ISSUE DATE:
Sept. 26, 2005
DECISION/ORDER NO:
2514

Ontario

PL040841

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

The Greenspace Alliance of Canada's Capital, Ronald Tolmie, Chris Sullivan and others have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Ottawa to approve Proposed Amendment No. 77 to the Official Plan for the City of Ottawa (former City of Kanata)
City File No. D02-02-03-0093
OMB File No. O040162

The Greenspace Alliance of Canada's Capital and Chris Sullivan have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 2004-342 of the City of Ottawa
OMB File No. R040191

Ron Tolmie, Northtech Land Development Inc., the Greenspace Alliance of Canada's Capital and the Kanata Beaverbrook Community Association have appealed to the Ontario Municipal Board under subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Ottawa to approve a proposed plan of subdivision on lands composed of Block 78, Plan 4M-1135, Part Lots 6,7,8,9 Concession 2 and 3 in the City of Ottawa (former March Township)
City File No. D07-16-03-0025
OMB File No. S050014

APPEARANCES:

Party	**Counsel**
City of Ottawa	T. Marc
KNL Developments Corporation	D. Kelly and U. Melinz
Greenspace Alliance of Canada's Capital; Kanata Beaverbrook Community Association; Ronald Tolmie; Mikelis Svilans, Keith McLean, Peter Van Boeschoten; Bruce Story; Pieter Prins; Gordon Henderson	P.A. Webber and M. St-Onge
Northtech Land Development Inc.	J. Bradley

DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD

The Board has three motions before it:

1. The City of Ottawa and KNL Developments Corporation (the Moving Parties) are seeking the Board's concurrence for an amendment to the draft conditions regarding the Solandt Road connection.

Northtech Land Development Inc. is also seeking the Board's concurrence for amendments to the conditions of Draft Approval regarding the Solandt Road connection, and also to seek the Board's concurrence for an amendment to Official Plan Amendment No. 77.

No party is responding in opposition to this motion.

2. The City of Ottawa and KNL Developments Corporation (the Moving Parties) seek to scope the issues list as stated in the draft Procedural Order heard by the Board on 2 August 2005 to exempt any discussion at the November 2005 hearing of the 1) "40% Agreement" – an agreement between the former land owner Campeau Corporation and the former City of Kanata wherein Campeau agrees to dedicate approximately 40% of its land for "open space" purposes, or 2) the "Natural Environment & Heritage" issue.

The City of Ottawa and KNL Developments Corporation (the Moving Parties) seek to scope the issues list as stated in the draft Procedural Order heard by the Board on 2 August 2005 to exempt any discussion at the November 2005 hearing of the 1) "40% Agreement" – an agreement between the former land owner Campeau Corporation and the former City of Kanata wherein Campeau agrees to dedicate approximately 40% of its land for "open space" purposes, or 2) the "Natural Environment & Heritage" issue.

Greenspace Alliance of Canada's Capital, Kanata Beaverbrook Community Association, Ronald Tolmie, Mikelis Svilans, Peter Van Boeschoten, Gordon Henderson, Pieter Prins, Keith McLean and Bruce Story (the Respondents to this

Motion) seek to have this motion dismissed in respect of the scoping of the issues list to remove the “40% Agreement” and “Urban Boundary/Natural Environment & Heritage” issues from that list.

The First Motion

The original conditions of approval and the Official Plan Amendment alluded to the fact that the Solandt Road connection might be deleted from the Official Plan and the Plan of Subdivision, and it said that KNL’s transportation study was to look at that. Paragraphs 4, 6, 8 and 10 of Steven Stoddard’s Affidavit (Exhibit 2) indicate that the revised study as required by section 5 of OPA 77 was received by the City of Ottawa in July 2005; section 5 requirements were satisfied; and the study confirmed that the Solandt Road connection is needed. This resulted in the need for a series of modifications to the Conditions of Draft Plan Approval at paragraphs 5, 7 and 9, allowing for construction of the Solandt Road connection. These amending conditions are numbered 17 and 19. Counsel Marc for the City submitted to the Board that the amending conditions will satisfy Northtech Land Development Inc. It is expected that the width of the Solandt Road connection will be decided upon before the November hearing.

Regarding Official Plan Amendment 77, and the proposed modifications as outlined in the Stoddard Affidavit, this is in fact an amendment to the Official Plan of the former City of Kanata. The City’s position is that a new Official Plan was adopted in 2003, thus making OPA 77 moot. If the Zoning By-law and Plan of Subdivision were approved by the Board, the City would then say that the proposed development can proceed. If the Board makes the modifications in paragraphs 3 and 4, the City has no objection, but the City believes the amendment is moot for the development of the land.

Counsel for KNL Developments Corporation (KNL) concurred with the proposed changes and is also of the position that OPA 77 is moot. Counsel for Northtech Land Development Inc. also concurred with the proposed changes. A letter outlining these matters is attached to the Affidavit of Lauren Reeves (Exhibit 4) and the Board notes that Northtech Land Development Inc. has no concern with the eventual alignment of the Solandt Road connection.

Counsel for the Respondents to the City's and KNL's other motion also have no concerns regarding the proposed modifications as outlined and no concerns with the right of way. They are not, however, in agreement with the Moving Parties that OPA 77 is a moot issue and submit that this is a matter to be determined at a later date.

Having considered the Counsels' submissions, the Board amends the Conditions of Draft Approval regarding the Solandt Road connection as set out in Exhibit 2, paragraphs 3, 5, 7, and 9 for conditions 17 and 19. The Board also approves the modifications in paragraphs 3 and 4 of OPA 77.

The Second Motion

The Board notes the comprehensive chronology of the 40% Agreement as detailed in Donald Kennedy's affidavit (Exhibit 2) and to which the Board refers to provide the context of this agreement. D. Kelly submitted that these motions seek to determine what the 40% Agreement means. He explained that it was an agreement to acquire and protect land based on a developer who owned the land to which KNL is the successor. The full land parcel, acquired by KNL in September 2000 and approved for urban development, is 1,398.6 acres. He made reference to Donald Kennedy's affidavit and submitted that there is no contrary evidence to the contents of Kennedy's affidavit. T. Marc also argued that there is no contrary evidence to the affidavits of both Donald Kennedy and Lauren Reeves.

Mr. Kelly said the previous owner of the land, Campeau Corporation, offered that 40% of the land would be maintained as open space (559.9 acres). The former City of Kanata entered into an agreement with Campeau that came into effect when Official Plan Amendment 24 came about. There were two 40% Agreements – the first in 1981 and a newer 40% Agreement in 1988.

The original 40% Agreement of 1981 suggested that a further study should determine where open space was to be dedicated. After Campeau's and Kanata's 1987 plans, Kanata City Council defined the open space dedication requirements to be 557 acres, creating the new 40% Agreement. Planner Kennedy's affidavit states his belief that "…the 1988 40% Agreement is registered on title of every residential lot in Kanata Lakes and it indicates the location and quantum of open space to be dedicated."

The Kennedy affidavit states that to date, some 440.9 acres have been residentially developed and 294.25 acres have been dedicated under the 40% Agreement. The remaining 664.7 acres is the subject of the within Applications of which 265.75 acres remains to be dedicated as per the 40% Agreement.

Mr. Kelly referred to one of the documents that serves as part of Donald Kelly's affidavit - Exhibit 3A, Tab 8, p.166, wherein the "Principle of Provision of 40% Open Space Areas" makes specific reference to the principles which "…shall be mutually agreed between the parties."

Campeau Corporation agreed to provide lands in excess of what was required under the *Planning Act*, and the City agreed to accept the land and maintain it. Implementation of the Concept Plans and the Plans of Subdivision were approved as they were brought forward, and the amount of land was defined in those plans.

Planner Kennedy's affidavit states that there is a shortage of available residential lots in the General Urban Area but the Full Parcel Land in question contains land which can satisfy this need. Applications to finalize the development plan for the Lands were submitted to the City of Ottawa in April 2003. D. Kelly advised the Board that the City of Ottawa's "General Urban Area" policies apply now, and he added that there have been no designation appeals and no previous appeals of the 1974, 1988 and 1997 Regional Official Plans, as well as the 2003 City of Ottawa Official Plan. Kennedy's affidavit states that regarding OPA 77, the new City of Ottawa Official Plan has the same provisions as those of the former Kanata, Ottawa and Region documents.

City of Ottawa Council designated the Full Land Parcel in May 2003 following the amalgamation of the former City of Kanata and ten other surrounding municipalities into the current City of Ottawa. As Kennedy states, the changes sought through the OPA application were revisions to the land use planning designations – adjusting the "Environmental Protection Area (EPA)" boundaries and by relocating school, park and commercial sites. The City of Ottawa adopted OPA 77 to the Official Plan of the former City of Kanata. Kennedy's affidavit outlines the boundary modifications (Exhibit 2).

City staff recommended approval of one of four draft concept plans (Plan H) that was also supported by KNL (Exhibit 3B, Tab 12, with the rationale on p.217 and the conclusion on p.219). The Respondents want more land north of the Beaver Pond to be

preserved. The City and KNL do not believe any additional protection should be provided beyond what Ottawa City Council approved in June 2004 – "Plan H plus 3 acres." As the Kennedy affidavit states, the Planning Report recommends the approval of Plan H since it attempts "to achieve the best balance possible between the Appellants' [Respondents'] wishes, the landowner's existing right to develop the land, and the desire to preserve the more environmentally valuable area in the west block." (Planning Report, p.11).

The Notice of Adoption of OPA 77 to the OP of the former City of Kanata was given by the City of Ottawa in July 2004. This was appealed by some of the Respondents. When the City issued its "Draft Subdivision Approval Notice" to proceed, additional appeals were filed.

D. Kelly submitted that the 40% Agreement is a private agreement between the City and KNL for the City to acquire land. In her affidavit (Exhibit 4), Planner Lauren Reeves opines that the objectives of the 40% agreement have been met. D. Kelly submitted that the City of Ottawa has designated land over and above the requirements of the *Planning Act* so it is for the City to determine what lands it will acquire. He submitted that the Ontario Municipal Board cannot order the City to acquire lands over and above what the *Planning Act* requires of the City.

D. Kelly said Counsel Webber's documents are "simply studies with no planning opinion." Kelly submitted that there is nothing before the Board to say that the designations in the Official Plan are not being dealt with properly by the City of Ottawa and KNL through this agreement.

T. Marc said the preservation of open space is of interest to the City and community at large, but all must appreciate that the City's ability to acquire lands for open space have been circumscribed. This Agreement gives the City an opportunity to acquire lands. He added that there is no provision in the *Planning Act* for an agreement to be a condition of an OPA. He submitted that this is a private agreement, and not one under the *Planning Act*.

T. Marc said that City Council spoke through its 2004 decision as to what it is prepared to acquire. He submits that the "Urban Boundary/Natural Environment &

Heritage" issues should be removed from this case as Council has identified what it is prepared to acquire and where (Exhibit 3B Tab 24).

T. Marc concurred with D. Kelly's submission that this is a private agreement, not imposed under the Planning Act. Exhibit 3, Tab 9, p.182 provides a reference to a concept plan that specifically allows for deviation from it through agreement between parties and through the subdivision process. The City has discretion as to which lands it wants. T. Marc also said it is striking to note that there was no guarantee in these two agreements, taken as a whole, that the lands would always remain as open space. T. Marc argued that any other lands are open to KNL to develop and therefore, natural environment should not be an issue in this hearing.

As for the third part of this motion – that of the urban boundary issue – T. Marc advised the Board that he has been instructed by the City to attempt to come to an agreement with the Appellants prior to the November hearing on the matter of "urban boundary". No submissions were presented by the Parties to this aspect of the motion before the Board.

P.A. Webber submitted that his client's issues are authentic and are worthy of the adjudicative process. He submitted that the Parties must have regard to the jurisdiction of the Board as the overriding question. He said that if the Board has jurisdiction, then it is bound to exercise it. He argued that the Board has clear authority under the *Planning Act* to deal with the subject lands. He said his question is the following: is a consideration of the 40% Agreement within that very broad jurisdiction of the Board?

Mr. Webber submitted four possible answers to this question of what the 40% Agreement is in a legal sense:

1. The Moving Parties see the 40% Agreement as a private one between two corporate bodies – no one else may deal with it and it is not covered under the *Planning Act*, and only the courts have jurisdiction.

2. The 40% Agreement actually forms part of the Official Plan, as part and parcel of OPA24. He said there is a nexus between the Agreement and OPA24 which is sufficiently close that the Board can officially consider it part of the Official Plan.

3. If the 40% Agreement does not form part of the Official Plan, it is then a "*Planning Act* kind of agreement." He argued that the courts have held that the Board has jurisdiction to deal with these kinds of agreements – agreements that relate to the Board's function and a municipality's planning function.

4. The 40% Agreement constitutes a restrictive covenant of the nature known in law as a "building scheme" in which any amendment to such an agreement requires the consent of all of the parties who own the lands subject to the agreement; that is, the successors to the Campeau lands, like KNL and every homeowner. Further, he argued that every building scheme requires an order of the court.

Mr. Webber said if the Board finds the answer to be the first one – that this is a private agreement – then the City and KNL are correct; their motion should be granted; and the Board is without jurisdiction. He submitted that the Respondents cannot give the Board jurisdiction that it does not have.

Mr. Webber argued that in finding the Agreement is part of the Official Plan (the second possible definition of the Agreement), the Board has exclusive jurisdiction. If the Board finds that it is a "Planning Act kind of agreement" (the third definition), he can take the Board to the law to show that the appeal is worthy and authentic as this is a non-commercial, *Planning Act* kind of contract over which the Board has jurisdiction, but that the court may also have a concurrent or other form of jurisdiction.

If the Board finds the fourth definition is most appropriate, Mr. Webber argued that the Board has jurisdiction, even though it is apparent that most of the jurisdiction would rest with the courts. The Board would have to cut out its piece; it would not be interpreting the building scheme at large, but simply whether the Official Plan or Zoning By-law should be approved.

Mr. Webber made extensive arguments as to why the Board should consider the 40% Agreement as a building scheme and referred to the exhibits related to Donald Kennedy's affidavit (3A and 3B) as well as his own exhibits (6 through 6F). He argued that the numbers in the subsequent Agreement are very precise in terms of total

acreage to be preserved. There was an obligation on Campeau Corporation to produce 287.745 acres of natural environment. He acknowledged that City staff sees this as a private agreement, enabling the City to make tradeoffs on the land with KNL, but he said that the community at large wants to know what is happening with the 287 acres, especially since there is an agreement in place. He argued that City staff felt they had a right to amend the Agreement as amended to pick and choose; that is, to have regard for some parts of the Agreement but not for other parts. He submitted that this is an issue worthy of adjudication. The City's unilateral claim of exclusive jurisdiction over the land or an exclusive right to amend it without regard for the reason for the agreement (why certain lands were classed in certain ways) is a matter worthy of review.

Mr. Kelly responded that it is both improper and unreasonable for the Board to allow the Appellants to go back and appeal the decisions of Council that were never appealed in the first place. He said that a building scheme is determined by what has been set up – the concepts and designations.

Mr. Webber had suggested a fifth test for the Agreement – one of reciprocity. Mr. Kelly said there is no such reciprocity with the residents. Mr. Marc also said there is no reciprocity in the 40% Agreement. Reciprocity requires the developer and/or the City to do something, and there is no such requirement on any other person or party. Mr. Marc said the very fact the City is a party to the Agreement – more than a vendor/purchaser arrangement which is what building schemes speak to – distinguishes it from the case law cited by Mr. Webber.

Mr. Webber did not contradict Mr. Marc's submission that OPA 77 is not needed. Mr. Marc argued there is an Official Plan in force and this is a local plan – not a building scheme. The 40% Agreement is not part of the Official Plan; there is no empowerment in the Official Plan or in the Zoning By-law to enter into an agreement to secure matters. The only way a municipality can take the authority to implement its projects and plans is through land acquisition. He argued that these are land acquisition agreements that implement the Official Plan.

Mr. Kelly said that the City has shown that planning policies were followed; the lands have been appropriately designated for preservation; and the Official Plan now in force designates land to be preserved generally. He agreed that there is some site

boundary interpretation but there is no need for another policy document since the lands are identified. He added that it is unreasonable for residents to be able to go back and review agreements that have been in force and applied over the past 23 years, especially where extensive public consultation took place, and where the lands in question have been provided well in excess of any *Planning Act* requirements for open space.

Mr. Marc argued that if one sets aside the 40% Agreement, there is nothing before the Board to justify a hearing proceeding on what lands should or should not be zoned for environmental protection, and there is no contrary evidence to the affidavits of Kennedy or Reeves. He said that the Respondents' environmental study is not sufficient, and as case law supports, it is not enough to raise apprehension.

He submitted that although Webber said the City had the ability to change the 40% Agreement without giving reasons, Mr. Marc actually took the Board through the City's and Council's considerable deliberations on the matter and there is no indication that Council did anything wrong. He reiterated that this is a private agreement.

Mr. Marc submitted that he found it striking that the Agreement is not referred to in the decisions on OPA 12 or OPA 24. If it was part of the OPA, he wondered aloud why the Agreement had to be signed off a day prior to going before Council. If it was part of the OPA, it could have been outlined more appropriately before Council at the time of its decision on the matter and subsequently referred to the Minister and ultimately to the OMB. This did not happen, and Mr. Marc submitted this gives credibility to his submission that this is a private agreement. He added that since 1981, there has been a series of Official Plans, with all repealed. If it was part of the OPA, it too would have been long gone, thus strengthening the City's and KNL's position that it is a private agreement that continues in force.

As for the definition of the Agreement as a building scheme, Mr. Marc said that one must show at least one of the Appellants has that on title, and he said there is nothing before the Board showing this is the case here. Mr. Marc reiterated that the Board should find that it does not have jurisdiction to interpret the 40% Agreement and that it should be eliminated from these proceedings, as well as the issue of the "Natural Environment & Heritage" issue. He said on this latter issue, the City is not pursuing this

item at the moment, but may try to deal with it in advance by contacting the Appellant. Otherwise, it will bring the matter to the November hearing.

The Board has reviewed all of the submissions of Counsel and the exhibits to which they referred in the course of their arguments, as well as their referenced cases. These motions involve the jurisdiction of the Ontario Municipal Board and its authority to rule on the 40% Agreement. While the Board has no jurisdiction over the legislative competency of municipalities, it has supervisory jurisdiction over their municipal planning competence. In this case, however, the Board finds no linkage between the Official Plan and the 40% Agreement and it finds the Agreement to be a private agreement between two parties. The Board may hear and determine the matter in issue and settle and determine the requirements for site plan approval, but this does not include the private agreement between the City and KNL as successors to the private agreement that was enacted years ago. The Board finds that the City, in carrying out its function of acquiring and maintaining land, does so in the public interest and for the long-term sustainability and growth of a vibrant community. But in doing so, it may operate under myriad arrangements or official planning instruments to achieve those goals. One such arrangement may be a private agreement, such as the one before the Board. In such matters, the Board has no jurisdiction to prevent the municipality from entering into any contract with regard to a matter within its jurisdiction. The Board further finds that on this question of public interest, City Council, most knowledgeable with the local municipal conditions, in best placed of all parties to determine what is or is not in the best public interest, and the Respondents have provided no persuasive argument to support a position that the Board has jurisdiction to determine the validity or otherwise of the 40% Agreement. Mr. Webber has provided no persuasive argument that a 'community of interest and obligation' has been established in the case at hand that would give rise to the Board having jurisdiction to hear this matter. Mr. Marc referred to the case of Charter Construction Limited et al. v. Town of Bradford West Gwillimbury (Board Case No. PL000857), in which the Board found that the Board had no jurisdiction to deal with a financial arrangement between two parties and the existence of that agreement, and that it was a matter properly brought before the Courts. The Board also found that it had no jurisdiction to issue an order enforcing any such agreement, should it exist. In summary, the Board places significant weight on the

statements of Donald Kelly in his affidavit, and it prefers the arguments and submissions of Messrs. Kelly and Marc to those of Mr. Webber in the motions at hand.

In closing, the Board finds that it does not have jurisdiction to address the 40% Agreement. As it is a private agreement between the City of Ottawa and KNL Developments Corporation, which these two Parties can amend without notice to or the consent of residents, and the Board has no free standing jurisdiction to interpret contracts. The motion to strike this issue is granted; and the Board will not rule on the "Urban Boundary" component of the motion until such time as the City pursues its further discussions with the Appellants in an attempt to resolve this matter on or before the date of the November hearing.

So orders the Board.

"R. Rossi"

R. ROSSI
MEMBER