

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: September 17, 2021

CASE NO(S): PL210036

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

Appellant: John Bacher
Subject: By-law No. 2020-124
Municipality: City of Niagara Falls
OLT Case No.: PL210036
OLT File No.: PL210036
OLT Case Name: Bacher v. Niagara Falls (City)

Heard: May 20, 2021 by video hearing

APPEARANCES:

Parties

Counsel

John Bacher

Ian Flett

City of Niagara Falls

Chris Barnett

GR (CAN) Investments Co. Ltd.

Jane Pepino, Maggie Bassani, John Pappas

DECISION DELIVERED BY JATINDER BHULLAR AND ORDER OF THE TRIBUNAL

[1] The matter before the Tribunal is a Motion brought by GR (CAN) Investments Co. Ltd. (the "Applicant") to dismiss without a hearing under s. 34 (25) of the *Planning Act* (the "Act") of an Appeal by John Bacher ("Bacher") from the City of Niagara Falls (the "City") decision with respect to the Applicant's proposal .

[2] The City enacted Zoning By-law No. 2020-124 which the Appellant appealed. The Zoning By-law No. 2020-124 allowed for:

- (a) the proposed residential blocks as site-specific Residential Low Density Grouped Multiple Dwellings (R4);
- (b) the proposed mixed use block as Neighbourhood Commercial (NC);
- (c) the open space/park blocks as Open Space (OS);
- (d) the natural heritage blocks as Environmental Protection Area (EPA); and
- (e) other lands owned by GR (CAN) as Development Holding (H) (the “ZBA Application”).

PARTY STATUS REQUEST GR(CAN)

[3] Since no previous Case Management Conferences (“CMC”) have occurred prior to the hearing of this Motion, the Applicant requested as part of the motion submission, an order of the Tribunal, adding GR (CAN) Investments Co. Ltd. as a party to Tribunal Case No. PL210036 pursuant to s. 34(24.1) and s. (24.2) of the Act.

[4] The Tribunal notes that GR(CAN) Investments Co. Ltd. has direct interest in the matter under Case No. PL210036 being the Applicant to a decision approved by the City and appealed by the Appellant.

[5] Bacher and the City raised no objection to the granting of requested party status to GR(CAN) Investments Co. Ltd.

[6] Having considered the request and submission of the parties, the Tribunal granted GR(CAN) Investments Co. Ltd. party status for Case No. 210036.

MOTION TO DISMISS BY APPLICANT

[7] The Applicant brings this Motion for:

1. An order of the Tribunal, adding GR (CAN) Investments Co. Ltd. as a party to Tribunal Case No. PL210036 pursuant to s. 34(24.1) and (24.2) of the *Planning Act*, R.S.O. 1990, c. P.13.

2. An order of the Tribunal dismissing, without a hearing, the Zoning By-law Amendment (“ZBA”) Appeal in its entirety pursuant to s. 34(25) of the Act.
3. In the alternative, should the Tribunal decide not to dismiss the ZBA Appeal, an order of the Tribunal that the hearing of the ZBA Appeal proceed and be decided on the basis of the materials filed by the parties in respect of this Notice of Motion and the materials in the Tribunal’s file in LPAT Case Nos. PL210036 and PL180727 (OPA 128 appeal proceedings).

[8] The following materials are before the Tribunal:

- a) Applicant’s Motion Record dated May 5, 2021, including the Affidavits of John Henricks, Noel Boucher, Sean Male, Ian Barrett, and Ronald Scheckenberger sworn on May 3, 2021;
- b) City’s Response to Motion dated May 13, 2021;
- c) Appellant Response to Motion dated May 13, 2021;
- d) Reply to response to notice of Motion to dismiss appeal without a hearing dated May 17, 2021;
- e) Brief of Authorities of GR (CAN) Investments Co. LTD. Dated May 20, 2021
- f) Excerpts submitted by Respondent of a previous case *Bacher v. Niagara Falls (City)*, [2009] O.M.B.D. No. 336 decision identified as OMB Case No.: PL080813, OMB File No.: PL080813. The City submitted written response to the motion in support.

