June 29, 2021

FYI only
TI-OP-1801

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

Ontario

ISSUE DATE: June 25, 2021 **CASE NO(S).:** PL210153

PROCEEDING COMMENCED UNDER subsection 17(40) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	McMahan Woods Developments Ltd.
Subject:	Failure of County of Simcoe to announce a decision respecting Proposed Official Plan Amendment No. TI-OP-1801
Municipality:	Township of Tiny
LPAT Case No.:	PL210153
LPAT File No.:	PL210153
LPAT Case Name:	McMahan Woods Developments Ltd. v. Simcoe (County)

Heard: June 22, 2021 by video hearing

APPEARANCES:

Parties	**Counsel**
McMahan Woods Developments Ltd. ("Appellant")	David White
County of Simcoe ("County")	Marshall Green
Township of Tiny ("Township")	Sarah Hahn

MEMORANDUM OF ORAL DECISION DELIVERED BY DAVID L. LANTHIER ON JUNE 22, 2021 AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This Decision relates to the first Case Management Conference ("CMC") in the appeal by the applicant Appellant of the County's Decision of January 26, 2021 ("Appeal") approving the Township's Official Plan ("Township OP") subject to two non-decisions.

[2] The Decision also determines the Motion brought by the County for a consolidation of this Appeal with an outstanding site-specific appeal by the Appellant relating to the County's Official Plan ("County OP"), Case File No. PL091167 ("County OP Appeal") currently with the Tribunal. The lands which are the subject matter of the Appeal are located at 2 Darby Road, being part of Lot 23, Concession 4, Plan 51M01064, Block 21 in the Township of Tiny ("Lands").

[3] As addressed below, this Decision also addresses the further request for an Order provided by the County, without the benefit of a written motion, which is deferred for the reasons, and in the manner, set out below.

[4] The Affidavit of Samantha Trottola affirmed on April 29, 2021 regarding service of the Notice of Case Management Conference is marked as Exhibit 1 to the CMC.

BACKGROUND

[5] The background to this Appeal, and the County OP Appeal is somewhat unique and is of some significance to the determinations and directions made by the Tribunal in this CMC Decision. The essential facts are as follows:

> December 29, 2016 – The County initiated processes for a new comprehensive official plan in or around 2012 which ultimately led to the final County OP being approved in December of 2016. This resolution resulted in 15 site-specific

appeals, one of which was the Appellant's County OP Appeal in relation to its Lands, being parsed out, and dealt with separately.

The Tribunal is advised by counsel that as a result of settlement negotiations between the parties, the County OP was eventually approved by the then Board in the Registrar's Order issued on December 29, 2016, subject to the continuation of the various site-specific appeals. The Panel has now reviewed the subject Order. One of those appeals identified in the Order, the Appellant's County OP Appeal, identified as the "Site-Specific Sub-Phase 5m" in Attachment 2 to the Order of the Tribunal, was adjourned *sine die*. The identified issue in the Appellant's County OP Appeal, in relation to the Lands, was identified to be whether the Greenlands designation was appropriate for the Lands.

There have been no steps taken in relation to this proceeding to date. The Township is a party to the Appellant's County OP Appeal.

November 26, 2018 – The Township then commenced its official plan review processes which culminated in the Township Council's adoption of the Township OP which was then forwarded to the County, the approval authority for the Township.

January 26, 2021 – The Township OP was approved by the County on this date, and the Notice of Decision issued on February 2, 2021. The relevant portion of the Notice of Decision reads as follows:

> A decision was made by County of Simcoe Council on the date noted above to approve the Official Plan for the Township of Tiny, as adopted by Township of Tiny By-law No. 2018-098 as modified per Schedule 3 to Item CCW 2021-015.
>
> **Non-Decisions**

> Non-decisions are placed on lands within and abutting the Settlement Area Boundaries of Perkinsfield, Wyevale, Lafontaine, Wyebridge and Toanche as shown on Schedules A-E and Appendices 1-5 within Schedule 3 to Item CCW 2021-015.
>
> Non-decisions are placed on lands located at 2 Darby Road and Part of Lot 23, Concession 4, Plan 51M-1064,Block 21 as shown on Schedule A within Schedule 3 to Item CCW 2021-015.

(The first of the two non-decisions relates to a separate property unrelated to this Appeal, and the Tribunal is advised that no appeal was filed with respect to the first of the two non-decisions).

February 16, 2021 – The Appellant initially filed its appeal pursuant to s. 17(36) of the *Planning Act* ("*Act*"). However, following discussions between the Appellant and the County, the Appellant corrected and clarified that the Appeal was in fact brought pursuant to s. 17(40) of the *Act*, as it was an appeal relating to the site-specific Non-Decision for the Appellant's Lands, as set out in the Notice of Decision above (and not the County's adoption of the Township OP).

[6] The Appellant's Notice of Appeal in this Appeal provides the following basis for the Appeal:

> The Township of Tiny Official Plan was approved by the County of Simcoe on January 26, 2021. The Notice of Decision issued on February 2, 2021 indicated that a non-decision was placed on the Subject Lands. The Subject Lands are also a subject of an appeal of the County of Simcoe Official Plan, (LPAT Case no. PL091167). The Subject Property has improperly been designated as Greenlands on the County Official Plan and were a subject of a non-decision of the approval of the local official plan.

REQUESTS FOR STATUS

[7] The Tribunal received only one request for party status from the Township. Given the obvious interest of the Township in its own official plan, the subject matter of this Appeal, and with the consensus of both the Appellant and the County, the Tribunal

finds that the Township's participation in the Appeal as a party is necessary to enable the Tribunal to adjudicate effectively and completely on the issues in the proceeding.

[8] The Township is accordingly granted status as a party to this Appeal pursuant to Rule 8.2 of the Tribunal's *Rules of Practice and Procedure* ("*Rules*").

MOTION TO CONSOLIDATE

[9] The County, with the consent of the Appellant and the Township, has brought a motion to consolidate pursuant to Rule 16 of the Tribunal's *Rules* requesting a consolidation of this Appeal with the Appellant's County OP Appeal in Case File No. PL091167. The Affidavit of Ms. Kristin Dibble Pechkovsky, the County's Senior Policy Advisor, affirmed on April 13, 2021 is filed in support of the Motion.

[10] As pointed out by Ms. Pechkovsky, given that the Township OP was found to conform to the County OP, and as the issues of both appeals – whether the Lands should be designated Greenlands – it is her view that it would be appropriate and convenient that the two appeals be consolidated and heard together. The Tribunal has confirmed that the parties and counsel to both appeals are the same, there is a common subject matter to both Appeals, and now that this Appeal is before the Tribunal, and no steps have been taken in the Appellant's County OP Appeal, there will be no prejudice to any party, and to the contrary, it will be efficient and expedient to have the matters heard together.

[11] The Tribunal will accordingly make the appropriate order consolidating the two Appeals.

COUNTY'S ADDITIONAL REQUEST FOR APPROVAL OF THE TOWNSHIP OF TINY OFFICIAL PLAN

[12] In the draft Agenda provided by the County, in advance of the CMC, and in submissions at this CMC, the County has requested that the Tribunal make an order that the Township OP "…be approved as filed with the exception of the designation on the McMahan Lands." The Affidavit of Shawn Persaud, the Director of Planning and Development for the Township, sworn June 11, 2021, was filed in support of this request.

[13] No Motion was filed.

[14] The Tribunal was advised that the Township and the Appellant did not object to the requested Order.

[15] As the Panel Member has indicated in the comments provided to counsel, although the approval of the Township OP, save and except, and without prejudice to, the Appellant's continued Appeal relating to the designation of the Lands and the Non-Decision is likely appropriate under the circumstances, in the absence of any authority from the County, the Tribunal is of the view that it may not have the jurisdiction to make such an Order due to the nature of the Appeal before the Tribunal, and due to certain sections of the *Act*.

[16] This Appeal is a site-specific appeal of the Non-Decision relating to the Appellant's Lands pursuant to s. 17(40) of the *Act*. It is not an appeal of the adoption of all or part of the County OP pursuant to s. 17(36). The Decision made by Council for the County, as excerpted above, "*…approve(d) the Official Plan for the Township of Tiny, as adopted by Township of Tiny By-law No. 2018-098 as modified"*. The Appellant has not appealed that aspect of the decision of the County but rather, only the second stipulated "Non-Decision" of the County placed on the Appellant's Lands, bringing into issue the disputed designation of the Lands.

[17] When all appeals under s. 17(36), with respect to all or part of an official plan, are withdrawn or dismissed, s. 17(39) and s. 17(47) are similarly worded and operate to cause the decision or part of the decision that was the subject of the appeal to be final and the official plan, or part of the plan that was approved, and in respect of which the appeals have been withdrawn or dismissed "*…comes into effect as an official plan or part of an official plan on the day after the day it was approved.*"

[18] When the Tribunal so advises the approval authority that all or part of the appeal is withdrawn or dismissed, the *Act* causes the OP, or part of the OP, that was under appeal to come into effect upon the date indicated. It is not uncommon, in appeals before the Tribunal under s. 17(36) to have the operative effect of these sections utilized by way of a motion to secure an order of the Tribunal clearly delineating and identifying those portions of an official plan that are, or are not, in dispute in the ongoing appeal proceedings in order to allow the balance of the instrument to come into effect under those sections.

