

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: June 30, 2021

CASE NO(S): PL210006

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

Applicant and Appellant:	Elev8 Properties Inc. and Brenner Holdings Inc.
Subject:	Application amend Zoning By-law No. 61-16 - Refusal of Application by County of Brant
Existing Zoning:	Agriculture
Proposed Zoning:	Rural Residential
Purpose:	To facilitate the creation and redevelopment of two newresidential lots
Property Address/Description:	526 Scenic Drive
Municipality:	County of Brant
Municipality File No.:	ZBA24-20-AW
LPAT Case No.:	PL210006
LPAT File No.:	PL210006
LPAT Case Name:	Elev8 Properties Inc. v. Brant (County)

PROCEEDING COMMENCED UNDER subsection 53(14) of the *Planning Act*, R.S.O. 1990,
c. P.13, as amended

Applicant and Appellant:	Elev8 Properties Inc. and Brenner Holdings Inc.
Subject:	Application for Consent - Failure of County of Brant to make a decision
Purpose:	To facilitate the creation and redevelopment of two newresidential lots
Property Address/Description:	526 Scenic Drive
Municipality:	County of Brant
Municipal File No.:	B64-20-AW
LPAT Case No.:	PL210006
LPAT File No.:	PL210007

Heard: May 12, 2021 by Video Hearing

APPEARANCES:**Parties****Counsel**

County of Brant ("County")	Jyoti Zuidema
Elev8 Properties Inc. & Brenner Holdings Inc. ("Applicants")	Denise Baker

DECISION DELIVERED BY M. ARPINO AND ORDER OF THE TRIBUNAL

[1] This Decision and Order is issued following the first Case Management Conference ("CMC") conducted pursuant to s. 33.1 of the *Local Planning Appeal Tribunal Act, 2017* ("LPATA") and Rule 19 of the Tribunal's *Rules of Practice and Procedure* ("Tribunal Rules") for the Appeal brought in the above-referenced LPAT Case File. The matter before the Tribunal has been brought pursuant to s. 53(14) and s. 34(11) of the *Planning Act*.

[2] The Applicants own the land at 526 Scenic Drive (the "Property"), in the County. The Property is zoned Agricultural with small portions of the Property zoned Natural Heritage, pursuant to Zoning By-law No. 61-16 (the "By-law").

[3] The Applicants seek to sever the Property and create three parcels. The retained parcel will consist of the existing dwelling. The two new residential lots are proposed for future development as residential lots (the "Proposal").

[4] The Applicants submitted an Application to rezone a portion of the Property from Agricultural to Rural Residential (the "ZBA"). On December 1, 2020, County Council refused the ZBA, the Applicants appealed the decision for Case No. PL210006.

[5] The Applicants submitted two applications for Consent to sever the Property (the "Consent Applications"). The Applicants appealed the failure of the County to make a decision on the Consent Applications within 90 days for Case File No: PL210007.

[6] Case File Nos. PL210006 and PL210007 (the “Appeals”) have been administratively consolidated.

[7] The Affidavit of Service of the Notice of the CMC is filed as **Exhibit 1** to the hearing.

[8] No requests for party or participant status were received by the Tribunal.

[9] The Tribunal inquired whether the parties had discussed mediation as a means to resolve the Appeal. Ms. Baker informed the Tribunal that the Land Use Planner for the Applicant requested a meeting amongst the experts. A meeting has yet to be scheduled. The Tribunal was informed that there is a significant gap between their respective positions regarding the natural heritage features and mediation will likely not be fruitful at this time.

[10] Ms. Zuidema informed the Tribunal that she anticipates the County will call three to four expert witnesses to testify at the Merit hearing, an Ecologist, an Environmental Planner and a Land Use Planner. The County may also call a representative from the Conservation Authority to testify.

[11] Ms. Baker informed the Tribunal that the Applicant also expects to call three to four expert witnesses to provide evidence at the hearing.

