Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: June 30, 2015 **CASE NO(S).:** PL080049

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

Appellant:	Town of LaSalle
Appellant:	Anna Lynn Meloche
Subject:	Proposed Official Plan Amendment No. OPA 67
Municipality:	City of Windsor
OMB Case No.:	PL080049
OMB File No.:	PL080049
OMB Case Name:	Meloche v. Windsor (City)

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

Appellant:	Town of LaSalle
Appellant:	Anna Lynn Meloche
Appellant:	Nancy Pancheshan
Subject:	By-law No. ZBL 232-2007
Municipality:	City of Windsor
OMB Case No.:	PL080049
OMB File No.:	PL080050

Heard: June 22, 2015 by telephone conference call

APPEARANCES:

Parties	**Counsel**
1223244 Ontario Limited	Mary Bull and Peter Gross
City of Windsor	Wira Vendrasco

Nancy Pancheshan	Ian Flett
Anna Lynn Meloche	self-represented

DECISION DELIVERED BY J. de P. SEABORN AND ORDER OF THE BOARD

INTRODUCTION

[1] Several pre-hearing conferences have been held in connection with these appeals and the hearing is scheduled to commence on **August 24, 2015** for a period of ten days. In a disposition issued March 4, 2015, I indicated that there was an expectation that the issues for the hearing would be narrowed once the evidence was exchanged. Ms. Bull, Counsel for 1223244 Ontario Limited ("Applicant"), had again reiterated her concern that many of the issues raised by Nancy Pancheshan and Anna Lynn Meloche ("Appellants") were not genuine land use planning issues and should be struck from the Issues List. Once the evidence from the Appellants was filed, Ms. Bull brought a motion to dismiss several issues and the grounds for the request were set out in a detailed notice of motion and corresponding motion record (Exhibits 1A and 1B), supported by affidavits sworn by Karl Tanner, a land use planner and Allen Benson, a biologist. Neither Appellants cross-examined Mr. Tanner or Mr. Benson on their respective affidavits. The City of Windsor ("City") filed a brief response, indicating its support for the motion to dismiss certain issues without the benefit of a full hearing. Mr. Flett, Counsel for Ms. Pancheshan, also filed a brief response to the motion (Exhibit 3), as did Ms. Meloche (Exhibit 4), who is self-represented.

[2] By way of background and as explained by Mr. Tanner in his affidavit, these appeals have been outstanding for several years and for the purpose of the motion to dismiss specific issues, it is not necessary to review the background in detail and it is accurately described in the motion material filed by the Applicant. Suffice to say that in 2014, the Town of LaSalle ("Town") settled its appeal with the Applicant, leaving outstanding the appeals of Ms. Pancheshan and Ms. Meloche. The Town, the City and the Applicant have agreed upon the form and content of the planning instruments under

appeal, which consist of a proposed official plan amendment (“OPA”) and zoning by-law amendment (“By-law amendment”) required to facilitate a commercial development on a portion of the Windsor Raceway, located at the northwest corner of Matchette Road and Sprucewood Avenue. The application has been supported by numerous studies undertaken over the past decade, addressing issues such as traffic, servicing, stormwater management and environmental issues, including species at risk.

[3] The application was initially approved by City Council in 2007 and subsequently appealed by the Town and the Appellants. The hearing was originally scheduled to begin in 2010. It was adjourned (and the proceedings stayed) so that the Applicant could complete detailed investigations and studies requested by the Ministry of Natural Resources and Forestry (“MNRF”) with respect to Species at Risk (“SAR”) on the site and on the adjacent road allowance, Matchette Road. The detailed studies were completed by 2013 and on August 14, 2014 a permit was issued pursuant to the provisions of the *Endangered Species Act, 2007* (the “ESA”) to permit the development to proceed. Due to the passage of time, the ESA permit has been amended and remains in force. In addition, the detailed conditions of the ESA permit have been added to form part of the planning instruments for which the Applicant seeks approval. Following the issuance of the ESA permit, the Applicant and the Town settled all of their issues. The basis for the settlement, which includes conditions, is also reflected in the proposed OPA and By-law amendment. The Applicant will seek approval of these instruments at the August 2015 hearing in order to implement the settlement it has reached with the Town, as supported by the City. As indicated above, following the settlement reached with the Town and the issuance of the ESA permit, the Applicant has consistently taken the position that there are no outstanding technical issues and the planning instruments should be approved, subject to the Board receiving land use planning evidence in support of the proposed OPA and By-law amendment. The Applicant intends to respond to genuine land use planning issues raised by the two remaining Appellants, as reflected in their witness statements (subject to the matters raised by this motion). The witness statements were to have been exchanged in accordance with the Procedural Order in effect to govern the hearing. However, the

parties agreed to a short delay in light of the motion. All of the Applicant's evidence must be served on the Appellants no later than July 24, 2015 with Reply by the Appellants due two weeks later.

