

**Ontario Municipal Board**  
Commission des affaires municipales  
de l'Ontario



**ISSUE DATE:** December 21, 2016

**CASE NO(S):** PL140374

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

Appellant:	Windsor Christian Fellowship
Subject:	Proposed Official Plan Amendment No. 94
Municipality:	City of Windsor
OMB Case No.:	PL140374
OMB File No.:	PL140374
OMB Case Name:	Windsor Christian Fellowship v. Windsor (City)

**Board Rule 107 states:**

**107. Effective Date of Board Decision** A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

**Heard:** July 26 and 28, 2016 in Windsor, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

City of Windsor

M. Bull, P. Gross, W. Vendrasco

Windsor Christian Fellowship

N. J. Pepino, D. Nelligan

**DECISION DELIVERED BY C. CONTI AND SHARYN VINCENT AND ORDER OF THE BOARD**

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## INTRODUCTION

[1] This is the decision for two motions brought regarding an appeal by Windsor Christian Fellowship (“Appellant”) against the approval by the City of Windsor (“City”) of Amendment No. 94 (“OPA 94”) to the Windsor Official Plan.

[2] The City passed OPA 94 on March 17, 2014 which applies to approximately 108 hectares (“ha”) of land in the southwestern portion of the City’s Sandwich South Planning District located to the north of Highway 401 (“Hwy. 401”) and south of the Windsor International Airport. The OPA 94 lands are part of the East Pelton Secondary Plan (“Secondary Plan”) area which includes 206 ha of land bounded generally by Seventh Concession Road to the west, Eight Concession Road to the east, Hwy. 401 to the south and lands on the south side of Baseline Road to the north. OPA 94 applies to the northern portion of the East Pelton Secondary Plan area.

[3] The City approved the East Pelton Secondary Plan in June 2009 through passage of Official Plan Amendment No. 74 (“OPA 74”). Three appeals were filed against OPA 74 including one by the Appellant. The appeals of OPA 74 including that of the Appellant were settled before another panel of the Board through its final decision issued on November 5, 2010.

[4] The north part of the Secondary Plan area was designated as Future Urban Area through OPA 74 with the development of the area dependent upon completion of the Windsor Airport Cargo Facility Study and the determination that development of the area would not detrimentally affect the current and future operations of the Windsor International Airport.

[5] Subsequent to the completion of the above-noted study and determination that the airport would not be detrimentally affected, the City brought forward OPA 94 which, through a Neighbourhood designation, provides for low density and medium density residential uses for the area designated as Future Urban Area in OPA 74. It also provides a transportation schedule for the area and associated policies.

[6] The Appellant owns approximately 17 ha of land located to the east of the Canadian National Railway (“CNR”) tracks in the southern part of the East Pelton Secondary Plan area. This parcel contains a church and associated facilities.

[7] The Appellant also owns approximately 2.7 ha of land to the west of the CNR tracks. These lands are outside of the East Pelton Secondary Plan area and are designated Industrial in the City’s Official Plan.

[8] The Appellant’s property is entirely outside of the area covered by OPA 94.

[9] Prior to the commencement of the hearing on the first motion, the Board received a request from Frank Fazio to address the motions. The Board heard that Mr. Fazio had not filed a response to the motions as required in the Board’s *Rules of Practice and Procedure* (“Rules”) but that he wished to address the motions orally. Mr. Fazio did not have status in the appeal.

[10] The request was opposed by Ms. Pepino who indicated that she could not anticipate the types of submissions that would be coming from Mr. Fazio and it may be necessary to adjourn the hearing on the motions in order to address matters that were raised.

[11] After considering the submissions, the Board denied Mr. Fazio’s request. The Board’s Rules are clear that parties who wish to address a motion must file a response with the other parties and the Board within two days of the scheduled date for hearing the motion. Mr. Fazio was not a party to the appeal and did not file a response.

[12] However, the Board agreed to a request from Mr. Fazio to provide him with a copy of the decision on the motions.

## **MOTION TO ADJOURN THE MOTION TO DISMISS THE APPEAL**

[13] The Appellant filed a motion to adjourn the motion which had been brought by the City to dismiss the appeal without a hearing. The Appellant filed a Motion Record (Exhibits 1A and 1B) supported by the Affidavit of Scott Stoll, a Partner with Aird & Berlis LLP.

[14] The City filed a Responding Motion Record (Exhibit 2) which was supported by the Affidavit of Angela Fang, a planner with Wood Bull LLP.

[15] Both the motion and the response were supported by a book of authorities.

[16] After reviewing the submissions of the Appellant, the Board has determined that the grounds for the motion can be summarized as follows:

1. The growth resulting from the redesignation of lands under OPA 94 will have a lasting effect on the transportation and development patterns in the area, more specifically the intersection of the 7<sup>th</sup> Concession Road and the proposed East-West Arterial will operate at level of service "F" which will cause traffic issues that could block access to the Appellant's lands.
2. The redesignation of the OPA 94 lands should wait until after the alignment and intersection design of the East-West Arterial have been finalized to determine the full impact on the Appellant's lands and surrounding area.
3. Planning for the East-West Arterial has been proceeding through the Lauzon Parkway Class Environmental Assessment ("Class EA").
4. The Appellant filed a Part II Order request regarding the Class EA which was withdrawn as a result of the City agreeing to produce an Addendum to the Class EA which would provide an additional access point to the Appellant's lands by way of two three-legged roundabouts on the East-West Arterial.