[12] The County provided a draft Procedural Order including an Issues List (“DPO”) . The Tribunal engaged the Parties in a discussion about the DPO. The Parties agreed that there were only a few issues in the PO that required refinement. They agreed to work together to submit a joint Procedural Order for the Tribunal to consider.

[13] After hearing submissions from counsel, the Tribunal determined that it would be appropriate to schedule an eight-day merit hearing.

[14] Ms. Zuidema requested that the hearing be an in-person hearing because there could be members of the public that would like to attend the hearing. She also stated that the County internet services are not reliable and that there might be credibility issues regarding facts in dispute that would be better assessed in a live hearing format.

[15] Ms. Baker submitted that there is nothing about the Appeals which requires that the hearing be held in-person. Ms. Baker also submitted that the Applicants would be prejudiced if the request were granted because it could be months until the Tribunal is able to safely convene an in-person hearing.

[16] After having considered the submissions of counsel, the Tribunal determined that an in-person hearing is not required to ensure a fair and just hearing of the merits of the Appeals. The Tribunal was satisfied that neither party would suffer significant prejudice if the hearing were convened in video format.

[17] Ms. Zuidema requested the hearing be scheduled in the Fall of 2021.

[18] Upon inquiry, none of the Parties indicated that there were any further matters to bring before the Panel for the purposes of case management of the Appeals.

THE TRIBUNAL ORDERS

[19] After discussing the appropriate length of time that should be scheduled for the Merit hearing the Tribunal determined that it was reasonable to schedule an eight-day hearing by video to commence **Monday, February 7, 2022 at 10 a.m.**

[20] Parties and participants are asked to log into the video hearing at least 15 minutes before the start of the event to test their video and audio connections:

<https://global.gotomeeting.com/join/401597181>

Access code: 401-597-181

[21] Parties and participants are asked to access and set up the application well in advance of the event to avoid unnecessary delay. The desktop application can be downloaded at [GoToMeeting](https://app.gotomeeting.com/home.html) or a web application is available:

<https://app.gotomeeting.com/home.html>

[22] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: **+1(647) 497-9373 or (Toll-Free) 1(888) 299-1889**. The access code is **401-597-181**.

[23] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the hearing by video to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[24] The Procedural Order as agreed between the parties attached hereto as Attachment 1 shall be in force and effect for the purpose of governing the required procedures leading up to and including the eight-day hearing scheduled to commence on **Monday, February 7, 2022**.

[25] No further notice will be provided.

[26] This Member is not seized.

"M. Arpino"

M. ARPINO
MEMBER

Ontario Land Tribunal

Website: olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal

ATTACHMENT 1

Ontario Land Tribunals

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LPAT File No.:	PL210007

1. The Tribunal may vary or add to the directions in this procedural order at any time by an oral ruling or by another written order, either on the parties' request or its own motion.

Organization of the Hearing

2. The video hearing will begin on **Monday, February 7, 2022 at 10 a.m.** at <https://global.gotomeeting.com/join/401597181>, **Access code:** 401-597-181.
3. The parties' initial estimation for the length of the hearing is **eight (8)** days. The parties are expected to cooperate to reduce the length of the hearing by eliminating redundant evidence and attempting to reach settlements on issues where possible.
4. The parties and participants identified at the case management conference are set out in Attachment 1 (see the sample procedural order for the meaning of these terms).
5. The issues are set out in the Issues List attached as Attachment 2. There will be no changes to this list unless the Tribunal permits, and a party who asks for changes may have costs awarded against it.
6. The order of evidence shall be as set out in Attachment 3 to this Order. The Tribunal may limit the amount of time allocated for opening statements, evidence in chief (including the qualification of witnesses), cross-examination, evidence in reply and final argument. The length of written argument, if any, may be limited either on the parties' consent, subject to the Tribunal's approval, or by Order of the Tribunal.
7. Any person intending to participate in the hearing should provide a mailing address, email address and a telephone number to the Tribunal as soon as possible – ideally before the case management conference. Any person who will be retaining a representative should advise the other parties and the Tribunal of the representative's name, address, email address and the phone number as soon as possible.
8. Any person who intends to participate in the hearing, including parties, counsel and witnesses, is expected to review the Tribunal's Video Hearing Guide, available on the Tribunal's website (<https://olt.gov.on.ca/tribunals/lpat/>).

