

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 15, 2016

CASE NO(S):

PL150694

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Arber Developments Ltd. and Hert Inc.
Subject: Request to amend the Official Plan - Refusal of request by the City of Welland
Existing Designation: Core Natural Heritage System, Low Density Residential and Medium Density Residential
Proposed Designated: Low Density Residential and Medium Density Residential
Purpose: To permit the development of a subdivision consisting of single detached and multiple residential units
Property Address/Description: 633 South Pelham Road
Municipality: City of Welland
Approval Authority File No.: 15-73
OMB Case No.: PL150694
OMB File No.: PL150694
OMB Case Name: Arber Developments Ltd. v. Welland (City)

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

Applicant and Appellant: Arber Developments Ltd. and Hert Inc.
Subject: Application to amend Zoning By-law No. 2667 - Refusal of Application by the City of Welland
Existing Zoning: Rural Agricultural Zone (RA), Highway Commercial Zone (C4) and Single-Detached Dwelling - Second Density Zone (R2)
Proposed Zoning: Site Specific Single-Detached Dwelling - Third Density Zone (R3) and Multiple Dwelling - Third Density Zone (RM3)
Purpose: To permit the development of a subdivision consisting of single detached and multiple residential units

Property Address/Description: 633 South Pelham Road
 Municipality: City of Welland
 Municipality File No.: 15-73
 OMB Case No.: PL150694
 OMB File No.: PL150697

PROCEEDING COMMENCED UNDER subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Arber Developments Ltd. and Hert Inc.
 Subject: Proposed Plan of Subdivision
 Property Address/Description: 633 South Pelham Road
 Municipality: City of Welland
 Municipal File No.: 15-73
 OMB Case No.: PL150694
 OMB File No.: PL150698

Board Rule 107 states:

107. Effective Date of Board Decision A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

Heard: April 25 to 29, 2016 in Welland, Ontario

APPEARANCES:

Parties

Counsel

Arber Developments Ltd. and Hert Inc.

M. Melling and K. Sliwa

City of Welland

T. Hanrahan

Region of Niagara

S. Chisholm

Don Labute

Self-represented

DECISION OF THE BOARD DELIVERED BY J.V. ZUIDEMA

INTRODUCTION

[1] A five day hearing had been scheduled further to a Pre-Hearing Conference (“PHC”). At that PHC, the Board, differently constituted, recognized the parties and participant and following that, issued a Procedural Order which was to govern the proceedings.

[2] By way of some background to this matter, the information contained in the Board’s file set out that Arber Developments Ltd. and Hert Inc. (“Appellants”) applied to the City of Welland (“City”) to permit the development of a subdivision consisting of single detached and multiple residential units. The property in question is located at 633 South Pelham Road (“subject property”) in the City.

[3] The applications sought the following:

- a. an amendment to the City’s Official Plan (“OP”) to redesignate the subject lands to Low Density Residential and Medium Density Residential from Core Natural Heritage System, Low Density Residential and Medium Density Residential;
- b. to rezone the subject lands from the existing Rural Agricultural Zone (RA), Highway Commercial Zone (C4) and Single-Detached Dwelling - Second Density Zone (R2) to Site Specific Single-Detached Dwelling - Third Density Zone (R3) and Multiple Dwelling - Third Density Zone (RM3); and
- c. to permit a Plan of Subdivision consisting of thirty-nine (39) lots for single-detached dwellings, 2 Blocks for multiple residential units, 1 Block for future residential, 1 Block for a proposed Storm Water Management Facility and 1 Block for a road widening.

[4] City Council refused the application for an official plan amendment, the application for rezoning and the draft plan of subdivision approval. The Appellants then appealed those decisions to this Board pursuant to subsections 22(7), 34(11) and 51(39) of the *Planning Act*.

[5] The Planning Report recommended that the applications be denied stating that on the subject lands is a Provincially Significant Wetland (“PSW”). Further the report stated that neither the Niagara Peninsula Conservation Authority (“NPCA”) nor the Ministry of Natural Resources and Forestry (“MNR”) have indicated that the designation can be removed, and as a result the applications could not be supported in its current configuration.

Motions to Adjourn

[6] Shortly before the hearing was to begin, the Region of Niagara (“Region”) and the City respectively filed complimentary Motions to Adjourn. The Motions were not served in accordance with the Board’s *Rules of Practice and Procedure* (“Rules”) as ten days’ notice had not been provided. The motions were supported by Mr. Labute, a party to these proceedings. It was opposed by Counsel for the Appellants.

