

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: May 14, 2019

CASE NO(S): PL170742

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Bunge Canada
Appellant: Harbour West Neighbours Inc. & Herman Turkstra
Appellant: Parrish & Heimbecker Ltd.
Subject: By-law No. BL 17-095
Municipality: City of Hamilton
OMB Case No.: PL170742
OMB File No.: PL170742
OMB Case Name: Bunge Canada v. Hamilton (City)

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Harbour West Neighbours Inc. & Herman Turkstra
Subject: By-law No. BL 17-096
Municipality: City of Hamilton
OMB Case No.: PL170742
OMB File No.: PL170743

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

Appellant: Bunge Canada
Appellant: Harbour West Neighbours Inc. & Herman Turkstra
Appellant: Parrish & Heimbecker Ltd.
Subject: Proposed Plan of Subdivision

Property Address/Description: 65 Guise St. E
 Municipality: City of Hamilton
 Municipal File No.: 25T201605
 OMB Case No.: PL170742
 OMB File No.: PL170744

Heard: April 1, 2 and 10, 2019 in Hamilton, Ontario

APPEARANCES:

| <u>Parties</u> | <u>Counsel*/Representative</u> |
|---|--------------------------------|
| City of Hamilton ("City") | B. Kussner*/J. Wice* |
| The Waterfront Shores Corporation ("WSC") | I. Kagan*/K. Jennings* |
| Herman Turkstra | Self-represented |
| Harbour West Neighbours Inc. ("HWNI") | S. Snider*/A. Toumanians* |

**MEMORANDUM OF ORAL DECISION DELIVERED BY BLAIR S. TAYLOR ON
 APRIL 10, 2019, AND INTERIM ORDER OF THE TRIBUNAL**

INTRODUCTION

[1] Phase 1 of the hearing on the appeals of the City's Zoning By-law Amendment ("ZBA") and Draft Plan of Subdivision ("Draft Plan") by Herman Turkstra, and HWNI was set down for 10 days commencing on April 1, 2019.

[2] In the lead up to the hearing the City brought a Motion with regard to the proposed opinion evidence of one of the participants.

[3] Mr. Turkstra also brought a Motion for Directions (Exhibit 2) with regard to three matters: firstly to be self-represented, to be able to call evidence, to cross-examine other witnesses, to be himself a witness, and to make submissions; secondly for

direction on a matter of *issue estoppel*; and finally also with regard to proposed opinion evidence by one of the participants.

[4] All parties filed Responses with regard to both the City's Motion and Mr. Turkstra's Motion for Directions.

[5] On April 1 and 2, 2019, the Tribunal heard and disposed of the motions with regard to the proposed opinion evidence of the participant, and for direction with regard to *issue estoppel*.

[6] As a result, the parties requested the Tribunal to (and the Tribunal did), adjourn the hearing to April 10, 2019 to enable the parties to engage in settlement discussions.

[7] At the resumption of the hearing on April 10, 2019, the Tribunal was advised that notwithstanding the efforts of all the parties, no resolution of the appeals had been reached, but that the parties had reached agreement among themselves on the matter of Mr. Turkstra's request to be self-represented, and the Tribunal was presented with Exhibit 23 being a draft Order for consideration by the Tribunal.

[8] The Tribunal made direct inquiries of all the parties with regard to the possibility of seeking Tribunal-led mediation to assist them in their settlement discussions. All of the parties were agreeable, save and except for Mr. Turkstra.

[9] Thereafter the Tribunal heard submissions with regard to the proposed resolution of Mr. Turkstra's request to be self-represented and also to give evidence.

[10] The Tribunal gave an oral decision allowing the motion in part as it related to the request for self-representation and to give evidence, based on a revised version of Exhibit 23, all for the reasons set out below.

DECISION

[11] The request before the Tribunal is to allow Mr. Turkstra, a lawyer at Turkstra Mazza Associates to be self-represented, advocate on his own behalf, call direct evidence, cross-examine other witnesses, be a witness himself, and make oral

submissions in closing.

[12] These are the circumstances in which the Motion for Direction arises:

- a. Mr. Turkstra appealed the City's decision on the ZBA and the Draft Plan in his personal capacity;
- b. Mr. Turkstra is therefore an appellant and a party at this hearing;
- c. The ZBA and the Draft Plan were also appealed by HWNI which is also an appellant and a party at this hearing;
- d. HWNI is represented by Mr. Snider and Ms. Toumanians;
- e. They are both members of the Turkstra Mazza Associates law firm;
- f. Mr. Turkstra is a senior member of that law firm; and
- g. Mr. Turkstra is registered as the Vice President, and also as the Corporate Secretary of the appellant HWNI, which appellant is here represented by Mr. Snider and Ms. Toumanians.

[13] Both the City and WSC originally opposed the Motion for Directions with regard to Mr. Turkstra being self-represented and filed Responses and case authorities with the Tribunal.

[14] All the parties acknowledge that there is a long line of Ontario Municipal Board ("OMB") and Local Planning Appeal Tribunal ("LPAT") cases where the Board/Tribunal has ruled that it will hear argument and submissions from advocates and will hear evidence from witnesses under oath, and those who seek to do both will be put to an election of one role or the other.

[15] Mr. Turkstra submits that he is not here as "counsel": he is here as any other self represented party and that as such he claims he is not caught by the Law Society of Upper Canada's Rules of Professional Conduct (s. 5.2).

[16] Mr. Turkstra, with the assistance of Mr. Snider, asserts that the *Statutory Powers Procedure Act* in s. 10.1 provides:

A party to a proceeding may, at an oral or electronic hearing,

- (a) call and examine witnesses and present evidence and submissions;
and
- (b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relating to the issues in the proceeding.

