

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: September 29, 2022

CASE NO(S): OLT-21-001567
OLT-21-001788

PROCEEDING COMMENCED UNDER section 28(15) of the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, as amended

Appellant: ONE Properties Limited Partnership
Respondent: Hamilton Conservation Authority
Subject: Appeal of refusal to grant permission for development
Property Address/Description: 140 Garner Road East
Municipality: City of Hamilton
OLT Case No.: OLT 21-001567
OLT Case Name: ONE Properties Limited Partnership v. Hamilton Conservation Authority

PROCEEDING COMMENCED UNDER subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: ONE Properties Limited Partnership
Subject: Proposed Plan of Subdivision - Failure of the City of Hamilton to make a decision
Purpose: To develop a prestige business park
Property Address/Description: 140 Garner Road East
Municipality: City of Hamilton
Municipal File No.: 25T-201806
OLT Case No.: OLT-21-001788
OLT Lead Case No.: OLT-21-001788
OLT Case Name: ONE Properties Limited Partnership v. Hamilton (City)

Heard: May 9, 2022 by video hearing and in writing

APPEARANCES:**Parties**

ONE Properties Limited Partnership
Hamilton Conservation Authority
Environmental Defence

Counsel

Patrick Harrington and Meaghan Barrett
John A. Olah and Francesca D'Aquila-Kelly
Philip Pothen

**DECISION DELIVERED BY HUGH S. WILKINS AND WARREN MORRIS AND
ORDER OF THE TRIBUNAL**

BACKGROUND

[1] This Decision arises from a Case Management Conference (“CMC”) brought before the Ontario Land Tribunal (the “Tribunal”) regarding two appeals by ONE Properties Limited Partnership (“Appellant”). The first is a draft Plan of Subdivision appeal (the “Subdivision Appeal”) and the second is an appeal under the *Conservation Authorities Act* (“CAA Appeal”). Both proceedings concern the proposed development of a business park on a 35.27-hectare property located at 140 Garner Road East (the “Site”), in the City of Hamilton (the “City”).

[2] The Appellant is the proponent of a draft Plan of Subdivision application for the proposed development of the Site. The proposed development would include 14 development blocks, a storm water management block, a wetland open space block, and four roadways.

[3] The subdivision application was deemed complete by the City on November 20, 2018, however, no decision has been rendered by the City to date with respect to the subdivision application. The Appellant appealed to the Tribunal regarding the failure of the City to render a decision within the statutory timeframe of 120 days, in accordance with s. 51(34) of the *Planning Act* (OLT Case No. 21-001788).

[4] The proposed development which is the subject of the Subdivision Appeal involves the relocation of a local wetland on the Site. On June 3, 2021, the Hamilton Conservation Authority (the “HCA”) refused an application for permission to relocate the wetland. On June 18, 2021, the Appellant filed an appeal with the Tribunal under s. 28(15) of the *Conservation Authorities Act*, in respect of the HCA’s refusal to approve such application (OLT Case No. 21-001567).

[5] A CMC was held for the CAA Appeal proceeding on February 8, 2022, at which the Tribunal granted Party status to Environmental Defence and Participant status to several individuals.

[6] A further CMC was held on May 9, 2022 for both proceedings at which the Tribunal addressed requests for Party and Participant status, a request from the Appellant that the Subdivision and CAA Appeal proceedings be consolidated and heard in one single phase, opportunities for settlement discussions, and the scheduling of the hearing.

Requests for Party and Participant Status

[7] At the CMC held on May 9, 2022, the City requested Party status in the CAA Appeal, and the Tribunal identified four new requests that had been received for Participant status from the following individuals:

1. Craig Cassar;
2. Alexis Harriman;
3. Don McLean;
4. Bruce Newbold.

[8] The City is already a statutory Party in the Subdivision Appeal and its request for Party status in the CAA Appeal was on consent. The Tribunal found that the City has a genuine and direct interest in the CAA Appeal proceeding, will be impacted by the Tribunal's decision, and will assist the Tribunal in making its decision. The Tribunal found that there are reasonable grounds to add the City as a Party and granted it Party status with regard to the CAA Appeal, as requested.

[9] None of the Parties opposed the requests for Participant status. They agreed that Participant status should be granted in both the Subdivision Appeal and the CAA Appeal proceedings to the individuals presently seeking Participant status and to those granted Participant status at the February 8, 2022 CMC. Upon review of the Participant requests, and noting that none of the Parties objected to any of them, the Tribunal granted Participant status to each person who requested such status both at the present CMC and the February 8, 2022 CMC for the CAA Appeal.

Consolidation and Phasing of the Hearing

[10] The Appellant requested that the Subdivision Appeal and CAA Appeal proceedings be consolidated and heard in one single hearing. The other Parties submitted that the proceedings be heard together in two phases.

Submissions

[11] The Appellant made submissions in favour of hearing the appeals in one single hearing and argued that such an approach would be efficient and cost effective. The Appellant argued that through a single hearing, the Tribunal would have greater context with regard to the planning considerations associated with the proposed development when considering the environmental matters forming the basis of the CAA Appeal. It submitted that the issue in the CAA Appeal regarding the location of the wetland is not a threshold issue for the Subdivision Appeal as it may be possible for the Appellant to

modify its original development proposal to maintain or reshape the wetlands in a manner that would allow it to proceed with the Application even in the event of failure of the CAA Appeal.

[12] The City disagreed. It argued that the proceedings should be heard one after the other in two phases. If the hearings are to be phased sequentially, the City submitted that the CAA Appeal should proceed first and a decision rendered in such respect before proceeding with a hearing on the Subdivision Appeal. The basis for the City's submissions was that the relocation of the wetland to be considered in the CAA Appeal constitutes a threshold issue which, if not approved, could be fatal to the Subdivision Appeal.

[13] Environmental Defence concurred with the City's submissions in this regard and expressed concern that if the matters were held in one single hearing, it would incur significant additional time and cost with respect to the planning matters relating to the Subdivision Appeal in which it has no direct interest and is not a Party.

[14] The HCA also agreed with the City that a phased approach was preferable with the CAA Appeal to proceed before the Subdivision Appeal. The HCA submitted that the Tribunal should reserve its decision in respect of the CAA Appeal until the conclusion of the Subdivision Appeal and then issue a single decision on all matters.

Analysis and Findings

[15] Rule 16.1 of the Tribunal *Rules of Practice and Procedure* (the "Tribunal Rules") provides that the Tribunal may order that two or more proceedings be consolidated, heard at the same time, or heard one after the other, subject to any applicable statutory or regulatory restrictions.

[16] In the event that proceedings are consolidated, Tribunal Rule 16.2 provides that each party to the original separate proceedings shall become a party to the consolidated proceedings and evidence presented in the separate proceedings shall become evidence in the consolidated proceeding. Conversely, if proceedings are heard together but not consolidated, Tribunal Rule 16.3 provides that each party remains a party only to its individual proceeding and not to the consolidated proceeding and, unless otherwise ordered by the Tribunal, evidence in the hearing is evidence in each proceeding to which it could apply.

[17] In addressing whether to consolidate or hear two or more appeals together, the Tribunal may consider whether they contain common facts, common issues and/or common elements of law, as well as considerations as to the efficiency and fairness of the proceedings, any prejudice that may result, and the possibility that a decision in one matter may predetermine a subsequent matter or result in the possibility of contradictory decisions. It must also consider the jurisdiction of the Tribunal to deal with all of the issues comprehensively.

