Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: August 11, 2015 **CASE NO(S).:** PL140700

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Ministry of Municipal Affairs and Housing
Appellant:	Phelps Homes Ltd.
Subject:	Proposed Regional Official Plan Amendment No. 3
Municipality:	Regional Municipality of Niagara
OMB Case No.:	PL140700
OMB File No.:	PL140700
OMB Case Name:	Ontario (Municipal Affairs and Housing) v. Niagara (Region)

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Ministry of Municipal Affairs and Housing
Appellant:	Phelps Homes Ltd.
Subject:	Proposed Official Plan Amendment No. 37
Municipality:	Township of West Lincoln
OMB Case No.:	PL140700
OMB File No.:	PL140701

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Ministry of Municipal Affairs and Housing
Appellant:	Phelps Homes Ltd.
Subject:	Proposed Official Plan Amendment No. 38
Municipality:	Township of West Lincoln
OMB Case No.:	PL140700
OMB File No.:	PL140702

PROCEEDING COMMENCED UNDER subsection 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended

Request by:	Dunloe Developments Inc. and Quentin Developments Inc.
Request for:	Request for Directions
Heard:	May 29, 2015 by telephone conference call

APPEARANCES:

Parties	**Counsel**
Dunloe Developments Inc. and Quentin Developments Inc.	R. Kanter R. D. Cheeseman
Phelps Homes Ltd.	N. Smith
Regional Municipality of Niagara	S. Chisholm
Township of West Lincoln	T.A. Richardson

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD

[1] Two pre-hearings have already occurred on this case, and the Board has issued a procedural order which includes an issue list. The reader is referred to these decisions and procedural order for additional background information on matters that were in dispute for the hearing of the merits.

[2] The matter before the Board in this appearance is a motion brought jointly by Dunloe Developments Inc. (“Dunloe”) and Quentin Developments Inc. (“Quentin”) for an Order of the Board to disqualify and exclude a witness from the hearing of the merits, set to commence approximately one month from the date of the motion.

[3] The motion was heard by teleconference.

[4] Dunloe and Quentin wish specifically to exclude Steven Frankovich and “any other person employed by or associated with the firm of S. Llewellyn & Associates Limited, Consulting Engineers”.

[5] Mr. Frankovich is a professional engineer who is an associate with S. Llewellyn & Associates Limited, Consulting Engineers (“Llewellyn Associates”).

[6] Phelps Homes Ltd. (“Phelps”) intends to call Mr. Frankovich as part of its case in the hearing of the merits.

[7] The Regional Municipality of Niagara (“Region”) and the Township of West Lincoln (“Township”) were in attendance at this teleconference to monitor these proceedings. Neither the Region nor the Township filed any response and both advised the Board that neither took a position on the merits of the motion generally.

[8] The response to the motion filed by Phelps sought an adjournment of the hearing of the merits if the Board granted the Dunloe and Quentin motion. Phelps was clear that the adjournment would only be sought in the event that the Board disqualified and excluded Mr. Frankovich, creating a circumstance where Phelps would need to secure another expert to deal with the professional engineering matters with which Phelps intended Mr. Frankovich to deal.

[9] Both the Region and Township indicated their interest in addressing the Board on the narrow question of an adjournment, should the Board grant the Dunloe and Quentin motion.

[10] The Board rendered an oral decision on the motion, with written reasons to follow.

[11] In its response to the motion, Phelps sought an oral decision on costs with a bill of costs to be submitted later. Dunloe and Quentin filed no reply to the request for costs. The Board reserved its decision on the question of costs sought by Phelps.

[12] Following the telephone conference call but prior to the commencement of the hearing of the merits, all appeals were withdrawn.

[13] This decision deals with the motion, provides direction on the matter of costs, and deals with the withdrawal of all appeals.

ISSUES, ANALYSIS AND FINDINGS

[14] The grounds for the motion are that Dunloe and Quentin, and their predecessor 1734234 Ontario Ltd. (“173”), retained Llewellyn Associates between 2007 and 2013 – specifically Scott Llewellyn – to provide professional engineering advice on municipal servicing and infrastructure. At the time, Dunloe, Quentin and/or 173 were exploring a possible urban boundary expansion of the community of Smithville within the Township.