[9] The Tribunal heard oral submissions from counsel and received extensive

authorities from counsel reflecting the Ontario Municipal Board and the Tribunal's *Practice and Procedures* ("Rules") on motions to dismiss.

[10] For the reasons that follow, the Tribunal finds that John Bacher's Appeal discloses no apparent land use planning ground upon which its appeal could succeed, in whole or in part, and accordingly grants Applicant's motion to dismiss the Appeal without a hearing.

GROUND FOR THE MOTION

[11] The Applicant alleges that John Bacher's Notice of Appeal fails to; raise authentic reasons; disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeals; are not worthy of a full hearing and should be dismissed as it does not raise any legitimate land use planning grounds.

[12] Section 34(25) of the Act provides that:

Despite the *Statutory Powers Procedure Act* and subsection (24), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if any of the following apply:

- i.) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,
- ii.) the appeal is not made in good faith or is frivolous or vexatious,
- iii.) the appeal is made only for the purpose of delay, or
- iv.) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process.

[13] On a motion to dismiss an appeal without holding a hearing, the Tribunal must consider:

- the authenticity of the reasons stated;
- whether there are issues that would affect a decision in a hearing; and

- whether the issues are worthy of the adjudicative process.

[14] The Applicant referring to Book of Authorities (“BOA”), Tab 5, pp. 26, 27, *East Beach Community Association v. Toronto (City)* (1996), O.M.B.R. 1890, at para. 9 (O.M.B.) maintains that the Tribunal has stated that it is not good enough for an Appellant to “simply raise apprehensions” in an appeal. The Tribunal is entitled to go behind the stated reasons for the appeal to see whether they constitute genuine, legitimate, and authentic planning reasons. The Appellant must present serious planning issues that can sustain an appeal in the face of a motion to dismiss.

[15] The Applicant further submitted that the test is not simply whether or not a land use planning concept, term, or hypothesis has been referenced in the grounds, but whether such a reference, and the evidence and argument that it begs, provide a meaningful, logical and permissible basis for the Tribunal to allow all or part of the appeal. If the land use planning ground is not supported or is incapable of support by reference to adequate evidence, then the Tribunal must dismiss the appeal. (BOA, Tab 6, p. 31, *Hansen v. Mississauga (City)* CarswellOnt 5723, [2000] O.M.B.D No. 879, at para. 6.)

[16] The Appellant added that an Appellant’s grounds for appeal must “anticipate the clear scope of the appellant’s concerns, perhaps reference or even challenge defects and defaults in the merits of the matter under appeal and hold the promise for contrary sustainable evidence to be called.” BOA, Tab 6, p. 31, *Hansen v. Mississauga (City)*, CarswellOnt 5723 [2000] O.M.B.D No. 879, at para. 6.

[17] The Appellant submitted that the Appeal application meets the essence of how, under the new regime, that the first CMC is considered mandatory, that the CMC is the time when issues are further focussed and refined. The Appellant further adds and submits as to:

The Appellant’s grounds are only understood in the context of the Provincial Policy Statement and the Official Plan. The Appellant goes into significant detail about errors made in the process of rezoning the Subject Lands. In particular, failures in respect of the requirement for further study

through Environmental Impact Studies.

“The relevant provision of the Planning Act do not require an enumeration of the specific policies underlying the appeal, that is better left to the CMC stage when issues are determined for a hearing, rather, the Planning Act seeks an explanation of allegations of non-conformity and inconsistency, which the Appellant provides.

[18] The Tribunal inquired if the Appellant’s approach akin to “*go figure it out for yourself*”. The Appellant citing a previous case of *Bacher v. Niagara Falls (City)*, April 14, [2009] O.M.B.D. No. 336 Case No.: PL080813, OMB File No.: PL080813 stated that Dr. Bacher has previously successfully participated in like manner before the Tribunal and has been vindicated and so accepted.

