Local Planning Appeal Tribunal

JOINT RESPONDING FACTUM

Case No. PL180494

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

Appellant:	Christopher Duncanson-Hales
Appellant:	Sudbury Business Improvement Area
Appellant:	Tom Fortin
Subject:	Proposed Official Plan Amendment No. OPA 92
Municipality:	City of Greater Sudbury
OMB Case No.:	PL180494
OMB File No.:	PL180494
OMB Case Name:	Duncanson-Hales v. Greater Sudbury (City)

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act,* R.S.O. 1990, c.P.13, as amended

Appellant:	Christopher Duncanson-Hales
Appellant:	Sudbury Business Improvement Area
Appellant:	Tom Fortin
Subject:	By-law No. 2018-61Z (Casino)
Municipality:	City of Greater Sudbury
OMB Case No.:	PL180494
OMB File No.:	PL180495

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act,* R.S.O. 1990, c.P.13, as amended

Appellant:	Sudbury Business Improvement Area
Appellant:	Tom Fortin
Appellant:	Minnow Lake Restoration Group Inc.
Subject:	By-law No. 2018-62Z (Parking)
Municipality:	City of Greater Sudbury
OMB Case No.:	PL180494
OMB File No.:	PL180496

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act,* R.S.O. 1990, c.P.13, as amended

Appellant:	Sudbury Business Improvement Area
Appellant:	Tom Fortin
Appellant:	Steve May
Subject:	By-law No. 2018-72Z (Arena)
Municipality:	City of Greater Sudbury
OMB Case No.:	PL180494
OMB File No.:	PL180497

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JOINT RESPONDING FACTUM

I. OVERVIEW

1. Gateway Casinos and Entertainment Limited, 1916596 Ontario Limited and the City of Greater Sudbury (collectively, the "**Responding Parties**") submit this Joint Responding Factum in response to the written motion brought by the Sudbury Business Improvement Area, Tom Fortin and Christopher Duncanson-Hale (together, the "**Appellants**") which was served to the Local Planning Appeal Tribunal (the "**Tribunal**") and the Responding Parties on March 11, 2020.

2. The Appellants have brought a motion to adjourn the hearing that has been scheduled in respect of the above-noted matter for a minimum of 90 days (the "**Motion to Adjourn**") to allow for the Superior Court of Justice to issue a decision in respect of the Appellants' application to quash the by-laws that are the subject of the proceeding before the Tribunal on the basis of: "disqualifying bias/fettering discretion, bad faith, and procedural unfairness" (the "**Application to Quash**").

3. For the reasons that follow, the Tribunal should dismiss the Appellants' Motion to Adjourn.

4. The Motion to Adjourn, if successful, will have a significant prejudicial impact to the Responding Parties and the taxpayers in the City of Greater Sudbury. It is not yet known when the Application to Quash will be heard. This means that the Motion to Adjourn is not in effect for 90 days, but for an undetermined and unknown amount of time. What is known is that the estimated cost of building the event centre has escalated significantly (from $80 million in 2017 to $100 million today).

5. No duplication of proceedings will occur if the result is that the Tribunal hears this matter prior to the Court making a determination in the Application to Quash. The Application to Quash is, as set out in the factum of the Appellant, based on Section 273 of the *Municipal Act*, which looks at whether a by-law was illegal. In this instance, the alleged illegality is on the basis that the decision of City Council was "disqualifying bias/fettering discretion, bad faith, and procedural unfairness." As confirmed in the Tribunal's decision of July 10, 2019, it was made clear that these matters are not before the Tribunal.

6. What is before the Tribunal are appeals where the land use planning grounds of the 2018 Planning Approvals (as defined below) are being heard. These planning grounds are, pursuant to Section 11 of the *Local Planning Appeal Tribunal Act*, the exclusive jurisdiction of the Tribunal.