5. The recommended alternative in the Class EA Addendum was for only a single access to the Appellant's lands through a four-legged roundabout which resulted in another Part II Order request. The Appellant proposed mediation under the *Environmental Assessment Act* as a way to resolve the situation.
6. The City agreed to mediation which was scheduled for September 13 and 14, 2016.
7. The appeal of OPA 94 and the Class EA Mediation are linked whereby if the result of the mediation produced the road design to which the City previously agreed, it would have the effect of rendering the appeal of OPA 94 moot. The appeal then could be withdrawn or dismissed on consent.
8. If the result of the mediation is not satisfactory, then the appeal of OPA 94 should be maintained.
9. The issue of whether OPA 94 is satisfactory should await the ultimate disposition of the alignment of the East-West Arterial either through the mediation or a decision of the Minister of the Environment and Climate Change.
10. The City's motion in advance of the mediation is premature and a waste of Board resources and allowing the motion to adjourn will not prejudice any party or public interest.
11. It is reasonable to grant the adjournment pending the outcome of the mediation.

[17] For the above reasons the Appellant submitted that the motion to dismiss the appeal without a hearing should be adjourned *sine die*. In the alternative the Appellant submitted that the motion to dismiss the appeal without a hearing should be adjourned

and re-scheduled to commence sixty days after the delivery of the Mediator's Report resulting from the mediation of the request for the Part II order.

[18] Based upon the submissions, the Board has determined that the City's response to the motion can be summarized as follows:

1. OPA 94 does not include the Appellant's lands and the Appellant's issues relate to the road alignment and design of the East-West Arterial and proposed access to the Appellant's lands which are matters that are not addressed in OPA 94.
2. The road alignment of the East-West Arterial was subject to a Class EA and an Addendum which are subject to a request for a Part II Order for a "bump up" which is subject to mediation.
3. The Board, in its oral decision from a Telephone Conference Call held on April 12, 2016, did not accept the Appellant's position that a decision on the Part II Order request is required prior to hearing the motion to dismiss the appeal.
4. The Appellant's position that the Class EA Addendum and the appeal of OPA 94 are inextricably linked is not supported by the facts.
5. The Appellant's issues involve the road alignment, design of intersections and the design of access to the Appellant's lands. These issues are being dealt with appropriately through the Class EA process. OPA 94 does not involve these matters and it does not apply to the Appellant's lands or the roads of concern to the Appellant.
6. The Appellant has admitted that its appeal of OPA 94 could be resolved through the Part II Order request and therefore that is the appropriate mechanism for resolving the Appellant's issues.

7. The appeal of OPA 94 is being used as leverage against the City with regard to the Part II request and other matters not related to OPA 94.
8. The appeal of OPA 94 has prevented planning approvals for 108 ha of land and has caused considerable prejudice to the owners of lands in the OPA 94 area.

[19] Based upon the above, the City requested that the Appellant's motion be dismissed.

### **ANALYSIS AND FINDINGS**

[20] The Board carefully considered the motion materials and the response including the authorities.

[21] The Appellant contended that the hearing on the motion to dismiss the appeal without a hearing should be adjourned either *sine die* or until sixty days after delivery of the Mediator's Report regarding the Part II order request. The Appellant maintained that the results of the mediation could resolve the appeal and that consideration of OPA 94 should be deferred until after the alignment of the East-West Arterial is finalized.

[22] The City maintained that the Class EA and OPA 94 are not linked and that the Class EA is the mechanism for resolving the Appellant's concerns. Furthermore, the City maintained that during the pre-hearing conference where the motion hearing was scheduled, the Board did not support the position that the results of the mediation should be known before the motion went forward.

[23] In considering the motion, the critical factor for the Board was the potential for the Board's consideration of the motion to dismiss the appeal to be affected by the results of the mediation. The Board recognizes that if the Appellant is satisfied with the results of the mediation that the hearing on the appeal might not be necessary. Also, the results of the mediation could be relevant to the hearing of the appeal. If the Board were to

allow the appeal to go forward, there may be some benefit in delaying the scheduling of the hearing of the appeal until after there is a final decision on the Class EA. However, the hearing on the appeal has not been scheduled, but the motion to dismiss the appeal already has been scheduled and would be delayed if the Appellant's motion were allowed.

[24] After reviewing the submissions, including the authorities, the Board did not accept the Appellant's contention that there would be some benefit in adjourning the motion to dismiss the appeal without a hearing to wait for the results of the mediation. As noted in the City's submissions, the date of the motion to dismiss the appeal had been set through a previous pre-hearing conference and decision of the Board. If there had been a need to defer the motion until after the Class EA mediation, this could have been accommodated in the scheduling of the motion to dismiss at the pre-hearing conference. However, another panel of the Board who presided at the pre-hearing conference did not determine that there was a need to delay the scheduling of the motion to dismiss.

[25] The motion hearing was already scheduled, the documents were filed and the Board and parties were in attendance when the motion for the adjournment was being considered. Any efficiency that may have been achieved by deferring the motion hearing until the after the conclusion of the mediation was to a great extent already lost.

[26] Furthermore, those matters that the Board must consider in determining the motion to dismiss the appeal without a hearing are not dependent on the outcome of the mediation process.

[27] The Board's consideration of the motion to dismiss the appeal without a hearing comes under s. 17(45) of the *Planning Act* which states the following:

**Dismissal without hearing** - Despite the *Statutory Powers and Procedures Act* and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

- (a) it 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 plan or part of the plan that is subject to the appeal could be approved or refused by the Board,
  - (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 Board proceedings that constitute an abuse of process
- (b) Repealed 2006. C. 23, s. 9(10)
- (c) the appellant has not provided written reasons with respect to an appeal under subsection (24) or (36);
- (d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1996, c. 4, s. 9; 2006, c. 23, s. 9(8-10).

[28] The City's motion to dismiss the appeal is based upon s. 17(45) (a) (i) and (ii) noted above. The determinations regarding whether planning grounds have been raised upon which the plan could be approved or refused or whether the appeal is frivolous and vexatious should not be influenced by the results of the mediation. The motion to dismiss the appeal must be considered in relation to the requirements of the *Planning Act* for filing an appeal and the above-noted section through which the motion may be permitted.

[29] In making a decision on the motion to dismiss the appeal, the Board must consider whether or not planning grounds have been raised in the notice of appeal that, based upon the relevant provisions of applicable planning documents and in light of the Board's jurisprudence, could provide logical and defensible reasons for approving or refusing the plan. This has nothing to do with potential resolution of the Appellant's

issues under a process carried out under other legislation. The Board is not concerned when dealing with the motion, if the Appellant's concerns have been resolved under the Class EA process, only whether legitimate planning grounds have been raised under the requirements of the *Planning Act*. Issue raised through the Class EA process may or may not be similar to planning grounds raised in the notice of appeal. The Appellant's issues may or may not be resolved through the Class EA mediation. However, the question for the Board regarding the motion is whether or not the planning grounds raised may be ones that under the provisions of the relevant planning documents passed pursuant to the *Planning Act* or provisions of the in-force provincial plans and policies could provide the basis for approving or refusing the plan. This will determine if the planning grounds raised in the appeal could be sustainable if the matter were to go forward to a hearing.

[30] With regard to the authorities, the Board could not determine from the decisions, if any of those submitted by the Appellant involved circumstances similar to the current appeal. The only authority submitted by the Appellant where an adjournment of a motion to dismiss a hearing was considered was the decision *Ewasyn v. Toronto (City) Committee of Adjustment*, 2002 CarswellOnt 7311. However, the Board could not determine from the decision if other details of that decision might illuminate the current case.

[31] The Board's decision regarding the Appellant's motion is consistent with the approach of Vice-Chair Seaborn in the decision *Kimvar Enterprises Inc. v. Simcoe (County)*, 2007 CarswellOnt 5385 which the City included in its authorities. In that case the Board was considering a motion to adjourn a hearing partly on the basis that requirements under other pieces of legislation had not been fulfilled with regard to a particular development project. In paragraphs 9 and 10, Vice-Chair Seaborn found that the necessity for approvals under other legislation is not a basis upon which a hearing should be adjourned and the Board would be failing to carry out its responsibilities under the *Planning Act* if adjournments were granted on this basis alone.

[32] Based upon the above considerations, the Board issued an oral decision on the Appellant's motion to adjourn the motion to dismiss the appeal as follows:

The Board has carefully considered the motion and the response. The Board has determined that it will refuse the motion to adjourn and it will hear the motion to dismiss the appeal.

The Board considers the future mediation related to the EA process to be a separate matter which, while it may inform the issues and result in some resolution of the OPA 94 appeal, it will not affect the legitimacy of the planning grounds that have been raised in the notice of appeal.

It is the sufficiency of the planning grounds that is the major consideration in the motion to dismiss the appeal. Regardless of the EA process, the appeal under the *Planning Act* must be considered on its own merits. If planning grounds have not been raised upon which the plan could be approved or refused, then the appeal cannot move forward as required through s. 17(45) of the Act.

The Board does not agree that prejudice may result in proceeding with the motion to dismiss the appeal.

Furthermore, the Board can find no basis for costs.

[33] Through the above ruling, the Board determined that the motion should be dismissed and the alternative relief requested by the Appellant to schedule to motion hearing 60 days after delivery of the mediator's Report would not be acceptable. The Board determined that the hearing should proceed to consider the motion to dismiss the appeal.

### **MOTION TO DISMISS THE APPEAL WITHOUT A HEARING**

[34] The City filed a motion to dismiss the appeal without holding a hearing contending that the reasons set out in the notice of appeal do not disclose any apparent and use planning grounds upon which the Board could grant all or part of the appeal and that the appeal is not made in good faith or is frivolous or vexatious. The City also requested that the Board award the costs of the motion to the City.

## Grounds for the Motion

[35] Based upon the motion record (Exhibit 4), the Board has determined that the grounds for the motion can be summarized as follows:

1. OPA 94 does not apply to the lands owned by the Appellant either those within the East Pelton Secondary Plan area or those outside of the Secondary Plan area.
2. The Appellant's reasons for appeal do not relate to matters that are addressed in OPA 94. The Appellant has not objected to the principal of the residential land use in the north portion of the Secondary Plan area and the reasons do not relate to the Major Road Plan-North Portion which amends the Major Road Plan in OPA 74.
3. The Appellant's appeal relates to issues regarding the Class EA undertaken for the new East-West Arterial road to be located in the southern portion of the Secondary Plan area. The issues relate to the location of the access from the East-West Arterial to the Appellant's lands that are within the Secondary Plan area. The Appellant has requested a Part II Order to require a full environmental assessment for the East-West Arterial to address the same issues.
4. The East-West Arterial is not within the area to which OPA 94 applies. The location of the East-West Arterial and conceptual access points are identified in OPA 74 and have not been changed through OPA 94.
5. The Appellant did not raise concerns about the location of the East-West Arterial or access to the Appellant's lands in its appeal of OPA 74 and in settling its appeal, the Appellant agreed to OPA 74 as modified and approved by the Board.

6. Through its appeal of OPA 94, the Appellant is attempting to re-litigate matters that were addressed and resolved through the settlement of the OPA 74 appeal. To allow these same matters to again be raised in the appeal of OPA 94 undermines the principal of *res judicata* and should not be permitted.
7. In its appeal of OPA 94, the Appellant raises concerns about intersections that are outside of the Secondary Plan area and are not addressed in OPA 94.
8. The reasons raised by the Appellant in its appeal of OPA 94 fail to disclose any apparent land use planning ground upon which the Board could grant the appeal and the reasons are frivolous and vexatious since these matters have already been adjudicated by the Board.
9. The appeal has resulted in prejudice to land owners in the OPA 94 area and to the City which has invested significant financial resources in the construction of a trunk sanitary sewer to facilitate development of the lands.

[36] The City's motion was supported by the Affidavit of Michael Cooke, Manager of Policy Planning with the City who is a Registered Professional Planner (Exhibit 4, Tab 2). The City also submitted a Book of Authorities.

