

1 Ontario Land Tribunal
2 Case No. PL 180376
3 5507 River Development Inc v. City of Niagara Falls
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6 **NOTICE OF RESPONSE TO MOTION** (Sections 10.6, 10.7 of the *Rules*)
7

8 23 August 2021
9

10 Kenneth Westhues
11 Non-appellant party to the case
12 5419 River Road
13 Niagara Falls, Ontario L2E 3H1
14 kwesthue@uwaterloo.ca
15
16



17 Responding to the Motion Record of 2486489 Ontario Inc served on 16 August 2021 for the
18 Motion Hearing scheduled for 10:00 AM 31 August 2021,
19 <https://global.gotomeeting.com/join/977599685>
20 Access code: 977-599-685
21
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23

24 **Contents of this Notice of Response to Motion**
25

26 List of individuals served (by email), p. 2
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30 Exhibit A, Applicant's Notice of Motion (pp. 8-23 of his Motion Record)
31

32 Exhibit B, Section 37 Request for Review of the Tribunal Decision of 10 January 2020 in PL
33 180376, K. Westhues, 24 February 2020
34

35 Exhibit C, Disposition of the Westhues Request for Review, Marie Hubbard, 14 May 2020
36

37 Exhibit D, Email chain, Westhues / parties / Shane Taylor, May-June 2020
38

39 Exhibit E, Email chain, Westhues / Herlovitch, July 2016
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43 Affidavit of service to be filed separately at or before the hearing (*Rule 10.7*)

44 This Notice of Response to Motion is served by email on the following individuals, in compliance
45 with *Rule 10.7*:

46

47

48 (1) Denise Baker: dbaker@weirfoulds.com
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53 Weirfoulds LLP, Oakville
54 Counsel for 2486489 Ontario Inc, the Applicant/Appellant in this case

55

56

57 (2) Tom Halinski: thalinski@airdberlis.com
58 Aird & Berlis, Toronto
59 Counsel for the City of Niagara Falls, responding party in this case

60

61

62 (3) Debra Jackson-Jones: dliacksonjones1@gmail.com
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64 Citizens for Responsible Development, Niagara Falls, non-appellant party

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66

67 (4) Shane Taylor: shane.taylor@ontario.ca
68 OLT.Registrar@ontario.ca
69 Case Coordinator and Registrar, respectively, Ontario Land Tribunal

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71

72 (5) Bill Matson: billmatson@niagarafalls.ca
73 Clerk, City of Niagara Falls

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75 STATEMENT ON WHICH I WILL RELY AT THE HEARING

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77 **Preface**

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79 Four points in preface. First, my objective in this proceeding is the same now as at the start, to
80 facilitate development of high-density housing on the site at issue here. It is to no one's benefit
81 that this site continues to lie fallow and vacant, as most of it has for 15 years. The larger part is
82 approved for a 120-unit low-rise building with surface parking, 250 units per hectare. The OMB
83 upheld the relevant Official Plan and Zoning amendments in 2009. This is the intensification, a
84 development along these lines, that the city needs and that nearby residents, including my wife
85 Anne and me, have been waiting for. It is what the law allows.

86

87 Second, I repeat my respect for Saeid Aghaei, owner of 2486489 Ontario Inc., the Applicant in
88 this appeal. Anne and I have hosted Mr. Aghaei, his wife Kim and daughter Shadi, in our home. I
89 think well of them, despite our differences in this matter. In addressing Niagara Falls Council on
90 the present development proposal on 12 November 2019, I lauded Mr. Aghaei as a respectable
91 developer with an admirable track record and reputation, ample expertise, experience, and
92 resources. I said I hoped he would be back with a proposal within the boundaries of law that
93 the City and neighbourhood could support. My sentiments have not changed.

94

95 Third, I am here at my own request and expense because, for the past five years, I have been
96 amassing evidence and information about this development proposal, its geophysical setting,
97 the impact it would have on my city and neighbourhood, and on the way it has been handled by
98 the City of Niagara Falls. Because the Ontario Land Tribunal is now, by law, the decision-maker
99 on this proposal, I want to present my evidence and information to the OLT, believing I can
100 thereby contribute to the public good. I am grateful to successive Ontario governments for
101 legislation allowing citizen participation in land-use planning, and I am grateful to the OLT for
102 granting me party status in this proceeding.

103

104 Fourth and finally, as holder of a PhD in social organization, I respect expertise and credentials
105 as a matter of course, whether in law, planning, or any other field. The Tribunal appropriately
106 gives more weight, as a general rule, to evidence of an expert in the relevant field than to that
107 of a nonexpert or layman. The emphasis, however, must always be on the evidence itself (the
108 data, information, fact, or argument), rather than the letters behind the name of the one
109 presenting it. I have cited elsewhere Jane Jacobs and Leonard Gertler as Canadian planning
110 experts of the first order. The first had no academic degrees, the second lacked a PhD. No
111 matter. They both believed in democracy. So do I. I do not want to live in a society ruled by
112 Plato's philosopher kings or any other kind of know-it-all.

113

114 **Essentials of the Applicant's motion and this reply**

115

116 The Applicant deserves compliments on the clarity, coherence, and detail of this motion. The
117 reader has no trouble understanding what the motion is and the rationale for it. This makes it
118 easier for an opposing party to reply than if the motion were convoluted mush.

119

120 Attachment 2 of the Procedural Order dated 17 June 2021 lists five questions that the Tribunal,
121 in its Decision of 9 June 2020, accepted as legitimate for me to raise, five issues on which it
122 would allow me to present evidence. The Applicant's motion (core pages in Exhibit A) is for the
123 Tribunal to strike all five issues "on the grounds that Mr. Westhues is not calling any evidence in
124 relation to these issues and therefore these issues should not be before the Tribunal" (§1).

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126 I oppose the Applicant's motion and hereby request the Tribunal to deny it, so that I may
127 present evidence on all five issues at the hearing scheduled to begin on 25 October 2021.

128

129 The following paragraphs give arguments in support of my request. These arguments apply in a
130 general way to other parts of the motion -- the parts that ask the Tribunal to strike the five
131 issues of the Citizens for Responsible Development and two issues from the City's list -- but my
132 focus in this reply is on the issues on my list.

133

134 **The problem of timing**

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136 In 2019 and 2020, the Applicant objected to numerous issues I put forward for the Tribunal to
137 address. Wrongly, in my opinion, the Tribunal agreed with the Applicant on some issues and
138 struck them from my list. In the end, in its Decision of 9 June 2020, the Tribunal accepted only
139 the five issues shown in the Procedural Order now in force, dated 17 June 2021.

140

141 This Procedural Order states:

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143 The issues are set out in the Issues List attached as Attachment 2. There will be no
144 changes to this list unless the Tribunal permits, and a party who asks for changes may
145 have costs awarded against it. (¶15)

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147 I take this to mean that the Tribunal has closed the debate about what questions may and may
148 not be asked in this proceeding, that at this point it wants to get on with hearing evidence on
149 the questions it has deemed legitimate.

150

151 This priority on moving ahead toward adjudication of the merits of the case, as opposed to
152 going back to rehash procedural matters, is reflected also in the Tribunal's *Rule* 19.9:

153

154 The Tribunal Member conducting the hearing or any subsequent hearing event is bound
155 by the order resulting from the case management conference unless that Member is
156 satisfied that there is good reason to vary the order.

157

158 The current motion, therefore, is ill-timed. If it were to be made at all, this should have been a
159 year or two ago.

160

161 I recognize the discretion the Tribunal enjoys by law to make exceptions to its rules, but I note
162 also the purpose of this discretion, as stated in its *Rule* 1.6:

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The Tribunal may grant all necessary exceptions from these *Rules* or from any procedural order, or grant other relief as it considers necessary and appropriate, to ensure that the real questions in issue are determined in a fair, just, expeditious and cost-effective manner.

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I would underscore the word *expeditious*. This appeal was filed 41 months ago, on grounds that the City was taking longer than six months to make up its mind.

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The Applicant's rationale for the motion

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The Applicant's rationale for striking the five issues rests entirely on a single, straightforward premise: that I should have produced by now an expert witness to give evidence on these issues. Because I have not done so, the issues should be struck. The Applicant formulates this premise succinctly in ¶6 of his Motion Record (boldface is his):

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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.

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He repeats this foundational premise in ¶ 37(d), saying I was "advised by the Tribunal that expectations for the hearing included 'putting a case forward which is supported by expert witnesses.'"

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At least four paragraphs of the Applicant's Motion Record document my failure to put forward a case supported by expert witnesses: that I said explicitly that I did not intend to do so (¶17),

192 that I did not submit a list of “properly qualified” expert witnesses by the stipulated date (¶17),
193 that I had no expert witness participating in a meeting of experts on land-use planning (¶18),
194 that each of my issues “raises matters of expert evidence for which Mr. Westhues has put
195 forward no witness and delivered no evidence” (¶34).

196

197 The Applicant’s Motion Record suggests that in his view, “expert evidence” is not just necessary
198 but really the only kind of evidence deserving of the Tribunal’s attention. He argues that neither
199 the Applicant nor the Tribunal should be expected to address issues “not supported by
200 evidence” (¶ 24) – as if the evidence of a nonexpert were not really evidence. Or similarly, that
201 my own statement “shows that there is no evidence to support his issues and thus the issues
202 should be struck” (¶ 44) – as if the hearing was already over and I had presented no evidence at
203 it relevant to my questions.

204

205 **Collapse of the rationale**

206

207 The Applicant’s Motion Record is like the condo tower in Miami two months ago that looked
208 solid until its foundation failed and the whole thing fell down. The Applicant’s motion rests
209 entirely on the premise, as stated in the Tribunal Decision of 28 January 2020, that I am
210 obligated to make a case supported by expert evidence. This premise has been overturned by
211 the Tribunal’s highest authority. The premise therefore carries no weight. An argument built on
212 it collapses as completely as the Miami condo tower.

213

214 Attached as Exhibit B is the Section 35 (*Rule 25*) Request for Review by the Associate Chair that I
215 submitted on 24 February 2020, seeking correction of errors in the Tribunal Decision of 28
216 January 2020. Among the errors I cited (¶ 28) was the expectation of “putting a case forward
217 which is supported by expert witnesses.”

