planning assumptions".

As such, changes in economic or planning assumptions, such as newly available employment or residential land in a greenfield area would not be considered in the Ministry's projections, but in reality, these changes would have the ability to affect the demand for new housing in a jurisdiction.

"Future generations of taxpayers will be left with a significantly larger physical footprint of urban infrastructure to maintain in perpetuity, even though there are no realistic expectations of significant property tax base growth on the planning horizon"

This statement ignores the significant amount of property tax revenues the County Road 42 Secondary Plan would generate, which can be used to offset the additional operating and maintenance costs associated with providing City services to the Secondary Plan area.

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I have undertaken numerous Fiscal Impact studies for greenfield developments in municipalities such as Wellington County, Brant County, the Town of Whitchurch-Stouffville, and generally the amount of taxes and other revenues generated on an annual basis exceed the incremental operating costs associated with providing services to new residents and maintaining and operating additional infrastructure required.

"Regardless of whether any future business growth occurs, taxpayers will be on the hook for infrastructure cost."

The City of Windsor has prepared an Interim Development Charges Background Study and By-law for the Sandwich South Planning District. This By-law will ensure that fees are collected from developers to help pay for the cost of servicing the new development, and so the growth-related apital costs of infrastructure to service Sandwich South will not be paid by taxpayers.

Sincerely,

Daryl Keleher, Senior Director, MCIP, RPP
Altus Group Economic Consulting

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Figure 1 **MHBC Background Analysis - Residential - with Altus' Suggested Changes**

Population and Housing Forecasts	Population	Persons Per Unit	Dwelling Units
2016	217,188	2.37	91,632
2036	225,466	2.24	100,653
Change - 2016-2036	8,278		9,021

Land Supply and Demand	Hectares	Density (units per ha.)	Units	PPU	Population
Designated Lands	317				
Less: In Process	107	15	1,605	2.37	3,804
Less: Spring Garden	100				
Equals: Other Designated Lands	110	15	1,650	2.37	3,911
Total Housing Supply			3,255		
Less: Total Housing Demand			9,021		
Equals: Surplus Supply / (Residual Demand)			(5,766)		

Range and Mix of Housing - Total	% of Units	Units
Low-Density	70%	4,036
Medium-Density	20%	1,153
High-Density	10%	577
Total		5,766
Infill (High-Density)		577

	PPU	Population
Infill (High-Density)	1.55	896.03

Range and Mix of Housing - Greenfield	Units
Low-Density	4,036
Medium-Density	1,153
High-Density	-
	5,189

Residential Land Area Requirements	Hectares	Density (units per ha.)	Units	PPU	Population
Low-Density	201.80	20	4,036	2.63	10,620
Medium-Density	32.95	35	1,153	2.31	2,668
High-Density	-	30	-	1.55	-
	234.74		5,189	2.56	13,289

Breakdown of Population Change	
Population via Additional Land Requirements	13,289
Population via Infill Housing	896
Population via Existing Designated Lands	7,715
Total Additional Population in New Units	21,900
Decline in Existing Population	(13,622)
Net Change in Population	8,278

Source: Altus Group Economic Consulting based on MHBC Background Report

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MHBC Background Analysis - Employment - with Altus' Suggested Changes

Figure 2

EDP Employment Forecast				
Base Case - 2016	120,700			
Base Case - 2031	141,840			
Employment Growth 2016-2031	21,140			
EDP Forecast by Sector	Jobs	% of Jobs on Employment Lands	Employment Land Jobs	
Manufacturing	4,545	100%	4,545	
Other Industrial Related	2,705	95%	2,570	
Popn & Business Services	9,410	20%	1,882	
Institutional	4,460	10%	446	
Primary	20	0%	-	
Total	21,140		9,443	
Supply of Employment Lands				
Total Vacant Employment Lands		384.20	ha	
Less: Exclusion of Unsuitable Lands		73.70	ha	
Less: Sites less than 1 hectare		35.30	ha	
Net Vacant Employment Lands		275.20	ha	
Less: Vacancy Factor	15%	41.28		
Net Vacant and Available Employment Lands		233.92		
Estimated Employment Density (jobs per ha)		25.0	jobs per net ha	
Employment Potential - Vacant Employment Lands		5,848	jobs	
Employment Land Requirements		9,443	jobs	
Existing Employment Potential - Vacant Lands		5,848	jobs	
Remaining Employment Land Employment		3,595	jobs	
Estimated Employment Density (jobs per net ha)		25.0	jobs per net ha	
Net Employment Land Need		143.79	net ha	
Conversion from Net to Gross Lands	20%	28.76	ha	
Gross Employment Land Need		172.55	gross ha	

Source: Altus Group Economic Consulting based on MHBC Background Report

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Altus Letter, August 9, 2018 (Excerpt)[35]

> The City has recently received employment projections on a City-wide basis in the 2015 City-wide Development Charges Background Study and in the 2018 Sandwich South Development Charge Amendment Background Study, the latter of which projected 10,977 new jobs in Sandwich South. This data confirms the scale of the employment projections contained in the MHBC Background Report.

Hemson Development Charges Background Study, 2015[36]

> Employment in Windsor is forecast to grow by approximately 2,600 employees over the next ten-years, 600 of which will be in new non-residential space.

[35] OP Written Submissions, Part 2, Altus Letter, August 9, 2018, at p.1 of 113 (handwritten page 1444); CAMPP's Motion Record, Tab 8 at Tab 9

[36] OP Appeal Record, Hemson Development Charges Background Study, 2015, page 32 of 36; CAMPP's Motion Record, Tab 11

Transcript (Excerpt)[37]

192

PL180842/3

LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED UNDER subsection 17(24) of the Planning Act., R.S.O. 1990, c.P13, as amended

Appellant:	386823 Ontario Limited
Appellant:	CAMPP Windsor Essex Residents Association
Appellant:	Fanelli Real Estate (South Airport Lands) LP
Applicant:	Windsor Regional Hospital
Municipality:	City of Windsor
LPAT Case No.:	PL180842
LPAT Case No.:	PL180842

PROCEEDING COMMENCED UNDER subsection 34(19) of the Planning Act, R.S.O. 1990, c. P. 13, as amended

Appellant:	CAMPP Windsor Essex Residents Association
Subject:	By-law NO. 132-2018
Municipality:	City of Windsor
LPAT Case No.:	PL180842
LPAT Case No.:	PL18084

Heard before: **S. Tousaw**

October 10, 2019, in Windsor, Ontario

APPEARANCES:

Eric Gillespie Ian Flett	-	Counsel for CAMPP Windsor Essex Residents Association
Philip McCullough	-	Counsel for 386823 Ontario Ltd
Mary Bull Kim Mullin	-	Counsel for Windsor Regional Hospital
Peter Gross Vera Vendrasco	-	Counsel for the City of Windsor

POLLARD VERBATIM
(905) 294-0044

[37] October 10, 2019 Hearing Transcript

Sir, actually, for the convenience of the Tribunal and the parties, there are two other documents and just to allow us to flow, hopefully, I would propose handing those to you now and, of course, the other parties. And, again, they're just materials from the record. So if I could do that now before I begin the submissions?

THE CHAIR: That would be fine.

MR. GILLESPIE: Yes, thank you. I apologize, sir. I will take one more moment just to locate the document. Thank you, sir, and we'll try this again.

THE CHAIR: That's fine. When you get back to the podium, Mr. Gillespie, can you please just confirm for me that these are from the enhanced municipal record?

MR. GILLESPIE: Sir, I can confirm that the Development Charges, Amendment Background Study for the South Sandwich Planning District, is prepared by Hemson Consulting with a cover date of May 24th, 2018, is part of the zoning enhanced -- part of the zoning appeal record, and it is found in section G of that record, the other relevant documents under Tab L, as in Lima.

And, sir, the other document I've handed

you, I'm sure appears, frankly, in a number of places. It is simply an excerpt from the City of Windsor's Official Plan, which I hope again there wouldn't be any dispute that that forms part of the materials that are properly before you.

Sir, as is, in our respectful submission, normal and appropriate in reply ---

THE CHAIR: Ms. Bull?

MS. BULL: Sorry, sir. I just, on this document, I have CAMPP's appeal record and I'm looking for this table in this document. Sir, it isn't there. I can see the title "Hemson Development Charges, Background Study." And there's one table from Appendix A. That's all I believe that's there from that study. Sorry, and then another table from Appendix A. What we have been given now isn't in the appeal record.

MR. GILLESPIE: So, sir, my suggestion on this is this: obviously this only forms a small portion of my submissions this morning. We could certainly stand down for a moment and try to straighten out the evidentiary point, but, at the same time, what might be more efficient is I'm thinking that there may well be a brief recess between the two sets of reply and we obviously will not have closed our case. If we simply say those conclude our oral submissions and then

over that break, I'll work with Ms. von Ziegenweidt to look into resolving that question.