[17] Also submitted was the fact that the OMB/LPAT practice with regard to self-represented parties is not found in the LPAT *Rules of Practice and Procedure* (“Rules”), but rather that the Rules do provide in s. 8 that: “... a person conferred party status to a proceeding before the Tribunal may participate fully in the proceeding...”.

[18] The parties arrived at a compromise, which is found at Exhibit 23, being a draft Order, which, subject to a number of terms, would permit Mr. Turkstra to present evidence and advocate on his own behalf on a “one off basis” (i.e. that it was without prejudice to the City’s right to oppose such permission in other proceedings).

[19] The rationale provided by the City and WSC was that, while they may disagree on the law, they are aware that the OMB/LPAT has in the past allowed such representation where the opposing parties have not objected. In light of the fact that Exhibit 23 attaches a hearing schedule, that there is a fixed hearing date for Phase 1, and that no new evidence will be filed by either Mr. Turkstra or HWNI, they support Exhibit 23.

[20] In light of this consent, the Tribunal makes no finding with regard to the law in this matter.

[21] The Tribunal notes that it is “the master of its own house” with regard to matters of practice and procedure.

[22] The Tribunal is cognizant of the unique circumstances of this case where there is definitely a co-mingling of those in opposition consisting of:

- a. Appellants;
- b. Parties; and
- c. Lawyers.

[23] In these unique circumstances the Tribunal, with reluctance, will allow the resolution of the Motion with regard to representation based on the draft Order as found in Exhibit 23, on a one off basis and this decision is not to be read as establishing any precedent in this area.

[24] The Tribunal directs that Exhibit 23 be amended to reference the resumption of this Phase 1 of the hearing on **Monday, September 30, 2019**.

[25] The Tribunal directs that the draft hearing schedule attached to Exhibit 23 be amended to establish a set time for the participants to be heard, and that there will be a 20 minute limit per participant for the presentation of their evidence.

[26] There will be no further notice.

[27] Counsel for the City was directed to and has provided the requested amended version of Exhibit 23, which is appended hereto and marked as Attachment 1 and forms part of this decision.

[28] I remain seized of Phase 1.

[29] The Tribunal would point out that Phase 2 of this hearing will commence on **Monday, September 23, 2019** and is now set for five (5) days.

[30] I am not seized of Phase 2 of this hearing.

[31] I may be spoken to for case management purposes.

[32] This is the Order of the Tribunal.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER

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

Local Planning Appeal Tribunal

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

ATTACHMENT 1

LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Harbour West Neighbours Inc. & Herman Turkstra
Appellant: Parrish & Heimbecker Ltd.
Subject: By-law No. BL 17-095
Municipality: City of Hamilton
LPAT Case No.: PL170742
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Description: 65 Guise St. E
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Municipal File No.: 25T201605
LPAT Case No.: PL170742
LPAT File No.: PL170744

B E F O R E:

)
)
) April 10, 2019

ORDER

**In resolution of ground 1 in the motion filed by Herman Turkstra dated March 19, 2019,
THE TRIBUNAL ORDERS AS FOLLOWS:**

1. In this matter, Herman Turkstra may be permitted to present evidence and advocate on his own behalf as an appellant by leading direct evidence, cross-examining witnesses, and making submissions. The permission to present evidence does not restrict the City of Hamilton (“City”) or Waterfront Shores Corporation (“WSC”) from their usual right to object on specific evidentiary matters.
2. This order does not restrict the City’s right in other proceedings to oppose such permission and is strictly without prejudice to the City’s right to do so.
3. The parties are to adhere to the timetable attached hereto and completed during the period scheduled from September 23, 2019 to October 4, 2019, assuming no new or modified evidence or planning instruments are proposed by the City or WSC including, without limitation, an OPA for the lands. Should Herman Turkstra or Harbour West Neighbours Inc (“HWN”) propose revisions to the appealed instruments and the City and WSC accept, the assumption above shall not apply.
4. Herman Turkstra and HWN shall not seek leave to file any additional evidence or call any additional witnesses, unless the City or WSC file new or modified evidence or planning instruments including, without limitation, an OPA for the lands.
5. There will be no costs related to this motion.

HEARING SCHEDULE

| | |
|----------------------------|---|
| Monday, September 30, 2019 | Opening statements and preliminary matters, if any E. John, in chief (1/2 day) |
| Tuesday, October 1, 2019 | E. John, cross-exam and re-exam (1/2 day) |
| Wednesday, October 2, 2019 | B. Hollingworth, in chief (up to 1 day) |
| Thursday, October 3, 2019 | B. Hollingworth, cross and re-exam (1/2 day) J. Webb, in chief (1/2 day) |
| Friday, October 4, 2019 | J. Webb, remaining cross and re-exam (1/2 day) A. Fleming, in chief (1/2 day) |
| Tuesday, October 8, 2019 | A. Fleming, cross and re-exam (1/2 day) A. Ferancik, in chief (1/2 day) |
| Wednesday, October 9, 2019 | A. Ferancik, cross and re-exam (1/2 day) H. Turkstra, in chief (1/2 day) |
| Thursday, October 10, 2019 | H. Turkstra in cross (1/2 day) R. Fiedler, in chief (1/2 day) |
| Friday, October 11, 2019 | R. Fiedler, cross and re-exam (1/2 day) Resident witnesses (1/2 day) |
| Tuesday, October 15, 2019 | City reply evidence, if any (1/2 day) Closing submissions (1/2 day) |