ARGUMENT AND FINDINGS

[4] The Applicant's motion (Exhibit 1A, paragraph 1) is brought pursuant to Sections 17(45) and 34(25) of the *Planning Act* ("Act") seeking an order dismissing, in part, the appeals made by Ms. Pancheshan and Ms. Meloche without holding a hearing. The ability of the Board to dismiss all or part of an appeal, or in the case of this motion to strike issues and/or evidence related to certain issues, is well known. Ms. Bull provided ample case law setting out the usual tests and in his response, Mr. Flett did not dispute the tests, but rather took the position that the issues his client seeks to raise (as well as those raised by Ms. Meloche) are grounded in land use planning and should not be dismissed without the benefit of a hearing. It was Mr. Flett's overall submission that the Applicant is seeking to dismiss large sections of the appeal before hearing any evidence, portraying the Appellants' witness statements as containing mere speculation or collateral attacks. It was his view that the arguments set out in the motion are consistent with closing submissions and are not reasons to dismiss an appeal by way of motion. Ms. Bull submitted that her motion is not intended to remove legitimate planning concerns from the Issues List. For example, several natural heritage issues, which are of interest to the Appellants, will be addressed by the Applicant in response to the concerns raised and the evidence that has been filed. However, it was her overall submission that several issues raised by the Appellants are either new issues not raised in the appeal letters, speculative concerns and impacts, or issues raised that seek to re-open matters that are outside the Board's jurisdiction and have already been addressed through the permitting process. In the notice of motion (Exhibit 1A, paragraphs 1 – 7), the Applicant seeks to dismiss specific issues related to: market impact; traffic impact; species at risk; certain policies contained in the Provincial Policy Statement ("PPS"); groundwater/stormwater issues; and lighting impacts. Each issue is addressed below.

1. Market Impact

[5] The Appellants did not raise market impact as an issue until the revised Issues List was filed in February 2015, when it included a policy from the City's Official Plan ("OP") associated with the issue. Neither Appellant raised market impact as part of their original appeals. More significantly, when market impact was raised by the Town as part of its appeal, the Applicant was successful before a different panel of the Board in dismissing the issue from the Town's Issues List. The Board found in a decision dated August 12, 2009 that the Issues List cannot include market impact issues. On this basis I accept the submission of Ms. Bull that market impact is not a proper issue for the hearing and the request to strike it from the Issues List is allowed. To raise the issue again is frivolous and vexatious and the Appellants are estopped from including it on the Issues List or calling any evidence with respect to market impact. On this basis, the Board will not issue a subpoena (as suggested by Ms. Pancheshan in her "Brief outline of summoned Witnesses Anticipated Evidence", dated May 29, 2015) requesting that Arnie Bain, Past President of the Downtown Business Improvement Association, attend at the commencement of the hearing for the purpose of providing evidence in the area of market evidence. The relief requested in paragraph 1 of the notice of motion is allowed.

2. Traffic Impact

[6] Ms. Pancheshan has filed a witness statement prepared by Frank Berry, an expert in traffic. Mr. Berry met with the expert retained by the Applicant and they have executed an agreed statement of facts indicating that the overall approach and methodology used to conduct the Traffic Impact Analysis ("TIA") meets the requirements of Policy 10.2.8.2 of the City's OP. While Mr. Berry questions the methodology used in the TIA and brings into question the validity of its conclusions, he does not conclude they are erroneous. On this basis (and given both the City and the Town are satisfied that traffic impacts are adequately taken into account and addressed), Ms. Bull submitted that the Board should strike the witness statement,

preclude the Appellants from calling evidence in respect of traffic impact and remove certain policies contained in the City's OP from the Issues List. Moreover, Ms. Bull argued that Ms. Pancheshan has added traffic as an issue more than seven years after filing her appeal and without any meaningful analysis or empirical study. On this basis Ms. Bull contended that the issue is not worthy of adjudication.