218

219 Attached as Exhibit C is the Disposition of the Request by Marie Hubbard, then as now Chair of the
220 Tribunal, dated 14 May 2020. Concerning the line at issue, the all-important premise of the
221 Applicant’s Motion Record, Ms. Hubbard wrote on page 3:

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I agree that the Tribunal appears to have made an inaccurate statement in the first sentence of paragraph 14 of its Decision, namely that non-appellant parties are expected to “[put] a case forward which is supported by expert witnesses.” I understand you previously raised your concern regarding this issue with the Tribunal and were advised that, notwithstanding paragraph 14 of the Decision, non-appellant parties are not required to retain legal counsel or expert witnesses. I confirm, you are not required or expected to retain legal counsel or an expert witness.

Why the Applicant has failed to take note of Ms. Hubbard’s ruling I do not know. Shortly after I received the ruling, I informed the other parties. The Applicant then requested copies of my Request and its Disposition from the Case Coordinator, who then sent these documents to all parties on 1 June 2020. The email chain is attached as Exhibit D.

The Tribunal has made its position clear: I am not required or expected to produce an expert witness or to submit expert evidence. The fact that I have not done so, and do not intend to do so, cannot therefore be a reason to strike the five issues on my list.

Two examples of the value of nonexpert evidence

In further support of my request that the Applicant’s motion be denied, I would cite two actual examples from the current case that show the value of evidence a layman like me can offer the Tribunal, and why I went to so much trouble and expense to obtain a ruling to this effect.

The first example is from my letter last week to the Tribunal: an assertion by the Applicant’s planner, Ryan Guetter, in his expert-witness statement (¶ 39, p. 10) dated 30 June 2021:

The John Street properties from 4399 to 4427 are each occupied by a two-storey, single detached dwelling.

252 I am not an expert planner, but as an ordinary citizen, a human able to walk and see, I can offer
253 the Tribunal eyewitness evidence, first-hand observation easily confirmed by any passerby, that
254 Mr. Guetter's assertion is false. My nonexpert evidence is that the applicant demolished the
255 four two-storey, single detached dwellings at 4399, 4407, 4413, and 4427 John Street in
256 November 2019, that he stripped the lots of mature trees and other vegetation, and that these
257 lots have been vacant for the past year and a half.

258

259 For sound adjudication of any issue pertaining to those four lots, a reasonable person would say
260 my nonexpert evidence is obviously relevant and helpful to the Tribunal.

261

262 A second example has to do directly with the questions from me that the Tribunal accepted as
263 legitimate, the questions the Applicant seeks to strike.

264

265 Of all the questions the Tribunal accepted as legitimate, all the issues listed in Attachment 2 of
266 the Procedural Order, the first two questions on my list are the only ones that distinguish
267 between the properties on the east side of River Lane, which are zoned R5E (seven-storey
268 building, 250+ dwelling units per hectare), and the properties on the west side of River Lane,
269 which are zoned R2 (detached homes, about 25 dwelling units per hectare). River Lane is the
270 dividing line and buffer between these two very different zones.

271

272 This distinction matters a great deal from the point of view of the *Planning Act* and principles of
273 good planning. The proposed 29-storey condo tower would involve *major* upzoning of the R5E
274 properties east of River Lane (fourfold increase in height), but *gargantuan* upzoning of the R2
275 properties west of River Lane (tenfold increase in height). It would also eliminate the street that
276 divides and buffers the low-density neighbourhood from high-density housing.

277

278 The Applicant and the City do not deny the zoning difference, but they tend to gloss over it,
279 tacitly suggesting that the subject properties are all of a piece, as if already deemed a single
280 property. This is because in the interval between the pre-application meeting in December

281 2016, and formal submission of the application in July 2017, the City bypassed the *Planning Act*,
282 closed River Lane, and effectively gifted the land to the Applicant.

283

284 Yet the zoning difference remains. It is the law. As an everyday citizen independent of both the
285 City and the Applicant, I can inform the Tribunal about this difference and show its implications,
286 providing the Tribunal with evidence it would probably otherwise have to do without.

287

288 The Tribunal may, of course, give my evidence scant weight or ignore it altogether. The Tribunal
289 has the authority by law to decide this appeal however it thinks best, picking and choosing
290 which evidence to prefer, which principles and precedents to cite. Even so, as these two
291 examples demonstrate, I can offer additions to the evidence that are genuinely useful for sound
292 adjudication of this case, and that accordingly recommend denial of the Applicant's motion.

293

294 Parenthetically, this is a good opportunity to express thanks to the Planning Department of the
295 City of Niagara Falls for maintaining a comprehensive, user-friendly website that lets residents
296 educate themselves about the City's Official Plan and Zoning By-law, thereby encouraging
297 public participation in civic affairs.

298

299 **Minor correction**

300

301 One should not quibble over small matters. Still, the dispute over this condo-towers proposal
302 has gone on so long I want to correct the Applicant's statement (¶ 5) that I have had a "a four-
303 year involvement in this matter." It is actually five years. It began with my inquiry to the City's
304 Director of Planning, Alex Herlovitch, on 21 July 2016. The email chain is Exhibit E.

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

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, 2020	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:

Issues List of Citizens for Responsible Development (Niagara Falls)

1. Is the proposal compatible with the character of the adjacent residential neighbourhood?
 2. Does the applicant's traffic impact study adequately address the anticipated increase in traffic resulting from the proposed development and include specific reference to the City's ability to widen the surrounding roads to accommodate any increase in traffic and impact of the tourist related traffic volumes generated by the proximity to the international border crossing?
 3. How does the applicant justify the shadow impacts that would be created by the proposed development with respect to the adjacent residential neighbourhood and the Niagara Gorge as appropriate?
 4. Given the proximity of the property to the Niagara Gorge, has the applicant completed a geotechnical report including a slope stability that satisfactorily addresses slope stability issues?
 5.
 - a) Does the geotechnical study adequately address the potential impact of this land use purpose on the structural integrity of the surrounding geology in conformity to City of Niagara Falls Official Plan — Part 2, Section 11.2.21 (slope stability on site and off site ...recommendations on how negative impact can be avoided); Part 4, Section 14.2.5 (slope stability study for proposals within or adjacent to valleylands, steep slopes or hazard lands) and 14.2.3 (impact on existing municipal services) — to the satisfaction of LPAT?
 - b) Are the proposed Official Plan and zoning by-law amendments consistent with the Provincial Policy Statement, section 1.1.1 c (Healthy liveable and safe communities...by avoiding development and land use patterns which may cause environmental or public health and safety concerns)?
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.

REQUEST FOR REVIEW OF THE “MEMORANDUM OF ORAL DECISION DELIVERED BY JOHN DOUGLAS ON JANUARY 10, 2020 AND ORDER OF THE TRIBUNAL” IN CASE NO. PL 180376, DECISION ISSUED ON 28 JANUARY 2020

PURSUANT TO RULE 25, LPAT RULES OF PRACTICE AND PROCEDURE

Contents of the request, as prescribed in Rule 25.3

Name of requestor: Kenneth Westhues, party to the proceeding
5419 River Road
Niagara Falls, Ontario L2E3H1
Telephone: 905-353-9602 or 904-342-8886
Email address: kwesthue@uwaterloo.ca

Reason for request: Errors of fact and law in the Memorandum of Oral Decision, as detailed on pages 3-11

Desired result of review: Correction of errors

Supporting documents: Provided as appendices, list is on page 12; the reader of a digital copy of this document may click on the links provided to some additional but inessential background documents available online

Affidavit: On page 2, using the LPAT recommended format

Statement re: application for leave to appeal to the court for judicial review No such application has been made or is contemplated. The errors are obvious, not complex. Correction should be straightforward through LPAT procedures, without recourse to the court.

Filing fee: The fee of \$300, payable to the Ministry of Finance, is enclosed herewith.

Signature and date:  24 February 2020

In compliance with Rule 25.2, two paper copies of this request will be submitted to the Office of the Associate Chair, LPAT, 655 Bay Street, Suite 1500, Toronto, Ontario M5G 1E5, on or before 27 February 2020. A digital copy (PDF) will also be submitted.

EXHIBIT B

Westhues request for review of Decision, LPAT Case No. PL 180376, Page 2

AFFIDAVIT OF KENNETH WESTHUES

CASE NO.: PL 180376

PROCEEDING COMMENCED UNDER subsection 22(7) of the Planning Act, R.S.O. 1990, c. P. 13, as amended, AND UNDER subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Originally 5507 River Development Inc., now 2486489 Ontario Inc.
Subject	Request to amend the Official Plan and to amend Zoning By-law No. 79-200 – failure or neglect of the City of Niagara Falls to grant the requests
Property Address/Description:	5471, 5491, & 5507 River Rd, 4399, 4407, 4413, & 4427 John St, and part of River Lane
Municipality:	City of Niagara Falls
Municipal File No.:	AM-2017-011
LPAT Case No.:	PL 180376
LPAT File No.:	PL 180376
LPAT Case Name:	5507 River Development Inc. v. Niagara Falls (City)

I, Kenneth Westhues, of the City of Niagara Falls, Regional Municipality of Niagara, make oath and say this Request for Review, consisting of 37 numbered paragraphs on pages 3-11.

Sworn at the City of St. Augustine, St. John's County, Florida, on 24 February 2020.



(stamps are on this document submitted in hard copy)

Preface and overview

1. The Decision I ask to be corrected is from the fourth pre-hearing or Case Management Conference for Case. No. PL 180376, held by teleconference on 10 January 2020 (click [here](#) or see Appendix A). Correction of this preliminary Decision will prevent the errors identified from tainting further steps in this proceeding, help keep it on the track of factual accuracy and procedural fairness, and help ensure that the final decision is defensible.
2. The paragraphs below describe in turn two major errors:
 - a. misidentification or inaccurate description of the property for which OPA and rezoning applications have been made, specifically omission of a key component of the assembled lands;
 - b. placing an expectation on parties to this proceeding that is contrary to the LPAT Rules of Practice and Procedure.
3. The final paragraph below points out minor errors also in need of correction.

First error: misidentification of the subject property

4. To the best of my knowledge and belief, the property for which OPA and rezoning applications have been made consists of (a) all the lots fronting River Road between Philip and John Streets, assembled more than ten years ago, currently zoned [R5E](#); (b) four adjacent lots on John Street, currently zoned R2; and (c) the linchpin parcel, River Lane, a public road separating the lots on River Road from the lots on John Street, until it was closed, declared surplus, and sold to the Applicant in February 2017.
5. In the City of Niagara Falls File on these applications (AM-2017-011), the subject property is briefly but accurately described as follows:

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5471, 5491 and 5507 River Road, 4399, 4407, 4413 and 4427 John Street and Part of River Lane

6. The City has used the same brief but accurate description in the front matter of successive Planning reports on these applications: [PBD-2018-32](#) of 19 June 2018; [PBD-2018-60](#) of 14 August 2018; and [PBD-2019-70](#) of 12 November 2019 (title pages shown in Appendix B).
7. Also accurate but more detailed was the description of the subject property in the lower part of the first page of the Applicant's letter of appeal (see Appendix C), dated 29 March 2018:

The Property is located south of Phillip Street and north of John Street, on the west side of River Road. The Property is irregularly shaped and comprised of seven parcels municipally known as 5471, 5491 & 5507 River Road and 4399, 4407, 4413 & 4427 John Street, as well as an existing laneway, River Lane, which traverses between Philip Street and John Street. River Lane separates the River Road and John Street properties, with the John Street properties being on the west side of the lane.

