

ISSUE DATE:

July 21, 2011



PL100206

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

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

APPEARANCES:

Parties

Counsel*/Agent

City of Ottawa

T. Marc*

Thomas Cavanagh Construction Ltd.

D. Kelly* and U. Melinz*

Ministry of Municipal Affairs and Housing

J. R. Boxma*

Friends of the Greenspace Alliance

A. Kempster and E. Driessen

DECISION OF THE BOARD DELIVERED BY N.C. JACKSON

Ottawa Official Plan Amendment number 76 follows a comprehensive review of the 2003 Ottawa Official Plan required under section 26 of the *Planning Act* (re-enacted Bill 51 to amend the *Planning Act*). Following a public process of approximately two years, Ottawa adopted Amendment 76 and it was processed to the Ministry of Municipal Affairs and Housing (MMAH) where it was modified and approved. Following notice given by MMAH, 30 Appeals were lodged and such were then to be heard by this Board. The stated City of Ottawa (the City) position is that the updating of its Official Plan is on the basis of the 2005 Provincial Policy Statement (PPS).

The Ontario Municipal Board held three Prehearing Conferences dealing with procedural matters including party status, issues and the setting down of the 30 Appeals into nine different hearings. The hearing for environmental issues including the Flewellyn Special Study Area and mapping and text environmental issues, including

quarries was set down for commencement on June 14, 2011 for two weeks. A Procedural Order governs the proceedings.

The hearing took place over eight hearing days. The Appellant Ken McRae called three witnesses under summons; Shaun Thompson, an ecologist with the Ministry of Natural Resources (MNR), Don MacIvor planner with the Rideau Valley Conservation Authority and Anda Rungis, planner with the MMAH now on secondment. Mr. McRae later testified in Reply. Mr. McRae took an active role cross examining other witnesses and making argument. The Friends of the Greenspace Alliance did not call evidence but cross examined and argued in support of Mr. McRae's position that 14 wetlands identified by the MNR in the Flewellyn Special Study area should be designated in the Official Plan now. Thomas Cavanagh Construction Ltd. (Cavanagh) called a planner experienced with aggregates and a land use planner. Cavanagh is generally supportive of the Flewellyn Special Study area provisions as modified, but does seek significant changes to the Official Plan Amendment. The City called three land use planning witnesses, two with qualifications in environment and the third with experience in the official plan process. MMAH called the current Ministry planner responsible for the Ottawa area in support of the modified provisions for the Flewellyn Special Study area and the City's position generally.

The Flewellyn Special Study Area

The Flewellyn Special Study Area as modified by MMAH and then amended further by the City is located in west Ottawa in the vicinity of Flewellyn Road and Conley Road. The area is dotted with wetlands that are southeast of the Goulbourn Significant Wetlands. Goulbourn is a former municipality, now part of the reorganized Ottawa, circa 2000. Ottawa experienced flooding in the Flewellyn area and concerns with aggregate resources. Concerns regarding the significance of the wetlands, the flooding and the complexity of competing natural resources were evaluated

Policy 3.2.5 as now proposed:

The Flewellyn Special Study is an overlay designation on Schedule A to the Ottawa Official Plan. The purpose is to restrict development until such time as the City has completed a cumulative effects study. This study will identify the changes to the drainage in the area resulting from, but not limited to, the effects

of road construction, private drain works, municipal drain maintenance, and discharge of water from quarries.

The City will follow the cumulative effects study with a re-evaluation of the area in 2016 using the Ontario Wetland Evaluation System. Once the study and re-evaluation have been completed, the City will amend this Plan to remove the Flewellyn Special Study Area overlay designation and confirm the appropriate land use designations and policies for the area.

In addition to the Flewellyn Special Study Area policies, the Study Area remains subject to the Drainage By-law No. 2007-398 and former Township of Goulbourn Removal of Topsoil By-law No 45-86.

Policies

Notwithstanding the underlying designations on Schedule A of this Plan, no new development, as defined in section 4.7.8, will be permitted until the Flewellyn Special Study Area overlay is removed.

Uses that lawfully exist on the date that this provision comes into force are recognized and may continue.

The MMAH completely and Cavanaugh substantially support this wording. Cavanaugh requests that the City reference the Mineral Resources Study which the City at the request of the Ministry has agreed to undertake. The City evidence is that this can be considered, although in a sequence of the cumulative effects study first, the wetlands re-evaluation second and mineral aggregates study third. The Board modifies accordingly.

Mr. McRae with the able support of the Friends of the Greenspace Alliance, opposes the very concept of the Flewellyn Special Study Area and asks the Board to proceed with the designations of the 14 provincially significant wetlands as identified by the Ministry of Natural Resources (MNR). Reasons advanced include process, doubt as to *bona fides*, and the desire to put provincially significant wetlands under protection. Process goes back to 2004 when the City initiated study identified as many as approximately 20 provincially significant wetlands (PSW's), generally in the area now called the Flewellyn Special Study Area. Mr. McRae's photographic evidence in Exhibit 6 showed changes to some of the wetlands so that in a later analysis by his witness (Thompson of the MNR) only 14 continued to qualify as PSW's. Although McRae and Driessen attributed this to landowners, the City through a drainage study by Robinson

concluded that blockages in drainage, maintenance, road construction and discharge of water from quarries contributed. Robinson undertook hydrologic investigations, a water budget and a hydrologic evaluation in response to landowner claims that water flows in the area of Flewellyn Road had increased significantly over time and that high water levels had caused changes in vegetation from upland to wetland type species.

Conclusions of the drainage study were that the original drainage area had increased from 75 hectares to 720 hectares through diversions of flow. Some culverts are now submerged demonstrating past better drainage and less standing water. Pumped discharge from quarries contributes to the persistent base flow. Downstream channel constrictions reduce the capacity of existing culverts.

It was inferred that Landowners had their way in the process. The City Committees working on these issues included environmentalists (Environmental Advisory Committee, Ottawa Forests and Greenspace Advisory Committee) as well as the landowner's representatives. Mr. McRae addressed the City Committee. Although a Drainage Petition was thought to be a solution it was not proceeded with in 2010.

Drainage plays into consideration of prohibition of development vs. no alteration and PSW's vs. Aggregates. The proposed policy for Flewellyn speaks to no development while Appellant McRae prefers no alteration. The Board is mindful that the Official Plan is Policy while regulation must be by Regulation under the *Conservation Authorities Act* or municipal by-law. While there has been some confusion on the by-law front both as to interpretation, administration and enforcement, Ottawa does have by-laws referenced in the Flewellyn Policy that can be applied. Further municipal work has been undertaken on a site alteration by-law not yet enacted. The Conservation Authority has a regulation that can be applied with direction to Conservation staff. The Board finds Regulatory means, outside the proposed Policy, do exist or are in process.

In many areas of Ontario policies of the PPS may overlap or interact. Important PSW's may be located on lands with Aggregate resources (Flewellyn). Both are resources to be protected under the PPS. Part 111 and section 4.3 of the PPS assume no priority and all policies are to be applied to each situation. Under 2.1.1 natural features shall be protected for the long term and by 2.1.3 development and site alteration shall not be permitted in PSW's. Under 2.5.1 mineral aggregate resources

shall be protected for long term use. Does one resource have priority over the other? That is not clearly spelled out in the PPS. The MMAH witnesses, due to impact concerns, favour PSW's but rely upon the MNR as the administration authority for approval of aggregate licenses and the identifier of PSW's under the PPS (definition of Significant in the PPS refers to wetlands identified by the MNR using provincial evaluation procedures), when both are in play. The evidence of the City witness Dr. Stowe is thoughtful and instructional when this clash of high priority resources takes place. Rather than recognizing by policy that Council will consider exceptions for aggregates in PSW complexing that he believes could set, unintentionally, a priority and practice, he offers the following test to be applied in 2016 in the studies and analysis to follow:

The Aggregate Resource is evaluated with the PSW as follows: The value (quality) of the aggregate resource and its need (close to market) are analyzed. The particular function of the wetland in a complex is studied with the hydrological habitat (flooding) and contribution to biodiversity considered. If it is proposed to remove a wetland what is the cost, and what mitigation or compensation is required in the short term and long term to protect the ecological value of the wetland complex as a whole?

Section 1.1.2 of the Natural Heritage Manual issued by the MNR 2010 (second addition) is to inform planning decisions on the PPS. Section 1.1.2 of the manual recognizes that regional variations in planning issues and approaches are contemplated.