7. As such, although the Application to Quash and the appeals before the Tribunal relate to the same by-laws, they are not duplicative proceedings. Each deals with a different challenge to the by-laws. The separation of these two processes is made very clear by the July 10, 2019 decision of the Tribunal and the limited, policy based, review process available to the Tribunal pursuant to the jurisdiction given to it under Bill 139.

8. While it is acknowledged that there is a scenario where the Tribunal dismisses the appeals and then the Court quashes the 2018 Planning Approvals, with the end result being that the Tribunal conducting a hearing that otherwise would not need to have occured, this is not, in and of itself, sufficient grounds to adjourn the hearing.

9. In this regard, it is important to recognize that the same result could happen in the reverse - the Court could dismiss the Application to Quash and then the Tribunal could find on behalf of the Appellants. In such a scenario the Court application could have been avoided if the Tribunal had made the first decision.

10. Since it is unknown how the Tribunal or the Courts will decide either matter, but each matter is independent and not duplicative as to what issues it is addressing with respect to the by-laws, there is no inherent requirement that one process happens prior to the other.

11. As such, even if we agree with the Appellants' that the issues to be decided are what prejudice would accrue to the Parties if the adjournment request was granted and whether it is in the public interest that the adjournment request be granted, the Appellants' motion would fail. As will be detailed below, the prejudice that accrues to the Responding Parties is great, and the cost to the public is already orders of magnitude greater than any costs that arise as a result of holding a Tribunal hearing.

12. Furthermore, as is set out in detail below, the Appellants rely on Section 18 of the LPAT Act in support of the Motion to Adjourn. The Responding Parties submit that this Section of the LPAT Act is not engaged in this instance, and that the reasons submitted by the

Appellants in support of the Motion to Adjourn entirely ignore the legislative framework that applies to proceedings under Bill 139.

13. The applicable statutory regime to the matter at hand requires a ten month appeal period which can only be adjourned pursuant to certain, exclusive grounds. These grounds are limited to adjournments granted on the consent of two or more parties for the purposes of mediation, or where it is "necessary" to secure a fair and just determination of the appeal. No evidence has been provided by the Appellants' to support the position that the adjournment is necessary for a fair and just determination of the appeal. Waiting for the Courts to make a determination on entirely different grounds for challenging the by-laws will not make the hearing of the land use planning considerations before the Tribunal any more fair or just. As is set out in the legislative regime, and in the specific facts of this case, it is in the public interest that this matter be resolved in a timely way and not subject to further delay.

14. Given the lack of duplication between the matters and the clear statutory objective to have Bill 139 appeals heard in a timely and fair manner, we submit that the Tribunal should dismiss the Appellants' Motion to Adjourn.

II. BACKGROUND INFORMATION

15. In November 2017, 1916596 Ontario Limited submitted the following planning applications for lands generally located on the north side of the Kingsway, west of the intersection of Levesque Street and the Kingsway in the City of Greater Sudbury:

    1. an application for an official plan amendment and zoning by-law amendment to permit the development of a place of amusement;

    2. an application for a zoning by-law amendment to permit the development of a recreation and community centre in the form of a public arena and events centre; and,

    3. an application for a zoning by-law amendment to permit a "parking lot" as a principal use,

    (collectively, the **"2017 Planning Applications"**).

16. The 2017 Planning Applications were approved by the City of Greater Sudbury Council as follows:

    1. City Council enacted By-law 2018-60P (OPA 92) and corresponding Zoning By-law 2018-61Z on April 10, 2018;

    2. City Council enacted 2018-63Z on April 10, 2018;

    3. City Council enacted Zoning By-law No. 2018-62Z on April 10, 2018 to permit a *parking lot* as a permitted use, in addition to the uses permitted in the M2 (Light Industrial) and M3 (Heavy Industrial) zones, respectively; and,

    4. City Council enacted Zoning By-law No. 2018-71Z on April 24, 2018, which was passed to correct a clerical error with By-law No. 2018-62Z (the Parking Lot Approval)

    (collectively, the **"2018 Planning Approvals"**).