[7] Following hearing submissions from all Counsel and Mr. Labute, and evidence from witnesses Ms. Morgan Casciani and Mr. Grant Munday, both Affiants to the Motion material, I provided an oral decision dismissing the Motions and directing that the hearing proceed. These Motions consumed the first day.

[8] My oral ruling was substantially as noted below.

- a. Motions to Adjourn brought by the Region and by the City were supported by Mr. Labute and opposed by the Appellants. These two Motions are denied and my reasons are as follows:

- i. The facts are that this hearing was scheduled on consent and

reflected in a Procedural Order issued by the Board a number of months ago.

- ii. The Board controls its processes pursuant to the *Statutory Powers Procedure Act*. That exercise of control and jurisdiction of its procedure is reflected in the Board's Rules.
- iii. The Board's Rules are explicit as they relate to adjournments and the Rules clearly state that adjournments are only granted in the most exceptional cases, especially when adjournments are made without the standard notice requirements, specifically ten days minimum for formal motions.
- iv. No emergency circumstance was alleged by the Moving Parties.
- v. The cornerstone for the request for this particular adjournment is founded on the Province's response to ROPA 11 which response was sent to the Region on or about April 15, 2016, just ten days before this hearing was to begin.
- vi. The Region asserts that it needs the adjournment in order to review the new information from the Province. "Niagara Region needs an opportunity to review the new material from the Province. This review will inform what, if any changes to Niagara Region's case preparation are required." Reference is made to paragraph 11 of Exhibit 3, tab 2, Affidavit of Casciani.
- vii. That new information is attached at Exhibit "D" to Ms. Casciani's affidavit.
- viii. When one reviews this correspondence the MNRF confirms a position it has held for some time, namely that a portion of the

subject property sought for removal from the Region's Environmental Protection Area ("EPA") is part of the Draper's Creek Provincially Significant Wetland Complex. That position has been maintained by the MNRF since 2009.

- ix. That stance has been re-addressed in 2012 and 2013 and on both occasions, the PSW status was confirmed.
- x. Even with the review done further to the Beacon 2015 Environmental Impact Statement ("EIS"), the Province's position remains the same in connection with this PSW.
- xi. With respect, there is nothing new which would justify adjourning this hearing process.
- xii. The Region also asserts that it needs time to assess whether it will need to summon additional witnesses. Reference is made to paragraph 12, Exhibit 6, tab 2.
- xiii. While the affidavit identifies the possibility of this, no such confirmation was provided by Mr. Stephen Chisholm. In fact, his office's earlier correspondence states that the Region will not be calling a witness from the MNRF. Reference is made to page 85 Exhibit 6, tab 2I. This email was sent out following the filing of ROPA 11.
- xiv. The City presents virtually identical grounds for its motion citing that it needs an opportunity to review the new material and consider the need for new witnesses. Reference is made to paragraph 7, Exhibit 5, tab 1. Nowhere in the materials are potential new witnesses or disciplines of witnesses identified.

- xv. Mr. Munday affirms in his affidavit “that the main issue in this proceeding is with respect to the determination of whether a Provincially Significant Wetland (“PSW”) exists on the subject lands and the jurisdiction of the Board to make that decision.” Reference is made to paragraph 7, Exhibit 5, tab 2.
- xvi. The issue of whether the subject lands contain a PSW has been known for some time given that the Region identified it as early as December 2015. Reference is made to page 6, Exhibit 7, tab 2.
- xvii. I am not satisfied that the Region and the City have adequately addressed the prejudice against the Appellants for the adjournment requested. In fact, I do not recall any submissions from them on this particular issue. The Board is required to balance the interests of all parties in its proceedings.
- xviii. In this instance, I am not persuaded that an adjournment outweighs the prejudice to the Appellants. For the foregoing reasons, the Board orders that the Motions are dismissed and reserves the right to further elaborate my reasons when I provided a written disposition reflecting this oral decision.

[9] Following the ruling, there was some discussion on whether or not the Region would be bringing a follow-up Motion on the Board’s jurisdiction in connection with the potential removal of the PSW but in the end, that Motion was not pursued. The Board then proceeded with the hearing.

PSW Threshold Issue

[10] The parties on consent, sought to phase this hearing with having a threshold issue adjudicated and decided first, as that would presumably set the stage for the remaining planning case. Specifically, the request to structure the hearing in this

manner was requested and acceded to by all the parties.

