Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: July 10, 2019 **CASE NO(S).:** PL180494

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 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

Heard: In writing

APPEARANCES:

Parties	**Counsel / Representative***
City of Greater Sudbury ("City")	Stephen Watt
Christopher Duncanson-Hales ("Hales")	Gordon Petch
Tom Fortin ("Fortin")	Gordon Petch
Sudbury Business Improvement Area (the "BIA")	Gordon Petch
Steve May ("May")	Self-Represented
Minnow Lake Restoration Group ("Minnow Lake")	John Lindsay*
Gateway Casinos and Entertainment Limited ("Gateway")	Andrew Jeanrie
1916596 Ontario Limited ("Applicant")	Daniel Artenosi

DECISION DELIVERED BY C. CONTI, DAVID L. LANTHIER AND S. JACOBS AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This is the Decision and Order for three motions in writing brought by certain parties in the appeals filed in relations to amendment No. 92 to the City of Sudbury ("City") Official Plan ("OPA") and By-laws No. 2018-61Z, No. 2018- 62Z and No. 2108-72Z ("ZBA's") which amend the City's Comprehensive Zoning By-law No. 2010-100Z. The OPA and ZBA's will permit the development a place of amusement containing a casino, an arena and a parking facility on a property at Part 3, 4, 8 and 9, Plan 53R-20983, Lots 9 and 10, Concession 4 in the Township of Neelon. Appeals were filed by Christopher Duncanson-Hales against the approval of the casino, Tom Fortin and the Sudbury Downtown Business Area against the entire proposal, by Steven May against the approval of the arena, and the Minnow Lake Restoration Group against the approval of the parking facility.

[2] The need for the motions arose at a Case Management Conference ("CMC") convened on November 6, 2018 for the appeals. After hearing from the parties at the CMC the Tribunal determined that motions in writing should be filed as follows:

1. A motion by the Appellants, Hales, Fortin, and the BIA, to allow them to file a response to the City's Case Synopsis;

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

3. Motions, or a combined Motion by the Applicant and Gateway permitting them to file Case Synopses; and

4. A Motion by Hales, Fortin and the BIA regarding Issue 19 in their 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 ("OLG") and related to the requirements of O. Reg.

81/12 of the *Ontario Lottery and Gaming Corporation Act* (“OLGCA”), 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.

[3] The written motions and responses were filed according to the schedule set by the Tribunal and in accordance with the Tribunal’s *Rules of Practice and Procedure* (“Rules”). For the purposes of the motions, the only Appellants to file documents were Hales, Fortin and the BIA. Therefore when this decision uses the term “Appellants”, it is referring only to Hales, Fortin and the BIA and not to Steve May and the Minnow Lake Restoration Group who are also appellants in the appeals.

MOTIONS

I. Motion by City

[4] The City has filed a motion to delete issues 1, 2, 3, 4, 18 and 19 contained in the Case Synopsis filed by Mr. Petch on behalf of the Appellants. The Case Synopsis filed by Mr. Petch put forward 19 issues to be considered. The City’s motion contends that the above-noted issues should be deleted and should not form part of the Tribunal’s consideration in the appeals. The issues that are subject to this motion as numbered in the Case Synopsis are as follows:

1. Did the City’s resolution of May 15, 2012 committing the City to be a “Willing Host” for expanded gambling in the City comply with O. Reg. 347/00?

2. Did the City fail to comply with the requirements of s. 3(i) of O. Reg. 81/12?

3. Did the City fail to comply with Bill 73 of the *Planning Act* (“Act”) for improved transparency and public involvement in the planning process, the requirements of s. 1.1 (d) and 16 (1) (b) of the Act and s. 1.3, 16.1, 16.2.1, and Part V (p. 162) if its own Official Plan by failing to hold a public meeting with adequate advance notice to obtain the views of the public on the single

issue as to whether or not the public wished its City to be a "Willing Host" for expanded gaming in the City as required by s. 3 i) of O. Reg. 81/12?

4. Is the failure of OLG to produce to the public and the Council the study required by s. 2 of O. Reg. 81/12 addressing the issue of responsible gambling occurring in the City as a whole, or on any specific site, contrary to the requirements of the regulation when read as a whole?

18. Did Council's actions prior to the adoption of all of the subject by-laws approving all of the subject applications "fetter its discretion" contrary to law, thereby rendering the adoption of the subject By-laws a nullity?

19. Should the City be compelled by this Tribunal to produce (a) all of the information, as described in the OLG letter dated January 14, 2015, that it relied on to determine whether or not the City complied with s. 3 i) of O. Reg. 81/12 and (b) copy of the Option Agreement and all other agreements and details of all other decisions staff may made arising from the authority granted to Staff pursuant to By-law No. 2017-149 and any other procurement By-law?

[5] As noted above, issue No. 19 is also the subject of a motion by the Appellants requesting production of the documents noted in the issue. The issue is dealt with through the findings on the Appellants' production motion included later in this decision.