### **Response to the Motion**

[37] The Appellant filed a Response to the Motion (Exhibit 5), which requested that the Board dismiss the City's motion and refuse the request for costs. Based upon the submissions, the Board has determined that the grounds for the response to the motion can be summarized as follows:

1. The appeal of OPA 94 does not relate solely to the Class EA and a Class EA Addendum that is being undertaken for the East-West Arterial and to alignment and access issues for the East-West Arterial, but also to the

- interaction of OPA 94 related growth and to the current and future transportation network of the surrounding area.
2. The development resulting from the redesignation of lands through OPA 94 will contribute to inefficient and unworkable traffic patterns at the intersection of 7<sup>th</sup> Concession Road and the East-West Arterial and will negatively impact lands along the western boundary of the East Pelton Secondary Plan area, including the Appellant's lands.
  3. OPA 94 introduces new residential uses and new roads into the north Secondary Plan area but it is not supported by any transportation studies that would demonstrate that expected growth can be accommodated by the existing and planned road network and therefore OPA 94 is either premature or inadequate.
  4. Transportation analyses carried out in conjunction with the Class EA and Class EA Addendum for the East-West Arterial demonstrate that the intersection of the 7<sup>th</sup> Concession Road and the East-West Arterial will operate at a Level of service F based upon traffic volumes and densities anticipated with the proposed development of the Secondary Plan area. This will potentially cause slow moving traffic and queuing along the 7<sup>th</sup> Concession Road which could negatively impact on the accessibility of the Appellant's lands and affect its development potential and value.
  5. The impact of OPA 94 on adjacent properties and the surrounding road network constitutes a legitimate land use planning ground worthy of adjudication at a hearing.
  6. OPA 94 and the Class EA are interlinked and it is necessary to understand the ultimate alignment of the East-West Arterial and details of its intersection with the 7<sup>th</sup> Concession Road in order to assess the effect of OPA 94 related

- growth. Consideration of these matters should have been finalized prior to enacting the land use designations and permissions in OPA 94.
7. The Appellant is not precluded from appealing the redesignation of lands in OPA 94 because the likely redesignation of the Future Urban Use lands was acknowledged in OPA 74.
  8. The location of the East-West Arterial and access to the Appellant's lands are only identified conceptually in OPA 74. Since they were shown conceptually in OPA 74 and issues related to potential impacts resulting from proposed growth were only identified through the studies completed for the Class EA and Class EA Addendum which were undertaken after OPA 74 was approved, the Appellant did not raise issues about these matters during the appeal of OPA 74.
  9. The matters raised by the Appellant in the appeal of OPA 74 were not settled with the approval of OPA 94 and these matters are not *res judicata*. Furthermore, the appeal of OPA 94 is not frivolous or vexatious.
  10. Under s. 17(45) of the *Planning Act*, prejudice to other parties is not a ground for dismissal of an appeal without a hearing.
  11. The appeal has been made in good faith on land use planning grounds upon which the plan could be approved or refused by the Board and it is not frivolous or vexatious. There is no basis for an award of costs against the Appellant.

[38] The Appellant's response to the motion was supported by the Affidavit of Eric Saulesleja, Senior Associate, Planner with GSP Group who is a Registered Professional Planner (Exhibit 5, Tab 2) and the Affidavit of Garry Pappin, Senior Transportation Consultant with Paradigm Transportation Solutions (Exhibit 5, Tab 3). A

Book of Authorities was also provided by the Appellant to support the response to the motion.

## **ANALYSIS AND FINDINGS**

[39] The Board has carefully considered all of the submissions of the parties including the authorities.

[40] The Board's jurisdiction regarding the motion to dismiss the appeal without a hearing is set out in s. 17(45) of the *Planning Act* which is included earlier in this decision.

[41] As acknowledged in the submissions, the above provisions of s. 17(45) are disjunctive and a finding that an appeal meets the requirements of only one of the provisions is sufficient to dismiss an appeal.

[42] The City's motion contended that the Board should dismiss the appeal based upon s. 17(45) (a) (i) and (ii). The basis of the City's motion is essentially that the grounds for appeal raised by the Appellant relate to matters that have already been addressed through the approval of OPA 74 to which the Appellant consented through the settlement of its appeal. Furthermore, the grounds raised by the Appellant deal with matters related to the Class EA and Class EA Addendum or matters that have not been changed by OPA 94 and/or are outside of the area covered by OPA 94. Therefore, the City contended that the grounds raised by the Appellant cannot be the basis for allowing the appeal in whole or in part because of the principal of *res judicata* or because the issues raised by the Appellant are not affected by the provisions of OPA 94.

[43] The Appellant maintained that it has raised apparent land use planning grounds with regard to traffic impacts that would result from the growth due to the designations in OPA 94. Furthermore, the Appellant contended that the appeal of OPA 94 is appropriate because the land use designations for the Future Urban Use area were not finalized in OPA 74 and because the road network, the alignment of the East-West

Arterial and the access locations to the Appellant's lands points were only shown conceptually in OPA 74 and an appeal at that time would have been premature.

[44] In considering if the motion meets the requirements of s. 17(45) (a) (i), it is important to review the planning grounds that have been identified by the Appellant in the notice of appeal in relation to the provisions of the in-force planning documents related to those planning grounds that are applicable to the area. If the appeal is to move forward, s. 17(45) (a) (i) requires that the notice of appeal disclose apparent land use planning grounds upon which the Board could approve or refuse all or part of the plan.

[45] The impact of increased traffic resulting from the land use designations and the anticipated development of a secondary plan area is a common land use planning ground raised in appeals. However, s. 17(45) (a) (i) does not simply require the identification of an apparent planning ground, but it must be a sufficient ground upon which the Board could approve or refuse all or part of the plan. The jurisprudence of the Board when considering motions to dismiss appeals without a hearing requires a careful examination of the grounds for appeal identified in the appeal notice. The Board's approach to these matters is clearly enunciated in a number of past decisions including *Toronto (City) v. East Beach Community Assn*, 1996 CarswellOnt 5740, which each party submitted in its book of authorities where the Board found that it is important to carefully examine the grounds for appeal to determine if there are issues that would affect the Board's decision in a hearing and if they are issues worthy of adjudication.

