Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: January 06, 2022 **CASE NO(S).:** PL180900

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	2025890 Ontario Inc.
Appellant:	DLR Holdings & 2524445 Ontario Inc.
Appellant:	Innisfil Mapleview Development Ltd.
Appellant:	Middlefield Financial Services Limited; and others
Subject:	Proposed Official Plan Amendment No. 1-OP-1801
Municipality:	Town of Innisfil
OLT Case No.:	PL180900
OLT File No.:	PL180900
OLT Case Name:	Ministry of Municipal Affairs and Housing v. Innisfil (Town)

Heard: in writing

APPEARANCES:

Parties	**Counsel**
Town of Innisfil	Q. M. Annibale M. Joblin L. Vrebosch
County of Simcoe	E. M. Green
2025890 Ontario Inc. Middlefield Financial Services Ltd. Nextnine Ltd.	N. M. Smiley

DLR Holdings and
2524445 Ontario Inc. J. Feehely

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE TRIBUNAL

[1] The Town of Innisfil ("Town") adopted an Official Plan ("OP") on January 17, 2018. The County of Simcoe ("County") approved the OP with modifications on October 9, 2018. Several appeals were filed, including an appeal by the Ministry of Municipal Affairs and Housing ("MMAH").

[2] The appeals were the subject of an initial Case Management Conference ("CMC") and a written motion to deal with the settlement of the MMAH appeal. The reader is referred to the decisions from the CMC and the settlement motion for additional details.

[3] The decision from the settlement motion brought the OP into effect except for certain lands whose designations in the OP remained under appeal.

[4] The hearing of these remaining appeals proceeded by way of written submissions. The Town and the County filed joint submissions for this written hearing and are occasionally referred to as the Municipal Parties in this decision.

[5] Three remaining Appellants filed submissions for this written hearing: Sugar Meadows Inc. ("Sugar Meadows"), DLR Holdings and 2524445 Ontario Inc. (together "DLR"), and 2025890 Ontario Inc., Middlefield Financial Services Ltd. and Nextnine Ltd. (together "Nextnine").

[6] Shortly after filing its written submissions, Sugar Meadows withdrew its appeal.

[7] DLR appealed the designation of Agricultural Area and the designation of Natural Environment Area on portions of its lands.

[8] Nextnine has appealed the designation of Key Natural Heritage Features and Key Hydrologic Features with a Natural Heritage System Overlay.

[9] The Tribunal dismisses the remaining appeals of DLR and of Nextnine for the reasons that follow.

ISSUES, ANALYSIS AND FINDINGS

Legislative Regime

[10] As a result of amendments to the *Planning Act* ("Act") effective September 3, 2019 and Ontario Regulation 174/16, these matters meet the requirement to be disposed of in accordance with the Act as it read on September 2, 2019. In summary, the Notice of Decision of the County, as the Approval Authority, was given within the necessary time envelope of April 2, 2018 and September 3, 2019. A CMC was held, and the written hearing was scheduled and noted in the written decision from that CMC.

[11] The result is that the tests applicable to these appeals are those of the Act as it read on September 2, 2019. Since the Tribunal is dealing with an OP adopted by the Town and approved, with modifications, by the County, it is s. 17(36.0.1) of the Act as it read on September 2, 2019, that applies.

[12] This section states:

> (36.0.1) An appeal under subsection (36) 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.

[13] In addition to these narrow grounds for appeal, s. 3(5) of the Act requires the Tribunal's decision to be consistent with the Provincial Policy Statement in effect at the time of the decision. It also requires that the decision conform, or not conflict, with a Provincial Plan applicable to the lands that is in effect at the time of the decision.

[14] For this decision, the Provincial Policy Statement in effect is the Provincial Policy Statement 2020 ("PPS 2020"). The Provincial Plans to be analyzed for conformity are the Growth Plan for the Greater Golden Horseshoe ("GGH") 2019 as amended in 2020 ("Growth Plan 2020") and the Lake Simcoe Protection Plan ("LSPP"). Since the Town is a lower tier municipality, the Tribunal must also determine if the OP designations under appeal conform with the County's Official Plan ("COP").

Evidence Considered

[15] For this written hearing, the Tribunal had before it the Municipal Record, which included the appeals, the staff report and materials before the Town when the decision to adopt the OP was made. The Tribunal also had the Appeal Records filed by both DLR and Nextnine, and the Responding Appeal Records filed by the Municipal Parties for each of these two groups of Appellants. These materials included several affidavits from qualified experts in fields that touched upon the central dispute between the particular appellant and the Municipal Parties.