[6] The grounds for the motion contained in the City's Motion Record can be summarized as follows:

1. The appeals are subject to the provisions of s. 17 (24) and 34 (19) of the Act as amended by Bill 139 which has placed significant limitations on the basis for appeals;

2. Appeals under s. 17 (24) and 34 (19) may only be made on the basis that part of the planning decision that is under appeal is inconsistent with a policy

statement issued under s. 3 (1) of the Act, fails to conform with or conflicts with a provincial plan, or fails to conform with an applicable Official Plan;

3. Issues 1, 2, 3, 4, 18, and 19 do not meet the statutory requirements of s. 17 (24) and 34 (19) as they do not cite inconsistencies with a policy statement, lack of conformity or conflict with a provincial plan, or failure to conform with the City's Official Plan; and

4. Issues 1, 2, 3, 4, 18 and 19 contain subject matter that falls outside of the limited appeal provisions which form the Tribunal's legal jurisdiction in this proceeding and address extraneous issues such as questions related to Ontario Regulation 347/00 and Ontario Regulation 81/12 of the OLGCA and questions related to quashing of the City's By-laws that are under appeal for allegations of fettered Council discretion.

[7] The Appellants filed a Notice of Response to the City's Motion. The grounds included in the response to the motion can be summarized as follows:

1. With regard to Issue 1, the Tribunal would only be required to review the materials submitted to the OLG that accompanies the Resolution of May 15, 2012 and determine if a referendum was held and the referendum's results;

2. With regard to Issue 2 the Appellants contend that s. 3 i) of O. Reg. 81/12 requires a separate public proceeding dealing only with the issue of whether or not the electorate is supportive of being a Willing Host for the new casino. The Tribunal would only be required to review materials submitted to the OLG to determine if the required steps were taken;

3. With regard to Issue 3, the Appellants are requesting the Tribunal to determine if adequate public notice was provided on the sole issue of whether or not the electorate wanted to have expanded gaming in the City. The Appellants contend that this issue engages s. 1.1 (d) and 16 (1) (b) of the Act and s. 13, 18.1, 16.2.1

and Part V of the Official Plan. If adequate notice was not provided the Appellants maintain that this would be contrary to s. 24 (1) of the Act and would justify the Tribunal ordering repeal of the By-laws;

4. The OLG was required to prepare a business case that demonstrates the viability of the proposed gaming site and the adequacy of responsible features for the proposed gaming site. Pursuant to Issue 4, the Tribunal simply needs to examine the business plan and determine if it addressed the required matters; and

5. With regard to Issue 18, the Appellants contend that the City's decision to approve all of the subject By-laws was made as early as August 9, 2017 when City staff executed an Option Agreement which fettered Council's discretion.

[8] The City submitted a Reply to the Motion.

[9] The Tribunal has carefully considered the submissions of the parties. The Tribunal has determined that the issues 1, 2, 3, 4 and 18 generally involve matters that occurred outside of the *Planning Act* process through which the OPA and ZBA's were approved and do not involve the only grounds identified in the Act upon which appeals are allowed to move forward. Therefore the Tribunal has determined that the motion will be allowed and the issues are to be removed from the Appellant's issues list. The reasons for coming to these conclusions are set out below.

[10] The fundamental task that is the subject of the City's motion is the determination of the issues list for the hearing of the appeals. The parties identify potential issues but the final determination of the issues list is at the discretion of the Tribunal. The City's motion disputes the legitimacy of including the above-noted issues on the Issues List. Relevance is normally the main test for including issues for consideration in an appeal. However, the Tribunal also endeavours to ensure that an efficient and effective hearing process is maintained and that the issues list does not include ones that are not essential to the decision.

[11] The main thrust of the motion is that the issues raised by the Appellants are not matters over which the Tribunal has jurisdiction in view of the changes to the Act and the system for resolving planning appeals that were enacted when Bill 139 came into force and effect. As a result of these changes appeals under s. 17 (24) and 34 (19) of the Act must be based on one or more of the following;

1. consistency with a policy statement issued under s. 3 (1);

2. lack of conformity or conflict with a provincial plan;

3. lack of conformity with an applicable Official Plan.

[12] It is the City's position that issues that do not engage one of these three general grounds for appeal are not legitimate considerations for the Tribunal, should not form the basis of the Tribunal's decision, and raise matters that are beyond the Tribunal's jurisdiction.

[13] The Appellant's position is that the issues raise important matters regarding the selection of the potential location of a casino, they could be dealt with easily by the Tribunal, and would not consume a great deal of time. The issues mainly relate to the process used under the OLGCA to determine that the City is an appropriate candidate location for a casino, and whether or not the public was properly consulted.

