

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



ISSUE DATE: December 03, 2019

CASE NO(S): PL180842

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 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	386823 Ontario Limited
Appellant:	CAMPP Windsor Essex Residents Association
Appellant:	Fanelli Real Estate (South Airport Lands) Limited Partnership
Subject:	Proposed Official Plan Amendment No. 120
Municipality:	City of Windsor
LPAT Case No.:	PL180842
LPAT File No.:	PL180842
LPAT Case Name:	CAMPP Windsor Essex Residents Association v. Windsor (City)

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

Appellant:	CAMPP Windsor Essex Residents Association
Subject:	By-law No. 132-2018
Municipality:	City of Windsor
LPAT Case No.:	PL180842
LPAT File No.:	PL180843

Heard: October 8, 9 and 10, 2019 in Windsor, Ontario

APPEARANCES:

<u>Parties</u>	<u>Counsel</u>
CAMPP Windsor Essex Residents Association (“Camp”)	E. Gillespie I. Flett
386823 Ontario Limited (“386”)	P. McCullough
City of Windsor (“City”)	P. Gross W. Vendrasco J. King
Windsor Regional Hospital (“WRH”)	M. Bull K. Mullin

DECISION DELIVERED BY S. TOUSAW AND ORDER OF THE TRIBUNAL**INTRODUCTION**

[1] This Decision upholds the City of Windsor’s decision to establish a planning framework, in the form of the County Road 42 Secondary Plan (“SP”), for the future expansion of the southeast part of the City. It also upholds Windsor’s decision to pass a Zoning By-law Amendment (“ZBA”) to implement one area of the Secondary Plan permitting a Major Institutional use, being the proposed Windsor Regional Hospital at County Road 42 and Concession Road 9.

[2] Persons engaged in or following the hospital issue in Windsor might reasonably think that this dispute is only about the location of a new hospital. While the hospital location figures prominently in the appeals, especially with respect to the ZBA, the matters before the Tribunal are much wider. The SP is a comprehensive planning framework to guide the development of the next phase of Windsor’s anticipated expansion. 386’s appeal, completely unrelated to the hospital, is testament to the breadth of planning issues raised by the SP. The planning considerations surrounding such a SP invoke virtually every section of the Provincial Policy Statement, 2014 (“PPS”). The City, when deciding to adopt the SP, and the Tribunal, when considering

these appeals, are statutorily bound to ensure that the SP is consistent with the PPS.

[3] The legislative tests are explained in more detail below. By way of introduction, the ZBA too must be consistent with the PPS and must also conform with the City's Official Plan ("OP"). This ZBA is integrally tied to the SP. If the SP satisfies the statutory tests and is approved, a ZBA implementing that SP or a part of it may be considered in light of the SP itself as well as under the OP as a whole. Section 24 of the *Planning Act* ("Act") ensures that a SP comes first, followed by a ZBA.

[4] Here lies the nuance that may not be readily apparent to interested observers. Within the context of an expanding City, assuming for the moment that all of the necessary justifications are satisfied, where an OP (in this case amended by the SP) permits a Major Institutional use in connection with a comprehensively planned area of the City, that use may be permitted by an implementing ZBA. Again, the ZBA is measured against the whole of the OP, including the SP. For the reasons set out in this Decision, the ZBA conforms with the OP and SP.

[5] Also for context, of importance is what is not before the Tribunal. This case is a land use planning appeal. It is not an appeal to the health care planning process, its criteria for site selection or the alternative sites evaluated but not chosen. It is quite possible, based on various criteria or the body evaluating them, that some might conclude that a better site exists for the proposed hospital. The Tribunal cannot and need not determine that County Road 42 and Concession Road 9 is the best site for a regional hospital. The Tribunal's task is to ascertain whether the planning instruments before it satisfy the tests under the Act. At its core, the Tribunal is asked to determine, from a land use planning perspective, whether the SP and ZBA are consistent with the PPS and whether the ZBA conforms with the OP.

PROCEDURAL BACKGROUND

[6] The City of Windsor ("City") adopted the County Road 42 Secondary Plan, consisting of a mix of institutional, employment, and residential uses, all located south of

Windsor International Airport in the southeast part of the City. This secondary planning process was prompted by Windsor Regional Hospital's desire to develop a new regional hospital at County Road 42 and Concession Road 9. On September 17, 2018, the City adopted the Secondary Plan as Official Plan Amendment No. 120 ("OPA 120") and also passed Zoning By-law Amendment No. 132-2018 ("ZBA") to establish the necessary zoning for the hospital site.

[7] Three appeals were lodged against OPA 120 pursuant to s. 17(36) of the Act by CAMPP Windsor Essex Residents Association ("Camp"), 386823 Ontario Limited ("386") and Fanelli Real Estate (South Airport Lands) LP ("Fanelli"). Fanelli subsequently withdrew its appeal. One appeal was lodged against the ZBA pursuant to s. 34(19) of the Act by Camp.

[8] The Tribunal convened a mandatory Case Management Conference ("CMC") on March 20, 2019 and issued its decision on April 16, 2019. Windsor Regional Hospital ("WRH") was granted party status at the CMC. Subsequent disputes over the Issues List for each appeal were heard by written Motion and the Tribunal issued that decision on August 9, 2019.

[9] In both Decisions following the CMC, the Tribunal had directed the parties to file an Agreed Statement of Facts and Evidence ("ASF"). In the end, the Parties could not arrive at a consensus within the allotted time and no ASF was completed. However, the process of dealing with the ASF precipitated a Motion for recusal from Camp. The Motion was heard and denied at the outset of this hearing. Brief oral reasons were given during the hearing and written reasons are provided at the end of this Decision.

LEGISLATIVE FRAMEWORK

[10] This Bill 139 matter proceeds under the legislative framework for planning appeals proclaimed on April 3, 2018 involving the *Local Planning Appeal Tribunal Act, 2017* ("LPAT Act") and concurrent amendments to the *Planning Act* ("Act"). Regulations under the more recently enacted Bill 108 confirm that this proceeding continues under

the LPAT Act and the *Planning Act* as they read before September 3, 2019.

[11] Section 3(5) of the Act has a longstanding requirement that decisions of a municipality and the Tribunal that affect a planning matter:

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

[12] In this case, the decisions of the City to adopt OPA 120 and to pass the ZBA must be consistent with the PPS. Under the applicable legislative framework, these consistency and conformity tests are expanded to apply to the appeals.

[13] Section 17(24.0.1) of the Act permits appeals of an adopted OPA only on the basis of consistency and conformity, as follows:

Basis for appeal

(24.0.1) An appeal under subsection (24) may only be made on the basis that the part of the decision to which the notice of appeal relates is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or, in the case of the official plan of a lower-tier municipality, fails to conform with the upper-tier municipality's official plan.

[14] Similarly, in s. 34(19.0.1) of the Act, appellants are required to address the consistency and conformity tests in an appeal to an adopted ZBA, as follows:

Basis for appeal

(19.0.1) An appeal under subsection (19) may only be made on the basis 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. 2017, c. 23, Sched. 3, s. 10 (5).

[15] Windsor is a single-tier municipality with its own OP. There is no upper-tier OP and no applicable provincial plan. Thus, the sole test for OPA 120 is its consistency with the PPS, and the tests for the ZBA are its consistency with the PPS and its conformity with the City's OP. OPA 120 is an amendment to the OP and, if approved,

becomes part of the OP.

[16] The Tribunal's jurisdiction on the OPA 120 appeals is found in s. 17(49.1) of the Act whereby "the Tribunal shall dismiss the appeal" unless it "determines that a part of a decision ... is inconsistent with a policy statement issued under subsection 3(1)" (s. 17(49.3)).

[17] Likewise, the Tribunal's jurisdiction on the ZBA appeal is found in s. 34(26) of the Act whereby "the Tribunal shall dismiss the appeal" unless it "determines that a part of the by-law ... is inconsistent with a policy statement issued under subsection 3(1) ... or fails to conform with an applicable official plan" (s. 34(26.2)).

[18] In summary, if the Tribunal finds OPA 120 and the ZBA to satisfy the consistency and conformity tests under the Act, the appeals would be dismissed and the City's decision would stand. If the Tribunal finds OPA 120 or the ZBA to not satisfy the consistency and conformity tests, the appeals would be allowed, the instruments would not be approved and would be remitted to the City with an opportunity to make a new decision (s. 17(49.3) and s. 34(26.4)).

[19] While not an explicit test for an OPA or ZBA, s. 2 of the Act assigns an overarching duty to the Tribunal to have regard to matters of provincial interest, as listed in that section, when carrying out its responsibilities under the Act.

[20] At the CMC, the Tribunal established Parties and Participants and marked as Exhibits the documents filed in accordance with the LPAT Act (i.e., enhanced municipal record, appeal records, responding records, WRH party status submission and Participant statements). An oral hearing was held in accordance with the procedures under the LPAT Act. The Tribunal did not request any Party to produce a witness for examination by the Tribunal. This Decision is made on the basis of the written record noted above, the consolidated Issues List, and the Parties' submissions.

[21] In arriving at its Decision, the Tribunal considered the affidavit evidence of the

experts proffered by the Parties.

[22] Camp submitted an affidavit from Jennifer Keesmaat, Registered Professional Planner (“RPP”) in support of its appeals. The City responded with affidavits from City staff Justina Nwaesei, RPP and Michael Cooke, RPP, as well as from Carol Wiebe, consulting planner and Daryl Keleher, consulting RPP and land economist.

[23] 386 submitted an affidavit from Theodore Halwa, consulting RPP, in support of its appeal. The City responded with affidavits from staff Ms. Nwaesei and Mark Winterton, P.Eng, the City’s Engineer.

PLANNING BACKGROUND

[24] The planning background to the SP is uncontested and not before the Tribunal. Several planning milestones lead to the passage of this SP.

[25] In 1996, the City began planning for its future growth and that process resulted in the Minister of Municipal Affairs and Housing approving a Boundary Adjustment Agreement in 2002 transferring 2,530 hectares (“ha”) from the Town of Tecumseh to the City. Because those lands were in agricultural use, the PPS necessitated a Municipal Comprehensive Review (“MCR”) to assess the appropriateness of their conversion to future urban uses. Supported by a MCR, the City adopted OPA 60 to bring the new lands into the settlement area of the City. OPA 60 was approved by the Tribunal’s predecessor, the Ontario Municipal Board, in 2007.

[26] OPA 60 established various land use designations including future urban and employment areas, and open space and natural heritage designations. Most of the OPA 60 area, including the area encompassed by this SP, was identified as Agricultural Transition Area where “development in this area will be subject to the completion of Secondary Plans and the availability of municipal servicing and infrastructure” (OP s. 1.23).

[27] Two implementing OPAs predate the current SP within the OPA 60 settlement area. The East Pelton Secondary Plan was established by OPA 74 in 2010 and by OPA 94 in 2016 for residential, institutional and other land uses to the west of the current SP area.

[28] In preparation for the eventual build-out of the OPA 60 area, the City installed a trunk sanitary sewer to the area in 2011. The City and the Town of Tecumseh completed the Lauzon Parkway—County Road 42 Environmental Assessment (“EA”) in 2014 setting out the future arterial roads. The City, with the Essex Region Conservation Authority (“ERCA”) and the Town of Tecumseh, is in the process of completing the Upper Little River Watershed Master Drainage and Storm Water Management Plan (“SWM Master Plan”) affecting a large area including the southeast part of the City.

CAMPP APPEALS

[29] The Parties address the SP and ZBA together in their arguments with the understanding that the statutory tests are different for the SP than the ZBA. In Camp’s oral submissions, it did not argue overtly that the SP must conform with the OP by operation of s. 4.7 of the PPS. However, occasionally in Camp’s written submissions and frequently in Ms. Keesmaat’s affidavit, the SP is entwined with policies in the OP.

[30] For clarity, the Tribunal does not accept that conformity with the OP is a test for the SP (i.e., an OPA) under s. 17(24.0.1) and s. 17(49.3) of the Act. Section 4.7 of the PPS reinforces that the SP must be consistent with the PPS stating that “the official plan is the most important vehicle for implementation...” The Tribunal accepts that for pragmatic purposes, the SP must fit coherently into the structure of the OP, and for that reason, certain references to OP policies may be relevant. However, the PPS, as a policy statement, cannot be read to expand the basis of a test articulated clearly in legislation.

[31] Camp opposes the SP and ZBA, arguing that insufficient justification exists to support the designation of these 400 ha for development and that many aspects of the

SP generally, and the ZBA for the hospital specifically, are inconsistent with the PPS and do not conform with the OP. Campp supports a new hospital but opposes it on the proposed site at the periphery of the City in favour of a more central location. Campp asks the Tribunal to allow the appeal and return OPA 120 and the ZBA to the City for a new decision.

[32] Campp relies on the affidavit of Ms. Keesmaat, whom in turn, adopts and relies upon the positions and analysis of her client in arriving at her conclusions (Exhibit 3, Tab D, para. 20). In so doing, Ms. Keesmaat agrees with the challenges raised by Campp to certain studies of the City or WRH.

[33] The City and WRH request that Campp's appeals be dismissed, arguing that the SP applies to the next logical area to accommodate the City's anticipated growth within the planning horizon set out in the PPS. The SP is a necessary and prescribed method of planning comprehensively for the area based on OPA 60, approved in 2007, which brought into the settlement area of the City lands previously transferred through a boundary adjustment.

[34] The City and WRH cite support in the numerous studies conducted in preparation for WRH's applications and further studies conducted at the City's request and leading to the City's approval of the applications. They rely on the affidavits of RPPs and other experts in support of their position that the SP and ZBA satisfy the legislative tests of consistency and conformity.

Consultation

[35] Campp asserts that the City failed to consult adequately with Indigenous communities in the preparation of the SP and ZBA. Campp acknowledges that it is not alleging a breach of the legal duty to consult that pertains, for example, to the Province of Ontario, but that the City failed to uphold the spirit and intent of the PPS and OP.

[36] The PPS states,

1.2.2 Planning authorities are encouraged to coordinate planning matters with Aboriginal communities.

[37] The OP contains a similar policy:

10.2.1.14 Consultation with First Nations will take place as part of a development application or detailed planning study.

[38] The City and WRH respond that three well-attended public information sessions were notified and convened by WRH before submitting the OPA and ZBA applications. After submission, the City displayed the Applicant's studies and applications on its website, published notice of the public meeting in the Windsor Star newspaper, and held a lengthy public meeting, all in accordance with the Act. The City followed its standard practice of notifying departments, groups and agencies by email, including the Walpole Island First Nation and Caldwell First Nation. When comments were not received from the First Nations, a follow-up email was also sent.

[39] For the reasons that follow, the Tribunal is satisfied that the SP and ZBA are consistent with the PPS and that the ZBA conforms with the OP regarding consultation with Aboriginal communities. As argued by the City and WRH, these applications were highly publicized throughout the City. The hospital planning process was extensive and controversial, and by the time planning applications were made, the record suggests that a full understanding of the proposal was widespread.

[40] Coordination and consultation connote discussion which implies a two-way conversation. The City must take reasonable steps to provide notice but cannot force a party to the table. An interested stakeholder bears some responsibility to respond to an invitation to participate whether that invitation arises from direct email, published notice or general knowledge in the community.

[41] The PPS utilizes verbs carefully and intentionally. Part III of the PPS provides instruction on how to interpret positive directives such as "shall" as compared to

enabling or supportive language such as “encourage.” The policy in question encourages but does not mandate the coordination of planning matters with Aboriginal communities. The Tribunal finds that, in the circumstances of these community-wide and publicly known issues, the City encouraged full participation of all potential stakeholders. Similarly, through the various channels, the City took reasonable steps to invite First Nations to enter into consultation as contemplated by the OP.

[42] In hindsight, more could have been done to consult local Indigenous communities. Camppp raises the Truth and Reconciliation Commission of Canada’s directives in support of finding new ways to engage fairly, openly and equally. However, in the case at hand, the statutory requirements for notice were satisfied, and even in the absence of more, the City’s efforts at consultation are considered sufficient to satisfy the policies.

[43] Camppp also argues that the City failed to satisfy its own OP directives to build consensus (s. 3.2.4.1), respond to community concerns (s. 3.2.4.1) and to communicate effectively (s. 4.2.5.3). The Tribunal does not find these sections of the OP to prevent the approval of this ZBA. These valid civic goals articulate a standard to which the City intends to hold itself. The Tribunal notes that full consensus is rare if not unlikely in any land use matter and that the City’s realistic goal is to build consensus, not achieve it. In addition, the Tribunal accepts the opinions of Ms. Nwaesei and Ms. Wiebe that the public notice and processes described above demonstrate effective communication and a responsiveness to input.

Need

[44] Camppp argues that the SP is premature and unnecessary for the City to meet its population and employment projections. To that end, Camppp finds fault in the methodology used to calculate the land needs upon which the SP is based.

[45] The City responds that Camppp merely raises an apprehension that insufficient need exists and does not provide evidence demonstrating that the studies are in error.

WRH suggests that Campb continues to fundamentally misunderstand the data even after all of their questions were answered by the appropriate experts.

[46] The PPS requires that:

1.1.2 Sufficient land shall be made available to accommodate an appropriate range and mix of land uses to meet projected needs for a time horizon of up to 20 years. ...

Within *settlement areas*, sufficient land shall be made available through *intensification* and *redevelopment* and, if necessary, *designated growth areas*.

[47] The growth management analysis justifying the need for residential and employment land in the SP is documented clearly in the Background Report (EMR p. 1193 - 1203) and need not be repeated here. It accounts for a slowing of population growth, allocates housing and employment demand to existing designated properties first, assigns a further 10% of units through intensification across the City, imposes a higher housing density in the SP area than is typical for the City, and delays estimated employment projections by five years.

[48] Perhaps owing to the above efforts to not over-estimate anticipated land needs, a peer review of the land needs study found the land estimates to be understated. For the residential calculation, after accounting for updated population data and more precise household sizes, Mr. Keleher concludes that an additional 100 ha will be required above the study's estimate of 133 ha. For employment land, Mr. Keleher arrives at an estimated need 30 ha higher than the 143 ha accounted for in the SP area.

[49] No apprehensions are raised by the peer review of the land needs study as to the justification for the residential and employment areas in the SP. On the contrary, the review suggests that more land is warranted within the 2036 horizon, with the implication that the SP area could have been larger. The peer review concludes that the land needs study understates the required land needs, but also concludes that the analysis properly follows the provincial guidelines and represents a reasonable approach in support of the SP.

[50] The Tribunal finds that the needs analysis required by the PPS is met by the thorough study, robust peer critique and conservative results. The area for residential and employment uses is found to be reasonable especially given its likelihood to under-represent the potential demand. The Tribunal finds no evidence to support Camp's assertion that the projections and land needs calculations are flawed. Based on the record, the Tribunal cannot reconcile the opinions of Ms. Keesmaat related to the forecasts and land needs with the thoroughly substantiated studies provided by WRH and accepted by the City.

[51] If there is any doubt remaining, the Tribunal reduces the issue to the following points. Roughly half of the demand for new housing derives from population growth; the other half derives from the decline in household size. A total estimate of 6,900 new dwelling units are required by 2036. Roughly half of these new units are expected to be accommodated through infilling and intensification; the other half remain to be accommodated within the SP area. Similarly, for projected employment land needs, roughly two-thirds are attributed to existing properties, including brownfields; one-third remain to be accommodated within the SP area. All details aside, these allocations represent a reasonable approach consistent with the PPS when planning for a growing City.

Location and Design

[52] Camp cites several PPS policies in support of its contention that the SP location and design are inefficient, car dependent, not transit supportive, costly to service, and contrary to supporting the downtown. Similar arguments are ascribed to the ZBA with an emphasis on downtown viability, brownfields redevelopment and accessibility.

[53] The City responds that the SP is a comprehensive plan for the next logical phase of the City's development where compact form, a mix of land uses, and multiple modes of transportation are supported. With reference to the ZBA, WRH emphasizes that the existing hospital sites in the City will be repurposed for various medical services as part

of the Windsor-Essex Hospitals System (“WEHS”).

[54] The following sections of the PPS are the focus of these issues.

1.1.1 Healthy, liveable and safe communities are sustained by:

- a) promoting efficient development and land use patterns which sustain the financial well-being of the Province and municipalities over the long term;
- b) accommodating an appropriate range and mix of residential ..., employment ..., institutional ... and other uses to meet long-term needs;
- c) avoiding development and land use patterns which may cause environmental or public health and safety concerns;
- d) ...
- e) promoting cost-effective development patterns and standards to minimize land consumption and servicing costs;
- f) improving accessibility for persons with disabilities and older persons by identifying, preventing and removing land use barriers which restrict their full participation in society;
- g) ensuring that necessary infrastructure ... and *public service facilities* are or will be available to meet current and projected needs; and
- h) promoting development and land use patterns that ... consider the impacts of a changing climate.

1.1.3.2 Land use patterns within *settlement areas* shall be based on:

- a) densities and a mix of land uses which:
 - 1. efficiently use land and resources;
 - 2. are appropriate for, and efficiently use, the *infrastructure* and *public service facilities* which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion;
 - 3. minimize negative impacts to air quality and climate change, and promote energy efficiency;
 - 4. support *active transportation*;
 - 5. are transit-supportive, where transit is planned, exists or may be developed; and
- b) a range of uses and opportunities for intensification and redevelopment ...

1.2.3 Planning authorities should coordinate emergency management and other economic, environmental and social planning considerations to support efficient and resilient communities.

1.6.3 Before consideration is given to developing new *infrastructure* and *public service facilities*:

a) the use of existing *infrastructure* and *public service facilities* should be optimized; and

b) opportunities for adaptive re-use should be considered, wherever feasible.

1.6.4. *Infrastructure* and *public service facilities* should be strategically located to support the effective and efficient delivery of emergency management services.

1.7.1 Long-term economic prosperity should be supported by: ...

c) maintaining and, where possible, enhancing the vitality and viability of downtowns and mainstreets;

...

e) promoting the redevelopment of *brownfield sites*;

[55] Ms. Keesmaat opines that “directing growth to existing serviced areas prior to building new infrastructure is the foundation of the responsible use of land in the PPS.” She considers the SP to “not support compact growth or a movement towards a more balanced transportation system where walking, cycling and transit are designed as foundational to the City of Windsor’s movement systems.” Further, Ms. Keesmaat opines that removing the hospital from the city centre weakens the downtown as a major economic centre.

[56] In response, Ms. Nwaesei opines that the City must accommodate all land uses to meet projected needs and that the SP, located within the City’s settlement boundary, provides for a compact community with an integrated transportation system including transit and active transportation. Ms. Wiebe describes the various health care services and associated employment that will remain in the downtown as planned by the WEHS and considers that the planned health care reinvestments in the City centre, along with other businesses, cultural venues, government offices and entertainment uses, will maintain the downtown as the focus of cultural, social and economic activities.

[57] The Tribunal finds that the SP is consistent with the PPS. It comprehensively plans for the City’s growth, as justified by the needs analysis reviewed above, and provides for a mix of uses, densities, modes of transport, and a fiscally responsible

approach to the phasing and costs of municipal services, from transit to greenspace to storm water management. The supporting studies respect the notion of optimizing existing infrastructure by allocating anticipated growth to developable parcels of land within the built-up areas of the City, including brownfields. The Tribunal agrees with Ms. Nwaesei that the PPS does not prioritize brownfields redevelopment over greenfields. In this case, both are required to meet the land needs for residential and employment uses in the City over the planning period to 2036.

[58] The Tribunal finds the ZBA for the new hospital location to be consistent with the PPS and to conform with the OP. There is little doubt that a new hospital located somewhere centrally in the City might also be found to satisfy the policies of the PPS and the OP. Nevertheless, an alternative site for the hospital is not before the Tribunal. The potentiality of a better site must not factor into the Tribunal's analysis. The task of the Tribunal is to determine on the evidence whether the ZBA permitting a hospital in the proposed location is consistent with the PPS and in conformity with the OP. WRH accurately identifies this subtle difference:

The question of site selection is not part of the appeal test the Tribunal must consider, nor is the question of how best to deliver health care services a land use planning issue. The Planning Applications did not seek approval for the proposed hospital location. Rather they sought approval for the implementing land use policies and regulations that arise from the decision to locate the New Regional Hospital at this location. (WRH Outline of Oral Submissions, para. 23)

[59] The City's support for the WRH proposal responds to the PPS requirement to provide for public service facilities to meet current and projected needs. Although build out will take time, its location within a planned area of the City will be adjacent to residential and commercial areas accessible by walking, cycling and transit. The planned transit services to the hospital will ensure access for those persons from a distance who cannot or choose not to drive. Area road connections and improvements have been planned through separate EA approvals which also include provisions for active modes of travel. In support of downtown employment and services, the existing hospital sites in or closer to the City centre are planned for adaptive re-use, including

the provision of numerous health care services guided by the region-wide WEHS plan.

[60] The OP reflects many of the same planning themes as the PPS, albeit with a necessarily specific Windsor lens. Many of the issues above apply equally to the ZBA's conformity with the OP. The main additional ZBA issues raised by Campp are examined next.

[61] The OP encourages emergency services in close proximity to where people live (s. 4.2.7.3) and seeks to integrate institutions within the City's neighbourhoods. Campp argues that the ZBA fails to achieve both of these intentions. The Tribunal concurs with Ms. Wiebe's response that emergency services include fire, police, ambulance and other services, as well as an acute care hospital, and that it is not possible for every service to be in close proximity to all residents. The proposed site will provide service to all residents whether nearby, across the City or in the outlying areas served by the WEHS. Again, the hospital site is part of a comprehensively planned growth area of the City that will be connected to adjacent residential, commercial, business park and natural areas.

Mobility

[62] Campp raises several issues of mobility, including distance, transit, accessibility, active transportation (e.g., walking, cycling) and vehicle trips. Ms. Keesmaat considers the sum of the PPS and OP directions to unequivocally support a downtown location for the new hospital. Conversely, the City's affiants consider the proposed site, as an anchor and major activity node in the SP, to satisfy all of the locational and design policies related to mobility.

[63] Several PPS policies are applicable to this SP and ZBA regarding mobility:

1.6.7.1 *Transportation systems* should be provided which are safe, energy efficient, facilitate the movement of people and goods, and are appropriate to address projected needs.

1.6.7.4 A land use pattern, density and mix of uses should be promoted that minimize the length and number of vehicle trips and support current and future use of transit and *active transportation*.

1.6.7.5 Transportation and land use considerations shall be integrated at all stages of the planning process.

1.8.1 Planning authorities shall support energy conservation and efficiency, improved air quality, reduced greenhouse gas emissions, and climate change adaptation through land use and development patterns which:

- a) promote compact form and a structure of nodes and corridors;
- b) promote the use of *active transportation* and transit in and between residential, employment (including commercial and industrial) and institutional uses and other areas;
- c) focus major employment, commercial and other travel-intensive land uses on sites which are well served by transit where this exists or is to be developed, or designing these to facilitate the establishment of transit in the future;
- ...
- e) improve the mix of employment and housing uses to shorten commute journeys and decrease transportation congestion;

[64] Complementary policies can be found in the OP pertaining to the ZBA:

3.2.3.1 Windsor will work toward achieving a sustainable transportation system where all modes of transportation can play a more balanced role. The creation of mixed use and employment centres will allow businesses and services to be closer to homes and allow greater opportunities for walking, cycling and transit.

6.6.1.2 To ensure that all institutional uses are strategically located within Windsor to be both accessible and act as neighbourhood focal points.

[65] The OP also calls for walkable neighbourhood centres serving the daily needs of residents (s. 4.2.1.6 and s. 4.2.3.2), integrating institutions within neighbourhoods (s. 6.1.6) and providing separated pedestrian and cycling access that is safe and convenient (s. 6.6.2.5(d)) as well as public transportation (s. 6.6.2.5(e)). Similar themes are found in the transportation policies (s. 7.2.2.21, s. 7.2.2.25 and s. 7.2.5.2).

[66] The Tribunal notes that many of the above policies are future oriented, with references to projected needs, the future use of transit, and working towards a more balanced transportation system. They account for the necessary time to plan and implement improvements to the transportation system.

[67] A reading of the SP demonstrates that the full range of transportation options are promoted at every opportunity. Mixed uses and densities will support public transportation (s. 8.2.4). Guideline plans for each phase of development with the SP area will address transportation, including trails and cycling routes (s. 8.3.1.7(f) and s. 8.5.2.6). Mixed use areas will support public transit, walking and cycling (s. 8.4.5.1.5).

[68] The SP has been prepared in step with transportation planning. EAs have been completed for roads serving the SP area as well as the larger area of OPA 60. Provisions and plans have been made to ensure that transit and active forms of transportation are incorporated into the build-out of the SP area.

[69] Campb raises a probing question: how can a new hospital 13 kilometres from the City centre satisfy the locational aspects of mobility? Compared to the two existing hospital sites, Campb calculates the new site to generate, on average, a 27% increase in travel distance.

[70] The City responds that the transportation impacts of any major activity node in the City, wherever they may be located, are similar whether the use is a major industry or a regional institutional facility. The City emphasizes that a Regional Employment Centre was already identified within the area of this SP by OPA 60, and that OPA 120 now also identifies the proposed hospital site as a Regional Institution Centre on Schedule J, Urban Structure Plan in the OP. The hospital is intended to anchor this regional employment node and will be serviced and accessible by roads, trails and transit.

[71] As indicated earlier, the Tribunal is not charged with comparing one hospital site to another or comparing the existing hospital sites to the proposed site. Campb raises

valid questions relevant to the health services planning exercises that predate these planning applications, and its questions have no doubt contributed to a thorough analysis of how best to accommodate the region's health care needs. The Tribunal's focus is the SP, including a site designated as Major Institutional, and an implementing ZBA for the hospital, and whether these planning instruments meet the consistency and conformity tests of the Act.

[72] Ideally, all large services and facilities might be located in the centre of an urban area. A downtown, university, hospital or manufacturing facility, all located at the geographic centre, would minimize the total travel distance of all residents to those facilities. In the actual and gradual evolution of a city, such ideals are not practical or possible. Like many cities, Windsor's own downtown is not centred in the City. It has grown from its river-side location at the north limit of the City. For the SP area, mobility and accessibility are addressed by the City's policy commitment to servicing the hospital site with public transit and by its integration with existing and future neighbourhoods, business areas and transportation corridors.

[73] While not a test under the Act, the SP is found to conform with the structure of the OP in respect of it containing both a Regional Institutional Centre and a Regional Employment Centre as contemplated by the OP (s. 3.3.1.2). The ZBA similarly conforms with the OP.

Infrastructure

[74] Campb contends that servicing a new part of the City is not cost-effective and that the hospital location is at risk of flooding. In rebuttal, the City and WRH reference the financial studies completed and the SWM Master Plan work underway for the OPA 60 area including the SP area and the hospital location.

[75] The relevant PPS policies are noted below, and similar directions are found in the OP's Infrastructure policies (s. 7.3).

1.6.1 ... Planning for infrastructure ... and public service facilities shall be coordinated and integrated with land use planning so that they are:

- a) financially viable over their life cycle ... and
- b) available to meet current and projected needs.

1.6.3 Before consideration is given to developing new infrastructure and public service facilities:

- a) the use of existing infrastructure and public service facilities should be optimized; and
- b) opportunities for adaptive re-use should be considered, wherever feasible.

3.1.5 *Development* shall not be permitted to locate in hazardous lands and hazardous sites where the use is:

- a) an institutional use including hospitals ...

[76] As cited earlier, the PPS requires the efficient use of infrastructure and public service facilities and the avoidance of their unjustified and/or uneconomical expansion (s. 1.1.3.2(a)2).

[77] As Ms. Nwaesei explains, the SP financing section is based on the principle that growth will pay for the cost of new servicing to the greatest extent possible in law. Each phased development must produce a Master Servicing Report (“MSR”) to establish the feasibility and costs associated with necessary services. The City conducted a development charge study and passed a development charge by-law for the area and each MSR will inform future changes to development charges.

[78] EAs have been completed for major roadways serving the area, including the Lauzon Parkway and north-south cycling routes. Ms. Nwaesei reports that some of the planned improvements are under construction.

[79] The Tribunal finds that the extension of infrastructure to service the SP area and the hospital is neither unjustified nor uneconomical. The needs analysis reviewed earlier provides the necessary justification for the area to be developed and accounts

for the utilization of existing infrastructure by allocating projected growth to existing designated properties within the built-up City. Development charges and other financial tools available to the City, guided by the OP, are sufficient to ensure that development pays for the service demands that it creates, and that long-term maintenance and replacement are financially planned.

[80] With respect to flooding, the municipalities and ERCA are preparing the SWM Master Plan. In support of the SP and ZBA, a Servicing Background Investigation Study was completed in 2018 to address, among other things, stormwater management and drainage. Ms. Wiebe reports, based on that study, that stormwater can be addressed as development proceeds and adjusted as necessary in accordance with the SWM Master Plan when completed. Ms. Nwaesei confirms that the hospital will not be built in a floodplain and that all requisite permits will be obtained from the ERCA.

[81] Through its experience and as evidenced in its planning documents, Windsor understands the importance of flood prevention and management. Extensive areas of the SP area are dually designated as Storm Water Management System and Non-Core Natural Heritage. The Tribunal is satisfied that the SP and ZBA satisfy the consistency and conformity tests and that the City will ensure that the new hospital and other developments with the SP area will not be located on hazardous lands.

Agriculture

[82] Campb takes issue with the SP being located on farmland. It argues that resources and greenspace are not protected as required by the PPS (s. 1.1.3). Ms. Keesmaat opines that OPA 120 prematurely develops active farmland.

[83] The City and WRH counter that the SP area, as part of the boundary adjustment process, was properly justified by a MCR and designated for future urban uses.

[84] It is true that active farmland exists in the area affected by the SP. It is not correct, however, that its development is premature. The needs analysis for the SP

area provides ample justification as described earlier. Both the SP area and existing infill sites within the City are required to meet the population's growing demand for urban land uses. Moreover, within the SP area itself, development will be phased based on demand and the provision of necessary services.

[85] The Tribunal agrees with the City and WRH that from a planning perspective, the SP area has not been designated as Agriculture since before 2007 when OPA 60 was approved. That amendment placed the area into the City's settlement boundary and ceased its designation for agricultural purposes. Its change in designation did not mean the end of agriculture in the area, as proven by its ongoing production today. The OP's Agriculture Transition Areas policies allow for the continuation of existing agricultural operations until development plans are approved. The Tribunal foresees that development will occur incrementally according to the SP policies and that tracts of the SP area will remain in crop production until converted to urban uses. The loss of farmland in Ontario underpins the PPS and other provincial policies that fervently protect agricultural land, especially prime land, unless fully justified for other uses. The City abided by these principles in OPA 60 and again in OPA 120.

[86] The SP is premised on accommodating the population and employment needs of the City to 2036. The planning for this area to accommodate growth began in 1996. That timeframe spans some 40 years. If the build out within the SP is slower than anticipated, the time span may expand to half a century. Whatever the development rate, which only the future knows, the agricultural lands within the SP area may continue to be used productively for agriculture.

[87] This process of planning for the City's needs, accommodating growth as demand determines, and regulating development in a phased manner constitutes the very basis of land use planning as envisioned by the PPS. It results in the efficient use of urban land and avoids the premature conversion of agricultural land.

Conclusion

[88] After full consideration of the record, submissions and cases submitted, the Tribunal finds that OPA 120 and the ZBA are consistent with the PPS, the ZBA conforms with the OP, and both instruments have regard for the provincial interests of s. 2 of the Act.

[89] Under s. 17(49.1) and s. 34(26) of the Act, unless OPA 120 and the ZBA are inconsistent with the PPS and the ZBA does not conform with the OP, “the Tribunal shall dismiss the appeal.” The Tribunal finds that Campb has not met its onus on appeal to demonstrate that the SP and ZBA fail the statutory tests. Accordingly, the appeals are dismissed.

386 APPEAL

[90] 386 owns an 11.4 ha property in agricultural production with frontage on the south side of County Road 42 and flanked on its east side by the Little River. With support from Mr. Halwa’s affidavit, 386 opposes OPA 120’s designation of Non-Core Natural Heritage (“NCNH”) covering the easterly three-quarters of the property. 386 contends that no natural heritage features as defined by the PPS exist on site and the property should be designated as Business Park Type 2 consistent with the designation to the west.

[91] 386 argues that the floodline for the Little River suggests that only a narrow strip of land on the property is within the floodplain. The City objected to 386’s request to file a map in support of this submission, resulting in the Tribunal’s rejection of the map. Under s. 42(3) of the LPAT Act, no party may adduce evidence at an oral hearing.

[92] 386 contends that the NCNH designation is unnecessary to allow its future use if required for storm water management (“SWM”) purposes and is premature until the EA is approved for the SWM Master Plan. 386 asks the Tribunal to allow the appeal and return this matter to the City for a new decision.

[93] The City responds that 386's entire property is currently designated as Open Space in the OP, as amended by OPA 60 in 2007. As such, under the existing designation, development is prohibited without an OPA supported by necessary studies. The City submits that OPA 120 is more permissive than the existing OP given that some of the property is designated for business park uses, development within NCNH may be considered subject to completion of an Environmental Impact Study ("EIS"), and if the SWM Master Plan or its implementation reduces the area required for SWM, the released land will automatically revert to Business Park Type 2 consistent with the adjoining area.

[94] The SWM Master Plan evaluated alternatives and selected option six, including a climate change factor increasing the 100-year design storm by 20%. Although the SWM Master Plan is not yet approved, the City argues, with reference to Mr. Winterton's affidavit, that all questions associated with option six have been addressed and no outstanding issues remain. The City asks the Tribunal to dismiss the appeal.

[95] As noted earlier, the statutory test for this appeal is whether OPA 120 is consistent with the PPS. Sections of the PPS relevant to this appeal are listed earlier in this Decision: 1.1.1(g), 1.1.3.2(a)2 and 1.6.1. In addition, the PPS states:

1.6.6.7 Planning for stormwater management shall:

- a) minimize, or, where possible, prevent increases in contaminant loads;
- b) minimize changes in water balance and erosion;
- c) not increase risks to human health and safety and property damage;
- d) maximize the extent and function of vegetative and pervious surfaces; and
- e) promote stormwater management best practices, including stormwater attenuation and re-use, and low impact development.

3.1.1 Development shall generally be directed to areas outside of: ...

- b) *hazardous lands adjacent to river, stream and small inland lake*

systems which are impacted by flooding hazards and/or erosion hazards;

6. Definitions ...

Hazardous lands: means property or lands that could be unsafe for development due to naturally occurring processes. ... Along *river, stream and small inland lake systems*, this means the land, including that covered by water, to the furthest landward limit of the *flooding hazard or erosion hazard* limits.

[96] The Tribunal finds that OPA 120 is consistent with the PPS with respect to its consideration of flooding, SWM infrastructure and NCNH designation. Mr. Halwa may be correct that the 386 property contains no natural heritage features, except for the floodplain immediately adjacent to the Little River. However, s. 8.4.2.2.3 of the SP makes clear that NCNH also includes “lands required to manage stormwater in the Upper Little River drainage area.” The SP’s NCNH and SWM System designations implement and refine the Open Space designation established by OPA 60 in accordance with the recommended alternative in the SWM Master Plan.

[97] To the argument of prematurity, while the Tribunal accepts the City’s contention that changes to the Greenway System are unlikely in the final approval of the EA for the SWM Master Plan, the Tribunal finds that the SP incorporates sufficient contingency measures in the event a change does occur. It allows for more detailed studies to refine the SWM system and should the area be reduced, “the designation of the abutting lands shall be used to determine future land use and no amendment to the Secondary Plan will be required” (s. 8.4.2.2.3). Further, development may occur in the NCNH designation with a supportive EIS demonstrating no negative effects on the features and functions of the natural features or their ecological functions (s. 8.4.2.2.2).

[98] 386’s lands do account for a larger share of the SWM Master Plan’s recommended corridor width of 325 metres (“m”) along the Upper Little River. The proposed road allowance for the planned extension of the Lauzon Parkway lies immediately east of the Little River, resulting in 225 m of the corridor on 386’s property on the west side of the river and the remaining 100 m on the property to the east of the river. However, the Lauzon Parkway extension underwent a thorough Class EA of its

own and any resulting implications for SWM planning are now accounted for in the SWM Master Plan and reflected in the SP.

[99] In accordance with the PPS, the SP appropriately integrates necessary SWM infrastructure and establishes processes to ensure its financially viable implementation to meet future needs. At the functional design stage, if less NCNH area is required for SWM purposes, the Business Park Type 2 designation may be expanded, without an OPA, as 386 is currently requesting.

[100] After full consideration of the record, submissions and cases submitted, the Tribunal finds that OPA 120 is consistent with the PPS and has regard for the provincial interests of s. 2 of the Act.

[101] Under s. 17(49.1) of the Act, unless OPA 120 is inconsistent with the PPS, “the Tribunal shall dismiss the appeal.” The Tribunal finds that 386 has not met its onus on appeal to demonstrate that the SP fails the statutory test. Accordingly, the appeal is dismissed.

MOTION FOR RECUSAL

[102] Campb brought a Motion for recusal of the panel on the grounds that the City provided erroneous information contained in the incomplete ASF to the Tribunal, and that settlement privilege had been breached via the correspondence from the City and WRH to the Tribunal surrounding the ASF. After learning from this Member at the Motion hearing that he had not read the incomplete ASF and as such, it was not before the Tribunal, Campb withdrew its first ground and focussed only on the matter of settlement privilege.

[103] Campb refers to a string of email correspondence in connection with the ASF to argue that the City and WRH released information to the Tribunal through the correspondence itself that constitutes a breach of settlement privilege by describing Campb’s responses or lack of responses related to the ASF. Campb argues that this

breach damages its reputation and is detrimental to the Tribunal's perception of Camp. Camp suggests that the inferences produce a reasonable apprehension of bias and that the panel should recuse itself to ensure a fair hearing by an impartial new panel.

[104] The City and WRH respond first by arguing that Camp's Motion fails to include the necessary grounds and evidence to support its argument. They emphasize that nowhere in Camp's Motion does the legal test of "reasonable apprehension of bias" appear, and that the emails contained in the affidavit do not reveal the entire communication exchange.

[105] To the substance of recusal, the City and WRH argue that Camp has not met its onus to demonstrate that the extraordinary remedy of recusal is warranted based on clear and cogent evidence that grounds for disqualification exist: that a reasonable person with an understanding of the circumstances would arrive at a reasonable apprehension of bias. They contend that settlement privilege was not breached by the correspondence, and even if it had been, the matters being addressed were precisely the job of a decision maker and do not give rise to bias.

[106] The Tribunal does not dismiss the Motion based on the City and WRH's first challenge that it should fail for lack of proper grounds. However light on details and arguably lacking some of the mandatory content set out in Rule 10 of the Tribunal's *Rules of Practice and Procedure*, Camp's Motion was seeking recusal and the Parties agreed on the relevant tests in law. Just as the responding parties went on to assess the necessary grounds, so too will the Tribunal.

[107] The accepted standard for disqualification is explained by de Grandpre J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434 at para. 40:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing

the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

[108] The courts have upheld an “essential element that informs the analysis: the strong presumption of judicial impartiality and integrity. The onus rests on the applicant to demonstrate a reasonable apprehension of bias, and the threshold is a high one” (*Ontario Provincial Police Commissioner v. MacDonald*, 2009 ONCA 805, 2009 CaswellOnt 7018, para. 44).

[109] The Tribunal accepts Camp’s position that the tenets of settlement privilege, while normally applied to settling an entire appeal, are equally applicable to a particular stage in an appeal process. In this case, the Parties were negotiating the contents of the ASF and it is reasonable that the give and take of that process should not come into the awareness of the Tribunal. From *Hollinger Inc., Re*, 2011 ONCA 579, 2011 CaswellOnt 9272, para 16, the Parties agree on the three tests for communications to be protected: there must be a litigious dispute; there must be express or implied intention that communications would not be disclosed in a legal proceeding in the event negotiations fail; and the purpose of the communication must be an attempt to effect a settlement.

[110] Again, at issue is not the disputed ASF but the correspondence associated with it. Upon examining the correspondence, the Tribunal finds no inappropriate disclosure of potentially protected communications. Essentially, each Party explained in its own way the process that had unfolded, that they were unable to agree on the contents of the ASF, and, in the case of the City and WRH, that time had run out owing, at least in part, to Camp not responding within a timeframe they felt was reasonable or necessary to satisfy the Tribunal’s direction. The Tribunal finds that the nature and content of the discussions among the Parties were not revealed in the communications. Further, the failure to produce the requested ASF is a failure of all Parties, not just Camp.

[111] Even if the above finding of no breach of privilege is wrong, the breach must give

rise to a reasonable apprehension of bias to support a recusal. Put another way, a finding on breach of privilege alone is academic if no recourse is sought by the moving party that is within the Tribunal's jurisdiction.

[112] Campb relies on the other Parties' allegations of it 'failing to respond' to argue that it clouds this panel's ability to proceed with impartiality and gives rise to a reasonable apprehension of bias. The Tribunal disagrees.

[113] The normal diet of the Tribunal is to digest correspondence, positions, facts and law in arriving at a decision, all within the context of land use disputes and often with significant implications. The Tribunal was well aware of the dispute over the ASF after the Parties were unable to produce the document following the CMC. Indeed, the Tribunal foreshadowed this eventuality when it warned in its August 9, 2019 decision that: "... the panel will not allow the parties' failure to submit this document to delay the hearing process." The panel heeded its own advice when it advised the Parties, through the Case Coordinator on September 17, 2019, that "the hearing will proceed on the basis of the two written Decisions of the Tribunal and the two documents received on consent: Order of Proceedings and the Consolidated Issues List." Already, the Tribunal had moved on from the incomplete ASF.

[114] If the inference that Campb asserts is embodied in the communications can be found, it does not register in any consequential way with the Tribunal. Differences of opinion and allegations that arise therefrom are common fare for the Tribunal, including language that is not always as factual and constrained as that contained in the correspondence of all counsel in this case. The Tribunal is accustomed to such exchanges in vociferous debates and is practiced in the methods of adjudication to make appropriate assessments of the relevance of information such that impartiality is maintained.

[115] The decision on the merits of these appeals will be made on the basis of the consistency and conformity tests of the Act, without regard to the circumstances around

the incomplete ASF.

[116] Campp has not met its necessary onus and the Motion is dismissed. The hearing on the merits proceeded following the Tribunal's abbreviated oral ruling.

ORDER

[117] The Tribunal orders that Campp and 386's appeals to OPA 120 are dismissed, the decision of the Council is final, OPA 120 comes into effect on the day after the date of this Decision, and the clerk of the municipality is hereby notified pursuant to s. 17(49.2) of the Act.

[118] The Tribunal orders that Campp's appeal to the ZBA is dismissed and Zoning By-law No. 132-2018 is deemed to have come into force on the day it was passed, pursuant to s. 34(30) of the Act.

"S. Tousaw"

S. TOUSAW
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

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