[16] As a result of changes to certain provincial planning instruments between the time appeal records were filed and the time of the written hearing, the Tribunal also had the benefit of Supplementary Affidavits from the expert planners, whose filed affidavits contained initial professional opinions on the OP in light of these provincial planning instruments.

[17] As a result of unavoidable delays occasioned by the onset of, and associated Provincial orders in response to the COVID-19 pandemic, further changes occurred with the coming into effect of the PPS 2020 and the 2020 amendment to the GGH 2019.

[18] When undertaking its analysis for this decision, the Tribunal considered the initial affidavits that analyzed the then in force PPS 2014, and the Supplementary Affidavits that analyzed and considered the professional opinions in the context of the GGH 2019. The Tribunal then examined these various affidavits in the context of the PPS 2020 and the Growth Plan 2020. The Tribunal is satisfied that the sections of these Provincial planning instruments on which the experts relied for their expert professional opinions, particularly for those expert opinions expressed in the Supplementary Affidavits, remained the same with the result that opinions and analyses expressed in these various affidavits were applicable to the 2020 documents.

A Focused Hearing

[19] The Tribunal's consideration in this hearing is quite focused.

[20] As a result of the narrow basis of an appeal, and the requirements of s. 3(5) of the Act, this hearing and decision deal primarily with the questions of whether the OP designations for these properties are consistent with the PPS 2020, conform to the applicable provincial plans in effect at the time of this decision and conform to the COP.

[21] Neither DLR nor Nextnine have an application for amendment of the OP before the Tribunal in this hearing. As such, the questions for determination are not whether some other designations may also meet the requisite tests.

[22] Both DLR and Nextnine prefer different designations on their lands that will assist them to implement their respective ambitions for development and use. Evidence and submissions in this regard are of assistance to the Tribunal only in terms of the Tribunal's analysis of whether the OP designations meet the consistency and conformity tests.

Prematurity

[23] Prematurity was raised in filings by each of these Appellants. In the case of DLR, it was phrased in submissions as a request for an order to adjourn its appeal. In both of these cases, the suggestion is that further study is needed to determine the final on-ground conditions that would then inform the appropriate designations.

[24] Part of this suggestion arises from the Tribunal's support for settlement between the Parties and the time such discussions might take. This was signalled in the Tribunal's earlier decisions. Ample time for such discussions and completed analyses has now passed and no settlement is before the Tribunal in this hearing. Additionally, prematurity is not a ground for appeal under the legislative regime for this hearing.

[25] The Tribunal denies the DLR request for adjournment and otherwise attaches no weight to the assertion of prematurity.

The DLR Appeal

[26] This appeal applies to 1194 and 1224 Belle Aire Beach Road. DLR takes the position that the designation of Agricultural Area does not conform to the COP, does not conform to the Growth Plan 2020, and is not consistent with the PPS 2020.

[27] DLR wishes to develop its lands. To do so, DLR needs a Rural Area designation. To support this intention, DLR wishes to re-designate a portion of the lands from Agricultural Area to Rural Area and amend the Natural Heritage System Hazard Lands and Streams overlay to support this change.

[28] DLR retained a number of experts who produced reports, some of which were complete and some of which remained outstanding at the time of the Town's decision and the time written submissions were filed. In short, the reports prepared by DLR's

experts favoured the DLR-requested designation, rather than the Town-preferred designation.

[29] While DLR identified a concern with the Natural Heritage System Hazard Lands and Streams overlay, the Tribunal finds that this does not stand separately from DLR's wish to have its lands re-designated as Rural Area. The main target of the DLR appeal is the requested change from Agricultural Area to Rural Area. The changes being sought to the Natural Heritage System Hazard Lands and Streams overlay simply flow from the sought-after change from Agricultural Area to Rural Area.

[30] In support of its challenge to the Agricultural Area designation, DLR notes the Agricultural Area designation is one that identifies its lands as Prime Agricultural Lands.

[31] The Town agrees and notes that the designation was based on an extensive and detailed agricultural analysis that identified the boundaries of the Agricultural Area. Those boundaries are unchanged from those initially identified and set in the 2006 OP to the current OP.

[32] DLR asserts that its lands are not Prime Agricultural Lands and designating them as such is not consistent with the PPS 2020 or the Growth Plan 2020.