[19] The City in reference to *East Beach Community Assn. v. Toronto (City)*, [1996] O.M.B.D. No. 1890 (O.M.B.), quoted in *MacLean v Strathroy-Caradoc (Township)*, 2018 CanLII 5649 (ON LPAT) submitted that the question is not whether the Notice of Appeal (or material filed in response to a motion to dismiss) discloses proper land use planning grounds, it is whether those grounds are “worthy of the adjudicative process” and that facing a motion to dismiss, the onus is now on the Appellant to substantiate the reasons for the appeal.

[20] The City further argued that with nothing to substantiate the concerns that have been raised. That the Appellant’s statements in appeal application which state that “...genuinely concerned and pre-occupied by the impacts of the passing of the impugned zoning by-law on the natural heritage features” does not make those concerns worthy of the adjudicative process, nor does it demonstrate that the statutory tests have been met.

ANALYSIS

[21] The Tribunal’s Rules require that a Notice of Response to a motion provide “an Affidavit setting out a brief and clear statement of the facts upon which the responding party will rely.” The Appellant did not produce any Affidavit in its response. The Appellant chose to bank on some unsigned, undated material. The Appellant explained

that this was not allowed to be admitted at the Official Plan Amendment hearing. Since it was not admitted at that hearing, it has been brought forward and now attached to the Zoning By-law Appeal application. The Tribunal finds that this is an approach that fails to suffice or conform to Rule 10.6:

- 10.6 The Notice of Response to Motion** A responding party shall serve a notice of response that:
- (a) states the response to be made, including a reference to any statutory provision or rule to be relied on;
 - (b) lists the documentary evidence to be used at the hearing of the motion; and
 - (c) includes an affidavit setting out a brief and clear statement of the facts upon which the responding party will rely.

[22] The Tribunal notes that these Rules provided the Appellant with an opportunity, in the face of a motion to dismiss, to demonstrate that the “explanation” requirements of s. 34 (19.0.1) is supported by elaboration or expert opinion evidence and that it warrants a hearing:

(19.0.1) If the appellant intends to argue that the by-law is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan, the notice of appeal must also explain how the by-law is inconsistent with, fails to conform with or conflicts with the other document.

[23] The Appellant submitted that since there were a large number of sworn Affidavits submitted by the Applicant in their motion, it indirectly proves that there are grounds for meritorious proceedings and a hearing. The Tribunal without having considered meritorious evidence advanced in the Applicant’s and City’s affidavits finds this argument by the Appellant fundamentally flawed. The Appellant had the opportunity to put the best foot forward to advance their cause but rather decided not to do so in spite of the Act and the Rules directing so. This is further troubling as it happened even when the Appellant had a qualified counsel providing representation.

[24] The Appellant has failed to explain and establish how he intends on arguing inconsistency and non-conformity, or even cite the policies with which he intends to

bolster his case. The Tribunal finds that simply stating and flagging high level policy documents the Appellant has failed to establish any authenticity of reasons.

[25] The Appellant banked on a possible future CMC where issues could be established and refined and cited that holding of a first CMC is a statutory requirement and the Appeal should stand pending such a CMC which has not been scheduled at the time of the Motion hearing. The Tribunal notes that s. 34(25) of the Act is not subservient to this requirement. The s. 34(25) allows the Tribunal to exercise appropriate due decision making authority to allow or dismiss such motions to dismiss appeals without a hearing.

[26] When an Appellant decides to not establish worthy issues before a CMC, then they castrate Tribunal's abilities to plan for efficient and appropriate adjudication. This can lead to expending of significant public resources and similarly causes other possible public and private parties to expend significant resources. This is contrary to Tribunal's mandate which requires that the Tribunal carry out expeditious, fair, just, and cost-effective adjudication of land use planning appeals.

[27] Sub-section 34(25) of the Act allows the Tribunal to dismiss an appeal without holding a hearing if:

34(25) 1. The Tribunal is of the opinion that,

- (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

[28] The Tribunal having considered all the material and submissions before it finds that the Appellant has failed to disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal.

ORDER

[29] The Motion to dismiss the appeal by John Bacher is hereby granted and the

appeal is hereby dismissed.

“Jatinder Bhullar”

JATINDER BHULLAR
MEMBER

Ontario Land Tribunal

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

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