8. By contrast, the LPAT Decision that is the subject of this request for correction omits the linchpin parcel, the former River Lane, from its description of the subject property. It commits this error in five separate instances.
9. **First instance of misidentification.** On the first page of the Decision, in the front matter about the proposed Official Plan Amendment, the "Property Address/Description" is as follows:

5471, 5491, & 5507 River Rd, 4399, 4407, 4413, & 4427 John St

10. **Second instance of misidentification.** At the top of Page 2, in the front matter about the proposed rezoning, the "Property Address/Description" again omits the former River Lane:

5471, 5491, & 5507 River Rd, 4399, 4407, 4413, & 4427 John St

11. **Third instance of misidentification.** Para. (1) of the Decision itself, under the heading “Introduction,” again omits the former River Lane in declaring that this conference was held

to facilitate development of lands located at 5471, 5491, and 5507 River Road and 4399, 4407, 4413 and 4427 John Street (the “subject property”).

12. **Fourth instance of misidentification.** Para. (3) summarizes the status of the subject property in the City of Niagara Falls [Official Plan](#) (OP). Like many other public roads, River Lane is among the OP’s parameters. Section 13.60 of the OP says “the portion of the land between River Road and River Lane may be developed with an apartment building to a maximum building height of 7 storeys...,” and further, “The portion of the site west of River Lane shall only be used for parking and buffering.” The LPAT Decision of concern here, however, excludes the former River Lane from what it calls the “subject property”:

The subject property is currently designated partially Residential and partially Special Policy Area in the City’s Official Plan (“OP”). The Special Policy Area designation permits a 119 unit apartment building up to seven storeys in height.

13. **Fifth instance of misidentification.** Para. (4) summarizes the status of the subject property in the City’s [Zoning By-law 79-200](#). Yet again, this LPAT Decision describes the subject property as consisting only of the residential lots on River Road and John Street, when in fact it consists of these lots *plus* the land that was formerly River Lane.

The subject property is 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.

14. Accurate description of the subject property is fundamental to all fields relating to land-use: land surveys, real estate, appraisals, tax assessment, and not least planning. A few jurisdictions,

like [Montgomery County, Maryland](#), explicitly state that applications for rezoning must “contain a complete and accurate description of the subject property.” Most jurisdictions take this for granted. Procedural fairness (LPAT Rule 25.7.b) requires that any adjudicating body accurately describe the subject of the proceeding. Yet nowhere in this Decision is the subject property accurately described. The key parcel, what was formerly a public road, River Lane, is not mentioned once.

Prejudicial effect of misidentification of the subject property

15. This error is traceable to its first occurrence in the heading and first paragraph of the Applicant’s letter of appeal (Appendix C), submitted by his solicitor, Daniel Artenosi. The Tribunal repeated the error in the front matter for its decisions from successive Case Management Conferences. One could therefore argue that the error at the start of the appeal letter was a kind of “false or misleading evidence” (LPAT Rule 25.7.d) that led to the errors in the Tribunal decisions. I prefer to say simply that procedural fairness (LPAT Rule 25.7.b) requires that the error be corrected in this Decision, and not be repeated in subsequent decisions.
16. The error escaped my attention until I received on 20 December 2019, from the Applicant’s solicitor, Natalie Ast, a draft Procedural Order and a compilation of the draft issues lists (see Appendix D) prepared by the other four parties in this proceeding. The front matter showed the same misidentification of the subject property as at the top of the Applicant’s letter of appeal.
17. Thinking the error might be due to oversight or carelessness, I pointed it out to Mr. Artenosi and Ms. Ast in an email of 31 December 2019 (Appendix E):

I strongly object to your omission of the River Lane parcel from the “Property Address/Description” in two places on the first page of your draft procedural order. Factual accuracy requires that this linchpin parcel be included in the description, as the

EXHIBIT B

city's Planning Department included it in the heading of its report PBD-2019-70, 12 November 2019.

18. The Applicant's solicitors did not reply to my objection, instead repeated the two instances of misidentification in the revised Draft Issues List that they circulated on 8 January 2020.
19. Further, in both the initial and the revised Draft Issues Lists, the Applicant's solicitors used strikethrough to signal their intent to delete all eleven issues on my list pertaining to the former River Lane, placing a Note to Draft after each one: "These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding."
20. Thereby it became clear to me that the misidentification of the subject property, the omission of the River Lane parcel, is a matter of serious consequence for this proceeding. If that parcel is excluded from the definition of the subject property, as the Applicants' solicitors have excluded it and as the LPAT Decision of 28 January 2020 has excluded it, then it becomes exceedingly difficult if not impossible for any party to raise issues concerning it. The effect of a flawed, incomplete definition of the subject matter of the proceeding is inevitably a flawed, biased outcome. That is why I am making this request for review.
21. Since the Applicant's solicitors ignored my request for correction of the description of the subject property, I raised this concern with the Tribunal at the teleconference of 10 January 2020. Mr. Douglas asked Mr. Artenosi for his response to my concern. I may have missed part of what Mr. Artenosi said, but I believe the gist of it was that in his Draft Procedural Order, he was simply repeating the "Property Address/Description" shown in the previous decisions issued in this case. Mr. Douglas seemed satisfied with Mr. Artenosi's response.
22. When I received on 28 January 2020 the Memorandum of Oral Decision and saw that it repeated yet again the flawed, incomplete description of the subject property, and this even after I drew the matter to Mr. Douglas's attention in the teleconference, I concluded that a request for review and correction of the Decision was not only reasonable but necessary. This

conclusion was reinforced by the fact that Mr. Douglas did not consider my expression of concern in this regard to be of sufficient importance even to mention in his Memorandum of Oral Decision.

23. Indeed, the misidentification of the subject property may already have led the Tribunal to rule out of its jurisdiction issues pertaining to the River Lane parcel. In a somewhat oblique sentence, Mr. Douglas writes in Para. (8) that “the Tribunal also expressed concerns regarding the Issues List noting that a number of concerns were outside the jurisdiction of the Tribunal to make a disposition on at a contested hearing.” As I recall the context of discussion at the teleconference, I believe the reference here is to issues pertaining to the River Lane parcel.
24. It may even be that on account of the erroneous description of the subject property, Mr. Douglas does not yet realize that the River Road parcel is part of it. Understandably, since he is new to the file, he may be under the mistaken impression that the City has handled this development proposal in the normal way, that River Lane is still a City-owned public road that will be closed and sold to the developer only if the OPA and rezoning applications are approved.

Second error: imposing on parties to this proceeding an expectation that is contrary to the LPAT Rules of Practice and Procedure

25. I had the feeling at the teleconference of 10 January 2020 that the Tribunal was ill-disposed to my participation as a self-represented party in the proceeding. Mr. Douglas seemed to defer to the Applicant’s and the City’s solicitors while treating me (and the other self-represented party, the Citizens for Responsible Development) with disdain. He lectured me at length about how I should hire a lawyer and/or a professional planner.
26. I was so unsettled by the experience that I immediately searched the *Planning Act*, the *LPAT Act* and LPAT’s Rules of Practice and Procedure, especially Rule 8 on the “Role and Obligations of a Party,” to see if some rule required a party to rely on a lawyer or on expert witnesses in presenting evidence and making a case. I found no such rule. I found instead a higher priority

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on addressing evidence and issues than on the professional credentials of parties and participants, and an emphasis on flexibility, consultation, compromise and mediation toward resolving contentious issues in ways that serve the public good. What I found was consistent with the impression I gained in my earlier limited experience with OMB and LPAT proceedings.

27. I therefore made a request for information on 19 January 2020 to Evelyn Dawes, the LPAT Deputy Registrar and formerly its Citizen Liaison Coordinator, asking “if LPAT now has a rule or policy that discourages anyone without a credential in planning or law from taking part in hearings as a party or participant.” (See Appendix F.) I explained in detail the reasons for and background of my request. Ms. Dawes referred my letter to the Office of the Associate Chair.
28. While awaiting reply, I received on 28 January 2020 the Tribunal Decision in the present case, the Decision that I am here requesting be reviewed. Para. (14) reports an even firmer rejection of self-representation than I had recalled from the teleconference:

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.

29. According to [Black's Law Dictionary](#), *expectation* means “the belief that something will happen based on a series of actions.” Reading the sentence in Para. (14), a reasonable person must conclude that the Tribunal will not take seriously, and may indeed disqualify, a party who puts forward a case without the support of expert witnesses.
30. The Tribunal’s assertion in Para. (14) is not supported by any rule or statement I can find in relevant provincial legislation, nor in LPAT’s Rules of Practice and Procedure. I therefore ask that this sentence be deleted from the Tribunal Decision. In terms of LPAT’s grounds for exercise of the Associate Chair’s discretion, the Tribunal’s assertion in Para. (14) violates procedural fairness and shows unmistakable bias against self-represented parties (Rule 25.7.b).

31. On 18 February 2020, I received a reply (see Appendix G) to the request for information I had sent on 19 January to the LPAT Deputy Registrar. The reply came from Scott A. Morrison, Executive Advisor to the Associate Chair. The following paragraph from his reply confirms my own reading of the LPAT Rules and supports my request for deletion of the sentence quoted above from Para. (14) of the Tribunal Decision:

The Tribunal does not require a Party to a proceeding to have representation; though they may elect to do so if they are not familiar with the process or do not feel comfortable acting before the Tribunal. Self-represented individuals are welcome in the hearing process, but are expected to fulfill the responsibilities of the standing they are granted; i.e. Party or Participant. Expert witness, qualified as such before the Tribunal, are not a requirement for the proceeding; though their evidence can include opinion evidence because of their expertise.

32. Two more paragraphs in Mr. Morrison's email deserve quotation here, since their characterization of an LPAT proceeding contrasts sharply with the overall thrust of the Tribunal Decision that I am asking here to be reviewed and corrected:

For all appeals before the Local Planning Appeal Tribunal, it is important for all the relevant facts to be presented and be available to the Adjudicator to allow for the most appropriate decision to be rendered.

To that end, the Tribunal does indeed wish to hear from all individuals that can contribute to the appeal at hand, as our Rules and the governing Legislation allow.

33. The error of law in this Tribunal Decision is of urgent practical importance to me, as a party to Case No. PL 180376. The Decision reports in Para. (12) that I do not plan to call witnesses of my own. If the sentence quoted above from Para. (14) is allowed to stand, the sentence stating an

expectation that a party will rely on expert witnesses, then there is no point in my continuing as a party to this proceeding – if, indeed, I am not already disqualified.

34. The error of law in the Tribunal Decision is of similar practical importance to the Citizens for Responsible Development (CRD), another party in LPAT Case No. PL 180376. The Decision reports in Para. (13) that CRD “noted that retaining counsel and expert witnesses is expensive,” and that CRD has not decided what witnesses it may call. If the sentence quoted above from Para. (14) is allowed to stand, then CRD may have to withdraw from this proceeding, for lack of sufficient funds to retain counsel and expert witnesses.

Minor errors in need of correction

35. LPAT may wish to clear up two further matters in this Decision. They are not at all so serious as the two major errors described above, and fall in the category of “technical or typographical error,” as described in Rule 24.04.
36. **First**, Para. (20) reads as follows: “Upon further consideration this panel is seized.” By standard dictionary definition, the phrase, “upon further consideration,” implies that one now takes a different position than one did sometime earlier. The phrase may not be appropriate here, since there is no indication in the Decision that the adjudicator was “not seized” at an earlier point in time. In addition, while the word *panel* can sometimes refer to just one adjudicator, the word normally refers, in Ontario’s [Rules of Civil Procedure](#), the [LPAT Act](#), and LPAT’s [Rules of Practice and Procedure](#), to an adjudicator consisting of at least three persons. In the present case, the word *Member* might make the sentence clearer.
37. **Second**, the name of the Applicant’s solicitor, Mr. Artenosi, is correctly spelled in the front matter, but misspelled in Paras. (6), (8), (15) and (16).

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Westhues request for review of Decision, LPAT Case No. PL 180376, Page 12

LIST OF APPENDICES

- | | | |
|----------|-----------|--|
| A | Pp. 13-18 | The Decision of concern here, dated 28 January 2020, from a Case Management Teleconference on 10 January 2020, Case No. PL 180376. |
| B | Pp. 19-21 | Title pages of three successive reports on the subject applications from the Department of Planning and Development, City of Niagara Falls, 19 June 2018, 14 August 2018, and 12 November 2019 |
| C | P. 22 | First page of Applicant's Letter of Appeal, Daniel Artenosi, 29 March 2018 |
| D | Pp. 23-29 | First page and relevant section of annotated draft issues list, from the draft Procedural Order, an email attachment from Applicant's solicitors sent to all parties, 20 December 2019 |
| E | P. 30 | Email, Westhues to Applicants' solicitors, 31 December 2019 |
| F | Pp. 31-32 | Letter requesting information, Westhues to LPAT Deputy Registrar, 19 January 2020 |
| G | P. 33 | Email in response to (F), Scott A. Morrison, Executive Advisor to the Associate Chair, to Westhues, 18 February 2020 |

APPENDIX A: Decision of concern here**Local Planning Appeal Tribunal**
Tribunal d'appel de l'aménagement
local**ISSUE DATE:** January 28, 2020**CASE NO(S):**

PL180376

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the 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, & 5507 River Rd, 4399, 4407, 4413, & 4427 John St
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

EXHIBIT B

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, & 5507 River Rd, 4399, 4407, 4413, & 4427 John St
Municipality: City of Niagara Falls
Municipality File No.: AM-2017-011
LPAT Case No.: PL180376
LPAT File No.: PL180377

Heard: January 10, 2020 by Telephone Conference Call

APPEARANCES:

Parties

Counsel/Representative*

2486489 Ontario Inc.

Daniel Artenosi and Natalie Ast

City of Niagara Falls

Tom Halinski

Niagara Parks Commission

Sarah Turney

Kenneth Westhues

Self-represented*

Citizens for Responsible
Development (Niagara Falls)

Dianne Munro* and Debra Jackson-Jones*

MEMORANDUM OF ORAL DECISION DELIVERED BY JOHN DOUGLAS ON JANUARY 10, 2020 AND ORDER OF THE TRIBUNAL

INTRODUCTION

- [1] This was the fourth Case Management Conference (“CMC”) conducted by Telephone Conference Call (“TCC”) in the matter of appeals to the Local Planning Appeal Tribunal (the “Tribunal”) by 2486489 Ontario Inc. (the “Applicant/Appellant”) pursuant to s. 22(7) and 34(11) of the *Planning Act* (the “Act”) for the refusal or

EXHIBIT B

neglect of the City of Niagara Falls (the “City”) to make decisions with respect to applications to amend the City’s Official Plan and Zoning By-law to facilitate development of lands located at 5471, 5491, and 5507 River Road and 4399, 4407, 4413 and 4427 John Street (the “subject property”).

- [2] The applications under appeal are intended to permit the development of 390 apartment units within a 21 storey tower and a 12 storey tower, with underground parking.
- [3] The subject property is currently designated partially Residential and partially Special Policy Area in the City’s Official Plan (“OP”). The Special Policy Area designation permits a 119 unit apartment building up to seven storeys in height. The Official Plan Amendment (“OPA”) would designate the entire subject property as Special Policy Area.
- [4] The subject property is 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 property is zoned Residential 5F Density which would permit the proposed development.
- [5] In addition to the parties, two participants, Rita Vetere and Ken Crossman, joined the TCC.
- [6] At the third PHC the parties were directed to exchange Issues Lists by December 13, 2019. The Applicant/Appellant was to draft a Procedural Order (“PO”), Issues List and Work Plan and provide copies to the other parties by December 20, 2019. The parties were also directed to file the draft PO and Issues List with the Tribunal by January 8, 2020. The Tribunal did receive a copy of the draft PO and Issues List but not a Work Plan. According to submissions, with the exception of the Work Plan, the directions set out in this paragraph were completed. Mr. Artenossi explained that a draft Work Plan could not be completed until the Issues List is finalized and the number of witnesses to be called by each party are identified.
- [7] The Tribunal wants to ensure that the parties are using the current formats for Procedural Order and the Work Plan/Hearing Plan. The current formats should be available on the Tribunal’s website. Alternatively, the parties may contact the Case

Coordinator if they have any difficulties locating the current formats online.

- [8] The Tribunal noted that the draft Issues List had been edited, using strikeout and highlighted comments showing issues that Mr. Artenossi thought should be removed from the list. During the TCC the Tribunal also expressed concerns regarding the Issues List noting that a number of concerns were outside the jurisdiction of the Tribunal to make a disposition on at a contested hearing.
- [9] Additional clarification is required with respect to non-appellant parties and the Tribunal's *Rules of Practice and Procedure* (the "Rules"), in particular Rule 8.3 which states:

Rule 8.3 - Non-Appellant Party A party, who is not an Appellant in a proceeding, but is conferred party status by the Tribunal, may not raise or introduce new issues in the proceeding. A non-Appellant party may only participate in the proceeding by sheltering under an issue raised in an appeal by an Appellant party and may participate fully in the proceeding to the extent that issue remains in dispute. A non-Appellant party has no independent status to continue an appeal that is withdrawn by an Appellant party, or is otherwise resolved or determined by the Tribunal.

- [10] The Tribunal noted at the hearing that the Issues List and the number of witnesses to be called assists the Tribunal in determining the number of days to be set for a hearing. The Tribunal asked the parties how many witnesses they planned to call if this matter proceeds to a contested hearing.
- [11] The Applicant/Appellant and the City will have a better idea of how many witnesses they will be calling once the Issues List is finalized.
- [12] Kenneth Westhues advised that he did not plan to call any witnesses. He plans to cross-examine the witnesses called by the other parties.
- [13] The Citizens for Responsible Development (Niagara Falls) noted that retaining counsel and expert witnesses is expensive. They will have a better idea what witnesses they may call after they have had a chance to revisit their Issues List.
- [14] 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 Tribunals 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.

[15] Mr. Artenossi requested that the Tribunal set a date for a fifth CMC, and a date for a 10-day contested hearing in this matter. The Tribunal advised that it would not set a hearing date until the Issues List has been refined to the satisfaction of the Tribunal, and the Tribunal had a better idea of how many witnesses each party planned to call for a contested hearing. The Tribunal agreed to schedule a fifth Case Management Conference ("CMC") in this matter, the purpose of which will be:

- to refine the draft PO;
- to refine the Issues List;
- to identify the number of witnesses each party intends to call; and,
- to set a date for a contested hearing.

[16] Mr. Artenossi advised the Tribunal that negotiations are ongoing with the City in the hopes of reaching a settlement. He further advised that there may be an interest in mediation between the parties. The Tribunal advised the parties that if there is an interest in Tribunal-led mediation, they should make a formal request through the Tribunal's Case Coordinator.

[17] The Tribunal noted that the *Planning Act* and the *Local Planning Appeal Tribunal Act* ("LPATA") had been revised through the proclamation of Bill 108 on September 3, 2019. Some of these changes affect the manner in which participants provide their evidence to the Tribunal, in particular s. 33.2 of LPATA:

Non-parties, written submissions only

33.2 Unless any general or special Act specifies otherwise, a person who is not a party to a proceeding before the Tribunal may make submissions to the Tribunal with respect to the proceeding in writing only. 2019, c. 9, Sched. 9, s. 5.

[18] The Tribunal advises the participants to read the PO carefully so they know the date by which their participant statements must be submitted to the parties and the Tribunal.

EXHIBIT B

- [19] The Tribunal scheduled a date for a fifth in-person CMC to commence at **10 a.m. on Tuesday, March 24, 2020**, to be held at:

**Municipal Building
Council Chambers
4310 Queen Street
Niagara Falls, ON L2E 6X5**

- [20] Upon further consideration this panel is seized.
[21] No further notice to be given.
[22] The Tribunal orders as directed above.