[14] The Tribunal agrees with the City that the planning appeal system has changed significantly with the enactment of Bill 139 and appeals must be based upon one of the three consistency and conformity grounds as noted above. The Tribunal briefly discussed these changes in its decision that resulted from the CMC for the appeals. None of the issues in dispute make reference to a policy statement issued under s. 3(1) of the Act. The Provincial Policy Statement ("PPS") is such a policy statement and lack of consistency with its policies often form the basis for appeals in the current planning appeal system. However, there is no reference in these issues to lack of consistency with the PPS. The issues, with the exception of Issue 3, also make no reference to

provincial plans or to an applicable Official Plan. While Issue 3 references sections of the Official Plan, the Tribunal understands that the basis of the issue is concern about the need for a public meeting and proper notice for a consultation process under the OLGCA.

[15] In defence of his position that matters under the OLGCA are legitimate concerns for the appeals, Mr. Petch referred to the broad jurisdiction of the Ontario Municipal Board ("Board") conferred on it by s. 35 and s. 36 of the *Ontario Municipal Board Act* ("OMBA"). He maintained that these provisions gave the Board broad powers to determine matters that came before it and that these powers have been continued with the Tribunal through s. 11 (1) and (2) of the *Local Planning Appeal Tribunal Act* ("LPATA"). Mr. Petch contended in para. 7 of the response to the motion that given the wide jurisdiction of the Tribunal that it is untenable, "…to assert that an Appellant is limited in its appeal to this tribunal to simply matters of land use…and that it has no right to appeal on the grounds of questions of law and of fact when this Tribunal has the specific jurisdiction to do so." It was his opinion that the limitations on the Tribunal regarding grounds for appeal should not restrict appellants from challenging the legality of the process leading to the approvals of the subject By-laws.

[16] Mr. Petch stated in para. 10 of the response to the motion:

> It was quite normal for the former OMB to make decisions under the former s. 35 and 36 as to whether or not there has been compliance with any number of types of legislation, not just their "Home Statutes" (OMBA and the Act), such as the Environmental Assessment, all of the Provincial Plans, the PPS, the *Conservation Authorities Act*, the *Municipal Act, 2001*, *City of Toronto Act*, *Heritage Act*, *Boundaries Act*, *Pits and Quarries Control Act*, *Aggregate Resources Act*, and the *Development Charges Act*.

[17] Mr. Petch also contended that the Tribunal has authority through the principle of shared jurisdiction to determine if the ZBA's should be repealed on the grounds of "bad faith", "bias" or "fettering discretion" because of matters related to the process under the OLGCA. Mr. Petch raised the decision of the Ontario Court of Appeal, *Equity Waste Management of Canada v. Halton Hills (Town)* 35 O.R. (3d) [1997] which determined that despite the exclusive jurisdiction given to the Board through s. 36 of the OMBA in

all cases and all matters for which it has conferred jurisdiction, this did not prevent the Ontario Court under s. 136 (1) of the *Municipal Act, 2001* from making a decision to quash an Interim Control By-law for illegality in spite of the matter being before the Board in an appeal. The Court of appeal found that both the Ontario Court and the Board had jurisdiction to consider the legality of an Interim Control By-law. It should be noted that the relevant provision of the *Municipal Act, 2001* is now s. 273 (1) which empowers the Superior Court of Justice to quash By-laws.

[18] The Tribunal understands that Mr. Petch views the current case as an example of “shared jurisdiction”. Simply because one adjudicative body may have exclusive jurisdiction over a matter does not prevent the Court or other adjudicative body from making determinations about that matter.

[19] Mr. Petch also raised the Supreme Court of Canada decision, *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 which concluded that a statute should be read within its entire context and within the intent and object of the Act and intent of Parliament. It also indicated that every Act is to be given a fair and liberal interpretation to best ensure the attainment of its true intent and meaning.

[20] In addition, Mr. Petch referred to a recent decision of the Tribunal, referenced in the response to the motion as *Craft Acquisitions et al and the City of Toronto,* but which Tribunal often refers to as the “Rail Deck” case. In the Rail Deck (*Canadian National Railway Company v. Toronto (City),* 2018 CanLII 102206 (ON LPAT)) decision the Tribunal agreed to bring a stated case to the Divisional Court about questions mainly related to whether or not parties in an appeal are entitled to question witnesses that may be called and examined by the Tribunal. Mr. Petch maintained that in the decision the Tribunal acknowledged that it has jurisdiction and expertise to decide issues of law. He also referred to statements in paragraph 33 of the decision, which indicate that administrative tribunals are capable of taking on questions of law.

[21] Mr. Watt’s position was that the Tribunal is a creature of statute. He maintained

that the Tribunal's jurisdiction is totally derived from its enabling legislation which for the subject appeals are LPATA and the Act. He raised the Supreme Court of Canada decision, *R v 974649 Ontario Inc.* [2001] 3 SCR 575 ("*R v. 974649 Ontario Inc.*") which indicates that statutory bodies may perform only the tasks assigned to them by the legislature and have only the expressed or implied powers granted to them. He maintained that because of the changes enacted through Bill 139 the Tribunal's jurisdiction in the subject appeals has been limited to issues that fall under the permitted grounds for appeal identified in s. 17 (24.0.1) and 34 (19.0.1) of the Act.

