

LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: 5507 River Development Inc.
Subject: Request to amend the Official Plan – Failure of the City of Niagara Falls to adopt the requested amendment
Existing Designation: Residential and Special Policy Area
Proposed Designation: Special Policy Area
Purpose: To permit a 390 unit apartment building, with a 21 storey and a 12 storey tower and underground parking
Property Address/Description: 5471, 5491, and 5507 River Road, 4399, 4407, 4413, and 4427 John Street
Municipality: City of Niagara Falls
Approval Authority File No.: AM-2017-011
LPAT Case No.: PL180376
LPAT File No.: PL180376
LPAT Case Name: 5507 River Development Inc. v. Niagara Falls (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: 5507 River Development Inc.
Subject: Application to amend Zoning By-law No. 79-200 – Refusal or neglect of City of Niagara Falls to make a decision
Existing Zoning: Residential Apartment 5E Density (R5E-840), in part, Parking (P-841), in part, and Residential Single Family and Two Family (R2-2), in part
Proposed Zoning: Residential Apartment 5F Density (site specific)
Purpose: To permit a 390 unit apartment building, with a 21 storey and a 12 storey tower and underground parking

Property Address/Description: 5471, 5491, and 5507 River Road, 4399,
4407, 4413, and 4427 John Street
Municipality: City of Niagara Falls
Municipality File No.: AM-2017-011
LPAT Case No.: PL180376
LPAT File No.: PL180377

MOTION RECORD of 2486489 ONTARIO INC.

August 16, 2021

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TAB 1

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Municipality:	City of Niagara Falls
Municipality File No.:	AM-2017-011
LPAT Case No.:	PL180376
LPAT File No.:	PL180377

NOTICE OF MOTION of 2486489 ONTARIO INC.

2486489 Ontario Inc. ("**248**") will make a motion to the Ontario Land Tribunal (the "**Tribunal**") on the 31st day of August 2021, at 10:00 a.m., or soon after that time as the motion can be heard, at the virtual hearing held at <https://global.gotomeeting.com/977599685>

PROPOSED METHOD OF HEARING: The motion is to be heard via GoTo Meeting.

THE MOTION IS FOR:

1. An Order striking issue nos. 1, 2, 3, 4, and 5 on the Issues List of Kenneth Westhues ("**Mr. Westhues**") at Attachment no.2 of the Procedural Order issued June 17, 2021 (the "**Procedural Order**") on the grounds that Mr. Westhues is not calling any evidence in relation to these issues and therefore these issues should not be before the Tribunal;
2. An Order striking issue nos. 1, 2, 3, 4, and 5 on the Issues List of Citizens for Responsible Development (Niagara Falls) ("**Citizens**") set out on the Procedural Order on the grounds that Citizens is not calling any evidence in relation to the issues and therefore these issues should not be before the Tribunal;
3. An Order striking issue no. 9 on the Issues List of the City of Niagara Falls (the "**City**") set out on the Procedural Order on the grounds that the City and 248 have agreed it is not in issue for this hearing;
4. An Order striking issue nos. 10 (Geological) and 11 (Environmental) on the Issues List of the City on the grounds that the City is not calling any evidence by a qualified

expert in relation to the issues and therefore these issues should not be before the Tribunal;

5. An Order striking that portion of the written evidence found in the Witness Statement of Andrew Bryce at paragraphs 11.1 to 11.5 inclusive and paragraphs 12.1 to 12.5 inclusive, which provide opinion on geological and environmental issues outside of Mr. Bryce's stated field of expertise, being land use planning; and
6. Such further and other relief as counsel may request and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

The Proposed Development

1. 248 is proposing the redevelopment of 5471, 5491, 5507 River Road and 4399, 4407, 4413, 4427 John Street (the "**Subject Lands**") for two high-rise residential towers, a 21-storey tower and a 12-storey tower connected by a 3-storey podium, with underground parking, providing for a total of 390 residential units and density of 494 units per hectare (the "**Proposed Development**").
2. In order to facilitate the Proposed Development, in July 2017, applications for an Official Plan Amendment and Zoning By-law Amendment were submitted to provide site specific regulations for the Subject Lands by its former owner.
3. On March 29, 2018, the refusal or neglect by the City to make decisions on these applications was appealed by the former owner of the Subject Lands pursuant to ss. 22(7) and 34(11) of the *Planning Act*.

The Longstanding Involvement of Mr. Westhues and Citizens

4. Mr. Westhues and Citizens have both been involved in these proceedings for over two years:
 - (a) By Order issued December 14, 2018, Mr. Westhues, who lives in the vicinity of the Subject Lands, was granted Party Status. He raised height, density, environmental, and geologic issues regarding the Proposed Development.

- (b) By Order issued June 10, 2019, Citizens was granted Party status in the proceeding. Citizens raised issues with traffic, environmental conditions, and community character. 248 was also granted Party status under this Order.

5. In fact, Mr. Westhues has stated he has had a four-year involvement in this matter.

The Responsibilities of Mr. Westhues and Citizens to advance Expert Evidence

6. In its Decision issued January 28, 2020, the Tribunal advised Mr. Westhues and Citizens of **their obligations to put forward a case supported by expert evidence**, learn the Tribunal Rules, learn the Roles and Obligations of a Party, and to contact the Case Coordinator to ask any questions. Mr. Westhues and Citizens knew or ought to have known that by putting forward no expert evidence, they would not be meeting their obligations to the Tribunal and the other Parties.