[46] In the current case, the Appellant has raised concern about the lack of traffic studies to support OPA 94, the potential impacts of increased traffic on its properties and intersections in the area, and the impact of traffic resulting from the proposed residential uses in OPA 94. The Board must determine first whether or not the provisions of the applicable planning documents require consideration of traffic impacts in conjunction with the approval of OPA 94. Then if there are provisions that relate to traffic impacts, the Board must consider the way in which the decision in the appeal

might be affected by evidence related to those provisions that may come forward at a hearing. In the current case, since the Appellant is not satisfied with OPA 94 in its current form, the planning grounds that have been raised must provide the possibility of forming the basis of the refusal of all or part of OPA 94.

[47] In considering the motion, the Board must be careful to base its decision on the submissions and not make assumptions about the merits of the evidence that would be provided at a hearing. The Board does not have the benefit of full evidence that would be provided in relation to the grounds raised by the Appellant and the testing of the evidence through cross-examination.

[48] The Board's jurisprudence recognizes that appeals should not be dismissed without a hearing easily or without careful consideration. Only when the Board is convinced from the submissions that an appeal based upon the planning grounds raised in the notice of appeal could not result in a plan being approved or refused in whole or in part should a motion to dismiss be allowed. In the current case without the benefit of full evidence, it must be apparent from the submissions that the provisions related to the Appellant's concerns would clearly not allow for refusing all or part of the plan based upon the grounds that have been raised.

[49] After reviewing the submissions, including the affidavits provided by the planners on behalf of both parties and the transportation submissions by Mr. Pappin on behalf of the Appellant, the Board has concluded that the planning grounds raised by the Appellant are related to traffic issues that are intended to be addressed through the Class EA process, separate and apart from the secondary planning process and related to residential density numbers substantially greater than those permitted in OPA 94. The submissions do not demonstrate that there are broader traffic concerns for the Secondary Plan area beyond those in the vicinity of the proposed East-West Arterial that are being addressed through the Class EA process. Based upon these conclusions, the Board finds that the planning grounds that have been raised cannot be the basis for refusal of all or part of OPA 94 and therefore, the motion to dismiss the appeal without a

hearing is being allowed. The reasons for arriving at these conclusions are provided in the remainder of this decision.

[50] As discussed above, the concerns identified by the Appellant are based upon the following two primary factors:

1. Traffic issues arising from the proposed extension of Legacy Park Drive through the Secondary Plan area to and from the East-West Arterial,
2. The potential increased traffic generated by the development of the Secondary Plan area.

### **Provisions Related to Traffic**

[51] With regard to the first factor noted above, from the submissions, the Board has determined that the critical provisions related to traffic impacts are included in the Secondary Plan in s. 7.8.2 of OPA 74. The parties did not raise provisions of any higher level planning documents, such as the Provincial Policy Statement that would relate to the grounds raised in the appeal. In s. 7.8.2.8 and s. 7.8.2.9 of OPA 74, the major road network is identified for the Secondary Plan area which is illustrated on Schedule EP-3. This includes the East-West Arterial which will be a Class I Collector Road, three north-south Class I Collector Roads and an east-west Class II Collector Road. One of the north-south Collector Roads is the existing 8<sup>th</sup> Concession Road located at the east limit of the Secondary Plan area.

[52] The provisions of s. 7.8.2 do not specifically require an overall assessment of the transportation system and traffic impacts within the Secondary Plan area or within the area covered by OPA 94. According to s. 7.8.2, the road system in the vicinity of OPA 74 is well developed and planned improvements are being undertaken on Walker Road to improve capacity and lane continuity between Provincial Road and Legacy Park Drive. Provincial Road is the extension of Hwy. 401 westward beyond the Secondary Plan area. Legacy Park Drive exists to the west of the Secondary Plan area and will be

extended eastward to form the proposed East-West Arterial across the Secondary Plan area which abuts the south limit of the Appellant's property.

[53] With regard to the proposed East-West Arterial, s. 7.8.2 states:

Furthermore, the City of Windsor will be undertaking a Class Environmental Assessment Study to evaluate the extension of Legacy Park Drive easterly from Walker Road to accommodate overall development in the South Sandwich Planning District. The study will be carried out independent of any and all Secondary Planning processes and identify a technically preferred alternative and a corresponding alignment, if applicable (Exhibit 4, Tab 2D, p. 107).

[54] In addition to the above, s. 7.8.2.17 requires that a Transportation Impact Study be prepared prior to development approvals in the Secondary Plan area. This section states:

Prior to development approvals within the East Pelton Secondary Plan the Municipality will request the preparation of a Transportation Impact Study, to assess the internal and off-site impact resulting from the proposed development. The need for such a study will be determined at the time of a subdivision, rezoning or site plan control application and will vary with the scale, location and planned phasing of the development. As per the requirements of policies 10.2.1 and 10.2.8 of the City of Windsor Official Plan, the Transportation Impact Study shall include, but not be limited to:

- (a) The collection and projection of traffic related data (vehicle bicycle and pedestrian flows, accidents, turning movements, etc.);
- (b) An assessment of trip generation, assignment and distribution;
- (c) An assessment of road and intersection capacity; and
- (d) A description and recommendation of remedial measures required to achieve the transportation goals, objectives and policies in the City of Windsor Official Plan and this Secondary Plan. (Exhibit 4, Tab 2D, p. 110).

[55] The provisions of OPA 74 are in force and effect and are not before the Board in the appeal of OPA 94. Since the OPA 94 area is part of the East Pelton Secondary Plan, the provisions of OPA 74 apply to OPA 94.

[56] According to the submissions, no Transportation Impact Study was carried out for the OPA 74 area prior to its approval. Furthermore, s. 7.8.2 states that the road system in the OPA 74 area is well developed.

[57] It appears that the intent of OPA 74 with regard to road transportation is to make use of the existing well developed road system, make improvements to Walker Road, to identify additional roads intended to service the Secondary Plan area, to leave the planning for the East-West Arterial to the Class EA process, and to require Transportation Impact Studies when necessary, to be carried out at the time of a development application to assess internal and off-site impacts. It is clear from s. 7.8.2 that the assessment of the impact of the East-West Arterial will be determined through the Class EA for the Legacy Park Drive extension which is intended to accommodate traffic from the development of the larger South Sandwich Planning District. The wording of s. 7.8.2 is clear that the assessment through the Class EA, "...will be carried out independent of any and all secondary planning processes...."

[58] In the context of the requirements of the OPA 74, if the Board were to allow traffic issues related to the extension of Legacy Park Drive to be considered in the appeal of OPA 94, then matters that are intended to be dealt with through the Class EA process would be intruding into the secondary planning process. This is contrary to the provisions of s. 7.8.2 which states that the assessment of the Legacy Park Drive extension should be carried out through the Class EA and independent of secondary planning processes.

[59] The measures set out in OPA 74 for the assessment of traffic impacts, that is through the Class EA and Transportation Impact Studies at the time of development applications, apply to the area affected by OPA 94. The Appellant contended that a more comprehensive traffic analysis is required and the studies carried out for the Class EA and Class EA Addendum should be considered in conjunction with the secondary planning process for OPA 94. However, the Board was not made aware of any provisions of the applicable planning documents that require the completion of other

transportation studies or for a more comprehensive traffic impact assessment for the Secondary Plan area prior to the approval of OPA 94.

[60] Furthermore, it appears that the Class EA and Class EA Addendum provide a comprehensive analysis of traffic generation in the Secondary Plan area. The Board understands that the Class EA focused on the extension of the Legacy Park Drive eastward through the Secondary Plan area, including the potential location of the East-West Arterial, and extending further eastward. The Board heard that the Class EA Addendum was completed at the direction of City Council in response to concerns raised by the Appellant. The Class EA Addendum (Exhibit 5, Tab 3E), includes a traffic analysis and it focusses on the East-West Arterial and different alternatives for accessing the Appellant's lands. The traffic analysis considers the traffic generated for the entire Secondary Plan area and predicts traffic volumes at the proposed intersections of the East-West Arterial with the existing roads and the roads proposed in OPA 74. While a comprehensive transportation analysis would include detailed projections for all major roads and intersections in the Secondary Plan area, the Class EA Addendum has included an analysis using traffic generation for the entire area and the alternatives considered are based upon this analysis.

[61] The Board understands that the Appellant is not satisfied with the results of the Class EA and the Class EA Addendum and requested a Part II order. The Appellant contended that the traffic studies carried out for the Class EA and the Class EA Addendum should be considered in conjunction with OPA 94. However, to link the studies undertaken for the Class EA and the Class EA Addendum to the process for OPA 94 would bring the planning for the evaluation of the alternatives for the East-West Arterial through the extension of Legacy Park Drive into the secondary planning process contrary to the requirements of s. 7.8.2 of OPA 74.

[62] The Appellant accepted all of the provisions of OPA 74 that apply to the determination of transportation needs and impacts in the area covered by the

Secondary Plan including the area under OPA 94 when it settled its appeal and OPA 74 was approved by the Board. .

[63] In addition, the Board heard in the submissions on the first motion that through its request for a Part II order regarding the Class EA, the Appellant agreed to potential mediation and that a mediation had been scheduled for September 13 and 14, 2016. Ms. Pepino acknowledged that the Appellant's issues could be resolved through the mediation and then there would be no need for a Board hearing.

### **Residential Densities**

[64] With regard to the second factor noted above that appears to form the basis of the appeal, much of the concern raised for increased traffic has been attributed by the Appellant to the growth from the proposed residential land use that will result from Neighbourhood designations in OPA 94. However, the traffic projections used in the Class EA Addendum were not based upon the density numbers in OPA 74 which apply to the areas proposed to be designated as Neighbourhood in OPA 94. The densities used in the traffic analysis in the Class EA Addendum were provided by the City planning staff based upon the potential future need for intensification of residential development of these areas. The densities used for the traffic analysis in the Class EA Addendum are well beyond the residential densities permitted in OPA 94. The Board heard that in order to implement these densities, one or more Official Plan amendments would be required. While traffic from these densities may eventually materialize, they are not a direct result of OPA 94.

### **Specific Reasons for Appeal**

[65] In the letter attached to its notice of appeal of OPA 94, the Appellant raised four specific reasons for the appeal (Exhibit 4, Tab 2DD). The reasons can be summarized as follows:

1. The technically preferred alternative identified through the Class EA will restrict access to and from the 7<sup>th</sup> Concession Road,
2. Policy 7.6.17 of the Secondary Plan intends to promote a pattern of roads and blocks in the community to provide for the most efficient access between land uses, whereas the access designation for the East-West Arterial in the Secondary Plan which is the basis for the technically preferred alternative in the Class EA will result in an inefficient and unworkable traffic pattern and negatively impact lands in the western part of the Secondary Plan area including the Appellant's lands. Formalization of the access point through OPA 94 will detrimentally affect future access and negatively impact the future use and development of a number of properties along the 7<sup>th</sup> Concession Road including the Appellant's lands.
3. OPA 94 has not addressed the Appellant's identified concerns and consideration of the alignment of the road and design of the road intersections should have been finalized prior to enacting the land use designations and permissions in OPA 94 in order to determine the effect on the western part of the Secondary Plan area.
4. Consideration of the alignment of the East-West Arterial and the intersection with the 7<sup>th</sup> Concession Road should have been finalized prior to deciding upon the land use designations and permissions in OPA 94 to determine the collective effects on the western portion of the Secondary Plan area.

[66] The above reasons all relate to the work undertaken through the Class EA for the East-West Arterial and to the traffic numbers generated using residential densities far in excess of those permitted in OPA 94. They also contend that OPA 94 finalizes the road network and access points. However, the Major Road Plan in OPA 94 only shows roads in the north part of the Secondary Plan area and the text indicates that they are conceptual. The OPA 94 Major Road Plan does not include the East-West Arterial.

Furthermore, OPA 94 states, "Future possible subdivision plans will further refine the location of the proposed roads." (Exhibit 4, Tab W, p. 314).

[67] The first reason noted above is a matter that directly involves the planning exercise being undertaken for the Class EA and the intersection with the 7<sup>th</sup> Concession Road.

[68] The second reason expresses concern for compliance with s. 7.6.17 of OPA 74 based upon work undertaken for the Class EA and Class EA Addendum. With regard to the concern for formalization of the access point through OPA 94, the Board agrees with the Affidavit of Mr. Cooke, that access points are not formalized through OPA 94. As noted earlier, the Major Road Plan in OPA 94 is conceptual as is the Major Road Plan in OPA 74. Conceptual access points were shown in both OPAs. In reviewing the Class EA Addendum, it is clear that a major part of that exercise is to finalize access to the Appellant's larger parcel. With regard to s. 7.6.17 (Exhibit 4, Tab 2D, p. 91), from the policies of the OPA 74, it is clear to the Board that efficient access between land uses is intended to be provided by a combination of the planning for the East-West Arterial and intersections through the Class EA, improvements to Walker Road, and through Transportation Impact Studies to be undertaken at the time of development applications. It is premature to determine there are issues based only on the analysis undertaken through the Class EA and Class EA Addendum.

[69] With regard to the third reason, the Appellant contends that a more comprehensive transportation analysis should have been undertaken prior to the enactment of the land use designations and permissions in OPA 94. However, this concern is based upon work carried out in conjunction with the Class EA and Class EA Addendum that anticipates traffic from residential densities that are substantially in excess of those permitted in OPA 94. This is not evidence that there will be traffic issues. As noted earlier, the Board was provided with no policies that require the completion of a traffic analysis prior to adoption of a secondary plan.

[70] The fourth reason noted above is again based upon issues resulting from work undertaken for the Class EA and Class EA Addendum. The Board understands that the intersection of the East-West Arterial and the 7<sup>th</sup> Concession Road is predicted to have a level of service “F” during peak hours. However, this is assuming traffic from densities well in excess of those permitted through OPA 94. As stated earlier, the planning related to the East-West Arterial is required through OPA 74 to be carried out through the Class EA and Class EA Addendum. Furthermore, all of the alternatives considered in the Class EA Addendum predicted a level of service “F” at the intersection of the East-West Arterial and 7<sup>th</sup> Concession Road, including the alternative proposed by the Appellant.

[71] As noted earlier, the in-force policies of OPA 74 require that the Class EA study which evaluates alternatives for the extension of Legacy Park Drive including the East-West Arterial should be carried out independent of any and all secondary planning processes and should identify a technically preferred alternative and corresponding alignment, if applicable. The issues identified by the Appellant relate to the location of the proposed alignment of the East-West Arterial, intersections with existing roads, and access to the Appellant’s lands. If the technically preferred alternative and corresponding alignment are required by OPA 74 to be determined through the Class EA process and should be considered apart from any and all secondary planning processes, how is the Board then to consider these issues in an appeal of OPA 94?

[72] The only conclusions that the Board can take from the Appellant’s submissions are that there may be traffic issues along sections of the proposed East-West Arterial and roads intersecting it created by the amount of traffic resulting from densities of residential development in excess of those permitted through OPA 94. The Board agrees with Ms. Bull’s contention that the Appellant has not provided any sustainable evidence through the submissions, including the affidavits, to support the position that there would be traffic issues arising from the approval of OPA 94.

[73] The Board finds from the submissions that the Class EA process is the required means of addressing concerns about inefficiency of traffic flow at intersections and access in the vicinity of the East-West Arterial.

### **Other Issues**

[74] The Appellant indicated that it should be allowed to appeal OPA 94, because in OPA 74, there was no certainty that the area designated as Future Urban Area in OPA 74 would be designated to permit residential uses in OPA 94. The Appellant indicated that in OPA 74, the area proposed to be designated for residential use was only identified in the Development Plan that was attached as Appendix A to OPA 74, but did not form part of the amendment. The Appellant maintained that through OPA 74, the Neighbourhood designation to provide for residential uses was not implemented and it was only identified as a likely possibility that residential use would be permitted in the future (Exhibit 5, p. 4).

[75] However, s. 7.7.9.4 of OPA 74 states the following:

Subject to the completion of the Windsor Airport Cargo Facility Study and where it has been determined that the development of the Future Urban Area will not detrimentally effect the current or future operations of the Windsor International Airport, Council shall redesignate the Future Urban Area to the land use designations as established in the Development Plan. (Refer to Appendix "A" of this report) (Exhibit 4, Tab 2D, p.104-105).

[76] It is clear from the wording of the above section that if the results of the Windsor Airport Cargo Facility Study were favourable and it was determined that the residential use would not affect the future operations of the airport, that in order to comply with OPA 74, City Council is obligated to redesignate the Future Urban Area to the Neighbourhood Designation identified in Appendix A of OPA 74. The area identified as Neighbourhood (Low Density) and Neighbourhood (Medium Density) in OPA 94 correspond exactly to the areas proposed for residential designations in OPA 74.

[77] The wording of this section makes the designation for residential uses more than a likely possibility. In order to comply with OPA 74, Council is required to follow through with the Neighbourhood Designation to permit residential uses.

[78] According to the submissions, the Appellant's concerns in its appeal of OPA 74 related to the permitted uses for its lands and did not involve traffic issues or the future designation for residential use. The Appellant contended that it would have been premature to express concerns about traffic issues since the proposed road system was conceptual and the residential designations were not implemented. However, since OPA 74 contained no requirement for a comprehensive transportation analysis, the Appellant could have raised concern about the method for assessing Transportation Impacts. Also, as noted above, the residential designations were clearly anticipated in OPA 74 and concerns could have been raised at that time.