The Board will not modify the proposed Flewellyn policy further to provide specifically for aggregate exceptions as requested by Cavanagh. The Board believes such are inherent in the Flewellyn Special Study area provisions.

The Board agrees the issue of licensed aggregate reserves is determined already through the application of section 66 of the *Aggregate Resources Act*. "This Act, the regulations and the provisions of licenses and site plans apply despite any municipal by-law, official plan, or development agreement and to the extent that a municipal by-law, official plan or development agreement deals with the same subject matter as this Act, the regulations or the provisions of a license or site plan, the by-law, official plan, or development agreement is inoperative." The Parties recognize the effect

of this provision and no one opposes the Board modification to the Flewellyn study area as outside the Cavanagh licensed aggregate area. The Board also modifies the Flewellyn study area in respect of the Taggart quarry lands in accordance with the environmental report on consent.

The cumulative effects study PSW analysis and mineral aggregates study are to be prior to any *Planning Act* process. As such, in accordance with the evidence the Board modifies section 3.2.5 to add the words “followed by a public consultation”, after the reference to cumulative effects study, Ontario Wetland Evaluation System (OWES) and mineral aggregates study.

Notwithstanding the earlier position of the Province to designate the PSW’s in the Official Plan, the Board finds the reasons above cause the Board to approve the modified position of the Province and the City to designate an overlay providing for no development. This remarkably is agreed to by the 60 landowners affected as a balance between protecting wetlands while recognizing legitimate concerns verified by the City in the Robinson study, that unique drainage problems existed.

Under the provisions of both sections 3.2.5 and 3.2.1 of OPA76 Mr. McRae has asked that the Board modify OPA 76 to require the City to adopt a site alteration by-law under the authority of the *Municipal Act* and a tree cutting by-law to protect significant environmental features. Prior to OPA 76 the Ottawa OP referenced a top soil by-law now modified to refer to grade alteration and fill under the *Municipal Act*. This is a by-law that is now under active consideration at the staff level. The Board is cautioned by counsel for the Province that it cannot require the City to act in a legislative function. The evidence in this hearing is that existing by-laws could be applied and are referenced in the new policy 3.2.5. That should be the first emphasis and then the application of Ontario Regulation 174/06 under the auspices of the Rideau Valley Conservation Authority respecting interference with wetlands. The Board will not modify further in the manner requested for a site alteration by-law. A tree By-law has been enacted albeit with no application in rural areas.

The Natural Heritage System

Ottawa proposed a system based upon mapping and the use of identifiers including a non Official Plan Annex 14 map and the extensive use of Environmental Impact Statements and Watershed and subwatershed plans. Cavanagh is seeking greater certainty from the mapping in OPA 76. Section 2.4.2 recognizes that Annex 14 is for information purposes and will be updated through watershed and site specific studies. The Board modifies the reference to Annex 14 updates to reference updates through public consultations at regular intervals. Policy 2 references the designation of most Significant features as Significant Wetlands, Natural Environment Areas and Rural Natural Features (estimated by the City at 84%) on schedules within the Plan. The Board accepts the City rationale for not designating all such features since:

1. Provincial mapping is not accurate, outdated and in some cases uses different definitions;
2. Some features are not discernable ie. significant wildlife; and
3. Some features require on site verification and right of entry is not always granted.

As a result the City mixes mapping of larger features with the practice of the precautionary approach. To the degree that there is scientific uncertainty there is some onus on the proponent through an Environmental Impact Study (EIS) to show no significant impact on the resource. This approach is supported by the Province in the Natural Heritage Reference Manual IBID. The Manual states its intended useage at OMB hearings and in section 2.2 it states; "To protect the ecological function and biodiversity of natural heritage systems and the health and integrity of natural heritage features or their associated ecological functions for the long term, Planning authorities should apply decision making approaches that incorporate the precautionary approach where appropriate." The Board accepts the principle Ottawa has followed in not expressly designating all natural features such as significant wildlife habitat and endangered and threatened species habitat. There are however, other natural features identified in policy 1 of section 2.4.2 which the City witness Stowe acknowledged in cross examination that could be included on Schedule A or on larger scaled Schedule

A. The Board directs further review by the City in consultation with Cavanagh as to City implementation on Schedule A, provided there are clear identifiers available. The Board may be spoken to prior to issuance of its Order should difficulties in implementation arise.

Cavanaugh further seeks to amend section 3.2.1 Policy 1 to provide for exceptions to PSW's when the lands are zoned with approvals under the *Planning Act* or the *Aggregate Resources Act*. The City and Province now agree and the Board so modifies in the City language of Item 35 of Exhibit 24. There is however disagreement with the following: "The policies of this section will also be applied to lands where the Ministry of Natural Resources has identified new significant wetlands or has revised significant wetland boundaries, regardless of whether the new significant wetlands or significant wetland boundaries are designated in this Plan" (items 35 and 40 of Exhibit 24). This type of deeming of wetlands identified by the MNR is described by City witnesses to be interim yet no interim time is set out. More importantly it seeks to incorporate into the Official Plan the work of the MNR without *Planning Act* notice under section 17 nor public process and appeal rights. As argued the City may act without notice under the part lot control provisions of the *Planning Act*. That is not the case with PSW's which the City recognizes by designation in the Official Plan. The Flewellyn Special study area itself and the case of *561650 Ontario Inc. v Ottawa [2003] O.M.B.D. No. 330 and Material Handling Problem Solvers Inc.* May 29 2002 Ont. S.C. and Aug 20, 2002 Ont. Div. Ct., demonstrate the clear *Planning Act* jurisdiction and process when dealing with PSW's identified by the MNR. The Board will modify to provide *Planning Act* process through annual consolidation of such new PSW's in public *Planning Act* process or inclusion in five year comprehensive reviews under section 26 of the *Planning Act*.

Acquisition

Sections 53, 90, and 257 of Exhibit 24 seek, at the request of Cavanagh, to have the City acquisition apply when land designated as Rural Natural Features or General Rural Area with an Environmental Impact Study (EIS) limiting development, or Rural Natural Feature designation, or General Rural Area and an EIS has determined that the protection of the feature eliminates development potential.

These requests stem from the existing provisions of section 5 of the Ottawa Official Plan whereby the City will acquire private lands if such cannot be developed related to their greenspace values. Section 5 is based upon the principle that if private lands are to be zoned or designated for conservation to benefit the public as a whole, then the appropriate authority must be prepared to acquire the property. Designations in OPA 76 can have that effect directly by designation or through subsequent watershed planning and required EIS work. The Board agrees that the proposed provisions in the Ottawa Official Plan bear revision but only if the effect is to sterilize the lands preventing their development. The Board so modifies.

Development within Floodplains

Cavanagh seeks permission to permit landscape features, ponds or hard surface basketball tennis courts and parking areas, under conditions, in floodplains. The Board is not satisfied with the appropriateness of what the City and Greenspace term the worsening of a default position in part due to the impermeable nature of the uses proposed. The Board adopts the testimony of the City witness Finley that Two-Zone Flood Plain Policy Areas permit under Policy 5, paragraph (d), only passive non-structural uses which do not affect flood flows.

Other Environmental Policies of OPA76 Appealed But Which Did Not Proceed

Based upon the City planning evidence and the absence of evidence supporting the Appeals to terms 12, 13, 34, 36,38, 39, 42, 43, 45, 47, 51, 52, 126, 147, 196, 200, 201, 203, 204, 205, 206, 207, 218, 269 with respect to schedules R7, R9, R10, R11, R23, R25, R26, R27, R28, R39, R30, R31, R32, R39 and item 274 with respect to schedules R13, R14 and R41, the appeals against such items set out in exhibit 24 are dismissed.

The Board also accepts modified wording on items in Exhibit 24 on which there is no longer dispute.

For the reasons given above, the Cavanagh appeal is allowed in part. The McCrae appeal is dismissed although the Board considered it carefully in language changes made. The Board finds consistency with the PPS, good planning and approves

of the disputed sections in this phase hearing as modified and referred to above. The final Order is withheld pending receipt of a draft order reflecting the above language changes, mapping changes and consideration of further mapping detail on Schedule A. This response is to come from the City in consultation with other parties.

“N.C. Jackson”

N.C. JACKSON
VICE-CHAIR

SCHEDULE “1”

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