[33] The Tribunal agrees that both the PPS 2020 and the Growth Plan 2020 emphasize the importance of preserving and protecting specialty crop areas and prime agricultural lands. The emphasis on the protection of specialty crop areas and prime agricultural lands needs to be understood in the context of the general thrust to protect the agricultural system by protecting agricultural lands and the functional and economic connections to the agri-food network.

[34] The PPS 2020 and the Growth Plan 2020 both set out minimum standards from the Provincial perspective. Municipalities implement these standards and may impose more stringent standards appropriate to their community.

[35] These two documents do not suggest that other agricultural lands should not be protected. There is no suggestion in either document that protecting lesser categories of agricultural lands is either inconsistent with the PPS 2020 or not in conformity with the Growth Plan 2020 and their respective emphasis on protecting the agricultural system. Quite the contrary.

[36] Even if the DLR challenge to the classification of the agricultural lands in the Agricultural Area designation were to be successful in the context of some future application for amendment, that would not result in an agricultural designation being inconsistent with the PPS 2020 or not conforming with the Growth Plan 2020. Nor does it undermine the question of whether the present designation of Agricultural Area that arose through extensive study and analysis meets the requisite tests.

[37] On the evidence before it in this written hearing, the Tribunal accepts and relies upon the Affidavit of Paul Lowes, sworn February 12, 2019, and the Supplementary Affidavit of Mr. Lowes, sworn November 12, 2019.

[38] The Tribunal finds that the designation of Agricultural Area is consistent with the PPS 2020 and conforms with the Growth Plan 2020.

[39] DLR has raised the question of conformity of the OP with the COP as part of its challenge to the OP designations.

[40] The DLR lands that are the subject of this dispute are near but outside of settlement areas. The location is important: near is not within. The lands are, however, within the Greenlands designation in the COP.

[41] The Greenlands designation permits agricultural and environmental uses within it when the lands are outside of settlement areas; Rural uses are not permitted on these lands.

[42] The Tribunal finds that the Agricultural Area designation and the Natural Heritage System Hazard Lands and Streams overlay conform with the COP.

[43] The appeal by DLR is dismissed.

The Nextnine Appeal

[44] The Nextnine Appellants are the owners of 173, 201 and 225 Big Bay Point Road in the Town. Nextnine is clear that it intends its lands to be used for the future expansion of the Big Bay Point Golf and Country Club existing golf course, which is located north of the intended golf course expansion lands.

[45] A golf course is not permitted on these Nextnine lands with the designation of Key Natural Heritage Features and Key Hydrologic Features with a Natural Heritage System Overlay that the OP places on these lands. The designation sought by Nextnine that would permit the golf course expansion is Parks and Open Space.

[46] Nextnine takes the position that the OP designation that does not permit a golf course is not consistent with the PPS 2020, does not conform with the Growth Plan 2020, and does not conform with the COP.

[47] In addition to being across the road from the existing Big Bay Point Golf and Country Club, the proposed golf club expansion lands are near significant development. The Tribunal agrees that the nearby marina-based development known as Friday Harbour may be called resort, but its component designations have certainly resulted in considerable development of the area.

[48] As with the DLR appeal analysis above, the presence of development nearby, around and outside the lands with the disputed designation does not contribute to the assessment of whether the disputed designation meets the requisite tests. This applies

whether the dispute focuses on the Agricultural Area designation, as the DLR appeal does, or whether it challenges the designation of Key Natural Heritage Features and Key Hydrologic Features with a Natural Heritage System Overlay, as the Nextnine appeal does.

[49] Central to the Nextnine appeal is a dispute over the appropriate characteristics of recreational uses permitted in the designation of Key Natural Heritage Features and Key Hydrologic Features with a Natural Heritage System Overlay. Nextnine wishes to have a designation that would permit a golf course. Such a designation would allow a more active recreation use that engages a greater degree of development and alteration than the more restrictive permission of passive recreation use.

[50] Nextnine and the Municipal Parties disagree on the amount, type and extent of natural heritage features on the Nextnine lands. Nextnine submits that the lands warranting natural heritage protection are far fewer and smaller than those identified by the Municipal Parties. This appears to underpin the Nextnine analysis that assesses the requisite tests through the lens of whether a golf course meets the tests and is appropriate.

[51] By way of example, when addressing the PPS test of consistency Nextnine focused on the policies in 1.1 that deal with managing and directing land use and patterns. Within this section, Nextnine focuses on recreation, parks and open space.