[22] In considering the matter of the Tribunal's jurisdiction, it is useful to review the wording of s. 35 and 36 of the OMBA which state the following:

> Power to determine law and fact
>
> 35. The Board, as to all matters within its jurisdiction under this Act, has the authority to hear and determine all questions of law or of fact. R.S.O. 1990, c. O. 28, s. 35
>
> Jurisdiction exclusive
>
> 36. The Board has exclusive jurisdiction in all cases and in the respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act. R.S.O. 1990, c. O. 28, s. 36

[23] There is no question that these provisions gave the Board broad authority to deal with matters that came before it. Mr. Petch contended that these broad powers have been carried forward in the LPATA. However, as Mr. Watt noted in his Reply to the Motion there are significant differences in the wording of s. 11 (1) and 11 (2) of the LPATA compared to s. 35 and 36 of the OMBA. Sections 11 (1) and 11 (2) of the LPATA state the following:

> Exclusive jurisdiction
>
> **11** (1) The Tribunal has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.
>
> Power to determine law and fact
>
> (2) The Tribunal has authority to hear and determine all questions of law or of

> fact with respect to all matters within its jurisdiction, unless limited by this Act or any other general or special Act.

[24] Mr. Watt noted the addition of the phrase at the end of s. 11 (2) of LPATA which states, "…with respect to all matters within its jurisdiction, unless limited by this Act or any other general or special Act." It was Mr. Watt's position that the Tribunal's jurisdiction is limited for appeals under s. 17 (24) and 34 (19) of the Act through the provisions that set out the permitted grounds for appeal.

[25] In considering the submissions, the Tribunal notes that while broad authority was provided to the Board through s. 35 and 36 of the OMBA, there was some restriction placed upon the Board's jurisdiction through the phrase in s. 35, "…as to all matters within its jurisdiction under this Act…" Having said this, the Tribunal acknowledges through s. 11(2) of LPATA the jurisdiction of the Tribunal is limited through the phrase that Mr. Watt raised, that is by the provisions of any other general and special Act.

[26] In this decision the Tribunal will not attempt to define the full extent of its jurisdiction. However, as noted in the *R v 974649 Ontario Inc.* Supreme Court decision, the Tribunal's powers are those granted by the legislature. The provincial legislature through the changes to the Act that came into force with Bill 139, amended the powers of the former Board that now rest with the Tribunal with regard to appeals under a number of provisions of the Act. The Tribunal's jurisdiction to hear the subject appeals under the Act is limited by the requirement that the grounds for appeal must be based upon matters of consistency and conformity as described above.

[27] It must also be recognized that the limits on the grounds for appeal are not the only changes to the planning appeal system that came into effect through Bill 139. Through s. 17 (45) and 34 (25) of the Act the Tribunal is obligated to dismiss appeals where the notice of appeal does not appropriately address the permitted grounds for appeal. Also, the initial hearing of the subject appeals will not be a hearing *de novo* and if the Tribunal finds that the OPA and ZBA's are not consistent with a policy statement or do not conform to a provincial plan or an official plan the Tribunal can only refer the

planning instruments back to the City for a new decision. Through s. 17 (49.3) and s. 34 (26.1) of the Act these are the only grounds for referring the OPA and ZBA's back to the municipality. After the first hearing the Tribunal cannot simply make its own decision about the OPA and ZBA's.

[28] In the pre-Bill 139 regime appellants only needed to raise apparent land use planning grounds and the Ontario Municipal Board had some discretion over the dismissal of appeals. However that discretion no longer applies. Appellants can no longer expect appeals to move forward to hearings based upon planning grounds such as the impact of development on one's property, incompatibility of a proposal with the neighbourhood, or other specific concerns unless they are related to matters of consistency with a policy statement, conformity or conflict with a provincial plan, or conformity with an Official Plan.

[29] When giving a fair and liberal interpretation of the legislation that was enacted through Bill 139, and considering the extent of the changes, the Tribunal must conclude that the intent of the legislation has been to limit the Tribunal's authority so that, in the first hearing, the matters that are allowed to be considered in the appeals of certain OPA's and ZBA's are only consistency with a policy statement, conformity or conflict with a provincial plan or conformity with an Official Plan.

[30] Having come to these conclusions, it should be recognized that the PPS, provincial plans and Official Plans include policies covering the full gamut of planning concerns that may be relevant at the provincial and local levels. The Tribunal's jurisdiction to consider issues related to these policies has not been limited as long as they evoke matters of consistency and conformity with these documents.