THE CHAIR: Ms. Bull, is that satisfactory to you?

MS. BULL: Well, sir, no, it isn't, because if Mr. Gillespie is going to refer to something that isn't in the appeal record, that's contrary to the rules of this Tribunal and he shouldn't be referring to it in his submissions. So speaking about it after he's done his submissions is not appropriate.

MR. GILLESPIE: Well, my point, sir, is that what I'm proposing is this: this only forms a small portion of our submissions. As a result, if I do not complete my submissions and we take a brief recess, then I would still be in my submissions and I would come back.

If it turns out that we're unable to demonstrate that it is part of the record, I will have no further submissions. If it turns out that we are able to demonstrate it is part of the record, then I'll have a very, very brief submission, but either way, I think it will still be proper and we'll just use that recess to straighten that out one way or the other.

THE CHAIR: So if I understand you correctly, to Ms. Bull's objection, you won't speak to

this until after the break and after we confirm that it is part of the record?

MR. GILLESPIE: Exactly, sir.

THE CHAIR: Okay.

MR. GILLESPIE: And then if it turns out that it is part of the record, it will just be a very brief submission and if it turns out it is not, there will be no submission.

THE CHAIR: Thank you. We'll proceed on that basis.

MR. GILLESPIE: Thank you, sir.

THE CHAIR: Ms. Bull, was that your objection to both documents or just to the Hemson document?

MS. BULL: Yes. I think the other is an excerpt from the Official Plan, which we have no objection to.

THE CHAIR: Okay, thank you. Please proceed, Mr. Gillespie.

MR. GILLESPIE: So thank you, Mr. Chairman. And on that basis, obviously, we'll proceed.

So, sir, what I'll be doing it taking you, as proper reply should, to various portions of the materials that you've heard. So we all understand it's not an opportunity to restate our case or repeat

any disagreement amongst the parties, then the numbered company's lands are not abutting the -- we can all see proposed hospital site, the hatched area. They are the lands that abut what is marked on this mapping as -- I believe there's a letter "A" in the shaded area and I apologize for any confusion that might have caused. We do note that they are still within the flood plain development content/area.

Secondly, sir, I did stop, as I said I would, when I got into what I thought was potentially controversial evidence. I will ask you to hear my submission now on one point. And then my third point; I know there's a difference of opinion between counsel and you'll hear some submissions from all of us about that point.

So the point that I believe I can now make now that I have confirmed with Ms. von Ziegenweidt that she believes what I would like to say is probably in the record, if you were to look at the appeal record of CAMPP, Item M, as in "Mary," page 3 of 235, you would find a reference there to a Hemson Report from 2015 that projects the number of employment jobs.

The response that we are making is to paragraph 86 of the Hospital submissions, page 27, where there's a projection of 21,000 jobs. Again, it

does not appear to be reconcilable to say that Hemson is saying 2600 jobs, which is in the evidence at the location I've just said, with the 21,000 job number.

My third and final submission deals with that document that we were looking at or started to look at earlier. And, sir, I just had a possible moment of clarity. Could I take one second to speak with our client, please?

Sir, upon reflection, in our respectful submission, the point that would have been related to this piece of paper has already been made in a different way. And acknowledging that there's a difference of views between counsel and that always takes real time to straighten out, we will conclude our submissions without the need for further reference to that particular document.

THE CHAIR: Are you withdrawing this document, then?

MR. GILLESPIE: We are, sir. So please feel free to hand it back to us.

THE CHAIR: I will hand it back, yes.

MR. GILLESPIE: Yes. Thank you. So I believe since that does conclude our submissions, as always, subject to any questions you may have, sir, then we will retire from this podium and I believe it

Expert Affidavit, Jennifer Keesmaat[38]

19. As proposed, OPA 120 creates a fundamental divergence from the objectives of the Official Plan to create a sustainable city over time. Given an expected on-going slow growth scenario, releasing agricultural land for development will likely result in more vacant properties in the core, add more vehicular traffic, resulting in the inefficient use of existing land and infrastructure. All of these outcomes, which are easily established through precedent, are contrary to the fundamental objectives of the Provincial Policy Statement and the Official Plan.

25. Further, given the slow growth scenario that Windsor is anticipating and expects to continue, the hospital will be an amenity that primarily serves existing populations – including an ageing population. To support walking, cycling and transit, the hospital must be sited in a location that readily provides excellent mobility choice related to these options. Integration with the existing urban fabric of the city would be the most strategic, effective, and cost-effective way to do so.

[38] Jennifer Keesmaat, Expert Affidavit, at pp.3-4; CAMPP's Motion Record, Tab 5

Slower Population and Employment Growth[39]

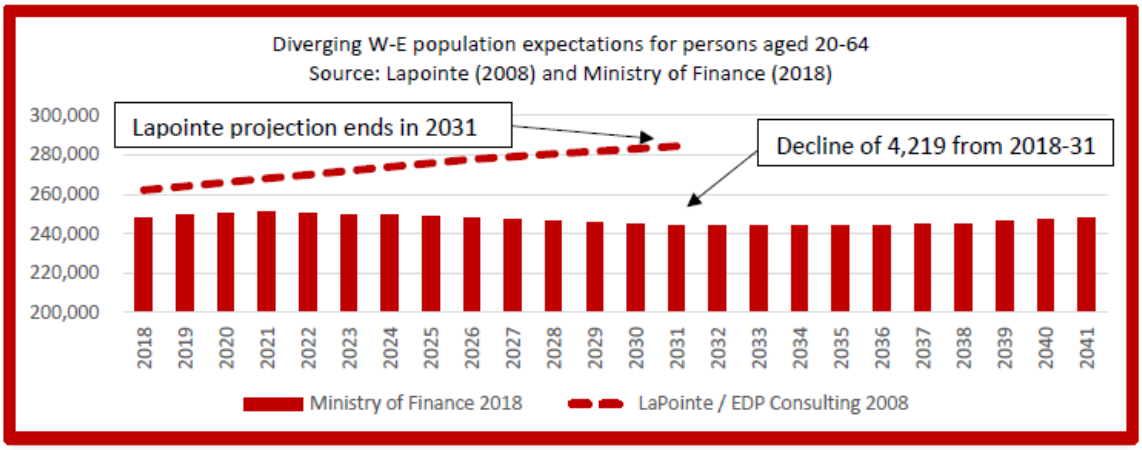
In 2008, Lapointe Consulting completed a study for the City entitled: Population and Housing Projections: 2006-2031 and Affordable Housing Targets. Population growth has also been slower than anticipated in this report. This could result in slower growth in employment. While EDP considered the economic downturn in 2007, the report could not have considered that it would take the City, as well as much of Canada, almost five years to recover from that downturn. To reflect this economic history, the 2026 employment projection will be used as the 2031 projection for the purposes of this analysis.

[39] OP Planning Report, Part 2, at p. 65 of 78 (handwritten page 1200; CAMPP's Motion Record, Tab 8 at Tab 8

Ministry of Finance: Declining Regional Population among Working-Age Persons[40]

1.4 Employment growth of 21,140 jobs based on obsolete population projections
The Ministry of Finance (2018) expects the regional supply of working age residents to decline by 4,219 (1.7%) over the next 13 years through 2031. This data was ignored in CR42SP. Instead, the plan's employment land needs calculation (p.190) is based on a 2008 study by EDP Consultants, who drew on 1996 and 2001 Census data and a 2008 report by Lapointe Consultants.

Without growth among 20-64 year olds, there is no reason to expect employment expansion:

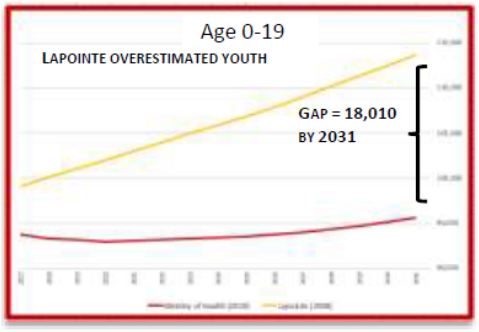


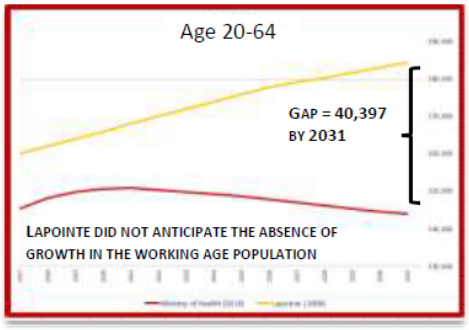
Source: Ministry of Finance (2018), Lapointe (2008), EDP (2008)

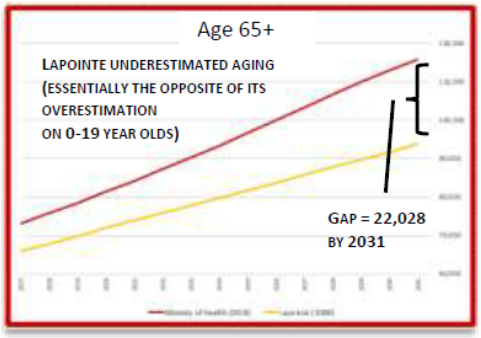
[40] *Building for the Past*, at p.7; Municipal Record, Written Submissions, Part 2, at pp. 39-106 of 113 (handwritten pp. 1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

Comparison of Windsor-Essex Population Growth Expectations 2008 vs. 2018 by Age Group[41]

1.5 Why is such obsolete data being used?







Beyond overall numbers, EDP and Lapointe, in 2008, anticipated a materially different demographic mix than the regional figures the Ministry of Finance projects in 2018.