[52] The Tribunal observes that there is an entire section specifically headed Wise Use and Management of Resources at policy 2.0. Policy 2.1 is devoted entirely, and directly, to Natural Heritage. The Tribunal finds that it is this policy, which opens with the statement that “Natural features and areas shall be protected for the long term”, that is the most directly relevant for an analysis of consistency.

[53] Similarly, the Growth Plan 2020 has an entire chapter devoted to the Natural Heritage System. The OP designation on the Nextnine site conforms to the COP

designation of Greenlands. The COP designation of Greenlands conforms to the requirements of the Growth Plan 2020, particularly when policy 4.2.2 is read as whole.

[54] It appears to the Tribunal that, since Nextnine does not agree that its lands should be designated as being natural heritage, its analysis has given less emphasis to the specific natural heritage sections and policies.

[55] The Municipal Parties disagree that the Nextnine lands have limited natural heritage features and functions.

[56] The Tribunal finds that the Municipal Parties, through the Affidavit of Tim Cane sworn February 12, 2019 and the Supplementary Affidavit of Mr. Cane sworn November 12, 2019, have provided a full answer to the Nextnine planning evidence. The Tribunal accepts and relies upon the Affidavit and the Supplementary Affidavit of Mr. Cane.

[57] The Tribunal finds that the appropriate starting point for the analysis of the OP designation on the Nextnine lands is the *Lake Simcoe Protection Act*, 2008 (“LSPA”). At s. 7, the LSPA requires municipalities within the Lake Simcoe watershed to bring their OPs into conformity with the designated policies set out in the LSPP.

[58] The LSPA, at s. 25, also makes clear that the LSPA prevails in the event of a conflict between a provision of the LSPA and another act on a matter that “…affects or has the potential to affect the ecological health of the Lake Simcoe watershed” then the provision that “…provides the greatest protection to the ecological health of the Lake Simcoe watershed prevails…”

[59] Policy 6.21-DP states that “Key natural heritage features are wetlands, significant woodlands, significant valleylands, and natural areas abutting Lake Simcoe”.

[60] The reference here to wetlands is more generous and encompassing than the more limited PPS reference to significant wetlands. The difference creates potential conflict and brings the protections of the LSPA and the requirements of LSPP to the fore.

[61] The OP designation treats the entire site as a key natural heritage feature. This conforms with the Greenlands designation of the site that is in the COP.

[62] The LSPP is clear that development or site alteration is not permitted within a key natural heritage feature except for a few, limited exceptions. In that list of exceptions, in policy 6.23-DP at section (h), is reference to "…Low-intensity recreational uses that require very little terrain or vegetation modification…"

[63] While low-intensity recreational uses are not defined in the LSPP, major recreational use is:

> Major recreational use means recreational uses that require large-scale modification of terrain, vegetation or both…including…
> a. golf courses

[64] Nextnine asserts essentially that if the limits of the OP designation are altered or reduced, then those lands removed from the OP natural heritage designation would be able to carry a designation that would permit a golf course. That would require an assessment of relevant studies in the context of an application for amendment that is not before the Tribunal in this hearing.

[65] The Tribunal finds that the OP designation of Key Natural Heritage Features and Key Hydrologic Features with a Natural Heritage System Overlay is consistent with the PPS 2020, conforms with the Growth Plan 2020, conforms with the LSPP and conforms with the COP.

[66] The appeal by Nextnine is dismissed.

Regard for Matters of Provincial Interest

[67] In addition to the tests of consistency and conformity, the Tribunal has had regard to the mattes of Provincial interest, as required by s. 2 of the Act.

[68] The Tribunal finds that the OP designations for the DLR lands and for the Nextnine lands have both had regard for matters of Provincial interest. The Tribunal notes particularly s. 2(a) on the protection of ecological systems, including natural areas, features and functions, s. 2(b) on the protection of agricultural resources, and s. 2(h) on the orderly development of safe and healthy communities.

Regard for the Decision of the Municipality and the Approval Authority

[69] Section 2.1 of the Act requires the Tribunal to have regard to the decision of the Town initially and of the County as the Approval Authority. This section further requires the Tribunal to have regard to any information and material the considered in making the decision.

[70] The Tribunal has done so with particular reference to the materials before the councils that were filed in these proceedings.

ORDER

[71] The Tribunal orders that the appeals of DLR Holdings and 2524445 Ontario Inc. are dismissed.

[72] The Tribunal orders that the appeals of 2025890 Ontario Inc., Middlefield Financial Services Ltd. and Nextnine Ltd. are dismissed.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR