

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 11, 2014

CASE NO(S): PL131306

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: J. P. Chenier Company Ltd.
Subject: Application to amend Zoning By-law No. 2008-250 – Neglect of the City of Ottawa to make a decision
Existing Zoning: EP and R1D
Proposed Zoning: Site Specific: R3
Purpose: To permit the development of a subdivision with single detached homes and townhouse units
Property Address/Description: 6279 Fernbank Road
Municipality: City of Ottawa
Municipal File No.: D02-02-13-0057
OMB Case No.: PL131306
OMB File No.: PL131306

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

Applicant and Appellant: J. P. Chenier Company Ltd.
Subject: Proposed Plan of Subdivision - Failure of the City of Ottawa to make a decision
Purpose: To permit the development of subdivision with single detached homes and townhouses
Property Address/Description: 6279 Fernbank Road
Municipality: City of Ottawa
Municipal File No.: D07-16-13-0016
OMB Case No.: PL131306
OMB File No.: PL131398

PROCEEDING COMMENCED UNDER subsection 69(3) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: J.P. Chenier Company Ltd.
Subject: Protest the levying of fees in relation to an application for plan of subdivision and a zoning bylaw amendment
Property Address/Description: 6279 Fernbank Road

Municipality: City of Ottawa
 OMB Case No.: PL131306
 OMB File No.: MM130059

Heard: November 24, 2014 in Ottawa, Ontario

APPEARANCES:

Parties

Counsel*/Representative

J. P. Chenier Company Ltd.

U. Melinz* and B. Hagen*

City of Ottawa

T. Marc*

Keldine FitzGerald

Self-represented

**MEMORANDUM OF ORAL DECISION DELIVERED BY R. G. M. MAKUCH ON
 NOVEMBER 24, 2014 AND ORDER OF THE BOARD**

[1] This is the second Pre-hearing Conference relating to this matter, which has been convened to settle/finalize the issues list for the hearing scheduled to commence on Monday, April 20, 2015 respecting appeals by J. P. Chenier Company pursuant to s. 34-(11) and 51(34) of the *Planning Act* for zoning by-law amendment and approval of plan of subdivision, respectively, relating to the lands known municipally as 6279 Fernbank Road.

[2] The parties have not, to date, agreed on an issues list and a motion is brought by the Applicant/Appellant (J. P. Chenier Company Ltd.) for:

- a) A decision and order of the Board establishing appropriate engineering standards that should be applied to address some of the items on the issues list; and
- b) A decision and order of the Board finalizing the issues list for the hearing.

[3] The materials before the Board on this motion area are as follows:

- 1) Motion Record of the Applicant/Appellant

- 2) Affidavits of:
 - a) Angela Jonkman, sworn November 14, 2014;
 - b) Sean Czaharynski, sworn November 14, 2014;
 - c) Bryan Byerley, sworn November 14, 2014;
 - d) Bryan Willcott, sworn November 14, 2014;
 - e) David Krajaefski, sworn November 13, 2014; and
 - f) Douglas Kelly, sworn November 14, 2014.
- 3) City's Notice of Response to Motion.
- 4) Affidavits of:
 - a) Lily Xu, sworn November 20, 2014;
 - b) Damien Whittaker, sworn November 20, 2014; and
 - c) Donald Moss, sworn November 19, 2014;
- 5) List of issues proposed by Keldine Fitzgerald.

[4] The Board was advised at the commencement of the pre-hearing conference that the parties had agreed to an issues list with the exception of one issue.

[5] Proposed issues 4. a), b) and c) read as follows:

4. a) Does the groundwater level and hydrogeological connectivity impose limits on the placement of underground infrastructure?
4. b) At what elevation does infrastructure for the development proposed have to be installed in order to insure that it is not constantly filled from a groundwater source?
4. c) Has this elevation been confirmed with evidence from a wet season and a dry season or is such confirmation necessary?

[6] The City and community group take the position that issue 4. c) should be included in the issues list, while the Applicant/Appellant argues that it should be deleted from the issues list.

[7] The City relies on the affidavit of Damien Whittaker in support of its position. At paragraph 10 of his affidavit, Mr. Whittaker deposes as follows with respect to issue 4.c):

Typically a water balance model is performed through a number of seasons to confirm the change of water level/flow over time and as a dynamic response to local inputs. From my experience taking rainfall measurements at the Ottawa MacDonald International Airport, 20,000 m away, is not ideal as it receives rainfall too different from that of the location of the proposed development. It is suggested that a local temporary, or existing, rain gauge should be used and piezometers. The *Geotechnical Investigation and Reporting Guidelines for Development Applications in the City of Ottawa*, section 3.3.1 and 3.3.5 discuss the variation in groundwater and determination of long-term groundwater level measured at 0.8 m may have not been the highest that can be obtained. The length of study is suggested to be a four season review to see the response of the proposed lands through high groundwater, low groundwater, high rainfall and low rainfall. It is suggested that only then will the response of the lands to inputs be understood.

[8] Tim Marc argues that collection of such important background information at the high and low periods, will provide the parties and the Board with a base case or starting point for assessing the appropriateness of the development.

[9] Ursula Melinz on the other hand, argues that this condition imposes an obligation on the Applicant/Appellant that is beyond the scope of what is reasonable or necessary and that there are established policies and guidelines that dictate what should be done in this case.

[10] Paragraph 14 of the affidavit of Bryan Byerley states as follows:

In an e-mail dated September 9, 2014 (attached as Exhibit "G"), the City stated that "A consultant will have to measure rainfall, evaporation, groundwater, inflows and outflows over a period of time with typical four seasons as the engineering consultant moves to a scientific approach to collecting data." The request for data collection specific to this Site is not consistent with the methods typically employed in Ontario, including Ottawa, for the type and scale of development proposed for the site. The data set utilized for the water balance (data supplied by Environment Canada for the MacDonald –Cartier International Airport is a 30 year data set. Any data collected on Site would be inferior to the available Environment Canada data which is used city-wide for development project assessments.

[11] Ms. Melinz argues that the Applicant/Appellant's consultant has already completed and submitted a water balance assessment report in accordance with generally accepted engineering standards as set out in the "Ministry of the Environment Storm Water Management Planning and Design Manual" (2003), and, the "Hydrogeological Assessment Submissions (Conservation Authority Guidelines for Development Applications)" (2013). This report according, to Ms. Melinz, indicates that

the proposed development will not adversely impact the adjacent Urban Natural Feature (UNF) or the underlying bedrock aquifer.

[12] Mr. Byerley's opinion suggests that due to site conditions, the groundwater elevation does not need to be measured during different seasons or climactic conditions in order to develop geotechnical and hydrogeological recommendations in relation to the proposed residential development of the Site.

[13] Furthermore, it is argued that parts of the site will have to be cleared, access road laid out and equipment installed on gravel pads, with subsequent reinstatement including the planting of replacement trees. The reinstatement cannot be done according to Ms. Melinz.

[14] It is also argued that this information should have been requested at the pre-consultation stage and that it is unfair for the City to require such studies after the application has been deemed complete by it since June 2013.

[15] The pre-consultation process used by the City, according to Mr. Marc, sets out the minimum studies required to "get the clock running" and allow the statutory time limit of 180 days to begin and does not prevent it to ask for further information/studies in order to assess the development application. It is argued that the onsite information, which would be provided using Mr. Whittaker's approach is more useful and relevant than the information, which would be provided using Mr. Byerley's recommendation of using data collected at the Ottawa International Airport some 20 kilometres away.

[16] With respect to the collateral issue of reinstatement of the lands following the carrying out of the above referred to studies, Mr. Marc has indicated that the City would be prepared to amend this condition so that the applicant/Appellant would only be required to reinstate the lands only after reasonable time has elapsed following any refusal of these applications by this Board.

[17] The Board has considered all of the evidence before it on this motion as well as the submissions of counsel and finds that issue 4 c) should remain. The Board is not in

a position at this time to make a determination as to the appropriateness of this condition. The issue should remain for determination at the hearing of this matter, where the witnesses will be subject to cross-examination as to their respective opinions. The Board re-iterates its previous caution to the parties its earlier disposition, that it is usually loathed to strike an issue where a party insists on its inclusion unless it is abundantly clear from the facts before it that it should not be an issue. Determination of that question should be left to the conclusion of the hearing where any party may make a request for costs in the event that that party was forced to proffer evidence on an issue, which should not have been an issue and inclusion of that issue for determination by the Board unduly prolonged the hearing and forced other parties to unnecessarily incur costs. Furthermore, Issue 4 c) provides that it is open to question whether the evidence referred to is necessary. This Member is not seized but will continue with the case management and may be spoken to by contacting the Board's planner to set up a telephone conference call.

[18] Accordingly, this proceeding shall be governed by Attachment 1 hereto.