CR42SP uses the 10-year old data, without reconciling it to the Ministry's 2018 population projections.

The scale and nature of the discrepancies is obvious in these comparative graphs.

[41] *Building for the Past*, at p.8; Municipal Record, Written Submissions, Part 2, at pp.39-106 of 113 (handwritten pp.1482-1549); CAMPP's Motion Record, Tab 8 at Tab 9

Altus Consulting: More Aging among Regional Population than City of Windsor[42]

> We have reviewed the age profile data for the City and the region as a whole, and have found that the City is a fairly average community from an age profile perspective, as the proportion of seniors (age 65+) in the City (17.6%) is less than the share of seniors in Essex County municipalities such as Kingsville (20.0%), Essex Township (19.7%), Tecumseh (19.1%), Leamington (18.1%) and Amherstburg (18.1%), and is only greater than LaSalle (15.3%) and Lakeshore (14.8%).

[42] OP Written Submissions, Part 2, Altus Letter, August 9, 2018, at p.3 of 113 (handwritten page 1446); CAMPP's Motion Record, Tab 8 at Tab 9

Windsor-Essex and City of Windsor Population and Housing Projections (2008)

2. Windsor-Essex

Components of Growth

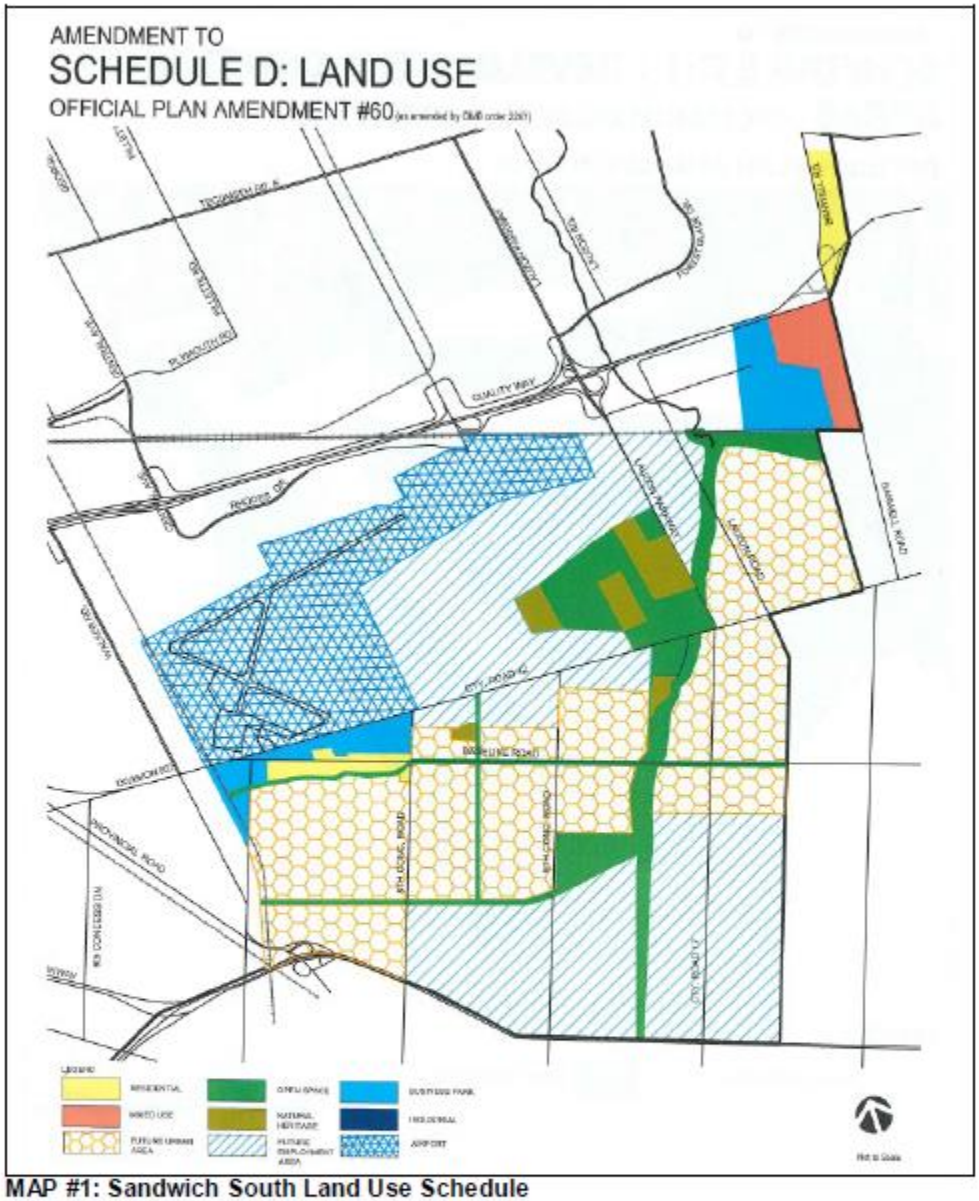
A review of data on natural increase between 1997 and 2004, has shown that natural increase is averaging about 1,500 persons annually while net migration has averaged around 3,700 persons annually. International migrants have become an important component of Windsor-Essex growth peaking at 4,000 persons annually in 2000-2001 and 2001-2002. Net inter-provincial (those moving in from other province minus those moving out to other provinces) and net intra-provincial migrants (those moving in from other parts of Ontario minus those moving out to other parts of Ontario) represent a smaller component of net migration. In recent years the City has experienced a loss of people moving out of Windsor-Essex to other provinces and to other centres in Ontario. This report contains a detailed description of past trends in migration and natural increase and the detailed assumptions we have used for future projections. Our report assumes continued low net migration into Windsor in the 2006-2011 period with a gradual improvement in net migration in 2011-2016 until net migration reaches the historical share of Ontario's net migrants of 3.6% after 2016.

OP Appeal Record: Windsor-Essex and City of Windsor Population and Housing Projections, 2008, Lapointe Consulting Inc, at page 16 of 36; CAMPP's Motion Record, Tab 11

The preceding analysis shows how important net migration is to growth in Windsor-Essex. Without it the population of Windsor-Essex would start to stagnate. Beginning in 2002, net migration has been on a downward trend. In fact most recent estimates from Statistics Canada point to a net out-migration for the period 2005-06. In the projections that follow it is anticipated that this reduction in net migration to Windsor-Essex will continue as the restructuring of the automotive sector occurs and as shifts occur from the auto sector to other economic sectors. Our projections are based on improving net migration patterns starting in 2011. More details regarding our assumptions about net migration are provided in Section 3.1.2 below.

OP Appeal Record: Windsor-Essex and City of Windsor Population and Housing Projections, 2008, Lapointe Consulting Inc, at page 18 of 36; CAMPP's Motion Record, Tab 11

10. Previous Plan Area[43]



MAP #1: Sandwich South Land Use Schedule

It is important to recognize that the County Road 42 Secondary Plan initiated by a private entity (Windsor Regional Hospital) for lands within the transferred lands area, will be the second request for a secondary plan within the transferred lands area since the boundary adjustment. The first secondary plan adopted in the transferred lands area was the East Pelton Secondary Plan which was initiated by Ontario Realty Corporation in order to consider a proposed detention facility (Southwest Detention Centre) on lands in the Sandwich South area. East Pelton south half was adopted as OPA 74 in 2009 by City Council and approved by the OMB in November of 2010. The East Pelton north half was subsequently adopted as OPA 94 by the City Council in 2014 and, was later approved by the OMB in December of 2016.

[43] OP Planning Report, Part 1, at p.8 of 126 (handwritten page 1017; CAMPP's Motion Record, Tab 8 at Tab 8

11. LPAT Case Management Conference April 16, 2019 (Excerpt)

Requests for Participant Status

[13] Of the 28 requests for participant status filed before the statutory deadline, the City disputed three requests, from: (1) Richard C. Spencer for RC Spencer Associates Inc.; (2) Ontario Association of Architects; and (3) Michigan Chapter of the Congress for New Urbanism. Generally, the Tribunal understood the City's concerns to be that these groups or individuals do not have a direct interest in OPA 120 or the ZBA, and are not in a position to provide opinion evidence that is relevant to the Tribunal's determination of the issues in these appeals. The City also raised a concern that there could be a conflict of interest with one of the representatives of the Ontario Association of Architects; however, it was clarified during the CMC that another individual would speak on behalf of this group. This resolved the City's concern with respect to conflict.

[14] The Tribunal reviewed all 28 requests for participant status prior to the CMC and found that each one met the requirements of s. 40(1) of *LPATA*. The Tribunal therefore granted participant status to the groups and individuals listed on Attachment 1.

[15] The Tribunal also notes that, in accordance with s. 42(1) of *LPATA*, should the Tribunal hold an oral hearing for these appeals, only the parties may participate in that hearing. This means that unless the Tribunal determines that it needs to call a participant in order to ask questions about their written submission, then that written submission will form the extent of their participation in an oral hearing. Regardless, any participant or interested person is welcome to attend and observe an oral hearing.

[16] One request for participant status, from Walpole Island First Nation, was filed on February 22, 2019, after the statutory deadline of February 19, 2019. The Tribunal invited the writer of the submission or a representative to speak to the submission, however, it appeared that no one was in attendance at the CMC to do so. Beth Ann Cook, who was granted participant status based on her individual submission, addressed the Tribunal to confirm that the writer of the submission was not in attendance and that she is not the authorized representative.

[17] The Tribunal invited counsel for the parties to make submissions regarding the Tribunal's jurisdiction respecting a written submission filed after the statutory deadline. Mr. Gross submitted that the Tribunal has no jurisdiction to accept a late submission, while Mr. Gillespie suggested that the Tribunal could convene a second CMC and direct that Walpole Island First Nation re-file its submission at least 30 days prior to that

second CMC. The Tribunal indicated that it would carefully consider that suggestion within the necessary statutory context, and it now provides its disposition here.

[18] The Tribunal has discretion to convene CMCs for appeals in which they are not otherwise required by *LPATA*, and also has discretion to convene multiple CMCs in any given appeal. However, for the *Planning Act* appeals in which *LPATA* does require a CMC, the Tribunal interprets s. 39(1) to require only one CMC that is mandatory:

> **Mandatory case management conference**
> **39** (1) The Tribunal shall, upon receipt of the record of appeal, direct the appellant and the municipality or approval authority whose decision or failure to make a decision is being appealed to participate in a case management conference under subsection 33 (1).

[19] Subsection 40(2) then ties the date of submission of a written request for status to that CMC:

> **Participation by other persons, subs. 38 (1)**
> **40** (1) If a person other than the appellant or the municipality or approval authority whose decision or failure to make a decision is being appealed wishes to participate in an appeal described in subsection 38 (1), the person must make a written submission to the Tribunal respecting whether the decision or failure to make a decision,
> (a) was inconsistent with a policy statement issued under subsection 3 (1) of the *Planning Act*;
> (b) fails to conform with or conflicts with a provincial plan; or
> (c) fails to conform with an applicable official plan.
>
> **Time for submission**
> (2) The submission must be made to the Tribunal at least 30 days before the date of the case management conference.

Both s. 39(1) and 40(2) refer to a singular CMC, which, when read together, the Tribunal interprets to be the mandatory CMC.

[20] Therefore, it follows that in this case, this first CMC is the mandatory CMC for the purpose of s. 39(1) and 40(2). Any requests for status must have been filed at least 30 days prior to the mandatory CMC in order to be considered. Given that the Tribunal has now held and concluded the mandatory CMC in these appeals, the window for written submissions closed 30 days prior to the CMC, on February 19, 2019.

[21] Even if the Tribunal were to accept Mr. Gillespie's solution, there would be no ability for the Tribunal to restrict its direction to one particular individual or group seeking status. Conceivably, this would mean that the Tribunal could be considering numerous submissions for status prior to a second CMC, in addition to the wave of submissions received for the first CMC. Such a result does not accord with the overall intent of the practices and procedures in *LPATA* to make the hearing process more efficient.

[22] The Tribunal finds that it does not have jurisdiction to grant participant status to Walpole Island First Nation, given that the submission was filed after the statutory deadline. The Tribunal does, however, note that the submission raised issues relating to consultation with First Nations, and that these issues are also raised by CAMPP in its appeals, and by Ms. Cook in her written submission. Should the Tribunal have any questions with respect to this issue, it may exercise its authority under s. 33(2) of *LPATA* to call a representative from Walpole Island First Nation for examination by the Tribunal.

ISSUES FOR THE HEARING

[23] The Tribunal canvassed counsel as to whether they had prepared or discussed preparation of a consolidated issues list. They had not, and Mr. Gillespie indicated that, given the relatively new CMC process, counsel were unsure as to whether this is required. The Tribunal explained that it is immensely helpful to the Tribunal to have a draft consolidated issues list prepared for the CMC in order to clearly identify which issues remain in dispute among the parties, and also to assist the Tribunal in determining the format of the hearing of the appeals. While the Tribunal's *Rules* require the statutory parties to set out the issues in their case synopses, the Tribunal anticipates that there will be ongoing refinement of the issues based on a party's reflection on another party's case synopsis, and on discussions among the parties prior to a CMC. This expectation is contained in Rule 26.20(d) whereby at a CMC, the Tribunal shall "identify, define or narrow the issues raised in the appeal."

[24] It is critical for the Tribunal to have a clear understanding of the issues in dispute

in order to determine the appropriate format for the hearing, and, more specifically, whether it needs to examine any witnesses at an oral hearing. Accordingly, the Tribunal directed the parties to submit a consolidated issues list within one week of the CMC.

[25] Within that timeline, the parties indicated to the Tribunal's case coordinator that, regrettably, they could not agree on a consolidated issues list. The Tribunal therefore received a proposed issues list from each of the Appellants, as well as a response from the City to each issues list with its own proposed wording and framing for many issues. WRH indicated that it supported the position of the City with respect to the issues list of the Appellants. Mr. Gillespie indicated, on behalf of CAMPP, that he would like an opportunity to address the Tribunal with respect to the issues list. It is unclear whether 386 or Fanelli dispute the City's proposed wording of their respective issues.

[26] There is no doubt that the new legislative scheme established through *LPATA* allows and even encourages the Tribunal to define the issues in these appeals. However, given the magnitude of OPA 120, the breadth of issues raised with respect to the PPS, and the nature of disagreement between at least some of the parties with respect to the issues, the Tribunal finds that the most fair and efficient approach is to provide direction with respect to the issues list and to allow the parties limited additional time to arrive at a consolidated list. Failing that, the Tribunal will direct the Appellant(s) to file motions in writing so that the Tribunal may finalize the issues list. In order to assist the parties in continuing to work toward a consolidated issues list, the Tribunal will offer direction with respect to its expectations regarding the issues list.

[27] In defining the issues in these appeals, the necessary starting point is the Tribunal's mandate and authority under the *Planning Act*. The *Planning Act*, as amended by *Bill 139*, establishes clear parameters in this regard. With respect to OPA 120, the Tribunal's powers are set out in s. 17(49.1) and (49.3). Generally, the Tribunal is required to dismiss the appeals unless the Tribunal determines that the part of a decision that is under appeal is inconsistent with the PPS, conflicts with or fails to conform with an applicable provincial plan, or, in the case of a lower-tier municipality, fails to conform with an upper-tier official plan:

> **Powers of L.P.A.T. — appeals under subss. (24) and (36)**
> (49.1) Subject to subsections (49.3) to (49.9), after holding a hearing on an appeal under subsection (24) or (36), the Tribunal shall dismiss the appeal.
> ...
> **Refusal and notice to make new decision**
> (49.3) Unless subsection (49.4), (49.7) or (49.8) applies, if the Tribunal determines that a part of a decision to which a notice of appeal under subsection (24) or (36) relates is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or, in the case of the official plan of a lower-tier municipality, fails to conform with the upper-tier municipality's official plan,
> (a) the Tribunal shall refuse to approve that part of the plan; and
> (b) the Tribunal shall notify the clerk of the municipality that adopted the official plan that the municipality is being given an opportunity to make a new decision in respect of the matter. [Emphasis added].

[28] The Tribunal's powers are similarly defined with respect to the ZBA appeal, as set out in s. 34(26) and (26.2):

> **Powers of L.P.A.T.**
> (26) Subject to subsections (26.1) to (26.10) and (26.13), after holding a hearing on an appeal under subsection (11) or (19), the Tribunal shall dismiss the appeal
> ...
> **Same — appeal under subs. (19)**
> (26.2) Unless subsection (26.3), (26.8) or (26.9) applies, if, on an appeal under subsection (19), the Tribunal determines that a part of the by-law to which the notice of appeal relates is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan,
> (a) the Tribunal shall repeal that part of the by-law; and
> (b) the Tribunal shall notify the clerk of the municipality that it is being given an opportunity to make a new decision in respect of the matter.

[29] Notably, both ss. 17(49.3) and 34(26.2) refer to the notice of appeal to define the part of the decision or by-law that is under appeal. It follows, then, as a first step, that the Appellants would refer to their respective notices of appeal in formulating an issues list. Such an exercise should entail scrutiny and a sharp focus on the parts of OPA 120 and the ZBA to which the notices of appeal relate. The Tribunal observes that this focus is lacking in the draft issues lists, and that clear identification of the specific policies, schedules, or provisions under appeal will assist greatly in ensuring a focussed and efficient hearing and disposition of the appeals.

[30] The Tribunal also notes that the City of Windsor is a single-tier municipality and is therefore not subject to an upper-tier official plan. There is also no applicable provincial plan. Accordingly, the Tribunal expects the issues list for the OPA 120

appeals to only address matters relating to consistency with the PPS.

[31] The Tribunal understands that CAMPP's proposed issues for its OPA 120 appeals reference conformity with the City's Official Plan in several instances by operation of policy 4.7 of the PPS. While the Tribunal is aware that policy 4.7 of the PPS refers to the local official plan as the most important vehicle for implementing the policies of the PPS, it does not logically follow that an amendment to that official plan should be expected to conform to the plan that is being amended. Should CAMPP wish to pursue this approach to the issues list, it will have an opportunity to do so by written motion.

[32] Regarding the ZBA appeal, to which CAMPP is the sole appellant, the Tribunal expects that CAMPP's issues list will focus on issues relating to consistency with the PPS and conformity with the Official Plan in accordance with s. 34(26.2) of the *Planning Act*.

[33] With these directions in mind, the Tribunal directs the parties to continue to work toward a consolidated issues list and to submit that list to the Tribunal within 15 days of the issuance of this decision. Should the parties be unable to agree on an issues list, the Appellant(s) are directed to bring a motion in writing in accordance with Rule 10 of the Tribunal's *Rules*. This decision, and more specifically, the 15th day following issuance of the decision, serves as notice to the moving party(ies) pursuant to Rule 10.03.

[34] In addition to the assistance that a consolidated issues list will provide in moving this matter forward to a hearing, the Tribunal finds that an agreed statement of facts and evidence among the parties will also assist the Tribunal in determining whether it needs to examine any witnesses at the hearing. To that end, and to allow sufficient time for necessary consultations among parties and experts, the Tribunal directs the parties to submit an agreed statement of facts and evidence within 45 days of the issuance of this decision.

12. ***Ravelston Corp. (Re)***[44]

Ravelston Corp. (Re), [2007] O.J. No. 1389

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

S. Borins J.A. (In Chambers)

Heard: March 22, 2007.

Judgment: April 13, 2007.

Docket: M34868 (C46730)

[2007] O.J. No. 1389 | 2007 ONCA 268 | 31 C.B.R. (5th) 233 | 156 A.C.W.S. (3d) 824 | 159 A.C.W.S. (3d) 541 | 2007 CarswellOnt 2114

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc. AND IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.O. 1985, c. B-3, as amended, and the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

(22 paras.)

Case Summary

Civil evidence — Appeals — Leave to appeal — Application by Black for leave to appeal from order allowing the receiver to issue payments report and to file it in court dismissed — Proposed appeal had no realistic chance of success if leave to appeal were granted as it raised no apparent error in law or palpable and overriding factual error.

Insolvency law — Practice — Application by Black for leave to appeal from order allowing the receiver to issue payments report and to file it in court dismissed — Proposed appeal had no realistic chance of success if leave to appeal were granted as it raised no apparent error in law or palpable and overriding factual error.

Application by Black for leave to appeal from an order allowing the receiver to issue a payments report and to file it in court. The receiver was the receiver for Ravelston, a company partly owned by Black, who faced criminal charges in United States. The receiver sought to finalize the report and analysis of money paid and distributed by the company, including money paid to Black. The company entered into a plea agreement with prosecutor in United States in exchange for cooperating in the investigation and preparing the payments report. Black sought deferral of the report until completion of the criminal trial. He claimed the report was prejudicial to his defence. The motion judge held that in the normal course of events the payments report would have been filed with the court by the receiver when it was completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. He found that Black had not provided any evidence that the filing of the payments report would be to his prejudice as a financial stakeholder having an economic interest in the Ravelston estate. He further stated that the possible use by the prosecution of any information contained in the report as evidence against Black was a consideration for the US District Court. He held that the receiver's decision to provide the payments report and to file it with the court as relevant information for the benefit of the stakeholders was reasonable. Black argued that the motion judge erred

[44] *Ravelston Corp*. (*Re*), [2007] O.J. No. 1389 (C.A.)

in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner, and in his understanding of the principle of comity and failed to consider the prejudice to Black, a Canadian resident, arising from the use of the payments report in the American criminal proceedings.

HELD: Application dismissed.

Neither of the proposed grounds of appeal was prima facie meritorious. The motion judge was correct in finding that Black's interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Black's alleged interest was not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the payments report was in his capacity as defendant in the American criminal proceedings. Black presented no evidence that the filing of the payments report would be prejudicial to him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. The motion judge made no error in principle in his comments on the principle of comity. The proposed appeal had no realistic chance of success if leave to appeal were granted as it raised no apparent error in law or palpable and overriding factual error.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, *R.S.C. 1985, c. B-3, s. 193*(e)

Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36*

Appeal From:

On appeal from the order of Justice Peter A. Cumming of the Superior Court of Justice dated February 15, 2007.

Counsel

George S. Glezos and Bryce Rudyk, for the applicant Conrad Black.

Alex L. MacFarlane and Tushara Weerasooriya, for the respondent, RSM Richter Inc. Interim Receiver for Ravelston Corporation Limited and Ravelston Management Inc.

Matthew P. Gottlieb and Davit D. Akman, for the respondent, Hollinger Inc.

Robyn M. Ryan Bell, for the respondent, Sun-Times Media Group, Inc.

S. BORINS J.A.

I

1 Pursuant to the orders of Farley J. of April 20, 2005 and May 18, 2005, RSM Richter Inc. ("Richter") was appointed receiver and manager and interim receiver of the property, assets and undertaking of what is referred to in these proceedings as the Ravelston Companies, including the Ravelston Corporation Limited ("RCL"), Ravelston Management Inc. ("RMI") and Argus Corporation Limited ("Argus"). On April 20, 2005 the court also issued an order granting RCL and RMI protection under the *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36* ("CCAA") and appointing Richter as the monitor.

2 Initially, Farley J. was the supervisory judge in this complex and long-term insolvency. The current supervisory judge is Cumming J. From the outset of its appointment as receiver, Richter has regularly filed reports with the court detailing the steps that it has taken in fulfilling its mandate, asking that the court approve each report and the recommendations contained in it and, frequently, asking the court's approval to take a particular step or to follow a particular course of action.

3 The motion before Cumming J., giving rise to this motion for leave to appeal, emanated from Richter's Nineteenth Report recommending the preparation of a report (the "Payments Report") setting out a factual account of the monies received by, and the distributions made by, RCL, RMI and Angus during the respective periods January 3, 1997 to April 20, 2005, July 3, 2002 to April 20, 2005, and January 1, 1999 to April 30, 2005. Pursuant to Richter's motion for authorization to complete and file the Payments Report with the Superior Court of Justice, on January 12, 2007 Cumming J. ordered Richter to complete the Payments Report, provided that it would not be filed or disseminated to any party until further order of the Superior Court. Pursuant to a further motion brought by Richter, on February 15, 2007, Cumming J. ordered Richter to file the Payments Report with the Superior Court. The Payments Report contains data as to payments made by RCL, RMI and Argus to corporate officers of these companies, including Conrad Black, who is a defendant in ongoing criminal proceedings in the United States District Court in Chicago. Before Cumming J., only Lord Black opposed the filing of the Payments Report.

4 Lord Black subsequently moved under s. 193(e) of the *Bankruptcy and Insolvency Act*, *R.S.C. 1985, c. B-3* ("BIA") for leave to appeal Cumming J.'s order of February 15, 2007 to the Court of Appeal. On March 22, 2007 I dismissed Black's motion with reasons to follow. These are my reasons.

II

5 In its Nineteenth Report, Richter indicated that on December 14, 2006 the United States Attorney's Office ("USAO") asked it to prepare and provide a schedule of payments, including salaries, bonuses and dividends, made by the Ravelston Companies to Lord Black and others between January, 1998 and January, 2004. The USAO is a stakeholder in the Ravelston estate, as is Lord Black. A number of other stakeholders have also requested similar information from Richter. Before Cumming J., and before this court, Lord Black contended that because on its filing the Payments Report would become a public document and available to all stakeholders, including the USAO, the information contained in the Report may assist the prosecution in the ongoing criminal proceedings. He contended that there may be unfairness in the use of the information revealed by the Payments Report. Lord Black, therefore, submitted that the Report should not be filed until the conclusion of the criminal proceedings against him.