[7] With respect to traffic impact, I will not strike the witness statement of Mr. Berry. The Board does not dismiss appeals, or issues, lightly. The Applicant now knows the issues raised by the Appellants. The Applicant is supported by the City with respect to how it has addressed traffic. It is also supported by the Town. Nevertheless, traffic impact is a legitimate land use planning concern and on this issue I adopt the submission of Mr. Flett that the Board ought to, at least, assess the evidence. In light of Mr. Berry's concessions with respect to how the Applicant has evaluated traffic impact, it may be that his evidence amounts to "an apprehension" of impact and the Applicant can respond to the issue through its land use planner and by way of argument. Certainly the agreement reached between the experts will substantially narrow the issues surrounding traffic impact and form the starting point for any response by the Applicant. On this basis there is no reason why the issue cannot be addressed very efficiently at the hearing. Ms. Meloche is not calling an independent traffic expert, albeit she intends to raise issues with respect to road mortality for wildlife. While this may not be an issue upon which the Board could not refuse the OPA and By-law amendment, the Applicant has been made aware of the concern and can determine how best to respond. The relief requested in paragraph 2 of the notice of motion is denied.

3. Species at Risk

[8] There are two matters that relate to SAR. First, both Appellants have raised issues relating to the *Species at Risk Act* ("SARA"), which is Federal legislation. Mr. Flett acknowledged that SARA does not apply to the Applicant's site and on that basis he agreed to remove Issue 1 as described by his client in her Issues List. However, it was also Mr. Flett's submission that just because SARA is not applicable that the

witness statements that refer to its requirements should not be ignored, especially in respect of issues raised in respect of destruction of habitat. Ms. Meloche stated that in her view (and the view of her witnesses) critical habitat will be destroyed as a result of the development proposal. I adopt and rely upon the submissions of Ms. Bull that the federal SARA issues identified by the Appellants are not worthy of adjudication. SARA makes it clear that no person can destroy habitat on federal lands. The Applicant position is that it is not destroying habitat and, in any event, neither the site nor any part of the adjacent Ojibway Prairie Provincial Nature Reserve or Ojibway Park are on federal lands or subject to a habitat order issued by the Governor-in-Council. On this basis, the SARA issues are removed from the Issues List and further, those portions of the witness statements filed by the Appellants that deal with SARA shall not form part of the evidence at the hearing. The relief requested in paragraph 3 of the notice of motion is allowed.

[9] The second issue under the category of SAR relates to the concerns raised by the Appellants surrounding the Minister's decision to issue the ESA permit and on the permitting process itself. Simply put, the Board has no jurisdiction to issue ESA permits or to interfere with the conditions of any permit. The Board cannot and will not interfere or second guess the Minister's decision in this regard. Consequently, in considering the planning instruments under appeal and any natural heritage impacts, as a question of fact (and law) the ESA permit has been issued and the Applicant is entitled to rely upon that permit in assessing impact. On this basis, I find that the Appellants may not call evidence regarding the ESA permitting process, the terms and conditions associated with the permit, speculative evidence in respect of the presence of extirpated, endangered and threatened ("EET") species or their habitat on the site, or evidence of harm under section 9 and sections 11, 13 and 55 of the ESA. To allow an inquiry into matters already determined by the Minister following a comprehensive review of the site (and Matchette Road) will substantially lengthen the hearing for no purpose. The environmental investigations with respect to this site began about 19 years ago and field investigations coordinated with MNRF since 2010 culminated in the issuance of the ESA permit which applies to four EET species (Eastern Foxsnake, Butler's Gartersnake,

Dense Blazing Star and Willow Leaf Aster) and their habitat within the permit area. Pursuant to the legislative requirements, it is a precondition to the issuance of an ESA permit that the Minister make a determination that there would be an overall benefit to the permit species achieved within a reasonable time if the permit is issued. The Minister is also required to consider a recovery strategy. All of this has been done and to launch into an evidentiary inquiry in respect of these matters in the context of these appeals is not a legitimate land use planning issue. On this basis, I adopt the submission of Ms. Bull that the Board simply cannot review the Minister's decision. The Board cannot, as suggested by Ms. Pancheshan's planner, make a decision that the planning instruments are premature until more is known about the analysis behind the ESA permit. The real difficulty is that the Appellants, through their witnesses, speculate that there may be other EET species on the site in addition to the permit species. Mere speculation that somehow the Minister made an error in issuing the permit and that its experts and those retained by the Applicant overlooked one or more species is not a genuine land use planning ground upon which the appeals could succeed. I acknowledge that Mr. Flett is correct that it is difficult to parse the witness statements that have been filed. However, in accordance with paragraph 132 of Ms. Bull's submissions, for the witness statements that have been filed, the Board will not hear evidence that pertains to the merits and process of the ESA permit. To the extent that the Appellants propose to summons government officials to speak to the process and the permit, those summons will not be issued (or if issued, quashed).

[10] Ms. Bull submitted that it is significant that Ms. Pancheshan made submissions to the Windsor Essex County Environment Committee ("WECE") requesting that City Council should reconsider its decision to approve the development given that the issuance of the ESA permit would likely result in an unsuccessful appeal. Similarly, in the context of the motion to dismiss, Ms. Meloche indicated her frustration that the Town had settled with the Applicant, leaving the environmental issues to be addressed by the remaining Appellants. Based on these submissions it is clear to me that each Appellant understands and appreciates that the agreement reached with the Town and the issuance of the ESA permit have necessarily has narrowed the issues for the hearing.

In this regard, it is important to emphasize that hearings before the Board are quasi-judicial proceedings grounded in legislative requirements. They are not public inquiries into local issues. The Board is required under the Act to have regard to decisions of Council when evaluating applications under appeal and the Board will do so when it adjudicates these appeals in August. It is also clear that over the past several years the Applicant has invested considerable funds in addressing environmental and technical issues, updating studies and formulating conditions in an effort to ensure that its proposed commercial development, adjacent to the Windsor Raceway, can be approved in accordance with the provisions of the Act. That determination will be made by the Board after it hears the evidence. However, to suggest that the Applicant has not addressed environmental concerns, in particular SAR, is an unfair characterization of the steps taken by the Applicant since the original hearing was stayed and adjourned in 2010. The proceedings were stayed for the purpose of further on site investigations (covering a number of seasons) which are now complete and the results are reflected in the ESA permit issued by the Minister. The relief requested in paragraph 4 of the notice of motion is allowed.

4. Specific policies contained in the PPS

[11] Several issues are identified on the Issues List which relate to specific policies in the PPS. Ms. Bull argued by leaving certain policies on the Issues List the Applicant will be required to call evidence to justify issues that fail disclose any apparent land use planning ground upon which the Board could allow either appeal. The submission made was that the polices identified by the Appellants have either been addressed by a prior process or are more properly addressed at the site plan stage, once the planning instruments are approved. Simply put, if these polices remain on the Issues List, the Applicant will have to prepare evidence and call witnesses to address matters that have already been determined, or will be finalized through conditions following detailed design at the site plan stage of the approval process.

[12] First, Policy 2.1.7 prohibits development in habitat of endangered and threatened species. Mr. Flett argued that this Policy should have been included on his client's Issues List due to its relevance to the SAR issues referred to previously. As explained above, SARA does not apply to the matter before the Board and the Minister has issued an ESA permit with respect to the development site and adjacent Matchette Road. As indicated above, the ESA permit allows the development to proceed in habitat of the Permit Species in accordance with provincial requirements. Second, Issue 3 refers to Policy 1.2.6.1 and Policy 1.2.6, which relate to the separation of major facilities, as defined, from sensitive uses. On the basis that the proposed development is not a major facility as defined in the PPS, I accept the submission of Ms. Bull that it is not relevant and need not be addressed by the Applicant. Third, Issue 3 includes a reference to Policy 1.6.6.1(b)(3), which relates to planning for new water and sewer services within a municipality. Ms. Bull argued that this Policy need not be justified by her client and in identifying this Policy, the Appellants have failed to disclose any land use planning ground upon which the Board could allow the appeal. In addition, the site is fully serviced.

[13] During the course of argument Mr. Flett agreed that Policies 1.2.6.1 and 1.6.6.1(b)(3) should be removed from the Issues List. On this basis, the Appellants are precluded from calling evidence regarding these policies. With respect to Policy 2.1.7, it will not be added to the Issues List. While Mr. Flett argued that the exclusion of the Policy was an oversight, the more significant matter is that the ESA permit, which was issued following extensive site investigations, sets the parameters for development and the Applicant cannot develop in habitat of endangered or threatened species, except in accordance with provincial and federal requirements. While the Applicant's land use planner will have to provide an opinion with respect to whether the application has regard to the PPS, responding to speculative evidence that suggests species have been overlooked does not amount to a genuine land use planning issue and in that context Policy 2.1.7 is not relevant. The relief requested in paragraph 5 of the notice of motion is allowed.