[19] There will be no further notice.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

**ONTARIO MUNICIPAL BOARD
COMMISSION DES AFFAIRES MUNICIPALES DE L'ONTARIO**

IN THE MATTER OF subsections 34(11) and 51(34) of the *Planning Act*, R.S.O. 1990, c.P.13, as amended

Appellants: J.P. Chenier Co. Limited
Subject: Failure to enact a zoning by-law
Failure to grant draft approval to a plan of subdivision
Municipality: City of Ottawa
OMB Case No.: PL131306
OMB File Nos.: PL131398

PROCEDURAL ORDER

1. The Board may vary or add to these rules at any time, either on request or as it sees fit. It may alter this Order by an oral ruling, or by another written Order.

Organization of the Hearing

2. The hearing will begin on April 20, 2015 at 10:00 a.m. in the Keefer Room, Ottawa City Hall, 110 Laurier Avenue West, City of Ottawa.
3. The length of the hearing will be 10 days. .
4. The parties and participants identified at the prehearing conference are listed in Attachment 2 to this Order. The order of evidence at the hearing is listed in Attachment 3 to this Order.
5. The Issues are set out in the Issues List attached as Attachment 4. There will be no changes to this list unless the Board permits, and a party who asks for changes may have costs awarded against it.
6. Any person intending to participate in the hearing should provide a telephone number to the Board as soon as possible. Any such person who will be retaining a representative should advise the other parties and the Board of the representative's name, address and phone number as soon as possible.

Requirements Before the Hearing

7. Expert witnesses in the same field shall have a meeting on or before three weeks prior to the hearing to try to resolve or reduce the issues for the hearing. The experts must prepare a list of agreed facts and the remaining issues to be addressed at the hearing, and provide this list to all of the parties and to the Board.
8. A party who intends to call witnesses, whether by summons or not, shall provide to the Board and the other parties, a list of the witnesses and the order in which they will be

called. This list must be delivered on or before six weeks prior to the hearing.

9. An expert witness shall prepare an expert witness statement which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in section 12. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Board may refuse to hear the expert's testimony. For greater certainty, each expert witness statement must comply with the minimum content requirements specified in Rule 21 of the Board's *Rules of Practice and Procedure*. If the expert witness has prepared any report(s) that he/she intends to rely on at the hearing, and which did not form part of the submissions made to the City such report(s) shall be provided to the other parties at the same time as the delivery of expert witness statements, as in section 12.
10. A participant must provide to the Board and the parties a witness or participant statement on or before five weeks prior to the hearing, or the witness or participant may not give oral evidence at the hearing. For greater certainty, participant statements or witness statements are to include the information in Attachment 1 to this Procedural Order.
11. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence, as in section 12.
12. On or before five weeks prior to the hearing, the parties shall provide copies of their witness and expert witness statements to the other parties
13. On or before two weeks prior to the hearing, the parties shall provide copies or webpage links of their visual evidence to all of the other parties. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing.
14. Parties may provide to all other parties a written response to any written evidence one week in advance of the hearing.
15. A person wishing to change written evidence, including witness statements, must make a written motion to the Board.

(See Rules 34 and 38 of the Board's Rules, which require that the moving party provide copies of the motion to all other parties 10 days before the Board hears the motion).

16. A party who provides a witness' written evidence to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Board at least 7 days before the hearing that the written evidence is not part of their record.
17. Documents may be delivered by personal delivery, email, by a webpage link, facsimile, or registered or certified mail, or otherwise as the Board may direct. For documents delivered by email or available by webpage link, a hard copy shall be provided to those that request it. Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.
18. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Board's Rules 61 to 65 apply to such requests.

19. The parties shall cooperate in preparing a Joint Document Book for the hearing, with the costs to be shared by the parties who request hard copies.

**This Member is not seized
So orders the Board.**

ATTACHMENT 1

Purpose of the Procedural Order and Meaning of Terms

*The Board recommends that the parties **meet to discuss this sample Order before the pre-hearing conference** to try to identify the issues and the process that they want the Board to order following the conference. The Board will hear the parties' comments about the contents of the Order at the conference.*

Pre-hearing conferences usually take place only where the hearing is expected to be long and complicated. If you are not represented by a lawyer, you should prepare by obtaining the Guide to the Ontario Municipal Board, and the Board's Rules, from the Board Information Office, 15th Floor, 655 Bay Street, Toronto, M5G 1E5, 416-326-6800, or from the Board website at www.omb.gov.on.ca.

Meaning of Terms Used in the Procedural Order:

***Party** is an individual or corporation permitted by the Board to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an **unincorporated group** wishes to become a party, it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorization from the party.*

***NOTE** that a person who wishes to become a party before or at the hearing, and who did not request this at the prehearing conference, must ask the Board to permit this.*

***Participant** is an individual, group or corporation, whether represented by a lawyer or not, who may attend only part of the proceeding but who makes a statement to the Board on all or some of the issues in the hearing. Such persons may also be identified at the start of the hearing. The Board will set the time for hearing this statements. **NOTE** that such persons will likely not receive notice of a mediation or conference calls on procedural issues. They also cannot ask for costs, or review of a decision as parties can. If a participant does not attend the hearing and only files a written statement, the Board will not give it the same attention or weight as submissions made orally. The reason is that parties cannot ask further questions of a person if they merely file material and do not attend.*

***Written and Visual Evidence:** **Written evidence** includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. **Visual evidence** includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.*

***Witness Statements:** A **witness statement** is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness' opinions on those issues; and a list of reports that the witness will rely on at the hearing. An **expert witness statement** should include his or her (1) name and address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing. A*

participant statement is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any, which the participant will refer to at the hearing.

Additional Information

Summons: A party must ask a Board Member or the senior staff of the Board to issue a summons. This request must be made before the time that the list of witnesses is provided to the Board and the parties. (See Rules 45 and 46 on the summons procedure) If the Board requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Board is not satisfied from the affidavit, it will require that a motion be heard to decide whether the witness should be summoned.

The order of examination of witnesses: is usually direct examination, cross-examination and re-examination in the following way:

- direct examination by the party presenting the witness
- direct examination by any party of similar interest, in the manner determined by the Board
- cross-examination by parties of opposite interest
- re-examination by the party presenting the witness; or
- another order of examination mutually agreed among the parties or directed by the Board

ATTACHMENT 2

LIST OF PARTIES and PARTICIPANTS

PARTIES

1. J.P. Chenier Co. Limited
2. City of Ottawa.
3. FitzGerald, Keldine

PARTICIPANTS

N/A

ATTACHMENT 3

ORDER OF EVIDENCE

1. J.P. Chenier Co. Limited
2. City of Ottawa.
3. FitzGerald, Keldine

ATTACHMENT 4

ISSUES LIST

Issues List

ATTACHMENT 4

CITY VERSION – ISSUES LIST – 24 NOVEMBER 2014

1. Will there be a lowering of ground water levels, and if so, would such groundwater lowering adversely impact the surrounding lands?
- 2 a) Do the subject lands presently provide stormwater management functions to any of the surrounding developed lands?

b) If the answer to a) is in the affirmative, are the subject lands required to provide or contribute to the stormwater management functions to any of the surrounding developed lands and if so, to what extent and what is required of the City to mitigate?
- 3 a) Is there sufficient information to allow the achievement of a stormwater site management plan review pursuant to applicable policy?

b) If the development proposes to use stormwater management measures, are they appropriately designed (at the preliminary level) and located?

c) If the answer to b) is in the affirmative, what are the stormwater management measures required to maintain the water balance?
- 4 a) Does the groundwater level and hydrogeological connectivity impose limits on the placement of underground infrastructure?

b) At what elevation does infrastructure for the development proposed have to be installed in order to ensure that it is not constantly filled from a groundwater source?

c) Has this elevation been confirmed with evidence from a wet season and a dry season or is such confirmation necessary?
- 5 a) Does the geotechnical report demonstrate a reasonable solution for the development of the subject lands?

b) Is a condition of subdivision approval required to address the type of material to be utilized for a stable development foundation?
- 6 Do the boundaries of the stormwatershed change for the larger storm events and, if so, has the design of the stormwater management measures taken such into account

or are the stormwater management measures for the subject property required to so address?

7. Has the proposed development demonstrated that there will be no negative impacts on the ecological functions of the adjacent Urban Natural Feature?

8. Does the proposed layout of the draft plan of subdivision comply with the *Planning Act*, subsection 51(24)?

9. Is the proposed development compatible with adjacent existing development or is there any undue adverse impact?

10 Is there sufficient information to:

- a) Demonstrate protection of endangered and threatened species;
- b) Demonstrate protection of groundwater within and surrounding the subject lands in accordance with applicable policy; and
- c) Considering the development and servicing proposed for the lands, can any of the existing vegetation be protected considering section 4.7.2 of the Official Plan?