6 In his reasons, reported at *[2007] O.J. No. 536* (S.C.J.), Cumming J. pointed out at para. 26 that in the normal course of events the Payments Report would be filed with the court by the receiver when it is completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. At para. 27, Cumming J. stated that Lord Black had not provided any evidence that the filing of the Payments Report would be to his prejudice as a financial stakeholder having an

economic interest in the Ravelston estate. To this I would add that Lord Black has also failed to provide any evidence that the filing of the Payments Report would prejudice the fairness of his criminal trial. As Cumming J. correctly observed, the possible use by the prosecution of any information contained in the Report as evidence against Black is a consideration for the United States District Court in Chicago.

7 In rejecting Black's attempt to seal the Report, at para. 33 Cumming J. stated:

> It is the personal interest of Lord Black at stake in the criminal proceedings which results in his request to delay the release of the Payments Report. The Receiver submits that such a personal interest, as opposed to an economic interest, is beyond the Receiver's area of proper consideration in the administration of the estate. The Receiver is not obliged to protect the interests of stakeholders which are unrelated to the administration of a debtor's estate, such as the interest of a stakeholder to avoid alleged prejudice in criminal proceedings. The Receiver's role is to make business decisions in the best interests of the estate after a careful cost/benefit analysis and the weighing of competing interests. *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.).

8 In the opinion of Cumming J., the receiver's decision to provide the Payments Report and to file it with the court as relevant information for the benefit of the stakeholders was "within the bounds of reasonableness". At para. 47, he added:

> [A]n Order sealing the Payment Report until the close of Lord Black's criminal trial would be inappropriate. There is not any social value established on evidence by Lord Black which is of superordinate importance to the rights of the public to open access to court records and the interest of the estate's stakeholders to proceed unimpeded with the receivership. There is a strong presumption against any order that restricts public access to court proceedings or records that must be met by an applicant before a sealing order may properly issue. *R. v. Toronto Star Newspapers Ltd.*, [2005] 2 S.C.R. 188.

III

9 In his motion for leave to appeal, Lord Black submits that Cumming J. committed two errors: (1) he erred in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner; and (2) he erred in his understanding of the principle of comity and failed to consider the prejudice to Lord Black, a Canadian resident, arising from the use of the Payments Report in the American criminal proceedings against Lord Black.

10 Lord Black contends that his proposed appeal raises issues significant to bankruptcy practice for which there is no guidance, including the extent and nature of the court's role in supervising the work of a court-appointed receiver whose interests, which are adverse to a major stakeholder, conflict with his duties to act in an even-handed manner, and the appropriate conduct of the receiver where it has consequences to stakeholders beyond the Canadian border. Lord Black also contends that granting leave to appeal will not hinder the administration of the receivership as the receiver conceded in submissions before Cumming J. that there is no need to file the Payments Report now for any reason relating to the administration of the receivership.

IV

11 As Armstrong J.A. noted, at para. 15 of *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A.) there appears to be a "measure of confusion" in respect to the test for leave to appeal under s. 193(e) of the BIA. However, the caselaw is clear that one factor that is considered in all cases is whether the appeal is *prima facie* meritorious, a factor that Armstrong J.A. relied on in *SVCM*. See, *e.g.*, *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol* (1995), 30 C.B.R. (3d) 90 (Ont. C.A.); *Re Baker* (1995), 22 O.R. (3d) 376 (C.A.); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A.); *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th)

256 (Ont. C.A.). Similarly, this factor is also considered by the court in applications seeking leave to appeal under s. 193(e) from orders made under the CCAA: *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (C.A.).

12 *Ravelston*, supra, is a helpful example of the need for a *prima facie* meritorious appeal as the starting point in the application of the test under s. 193(e). If the proposed appeal is found to be *prima facie* meritorious, the court must then consider whether the other elements of the test have been met. At paras. 27-32 of *Ravelston*, Doherty J.A. provided this helpful guidance:

> As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the BIA. The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: [Citations omitted.]
>
> The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.
>
> A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.
>
> In *Re Canadian Airlines Corp. (2000), 261 A.R. 120* at para. 35 (C.A.), Wittmann J.A. (in chambers) was faced with an application for leave under the CCAA. He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is prima facie meritorious." He described the necessary merits inquiry in this way:
>
> > ... There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.
>
> I think the same level of merits inquiry is warranted on an application for leave to appeal under the BIA. I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.
>
> The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has prima facie merit. I do not reach those other considerations on this motion.

V

13 As I have indicated, Lord Black's proposed appeal focuses on two aspects of the reasons of Cumming J. He submitted that Cumming J. failed to act fairly and even-handedly in preferring the interests of the other stakeholder, USAO to his interests, thereby possibly prejudicing his right to a fair trial in the American criminal proceedings. Second, he contends that Cumming J. erred in his understanding of the principles of comity. In my view, neither of the proposed grounds of appeal is *prima facie* meritorious.

14 There are two important principles that this court has endorsed in considering whether leave to appeal should be granted in bankruptcy and CCAA proceedings. In *Ravelston Corp. (Re)*, [2007] O.J. No. 749 at para. 3 (C.A.), the court stated: "It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and

that absent demonstrable error, it will not interfere." In *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 at para. 40 (Ont. C.A.), Doherty J.A. stated: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all the stakeholders, the court will support the receiver's decision." These principles, necessarily, inform the determination of whether the proposed appeal is *prima facie* meritorious.

15 Turning to the first proposed ground of appeal, as Cumming J. said, the Payments Report is a necessary and normative analysis and part of the receiver's fiduciary duties in determining the financial situation of the bankrupt's estate. It will permit the stakeholders to learn and better understand the historical transactions of the insolvent business. Moreover, the motion judge found that the receiver had considered all relevant interests relating to the administration of the Ravelston estate in its decision to complete the Payments Report and to file it with the court. The interests that are relevant are those that are economic in nature, involving the debtor's assets, property and undertaking.

16 Lord Black has raised no competing economic interest to delay the filing of the Payments Report on its completion. Therefore, Cumming J. was correct in finding that his interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Lord Black's alleged interest is not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the Payments Report is in his capacity as defendant in the American criminal proceedings.

17 It is noteworthy that Lord Black presented no evidence that the filing of the Payments Report would prejudice him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. In my view, this is not surprising as it is difficult to understand how any relevant information in the Payments Report introduced in evidence by the United States Attorney could prejudice Lord Black's right to a fair trial. There is nothing unfair in the prosecution's introduction of relevant and admissible evidence against a defendant in a criminal trial.

18 I see no viable argument that Cumming J. erred in principle in the exercise of his discretion in approving the filing of the Payments Report. The proposed appeal has no realistic possibility of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error. In other words, Cumming J. made no apparent error in law or apparent palpable and overriding error of fact in his supervision of the receiver.

19 As for the second proposed ground of appeal, Lord Black contends that Cumming J.'s misapprehension of the principle of comity caused him to refuse to consider the prejudice to him from the use of the Payments Report by the USAO. In my view, this contention is also untenable.

20 The motion judge's comments in respect to comity were general in nature. He stated that comity requires that each society, and its courts, must recognize and respect the legal processes of the courts of other societies, and that, accordingly, it would be for the United States District Court to determine the admissibility of any information contained in the Payments Report that the prosecution may seek to introduce against Lord Black in his criminal trial. Cumming J. was never asked to rule on any foreign law or procedure, nor was evidence of a foreign law or procedure introduced. He made it clear at para. 25 that "[t]he issue as to whether the Payments Report is to be filed in this Court is, of course, a mater for this Court alone". He properly recognized that there was nothing improper in the receiver voluntarily providing the information in the Payments Report to the USAO, especially where the information may be relevant to the administration of justice.

21 I see no viable argument that Cumming J. erred in principle in his comments on the principle of comity. The proposed appeal has no realistic chance of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error.

VI

22 I would confirm the order that I made at the close of argument on March 22, 2007 refusing Lord Black's motion for leave to appeal the order of Cumming J. to this court. The parties have agreed that the successful responding parties should have their costs, and have agreed on the amount of costs as follows: RSM Richter Inc. - $5,000; Hollinger Inc. - $2,500; Sun-Times Media Group, Inc. - $1,500. All costs include disbursements and GST.

S. BORINS J.A.

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13. ***Eastman v. Dewdney Mountain Farms Ltd.***[45]

CITATION: Eastman, Johnson, Klein and Pillsworth v. Dewdney Mountain Farms Ltd.
2017 ONSC 5749
DIVISIONAL COURT FILE NO.: DC-1014/17
DATE: 20170929

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

M. G. Quigley, Matheson, Faieta JJ.

BETWEEN:

Adri and Tim Eastman, Melissa and Steve Johnson, Janet and David Klein, and Ruth Pillsworth
Appellants

– and –

Dewdney Mountain Farms Ltd.
Respondent

E. Gillespie, A. Chachula and K. Coulter, for the Appellants

D. White and A. D'Andrea, for the Respondent

HEARD at Oshawa: September 26, 2017

Matheson J. (Orally)

[1] This is a statutory appeal under s. 96(1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 (OMBA), from a series of decisions of the Ontario Municipal Board (OMB).