Requirements Before the Hearing

9. A party who intends to call witnesses, whether by summons or not, shall provide to the Tribunal 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 August 6, 2021 and in accordance with paragraph 22 below. A party who intends to call an expert witness must include a copy of the witness' Curriculum Vitae and the area of expertise in which the witness is prepared to be qualified.

10. Expert witnesses in the same field shall have a meeting on or before October 1, 2021 and use best efforts to try to resolve or reduce the issues for the hearing. Following the experts' meeting the parties must prepare and file a Statement of Agreed Facts and Issues with the LPAT case co-ordinator on or before October 15, 2021.
11. 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 paragraph 13 below. 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 Tribunal may refuse to hear the expert's testimony.
12. 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 paragraph 13 below. A party who intends to call a witness who is not an expert must file a brief outline of the witness' evidence, as in paragraph 13 below.
13. On or before December 23, 2021, the parties shall provide copies of their [witness and] expert witness statements to the other parties and to the LPAT case co-ordinator and in accordance with paragraph 22 below.
14. On or before December 23, 2021 (*a minimum of 38 days before the hearing date*), a participant shall provide copies of their written participant statement to the other parties in accordance with paragraph 22 below. A participant cannot present oral submissions at the hearing on the content of their written statement, unless ordered by the Tribunal.
15. On or before January 17, 2022, the parties shall provide copies of their visual evidence to all of the other parties in accordance with paragraph 22 below. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing.
16. Parties may provide to all other parties and the LPAT case co-ordinator a written response to any written evidence on or before January 14, 2022 in accordance with paragraph 22 below.
17. The parties shall cooperate to prepare a joint document book which shall be shared with the LPAT case co-ordinator on or before January 27, 2022.
18. Any documents which may be used by a party in cross examination of an opposing party's witness shall be password protected and only be accessible to the Tribunal and the other parties if it is introduced as evidence at the hearing, pursuant to the directions provided by the LPAT case co-ordinator, on or before *January 31, 2022*.
19. A person wishing to change written evidence, including witness statements, must make a written motion to the Tribunal. *See Rule 10 of the Tribunal's Rules with respect to Motions, which requires that the moving party provide copies of the motion to all other parties 15 days before the Tribunal hears the motion.*

A party who provides written evidence of a witness to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Tribunal at least 7 days before the hearing that the written evidence is not part of their record.

20. The parties shall prepare and file a preliminary [hearing plan](#) with the Tribunal on or before January 21, 2022 with a proposed schedule for the hearing that identifies, as a minimum, the parties participating in the hearing, the preliminary matters (if any to be addressed), the anticipated order of evidence, the date each witness is expected to attend, the anticipated length of time for evidence to be presented by each witness in chief, cross-examination and re-examination (if any) and the expected length of time for final submissions. The parties are expected to ensure that the hearing proceeds in an efficient manner and in accordance with the hearing plan. The Tribunal may, at its discretion, change or alter the hearing plan at any time in the course of the hearing.
21. All filing shall be electronic and shall be provided in hard copy to the Tribunal upon their request. Electronic copies may be filed by email, an electronic file sharing service for documents that exceed 10MB in size, or as otherwise directed by the Tribunal. The delivery of documents by email shall be governed by the *Rule 7*.
22. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Tribunal's Rule 17 applies to such requests.

This Member is [not] seized.

So orders the Tribunal.