[15] Mr. Llewellyn also provided professional engineering advice to Phelps.

[16] The Dunloe and Quentin lands are located in the northwest area and the Phelps lands are located in the southwest area.

[17] In the event the Board agreed with some expansion, a key question would then be whether the appropriate expansion is to the northwest on the Dunloe and Quentin lands or to the southwest on the Phelps lands.

[18] Dunloe and Quentin assert that Mr. Llewellyn and Llewellyn Associates have a direct conflict of interest as a result of providing professional engineering advice both to Phelps and to Dunloe, Quentin and/or 173 regarding municipal infrastructure related to lands expected to be the subject of a boundary expansion of the community of Smithville.

[19] The Board had affidavit evidence from the following people, set out in the motion record of Dunloe and Quentin:

a. John S. Ariens, a professional land use planner with the IBI Group

b. Don Manson, the development manager for Dunloe, Quentin and 173

c. Mark Kolacevic, a partner in 173

d. Kelly Cobbe, a professional engineer with the IBI Group

[20] The Board had affidavit evidence from the following people, set out in the response to the motion filed by Phelps:

a. Paul Phelps, the president of Phelps

b. Scott Llewellyn, a professional engineer with Llewellyn Associates

c. Steven Frankovich, a professional engineer with Llewellyn Associates

[21] At the core of the Dunloe and Quentin motion is the fact that Llewellyn Associates, and specifically Mr. Llewellyn, provided professional engineering advice to 173 between 2007 and 2013, and was paid for it, as set out in the affidavit of Mr. Manson.

[22] In his affidavit, Mr. Ariens states that he relied upon the professional engineering advice from Mr. Llewellyn and that this professional engineering advice informed the professional planning advice Mr. Ariens provided to Dunloe and Quentin.

[23] There is no assertion from either Mr. Manson or Mr. Ariens that Mr. Llewellyn's engineering advice was other than properly professional.

[24] The Board has no doubt that the question of which lands should be the subject of the proposed expansion of the community of Smithville engendered deeply held views.

[25] Dunloe and Quentin feel strongly that Mr. Frankovich and Llewellyn Associates should be excluded. The depth and strength of that view is readily seen in an e-mail of December 20, 2013 sent by Mr. Manson to Mr. Llewellyn, filed as Exhibit A to the affidavit of Mr. Llewellyn and reproduced below:

> December 20, 2013
> To: Scott Llewellyn
> From: Don Manson
>
> Re: Smithville New Town
>
> Following our meeting yesterday Mark and I received a call from John Ariens who has been preparing the proposed concept plan for the north side of Hwy 20. As you are aware we are collectively pursuing applications to include our land holdings in the swap presentation for January 13th. John advised us that we are now engaged in full battle for the limited number of acres available for residential expansion. We have also requested additional lands beyond the 25 acres identified by the Town as preferred across from the new school.
>
> With the request being made by IBI on behalf of the Tek/New Town group the necessity to secure approval based on an expanded area puts us in direct conflict with other land owners. With the additional lands requested the conflict worsens to an all out war with our opponents and, as such, we are in a major battle with Phelps Homes. For this reason, and I will be in discussion with John Miljan who is involved with Tek, it is our feeling that your activities with Phelps Homes puts you in a conflict of interest that is unacceptable given the magnitude of what is at stake for both groups. Obviously we would prefer to have you continue on the team but it is totally unacceptable to all our partners that your firm be providing our enemy with ammunition that can be used against us in the fight for the available land being granted by the swap.
>
> Furthermore, it is inevitable that the losing candidates will consider an appeal to the OMB which will further complicate matters. I would ask that you reflect on the position and situation as I am sure you can appreciate the magnitude of what is at stake.
>
> John's pursuit of our proposal is and has to be pursued in the best possible light in order to present the best reasons why our area should be approved ahead of others.
>
> I trust that you can see our point as it comes from the collective group.

[26] Phelps has responded that Mr. Llewellyn has provided professional engineering services to Phelps for 20 years, as set out in the affidavit of Paul Phelps.