[19] There is no similar provision which applies to appeals under s. 17(40) which relate to a non-decision. In contrast, s. 17(43) and s. 17(48) of the *Act*, apply to circumstances where all appeals pursuant to s. 17(40) with respect to all or part of an official plan, are withdrawn or dismissed, and stipulates the impact this has upon the subject official plan. Neither s. 17(43), nor 17(48) of the *Act* operate in the same manner as s. 17(39) to cause the official plan to come into force and effect upon withdrawal or dismissal of all appeals. Logically, since the subject of the appeal under s. 17(40) is a non-decision, instead, after the approval authority is notified by the Tribunal, s. 17(43) and (48) provide that "*…the approval authority may then proceed to make a decision under subsection (34) in respect of all or part of the plan, as the case may be.*"

[20] It is the observation of the Panel Member that save and except for the Non-Decision of the County affecting the Appellant's Lands, the Decision of the County on

January 26, 2021 approving the Township OP does not appear to be under appeal and is not before the Tribunal.

[21] On its face, given the limited nature of the Appellant's appeal of the Non-Decision under s. 17(40), and notwithstanding the powers granted to the Tribunal under s. 17(50) of the *Act* to approve all or part of an official plan in an appeal under s. 17, the Tribunal is uncertain, in the absence of a proper Motion with supporting authority and evidence, and at this point, that the facts warrant, or the *Act* allows for, an order of the Tribunal definitively approving the Township OP.

[22] It is nevertheless clear to the Tribunal, with the consolidation Order now made, that the only matters that are before the Tribunal are the designations of the Appellant's Lands under the Township OP and County OP.

[23] Should the County, with the consent of the parties, determine however that they wish to press further with the request for the Tribunal's approval of the Township OP, the County is directed to bring the necessary written motion in accordance with Rule 10, supported by affidavit material, submissions and authority for the Tribunal's ability to make the requested Order.

[24] The Panel Member will remain seized with respect to the matter of the request for a Tribunal's Order approving the Township OP, by written motion as directed. The Panel Member will also make himself available to be spoken to should the parties wish to request a telephone conference call ("TCC") for that limited purpose of follow-up to this section of the Decision and the Panel Member's directions as set out herein.

MEDIATION AND SETTLEMENT

[25] The Tribunal explored the possibility of mediation or settlement with the parties and the indication has been made that the parties may wish to request Tribunal-led mediation. As the hearing of the consolidated Appeals is not likely to occur during the

balance of this year, there is sufficient time for the parties to make the written request for mediation following the Tribunal's processes.

FURTHER CMC AND DRAFT PROCEDURAL ORDER AND ISSUES LIST

[26] The parties do not have a Procedural Order or Issues List in place for either of the Appeals now consolidated. After considering submissions the Tribunal has directed a further CMC for the purposes of approving and issuing a Procedural Order and Issues List and scheduling of the hearing of the consolidated Appeals.

[27] The next CMC in this proceeding will be conducted by TCC at **9 a.m.** on **Friday, October 15, 2021**.

[28] Individual(s) are directed to **call 416-212-8012 or Toll Free 1-866-633-0848** on the assigned date at the correct time. When prompted, **enter the code 4779874#** to be connected to the call. It is the responsibility of the person(s) participating in the call to ensure that they are properly connected to the call and at the correct time. Questions prior to the call may be directed to the Tribunal's Case Coordinator having carriage of this case.

[29] Except for the request for a Tribunal's Order approving the Township OP, by written motion this Member of the Tribunal is not otherwise seized with respect to the further CMC and no further notice will be given.

[30] Counsel are expected to attend to the next CMC ready to address the form and content of the draft Procedural Order and Issues List. Within two weeks following this CMC, counsel for the County shall prepare and circulate to the Township and the Appellant the draft documents for their consideration in order to prepare a final draft for presentation to the Tribunal.

[31] The draft Procedural Order and Issues List is to be forwarded to the Tribunal not less than 10 days prior to the scheduled CMC. In the event that there are matters in dispute with respect to the form of the Procedural Order or the identification of the Issues, the Tribunal is also to be provided with a concise summary of the issues in dispute and the position of the parties together with the draft Procedural Order and Issues List. As well, 10 days prior to the CMC, counsel are invited to provide their conflict dates for the scheduling of the estimated five-day hearing within the 10-month period following the CMC to assist in the scheduling of the hearing.

[32] In addition to the Order below determining the Motion for Consolidation, the Tribunal orders and provides those other CMC directives herein for the purposes of the case management of this Appeal and the appeal in Case File No. PL091167 as now consolidated and subject to continuing case management.

ORDER

[33] The Tribunal orders that this Appeal be consolidated with the appeal in Tribunal Case File No. PL091167 in accordance with Rule 16.2 of the *Tribunal's Rules of Practice and Procedure*.

"David L. Lanthier"

DAVID L. LANTHIER
VICE-CHAIR