7. A telephone conference in this matter was held on June 2, 2020, during which both Mr. Westhues and Citizens indicated that they "do not intend to call any witnesses".

The Initial Procedural Order

8. The hearing of this matter was originally scheduled to commence on May 31, 2021; however, on February 20, 2021, it was rescheduled to August 19, 2021. This adjournment provided the Parties with an additional ten weeks to prepare for the hearing.

9. On March 29, 2021, counsel for 248 provided the Tribunal with a procedural order for issuance and copied all the Parties on the correspondence, including Mr. Westhues and Citizens. The attached order for issuance provided for the following exchange dates:

Date	Event
May 3, 2021	List of witnesses and the order in which they will be called
May 17, 2021	Meeting of expert witnesses

May 24, 2021	Agreed Statement of Facts
June 18, 2021	Exchange expert reports/witness statements, evidence outlines for summonsed witnesses
June 18, 2021	Exchange of Participant Statements
July 16, 2021	Exchange of Reply Evidence/Statements
July 23, 2021	Exchange of Visual Evidence
July 5, 20201	Hearing Plan
July 23, 2021	Joint Book of Documents
August 9, 2021	Commencement of Hearing

10. On April 28, 2021, the Tribunal issued a Procedural Order in this matter that originally provided for the above-noted exchange dates in the proceeding (the "**Initial Procedural Order**").

11. At no point did either Mr. Westhues or Citizens object to the dates set out in the Initial Procedural Order or raise any concerns.

The Other Parties Lack Witnesses to give Evidence on Certain Issues (May 3)

12. The other Parties have failed to put forward experts or properly qualified experts in their Witness Lists with respect to numerous Issues listed in the Procedural Order.

13. On May 3, 2021, 248 provided its List of Witnesses in compliance with the Initial Procedural Order.

14. 248's List of Witnesses included the following experts:

- (a) Ryan Guetter: Land Use Planner
- (b) Michael Spaziani: Urban Design
- (c) Mark Schollen: Landscape Architect
- (d) Andre Brochu: Architect
- (e) Ron Huizer: Ecologist
- (f) Mark Telesnicki: Geotechnical Engineering
- (g) Kenneth Chan: Traffic

(h) Vincent Ferraro: Wind

15. The City's List of Witnesses including the following experts:

(a) Andrew Bryce: Land Use Planning

(b) Mathew Bilodeau: Transportation

(c) Khaldoon Admad: Urban Design

16. The City lists no witnesses with respect to geology or ecology.

17. Neither Mr. Westhues nor Citizens provided their List of Witnesses on the exchange date required by the Initial Procedural Order or at all.

The Agreed Statement of Facts and the Lack of the Other Parties' Expert Evidence

18. In compliance with the Procedural Order, the land use planning experts retained by 248 and the City held a videoconference on May 13, 2021 to try to resolve and reduce the issues for the Hearing and prepare a Statement of Agreed Facts and Issues. Mr. Westhues and Citizens did not participate in this meeting as they had not submitted Witness Lists to identify any experts as required by the Procedural Order.

19. It would defeat the purpose of the experts' meeting (to try to resolve issues) if either Mr. Westhues or Citizens were able to put forward issues for which they have no evidence of an expert. It would also be prejudicial to 248.

20. On May 25, 2021, counsel for 248 delivered to the Tribunal, with a copy to all Parties, an Agreed Statement of Facts of the Planners (the "**Statement of Facts**") in this appeal.

21. In the Agreed Statement of Facts, the City acknowledged that it would not be calling witnesses in relation to expertise in the fields of geology and ecology.

248 Relies on Mr. Westhues and Citizens' intent to not call Witnesses (May 28)

22. By correspondence dated May 28, 2021, the Tribunal adjourned the commencement of the hearing from August 9, 2021 to October 25, 2021.

23. On May 28, 2021, counsel for 248 wrote to the Tribunal and the other Parties in response to the Tribunal's correspondence as follows.

Further to your Adjournment Notification, you will recall that only the applicant/appellant and the City filed lists of witnesses that they intended to call at this hearing, and participated in the meetings to try to narrow/scope issues. As such, and on that basis, it is expected that only the applicant/appellant and the City will be calling evidence in this hearing.

24. Neither Mr. Westhues nor Citizens wrote any response, let alone made any objection to not being able to call evidence in the hearing. 248 was entitled to rely on the conduct of Mr. Westhues and Citizens such that 248 should not be expected to devote its own resources to addressing issues not supported by evidence. It would also be a waste of the Tribunal's scarce resources.

25. Counsel for 248 also indicated that exchange dates that had not already passed were being extended by agreement in light of the new October 25, 2021 start date for the hearing. Counsel for 248 delivered to the Tribunal a draft procedural order for issuance setting out the revised exchange dates.