[27] In its motion, Dunloe and Quentin did not deal with Rule 21.01 of the Board's *Rules of Practice* and did not set out any of the legal tests for the disqualification and exclusion of an expert witness.

[28] In considering this motion to exclude an expert witness, the Board begins with the simple premise that those giving independent expert professional opinion evidence to the Board are not advocates. They appear before the Board to provide neutral, impartial evidence.

[29] The considerable importance the Board attaches to this point is demonstrated in the Board's requirement, in Rule 21.01, that an Acknowledgement of Expert's Duty form be executed by the expert witness. Paragraphs 3 and 4, reproduced below, are the key elements:

> 3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
>
> a. to provide opinion evidence that is fair, objective and non-partisan;
>
> b. to provide opinion evidence that is related only to matters that are within my area of expertise; and
>
> c. to provide such additional assistance as the Board may reasonably require to determine a matter in issue.
>
> 4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

[30] The required acknowledgements set out in the Board's form stand as important reminders to expert witnesses that they are not advocates.

[31] The acknowledgements also follow the well-established principle, repeatedly enunciated by the Court and repeatedly followed by the Board, that there is no property in an expert witness and no property in the facts observed and the opinion drawn by that expert.

[32] In *Harmony Shipping Co. v. David* [1979] AII E.R. 177 (C.A.) the Court states:

> I would add a further consideration of public policy. If an expert could have his hands tied by getting instructed by one side, it would be very easy for a rich client to consult each of the acknowledged experts in the field. Each expert might give an opinion adverse to the rich man, yet the rich man could say to each, "Your mouth is closed and you cannot give evidence in court against me' .... Does that mean that the other side is debarred from getting the help of any expert evidence because all the experts have been taken up by the other side? The answer is clearly NO .... There is no property in an expert witness as

> to the fact he has observed and his own independent opinion of them. There is no such property in a witness, it is the duty of a witness to come to court and give his evidence in so for as he is directed by the judge to do so.

[33] In *Remus v. Remus* [2002] 61 O.R. (3d) 680 (S.C.) the Court was dealing with the question of confidential information received by a lawyer. While this motion deals with the exclusion of an expert witness, the Court's direction regarding confidential information is instructive:

> The mere assertion that there is an appearance of impropriety or that the former lawyer has some general form of confidential information has been held by various courts to be insufficient to remove the solicitor. There must be clear and cogent evidence from which the court can reach the conclusions that in all the circumstances it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that would be relevant to the current matter.

[34] In *Lorne Park Estates Association v. Cairns* [2006] O.J. No. 454 the Court reviews the test for expert disqualification based on whether the expert has knowingly received confidential information with the expectation that such information would be maintained in confidence.

[35] Even if they had received confidential information, the test goes on to require an examination of the nature of that confidential information, the risk of it being disclosed, the risk of prejudice to either party, and consideration of the "interests of justice and public confidence in the judicial process".

[36] With the exception of any privileged material the expert may have received from opposing Counsel, or any opinion given to opposing Counsel, the Court states:

> Even though a party has retained an expert and communicated privileged information to the expert, the expert may still be asked for an opinion by an opposing party and may call that expert at trial.

[37] In *466353 Ontario Limited v. Kirby* (2004) 47 O.M.B.R. 345, the Board, differently constituted, considered the question of whether visions of land use would meet the test of being confidential information that should be excluded. The Board was clear that visions of how land should be developed are not normally confidential in nature.

[38] In *Yorkville North Development Ltd. v. Toronto (City)* [2007] O.M.B.D. No. 249, the Board, differently constituted, also dealt with a motion to exclude an expert witness and reviewed the key legal tests set out above. The Board followed those tests and declined to disqualify and exclude the expert witness.

[39] In the matter now before the Board, there is no assertion that a confidential ambition regarding proposed land use and development was disclosed.

[40] There is no assertion that a particular vision of future land use and development, whether intended to be confidential or otherwise, shaped any professional engineering opinion that might be provided to the Board by Mr. Frankovich.

[41] What is clear from Mr. Ariens' affidavit is that the professional engineering opinion provided to 173 in Mr. Llewellyn's work was then relied upon by Mr. Ariens as he formed his professional land use opinion.