17. On January 2, 2018, Tom Fortin made it clear in an interview he gave to a local news agency that he would do whatever it takes to stop the casino project. Specifically he stated that:

    "We are going to stop the casino. The only questions remaining are how long and how much it will cost to do so."

    Tab 2 of Responding Motion Record, Exhibit C to Affidavit of David Shelsted

18. Since that time Mr. Fortin has proceeded to act in accordance with this statement, challenging the process in multiple legal forms, including the Application to Quash, and raising administrative and procedural matters open to him even where such procedural matters were clearly to his benefit, such as his opposition to receiving disclosure of the arguments to be used by parties to the Tribunal hearing in advance of the hearing through a responding case synopsis.

19. On May 7, 2018, the Appellants filed their respective notices of appeal in respect of the 2018 Planning Approvals (the **"Appeals"**).

20. At the first case management conference (held on November 6, 2018), the Tribunal was advised respectively by the parties of four motions that were intended to be brought forward, which the Tribunal directed were to proceed by written motion and filed by no later than December 3, 2019. The four motions can generally be described as follows:

    a. a Motion by the Appellants to allow them to file a response to the City's Case Synopsis;

b. a Motion by the City to determine if Issues 1, 2, 3, 4, 18 and 19 in the Case Synopsis of the Appellants involve matters that are within the Tribunal's jurisdiction under s. 17(24) and 34(19) of the Act;

c. a Motion by Gateway Casinos and Entertainment Limited and 1916596 Ontario Limited for permission to file Case Synopses; and,

d. a Motion by the Appellants regarding Issue 19 in the Appellants' Case Synopsis requesting the Tribunal to order the production of certain documents and agreements regarding the City's submissions to the Ontario Lottery and Gaming Corporation and related to the requirements of O. Reg. 81/12 of the Ontario Lottery and Gaming Corporation Act, 1999, S.O. 1999, c. 12, Sched. L regarding the location of the proposed casino and the determination that it is an appropriate candidate site.

21. As set out in the written decision issued by the Tribunal following the first case management conference, *"due to the additional time required to deal with the matters raised in the Motions now before the Tribunal, pursuant to s. 1(2) of O. Reg. 102/18 of LPATA, it is necessary to postpone the time frame provided for in the legislation in order to secure a fair and just determination of the Appeals."*

22. In its written decision dated July 10, 2019, the Tribunal decided the four written motions. None of the parties sought to challenge or review this decision.

23. Hearing dates for the Appeals were set at the second case management conference on August 8, 2019. At that time, counsel for the Appellants advised the Tribunal that he intended to bring a motion to stay the proceedings in light of an application that his clients were advancing with the Court. Counsel for the Appellants further requested that the Tribunal allow him to file a written motion to stay the Tribunal's proceedings until after the Court deals with the matter. The Tribunal directed that if the Appellants intended to proceed with a motion to stay the Tribunal proceedings, a written motion was to be filed in accordance with the following deadlines:

" Motion	August 30, 2019
Responses	September 9, 2019
Reply	September 13, 2019 "

As noted in the written decision of the Tribunal following the second case management conference: *"subsequent to the CMC no written motion was filed."*

Tab 4 of Motion Record, LPAT Decision issued on March 18, 2020 following second case management conference (paragraph 7-8)

24. The hearing of the Appeals was scheduled for 4 days commencing on May 5, 2020. These dates were selected, in part, to "accommodate" the Court application, with the expectation that the Appellants would act expeditiously with respect to filing the Application to Quash. The Tribunal did not, however, receive any argument or evidence on a motion to adjourn, the accommodation was made in the context of a request to expedite the court proceeding and the scheduling of a hearing date.

25. The Application to Quash was filed with the court on April 8, 2019, which was the second last day of the statutory appeal period given the 2018 Planning Approvals on April 10, 2018. An Amended Notice of Application was subsequently filed and served by the Appellants on October 22, 2019.