KEY DATES:

Date:	Task:	By:	PO Paragraph Reference
August 6, 2021	Witness List	All Parties	9
October 1, 2021	Experts' Meeting	All Parties	10
October 15, 2021	Statement of Agreed Facts and Issues	All Parties	10
December 23, 2021	Witness Statement Exchange	All Parties	13
December 23, 2021	Participant Statement Exchange	All Participants	14
January 14, 2022	Response Evidence Exchange	All Parties	16
January 17, 2022	Visual Evidence Exchange	All Parties	15
January 21, 2022	Hearing Plan Due	All Parties	21
January 27, 2022	Joint Document Book	All Parties	17
January 31, 2022	Documents used in cross-examination	All Parties	18
February 7, 2022	Hearing	All Parties	2

Meaning of terms used in the Procedural Order:

Party is an individual or corporation permitted by the Tribunal 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 authorisation 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 case management conference (CMC), must ask the Tribunal to permit this.

A **participant** is an individual, group or corporation, whether represented by a lawyer or not, who may make a written submission to the Tribunal. A participant cannot make an oral submission to the Tribunal or present oral evidence (testify in-person) at the hearing (only a party may do so). Subsection 33.2 of the *Local Planning Appeal Tribunal Act* states that a person who is not a party to a proceeding may only make a submission to the Tribunal in writing. The Tribunal may direct a participant to attend a hearing to answer questions from the Tribunal on the content of their written submission, should that be found necessary by the Tribunal. A participant may also be asked questions by the parties should the Tribunal direct a participant to attend a hearing to answer questions on the content of their written submission.

A participant must be identified and be accorded participant status by the Tribunal at the CMC. A participant will not receive notice of conference calls on procedural issues that may be scheduled prior to the hearing, nor receive notice of mediation. A participant cannot ask for costs, or review of a decision, as a participant does not have the rights of a party to make such requests of the Tribunal.

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.

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 wishes to address and the submission of the participant on those issues; and a list of reports, if any, which the participant wishes to refer to in their statement.

Additional Information

Summons: *A party must ask a Tribunal Member or the senior staff of the Tribunal to issue a summons. This request must be made before the time that the list of witnesses is provided to the Tribunal and the parties. (See Rule 13 on the summons procedure.) If the Tribunal requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Tribunal 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 Tribunal;*
- *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 Tribunal.*

Attachment 1**PARTIES**

1. Elev8 Properties Inc. and Brenner Holdings Inc.

As represented by:

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2. County of Brant

As represented by:

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Attachment 2

Issues List

County of Brant Issues

PLANNING ISSUES:

1. Do the applications have regard for the following matters of provincial interests, as per Section 2 of the Planning Act, in particular?
 - (a) The protection of ecological systems, including natural areas, features; and functions;
 - (b) The protection of agricultural resources of the Province;
 - (c) The appropriate location of growth and development; and,
 - (d) The mitigation of green house gas emissions and adaptation to a changing climate.
2. Do the applications conform to the *Growth Plan for the Greater Golden Horseshoe 2019* (the “**Growth Plan**”), in particular policies:
 - (a) 2.2.1.2(a) & (b) regarding growth in settlement areas;
 - (b) 2.2.9.3 regarding permitted development outside of settlement areas;
 - (c) 2.2.9.6 regarding the creation of new lots on rural lands;
 - (d) 4.2.2.3 regarding development and site alteration within the natural heritage system;
 - (e) 4.2.3.1 regarding development in key natural heritage features; and,
 - (f) 4.2.4.1, 4.2.4.2, & 4.2.4.3 regarding development adjacent to key natural heritage and key hydrologic features.
3. Are the applications consistent with the *Provincial Policy Statement, 2020* (the “PPS”) in particular policies:

- (a) 1.1.1(c) & (h) regarding healthy, livable and safe communities;
 - (b) 1.1.3.2(a) & (c) regarding land use patterns within settlement areas;
 - (c) 1.1.4.1(c) & (d) regarding housing in rural settlement areas and rural lands;
 - (d) 1.1.5.2(c) regarding residential development on rural lands;
 - (e) 1.1.5.4 regarding compatible development on rural lands;
 - (f) 1.1.5.8 regarding lot creation and MDS;
 - (g) 2.1.1 regarding the protection of natural features;
 - (h) 2.3.3.2 regarding maintaining and enhancing agricultural systems; and,
 - (i) 2.3.3.2 regarding rural residential zoning and MDS.
4. Do the applications conform with the County's in-force Official Plan (the "**Official Plan**"), in particular policies:
- (a) 2.2.3.3(a)(vii) regarding development on rural residential lands and MDS;
 - (b) 2.2.3.4(e) regarding development in proximity to agricultural areas and MDS;
 - (c) 2.3.2.1 regarding the identification, evaluation and/or the delineation of natural heritage features and areas;
 - (d) 2.3.2.2(a) regarding the protection of Provincially significant natural heritage resources and locally significant natural heritage resources from development and site alteration;
 - (e) 2.3.2.2(g) regarding the fragmentation of lands parcels associated with natural heritage features, areas, and systems;
 - (f) 2.3.2.2(h) with regard to replanting trees removed because of new development;
 - (g) 2.3.2.3.2(f) regarding permitted uses for woodlands and vegetation;
 - (h) 3.7.1 regarding the intent of rural residential lands;

- (i) 3.7.2(a) regarding permitted uses on lands designated as rural residential;
and
 - (j) 3.7.3(f) regarding the creation of lots and zoning requirements.
5. Do the applications address the following County Zoning By-Law 61-16 (the **“Zoning By-Law”**) policies:
- (a) 4.24(a) regarding development and MDS; and,
 - (b) 9.29 regarding development standards for Rural Residential zones.
6. Do the applications represent good and proper planning?
7. Are the applications in the public interest?
8. Do the applications maintain the intent of the Minimum Distance Separation Guidelines?
9. Did the MDS 1 Report prepared by Crop Quest Inc. assess conformity with the Minimum Distance Separation Formulae for the entirety of the area proposed to be rezoned from agricultural rural residential; or was the assessment only related to the area proposed for the two severances? If it was only the area of the proposed severances, should it not have addressed lands beyond to ensure MDS requirements were met?
10. Did the Environmental Impact Study prepared by Aboud and Associates assess conformity with natural heritage policies for the entirety of the area proposed to be rezoned from agricultural to rural residential; or was the assessment only related to the area proposed for the two severances? If it was only the area of the proposed severances, should it not have addressed lands beyond to ensure natural heritage protection and connectivity were protected?

SUBSECTION 51(24) CRITERIA:

11. Do the Proposed Severances adequately address the relevant and applicable criteria under Subsection 51(24) of the *Planning Act* and in particular, do the proposed severances have appropriate regard to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to:
- (b) whether the proposed severances are premature or in the public interest;

- (c) whether the severances conform to the official plan and adjacent plans of subdivision, if any;
- (g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
- (h) conservation of natural resources;
- (i) the adequacy of utilities and municipal services

TECHNICAL ISSUES:

- 12. Are there any technical issues which should be addressed such as, woodlot preservation, and natural heritage protection?
- 13. Are the reports from the Applicant such as the Tree Management Report, the EIS and the MDS Report adequate and sufficient to address these technical issues?
- 14. Have the necessary protections been put in place in connection with stormwater management, infiltration and location of private services, to ensure there are no negative impacts to groundwater, surface water, and the natural heritage features?
- 15. At the pre-consultation stage, a sediment erosion plan and lot grading plan was identified. To ensure that proposal is not premature, has the Applicant addressed these for the proposed development?
- 16. What will be the water supply? If the water supply is private wells, has an analysis been done to ensure there is no negative impact on the quantity of groundwater available for surrounding properties and their wells?
- 17. What is the plan for private sewage disposal systems? If the proposal is on private septic services, has an analysis been done to ensure that can be accommodated without negative impacts to existing conditions of groundwater and soils?

Attachment 3**ORDER OF EVIDENCE**

1. Elev8 Properties Inc. and Brenner Holdings Inc.
2. County of Brant
3. Elev8 Properties Inc. and Brenner Holdings Inc., in Reply