[79] The Board concludes from the submissions, that at the time when final approval of OPA 74 was issued, the Appellant was satisfied with the provisions for assessing transportation impacts and was not concerned about the future residential designations.

## **CONCLUSIONS**

[80] From the submissions, the Board concludes that the concerns raised by the Appellant are based upon matters that are required by the in-force planning provisions to be considered apart from the secondary planning process and are based upon potential traffic issues that may be generated by residential densities that are substantially in excess of those that will be permitted by OPA 94.

[81] Apart from the transportation requirements of the in-force planning documents, at a hearing, the Board could approve or refuse all or part of the plan if the planning grounds raised by the Appellant identified a significant public interest that would be affected by the Board's decision in the appeal. However, the submissions primarily identify interests related to the Appellant's lands. The potential for a broader public

interest to be effected by the planning grounds raised has not been established in the submissions.

[82] Based upon these considerations, the Board could not approve or refuse all or part of the plan based upon the planning grounds raised by the Appellant if they came forward in the hearing of the appeal.

[83] In her argument, Ms. Pepino indicated that the motion should be dismissed and the issues raised by the Appellant should be tested through the examination of evidence at a hearing and that the Board's decision on the motion should not be based upon whether or not the Appellant's evidence will be upheld at a hearing. On the motion, the Board must only determine if all or part of the plan could be approved or refused based upon the planning grounds. The Board recognizes this distinction raised by Ms. Pepino.

[84] However, in this case the provisions of OPA 94 are clear that the issues raised by the Appellant are required to be dealt with through a separate process that is the Class EA. The key provisions of OPA 94 in s. 7.8.2 identify the structure of the process to be used in assessing transportation issues. The essential structure would not be altered through the consideration of opinion evidence at a hearing. In light of these provisions, if the Board were to allow the appeal to go forward to a hearing it would constitute an abuse of process and an inefficient use of the Board's time.

[85] The Board has carefully considered the authorities submitted by both parties. In the Board's decision, *Meloche v. Windsor (City)* 2015 CarswellOnt 10264, in dealing with a motion to dismiss an appeal, Vice-Chair Seaborn found that traffic issues in that case were legitimate land use planning concerns and the issue needed to be tested through the evidence at a hearing. However, it is noteworthy that the motion was allowed in part and a number of issues that had been raised in the planning grounds were determined not to be worthy of adjudication and that they should not move forward to a hearing. In the current case, the Board has determined that all of the issues raised

could not be the basis for approving or refusing all or part of the plan and therefore the motion is being allowed in its entirety.

[86] In the Board's decision, *Nashville Landowners Group Inc., Re*, 2010 CarswellOnt 4063, Vice-Chair Zuidema upon a motion to dismiss a hearing found that some issues should not move forward to a hearing and that others should have the benefit of full evidence at a hearing. It was determined that an issue regarding the extension of 400 series highways should go forward to a hearing in spite of the submissions of the moving party that the Board could not change the decision of the Province regarding the extension of the highways. In that case Vice-Chair Zuidema found that evidence related to traffic impacts from the extension of the highways could be relevant. There are some similarities to the current case in that the Appellant's traffic concerns are also being considered through a provincial process that is the Class EA. However, in the current case, the provisions of OPA 74 specifically indicate that planning for the alignment of the East-West Arterial is to be undertaken through the Class EA process. The above-noted decision does not indicate similar provisions in the documents relevant to that case that would defer traffic considerations resulting from the extension of the 400 series Highways to the Province.

[87] The Appellant also provided the Board decision *Fors, Re*, 2015 CarswellOnt 5263 in which Member Chee-Hing denied a motion to dismiss an appeal without a hearing and found that legitimate planning grounds had been raised. However, as noted in paragraph 15 of that decision, the core of the motion to dismiss was the contention that the appeal had been *de facto* abandoned which Member Chee-Hing found was not the case. There is no such contention in the current appeal.

[88] Based upon the above, the Board finds that nothing raised in the authorities provided by the Appellant changes the conclusions of the Board regarding the motion and the City's authorities support the Board's findings.

[89] In view of the above findings and after fully considering the submissions, the Board finds that the Appellant has not raised planning grounds upon which the plan could be approved or refused in whole or in part pursuant to s. 17(45) (a) (i). In making this decision the Board has been guided by its jurisprudence, including the decision *Toronto (City) v. East Beach Community Assn*, 1996 CarswellOnt 5740. The Board has carefully examined the grounds for the appeal and through review of the submissions has determined that based upon the relevant policies and provisions of planning documents, the issues raised are not worthy of adjudication and could not provide the basis for refusing or approving all or part of the plan. Therefore, the Board will allow the City's motion and dismiss the appeal without holding a hearing.

[90] The City indicated that it was reserving its right to request costs. The Board has not received submissions on this point. However, nothing in the Board's findings suggest that the Appellant has acted in a manner that would warrant the awarding of costs.

[91] The appropriate orders for both motions are provided below.

## **ORDER**

[92] Upon appeal to this Board by Windsor Christian Fellowship regarding the approval by the City of Windsor of Official Plan Amendment No. 94;

And upon motion to this Board by the City of Windsor for an Order dismissing the appeal under subsection 17(45) of the *Planning Act*;

And upon motion to this Board by Windsor Christian Fellowship for adjournment of the hearing regarding the motion by the City of Windsor to dismiss the appeal;

After hearing both motions;

The Board orders that the motion by Windsor Christian Fellowship to adjourn the motion brought by the City of Windsor is dismissed;

The Board orders that the motion by the City of Windsor is granted and the appeal by Windsor Christian Fellowship against the approval of Official Plan Amendment No. 94 is dismissed.

*“C. Conti”*

C. CONTI  
MEMBER

*“Sharyn Vincent”*

SHARYN VINCENT  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Ontario Municipal Board**

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