26. It has now been approximately 22 months since the Appeals were filed.

27. In that time period, the estimated cost to the municipality in constructing the event centre (i.e. not the private casino) has increased from $80 million to $100 million. This amount is publicly funded by the City of Greater Sudbury.

    Tab 2 of Responding Motion Record, Affidavit of David Shelstead, paras 4, 5, and 6

28. The event centre is the largest capital project proposed within the City of Greater Sudbury and the largest in Northern Ontario. It is anticipated that the event centre will have significant economic benefits, including a GDP impact to Canada of $82,798,000 and the creation of 925 person years of construction employment.

    Tab 2 of Responding Motion Record, Affidavit of David Shelstead, paras 7 and 8

29. The Superior Court of Justice is now closed due to emergency conditions and no date has been scheduled for the hearing of the Application to Quash. As such, any adjournment made contingent upon the Superior Court deciding in the Application to Quash is of an unknown and potentially unlimited duration.

    Tab 2 of Responding Motion Record, Affidavit of David Shelstead, para 10

30. The City has recently borrowed funds for the creation of the event centre and other major construction projects. Delays to the project not only postpones the anticipated economic benefits, but also continues to drive up cost of construction due to inflation. Together these impacts have significant prejudice to the interests of the City and the general public.

    Tab 2 of Responding Motion Record, Affidavit of David Shelstead, paras 12 through 15, para 17

III. LOCAL PLANNING APPEAL TRIBUNAL ACT

31. In support of the motion to adjourn the scheduled hearing, the Appellants purport to rely on Section 18 of the *Local Planning Appeal Tribunal Act (the "***LPAT Act***")*, which states the following:

> *18. The Tribunal shall not grant or issue any approval or certificate under this or any other general or special Act in respect of any municipal matter if there is any pending action or proceeding relating to the matter, including an application to quash any by-law of a municipality relating to the matter* [emphasis added].

32. The Appellants' Factum at paragraph 29 sets out the Appellants' basis for reliance on Section 18 of the LPAT Act in support of the motion for adjournment as follows:

> *The said Act provides no definition of the word "approval'. It is therefore reasonable to interpret its meaning in the normal meaning of the word. However, insofar as it relates to "an application to quash any by-law" that can only refer to the (sic) any Decision or Order of the Tribunal that would frustrate the clear intent of the section as described in the title that the "Approval to be withheld where litigation pending". The clear purpose of this section is to preclude an LPAT proceeding that would have no meaning or purpose if the Court were to quash the by-law and to avoid the unnecessary costs for such a proceeding being thrown away not only by the private parties but the municipality's use of public moneys and this Tribunal's resources* (emphasis added).

33. As an initial observation, the Appellants' reliance on the heading that precedes Section 18 as an aid to interpreting the section that follows ignores the legislative directive set out in Section 70 of the *Legislation Act*, S.O. 2006, Chapter 21, Schedule F, as amended (the "Legislation Act") which states that *"headings are inserted in an Act or regulation for convenience of reference only and do not form part of it."* The heading inserted prior to Section 18 of the LPAT Act is not intended, and does not operate as, an aid to interpreting the legislative intent of this Section.

34. The Appellants offer no contextual analysis to support their interpretation of Section 18 of the LPAT Act. In fact, the Appellants' reliance on Section 18 is limited to that Section alone, without any analysis of how this Section fits into the LPAT Act read as a whole, or the broader statutory framework introduced under Bill 139 (and further discussed below).

35. The Appellants' conclusion that the word "approval" should be interpreted in accordance with its "normal meaning" ignores the modern rule to statutory interpretation, as well as legislative directives set out in the Legislation Act.

The Modern Rule to Statutory Interpretation

36. The modern rule to statutory interpretation is set out in the seminal decision by the Supreme Court of Canada in ***Rizzo & Rizzo Shoes Ltd. (Re***), [1998] 1 S.C.R. 27, where the Court held that *"the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*

Tab 5 of Motion Record, *Rizzo & Rizzo Shoes Ltd. (Re)* (paragraph 21)

37. Since the time of the Supreme Court's Decision in *Rizzo*, Canadian courts have consistently held that the "modern approach to statutory interpretation" involves a "textual, contextual and purposive analysis of the statute or [the] provision in question".

Tab 6 of Motion Record, *Ayr Farmers Mutual Insurance Co v. Wright* (paragraph 28)

38. In ***Ayr Farmers Mutual Insurance Co v. Wright***, the Ontario Court of Appeal noted that the modern approach to statutory interpretation requires the consideration of three factors: (a) the language of the provision; (b) the context in which the language is used; and (c) the purpose of the legislation or statutory scheme in which the language is found.

Tab 6 of Motion Record, *Ayr Farmers Mutual Insurance Co v. Wright* (paragraph 29)

39. The Ayr Farmers case stands for the proposition that while the ordinary meaning of words continue to play a role in the judicial interpretation of statues, such an analysis cannot operate in a silo without sufficient regard for the legislative intent, as well as an assessment of the history and object of the relevant statue.

40. This approach to statutory interpretation is consistent with Section 64(1) of the Legislation Act, which provides that an Act *"shall be interpreted as being remedial and shall be given such fair, large, and liberal interpretation as best ensures the attainment of its objects"*.

The Legislative Framework in the LPAT Act

The Applicable Version of the LPAT Act

41. In accordance subsections 1(1)(4) and 1(2) of O.Reg. 303/19 (Transition for Planning Act Appeals), the version of the LPAT Act that applies in this proceeding is the version in effect prior to September 3, 2019, since:

    a. The appeals were commenced on May 7, 2018, being after April 3, 2018 but before September 3, 2019; and,

    b. The hearing of the merits of the appeal was scheduled at the second case management conference on August 8, 2019.

42. As a result, O.Reg. 102/18 (Planning Act Appeals) continues to apply to the subject proceedings [see subsection 1(4) of O.Reg. 303/19].

The Tribunal's Jurisdiction to Approve under the LPAT Act

43. The Tribunal's general jurisdiction and powers in relation to municipal affairs are set out in Part IV of the LPAT Act, specifically at Section 15. While the LPAT Act does not define the word "approval", it does set out clear examples of circumstances where the Tribunal may grant an approval. Examples of the Tribunal's power to grant an approval include:

    a. the power to approve the exercise of any powers by a municipality under any general or special Act that may involve or will require the borrowing of money by the issue of debentures, or the incurring of any debt, which approval the municipality voluntarily applies for or is required by law to obtain [See Section 16(a) of the LPAT Act];

    b. the power to approve any by-law of a municipality, which approval the municipality voluntarily applies for or is required by law to obtain [See Section 16(b) of the LPAT Act]; and,

c. the power to approve any "work" or class of work before a municipality or board authorizes, or exercises any of its powers to proceed with or provide money for any work or class of work, if the cost or any portion of the cost of the work is to be, or may be raised, after the term for which the council or board was elected [see Section 25 of the LPAT Act].

44. The LPAT Act does not include reference to the Tribunal approving an official plan amendment or zoning by-law amendment that is the subject of a "first appeal" under the applicable Planning Act provisions that apply in this case, and as further discussed below.

45. Part IV of The LPAT Act further sets out procedures and additional qualifications that apply to the Tribunal's exercise of those enumerated powers to grant an approval in respect of municipal affairs.

The Overall Legislative Framework (Bill 139)

Municipal Council is the Approval Authority

46. The LPAT Act was enacted by the Province as part of "*Bill 139, Building Better Communities and Conserving Watersheds Act, 2017*" ("**Bill 139**"), and was proclaimed into force on April 3, 2018. The LPAT Act replaced the former *Ontario Municipal Board Act*. As a general proposition, the LPAT Act formed part of a broader set of legislative revisions intended to recognize greater autonomy for municipal councils in enacting planning instruments that include official plan and zoning by-law amendments.

47. This fundamental legislative intent is manifest in the coordinated statutory frameworks of the Bill 139 Planning Act and LPAT Act, particularly as it relates to rights of appeal, the related appeal process, and the Tribunal's jurisdiction to decide appeals. The Bill 139 framework establishes a potential for two appeals of an official plan or zoning by-law amendment. In the first appeal, the Tribunal performs an appellate, review function, to determine whether the planning instrument under appeal fails on any one of three exclusive grounds of appeal being: (a) consistency with the Provincial Policy Statement; (b) conformity with the Growth Plan; and, (c) conformity with the Official Plan. If the planning instrument satisfies these three exclusive tests, the decision of the municipal council to approve the instrument stands. The Tribunal's function in the first appeal is

fundamentally different than the function of the former Ontario Municipal Board under the pre-Bill 139 framework, where the Board functioned as an "approval authority" under a *de novo* hearing process.

48. The coordinated statutory frameworks of the Bill 139 Planning Act and LPAT Act is explained in the decision of the Ontario Superior Court of Justice in ***Craft et al. v. City of Toronto et al****,* 2019 ONSC 1151 (the "**Stated Case**"):

> "Pursuant to s. 38(1) of the [Local Planning Appeal Tribunal] Act, the procedures to be followed in these *Planning Act* appeals are as follows:
>
> **Step 1**: the only issue to be decided is whether City Council's decision is consistent with provincial policy and conforms to a provincial plan and the applicable official plan. In this first decision (a "First Appeal"), LPAT will only decide whether or not the municipality/approval authority met the test of conformity and consistency, and if their decision:
>
> i. Was consistent with the Provincial Policy Statement;
>
> ii. Conforms with or conflicts with a provincial plan; or,
>
> iii. Conforms to an applicable Official Plan.
>
> If LPAT finds that Council's decision is consistent with provincial policy and conforms to a provincial plan and the applicable official plan, LPAT must dismiss the appeal. If LPAT decides Council's decision conforms, there are no further proceedings as that decision is final: See s. 17(49.2) of the *Planning Act*.
>
> **Step 2:** If and only if, LPAT finds that Council's decision is not consistent with provincial policy and/or does not conform to a provincial plan or the applicable official plan in s. 17(24.0.1) of the *Planning Act,* LPAT must remit the matter back to Council to give Council an opportunity to make a new decision.
>
> **Step 3:** Where LPAT has remitted a matter back to Council and a party appeals Council's new decision to LPAT, the matter proceeds to a second hearing (a

"Second Appeal"). LPAT must again consider whether the decision is consistent with a provincial policy statement and conforms to a provincial plan or applicable official plan. However, at this Second Appeal, LPAT may make modifications to all or part of the plan, approve all or part of the plan, or refuse all or part of the plan. At this Second Appeal, LPAT has broader powers and in effect conducts a hearing de novo: See section 17 (49.7) of the *Planning Act"* [emphasis added].

Tab 7 of Motion Record, *Craft et al. v. City of Toronto et al* (paragraph 11)

49. The interpretation of Section 18 of the LPAT Act, and in turn whether this Section is directly engaged by the Appellants' request for an adjournment, must be informed by the legislative intent of the coordinated statutory framework under the Bill-139 Planning Act and LPAT Act.

50. In the First Appeal, the Tribunal is not being asked to grant or issue an approval or certificate in respect of the by-laws that are the subject of the appeals. In our respectful submission, the Tribunal does not have the jurisdiction to make such a decision at this juncture. As set out in the Stated Case, the Tribunal has the limited jurisdiction to either: dismiss the appeals or remit the matter back to Council to provide an opportunity for Council to make a new decision based on its determination of the three exclusive grounds of appeal. Under this framework, municipal council remains the approval authority unless and until a matter proceeds to a Second Appeal, at which point the Tribunal's powers are expanded to approve the proposed instruments, as initially enacted or as may be amended/modified by the Tribunal.