[11] As such, I was asked by the Appellants to make a finding that the wetland units situated on the subject property were not part of the Draper's Creek Provincially Significant Wetland Complex hereinafter sometimes simply referred to as the PSW complex.

[12] The specific relief sought by the Appellants was to have this threshold issue decided first and follow with a direction to proceed to the next phase of the hearing which would address the planning merits.

[13] To be clear, the starting point for this threshold issue is that the wetland units currently on the subject property ARE part of the PSW complex. The Appellants are trying to establish that those units should not be recognized as part of the PSW. The question is not to determine the status of those units as if they were not evaluated already – they have been evaluated and have been determined to be part of a PSW complex.

[14] For this first phase, I heard overview evidence from Mr. Munday on behalf of the City. Mr. Munday is a professional land use Planner with the City. His evidence was simply to provide the geographical and historical context of the matters before the Board. No opinion evidence was provided at this stage. He provided no planning recommendation.

[15] I then heard from Mr. Ron Huizer who was qualified and accepted as an expert in the areas of biology, wetland evaluation in Ontario and environmental impact assessment. In a nutshell, his evidence was that removal of the wetland units on the subject property would not negatively affect the status of the remainder of the complex. In other words, the Draper's Creek PSW complex would remain, just without the three small wetland units currently situated on the subject property.

[16] Mr. Huizer was candid in his presentation of his data and his application of the

Ontario Wetland Evaluation System (“OWES”). He was forthright to explain that his testimony was being provided in his capacity as a biologist and wetland evaluator.

[17] Mr. Huizer was not a Planner and on a few occasions, his answers reiterated that he could not provide evidence on policy or planning issues. For example, he testified that MNR holds the data files for wetland evaluations and those are “open” files which meant that the Province accepts updates on evaluations or existing PSW’s.

[18] When asked about the policy associated with MNR’s control and jurisdiction on the identification of PSW’s, Mr. Huizer stated that he could not comment on the policy or the planning rationale behind them.

[19] I value Mr. Huizer’s candour and meaning no disrespect, appreciate that his understanding of land use planning was limited. In fact, on one occasion, Mr. Huizer stated that he believed ROPA 11 was one of the matters before this Board which was factually incorrect.

[20] To be clear, the specific matters before the Board are three planning instruments: a local OPA, a ZBA and a plan of subdivision. The Board’s responsibility to adjudicate planning matters goes beyond a dispute between the parties. There are numerous Board decisions and considerable jurisprudence which direct the Board to ensure that the broader public interest is met.

[21] The decision on the threshold issue feeds into these three planning instruments but it does not and should not substitute for the necessary evidence, analysis and determination of those planning documents.

[22] Presumably if the determination on the threshold issue is in favour of the Appellants’ position (that the three wetland units should be removed from the PSW complex), then the three planning instruments would be judged and proceed as proposed with development proposed over the areas where the wetland units are situated.

[23] If however, the Board determines that the wetland units should remain as currently recognized as part of the PSW complex, then presumably the planning instruments would require amendment as the development concept would have to be adjusted to reflect the Board's decision.

[24] In either scenario, the initial determination has a material effect on how those planning instruments will be treated. There is no denying this fact.

[25] There is also no denying that the concept of a Provincially Significant Wetland is not just a scientific one. While the science provides inputs of functional assessment, size and point scores to name a few, the notion of a natural feature or features being recognized and protected by having it labelled as a "Provincially Significant Wetland" is linked to provincial policy.

[26] Specifically, the 2014 Provincial Policy Statement ("2014 PPS") defines "Significant" in relation to wetlands as "an area identified as provincially significant **by** the Ontario Ministry of Natural Resources using evaluation procedures established by the Province, as amended from time to time." [bold emphasis added] [see Exhibit 2, tab 2, page 33]

[27] In this case, the Board's initial determination would be made without the benefit of any planning opinion evidence. This in my estimation undermines and impedes the Board's responsibility to assess whether the public interest is being met and whether the resulting impact to the planning instruments represents good and proper planning.

[28] While it may have been convenient to the Appellants to segment its case to have a technical threshold issue determined at the outset, doing so bears a risk. To be clear, I cannot ignore that by accepting Mr. Huizer's recommendation to remove the three wetland units from the PSW complex has a direct effect on and correlation to the planning instruments.