[42] Dunloe and Quentin do not assert that either Mr. Llewellyn or Mr. Frankovich have received confidential information.

[43] The affidavits of Messrs. Llewellyn and Frankovich support the proposition that they have not received confidential information from Dunloe, Quentin or 173.

[44] Mr. Llewellyn's affidavit sets out that he did work for 173 but did not receive any confidential information from 173 nor has he spoken to Mr. Frankovich regarding his work for 173. Mr. Llewellyn also states that he has never been retained by Dunloe or Quentin.

[45] In his affidavit, Mr. Frankovich states:

> I am familiar with my professional obligations under the *Professional Engineers Act* and Regulations. I understand my role in giving objective advice and opinion. I understand that I must disclose any interest to my clients that might be construed as prejudicial to my professional judgment. I fulfill this role in all my retainers. I fulfilled this role in my retainer

> with Phelps. I have never done work for Dunloe Developments Inc. and Quentin Developments Inc.…
>
> I am a witness in this case. I am familiar with my professional duty in giving expert opinion before the OMB. I signed the Acknowledgement of Experts Duty. I attach it as Exhibit *"B".* I swear to its contents…
>
> I will testify to my engineering review and findings at the hearing…
>
> I have no knowledge of any past services that Mr. Llewellyn has provided to 173.

[46] Mr. Cobbe is a professional engineer, as are Messrs. Llewellyn and Frankovich. All three gentlemen are bound by the requirements of Ontario Regulation 941/90 made under the *Professional Engineers Act*, R.S.O. 1990, c. P.28. Section 77 of that regulation is the Code of Ethics that governs professional engineers.

[47] In his affidavit in the Dunloe and Quentin motion record, Mr. Cobbe stated that he reviewed the affidavits of Messrs. Manson and Ariens. He also stated that he reviewed a guideline set out by the Professional Engineers of Ontario titled "*The Professional Engineer as an Expert Witness".* Mr. Cobbe concluded in his affidavit that:

> In my opinion, an engineer employed by S. Llewellyn and Associates cannot fulfill a duty of neutrality and impartiality with respect to this appeal, since the firm was previously retained by another client with a different interest in the same appeal.

[48] In asserting this very serious professional impropriety in the event that Mr. Frankovich was not excluded and was called to give expert opinion evidence to the Board, Mr. Cobbe provided no analysis of the requirements of Ontario Regulation 941/90, no analysis of the specifics of this case, no analysis of Board Rule 21.01 and no analysis of the tests to support an allegation of conflict of interest.

[49] The Board finds no reasonable basis for Mr. Cobbe's conclusion and es no weight to this opinion.

[50] The Board finds that there is no disqualifying conflict of interest and no basis to exclude Mr. Frankovich as an expert witness.

[51] In its response to the motion, Phelps has sought an order for its costs of this motion.

[52] In accordance with Rule 97, if Phelps wishes to pursue its request for costs, the Board directs that Phelps proceed by way of a written submission on the application for costs, as set out in Rule 98(ii).

[53] Any responses are to be served and filed in accordance with Rule 99.

[54] Any reply is to be served and filed in accordance with Rule 100.

[55] In accordance with Rule 101, this panel of the Board will remain seized of any request for costs arising from this motion.

[56] Subsequent to the Board's oral decision denying the motion to disqualify and exclude Mr. Frankovich, but prior to the start of the hearing, Phelps withdrew its appeals.

[57] Since the Ministry of Municipal Affairs and Housing had also, previously, withdrawn its appeals, no further appeals remained in this matter.

[58] With all appeals withdrawn, the Board cancelled the scheduled hearing of the merits.

[59] Pursuant to s. 17(39) of the *Planning Act*, R.S.O. 1990 c. P. 13, the decisions of the Region of Niagara on Regional Official Plan Amendment No. 3 and on the Township of West Lincoln Official Plan Amendment Nos. 37 and 38, as modified by order of the Board issued on May 6, are final.

ORDER

[60] The Board orders that the motion brought by Dunloe Developments Inc. and Quentin Developments Inc. is denied.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR