

**Re: OLT-21-001728, Niagara Falls: How many witnesses, how many days**


Kenneth Westhues <kwesthues@uwaterloo.ca>

Fri 6/17/2022 2:47 PM

To: Tamara Zwarycz <Tamara.Zwarycz@ontario.ca>

Cc: Rocky Vacca <rvacca@sullivan-mahoney.com>; Tom Halinski <thalinski@airdberlis.com>

Bcc: Anne Westhues <awesthue@hotmail.com>

 1 attachments (294 KB)

5411-VRBO220617.jpg;

Dear Ms. Zwarycz:

I've received no response from anyone to my email (below) of 29 May 2022.

Please let me know if there is any action I can take toward expediting the hearing of my appeal. If the tribunal would like me to submit relevant documents that are not in the Municipal Record, I would be pleased to do so. If the tribunal would like me to submit a more detailed argument for why the owner (Mr. D'Souza) and the applicant/manager (Mr. Pinter) should be summoned to testify, I would be pleased to do so. If, according to some written or unwritten rule, I should be doing something else at this point, I would be grateful to be directed to that rule.

So that the tribunal may understand why I am eager to expedite the hearing, attached please find a screenshot of the current ad for the subject property, 5411 River Road, on VRBO (Vacation Rental By Owner). It shows that the property has already been removed from the residential housing market and is almost fully booked for tourist accommodation for the rest of June and for July. Bookings are shown for as late as October. Thus, the owner and manager are now using the property, with the apparent acquiescence of the city, in a way that is contrary to the city's Official Plan and forbidden by the zoning by-law currently in place.

Respect and kind regards to all,

Kenneth Westhues  
5419 River Road  
Niagara Falls, Ontario L2E 3H1

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**From:** Kenneth Westhues <kwesthues@uwaterloo.ca>

**Sent:** Sunday, May 29, 2022 10:07 PM

**To:** Tamara Zwarycz <Tamara.Zwarycz@ontario.ca>

**Cc:** Rocky Vacca <rvacca@sullivan-mahoney.com>; Tom Halinski <thalinski@airdberlis.com>

**Subject:** OLT-21-001728, Niagara Falls: How many witnesses, how many days

Dear Ms. Zwarycz, with copies to Mr. Vacca and Mr. Halinski,

This is further to my reply of 22 May to your request that each party let you know "how many witnesses you intend to call and how many days you think will be required for you to present your argument."

I answered that I want to call two witnesses, the co-owner of the subject property (Mr. D'Souza) and the manager, Mr. Pinter, who is also the applicant for the OPA and ZBA. I said I would limit my presentation of evidence and argument to one day -- or a day and a half, if the tribunal would like also to hear from City Councillors on opposing sides of the issue.

In their replies, neither Mr. Vacca nor Mr. Halinski has given you the information you requested. I am puzzled that neither has said how many witnesses, expert or otherwise, he intends to call or how many days he thinks will be required for him to present his argument, while at the same time each of them wants to know whether I intend to

call any expert witnesses.

Since I gave no indication, either in my reply to your email or in my appeal statement, that I intend to call one or more expert witnesses, it is a fair and an accurate inference that I do not intend to do so. There are many OLT cases in which the tribunal needs to hear from experts in engineering or other fields, but I do not believe this is one of them. The tribunal is fully capable of understanding the issues in this case without expert help. In a general way, Justice Sopinka's caution in 1994 is worth remembering, that experts "must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts."

Respect and kind regards to you and to the lawyers for the applicant and the city.

Kenneth Westhues  
5419 River Road  
Niagara Falls, Ontario L2E 3H1

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**From:** Tom Halinski <thalinski@airdberlis.com>  
**Sent:** Sunday, May 29, 2022 4:48 PM  
**To:** Tamara Zwarycz <Tamara.Zwarycz@ontario.ca>  
**Cc:** Kenneth Westhues <kwesthues@uwaterloo.ca>; Rocky Vacca <rvacca@sullivan-mahoney.com>  
**Subject:** RE: OLT-21-001728 (OPA 139 & ZBA 2021-96, Niagara Falls) - Scheduling hearing

Ms. Zwarycz,

The City agrees that it would be helpful to the process to understand whether Mr. Westhues intends to call any expert witnesses. From previous dealings with Mr. Westhues in connection with another, recent OLT matter, I recall that he appreciates the difference between expert and lay evidence at the Tribunal, as well as the need for evidence to support a party's submissions to the panel.

I can confirm that the City does not intend to take the highly-unusual step of calling any members of Council as witnesses.

Please note that Mr. Lustig, who is one of my instructing clients, does not need to be copied on correspondence from the Tribunal.

Thank you.

**Tom Halinski**  
**Aird & Berlis LLP**

**T** 416.865.7767  
**E** thalinski@airdberlis.com

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If you did receive this email in error, the information in this email may be confidential and must not be disclosed to anyone.

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**From:** Rocky Vacca <rvacca@sullivan-mahoney.com>  
**Sent:** May 22, 2022 5:27 PM  
**To:** Tamara Zwarycz <Tamara.Zwarycz@ontario.ca>  
**Cc:** elustig@niagarafalls.ca; Tom Halinski <thalinski@airdberlis.com>; kwesthues@uwaterloo.ca  
**Subject:** Re: OLT-21-001728 (OPA 139 & ZBA 2021-96, Niagara Falls) - Scheduling hearing

**CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.**

Ms. Zwarycz,

I object and will be objecting at the CMC to a number of Mr. Westhues' submissions in his email. First, the reference to the 2012 OMB case and the statement that this case is a replay of that case is entirely false. LPAT approved an OPA in respect of the subject use last year. Mr. Westhues was present at that hearing I understand. That OPA is the current relevant policy not the policies or, more correctly, the lack of policies 10 years ago. Second, I will object vehemently to Mr. Westhues calling my client, Mr. Pinter, and the owner of the subject property, Mr. D'Souza, under summons. I will leave it up to Mr. Halinski to comment on the suggestion that Council Members ought to be called as witnesses but I wish to go on the record that I will also object to same. It appears that Mr. Westhues does not intend to call any expert witnesses. I would ask that he confirm this to be the case.

Regards,

Rocco "Rocky" Vacca  
Partner  
Sullivan Mahoney LLP  
(905)357-5863

Sent from my iPhone

On May 22, 2022, at 3:05 PM, Kenneth Westhues <[kwesthues@uwaterloo.ca](mailto:kwesthues@uwaterloo.ca)> wrote:

Dear Ms. Zwarycz,

I'm glad to know the hearing in this case is about to be scheduled. Thank you for inviting input from all parties about how many days to reserve. I'm aware the tribunal has a backlog of cases and I share the tribunal's priority on not wasting time.

For guidance as to how long the hearing should take, I have looked especially at a precedent from 2012, OMB Case PL120425. The present case is in great part a replay of that case ten years ago, which was the last time Niagara Falls City Council voted to spot-zone a vacation rental in a neighbourhood zoned residential. In that case as in this one, the appellant was the person living next door. Her name is Veronica Veal. She represented herself, and did not call any expert witnesses. The tribunal allowed her to call me as a lay witness presenting relevant evidence.

So far as I recall, the hearing of that case took just one day, 5 July 2012, or possibly two days. Mr. Vacca may remember better than I, because he represented the property owners who sought the zoning change. The present case is a little more complex. It involves both spot-zoning and spot-*Official-Planning*. But the planning issues are much the same.

In my view, two days should be sufficient for the hearing. I should be able to condense my evidence and argument to what can be presented in one day. That would include brief testimony from the two witnesses I want to call, the owner (Mr. D'Souza) and the manager (Mr. Pinter), so that the tribunal may be well informed of the facts of the case.

As indicated in my appeal submission, I leave it up to the tribunal whether it wants to hear from City Councillors on opposing sides of this dispute. If it does, this might require a further half-day of hearing. If it does not, then I remain committed to compressing my side of the case into one day.

I ask the tribunal to bear in mind an unusual aspect of this case, that while delay usually favours the party opposed to rezoning, delay in this case favours the party seeking a new, currently prohibited use of the subject property. This is because the owners and manager of 5411 River Road are already using the subject property in this new, prohibited way, having turned it into tourist accommodation in 2017 and used it for this purely commercial purpose ever since. As the party arguing for retention of the existing residential zoning and for an end to the unlicensed, illegal use of this property, I prefer as little delay as possible in scheduling of the hearing.

Like the other parties, I will accept the tribunal's scheduling of the hearing in the same way as any other of its decisions, in keeping with OLT Rule 1.3: "These Rules shall be liberally interpreted to offer the best opportunity for a fair, just, expeditious and cost-effective resolution of the merits of the proceedings."

I look forward to hearing from you further. Thanks and kind regards to you and the other parties,

Kenneth Westhues  
5419 River Road

Niagara Falls, Ontario L2E 3H1

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**From:** Zwarycz, Tamara (MAG) <[Tamara.Zwarycz@ontario.ca](mailto:Tamara.Zwarycz@ontario.ca)>

**Sent:** Tuesday, May 17, 2022 9:14 AM

**To:** [elustig@niagarafalls.ca](mailto:elustig@niagarafalls.ca) <[elustig@niagarafalls.ca](mailto:elustig@niagarafalls.ca)>; [thalinski@airdberlis.com](mailto:thalinski@airdberlis.com) <[thalinski@airdberlis.com](mailto:thalinski@airdberlis.com)>; [rvacca@sullivanmahoney.com](mailto:rvacca@sullivanmahoney.com) <[rvacca@sullivanmahoney.com](mailto:rvacca@sullivanmahoney.com)>; Kenneth Westhues <[kwesthue@uwaterloo.ca](mailto:kwesthue@uwaterloo.ca)>

**Subject:** OLT-21-001728 (OPA 139 & ZBA 2021-96, Niagara Falls) - Scheduling hearing

Good Morning Parties,

The Tribunal will be scheduling a hearing for this matter. To assist us in knowing how long of a hearing to schedule, would each party please let me know how many witnesses you intend to call and how many days you think will be required for you to present your argument. Please provide me with your estimates by the end of day Tuesday, May 24, 2022, at which point I will schedule this matter for the earliest available date on our calendar. If parties feel that more than 4 days are required for this hearing the Tribunal may schedule a Case Management Conference for this matter.

I sent you this email because I have you listed as the main contact for your party. If you have retained legal counsel, or if there is someone else I should be contacting, please let me know so that I may update our contacts list.

Tamara Zwarycz

Case Coordinator, Planner

[Ontario Land Tribunal](#)

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