51. Under the Bill 139 framework, the act of dismissing an appeal is not akin in function to "approval" of a by-law. Earlier jurisprudence that interpreted and applied the predecessor to Section 18 of the LPAT Act, being Section 57 of the Ontario Municipal Board Act (the **"OMB Act"**), is not particularly instructive on how Section 18 is to be interpreted and applied in a First Appeal under the Bill 139 framework. That being said, it should be noted that even under the preceding (pre-Bill 139) legislative framework, Section 57 of the OMB Act did not force the Board to adjourn a matter if it was also the subject of a court proceeding/challenge. Rather, as Member Rogers held in ***1244056 Ontario Ltd. v. Aurora***, [2005] O.M.B.D. No. 532 at paragraph 8:

In the end, both counsel agreed, and the Board accepts, that the cases, both before the Board and before the courts, indicate that the Board has discretion to either proceed with the matter before it, issue a decision and withhold the order; or, adjourn the matter before the Board pending the outcome of the court challenge.

Tab 8 of Motion Record, *1244056 Ontario Ltd. v. Aurora* (paragraph 8)

52. The Board's decision to proceed with a hearing and/or withhold its Order pending the outcome of a related court challenge to the instruments under appeal, or to adjourn the hearing of the appeal until the completion of the court challenge, was to be decided on a case-by-case basis, depending on the facts.

Tab 9 of Motion Record, *Loblaws Ltd. v. Ontario (Municipal Board)*, 25 O.R. (2d) 539 (page 2)

53. In a more recent decision, ***Clublink Corp. ULC v. Oakville***, 2019 LPAT 1502, which is a decision made under the legislative framework introduced by "*Bill 108, More Homes, More Choice Act, 2019*" ("**Bill 108**"), the Tribunal interpreted and applied Section 18 of the LPAT Act in a manner similar to the manner in which Section 57 of the OMB Act was historically interpreted and applied by the Board. In considering whether to adjourn a previously scheduled multi-week hearing in light of a pending application related to the same matter before the Court, the Tribunal held that *"Section 18 of the LPATA does not oblige the Tribunal to proceed, and as Ms. Butler has submitted, it does not encourage the Tribunal to proceed, although it would authorize the Tribunal to proceed if it elected to do so."*

54. However, as a general proposition, the overarching legislative framework applicable to the Tribunal's determination in the Clublink case is fundamentally different than the framework under Bill 139. More specifically, Bill 108 reintroduces the function of the Tribunal as an approval authority in the context of a *de novo* hearing process. In this regard, the historical jurisprudence developed under the pre-Bill 139 legislative framework is apposite to the Tribunal's interpretation and application of Section 18 of the LPAT Act to matters proceeding under the Bill 108 framework, but not to appeals proceeding under the Bill 139 framework.

Tab 10 of Motion Record, *Clublink Corp. ULC v. Oakville* (paragraph 57)

Strict Timelines for Appeals

55. The Appellants argue at paragraph 27 of the Appellants' Factum the following:

> *27. The issues to be decided are:*
>
> *a. What prejudice would accrue to the Parties if the adjournment request was granted?*
>
> *b. Is it in the public interest that the adjournment request be granted?*

56. The Appellants' position entirely ignores the strict timelines that are generally to be met by the Tribunal in disposing of an appeal under O.Reg. 102/18. More specifically, the Tribunal is expressly required to dispose of the appeals of council's decision to approve the subject official plan and zoning by-law amendments within ten (10) months commencing on the day on which the appeals were received and validated by the Tribunal (May 7, 2018) [See subsection 1(1) of O.Reg. 102/18].