[31] Mr. Petch raised the Tribunal's jurisdiction to make decisions under a number of pieces of legislation and policy documents as an indication of its broad authority. However, most of the examples raised by Mr. Petch are statutes where the Tribunal has specific jurisdiction to adjudicate appeals or where matters that fall under the statutes or

policy documents also involve planning considerations under the Act.

[32] The Tribunal does not consider its jurisdiction to deal with matters in these other statutes and policy documents as an indication that the Tribunal's authority should extend to processes and decisions under the OLGCA and the issues raised by the Appellants. The Tribunal simply has been given specific jurisdiction to deal with matters in the referenced statutes and policy documents, or has jurisdiction because they involve planning issues under the Act.

[33] Furthermore, the Tribunal does not consider this to be evidence of shared jurisdiction. Mr. Watt's opinion was that the Tribunal cannot share jurisdiction with the Courts over a matter that it did not originally have some authority over. The Tribunal agrees with Mr. Watt's submission. The Equity Waste Management decision referenced by Mr. Petch was a case where the Board had jurisdiction over appeals of interim control by-laws through the Act and the Ontario Court had the authority to quash By-laws under the *Municipal Act, 2001*.

[34] No shared jurisdiction applies to the subject appeals. The Tribunal is not aware of any jurisdiction it might have through the OLGCA to consider determinations made under that legislation. The jurisdiction of the Tribunal in the subject appeals is provided by the provisions of the Act and is related to consistency with a policy statement, conformity or conflict with a provincial plan and conformity with an applicable Official Plan.

[35] An issue must in some way relate to one of the three main grounds for appeal in order for it to be determined by the Tribunal. Issues 1, 2, and 4 appear to involve the process under the OLGCA and with OLG through which the City was determined to be a candidate site for a casino. Nothing was raised in the submissions of the parties indicating that the Tribunal has any specific statutory authority under the OLGCA, and the Tribunal must conclude that it has no specific authority.

[36] Issue 3 raises questions of conformity with sections of the Act including changes

to the Act resulting from Bill 73, and conformity with sections of the Official Plan but it appears to be mainly related to the process under the OLGCA. The sections of the Official Plan referenced in this issue relate to the protection of heritage features and include general policies for citizen engagement in planning matters. However, the issue contends that there was not adequate citizen engagement under the OLGCA process. The Tribunal cannot conclude from the submissions that the specific requirements for public consultation or public notice in the planning process under the Official Plan or the Act which resulted in the approval of the OPA and ZBA were not followed. As noted earlier, the Act as amended by Bill 139 applies to the applications and would include any Bill 73 changes that may have been retained.

[37] Based upon the above, the Tribunal agrees with the City's submissions that Issues 1, 2, 3, and 4 do not engage the only permitted grounds for appeal under s. 17 (24) and 34 (19) of the Act.

[38] Even if it were concluded that the Tribunal may have broader jurisdiction, the Tribunal would question the relevance of the Appellants' issues that mainly involve processes under separate legislation when considering a Planning Act appeal. It is not clear that evidence related to these issues would enlighten the Tribunal's consideration of the provisions of the PPS, a provincial plan or Official Plan.

[39] Issues 1, 2, 3 and 4 involve a process under the OLGCA and its regulations that is separate from the planning process under the Act. The Tribunal recognizes that this process may have had some bearing on the proposed location of the casino and arena. However, planning applications often involve processes which occur under other pieces of legislation that influence where development will be located. The Tribunal may choose to comment on the outcome of those processes in its decisions, but it has no authority to change them. It is the process under the Act that must be the focus of the Tribunal's consideration and of the hearing of the subject appeals. The issues for the hearing must involve the policy documents and planning policies under which the City's approvals were given.

[40] Furthermore, as noted earlier through s. 17 (45) and 34 (25) of the Act the Tribunal is obligated to dismiss appeals where the notice of appeal does not address one of the three planning grounds. The Tribunal process requires determination of the validity of appeals based upon the grounds set out in notices of appeal. If issues 1, 2, 3, and 4 had been raised in the notice of appeal as the only grounds for appeal, it is doubtful that the appeals would have been determined to be valid.

[41] In summary, the Tribunal has not been convinced by the submissions that issues 1, 2, 3, and 4 raise matters that are within the Tribunal's jurisdiction with regard to the appeals of the OPA and ZBA's or that the issues would be in some way relevant to the Tribunal's consideration of the appeals. On that basis, the Tribunal finds that issues 1, 2, 3, and 4 should be removed from the Appellants' issues list and should not form the basis of submissions at the hearing.

[42] With regard to Issue 18, it again relates mainly to the process that occurred under the OLGCA. The Appellants contended that Council's discretion was fettered because of actions and agreements that had been made prior to the approval of the OPA and ZBA's. Mr. Watt maintained that this issue does not involve consistency with the PPS, conformity with a provincial plan or conformity with an Official Plan. He indicated that the issue is not within the jurisdiction of the Tribunal, but it a matter for the Superior Court which could quash the By-laws. In view of the limits placed by the Act on the grounds for appeal and the need to maintain an efficient hearing process, the Tribunal agrees with Mr. Watt's position. This issue does not appear to involve the legitimate planning grounds upon which the appeals must be based and the Tribunal also questions the relevance of the issue.

