

ISSUE DATE:

February 1, 2013



PL110913

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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

Appellant: Ministry of Municipal Affairs and Housing
Subject: Part 1 of Proposed Official Plan Amendment No. 4-2006
Municipality: Regional Municipality of Niagara
OMB Case No.: PL110913
OMB File No.: PL110913

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Bill Miller
Appellant: Ministry of Municipal Affairs and Housing
Subject: Proposed Official Plan Amendment No. 5
Municipality: Town of Fort Erie
OMB Case No.: PL110913
OMB File No.: PL110914

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Bill Miller
Appellant: Ministry of Municipal Affairs and Housing
Subject: Proposed Official Plan Amendment No. 65
Municipality: Town of Fort Erie
OMB Case No.: PL110913
OMB File No.: PL110915

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Ministry of Municipal Affairs and Housing (MMAH)
Subject: Proposed Official Plan Amendment No. D.10.M.15.20
Municipality: Town of Fort Erie
OMB Case No.: PL111293
OMB File No.: PL111293

APPEARANCES:

<u>Parties</u>	<u>Counsel</u>
Ministry of Municipal Affairs and Housing	C. Young S. Lee
Bill Miller 1049506 Ontario Inc. Bridgeburg Holdings Inc.	J. Walker
Regional Municipality of Niagara	P. DeMelo
Town of Fort Erie	E. Lustig

DECISION DELIVERED BY C. HEFFERON ON A MOTION FOR DIRECTION AND ORDER OF THE BOARD

[1] The subject application by way of a Notice of Motion was brought to the Board pursuant to O/Reg. 311/06 of the *Places to Grow Act* by Mr. J. Walker, counsel for Bill Miller, 1049506 Ontario Inc. and Bridgeburg Holdings Inc. (together, “Bill Miller”). O/Reg. 311/06 provides transitional matters for the Greater Golden Horseshoe (“Growth Plan”) which came into effect on June 16, 2006.

[2] At this motion hearing, Bill Miller requested that the Board Decision and Order reflect the fact that the Town of Fort Erie (“Town”) had made a valid request to amend its own Official Plan and the Regional Policy Plan of the Regional Municipality of Niagara (“Region”) which was received by the Region prior to June 16, 2006, when the Growth Plan came into effect.

[3] The motion was supported by both the Town and the Region.

[4] The Ministry of Municipal Affairs and Housing (“Ministry”) opposed the motion.

[5] To argue this motion, the parties submitted five exhibits, which are listed in the lead file as Exhibits M1 to M5.

AFFIDAVITS ENTERED

1. Affidavit of Richard Brady was entered to the evidence as Exhibit M2, Tab 2.
2. Affidavit of John Darbyson was entered to the evidence as Exhibit M3, Tab 2.
3. Affidavit of Thomas Smart was entered to the evidence as Exhibit M3, Tab 3.
4. Affidavit of Rino Mostacci was entered to the evidence as Exhibit M3, Tab 4.
5. Affidavit of John Dimitrieff was entered to the evidence as Exhibit M3, Tab 5.
6. Affidavit of Ronald Reinas was entered to the evidence as Exhibit M3, Tab 6.

[6] None of the affiants' evidence was tested by cross-examination.

BACKGROUND

[7] The appeal that is the subject of this Notice of Motion is in respect of a request by the Town to the Region to expand the existing boundary of the Bridgeburg urban area to include Bill Miller's approximately 37 ha of land located about two km from the existing limits of the settlement area and the Anger Street Sewage Treatment Plant.

[8] The Bridgeburg Secondary Plan, which includes the expanded boundary, amends both the 2001 Official Plan ("old OP") and draft 2006 Official Plan ("new OP") of the Town. The Bridgeburg Secondary Plan is also known as Official Plan Amendment No. 65 ("OPA 65") in the old OP and Official Plan Amendment No. 5 ("OPA 5") in the new OP.

[9] The Town's request to the Region was prompted by a series of letters between 2002 or earlier and 2005 from Messrs. Bill and Jim Miller to the Town. The letters were exhibited to the evidence as Exhibit M2, Tabs 2A-2D.

[10] Working with what the Board was informed is an experienced developer of 'lifestyle' communities, Bill Miller proposes to develop on its lands, a community totalling approximately 538 dwelling units. The lands in question are shown in Exhibit M3, Tab 2B.

[11] On September 19, 2005, Town council adopted the following resolution:

The urban boundaries be expanded east of Thompson Road and south of Niagara Boulevard and that those lands be included in the Draft Official Plan for submission to the Region for approval.

[12] The resolution was included in the “Summary of Recommendations” contained in Report No. CDS-119-05 (“Report”) prepared by Town staff for the Town’s Council-in-Committee. The Board was advised that the Report, which was dated September 30, 2005, was received by the Region shortly thereafter, along with a draft of the Town’s revised 2005 Urban Land Needs Study (“ULNS”). The resolution requested that the (Bill Miller) lands be included in the draft of the Town’s draft new OP for submission to the Region for approval and that the Region implement both what were described as the proposed “refinement” to the urban boundaries and the “removal of deferrals” as shown in Appendix 4 to the Report. The Report was exhibited to the evidence as Exhibit M3, Tab G.

[13] On September 11, 2006, the Town adopted its new OP and on September 30, 2006, forwarded it to the Region, which is the approval authority, with a request that the Region approve (the new OP) and amend the Regional Policy Plan correspondingly. The Town pointed out in the third paragraph of the (September 30, 2006) letter that this letter follows up on the Town’s September 26, 2005, request (to the Region) to expand the urban boundary to include the Bill Miller lands. The Town describes this September 30, 2006, letter as its “application” and includes in the (application) package all of the information that it assumes the Region will require. This letter is exhibited to the evidence as Exhibit M3, Tab H.

[14] On August 5, 2011, which is after a gap of five years, the Region approved both of the requested OPAs and the new OP. It also adopted Regional Policy Plan Amendment No. 4-2006 (“RPPA 4-2006”) which amends the Regional Policy Plan. Part 1 of RPPA 4-2006 includes the revised urban area boundary in the new OP, and includes the Bill Miller lands within the revised urban boundary.

[15] On August 25, 2011, the Ministry appealed all four of these instruments. In its Notice of Appeal letter, which is exhibited to the evidence as Exhibit M4, Tab M, the Ministry writes that the revised boundaries include some 131 ha, which includes Bill

Miller's approximately 37 ha of previously designated *Rural* land within the proposed expanded Bridgeburg urban area. The Notice of Appeal also contended that the process whereby the urban boundary was revised is contrary to both policy 1.1.2 of the 2005 Provincial Planning Statement ("PPS") and policy 2.2.8.2 of the Growth Plan.

[16] It was pointed out during the motion hearing that Messrs. Bill and Jim Miller at some time in the past had received planning permission to develop 26 estate-type homes (with private septic tanks) on a 30-acre portion of the (Bill Miller) lands. The lands referred to are included in the (Bill Miller) lands that are the subject of this appeal.

CORE ISSUE

[17] The parties agreed that the core issue in this motion hearing is whether the September 30, 2005, letter with attachments (Exhibit M3, Tabs E, F, and G) from the Town to the Region constitutes a valid "request" under the transition provisions of s. 2(a) of O/Reg. 311/06 of the *Places to Grow Act*.

PROCEEDINGS

The Responding Party's Argument

[18] The responding party (that is, the Ministry) argued that a valid request under O/Reg. 311/06 was not received by the Region until September 26, 2006, which was after the date the Growth Plan came into effect. As the Growth Plan came into effect on June 16, 2006, which is prior to the (September 26, 2006) date the request was received by the Region, the Ministry argued that the policies of the Growth Plan apply to (the Bill Miller) lands.

[19] Section 2(a) of O/Reg. 311/06 provides:

For the purposes of this Regulation, a matter is deemed to have been commenced, in the case of a request for an official plan amendment, on the day the request is received.

[20] Section 1(1) of O/Reg. 311/06 defines “matter” as an “application, proceeding or request”.

[21] The Ministry further argued that that s. 2(a) of O/Reg. 311/06 of the *Places to Grow Act* implicitly directs any request or application to s. 22 of the *Planning Act*.

[22] Section 22 (1) (a) of the *Planning Act* provides that:

If a person or public body requests a council to amend its official plan, the council shall forward a copy of the request and the information and material required under subsections (4) and (5), if any to the appropriate approval authority, whether or not the requested amendment is exempt from approval;

[23] Section 22(4) of the *Planning Act* provides that:

A person or public body that requests an amendment to the official plan of a municipality or planning board shall provide the prescribed information and material to the council or planning board.

[24] Section 22(5) of the *Planning Act* provides that:

A council or planning board may require that a person or public body that requests an amendment to its official plan provide any other information or material that the council or planning board considers it may need, but only if the official plan contains provisions relating to requirements under this subsection.

[25] The responding party thus contended that for the request to be valid, there had to have been both an act of asking and as well, that act of asking had to constitute a privately-initiated request. Although the request was initiated by Bill Miller, it came to the Region from the Town. The responding party maintains that the request is therefore subject to the transition rules in O/Reg. 311/06 of the *Places to Grow Act*. The transition rules are found in s. 3(1) to 3(5) of O/Reg. 311/06.

[26] The transition rules continue in s. 3.1(1) to s. 3.1(2) of O/Reg. 311/06. Section 3.1(1) and 3.1(2) of O/Reg. 311/06 pertain to uses permitted by a minister’s order and is not germane to the matter before the Board.

[27] Section 3(1) of O/Reg. 311/06 provides that:

A matter that is described in clause 2(a) or (b) and commenced before June 16, 2006 shall be continued and disposed of as set out in sections 4 and 5, subject to subsections 3.1 (1.1), 3(2) and 3(3).

[28] And, s. 3(5) of O/Reg. 311/06 provides that:

A matter that is described in section 2 and commenced on or after June 16, 2006 shall be continued and disposed of in accordance with the (Growth) Plan.

[29] The responding party cited other information in support of its position as well. For example, counsel pointed to the date on RPPA 4-2006, which amends the Regional Policy Plan. It argued that “RPPA 4-2006” refers to the 4th amendment of the Regional Policy Plan that had been received in 2006. Since the 3rd amendment to the Regional OP was received on May 30, 2006, the request for the 4th amendment must logically antedate that request.

The Moving Party’s Argument

[30] The moving party, Bill Miller, argued that the subject matter was commenced when the Town’s request was received by the Region – that is, on or about September 30, 2005.

[31] Section 2(a) of O/Reg. 311/06 provides:

For the purposes of this Regulation, a matter is deemed to have been commenced, in the case of a request for an official plan amendment, on the day the request is received.

[32] As noted in paragraph 20, s. 1(1) of O/Reg. 311/06 defines “matter” as an “application, proceeding or request”.

[33] The moving party argued that the matter commenced (that is, its request was received) on or about September 30, 2005, when the Town sent the Report (and covering request letter from Dan Heyward, senior planner) to the Region. The Report included the Summary of Recommendations, which specified exactly what the Town

was requesting. This included amendments to both the Town OP and the Regional Policy Plan.

[34] The moving party contended that for its request to have been valid under O/Reg. 311/06 of the *Places to Grow Act*, there had only to have been an “act of asking” and a “received”, both of which it argued occurred around September 30, 2005. This request or act of asking for an amendment to (the Town’s) new OP, as well as the corresponding amendment to the Regional Policy Plan, are subject to O/Reg. 311/06.

[35] The moving party also argued that even though the “application” for the requested official plan amendments with all of the required information was not sent to the Region until September 26, 2006, the September 30, 2005 request (and attendant receipt of this request by the Region) satisfies s. 2(a) of O/Reg. 311/06.

[36] The moving party argued that accordingly the Town’s application to the Region requesting approval of OPA 5 as well as a corresponding amendment to the Regional Policy Plan is not subject to the policies of the Growth Plan because the request to amend the boundary of the urban area to include the Bill Miller lands (and other lands totalling some 131 ha) was received by the Region prior to June 16, 2006. The moving party pointed out that it was in what its counsel described as “an abundance of caution” that the Town also adopted OPA 65, which amends the old OP to include the Bill Miller lands within the urban boundary. The moving party maintains that the OPA 65 is also not subject to the provisions of the Growth Plan either.

[37] This position was supported by the Town and was accompanied by sworn affidavits from five former planning directors for the Town who had either served or had personal knowledge of the subject request. The affidavits were entered to the evidence as Exhibit M3, Tabs 2(J), 3, 4, 5 and 6 as well as Exhibit M5, Tab 2. In addition, the affidavit of the Town’s current Director of Community and Development Services (that is, planning director), Richard Brady, was entered to the evidence as Exhibit M2. The affidavits of all of these experienced planning officials support Bill Miller’s argument that the Town was then, and remains today, satisfied that a valid request to revise the boundary of the Bridgeburg urban area was received on or about September 30, 2005.

As noted above, the Board was advised that these affidavits were not tested in cross-examination.

[38] Mr. DeMelo, counsel for the Region, argued in his oral submission that the Region was also satisfied in 2005 and remains so today that a valid request to revise the boundary of the Bridgeburg urban area (by including the Bill Miller lands) was received by the Region on, or about, September 30, 2005.

[39] In reply argument, counsel for the moving party, Mr. Wilker, offered a personal anecdote in response to the Ministry's submission that RPPA 4-2006 must antedate RPPA 3-2006. He pointed out that as a former professional land use planner with experience at the municipal level, he can attest that the numbering of an instrument is simply an administrative tool used to keep track of when the initial request is made. It does not signify when the complete application was made. His statement was not disputed.

FINDINGS

[40] After careful consideration of the submissions of all the parties and the evidence provided in the form of sworn affidavits from former and current planning directors for the Town, the Board finds that the Town made a valid request under s. 2(a) of O/Reg. 311/06 of the *Places to Grow Act* in its letter to the Region dated September 30, 2005.

[41] The Board finds the argument of Mr. Wilker, counsel for the moving party (Bill Miller), to be the more persuasive. Mr. Wilker argued that s. 2(a) of O/Reg. 311/06 of the *Places to Grow Act* does not direct the requesting party to s. 22 of the *Planning Act*. The latter provides that a person or a municipality requesting an official plan amendment must submit the information prescribed in s. 22 (4) and (5) of the *Planning Act* at the same time that it submits the request.

[42] The Board finds that the comprehensive package of information listed in the Schedule to O/Reg. 311/06 which is required to complete an application, need not be submitted at the same time as the valid request is made. The Board finds that it is sufficient simply to provide a description of the lands with the request so that the official receiving the request is able to identify both what is being asked and the property to

which the act of asking pertains. In the case of the September 30, 2005, request submitted by the Town, the Board finds that the lands in question are adequately identified (in Schedule 4) in the Report, which is identified above.

[43] The complete package of information required was submitted about one year after the request was made, which it was not disputed was after the enactment of the Growth Plan. The complete application was received by the Region on September 26, 2006, which is one year after the request was received and approximately three months after the Growth Plan received legislative approval.

[44] Having considered the arguments of all counsel, the Board finds that the Ministry's case requires an interpretation of s. 2(a) of O/Reg. 311/06 that is not supported by a plain and simple reading of the words on the page.

[45] On the other hand, the Board finds that the moving party's argument provided sufficient reason to accept that, at the very least, Bill Miller deserves the benefit of the doubt and that its communications with Town officials between 2002 and 2005, which were exhibited to the evidence as Exhibit M2, Tabs 2A to 2D, and the Town's September 30, 2005 letter to the Region with the accompanying Report, constitute a valid request to amend the Town boundaries to include the Bill Miller lands.

[46] The Board cautions that this finding is not to be construed as giving Bill Miller additional development permission for its lands.

ORDER

[47] The Board orders that the Motion is allowed.

[48] The following planning instruments are therefore transitioned:

1. Part 1 of Niagara Regional Policy Plan Amendment 4-2006
2. Town of Fort Erie OPA 65
3. Town of Fort Erie OPA 5
4. The New Town of Fort Erie Official Plan

[49] The parties are directed to contact the Board planner, Tamara Zwarycz, to arrange a hearing date.

[50] No further notice is required.

“C. Hefferon”

C. HEFFERON
MEMBER