5. Groundwater/Stormwater issues and Lighting Impacts

[14] With respect to groundwater and stormwater issues, Dr. Michael Sklash has filed a witness statement claiming that the proposed development will result in a water table decline on adjacent properties. He does not conclude that the site is not suitable for the development. Dr. Sklash suggests that he cannot determine the magnitude of the water table decline because the Applicant has failed to characterize the hydrogeology of the site. Ms. Bull indicated that the Applicant was not required by the City to undertake a hydrogeological analysis beyond the work it did as part of its functional servicing report (2009). However, it will address any groundwater or stormwater management issues in the normal course and as part of the site plan process. In this regard, Ms. Vendrasco submitted that from the City's perspective these issues are addressed in sufficient detail for the purpose of approving the development application. The Town had identified as an issue plans for stormwater and groundwater when it appealed and it is now satisfied with the City's approach. The City has undertaken to address these issues as part of the site plan control process and specifically, an engineer will have to prepare a stormwater quality and quantity study as a condition of removing the H symbol in the proposed By-law amendment. The same submission was made with respect to the suggestion by the Appellants that lighting impacts must be addressed by the Applicant. This is, again, a matter that is routinely addressed at the site plan stage, usually through detailed conditions. In this regard, Ms. Bull offered to meet with Mr. Flett and (the City) to discuss conditions to be attached to any future site plan approval to ensure that both potential impacts from lighting and groundwater/stormwater issues are addressed.

[15] The position of Mr. Flett and Ms. Meloche with respect to the request to strike the issues raised as they relate to groundwater/stormwater and lighting was that the City's believe that the issues are properly addressed through conditions of site plan approval does not end the appeal of another party. While that may be true, the test to be applied remains the same. Is there a legitimate and apparent land use planning issue raised by the Appellants upon which the Board could refuse to give approval to the application. The evidence proposed by the Appellants in respect of groundwater/stormwater and

lighting does not meet this test. Dr. Sklash does not conclude that the development should not proceed based on the concerns he has raised in respect of groundwater and stormwater. At best, the concerns regarding the groundwater levels are mere apprehensions, unsupported by technical studies. The proposed witnesses speculate that there may be impact, with no solid foundation for their conclusions. Issues raised, such as re-charge, are dealt with through site plan approval in the absence of any independent work from the Appellants. The Applicant has undertaken the requisite technical studies (to the satisfaction of the City and the Town) and has offered to provide conditions now, even though these are normally site plan issues. I reach the same conclusion with respect to the suggestion by the Appellants (evidence of Anton Reznicek) that potential impacts from lighting have not been addressed. This is an issue for site plan approval and Ms. Bull is prepared to also address this in advance as a condition to be implemented at the appropriate stage. On this basis, I find that the issues in respect of groundwater/stormwater and lighting should be removed from the Issues List and shall not form part of the evidence at the hearing. The relief requested in paragraphs 6 and 7 of the notice of motion is allowed.

DECISION AND ORDER

[16] For all of the reasons given and in accordance with the decision set out above for each issue, the motion to dismiss specific issues and restrict the evidence for the hearing is allowed, in part. The Board orders, as follows:

(i) Market impact is removed as an issue from the Issues List and need not be addressed by the Applicant;

(ii) Traffic impact will remain on the Issues List;

(iii) The proposed issues surrounding Species at Risk are restricted insofar as: first, the Federal SARA process is removed from the Issues List; and second, the ESA permit issued for the site, its conditions and the process undertaken to obtain the permit from the Minister are not proper issues for

the hearing nor is evidence that speculates that EET species or their habitat on the site have been overlooked by the Applicant. Subject to the findings set out in this disposition, other natural heritage issues raised by the Appellants are proper issues for the hearing.

(iv) PPS Policies 1.2.6.1 and 1.6.6.1(b)(3) are removed from the Issues List and the Appellants are precluded from calling any evidence regarding these policies. Policy 2.1.7 will not be added to the Issues List.

(v) Groundwater/stormwater and lighting impacts shall be removed from the issues list on the basis that each are matters to be address at the site plan approval stage (if the Applicant succeeds in obtaining approval of the application). The Appellants are precluded from calling any evidence in respect of these issues as set out above. .

[17] The hearing will proceed, as scheduled on August 24, 2015 with no further notice and in accordance with the provisions of the Procedural Order, as amended by this decision to reflect a change in the date for exchanging the Applicant's witness statements and all reply. The hearing date is peremptory for all parties. The Board expects the parties to be vigilant in their preparation and based on the narrowing of the issues as a result of this disposition, the entire ten days should not be required to complete the hearing. In this regard, the Board has a responsibility to ensure that hearings are efficient and cost effective. I continue to be seized of the pre-hearing process, but I am not seized of the hearing.

[18] Finally, the Applicant seeks costs of its motion, including legal fees and consultants fees, on a full indemnity basis. Awards of costs are rare and only made in specific circumstances, based on certain criteria. A request for costs, if any, may be made in writing in accordance with the Board's *Rules of Practice and Procedure*.

“J. de P. Seaborn”

J. de P. SEABORN
VICE-CHAIR

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