[43] Mr. Petch maintained that Issue 18 raises matters of fairness and it should be within the Tribunal's jurisdiction to find that there have been errors in law. The Tribunal recognizes that it is obligated to uphold principles of fairness in making its decisions and through its proceedings. However, given the concerns about the Tribunal's jurisdiction to consider the matters raised by this issue and their relevance, if there are concerns

about Council's discretion having been fettered then this is a matter that should proceed to the Superior Court.

[44] Based upon the above, the Tribunal finds that Issue 18 should also be removed from the Appellants' issues list and should not form part of the evidence at the hearing.

[45] The Tribunal recognizes that it must give a fair and liberal interpretation to statutes in view of their intent and it can make determinations about some questions of law. However, when viewed in the context of the full changes enacted through Bill 139, the Tribunal can come to no other conclusion than the intent has been to limit the Tribunal's jurisdiction so that the subject appeals, at least at the first hearing, must be focussed exclusively on the consistency and conformity matters that can form the grounds for appeal. As noted earlier, the Tribunal still has the authority to consider a broad range of planning issues, but they must involve concerns about the consistency and conformity requirements in the Act for the planning instruments that are under appeal. The focus of the issues under consideration in these appeals must be the suitability of the proposed land use and the process under the Act through which approvals were given in the context of the requirements of the PPS, Growth Plan for Northern Ontario and Official Plan. Given the restrictions in the current planning regime, and the need for an efficient and effective process, it makes little sense to probe issues that are beyond the core areas of concern. Issues that do not relate to these grounds are not legitimate issues and are not relevant.

[46] Based upon the above, the Tribunal finds that the motion is allowed and issues 1, 2, 3, 4, and 18 shall be struck from the Appellants' issues list and should not form the basis for evidence at the hearing.

[47] Because Issue 19 forms the basis for the motion discussed in the next section, it will be addressed in that context.

II. Motion by Appellants for Production and Reply

[48] The Appellants bring a motion to obtain production of certain documents from the City. Specifically, they request the following relief from the Tribunal:

1. An Order requiring the City to produce, within seven (7) days, the following documents and information:

   a. Those documents noted in paragraph 19 of the Appellants Case Synopsis ("ACS"):

      i. All of the documents and information that the City of Greater Sudbury submitted to the Ontario Lottery and Gaming Corporation that OLG described in its letter to the City dated January 14, 2015 (AR Tab 26) that it relied on to determine whether or not the City complied with s. 3 i) of O. Reg 81/12 relating to Issue 2 ACS;

      ii. A copy of all documents amending the Option Agreement dated June 8, 2017 (Motion Document Book, Tab "C") and copies of all emails, memoranda, minutes relating to any amendment(s) to the said Option Agreement or any subsequent Agreements replacing the said Option Agreement;

      iii. A copy of the Cost Sharing Agreement referenced in the Motion Document Book, Tab "D"; and

      iv. Written materials of any kind referencing the Decisions City Staff may have made arising from the authority granted to Staff pursuant to By-law No. 2017-149 or any other procurement by-law relating to the subject Applications.

b. Those documents requested in Mr. Petch's letter to Mr. Watt dated October 17, 2018 (Motion Document Book, Tab "B");

c. Those documents requested in Mr. Petch's email exchange with Mr. Watt commencing August 17, 2018 (Motion Document Book, Tab "D"); and

d. Those documents requested in Mr. Petch's letter to Mr. Watt dated November 4, 2018 (Motion Document Book, Tab "E").

[49] The Appellants also request leave to file a reply case synopsis to the City's Responding Case Synopsis and to any case synopses that may be submitted by the added parties. Due to the intertwined nature of this request for relief with the third motion before the Tribunal, it will be addressed within the context of that motion, below.

Issues and Analysis

[50] When faced with a motion requesting production, the main issue for the Tribunal to determine is the necessity and relevance of the requested documents to the Tribunal's determination of the issues before it in an appeal. This issue is underscored in the new legislative scheme of the Act under which these appeals are brought.

[51] As noted earlier, with respect to the motion relating to the Tribunal's jurisdiction, the Tribunal's mandate in these appeals pursuant to s. 17(24) and 34(19) of the Act is clear: the Tribunal must determine whether the appealed instruments are consistent with the PPS, in conformity with the Growth Plan for Northern Ontario, and, in the case of the ZBA, in conformity with the City's Official Plan. With this mandate in mind, the Tribunal has made its findings with respect to its jurisdiction on the proposed issues before it, and now must consider whether the remaining issues align with the Appellants' requests for production, such that the Tribunal could consider the requested documents necessary and relevant to its ultimate determination of the issues in this appeal.

[52] The Appellants' written submissions helpfully identify which proposed issues relate to the requested documents for production. The Tribunal will deal with each of these issues and related requests for production in turn below.

Issue 2: Compliance with Ontario Regulation 81/2

[53] For the reasons above relating to the City's motion, the Tribunal has determined that it does not have jurisdiction to determine this issue in these appeals. Accordingly, all of the Appellants' requests for documents that relate to this particular issue cannot be considered necessary or relevant to the Tribunal in determining the issues in these appeals, and the Tribunal will not order production of them.

Issues 7, 8, and 9: Community Economic Plans

[54] There is no dispute that proposed Issues 7, 8, and 9 are properly before the Tribunal and fall squarely within its mandate to determine matters of consistency and conformity. The Tribunal understands the Appellants' request for production to relate to community economic planning documents that are referred to in the City's Official Plan. The City does not dispute that it should release documents that are referenced in its Official Plan.

[55] The Tribunal finds that any community economic development planning documents that are referenced in the City's OP may be relevant to the Tribunal's ultimate determination of issues in these appeals relating to conformity with the OP. Accordingly, and for the sake of clarity, the Tribunal will grant this ground of relief and orders the City to produce the documents set out in Mr. Petch's October 17, 2018 correspondence to Mr. Watt, found at Tab B of the Motion Document Book.

Issue 18: Bias and Fettering Discretion

[56] For the reasons set out above in the Tribunal's disposition on the City's motion, the Tribunal has determined that the proposed Issue 18 is beyond its jurisdiction. The

Appellants' have requested several documents pertaining to this proposed issue, including an Option Agreement and Cost Sharing Agreement between the City and Zulich and correspondence between elected City and Provincial Officials.

[57] Again, because the proposed issue is not one that falls within the Tribunal's mandate under the Act, the Tribunal finds that these documents are not necessary or relevant to its ultimate determination of the issues in these appeals. Accordingly, the Tribunal will not order production of these documents.

Issue 19: Production

[58] Because proposed Issue 19 deals with the subject of this motion, and the Tribunal has now disposed of the motion, the Tribunal directs Issue 19 to be removed from the Issues List.

III. Motions/Combined Motions by the Applicant, Gateway and by Hales, Fortin, and the BIA, to file Case Synopses/Responses

[59] The Appellants bring a motion to permit them to file a Reply Case Synopsis as a response to the City's Case Synopsis. They also seek leave to file a Reply Case Synopsis replying to any Case Synopsis that might be filed by the Applicant and Gateway as a result of the order of the Tribunal on their motions.

[60] The Applicant and Gateway, having been granted status as parties in the Appeals, bring a combined motion to allow them to file a Case Synopsis and Responding Appeal Record in the Appeals.

Request by the Appellants to File Reply Case Synopses

[61] Dealing first with the request by the Appellants to file a Reply Case Synopsis, the Tribunal has received submissions from the City and from the Applicant and Gateway on this motion.

[62] The Appellants take the position that until such time as the City provided its Responding Case Synopsis, they did not know what the City's response would be on the matters raised by the Appellants, and must now, out of necessity, respond to the matters now raised by the City. They also assert that the City's Responding Synopsis is "wrong on its face" and having identified certain sections of the City's Case Synopsis to be incorrect or lacking in response, and for this reason it is imperative that they be permitted to file a Reply, as otherwise, they will be unable to present a complete case for the Tribunal. If the Applicant and Gateway are permitted to file a Responding Case Synopsis the Appellants similarly argue that they must be permitted to file a Reply Case Synopsis to those filings since they will not have seen what their position is and whether it is different from that filed by the City.

[63] For these reasons, the Appellants argue that there will be a denial of the common law rules of procedural fairness and an error in law if they are not given the opportunity to make corrections and file reply responses in a Reply Synopsis.

[64] The request to file a Reply Case Synopsis is also directly tied to the request for production of additional documents which the Appellants submit, necessitates the filing of a written response to address those matters.

[65] Dealing first with this latter argument, the decision of the Tribunal in regards to production, as set out above, is to deny the production of the requested documents, save and except (for the sake of clarity) the production of the community economic development planning documents identified in Mr. Petch's correspondence of October 17, 2018 since they may be relevant to the Tribunal's ultimate determination of issues in these appeals relating to conformity with the OP.

[66] As the requests for production have essentially been denied, save and except with respect to the economic development planning documents, the Appellants' arguments supporting the necessity of a Reply are not persuasive. Given the limited nature of the productions that have been directed by the Tribunal, and upon the facts as

a whole, the Tribunal cannot conclude that the production of such limited additional documents for the purposes of clarification will substantially change the arguments and submissions of the Appellants on those identified issues. The Tribunal accordingly finds that the disclosure of the limited identified documents, in itself, is not sufficient reason to require the filing of a Reply Case Synopsis by the Appellants.