[2] The appellants seek to set aside three OMB decisions regarding amendments to the Municipality of Trent Lakes' Official Plan and Zoning By-laws regarding a proposed limestone quarry.

[45] *Eastman v. Dewdney Mountain Farms Ltd.,* [2017] O.J. No. 5054 (Div. Ct.)

Brief Background

[3] The respondent wants to develop a large-scale limestone quarry on land northeast of Bobcaygeon.

[4] On January 15, 2013 the Municipality of Trent Lakes approved the amendments to its Official Plan and Zoning By-Laws needed for the respondent to go ahead with the quarry.

[5] The appellants are Trent Lakes residents. They are concerned—among other things—about excessive road noise and ecological concerns resulting from the quarry. They appealed Trent Lakes' approvals to the OMB.

[6] The OMB hearing proceeded over several weeks in 2014 before Member Hefferon. The OMB heard from numerous expert and fact witnesses.

[7] On February 5, 2015, the OMB released its decision, making a contingent order. OMB Member Hefferon wrote a lengthy decision, which included a review of the evidence. The respondent's requested amendments to the Official Plan and Zoning By-laws were approved subject to certain conditions being met.

[8] Three errors in the decision were promptly noted by the respondent. The second error is most significant for this appeal – a finding by the OMB that an expert witness, Rob West, had not testified in support of his report when he had in fact done so.

[9] The parties took a number of follow-up steps as a result of these three errors. Different avenues were raised to address them.

[10] A motion for directions was brought before Member Hefferon, returnable May 5, 2015.

Prior to the return of the motion, on May 1, the appellants gave notice of their position in their formal Notice of Response. Among other things, they took the position that the matter could fall within s. 43 of the OMBA, which allows for a review, correction or rehearing, but also took the position that Member Hefferon could not be the adjudicator.

[11] On May 5, prior to the hearing of the motion for directions, the appellants' counsel asked to meet with Dewdney and Trent Lakes' counsel outside the hearing room. At that meeting, the appellants' counsel requested that the motion be heard in front a member other than Member Hefferon, and requested that it should be referred to the Executive Vice-Chair of the OMB, pursuant to s.43 of the OMBA.

[12] The respondents' counsel agreed with the appellants' counsel request that a member other than Member Hefferon deal with the three errors. At no point did appellants' counsel qualify his request or suggest that he objected in any way with a member other than Member Hefferon resolving the matters that had been raised, or reserve his right to do so later in the proceedings. If counsel for Dewdney had known that appellants' counsel was going to take issue with a member other than Member Hefferon resolving the matter at a later stage, he would not have consented to the request.

[13] On May 6, 2015, a letter was sent to the OMB with the consent of all concerned indicating that an agreement had been reached that the requested corrections regarding the three errors be addressed in a motion under s. 43 of the OMBA. The respondent Dewdney then brought the s. 43 motion.

[14] Along this course of events, the appellants had also moved for leave to appeal to this Court. The parties also agreed to adjourn that motion until the s. 43 motion had been heard.

Section 43 Motion

[15] Prior to the hearing of the s. 43 motion, the appellants delivered their formal response to the s. 43 request for review, correction or rehearing. Their primary position was that the error regarding the evidence of Mr. West could not be corrected. Their alternative position was that recalling Mr. West as a witness at a reconvened hearing, as proposed by the respondent,

"would resolve most if not all of these issues. Still, consideration would need to be given to the ability of [Dewdney] to have its witness participate in such a process. Subject to these considerations, in the Appellants' respectful submission this is the only appropriate approach to resolve this second error."

[16] The OMB held a hearing on November 12, 2015 regarding the s. 43 motion. Members Stefanko and Conti presided. As recorded in the decision, there was no dispute that these Members had jurisdiction.

[17] By the time of the hearing before these members, the parties had reached an agreement with respect to the approach to take to the alleged errors. In accordance with that agreement, by decision dated November 19, 2015, the OMB ordered as follows:

(i) there was a consent correction to para. 6 of the Hefferon decision;

(ii) with respect to the second error, regarding Mr. West's evidence, the OMB ordered that a "portion" of the hearing be "reconvened," and at that time, the OMB "shall once again hear the evidence of two experts, Chris Ellingwood and Rob West, both of whom were called at the original hearing."

[18] Thus, on consent, a portion of the hearing was reconvened to hear not just Mr. West's evidence, but also the evidence of another expert witness on the relevant subject matter, Mr. Ellingwood. The parties did not request, nor did the OMB order, a full re-hearing.

[19] The prior contingent order was replaced. The decision also approved the amendments in part, withholding only the zoning by-law amendment subject to the parties reaching a haul route agreement.

[20] On December 2, 2015, the re-hearing of Mr. Ellingwood's and Mr. West's oral and written evidence took place. In keeping with the agreement between the parties reached May 5th, the hearing did not proceed before Member Hefferon. It proceeded before Member Conti.

[21] There is no indication that a preliminary objection was made to Member Conti conducting the re-hearing, as we would expect would have been made if the appellants did object to a different member presiding.

[22] Both experts testified. In final submissions, after their testimony, counsel to the appellants began to make submissions that took issue with Member Conti making a decision regarding certain issues without having heard all the prior evidence. After the evidence had been re-heard, the appellants requested a new full hearing.

[23] On May 3, 2016, the OMB released its decision. As set out in the reasons for decision, Member Conti noted that part of the evidence had been re-heard by an order that was on consent of both sides. He further acknowledged that he had not heard all the prior evidence but had heard the evidence necessary to correct the error regarding Mr. West's evidence. He went on to consider the impact of the evidence that he had heard, and, as shown in his reasons for decision, he considered the evidence in detail. With respect to the appellants' request, he concluded that a full new hearing was not justified. Minor amendments were made to the February 5, 2015 decision and the remainder of the decision remained unchanged.

[24] After Member Conti's decision was released, the appellants' application for leave to appeal to this Court was resumed, with an amended leave motion that added the issue of audi alterem partem, otherwise described as "he who hears must decide."

Motion for Fresh Evidence

[25] I turn now briefly to the motion for fresh evidence, which was disposed of earlier today with reasons to follow. These are those reasons.

[26] The respondent brought a motion for leave to introduce fresh evidence on the appeal. The fresh evidence relates to certain of the events I have just described, including the agreement made May 5, 2015,

under which Member Hefferon not preside on the s. 43 motion to review, correct or rehear his original decision. We granted the motion for leave to introduce fresh evidence.

[27] Leave was sought to introduce four documents in particular. Three of those documents are part of the formal proceedings before the OMB. The fourth is a brief affidavit of Mr. Ewart, counsel to the respondent Municipality of Trent Lakes, who is not appearing as counsel on this appeal.

[28] The parties agree on the test for admission of the fresh evidence, as set out in the decision of Sengmueller v. Sengmueller, 1994 CanLII 8711 (ON CA), [1994] O.J. No. 276 (Ont. CA).

[29] The appellants dropped their objection based on settlement privilege after the Court drew to their attention the decision in Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35, [2014] 1 S.C.R. 800, regarding the exception to the privilege where a settlement or its terms are being disputed.

[30] After argument, we concluded that the fresh evidence met the test, as follows:

(1) The fresh evidence is credible. It comprises three formal documents filed at the OMB, two of which are from the appellants. The fourth document is an affidavit that is mainly first hand testimony from Mr. Ewart, a witness who was present at the May 5th meeting. His evidence is not challenged by contrary evidence on this motion, and the one paragraph on information and belief from counsel appearing today has not been shown to be controversial and is consistent with other material in the record.

(2) The fresh evidence was put forward after the issue it relates to arose, which was late in the proceedings. We do not agree that it should have been brought in front of the judge dealing with the leave to appeal motion. We conclude that there was not a problematic delay in bringing the motion in the circumstances of this case.

(3) The fresh evidence would likely be conclusive on the ground of appeal to which it relates, as it has turned out to be for Issue #1, as shown in our reasons that follow.

Analysis

[31] This appeal is made under s. 96 of the OMBA, which grants this Court jurisdiction to hear an appeal on a question of law only. Leave to appeal is required and has been granted.

[32] We note that the appellants submit that the issue of whether the four issues before us are questions of law has already been determined by the leave judge. We accept that the leave judge must be satisfied to some degree, for the purposes of granting leave, but we do not accept that his determinations are binding on this panel. The leave judge, who gave no reasons for decision, was not deciding the

ultimate appeal after full argument on the merits. This panel is doing so, and must consider the question of whether the issues raised, as argued fully before us, are questions of law.

[33] With respect to the standard of review, questions of law engaging the special expertise of the OMB attract a standard of reasonableness. Questions of law generally applied and for which the OMB has no special expertise are reviewed on a standard of correctness. There is no standard of review for questions of procedural fairness or natural justice.