[29] I also cannot accept that a determination based on technical and scientific data is

only that. The reality is that this interim decision affects and has an implicit control on the planning instruments. The net effect of a decision to remove the three wetland units is a *de facto* decision to rezone and redesignate without the benefit of planning advice.

[30] Specifically the Appellants did not proffer an expert planning witness to provide evidence that Mr. Huizer's scientific conclusions and implementation thereof, represent good planning and are in the public interest. They wanted to address this at a later phase of the hearing. With respect, such an approach is unacceptable and unduly binds the Board.

[31] Without the benefit of evidence to support Mr. Huizer's recommendations on a planning and policy basis, I must proceed with caution and cannot accede to the Appellant's request.

[32] Further, to address the issues of this case in a piece-meal fashion undermines and erodes the responsibility of the Board to ensure the public interest is met.

[33] To connect my findings to the specific evidence before me, I refer to the Ontario Wetland Evaluation System Southern Manual, 3rd Edition, Version 3.3 from 2014 ("Wetland Manual") used by Mr. Huizer in his data collection [found at Exhibit 2, tab 12]. At pages 317 and 318 of this Wetland Manual, guidance is provided on how one is to view the wetland evaluation file held by the then Ministry of Natural Resources ("MNR").

[34] At page 317, it states:

A wetland evaluation must be considered an "open file". Any change to the wetland boundaries (e.g., deletions/additions) after the evaluation file has been **approved** must be documented in the file (e.g., maps showing rationale for boundaries changes). Full documentation of size/boundary changes will facilitate future review and update of the files. [bold emphasis added]

[35] At page 318, it states:

NOTE: Existing wetland boundaries, regardless of their age remain in effect until they are revised and those revisions are **approved** by the

MNR. [bold emphasis added]

[36] Here is where the policy of the Wetland Manual intersects with the application of the technical information. Mr. Huizer was not able to satisfactorily address the rationale for this process or how appeals to this Board were to replace the authority of the MNR as articulated in the Wetland Manual.

[37] From the materials contained in the joint document brief, the Appellant Hert Inc. through its consultant Ms. Jennifer Vida, a professional Planner, certainly was aware of the requirement that MNRF was to provide approval to remove PSW wetland units from the property.

[38] I refer now to the Pre-consultation Meeting Form of the City dated September 18, 2014 and signed by a representative for Hert Inc. wherein it states “need MNR [as it was then] to agree to eliminate, reduce PSW, a wetland evaluation will be required.” [see pg. 427 of Exhibit 2]

[39] The authority to remove or reduce or otherwise amend the PSW on the subject property was again confirmed through correspondence from the Niagara Peninsula Conservation Authority (“NPCA”) in its letter dated May 22, 2015 to the City Planner, Mr. Munday and copied to Ms. Vida.

[40] In that letter, Mr. David Deluce, a registered professional Planner with the NPCA states:

Despite the applicant’s rationale for reclassifying the wetland on the property as non-PSW, the NPCA does not have the legal ability [to] [sic] declassify a PSW. This is the role of the Ministry of Natural Resources and Forestry (MNRF). Our understanding is that the applicant approached the MNRF to redefine the PSW boundaries in October 2013, however, the MNRF did not declassify the wetland as a PSW. Given this, the NPCA cannot support the applications as submitted since NPCA policy does not permit new development within a PSW. Should the applicant resolve this issue by either revising the proposed plan (to protect the PSW and provide an appropriate buffer) or having the MNRF remove the PSW classification from the wetland, the NPCA would be in a better position to consider supporting the applications. Please note that if the draft plan is revised to stay of the PSW, the EIS will need to be updated to provide an appropriate buffer from the PSW. [see page 696 of

Exhibit 2]

[41] In this case, the applicant did neither but rather sought through the Board's process to have the PSW removed but without the benefit of planning analysis. For these reasons amongst others noted below, I cannot accept Mr. Huizer's recommendation.

Scientific Assessment

[42] Aside from my reservations noted above, I was also not fully satisfied with Mr. Huizer's analysis with respect to the existence of two items: frogs calls and purple loosestrife.

[43] The existence of purple loosestrife is an indicator of a wetland. Through cross-examination by Mr. Thomas Hanrahan, Mr. Huizer conceded that he relied upon the Environmental Impact Statement prepared by Beacon Environmental ("Beacon EIS") to come to his recommendations with respect to the PSW. Mr. Huizer was not the biologist who prepared this EIS. He used the data from this EIS as an input to formulate his own professional opinions.