57. The only exceptions to these strict timelines are those set out in subsection 1(2) of O.Reg. 102/18, which provide that in calculating the ten (10) month period in subsection 1(1), the following periods of time shall be excluded:

> a. *Any period of time occurring during an adjournment of the appeal <u>if the adjournment</u>,*
>
> i. *is granted by the Tribunal on the consent of two or more parties for the purposes of mediation, or*
>
> ii. *is necessary, in the Tribunal's opinion, <u>to secure a fair and just determination of the appeal</u>.*
>
> b. *Any period of time during a stay of the appeal granted by the Divisional Court.* (emphasis added)

58. In our respectful submission, these legislative directives are themselves dispositive of the Appellants' request for adjournment for the following reasons:

    a. The strict timelines form part of the overall statutory framework implemented under Bill 139. An appeal under Section 17 and 34 against Council's decision to approve the official plan amendments and zoning by-law amendments "shall" be disposed of by the Tribunal within the ten-month period. This is a mandatory directive imposed by the legislature on the Tribunal.

    b. There are only two exceptions to the mandatory directive: (a) an adjournment granted by the Tribunal; and, (b) a stay of proceeding granted by the Divisional Court, which does not apply in this case although such recourse is open to the Applicants to pursue.

    c. The first exception, an adjournment granted by the Tribunal, only applies if the adjournment meets the following criteria:

        i. it must be granted by the Tribunal on the consent of two or more parties for the purposes of mediation, which does not apply in this case; or,

        ii. it must be necessary, in the Tribunal's opinion, to secure a fair and just determination of the appeal.

59. Following the first case management conference, the Tribunal issued a Notice of Postponement of the appeal timelines prescribed under O. Reg. 102/18 due to the additional time required to deal with the matters raised in the written motions that were filed in December 2019. The written motions were resolved in the decision that was issued by the Tribunal on January 4, 2019. The grounds for adjournment of the ten month appeal period no longer apply.

60. O.Reg. 102/18 is not engaged in all requests for adjournment. Rather, it applies specifically to a postponement of the ten month appeal period. In this manner, the Tribunal has discretion to grant adjournment as a matter of its own proceedings. However, we respectfully submit that to the extent that request for an adjournment would preclude the

ability of the Tribunal to dispose of the appeal in accordance with the prescribed ten month timeline, the postponement may only be granted if the exclusive grounds set out in subsection 1(2) of O.Reg. 102/18 have been met.

61. It is noted that the exclusive grounds to grant the adjournment of the tenth month period do not include criteria of prejudice, generally. In addition, unlike the historical body of jurisprudence dealing with Section 57 of the OMB Act, and more recently Section 18 of the LPAT Act under the Bill 108 legislative framework, a decision to adjourn the ten month appeal period cannot be made on the basis of efficiency, expedience, or convenience. The exclusive grounds are limited to those to secure a fair and just determination of the appeal. No evidence has been provided by the Appellants to support the position that the adjournment is necessary for a fair and just determination of the appeal. Having the Courts make a determination on an entirely different ground of appeal will not facilitate a fair and just determination of the Appeals in this manner. Similarly, the fact that one of the Appellants (Fortin) may incur costs in two different processes, as is his choice, is not a basis to grant the adjournment in this case, since both matters were commenced by him and they do not deal with the same issues.

Appellants Proposed Issues Also Conclude that the Motion Be Refused

62. Even in the event that the issues to be determined by the Tribunal were as set out in paragraph 27 of the factum of the Appellants, the motion would clearly fail on grounds of prejudice to the parties and the determination of what is in the public interest. The escalation costs to the event centre, to be paid by the taxpayers of Greater Sudbury, and the lost economic benefits of this proposal make it clear that the prejudice that accrues to the Responding Parties and the general public in Sudbury is very high in financial and economic terms and well in excess of the “obvious waste of significant monies” that are argued by the solicitor for Fortin as the basis for ignoring the Bill 139 statutory objectives set out above.

63. For the reasons set out herein, the Responding Parties jointly request that the Motion to Adjourn be refused.

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