[34] There are four issues before us, as follows:

1. whether the OMB breached audi alterem partem;
2. whether the OMB misapprehended evidence about the at-risk turtle species;
3. whether the OMB misapprehended evidence about sound levels; and,
4. whether the OMB erred in proposing noise mitigation measures without evidence supporting their feasibility.

[35] We conclude that the appeal must fail on Issues 1, 2 and 3, but we grant the appeal on Issue 4.

Issue 1: Whether the OMB breached audi alterem partem

[36] According to the appellants, the OMB violated this procedural fairness principle because Member Conti only heard Mr. Ellingwood's and Mr. West's evidence, which the appellant submits was out of context of the other evidence from the original hearing. And the appellants submit that they never consented to proceeding in this manner.

[37] However, the evidence before us amply demonstrates that the appellants did consent to the process that took place, without qualification, and waived their right to object at this stage.

[38] At the request of the appellants, the parties' agreed that Member Hefferon would not preside over the s. 43 matter. Also on consent, the OMB ordered that only a portion of the hearing was reconvened, to rehear two witnesses only, as stated in its order. On consent, there was a re-hearing of only a portion of the evidence before a different member.

[39] Further, before the s. 43 hearing there was no request that other evidence also be re-heard, nor was there a submission that Member Conti would have to rehear all of the prior evidence.

[40] Moving to when the rehearing commenced, there was no objection raised when it was obvious that Member Conti would be rehearing the evidence of those two witnesses. That would have been the appropriate time to raise the issue, yet it was only raised in final argument about certain issues, after the expert testimony had been reheard.

[41] Member Conti was keenly aware of his role, as shown in his reasons for decision. At the outset of his decision he noted, as set out in para. 5 that "based on the submissions and the consent of the parties, the OMB determined that it would re-hear the evidence of both Mr. West and Mr. Ellingwood to determine if the decision should be altered in any way."

[42] Member Conti discussed this at some greater length at para. 60 of his reasons for decision, as follows:

Mr. Gillespie contended that this paragraph could not be dealt with because this Member did not hear 'all of the evidence' and that the Board should order a new hearing. While this Member did not hear all of the evidence provided at the original hearing, the Member heard the evidence that was determined to be critical to correct errors in the decision as identified by the parties through the motion hearing. It is the Board's understanding that Mr. Gillespie consented that this was the evidence that should be re-heard to correct errors. This evidence dealt directly the main matters included in para. 85, that is, Blanding's turtle, the whip-poor-will and species at risk. The Issues that were raised through the re-hearing of the evidence of Mr. West were simply not of sufficient significance to require revisions to para. 85. Furthermore, only through significant and compelling evidence raised in the re-hearing would the Board contemplate that a new hearing may be required. The evidence provided by Mr. Ellingwood and Mr. West did not raise Issues that would meet this threshold. Based upon the evidence, the Board will make no changes to para. 85. The Board affirms the original decision as amended through the above and as amended through the decision of the Board issued on November 19, 2015 as a result of the motion hearing held on November 12, 2015.

[43] The appellants now submit that they could not have consented because they could not have known in advance what Member Conti would refer to and rely upon in making his decision. We disagree. The appellants requested and agreed that a portion of the hearing would be reconvened before another member of the OMB and should not now be able to appeal on the basis that that member did not hear all the prior evidence. Member Conti did what he was called upon to do in accordance with the agreement between the parties of May 5 and the consent order of November 19, 2015. This ground of appeal therefore fails.

Issue 2: Whether the OMB misapprehended evidence about the at-risk turtle species

[44] The appellants have not identified a question of law in their submissions on this ground of appeal. Their submissions ask for a reassessment of the facts in their favour.

[45] The appellants submit that the OMB wrongly rejected uncontroverted evidence of an observed Blanding's turtle near the quarry site, evidence about how far the turtles can travel and Mr. West's evidence at the s. 43 re-hearing. However, the OMB specifically considered all of this evidence along with other evidence that the turtles had never been seen on the proposed quarry lands and that turtles would not experience harm as a result from the quarry's construction and operation. The OMB further concluded that there was no evidence that demonstrated that the turtle's habitat extended near the quarry site.

[46] The appellants further submits that the OMB failed to consider the Environmental Review Tribunal's findings about the Blanding's turtle and mitigation measures proposed to protect those turtles in a different case – Prince Edward County Field Naturalists v. Ontario, [2016] O.E.R.T.D. No. 25 – which relates to property at Ostrander Point in Prince Edward County. However, the OMB specifically considered and distinguished that case, noting the substantial factual differences. That case related to an area in Prince Edward County where a proposed site was found to be entirely composed of a high quality Blanding's turtle habitat and the turtles, as a result of the project, would suffer serious and irreversible harm. That is plainly completely different from the evidence before the OMB in this case.

[47] The appellants further submitted that the OMB reached a conclusion on mitigation measures without any supporting evidence. This is not borne out. The OMB found there was no evidence of a turtle habitat on the quarry lands and that there was no evidence of a Blanding's turtle having been discovered on the quarry lands. We note, therefore, that there was no demonstrated need for mitigation measures. However, the respondent Dewdney had mitigation measures under which a Blanding's turtle, if discovered, would be moved to safety. Appellants' counsel acknowledged that those measures were part of respondent Dewdney's Operational Plan under the Aggregate Resources Act, R.S.O. 1990, c A.8. Thus, the existence of supervision of this mitigation, as part of the Operation Plan under that Act, was implicit.

[48] We do not agree that it was an error of law not to require more in these circumstances.

Issue 3: Whether the OMB misapprehended evidence about sound levels

[49] This issue also does not give rise to a question of law. The OMB based its decision on sound levels after assessing the evidence of both party's experts. The OMB preferred Dr. Williamson's evidence about sound levels, as found in paragraphs 38 and 39 of the February 5, 2015 reasons for decision, as follows:

The Board was told that "45 dba" is generally considered by acoustic professionals to be an acceptable one-hour equivalent sound level in a rural area. The projected noise increase, Dr. Williamson contended, should therefore be measured from a base of 45 dba rather than the existing 30-35 dba. Mr. Emiljanow did not agree. Mr. Emiljanow maintained that an increase of 10 + dba (as measured from the current 30-35 dba along Ledge Road to the generally accepted rural noise level of 45 dba) would be classified using MOE Guidelines MPC 232 as 'very significant' (Exhibit 89, table 9).

From the testimony of the two experts, the Board concluded that the noise levels of 30-35 dba are more commonly found in wilderness areas rather than on rural properties metres from a municipal road that is maintained year-round, which is the case in the subject area, and on which families live and presumably use power tools (chain saws, garden tractors, power mowers, etc.) to maintain their properties. The Board prefers the evidence of Dr. Williamson and finds that for the purposes of these proceedings, the ambient one-hour equivalent sound levels along Ledge and Quarry Roads should be considered to be 45 dba.

[50] It was not an error of law to accept an expert's evidence that regard should be had for acceptable sound levels in a rural area. The appellants have essentially challenged the Board's fact-finding process in preferring one expert's evidence over another.

[51] The appellants also seek to rely on another case, James Dick Construction Ltd. v. Caledon (Town of), [2010] O.M.D.B. No. 905. However, as appellants' counsel acknowledged in oral argument, a similar finding of fact to that relied upon before us was not even made in that case and, again, the factual basis of that case is materially different.

[52] The OMB's decision was based on the evidence before it and is reasonable. No error of law has been demonstrated.

Issue 4: Whether the OMB erred by proposing noise mitigation measures without evidence supporting their feasibility

[53] The appellants submit that the OMB erred in law in adopting the respondent's mitigation measures without regard for the accepted evidence that there was a possibility that access to private lands would be required to implement those measures.

[54] In response, Dewdney submits that as set out in the OMB Order of November 19, 2015, the order was contingent. The OMB's order provided that the "zoning by-law amendment shall be withheld pending confirmation from the Municipality that a Haul Route Agreement has been executed by the relevant parties." However, counsel to Dewdney acknowledged that the reference in the order to "relevant parties" would not ordinarily encompass private land owners.

[55] The appellants submit that the approval is therefore ineffective and in error because it fails to address this issue. It contemplates mitigation measures that may not be implemented without the private land owners' consent, which is not provided for.

[56] We agree that this is an error in law and remit this one issue to the OMB for re-consideration.

[57] The appeal is therefore granted in part.

CAMPP WINDSOR ESSEX RESIDENTS ASSOCIATION	- and -	**CITY OF WINDSOR, WINDSOR REGIONAL HOSPITAL and 386823 ONTARIO LIMITED**	Divisional Court File No.: DC-20-00000151-00 LPAT Case No.: PL180842/180843
Appellant *(Appellant and Moving Party)*		*Respondents* *(Respondents)*	

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding Commenced at London

APPELLANT'S COMPENDIUM FOR ORAL ARGUMENT

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