“John Douglas”

JOHN DOUGLAS
MEMBER

APPENDIX B: Title pages of three successive Planning Reports from the City of Niagara Falls with respect to the Application



PBD-2018-32
June 19, 2018

REPORT TO: Mayor James M. Diodati
and Members of Municipal Council

SUBMITTED BY: Planning, Building & Development

SUBJECT: PBD-2018-32
AM-2017-011, Official Plan & Zoning By-law Amendment Application
5471, 5491 and 5507 River Road, 4399, 4407, 4413 and
4427 John Street and Part of River Lane
Proposal: Apartment Building Consisting of Two Towers
Applicant: 5507 River Development Inc. (Mike Wang)
Agents: Italia Gilberti, Broderick and Partners
Ryan Guetter, Weston Consulting

RECOMMENDATIONS

1. That Council defer the Official Plan and Zoning By-law amendment application to enable the applicant time to modify the project in keeping with the following principles:
 - a. The towers being stepped back in accordance with a 45 degree angular plane measured from the east side of River Road, as detailed in this report;
 - b. A minimum 6 metre exterior side yard building setback being provided from River Road;
 - c. A 3 metre wide landscaped open space strip being provided between John Street and any parking area; and
 - d. Maintenance of the separation distance between the two towers and the setbacks and stepped back form from John and Phillip Streets and the residential properties to the west as shown in the schedules to this report.
2. The public meeting be continued once revised drawings implementing the above noted recommendations have been received and reviewed by Staff.

EXECUTIVE SUMMARY

5507 River Development Inc. has requested Official Plan and Zoning By-law amendments to permit the development of a 390 unit apartment building with 21 and 12 storey towers on the lands known as 5471, 5491 and 5507 River Road, 4399, 4407, 4413 and 4427 John Street and the closed part of River Lane. The project cannot be recommended in its current form. To ensure an appropriate transition is provided to the residential neighbourhood to the west and north and the buildings are designed to respect the streetscape to ensure a human scale development that does not overwhelm the pedestrian realm along River Road several modifications are recommended to the proposed building and site design. Provided revised drawings incorporate these modifications, it can be concluded:



PBD-2018-60
August 14, 2018

REPORT TO: Mayor James M. Diodati
and Members of Municipal Council

SUBMITTED BY: Planning, Building & Development

SUBJECT: **PBD-2018-60**
AM-2017-011, Official Plan & Zoning By-law Amendment Application
5471, 5491 and 5507 River Road, 4399, 4407, 4413 and
4427 John Street and Part of River Lane
Proposal: Apartment Building Consisting of Two Towers
Applicant: 5507 River Development Inc. (Mike Wang)
Agents: Italia Gilberti, Broderick and Partners
Ryan Guetter, Weston Consulting

RECOMMENDATIONS

1. That Council approve the revised Official Plan and Zoning By-law amendment application to permit an apartment dwelling on the subject lands, subject to the south tower being a maximum of 16 storeys and the north tower being redesigned to have a maximum height of 8 storeys and this tower and podium being stepped back in accordance with a 45 degree angular plane measured from the west lot line of the property;
2. That the site specific zoning by-law be subject to the regulations recommended in this report and a Holding (H) provision to secure archaeological assessments and a Record of Site Condition to the satisfaction of the Region of Niagara; and
3. That the passage of the amending by-law be conditional on the execution of a Section 37 Agreement to secure: contributions to streetscape improvements on the abutting River Road frontage; the design of the project and; a capital facilities contribution based on 1% of the construction value of the net floor area beyond what is currently permitted by the Official Plan

EXECUTIVE SUMMARY

5507 River Development Inc. has requested Official Plan and Zoning By-law amendments to permit a development on the lands known as 5471, 5491 and 5507 River Road, 4399, 4407, 4413 and 4427 John Street and the closed part of River Lane. The original proposal, consisting of a 390 unit apartment building with 21 and 12 storey buildings, was deferred from the June 19/18 Council meeting at the request of the applicant to allow him time to consider several recommended changes by Staff.

The applicant has revised the proposal and is now seeking approvals for a 350 unit apartment building with 16 and 10 storey towers. The revised proposal represents an improvement in providing an appropriate transition between River Road and the residential area to the west and north. However, Staff is concerned that an appropriate transition is not provided from the nearest residential property on Phillip Street. Planning Staff recommend the project be



PBD-2019-70
November 12, 2019

REPORT TO: Mayor James M. Diodati
and Members of Municipal Council

SUBMITTED BY: Planning, Building & Development

SUBJECT: **PBD-2019-70**
AM-2017-011, Official Plan & Zoning By-law Amendment Application
5471, 5491 and 5507 River Road, 4399, 4407, 4413 and
4427 John Street and Part of River Lane
Proposal: Apartment Building Consisting of 34 and 7 Storey
Towers
Applicant: 2486489 Ontario Ltd.
Agent: Ryan Guetter, Weston Consulting

RECOMMENDATIONS

That Council not approve the revised Official Plan and Zoning By-law amendment application to permit a 384 unit apartment dwelling, with 34 and 7 storey towers, on the subject lands.

EXECUTIVE SUMMARY

2486489 Ontario Ltd. has requested revised Official Plan and Zoning By-law amendments to permit a development on the lands known as 5471, 5491 and 5507 River Road, 4399, 4407, 4413 and 4427 John Street and the closed part of River Lane. 2486489 Ontario Ltd. recently purchased the land and is seeking approval for a 384 unit apartment complex having 34 and 7 storey towers.

Previously, a 390 unit apartment building with 21 and 12 storey towers was proposed by 5507 River Development Inc. This request was revised to be a 350 unit apartment building with 17 and 10 storey towers. Consideration of this proposal was deferred at the August 14, 2018 Council meeting at the request of the applicant.

This file is currently before the Local Area Planning Tribunal (LPAT), having been appealed by the previous owner. The current owner is asking a decision of Council which will form part of the appeal.

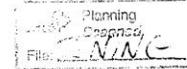
The revised proposal cannot be recommended for the following reasons:

- The proposal exceeds the height and density provisions for a Residential designation;
- The proposal does not conform to the intent of the Official Plan in providing an appropriate transition and separation distance between the established low rise neighbourhood and the high rise building proposed;
- The lands are not within one of the intensification nodes or corridors identified for taller buildings or higher densities;

APPENDIX C: First page of Applicant's Letter of Appeal, 29 March 2018



Overland LLP
 Daniel B. Arsenosi
 Tel: (416) 730-0337 x. 111
 Direct: (416) 730-0320
 Email: darsenosi@overlandllp.ca



March 29, 2018

VIA COURIER

City Clerk
 City Clerk's Office
 4310 Queen Street
 Niagara Falls, ON L2E 6X5



**RE: Official Plan Amendment and Zoning By-law Amendment Applications
 City File No. AM-2017-011
 5471, 5491 & 5507 River Road and 4399, 4407, 4413 & 4427 John Street
 ** NOTICE OF APPEALS ** by 5507 River Development Inc.
 Planning Act, ss. 22(7) and 34(11)**

We are the solicitors for 5507 River Development Inc. ("**Formie**"), being the applicant in the above-noted applications for an official plan amendment (the "**OPA Application**") and zoning by-law amendment (the "**ZBA Application**") in respect of the properties municipally known 5471, 5491 & 5507 River Road and 4399, 4407, 4413 & 4427 John Street (collectively, the "**Property**").

On behalf of Time, we hereby appeal the OPA Application and the ZBA Application (collectively, the "**Applications**") to the Ontario Municipal Board pursuant to ss. 22(7) and 34(11) of the *Planning Act*, R.S.O.1900, c. P. 13, as amended. The reasons for appeal are generally set out below.

The Property and Surrounding Area

The Property is located south of Phillip Street and north of John Street, on the west side of River Road. The Property is irregularly shaped and comprised of seven parcels municipally known as 5471, 5491 & 5507 River Road and 4399, 4407, 4413 & 4427 John Street, as well as an existing laneway, River Lane¹, which traverses between Philip Street and John Street. River Lane separates the River Road and John Street properties, with the John Street properties being on the west side of the lane. The Property has total lot area of 0.79 hectares (1.96 acres) and frontages of approximately 106.3 m along John Street and 120.7 m along River Street. The topography of the Property ascends towards the west by approximately 10 metres.

All three of the River Road land parcels are vacant. The four John Street properties are each occupied by a 2.5 storey single detached dwelling.

¹ On February 14th, 2017 a Recommendations Report was presented to City of Niagara Falls Council to request the closing of River Lane and conveyance of this land to the landowner for the Proposed Development. The proposed land conveyance was approved by Council and By-law 2017-23 was passed on February 14, 2017 to permanently close the laneway.

APPENDIX D: First page and relevant section of annotated draft issues list, from the Draft Procedural Order sent as email attachment by the Applicant's solicitors to all parties, 20 December 2019



Local Planning Appeal Tribunal
Procedural Order

ISSUE DATE: [DATE]

CASE NO(S). PL180376

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

Applicant and Appellant: Subject:	5507 River Development Inc. Request to amend the Official Plan – Failure of the City of Niagara Falls to adopt the requested amendment
Existing Designation: Proposed Designation: Purpose:	Residential and Special Policy Area Special Policy Area 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: Subject:	5507 River Development Inc. 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: Purpose:	Residential Apartment 5F Density (site specific) 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

Issues List of Kenneth Westhues

Proposed all-party agreement

1. Although LPAT has not yet asked the parties to this case to identify areas of agreement, the hearing will proceed more clearly and expeditiously if we begin now to work toward such identification, an agreed-upon statement of facts and procedures. Two areas of prospective all-party agreement are as follows. **[NTD: These statements are not issues for adjudication, and do not engage matters of land-use planning that are germane to the Tribunal's determination of the appeals.]**
2. Given that the subject properties were owned by 5507 River Development when Mr. Artenosi filed the letter of appeal to LPAT on 29 March 2018, it is appropriate that all parties agree that the subject matter of this hearing includes all the steps taken toward development of these properties by the previous owner beginning with the first step identified in Mr. Artenosi's letter, the pre-application meeting of December 2016. **[NTD: These statements are not issues for adjudication, and do not engage matters of land-use planning that are germane to the Tribunal's determination of the appeals.]**
3. When asked at the open house on 28 October 2019 why he is not willing to build within the height and density limits set down in the Official Plan and zoning by-law, Amir Aghaei replied that the numbers do not add up—which is to say that his company would not make enough money. His concern may or may not be warranted, but since he expressed it in a public forum, it is appropriate that all parties to this proceeding agree that in keeping with the Planning Act, LPAT's eventual decision should not depend in any way on how much or how little money the applicant might make from the proposed development. The applicant's business plan should not be part of the evidence of this hearing. Anticipated financial return is not a planning reason, not a legitimate basis for LPAT's approval or denial of the amendment application. **[NTD: These statements are not issues for adjudication, and do not engage matters of land-use planning that are germane to the Tribunal's determination of the appeals.]**

Preface to my draft issues list

4. The proposed development extends over lands in three different categories, each of which has a different status in the city's Official Plan: (1) the previously assembled lots fronting River Road, zoned R5E; (2) the four residential lots fronting John Street, zoned R2; and (3) the former River Lane, which had been since the 19th century a city-owned public street and a standard reference point in planning and public administration until it was sold to the applicant. The issues I would ask LPAT to address can be placed in these same three categories, as shown below. My list concludes with issues pertaining to all three categories of property. **[NTD: These statements are not issues for adjudication, and do not engage matters of land-use planning that are germane to the Tribunal's determination of the appeals.]**

Substantive issues pertaining to the properties fronting River Road, zoned R5E

5. Does the application provide adequate planning reasons for its deviation from the Official Plan and current zoning, as approved by City Council in 2008 and upheld by the Ontario Municipal Board,
 - a) With respect to height,
 - b) With respect to density, and
 - c) With respect to building setbacks from
 - i. River Road,
 - ii. John Street,
 - iii. Philip Street, and
 - iv. most especially, the property at 4434 Philip Street?
6. Given that the “extremely dense” (PD-2008-70) development currently allowed for this site by the Official Plan (about 96 units per acre) more than satisfies the provincially mandated targets for residential intensification, can these targets now be cited in support of density twice as high, about 200 units per acre? **[NTD: Clarification is requested to understand this issue. What is being referred to in this statement: “can these targets now be cited in support of density twice as high, about 200 units per acre?”]**
7. What evidence is there, if any, of compatibility of the proposed development with the existing neighbourhood, as required by Part 2, Section 1.15 of the Official Plan,
 - a) With respect to height,
 - b) With respect to density,
 - c) With respect to architecture and design?

Substantive issue pertaining to the properties fronting John Street, zoned R2

8. Given that existing provisions of the Official Plan and zoning (R2) for the John Street properties allow for maximum density of less than 20 units per acre, and given that these properties have always been legally part of the River Road neighbourhood, is there any justification for allowing super-high-density, high-rise condos on these properties, beyond the fact that they are currently owned by the same company that owns the property on River Road approved in 2008 for high-density development?

Substantive issues pertaining to the former River Lane

- ~~9. Did the applicant violate standard principles of land-use planning and/or infringe upon the rights of abutting landowner and resident, Susie Ong, 4434 Philip Street, by:
 - ~~a. providing to the city’s legal department sometime in the summer of 2016, and through that department to appraiser Ronald C. Ellens, a map that falsely showed the applicant as owning all properties abutting River Lane, including property actually owned then and now by Ms. Ong;~~
 - ~~b. falsely representing to the city (as reported by the City Solicitor in February 2017) that Ms. Ong supported the development proposal;~~
 - ~~c. circulating throughout the River Road neighbourhood in the spring of 2017, a handout with a map that falsely showed Ms. Ong’s property as part of the development site?~~~~

[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]

10. Did the applicant violate standard principles of land use planning by using the name, "Time Development Group," when it bought land from the city in February 2017 and when it invited local residents to an information meeting in April 2017, despite the Federal Court of Canada having granted an injunction on 22 September 2016 against the applicant's use of that name? **[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]**
11. Does available evidence support the assertion in Mr. Artonosi's letter of appeal dated 29 March 2018 that "Feedback received from residents was considered in the preparation of the applications which were submitted to the City"? **[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]**
12. Did the City of Niagara Falls infringe upon the property rights of Susie Ong, owner of 4434 Philip Street, by
 - a. Failing to offer her an opportunity to purchase half the public road that it declared surplus and sold to the applicant in February 2017, that is half of River Lane in the two places where the lane abuts Ms. Ong's property;
 - b. Ignoring the suggestion of the City Solicitor in his report, to make the sale of the River Lane property conditional, out of concern for Ms. Ong's interests, on negotiating satisfactory arrangements with her?**[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]**
13. Did the appraisal of the River Lane parcel for \$11,400 greatly undervalue this parcel?
[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]
14. Was the appraisal of the River Lane parcel as of 31 August 2016, an accurate, reliable basis on which to sell the parcel in February 2017, or was it outdated?
[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]
15. In selling the former River Lane property to the applicant for \$1.30 per square foot, two weeks after the applicant had paid between \$55 and \$158 per square foot for five abutting parcels, did the city violate the prohibition of bonussing in the *Municipal Act*, that is, "selling any property of the municipality at below fair market value" (S. 106)?
[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]
16. Was the sale of the former River Lane property to the applicant in February 2017 a planning decision, in effect a major amendment to the Official Plan, disguised as the sale of land "surplus to the city's needs"?

[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]

~~17. Was the sale of the former River Lane property to the applicant in February 2017, prior to assessment of the applications by the Department of Planning, in keeping with precedents in the City of Niagara Falls for processing of development proposals?~~

[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]

~~18. Did the sale of the former River Lane property to the applicant in February 2017 corrupt from the start, in the applicant's favour, the proper handling of this development application in terms of the *Planning Act*?~~

[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]

~~19. What is the fairest, most reasonable, most constructive solution at this point to the irregularities surrounding the closure and sale of River Lane on 14 February 2017? Can any party to this proceeding think of a better alternative than the following? That LPAT require that prior to approval of any development on the River Lane property, (a) the City of Niagara Falls commission two independent appraisals of the market value of this property on 14 February 2017, by professional appraisers having no previous involvement with either the applicant or the city; (b) that the cost of these appraisals be borne by the applicant; (c) that the applicant pay to the City of Niagara Falls any difference between the average of the two independently determined appraised values and the \$12,000 that was previously paid; and (d) that the city publish on its website the full text of the letters requesting these appraisals and the appraisals themselves.~~

[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]

Procedural issues pertaining to all three categories of property

~~20. LPAT might reasonably dismiss this appeal without a hearing on grounds that the legal basis for it, as stated in Mr. Artenosi's letter of 29 March 2018, namely the city's inordinate delay in making a decision on the applications, was lost on 18 June 2018, and lost with more finality on 14 August 2018, when the applicant himself requested the city to delay making a decision. LPAT might also reasonably dismiss this appeal without a hearing on grounds that the applicant now proposes a development substantially different (different owner, architect, architectural style, footprint, layout, and most notably height, 34- and 7-storey towers as compared to 21- and 12-storey towers) from the development described in Mr. Artenosi's letter of appeal.~~

~~21. If one of the other parties moves for summary dismissal of this appeal on one of these grounds or some other ground, I will support the motion. I will not, however, make such a motion myself. This appeal has dragged on so long, my preference at this juncture is that all relevant issues be given a full airing before LPAT and that LPAT deliver a~~

decision that will not only confirm the decision of City Council on 12 November 2019, but will serve as a guide to any applications that may be made in the future.

[NTD: Issues 20 & 21: This does not relate to issues for adjudication in the hearing. They purport to raise preliminary matters that the party suggests may be determined by way of motion, which the party does not intend to bring.]

22. Specifically, I ask that LPAT review the complete documentary record of this development application beginning with the pre-application conference of December 2016 and the closure and sale of River Lane on 14 February 2017, and that LPAT comment on this and all subsequent decisions taken by the applicant, by the city, and by LPAT, in light of the procedures set forth in the Planning Act and relevant precedents. For the 20-month period between 29 March 2018 and 12 November 2019, more than a year and a half, the applicant was allowed to pursue at once two parallel paths toward gaining approval of his development proposal, the municipal path (the city) and the provincial path (LPAT). This is not the process envisioned in the Planning Act. Concerned residents showed up for public meetings with City Council on 18 June 2018 and 14 August 2018, only to see those meetings cancelled at the last minute, at the applicant's request. From the start until 12 November 2019, the deck seemed to be stacked in the applicant's favour, while confusing, discouraging, frustrating and wearing down the statutorily mandated public participation in the planning process.

[NTD: These issues do not engage matters of land use planning and are not germane to the Tribunal's determination in this proceeding.]

Substantive issues pertaining to all three categories of property

23. Given the proximity of the subject properties to the lip and wall of the Niagara Gorge, is it reasonable to require a thorough slope-stability assessment and positive recommendation by engineers specializing in geomechanics, prior to approval of any large-scale construction and development?
24. Does the applicant's Geotechnical Report provide evidence-based assurance that construction of the proposed high-rise condo towers and excavation for multiple levels of underground parking entail minimal risk to the Niagara Gorge?
25. Does the applicant's Environmental Impact Study provide evidence-based assurance that construction of the proposed high-rise condo towers and excavation for multiple levels of underground parking entail minimal risk to the Niagara Gorge?
26. Are the objections raised to the proposed development by Niagara Parks a proper exercise of its authority under the Niagara Parks Act "to manage, control and develop the Parks," including by "providing for the protection and preservation from damage of the property of the Commission"?

[NTD: This issue is raising the question of validity of objections raised by the Niagara Parks Commission and not issues with the proposal itself.]

~~27. Are the objections raised to the proposed development by the Niagara Peninsula Conservation Authority a proper exercise of its authority under the Conservation Authorities Act, as stated in Section 3.27 of NPCA policies: "Planning Act applications and building permit applications along the Niagara River will be reviewed by the NPCA to address erosion hazards associated with steep slopes (slope height greater than or equal to 3m)..."?~~

[NTD: This issue is raising the question of validity of objections raised by the Niagara Parks Commission and not issues with the proposal itself.]

In summary: Did Niagara Falls City Council, in its decision on 12 November 2019 to deny this application, deviate so far from applicable laws and principles of urban planning that LPAT can appropriately disregard the purpose of the Ontario Planning Act stated in Para. 1.1(f): "to recognize the decision-making authority and accountability of municipal councils in planning"?

APPENDIX E

EMAIL, Westhues to Applicant's solicitors, 31 December 2019

From: Kenneth Westhues

Sent: 31 December 2019 10:58

To: Natalie Ast; thalinski@airdberlis.com; sturney@fasken.com; dljacksonjones1@gmail.com; dbmunro@icloud.com; 'Zwarycz, Tamara (MAG)'; Daniel Artenosi

Subject: In response to your draft procedural order for PL180376

Dear Ms. Ast and Mr. Artenosi,

Attached please find my revised issues list.

- (1) I do not consent to your deletion of the issues pertaining to the River Lane property. These are numbered 9-19 on the list I circulated on 13 December, 6-16 on the revised list I'm circulating today.
- (2) From your deletion of my paragraphs about possible matters of all-party agreement, I conclude that you are not interested for now in trying to identify such matters. I have therefore reformulated these as issues for adjudication, while noting that these issues may yet be resolved by all-party agreement.
- (3) I strongly object to your omission of the River Lane parcel from the "Property Address/Description" in two places on the first page of your draft procedural order. Factual accuracy requires that this linchpin parcel be included in the description, as the city's Planning Department included it in the heading of its report PBD-2019-70, 12 November 2019.
- (4) Please have another go at your Attachment 3, the order of evidence, which appears to be garbled, or perhaps it's mainly boilerplate. The City of Niagara Falls and the Niagara Parks Commission are listed as if they are parties in support of the proposal.
- (5) I won't comment on how you have handled the other parties' issues lists, except to emphasize the point you nicely phrase at the start of your Attachment 2, that including an issue on the list does not imply any kind of agreement about it among the parties. The draft procedural order is not an adjudication but a sorting-out exercise, in order to clarify, speed and facilitate the tribunal's adjudication later on.

Best wishes for the new year to you and all the parties.

Kenneth Westhues

5419 River Road

Niagara Falls, Ontario L2E3H1

APPENDIX F: Letter requesting information, Westhues to Deputy Registrar, 19 January 2020

19 January 2020
Ms. Evelyn Dawes
Deputy Registrar, LPAT

Dear Ms. Dawes:

I am writing to ask if LPAT now has a rule or policy that discourages anyone without a credential in planning or law from taking part in hearings as a party or participant. I have not been able to find such a rule or policy in the *LPAT Act* or in its *Rules of Practice and Procedure*, but recent observation and experience lead me to suspect that *de facto*, the tribunal strongly prefers that participation be limited to lawyers, planners, and expert witnesses credentialed in related fields.

The LPAT website directs that general inquiries be directed to you as Deputy Registrar. It may be appropriate for you to refer this letter to some other official. I have noticed on your *linkedin* page, however, that you were formerly LPAT's Citizen Liaison Coordinator, and in that capacity designed programs to assist "self-represented clients." I would therefore imagine that you are personally attuned to this issue and knowledgeable about relevant practice and policy.

Earlier background: PL 120425, OMB, decision 20 August 2012

My one previous encounter with LPAT (then OMB) was in the summer of 2012, when a fellow resident of Niagara Falls, Veronica Veal, appealed a municipal by-law to rezone as a vacation rental the dwelling next to her home. She asked me to accompany her to the hearing, since I had done some studies of our city's practice and policy with regard to vacation rentals. Member Reid Rossi presided for the tribunal.

I observed that Mr. Rossi showed Ms. Veal the same courtesy, respect, patience, and attentiveness as he showed the applicant's lawyer, the city's lawyer and the city's planner. She was obviously not as expert as they in planning matters, not as polished a public speaker, and she did not say "sir" as often as they did, but this seemed to make no difference to Mr. Rossi. His focus seemed to be more on evidence, issues and arguments than *ad hominem*. Indeed, when Ms. Veal asked that I be permitted to inform the tribunal of the results of my research, Mr. Rossi allowed me to speak, even though I made no claim to be expert in law or planning. His written decision some weeks later was mostly in Ms. Veal's favour.

Contrasting recent background: LPAT PL 180774, 25 July 2019

I observed an altogether different attitude last summer, when I sat in as an observer on a prehearing for a case currently before LPAT, an appeal of the city's new by-law on vacation rentals. Two couples were in attendance, Dan and Debbie Ferro, and Janice and David Low, both seeking "participant status" – which I understand to involve nothing more than making a presentation to the tribunal (and now, with passage of Bill 108, just a written submission). Member John Douglas presided for the tribunal.

The city's lawyer did not object to granting participant status to these local residents, but the appellant's lawyer did so. Mr. Douglas quickly and confidently sided with the latter and denied the residents' requests. Neither the Ferros nor the Lows couched their arguments neatly in terms of official plans. Like Ms. Veal years ago, they were obviously inexperienced in LPAT proceedings, yet reasoned, well-

EXHIBIT B

informed, and respectful. Mr. Douglas interpreted the relevant section of the *LPAT Act* strictly, treated these residents disdainfully, and conveyed an implicit message that “We professionals will handle this.”

Most recent background: LPAT PL 180376, 8 January 2020

As a resident living near a proposed high-rise condo development here in Niagara Falls, I have been studying the case closely since 2016, uncovering and documenting serious irregularities, violations of the *Planning Act* and the *Municipal Act*, in the city’s handling of the proposal. Thus my interests in the matter are different both from the appellant’s and from the city’s. At an earlier prehearing in October 2018, the member presiding for the tribunal, Hugh Wilkins, granted me party status, accurately writing that I “raised issues regarding the approval process at City Council.” Mr. Wilkins showed the same priority on issues as opposed to credentials that Mr. Rossi showed in 2012, and he showed me the same respect Mr. Rossi showed Ms. Veal.

At the further prehearing on 8 January 2020, however, in the midst of discussion of contested issues lists, Mr. Douglas lectured me at length about how I should hire a lawyer and/or a professional planner. He treated the issues I have raised with such scorn that I eventually asked him if he was dismissing them without hearing arguments for and against. He said no, while nonetheless displaying the same patronizing attitude as he did last summer in PL 180774: “We professionals will handle this.”

Conclusion

From the list on LPAT’s website, I see that neither Mr. Rossi nor Mr. Wilkins is any longer a member of the tribunal. Hence I am left wondering if perhaps the rules have changed, perhaps not yet officially but nonetheless in practice, such that self-represented parties and participants are no longer welcome. That is why I am making this inquiry.

Feel free to forward this letter to vice-chairs or other members of LPAT, including Mr. Douglas. I cannot copy them myself, since their email addresses are not shown on the LPAT website. If the rules have changed, formally or informally, ordinary citizens planning to represent themselves and hoping to be heard should be informed clearly from the start, lest they waste their time.

Finally, so that you know where I get the chutzpah to make this inquiry, I can tell you I’m a professor emeritus of sociology and legal studies at the University of Waterloo. In a long career working with both humble and pompous academics, I learned that a person’s credentials and position are imperfect measures of the worth of his or her ideas. Leonard Gertler, the founding director of UW’s School of Planning, a first-rate scholar and personal friend, did not have a Ph.D. Jane Jacobs, perhaps Canada’s greatest planning expert, had no degrees at all.

Thank you for your attention. I look forward to hearing from you as soon as convenient, since a further prehearing in PL 180376 is scheduled for this March, and I should like to know if it is worth my while to continue as a party. Respect and kind regards,

Sincerely,



Kenneth Westhues

5419 River Road, Niagara Falls, Ontario L2E3H1

APPENDIX G

EMAIL IN REPLY TO (F), Morrison, Executive Advisor to the Associate Chair, to Westhues

From: Morrison, Scott A. (MAG) <Scott.A.Morrison@ontario.ca>

Sent: 18 February 2020 16:47

To: Kenneth Westhues

Subject: RE: Request for information

Hello Mr. Westhues,

I apologies for the delay in getting back to you on your concerns.

For all appeals before the Local Planning Appeal Tribunal, it is important for all the relevant facts to be presented and be available to the Adjudicator to allow for the most appropriate decision to be rendered.

To that end, the Tribunal does indeed wish to hear from all individuals that can contribute to the appeal at hand, as our Rules and the governing Legislation allow.

That being said, the governing legislation, The Planning Act, restricts participants to providing a written statement to the Tribunal. The Tribunal's Rule 7.7 speaks to the role and responsibility of a Participant.

Additionally, the Tribunal's Rule 8 speaks to the role and responsibility of a Party to the hearing. I have attached a link of the Tribunal's Rules of Procedure for your convenience.

The Tribunal does not require a Party to a proceeding to have representation; though they may elect to do so if they are not familiar with the process or do not feel comfortable acting before the Tribunal. Self-represented individuals are welcome in the hearing process, but are expected to fulfill the responsibilities of the standing they are granted; i.e. Party or Participant. Expert witness, qualified as such before the Tribunal, are not a requirement for the proceeding; though their evidence can include opinion evidence because of their expertise.

With respect to your comment regarding former Adjudicators Rossi and Wilkins: Mr. Rossi chose to resign his position last year and Mr. Wilkins's term expired in December of 2019. Both were welcome and respected members of the Tribunal.

I hope this addresses your concerns.

Sincerely,

Scott Morrison
Executive Advisor to the Associate Chair
Local Planning Appeal Tribunal

EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

RE: For the Case Management Conference, 3 June 2020, LPAT Case No. PL180376

Taylor, Shane (MAG) <Shane.Taylor@ontario.ca>

Mon 6/1/2020 12:52 PM

To: Daniel Artenosi <dartenosi@overlandllp.ca>; Kenneth Westhues <kwesthues@uwaterloo.ca>; sturney@fasken.com <sturney@fasken.com>; esavoia@niagaraparks.com <esavoia@niagaraparks.com>; dbmunro@icloud.com <dbmunro@icloud.com>; dljacksonjones1@gmail.com <dljacksonjones1@gmail.com>; thalinski@airdberlis.com <thalinski@airdberlis.com>

Cc: Natalie Ast <nast@overlandllp.ca>

 2 attachments (2 MB)

Westhues, Kenneth (5507 River Developments Inc v Niagara Falls (City)) PL180376 May 14 2020.pdf; PL180376, s.35 Request.pdf;

Good afternoon,

Please find attached Mr. Westhues' request for review and Associate Chair Hubbard's disposition letter of May 14, 2020, as requested by Mr. Artenosi.

Mr. Westhues' request for review and Associate Chair Hubbard's disposition are part of the Tribunal's public file in this matter in accordance with the Tribunal's long standing practice.

The Associate Chair's disposition letter speaks for itself – the Tribunal will not further comment on the Associate Chair's disposition or reasons.

Regards,

Shane Taylor

Case Coordinator - Planner

Local Planning Appeal Tribunal

Tribunals Ontario - Environment and Land Division

655 Bay Street, 15th Floor

Toronto, Ontario

M5G 1E5

Work Cell (new): (437-225-3704) * (PLEASE NOTE THAT 416-326-6794 WILL BE DISABLED BY THE END OF MAY 2020)

Toll: (866) 448-2248

Fax: (416) 326-5370

Email: Shane.Taylor@ontario.ca

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EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

immediately.

From: Daniel Artenosi <dartenosi@overlandllp.ca>

Sent: June-01-20 9:15 AM

To: 'Kenneth Westhues' <kwesthues@uwaterloo.ca>; Taylor, Shane (MAG) <Shane.Taylor@ontario.ca>; sturney@fasken.com; esavoia@niagaraparks.com; dbmunro@icloud.com; dljacksonjones1@gmail.com; thalinski@airdberlis.com

Cc: Natalie Ast <nast@overlandllp.ca>

Subject: RE: For the Case Management Conference, 3 June 2020, LPAT Case No. PL180376

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Mr. Taylor:

We acknowledge receipt of Mr. Westhues' email below and the attached proposed Issues List.

I also confirm that this is the first time that we have learned that Mr. Westhues submitted a request to review the decision of the Tribunal issued on January 28, 2020.

Before offering a response to Mr. Westhues' email, we are writing to request a copy of Mr. Westhues' Initial Request for Review as well as a copy of the Decision by Associate Chair Hubbard as referred to below.

Please let us know if you require any additional information from us in support of this request.

Thank you.

Daniel

Overland LLP

Daniel B. Artenosi

dartenosi@overlandllp.ca

Office: 416-730-0320

Cell: 416-669-4366

www.overlandllp.ca

From: Kenneth Westhues [<mailto:kwesthues@uwaterloo.ca>]

Sent: Sunday, May 31, 2020 5:26 PM

To: Taylor, Shane (MAG); Daniel Artenosi; sturney@fasken.com; esavoia@niagaraparks.com; dbmunro@icloud.com; dljacksonjones1@gmail.com; thalinski@airdberlis.com; Natalie Ast

Subject: For the Case Management Conference, 3 June 2020, LPAT Case No. PL180376

Mr. Shane Taylor

Case Coordinator, LPAT Case No. PL180376

Dear Mr. Taylor,

EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

Thank you for acknowledging receipt of my email of 4 May 2020, responding to your request of 1 May 2020 for any updates with respect to this case. This is in further response to your request for updates.

The Section 35 Request for Review

Thank you for sending me Associate Chair Marie Hubbard's Decision of 14 May 2020 on my Section 35 Request for Review of Member John Douglas's Decision of 28 January 2020, from the Fourth Case Management Conference held on 10 January 2020.

I expected that Ms. Hubbard would have informed all parties of my Request for Review when I first submitted it last February and that she would have invited reply submissions. My understanding of LPAT procedure in this respect was apparently incorrect – I'm still learning the rules. As advised by the Tribunal, I have refrained from sending the other parties copies of my Request for Review and Ms. Hubbard's Decision. I defer to the Tribunal as to whether these documents should now be made public.

The most noteworthy outcome of the Section 35 Review is that Ms. Hubbard strikes down the expectation (in Para. 14 of Mr. Douglas's Decision) that non-appellant parties put a case forward that is supported by expert witnesses. I appreciate her confirming that I am "not required or expected to retain legal counsel or produce an expert witness." This ruling is written in a way that seems to apply to self-represented parties in any and all LPAT proceedings.

I respectfully disagree with another general principle Ms. Hubbard sets forth, that how accurately the subject property is described in LPAT decisions "has no bearing on the parties' substantive or procedural rights or on the issues in dispute in the proceeding." At the same time, in the case at hand, I accept with thanks her assurance that the omission of the River Lane parcel from the description of the subject property in the Decision of 28 January 2020 does not preclude or hinder any party from raising issues with regard to this parcel, so long as the party is otherwise entitled to do so.

Without giving reasons, Ms. Hubbard upholds Mr. Douglas's determination that my issues pertaining to River Lane, as I had formulated them last December, are outside the Tribunal's jurisdiction.

Issues List further Revised

Ms. Hubbard may have been less dismissive of those issues in the revised formulation I suggested at the parties' teleconference on 4 March 2020. In any case, I have now revised my Issues List still further (see attached). Instead of 27 issues, the list now includes just the eight issues to which Mr. Artenosi has made no objection, plus a general question about "issues regarding the approval process at City Council." The latter is the phrasing the Tribunal itself used, without objection from Mr. Artenosi, in granting me party status at the first Case Management Conference on 30 October 2018.

I want to be as cooperative and accommodating as possible on the issues list, as on all aspects of this proceeding, while holding firm to the requirement in Section 2.1 of the *Planning Act*, that "the Tribunal shall have regard to any information and material that the municipal council or approval authority received in relation to the matter." Scott A. Morrison,

EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

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I want to clarify Para. 12 of the Decision of 28 January 2020, about how many witnesses I plan to call. Oral evidence from each of the following will be helpful to me in making my case to the Tribunal:

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Whoever from Golder Associates can speak to the Applicant's geotechnical and hydrogeological reports; and

Whoever from Beacon Environmental can speak to the Applicant's Environmental Impact Study.

If I understand correctly, the City, the Applicant, or both plan to call each of these four as witnesses. I can put my questions to them and possibly other witnesses in that context, and have no need to call these witnesses myself.

Order of Evidence

I am in agreement with the Order of Evidence Mr. Artenosi has proposed, look forward to a "fair, just and expeditious resolution of the issues" (*LPAT Act*, Section 33.1.9), and hope the hearing can take place without undue delay.

Keep safe, everyone, in this stressful time of COVID-19. With best wishes,

Kenneth Westhues

EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

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Mon 6/1/2020 12:52 PM

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Regards,

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Local Planning Appeal Tribunal

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Toronto, Ontario

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Overland LLP

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Subject: For the Case Management Conference, 3 June 2020, LPAT Case No. PL180376

Mr. Shane Taylor

Case Coordinator, LPAT Case No. PL180376

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EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

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EXHIBIT D: Email chain, Westhues / Artenosi / Taylor

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Whoever from Beacon Environmental can speak to the Applicant’s Environmental Impact Study.

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Keep safe, everyone, in this stressful time of COVID-19. With best wishes,

Kenneth Westhues

EXHIBIT E: Westhues / Herlovitch

RE: Inquiry about River Road development

Kenneth Westhues <kwesthues@uwaterloo.ca>

Wed 7/27/2016 8:50 PM

To: Alex Herlovitch <aherlovitch@niagarafalls.ca>

Cc: Jim Diodati <jdiodati@niagarafalls.ca>

Dear Mr. Herlovitch:

Thank you very much for your prompt reply to my inquiry of 21 July.

What you told the developer who came to see you about a possible River Road development seems to me to be accurate and responsible and to reflect best practices in urban planning. It's what residents of this neighbourhood would hope and expect you to say.

I appreciate the assurance that your department would handle any amendment application for this property in the normal way according to the Planning Act, which includes public notice and meeting.

Yes, I am grateful to be included in the list of people who receive notification, even though our home may lie outside the 120-metre stipulation.

It is not my intention to share your email with neighbours, at least not now, but I have reported to several of them the gist of it, namely that the city's planning department stands behind the Official Plan and is not in cahoots with any developer, and that standard procedures will be followed for any application for rezoning or amendment.

Thanks for setting some unfounded rumors to rest. Best wishes,

Ken Westhues

From: Alex Herlovitch [aherlovitch@niagarafalls.ca]
Sent: 22 July 2016 10:46
To: Kenneth Westhues
Cc: Jim Diodati
Subject: RE: Inquiry about River Road development

Hello Mr. Westhues

I can confirm that a month or 6 weeks ago a developer was in to see me to discuss the development opportunities on the lands fronting onto River Road between Phillip and John Streets. He was brought in to see me by someone else and I am sorry I do not recall the developer's name nor do I have it recorded in my scheduled appointments. It may or may not be the person you cite.

I reviewed with him the long history of official plan and rezoning of the site. The information I passed along is pretty much as you outline in your email below. He expressed an interest in developing a much taller building(s) than currently approved with an increased number of units. I explained the heights and densities proposed far exceeded current Official Plan designation of the lands. I reviewed with him the intent of the policies affecting the lands, the zoning of the lands and also reviewed the OP and zoning for the surrounding residential neighbourhood. I explained to him that this was a very solid residential neighbourhood with strong resident interest which had objected to the previous two development scenarios (which you outlined). I advised him (as I do many developers) to consult with the surrounding neighbourhood to determine whether or not there would be any support for his application. I told him he would have to provide sound planning rationale to substantiate any application he would intend to submit to the City.

EXHIBIT E: Westhues / Herlovitch

I have had no further contact with this man since that initial meeting. I told him the site was too small for the density he proposed. I certainly did not encourage him to purchase additional lands, if he is acquiring lands it was not on my advice.

The Planning Department does not have an amendment application for these lands. In the event an application is received, it will follow the regular processing which includes a neighbourhood meeting in advance of the statutory public meeting under the Planning Act. Notice of the open house and public meeting (once received and processing commences) is circulated to property owners within 120 metres of the property. I will ask that your name be added to the list just in case you are outside of the circulation distance, but we have nothing to date.

I trust this outlines to your satisfaction the only contact I have recently had on the site in question.

Sincerely

Alex

Alex Herlovitch, MCIP, RPP
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From: Kenneth Westhues [mailto:kwesthues@uwaterloo.ca]

Sent: Thursday, July 21, 2016 3:42 PM

To: Alex Herlovitch

Cc: Jim Diodati

Subject: Inquiry about River Road development

Mr. Alex Herlovich
Director of Planning and Development
City of Niagara Falls, Ontario

Dear Mr. Herlovich:

Some possibly wild rumors are circulating in our neighbourhood – the area along River Road north of the Rainbow Bridge. Rather than engage in gossip-mongering myself, it's more responsible citizenship that I ask you directly if or to what extent the rumors are true.

According to the rumors, a Toronto developer is working quietly with you or members of your staff, planning a high-density, high-rise condo development contrary to current zoning and inconsistent with the low-density, primarily single-family residential character of this neighbourhood, as set down in the Official Plan.

The developer's name is said to be Michael MacChesney, who is known for his leading role in a long-drawn-out conflict over a condo development called Glengrove on the Park in Stouffville.

EXHIBIT E: Westhues / Herlovitch

The gossip is that the investors Mr. MacChesney represents have purchased the now vacant lots along River Road between John and Philip Streets. This is the parcel that was approved in 2006 for a 29-storey condo development, but then, after fierce opposition from local residents, scaled back to seven storeys in 2008. Nothing has happened on this parcel for the past eight years, except that after a petition from local residents, the city three years ago required the owner to demolish the existing houses, which had been allowed to deteriorate beyond repair.

According to the rumors, Mr. MacChesney, with advice from your Planning Department, is in the process of buying up additional properties along John and Philip Streets, with a view to adding them to the parcel approved for the condos in 2008, and undertaking a still larger condo development. This would involve extensive rezoning and it would change even more the existing character of this neighbourhood, as set down in the Official Plan.

This email is to ask if there is any truth in these rumors, and if so, when local residents will be able to give input. I'll copy this also to Mayor Diodati, since i would think it unlikely that your Planning Department would participate in an initiative of the rumored scale without the mayor being aware and involved.

I look forward to hearing from you. Respect and kind regards,

Kenneth Westhues

Kenneth and Anne Westhues
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