The June 17, 2021 Procedural Order

26. On June 17, 2021, the Tribunal issued a new Procedural Order in this matter that provided for the exchange dates listed below (the "**Procedural Order**"). The dates for the delivery of Witness Lists, the meeting of experts, and the Agreed Statement of Facts had already passed and remained unchanged.

Date	Event
May 3, 2021	List of witnesses and the order in which they will be called

May 17, 2021	Meeting of expert witnesses
May 24, 2021	Agreed Statement of Facts
June 30, 2021	Exchange of expert reports/witness statements, and evidence outlines for witnesses under summons
June 30, 2021	Exchange of Participant Statements
August 13, 2021	Exchange of Reply Evidence/Statements
September 10, 2021	Exchange of Visual Evidence
August 20, 2020	Hearing Plan
September 24, 2021	Joint Book of Documents
October 25, 2021	Commencement of Hearing

Issues Should be Struck

27. Based on the foregoing, 248 seeks that a number of issues be struck from the Procedural Order on the basis that there is no evidence in support of these issues before the Tribunal.

City Issues sought to be Struck

28. 248 seeks that City Issues 9, 10, and 11 be struck from the Issues List:

Infrastructure

9. In conformity to Part 4, Section 2.6.6 of the Official Plan:
- a. Can the traffic generated from the development be accommodated within the transportation infrastructure?
 - b. Will surrounding local residential roads be negatively impacted from traffic generated by the development?
 - c. Does the development support the use of mass transit, including GO trains, and active transportation?

Geological

10. In conformity to Part 2, Section 11.2.21 and Part 4, Section 14.2.5 of the Official Plan,
 - a. Will the construction, including excavation and site preparation, have any impact on the integrity of the surrounding geology, including the Niagara Gorge?
 - b. What methods should be employed to ensure the construction and excavation does not impact on the structural integrity of surrounding residences?
 - c. Is a stable top of bank indicated to the satisfaction of the Niagara Peninsula Conservation Authority?

Environmental

11. Is adequately demonstrated that the proposed development does not impact natural heritage features, significant wildlife habitat or species at risk, in conformity to Part 4, Section 2.6.6 of the Official Plan?

29. Regarding the City's Issue 9, the City has consented to it being removed. There has been no expert evidence put forward regarding Issue 9.

30. Regarding the City's Issue 10, the City's List of Witnesses did not list a geotechnical engineer.

31. Regarding the City's Issue 11, the City's List of Witnesses did not include an expert in ecology or the environment.

32. In the Agreed Statement of Facts, the land use planning experts for 248 and the City acknowledged that the City is not calling witnesses in relation to expertise in the fields of geology and ecology.

Issues of Kenneth Westhues sought to be Struck

33. 248 seeks that Issues 1 to 5 of Kenneth Westhues be struck from the Issues List. Mr. Westhues' five issues are excerpted below from the Procedural Order:

Issues List of Kenneth Westhues

1. For the properties fronting River Road (zoned R5E), does the Application provide sufficient planning justification to amend the Official Plan and Zoning By-law to permit the proposed heights, density, building setbacks, and impact on the surrounding low-density area?
 2. For the properties fronting John Street (zoned R2). is the proposed development compatible with the existing neighbourhood as required by Part 2, Section 1.15 of the Official Plan with respect to height, density, architecture and design?
 3. Does the Application unjustifiably exceed the provincially mandated targets for residential intensification contained in the Niagara Region Official Plan?
 4. Has the Applicant provided Geotechnical Reports that adequately address issues arising from proximity to the Niagara Gorge, in particular the issue of slope stability?
 5. Has the Applicant provided an Environmental Impact Assessment that adequately addresses issues arising from proximity to the Niagara Gorge?
34. 248 seeks that Issues 1 to 5 of Mr. Westhues be struck because each issue raises matters of expert evidence for which Mr. Westhues has put forward no witness and delivered no evidence. The matter of expert opinion raised by each issue is as follows:
- (a) Issue 1: planning
 - (b) Issue 2: planning, landscape architecture, and urban design
 - (c) Issue 3: planning
 - (d) Issue 4: geotechnical engineering
 - (e) Issue 5: ecology

Issues of Citizens sought to be Struck

35. 248 seeks that the following issues of Citizens be struck from the Issues List:

36. 248 seeks that Issues 1 to 5 of Citizens be struck because each issue raises matters of expert evidence for which Citizens has put forward no witness and delivered no evidence. The matter of expert opinion raised by each issue is as follows:

- (a) Issue 1: planning
- (b) Issue 2: traffic engineering
- (c) Issue 3: urban design
- (d) Issue 4: geotechnical engineering
- (e) Issue 5(a): geotechnical engineering
- (f) Issue 5(b): planning

The Issues Should be Struck

37. The Issues of Mr. Westhues and Citizens should be struck because they failed to deliver their witness lists and failed to put forward evidence in support of their Issues despite the following facts:

- (a) They were required to do so pursuant to the Procedural Order;
- (b) Both had been involved in the proceeding for over two years prior to Witness Lists being due. Mr. Westhues indicated a four-year involvement. Both had ample time to have learned the Rules and gathered expert evidence. The matter was adjourned twice, which provided additional time to prepare;
- (c) Both had ample notice, including directly from the Tribunal, that they had to become familiar with the responsibilities of Parties under the Rules;
- (d) Both were advised by the Tribunal that expectations for the hearing included "putting a case forward which is supported by expert witnesses";
- (e) Neither objected to the Initial Procedural Order or the Procedural Order providing for the delivery of Witness Lists and Witness Statements; and
- (f) Both had received correspondence on May 28, 2021 from counsel for 248, in which she advised that, given that neither had filed witness lists, 248 expected that neither would be calling evidence in the hearing. Neither Mr. Westhues nor Citizens either objected or indicated that they intended to call evidence at that time or at any other time.

38. The Parties' experts were required to meet by May 17, 2021 to "use best efforts to try to resolve or reduce the issues for the hearing" and to file a Statement of Agreed Facts and Issues with the LPAT case-coordinator on or before May 24, 2021. Mr. Westhues and Citizens failed to comply with these requirements, which, if they were allowed to proceed with these issues, would be highly prejudicial to 428, as 428 would be forced to fight issues that could have potentially been resolved or dealt with more

expeditiously but for Mr. Westhues and Citizens taking away that opportunity without a reasonable explanation.

39. 248 has relied on the Procedural Order to advance its case. It would be prejudicial if 248 were to be forced to respond to a case that should have been but wasn't brought forward by Mr. Westhues and Citizens without reasonable excuse.

40. The Tribunal has stated that "a Party that places an issue on the Issues List is expected to be prepared to call evidence in support of that issue". Mr. Westhues and Citizens have completely failed to meet that expectation and the City has partly failed in that obligation. In particular, the following is submitted:

- (a) Mr. Westhues' Issues List raises questions with respect to planning, landscape architecture, urban design, geotechnical engineering, and environmental matters that would require expert opinion. No evidence has been provided to the Tribunal upon which it can adjudicate the issues raised in Mr. Westhues' Issues List.
- (b) Citizens' Issues List raises questions with respect to planning, traffic engineering, urban design, and geotechnical engineering that would require expert opinion. No evidence has been provided to the Tribunal upon which it can adjudicate the issues raised in Citizens' Issues List.
- (c) The City has failed to submit an expert report or expert witness statement with respect to the Geological Issue No. 10 and Environmental Issue No. 11 on its Issues List. No evidence has been provided to the Tribunal upon which it can adjudicate these issues.

41. On July 5, 2021, counsel for 248 wrote to the Tribunal and all Parties that 248 would seek that the issues of Mr. Westhues and Citizens be struck from the Issues List.

42. Citizens did not respond and to date has provided no explanation for failing to comply with the requirements of the Procedural Order.

43. On July 5, 2021, Mr. Westhues wrote to the Tribunal seeking its indulgence on the following basis:

- (a) he had been trying his best for four years to learn the Tribunal's Rules but knew less than the lawyers;
- (b) because his issues were already listed on the Issues List they were entitled to be protected; and
- (c) the deadline to call witnesses did not apply to him as he had advised the Tribunal that he intended to call no witnesses.

44. The statement of Mr. Westhues shows that there is no evidence to support his issues and thus the issues should be struck.

Witness Statements (June 30, 2021)

45. As required by the Procedural Order, and relying upon the list of witnesses provided by the City, 248 delivered Expert Reports/Witness Statements on June 30, 2021 for the following experts:

- (a) Ryan Guetter: Land Use Planner; and
- (b) Michael Spaziani: Urban Design.

Paragraphs Proposed to be Struck from the City Planner's Witness Statement

46. Andrew Bryce submitted a Witness Statement providing land use planning evidence on behalf of the City.

47. The following paragraphs should be struck from Mr. Bryce's Witness Statement:

- (a) Paragraphs 11.1 to 11.5 and 12.1 to 12.5: The Witness Statement of Mr. Bryce includes a discussion whereby he provides his opinion on Geological Issues (paragraph 11) and Environmental Issues (paragraph 12). Mr. Bryce is a Registered Professional Planner who is not qualified to give expert evidence on geological or environmental issues.

48. Rule 7.5(b) of the Ontario Land Tribunal Rules of Practice and Procedure provides that it is the duty of every expert engaged by or on behalf of a party who is to provide opinion evidence at a proceeding to acknowledge that they are to provide opinion evidence that is related only to the matters that are within the expert's area of expertise.

49. Mr. Bryce purports to rely on reports and comments of others in providing his opinion as follows:

- (a) At paragraphs 11.1, 11.2, and 11.3, he relies on the comments from the Niagara Parks Commission with respect to the work done by Golder Associates Ltd done on behalf of 248 in arriving at "his" opinion in paragraphs 11.4 and 11.5; and
- (b) At paragraphs 12.1, 12.2, and 12.3, he relies on the comments from the Niagara Peninsula Conservation Authority with respect to work done by Beacon Environmental on behalf of 248 in arriving at "his" opinion in paragraphs 12.4 and 12.5.

50. Mr. Bryce arrives at "his" opinions with respect to geological and environmental issues entirely on third party sources that address matters outside of his area of expertise.

51. Subrule 4.1.01(1)(b), of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, uses identical wording to Rule 7.5(b) of the Tribunal Rules of Practice and Procedure, and expressly provides that it is the duty of every expert engaged on behalf of a party "to provide opinion evidence that is related only to matters that are within the expert's area of expertise." We submit that the case law on Subrule 4.1.01(1)(b) would be binding on the Tribunal.

52. With respect to the duty of experts to give evidence that is related only to matters that are within the expert's area of expertise, the Superior Court has stated as follows:

- (a) "A proposed expert must have demonstrated experience, through education, training and practice, in the specific subject matter of the proposed opinion.
- (b) A review of the relevant research literature on a subject matter "at the margins of the witness's education, training and experience, or in a closely related field of study, does not render one an expert.
- (c) Absent demonstrated experience, the court runs the risk that the proposed witness is not offering an independent opinion, but rather is merely relying on the opinions of others".

Mclsaac v. MacKinnon, 2019 CarswellOnt 8595, 2019 ONSC 3114 (para 15)

53. The Ontario Court of Appeal has stated as follows:

- (a) "It is inappropriate to find a witness to be a properly qualified expert where the source of the proposed expertise comes from reviewing literature — albeit with a facility that most of us would not have — but in respect of a subject matter that is outside the field of that witness's education and training"
- (b) Courts are not "obliged to qualify as experts persons who could not offer real opinions of their own on any given subject but could only point to what they had read".

R. v. Mathisen, 2008 CarswellOnt 6489, 2008 ONCA 747 (paras 126 – 127)

54. On August 13, 2021, 248 filed Reply Evidence/Statements in compliance with the Procedural Order and the Tribunal Rules of Practice and Procedure.

Statutory and Procedural Grounds

55. The *Ontario Land Tribunal Act, 2021*, SO 2021, c 4, Sch 6;

56. The Ontario Land Tribunal Rules of Practice and Procedure;

57. Such further and other grounds as counsel may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Micah Goldstein sworn August 16, 2021 and all exhibits attached thereto;
2. The content of the Tribunal's file in this case;
3. Such further and other materials as counsel may advise and the Tribunal may permit.

August 16, 2021

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TAB 2

LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED UNDER subsections 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Viridis Development Group Inc. and 2289238 Ontario Inc.
 Subject: Request to amend the Official Plan – Failure of City of Kitchener to adopt the requested amendment
 Existing Designation: General Industrial Employment
 Proposed Designation: Mixed Use
 Purpose: To permit four residential towers
 Property Address/
 Description: Courtland Road East and Block Line Road
 Municipality: City of Kitchener
 File No.: OP17/001/C/GS
 LPAT Case No.: PL190267
 LPAT File No.: PL190267
 LPAT Case Name: Viridis Development Group Inc. v. Kitchener (City)

PROCEEDING COMMENCED UNDER subsections 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Viridis Development Group Inc. and 2289238 Ontario Inc.
 Subject: Application to amend City of Kitchener Zoning By-law – Refusal or neglect of City of Kitchener to make a decision
 Existing Zoning: General Industrial (M-2)
 Proposed Zoning: Site Specific (to be determined)
 Purpose: To permit four residential towers
 Property Address/
 Description: Courtland Road East and Block Line Road
 Municipality: City of Kitchener
 Municipality File No.: ZC17/005/C/GS
 LPAT Case No.: PL190267
 LPAT File No.: PL190268

**AFFIDAVIT OF MICAH GOLDSTEIN
 (motion returnable August 31, 2021)**

I, **MICAH GOLDSTEIN**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a lawyer at Weirfoulds LLP and I am assisting Denise Baker, counsel of record for 2486489 Ontario Inc. (“**248**”), with respect to 248’s appeals assigned LPAT Case No. PL180376. As such I have knowledge of the matters hereinafter deposed. Where I have knowledge based on information and belief, I state the source of the information, which I believe to be true.

Background regarding the Development Application

2. I have reviewed the Tribunal's Order issued June 10, 2019 and the Planning Justification Report of Ryan Guetter dated August 12, 2020 and exchanged with the parties and filed with the Tribunal and as such I am aware of the following background information that may assist the Tribunal in adjudicating the motion before it:
 - (a) 248 is proposing the redevelopment of 5471, 5491, 5507 River Road and 4399, 4407, 4413, 4427 John Street (the "**Subject Lands**");
 - (b) The Subject Lands are currently designated partially Residential and partially Special Policy Area in the City’s Official Plan. The Special Policy Area designation permits a 119-unit apartment building up to seven storeys in height. The Official Plan Amendment would designate the entire Subject Lands as Special Policy Area;
 - (c) The Subject Lands are currently zoned Residential Apartment 5E Density (R5E-840) in part, Parking (P-841) in part, and Residential Single Family and Two Family (R2-2) in part. The Zoning By-law Amendment (ZBA) proposes to amend Zoning By-law No. 79-200 so that the entire Subject Lands are zoned Residential 5F Density which would permit the proposed development;
 - (d) 248 is proposing the redevelopment of the Subject Lands for two high-rise residential towers, a 21-storey tower and a 12-storey tower connected by a 3-storey podium, with underground parking, providing for a total of 390

residential units and density of 494 units per hectare (the "**Proposed Development**");

- (e) In order to facilitate the Proposed Development, in July 2017, applications for an Official Plan Amendment and Zoning By-law Amendment were submitted to provide site specific regulations for the Subject Lands. The materials were submitted by the original owner of the Subject Lands, 5507 River Development Inc. (the "**Original Owner**"), which subsequently sold the Subject Lands to 248; and
- (f) On March 29, 2018, the Original Owner appealed the refusal or neglect by the City of Niagara Falls (the "**City**") to make decisions on these applications pursuant to s. 22(7) and 34(11) of the *Planning Act*;

The Longstanding Involvement of Mr. Westhues and Citizens

3. By Order issued December 14, 2018, Kenneth Westhues, who lives in the vicinity of the Subject Lands, was granted party status. He raised height, density, environmental, and geologic issues regarding the Proposed Development. Attached hereto as **Exhibit "A"** is a copy of the December 14, 2018 Order.

4. By Order issued June 10, 2019, both 248, which had by then become the owner of the Subject Lands, and the Citizens for Responsible Development (Niagara Falls) ("**Citizens**") were granted Party status in the proceeding. Citizens is an incorporated group, which raised issues with traffic, environmental conditions, community character, and the planning approval process with respect to these proceedings. Attached hereto as **Exhibit "B"** is a copy of the June 10, 2019 Order.

The Responsibilities of Mr. Westhues and Citizens to advance Expert Evidence

5. In its Decision issued January 28, 2020, the Tribunal stated as follows:

The Tribunal reminded the non-appellant parties that party status comes with certain expectations, which includes putting a case forward which is supported

by expert witnesses. The parties are expected to familiarize themselves with the Roles and Obligations of a Party. If they have not already done so, the non-appellant parties should review the Tribunal's Rules (particularly Rule 8) which are available on the Tribunal's website. If they require further assistance or information they may contact the Tribunal's Case Coordinator.

Attached as **Exhibit "C"** is a copy of the January 28, 2020 Decision (see paragraph 14).

6. A telephone conference in this matter held on June 2, 2020. During that telephone conference, both Mr. Westhues and Citizens indicated that they "do not intend to call any witnesses". Attached as **Exhibit "D"** is a copy of the June 9, 2020 Order that arose from the telephone conference.

The Initial Procedural Order

7. The hearing of this matter was originally scheduled to commence on May 31, 2021; however, on February 20, 2021, it was rescheduled to August 19, 2021. Attached as **Exhibit "E"** is the Tribunal's Adjournment Letter dated February 19 and sent on February 20, 2021.
8. On March 29, 2021, counsel for 248 provided the Tribunal with a procedural order for issuance and copied all the Parties on the correspondence, including Mr. Westhues and Citizens. Attached as **Exhibit "F"** is a copy of the March 29, 2021 email and the attached order for issuance.
9. The attached order for issuance provided for the following exchange dates:

Date	Event
May 3, 2021	List of witnesses and the order in which they will be called
May 17, 2021	Meeting of expert witnesses
May 24, 2021	Agreed Statement of Facts
June 18, 2021	Exchange of expert reports/witness statements, and evidence outlines for witnesses under summons

June 18, 2021	Exchange of Participant Statements
July 16, 2021	Exchange of Reply Evidence/Statements
July 23, 2021	Exchange of Visual Evidence
July 5, 20201	Hearing Plan
July 23, 2021	Joint Book of Documents
August 9, 2021	Commencement of Hearing

10. On April 28, 2021, the Tribunal issued a Procedural Order in this matter that originally provided for the above-noted exchange dates in the proceeding (the "**Initial Procedural Order**"). Attached as **Exhibit "G"** is the Initial Procedural Order.
11. At no point did either Mr. Westhues or Citizens object to the dates set out in the Initial Procedural Order or raise any concerns.

The Other Parties Lack Witnesses to give Evidence on Certain Issues (May 3)

12. On May 3, 2021, 248 provided its List of Witnesses in compliance with the Initial Procedural Order. Attached hereto as **Exhibit "H"** is a copy of the Witness List and the email by which it was delivered.
13. 248's full List of Witnesses is as follows:
 - (a) Ryan Guetter: Land Use Planner
 - (b) Michael Spaziani: Urban Design
 - (c) Mark Schollen: Landscape Architect
 - (d) Andre Brochu: Architect
 - (e) Ron Huizer: Ecologist
 - (f) Mark Telesnicki: Geotechnical Engineering
 - (g) Kenneth Chan: Traffic
 - (h) Vincent Ferraro: Wind

14. The City's full List of Witnesses is as follows:
 - (a) Andew Bryce: Land Use Planning
 - (b) Mathew Bilodeau: Transportation
 - (c) Khaldoon Admad: Urban Design

Attached hereto as **Exhibit "I"** is a copy of the City's Witness List.

15. Neither Mr. Westhues nor Citizens provided their List of Witnesses on the exchange date required by the Initial Procedural Order or at all.

The Agreed Statement of Facts and the Lack of the Other Parties' Expert Evidence

16. In compliance with the Procedural Order, on May 13, 2021, the land use planning expert retained by the City, namely, Andrew Bryce, and by 248, namely, Ryan Guetter, met to try to resolve and reduce the issues for the Hearing and prepare a Statement of Agreed Facts and Issues. Mr. Westhues and Citizens did not participate in this meeting as they had not submitted Witness Lists to identify any experts as required by the Procedural Order. (This information is set out in the Agreed Statement of Facts in the Exhibit below.)
17. On May 25, 2021, counsel for 248 delivered to the Tribunal, with a copy to all Parties, an Agreed Statement of Facts of the Planners for the City and 248 (the "**Statement of Facts**") in compliance with the Procedural Order and the Tribunal Rules of Practice and Procedure. Attached hereto as **Exhibit "J"** is the email correspondence and attached Statement of Facts.
18. The Agreed Statement of Facts included a statement that "the Land Use Planning experts acknowledge that the City is not calling witnesses in relation to expertise in the fields of Geology and Ecology".
19. Although not marked as "resolved" on the Agreed Statement of Facts, I am advised by Ms. Baker and do verily believe that Issue 9 has been resolved between the City and 248 and the City consents to Issue 9 being removed from the Issues List. Based on my review of the Witness Statements submitted under the Procedural Order, there is no expert evidence put forward regarding Issue 9.

248 Relies on Mr. Westhues and Citizens' intent to not call Witnesses (May 28)

20. By correspondence dated May 28, 2021, the Tribunal adjourned the commencement of the hearing from August 9, 2021 to October 25, 2021. Attached hereto as **Exhibit "K"** is a copy of the May 28, 2021 correspondence.
21. On May 28, 2021, counsel for 248 emailed the Tribunal and the other Parties in response to the May 28, 2021 correspondence as follows.

Further to your Adjournment Notification, you will recall that only the applicant/appellant and the City filed lists of witnesses that they intended to call at this hearing, and participated in the meetings to try to narrow/scope issues. As such, and on that basis, it is expected that only the applicant/appellant and the City will be calling evidence in this hearing.

Attached as **Exhibit "L"** is a copy of the May 28, 2021 email.

22. Neither Mr. Westhues nor Citizens wrote any response, nor made any objection to not being able to call evidence in the hearing.

The June 17, 2021 Procedural Order

23. On June 17, 2021, the Tribunal issued a new Procedural Order in this matter that provided for the following key dates in the proceeding (the "**Procedural Order**"). The dates for the delivery of Witness Lists, the meeting of experts, and the Agreed Statement of Facts had already passed and remained unchanged. Attached hereto as **Exhibit "M"** is a copy of the Procedural Order.

Date	Event
May 3, 2021	List of witnesses and the order in which they will be called
May 17, 2021	Meeting of expert witnesses
May 24, 2021	Agreed Statement of Facts
June 30, 2021	Exchange of expert reports/witness statements, and evidence outlines for witnesses under summons
June 30, 2021	Exchange of Participant Statements
August 13, 2021	Exchange of Reply Evidence/Statements

September 10, 2021	Exchange of Visual Evidence
August 20, 2020	Hearing Plan
September 24, 2021	Joint Book of Documents
October 25, 2021	Commencement of Hearing

City Issues sought to be Struck

24. 248 seeks that the following issues of the City, which are excerpted from the Procedural Order, be struck from the Issues List:

Geological

10. In conformity to Part 2, Section 11.2.21 and Part 4, Section 14.2.5 of the Official Plan,
- a. Will the construction, including excavation and site preparation, have any impact on the integrity of the surrounding geology, including the Niagara Gorge?
 - b. What methods should be employed to ensure the construction and excavation does not impact on the structural integrity of surrounding residences?
 - c. Is a stable top of bank indicated to the satisfaction of the Niagara Peninsula Conservation Authority?

Environmental

11. Is adequately demonstrated that the proposed development does not impact natural heritage features, significant wildlife habitat or species at risk, in conformity to Part 4, Section 2.6.6 of the Official Plan?
25. Regarding the City's Issue 10, the City's List of Witnesses did not list a geotechnical engineer. The Agreed Statement of Facts indicates that the City will not be calling an expert in geotechnical engineering.
26. Regarding the City's Issue 11, the City's List of Witnesses did not include an expert in ecology. The Agreed Statement of Facts indicates that the City will not be calling an expert in ecology.
27. Paragraphs 11 and 12 (on Pages 18 to 20) of the Witness Statement of Mr. Bryce (previously filed with the Tribunal) includes a discussion of the Geological and Environmental Issues.

Issues of Kenneth Westhues sought to be Struck

28. 248 seeks that Issues 1 to 5 of Kenneth Westhues be struck from the Issues List. Mr. Westhues' five issues are listed below:

Issues List of Kenneth Westhues

1. For the properties fronting River Road (zoned R5E), does the Application provide sufficient planning justification to amend the Official Plan and Zoning By-law to permit the proposed heights, density, building setbacks, and impact on the surrounding low-density area?
2. For the properties fronting John Street (zoned R2), is the proposed development compatible with the existing neighbourhood as required by Part 2, Section 1.15 of the Official Plan with respect to height, density, architecture and design?
3. Does the Application unjustifiably exceed the provincially mandated targets for residential intensification contained in the Niagara Region Official Plan?
4. Has the Applicant provided Geotechnical Reports that adequately address issues arising from proximity to the Niagara Gorge, in particular the issue of slope stability?
5. Has the Applicant provided an Environmental Impact Assessment that adequately addresses issues arising from proximity to the Niagara Gorge?

29. 248 seeks that Issues 1 to 5 of Mr. Westhues be struck because each issue raises matters of expert evidence for which Mr. Westhues has put forward no witness and delivered no evidence. The matter of expert opinion raised by each issue is as follows:

- (a) Issue 1: planning
- (b) Issue 2: planning, landscape architecture, and urban design
- (c) Issue 3: planning
- (d) Issue 4: geotechnical engineering
- (e) Issue 5: ecology

Issues of Citizens sought to be Struck

30. 248 seeks that the following issues of Citizens be struck from the Issues List:

31. 248 seeks that Issues 1 to 5 of Citizens be struck because each issue raises matters of expert evidence for which Citizens has put forward no witness and delivered no evidence. The matter of expert opinion raised by each issue is as follows:
- (a) Issue 1: planning
 - (b) Issue 2: traffic engineering
 - (c) Issue 3: urban design
 - (d) Issue 4: geotechnical engineering
 - (e) Issue 5(a): geotechnical engineering
 - (f) Issue 5(b): planning

32. As required by the Procedural Order, 248 delivered Expert Reports/Witness Statements on June 30, 2021.

33. As required by the Procedural Order, and in reliance upon the list of issues identified by the Parties, 248 delivered Expert Reports/Witness Statements on June 30, 2021 for the following experts:

(a) Ryan Guetter: Land Use Planner; and

(b) Michael Spaziani: Urban Design.

Attached as **Exhibit "N"** is a copy of the June 30, 2021 correspondence. The Witness Statements have been filed with the Tribunal.

34. Andrew Bryce submitted a Witness Statement providing land use planning evidence on behalf of the City, which has been filed with the Tribunal.

35. On July 5, 2021, counsel for 248 wrote to the Tribunal copying all the Parties and advising as follows:

Witness statements in this matter have been exchanged in accordance with the attached Procedural Order, but only by the Applicant/Appellant, and by the City.

The other two parties, Mr. Westhues and Citizens have not provided witness statements as required under the PO. As no supporting evidence has been called, these issues are no longer valid to adjudicate. As such, we request a determination by the Tribunal that the issues placed on the Issues List by Mr. Westhues and Citizens for Responsible Development be removed from the Issues List.

Attached hereto as **Exhibit "O"** is a copy of the email chain commencing July 5, 2021.

36. Citizens did not respond to the July 5, 2021 email.

37. Mr. Westhues responded to the July 5, 2021 email as follows:

As a self-represented party to this case, I acknowledge that the lawyers for the applicant and for the city know much more than I about the tribunal's rules of practice and procedure. I am doing my best to educate myself and follow the rules, as I have for the past four years, but I beg the tribunal's indulgence if I am sometimes out of line.

With all due respect to Mr. Goldstein (in his request below), I believe it is he who is out of line in this instance. He asks the tribunal to strike my issues list on grounds that I "have not provided witness statements as required under the PO."

The tribunal accepted the issues on my list in its decision and order of 9 June 2020. The tribunal struck two issues from my list -- wrongly, in my opinion -- but I acquiesced. The five issues on the Procedural Order of 17 June 2021 were accepted by the tribunal a year earlier.

Further, in its decision and order of 9 June 2020, **the tribunal acknowledged that I do not intend to call witnesses of my own, instead to question the witnesses brought by the applicant and the city. Hence I do not believe the deadline of 30 June 2021 for circulation of witness statements was applicable to me.**

I acknowledge with thanks the witness statements I have received from Ms. Baker for Mr. Guetter and Mr. Spaziani, and from Mr. Halinski for Mr. Bryce and Mr. Ahmad. Unless I've missed something, the applicant's lawyers appear to have missed the 30 June deadline for circulating the witness statements of six others they intend to call: Mark Schollen, Andre Brochu, Ron Huizer, Mark Telesnicki, Kenneth Chan, and Vincent Ferraro. I look forward to receiving these statements when they are available, and will study them carefully.

Should the tribunal want further response from me to Mr. Goldstein's email below (which I realize may have been sent in

error, on account of his being new to the case), please let me know.

(See Exhibit "O").

38. On August 13, 2021, 248 filed Reply Evidence/Statements of Mr. Spaziani (urban design), Mr. Guetter (planning), and Mr. Telesnicki (geotechnical engineering), in compliance with the Procedural Order and the Tribunal Rules of Practice and Procedure. Attached hereto as **Exhibit "P"** is a copy of the August 13, 2021 correspondence to the Tribunal. No Reply Evidence/Statements were filed by either Mr. Westhues or Citizens.

39. I swear this affidavit in support of 248's Notice of Motion returnable August 31, 2021 and for no other improper purpose.

AFFIRMED remotely by Micah Goldstein,)
of the City of Toronto, of the Province of)
Ontario, before me at the City of Toronto,)
in the Province of Ontario, on August 16,)
2021, in accordance with O. Reg.)
431/20, Administering Oath or)
Declaration Remotely.)

a Commissioner, etc.

MICAH GOLDSTEIN