[44] Mr. Huizer could not adequately explain why the EIS indicated that purple loosestrife is facultative which was at odds with the information from the MNR staff that purple loosestrife is an obligate wetland plant "which means it needs to live in a wetland area and is a wetland indicator plant as identified in OWES." [see Exhibit 2, tab 30, page 757]

[45] So the disconnect between Mr. Huizer's conclusions stemming from his clients' EIS and that from MNR staff, left me with some uncertainty on the scientific foundation associated with this particular wetland plant.

[46] Then there was Mr. Huizer's interpretation of data compiled by another biologist. Again, during Mr. Hanrahan's cross-examination, Mr. Huizer could not comment on the level of expertise or approach taken by that other biologist as reflected in the field notes.

[47] The handwritten notes were referenced by Mr. Huizer in his testimony and filed as Exhibit 15. Mr. Huizer was not sure if this biologist heard or saw other listed frogs at a code 3 level.

[48] Therefore, because of this uncertainty and at the Board's request, Ms. Michelle Martin, an MNRF Biologist and author of the field notes attended. The Board had some questions arising from her notes and in particular, the existence and number of Western Chorus Frogs or other frogs on the subject property.

[49] Mr. Huizer testified that he had listened to the audio recordings produced by Mr. Labute, an unrepresented party to these proceedings who was scheduled to testify and those of Ms. Martin, with whom Mr. Huizer deals routinely. Mr. Huizer concluded that following his review of the audio recordings, he believed that the Western Chorus Frog and the Peeper Frog were at code 1 or 2 levels, not code 3 even though Ms. Martin's field notes stated: "Code 3 abundance Western Chorus Frogs mainly."

[50] Firstly, I recognize that Ms. Martin was produced on very short notice. Secondly, I appreciate that Mr. Hare, counsel with the Ministry of Municipal Affairs and Housing attended to support this witness. The Board thanks both Mr. Hare and Ms. Martin for their assistance.

[51] Ms. Martin attended because there was uncertainty as to what her notes really meant and because Mr. Huizer's had relied upon to those notes and audio tapes in his testimony. In response to the Board's question, Mr. Huizer indicated that he had not contacted Ms. Martin to get clarification of her field notes.

[52] What resulted was testimony from Mr. Huizer that was somewhat speculative and this prompted my request to hear from Ms. Martin. No other biologist was slated to be called by either the Region or the City. While Mr. Huizer had done his own independent field work, his results did not mesh neatly with that of Ms. Martin as reflected in her notes.

[53] Ms. Martin clarified her notations to state that she could hear Western Chorus Frogs at a code 3 level; the Spring Peeper was at code 2. Other than the Western Chorus Frog, she could not identify another wildlife species listed in the Significant Wildlife Habitat Criteria Schedules for Ecoregion 7E January 2015 [found at Exhibit 2, tab 14, page 424]. Had there been two or more of the listed frogs or toads, then the area would have been recognized as Significant Wildlife Habitat.

[54] Significant Wildlife Habitat is one of the criteria for wetland evaluations.

[55] Mr. Labute's audio recordings of frog calls taken on or about April 1, 2016 however were also different to Ms. Martin's. Mr. Huizer reviewed those recordings to conclude that he heard Spring Peeper Frogs and Western Chorus Frogs, both a code 2 levels. Spring Peeper Frogs are not on the list noted above as they are abundant throughout Ontario.

[56] So in the end, Mr. Huizer testified that he heard two species of frogs at code 2 levels; for Ms. Martin, it was the Western Chorus Frog at code 3 and the Spring Peeper at code 2; and Mr. Labute filed video files which captured the frog calls over a number of days at different times and under various weather conditions to which he could not classify the species or code.

[57] Unfortunately these conflicting conclusions coupled with the uncertainty associated with the deductions on the purple loosestrife, cause me to question Mr. Huizer's recommendations.

[58] I also could not understand why Mr. Huizer would provide testimony based on field notes of another biologist when he had not contacted that biologist to fully understand and appreciate the meaning of those notes, especially when he stated he knew Ms. Martin and deals with her routinely in his work. Again, I was left with some doubt concerning the reliability of this evidence.

[59] As such, I needed to proceed with caution before removing wetland units from a

PSW complex.

[60] Therefore given my reservations on the scientific assessment coupled with the effect of the interim decision on a policy basis, I do not find it is appropriate to remove the three wetland units currently on the subject property from the PSW complex.

"J.V. Zuidema"

J.V. ZUIDEMA
VICE-CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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