[18] In the present case, the Subdivision Appeal and CAA Appeal contain some common facts and issues as they involve the same Site and development proposal and both proceedings are expected to involve the testimony of similar experts with respect to considerations under the *Conservation Authorities Act* in the CAA Appeal and with respect to natural heritage matters in the Subdivision Appeal. However, the two appeals involve the application of different laws, and the Subdivision Appeal will canvas various planning and development matters which will not be addressed in the CAA Appeal. Although submissions were made by the City to the effect that the outcome of the CAA Appeal could be fatal to the Subdivision Appeal, the Appellant submitted that it may be possible for it to modify its original development proposal to maintain or reshape the wetlands in a manner that would allow it to proceed with the Application even in the event of failure of the CAA Appeal. Based on this, the Tribunal is of the view that the environmental matters underlying the CAA Appeal are not true threshold issues. Based

on the foregoing and with regard to ensuring greater context by considering all matters concurrently, the Tribunal finds that it would be most efficient for the appeals to be heard together in one phase. The Tribunal is sensitive to the additional burden that would be placed on the Parties to the CAA Appeal if they were forced to also become Parties to the Subdivision Appeal upon a consolidation pursuant to Tribunal Rule 16.2. Accordingly, the Tribunal orders that the appeals shall be heard together pursuant to Tribunal Rule 16.3 in one phase and not consolidated pursuant to Tribunal Rule 16.2. In this manner, the Tribunal is of the view that it will be best able to determine all related issues fairly and comprehensively.

Opportunities for Settlement Discussions

[19] The Parties also canvassed opportunities for settlement discussions and while all Parties indicated they were open to discussions, given the nature of the dispute regarding the relocation of the wetlands, it was unclear whether such discussions would be successful. The Parties are strongly encouraged to engage in settlement discussions and/or mediation in an effort to narrow or resolve the issues.

Scheduling the Hearing and Next Steps

[20] The Parties discussed the estimated length of time that would be required for the hearing, and it was estimated that a hearing in respect of the Subdivision Appeal would take approximately five (5) days, and a hearing in respect of the CAA Appeal would take approximately ten (10) days. They suggested hearing dates in May and June 2023.

[21] The Tribunal finds that the proposed 15 days for the hearing of the appeals is reasonable.

[22] Subsequent to the CMC, the Tribunal directed the Parties in July 2022 to prepare and file a draft Procedural Order and Issues List regarding the proceedings. Despite efforts to reach agreement on a draft Procedural Order and Issues List and on hearing dates, the Parties have been unsuccessful.

[23] Given the need to finalize a draft Procedural Order and Issues List and to address hearing dates, the Tribunal directs that a further CMC will be held in October 2022 to address these issues.

ORDER

[24] The Tribunal orders that the City of Hamilton is a Party in the CAA Appeal.

[25] The Tribunal orders that Craig Cassar, Alexis Harriman, Don McLean, and Bruce Newbold, as well as the individuals granted Participant status in the CAA Appeal at the February 8, 2022 Case Management Conference, are Participants in both the CAA Appeal and the Subdivision Appeal.

[26] The Tribunal orders that the Subdivision Appeal and CAA Appeal shall be heard together pursuant to Rule 16.3 of the Ontario Land Tribunal's *Rules of Practice and Procedure* in one phase.

[27] The Tribunal directs that a further Case Management Conference will be held on **Wednesday, October 26, 2022** commencing at **10 a.m.** at which the draft Procedural Order and Issues List will be finalized and the scheduling of the hearing will be addressed.

[28] Parties and Participants are asked to log into the video hearing at least **15 minutes** before the start of the event to test their video and audio connections:

<https://global.gotomeeting.com/join/638422541>

Access Code: 638-422-541

[29] Parties and Participants are asked to set up the video hearing application well in advance of the event to avoid unnecessary delay. The desktop application can be downloaded at [GoToMeeting](#) or a web application is available:

<https://app.gotomeeting.com/home.html>.

[30] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: **Toll-Free 1-888-299-1889 or +1 (647) 497-9373**. The **Access Code** is as indicated above.

[31] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the hearing by video to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Hearing Office's Case Coordinator having carriage of this case.

[32] There will be no further notice.

[33] These Members are not seized.

“Hugh S. Wilkins”

HUGH S. WILKINS
MEMBER

“Warren Morris”

WARREN MORRIS
MEMBER

Ontario Land Tribunal

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.