Issue Date:

Dec. 11, 2008

PL070900

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Nick Wiendels and Colleen Wiendels (together with Bartels Environmental Services Inc.) have appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 2005-005 of the Municipality of Middlesex Centre to rezone lands respecting 10098 Greystead Drive (South Part Lot 6, Concession 12) from A-2 to R-1 – to rezone the property from Agricultural A1 to Agricultural A1-# to allow for an additional use to permit storage of bio-solids within an existing manure pit
OMB Case No. PL070900
OMB File No. Z070127

A P P E A R A N C E S :

Parties	**Counsel**
NUBS.ORG Environmental Protection Committee Inc.	A. Patton
The Municipality of Middlesex Centre	A. Wright
Nick an Colleen Wiendels and Bartels Environmental Services Inc.	J. Doherty and D. Sunday

MEMORANDUM OF ORAL DECISION DELIVERED BY S. J. STEFANKO ON NOVEMBER 26, 2008 AND ORDER OF THE BOARD

Prior to the commencement of this hearing NUBS.ORG Environmental Protection Committee Inc. ("Moving Party") brought a motion requesting adjournment of this matter *sine die,* to a date to be determined by the Board, pending receipt of the decision of the Ontario Divisional Court in the appeal of McCutcheon et al. v. Westhill Redevelopment Co. et al. (2008) 59 O. M. B. R. 257 ("Aurora Case").

Background

On May 26, 2008, Board Member Hefferon ruled ("Board Decision") that a consolidated hearing in this matter was not warranted. The Moving Party suggests that

this decision is similar to Board Member Hefferon's decision ("Aurora Decision") of March 26, 2008 in the Aurora Case on a similar motion and since Justice Himel granted leave to appeal the Aurora Decision on August 13, 2008 ("Leave Decision"), it is appropriate and fair to adjourn the hearing in this matter as requested. The Municipality of Middlesex Centre ("Municipality") supports the relief sought.

In the Aurora Case, Westhill Redevelopment Co. Limited is seeking to develop an 18-hole golf course, clubhouse and 75 condominium dwellings on 81.9 hectares on the Oak Ridges Moraine, not served by municipal services. Prior to the scheduled hearing, certain residents brought a motion to consolidate the hearing with hearings that may be required before the Environmental Review Tribunal under the *Ontario Water Resources Act.* The Aurora Decision denied the consolidation requested and such denial gave rise to the Leave Decision. In my view, certain extracts of the Leave Decision bear repeating. At paragraph [13], Justice Himel stated:

> ....Generally, deference should be given to the OMB in keeping with its degree of independence and the expertise of the Board. However, this case does not demand significant deference as the OMB does not deal with CHA matters on a routine basis and this court has not made significant rulings on this legislation. It is important that the law be developed in this area and that the Divisional Court be able to comment on the proper interpretation of the statute.

And at paragraph [19]:

> In my view, there is good reason to doubt the correctness of the decision of OMB. I find that the correctness of the decision is "open to very serious debate." See Basso v. King (Township) 9 M. P. L. R. (4th) 140, 50 O. M. B. R. 129 (Div. Ct.) at para 14. Furthermore, the proposed appeal is of sufficient importance to justify granting leave. The matters raised are of broad significance which transcend the interests of the parties and warrant resolution by a higher level of judicial authority: see Klein v. American Medical Systems Inc. (2006), 84 O. R. (3d) 217, 278 D. L. R. (4th) 722 (Ontario Divisional Court).

Although the case at hand does not in any way deal with a golf course and residential development, it does very clearly bring into play the application of two statutes, the *Planning Act* and the *Environmental Protection Act*, along with the reality that a hearing may be held by more than one tribunal under these Acts.

Positions of the Parties

Nick and Colleen Wiendels and Bartels Environmental Services Inc. (collectively the "Appellants") argue that the Moving Party and the Municipality seek to revisit a decision of the Board from which leave to appeal was not sought, are revisiting an issue which is *res judicata* and cannot be reopened, are linking this case to the progress of an appeal in a different and unrelated matter, are delaying the hearing and thereby prejudicing the Appellants and are acting in a way which is an abuse of process.

The Moving Party and the Municipality, on the other hand, take the position, *inter alia,* that the legal principles between this case and the Aurora Case are fundamentally the same, that an adjournment is in the public interest, that they have acted in a timely fashion in relation to the Leave Decision and the Appellants will not be prejudiced if the adjournment were granted. It is also submitted that I have the requisite jurisdiction under s. 34 and s. 37 of the *Ontario Municipal Board Act* to grant the relief sought.

Analysis

It is, in my view, important at the outset to emphasize that I am not determining on this motion whether a joint board should be established under the *Consolidated Hearings Act* ("CHA"), but rather, I am being asked to deal with an adjournment request based upon, among other things, the Aurora Case and the Leave Decision.

Although the adjournment sought does indirectly relate to the Board Decision, I do not consider such a request as revisiting that decision. Even if I were to conclude otherwise, I am not satisfied that I am bound, on this motion, by the Board Decision. In that regard I would refer to the comments of Lamer C. J. in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3 and those of Finch, J. A. (now C. J. B. C.) in British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B. C. L. R. (3d) 1 (C.A.).

At pp. 25-26 of the Canadian Pacific case, *supra*, Lamer, C.J. stated:

> It is now settled that while the decisions of administrative tribunals lack the force of *res judicata,* nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.

And in the Bugbusters case, *supra*, Finch, J. A. observed at paragraph 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application...The doctrine of issue estoppel is designed as an implement of justice and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

In terms of similarity between the Aurora Case and the one at hand, I have already commented that the two cases, in my view, are similar from the perspective of s. 2 of the CHA. Moreover, the parallels drawn between the decisions in the two cases by the Moving Party have been illuminating.

In relation to delay and prejudice, it is significant, in my opinion, that the Appellants have not raised any specific examples of loss or damage which they may sustain if an adjournment was granted. In fact, I would note that even if the hearing is adjourned, it would appear that they still enjoy the rights of requesting a joint board hearing pursuant to s. 3 of the CHA.

Lastly, I am not satisfied that the conduct of the Moving Party and/or the Municipality is an abuse of process. Upon being apprised of the Leave Decision, they moved swiftly and decisively as evidenced by Exhibits 1-3 filed in this motion. In my view, the Moving Party and Municipality, by seeking the adjournment in question, are acting in accordance with the spirit and intent of the Leave Decision and should not be constrained in so doing.

Disposition

Based on all of the foregoing, the hearing in this matter is adjourned *sine die*, to a date to be determined by the Board, pending receipt of a final decision of the Aurora Case. The granting of the adjournment is not and should not be construed as my endorsement of the joint board process for this hearing. That is a determination which can only be made after review of the final decision of the Aurora Case and by the

Moving Party establishing that the provisions of the *Ontario Municipal Board Act* and/or the CHA allow for a joint board to be appointed at that time.

It is so Ordered and I am not seized.

"S. J. Stefanko"

S. J. STEFANKO
MEMBER