[67] Dealing with the remaining submissions and arguments of the Appellants, as has been noted, the Rules do not provide for the opportunity to file Reply materials, but neither do they prohibit the filing of a Reply and the Tribunal's discretion does allow for it to direct the filing of such materials pursuant to Rule 26.20 or s. 33(1) of the LPATA. The question is whether there are sufficient reasons to permit or require a Reply Case Synopsis in this case.

[68] The Appellants, upon the evidence identified by them, have appealed the decision of City Council upon the grounds and reasons identified by the Appellant in the Notice of Appeal and addressed in their Case Synopsis which they have filed pursuant to Rule 26.13. It is the Appeals filed by the Appellants, as they will now be placed before the Tribunal, which direct and delineate the issues for determination.

[69] The City, and now the Applicant and Gateway, will have responded to those issues raised by the Appellants in their filings. The City has filed its responding Case Synopsis pursuant to Rule 26.16. As determined below by the Tribunal, the Applicant and Gateway will shortly file their joint, and limited, Case Synopsis to provide such additional submissions and materials which they deem appropriate and which have not been provided by the City.

[70] The Appellants have filed their Appeal Record pursuant to Rules 26.11 and 26.12. Under Rules 26.15(b) and (c) the City has had the opportunity to respond with its Response Appeal Record and add to the Record those documents which they believe formed part of the process associated with the application and are material to the determination of the issues. In accordance with the decision rendered below, the

Applicant and Gateway will also have the opportunity to file a Responding Appeal Record and also add to the Record. The Case Synopses filed by the City and to be filed by the Applicant and Gateway, collectively represent appropriate responses to the Appellants' Case Synopsis and the evidence which they have identified as relevant to support the explanations, grounds and bases upon which the Appeals were filed.

[71] Once the filings from the Applicant and Gateway are delivered the exchange of documentation under the Rules and as ordered herein will be complete. The Tribunal's Rules, as implemented by the Tribunal pursuant to s. 12 and s. 31(2) of the LPATA, clearly do not provide for the filing of a Reply Synopsis by the Appellant simply because a responding Case Synopsis or Responding Appeal Record have been filed. There is no presumption that a Reply is required simply because the responding parties are filing a Case Synopsis or identifying portions of the Record that they feel are essential to the issues, which the Appellants have not included because they believe they are not material to the determination of the issues. As the Rules have been drafted there is clearly no expectation that a Reply can be provided simply because there is a response to the synopsis or the record filed by the Appellant.

[72] The Appellants in this case submit that it is "imperative" that a Reply must nevertheless be filed in the circumstances of this case. For the reasons that follow, the Tribunal does not agree. With the comprehensive nature of these filings under the Rules, and the further oral hearing that will occur, the Tribunal must conclude that it does not require a further Case Synopsis from the Appellants to counter-argue the submissions and response to their Appeals. It is the view of the Tribunal that there are no circumstances which exist to justify a deviation from the Rules in this case.

[73] The Appellants specifically submit that the Tribunal will be denied the opportunity to receive the Appellants' differing views on matters raised by the City (or the Applicant and Gateway) in their Case synopses and also assert that the City failed to respond to certain issues raised by them. The Tribunal finds that these arguments have no merit. The Tribunal does not accept the Appellants' argument that upon the conclusion of the

entirety of the appeal and hearing processes that the Tribunal will somehow be left with the unchallenged position of the City without the opportunity for submissions and input from the Appellants if they are not permitted to file a Reply Case Synopsis.

[74] As for the suggestion that the City's Case Synopsis was non-responsive, if that is the case, then this failure to respond to a specific issue is either at the City's peril, or alternatively the City has determined that it does not need to provide a response to the issue. This is not a reason to file a further reply argument.

[75] It is not surprising that the Appellants disagree with what is contained within the City's Responding Case Synopsis, and they will, undoubtedly disagree with much of what will be contained within the Responding Case Synopsis to be filed by the Applicant and Gateway. The fact that there are issues in dispute is not, itself, sufficient reason to require a written Reply. There will be ample opportunity to address the points raised by the Appellants in their motion materials in the oral argument presented at the oral hearing. The oral hearing will allow for the presentation of supportive argument on those submissions and positions which differ between the parties. Oral argument will also permit the Appellants to make submissions in response to those aspects of the City's Synopsis that they submit are "obviously wrong".

[76] As to the Appellants' argument that the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, ("*Baker*"), and concerns with respect to procedural fairness (as discussed below), should equally apply to the necessity of filing a reply, the Tribunal does not agree. The Tribunal does not agree that the denial of a further written Reply to the Responding Synopses is somehow a denial of the common law rules of procedural fairness, particularly where the parties will be afforded the opportunity for robust oral submissions and argument at the oral hearing based upon the existing evidentiary record. The Tribunal has considered the decision of *Treleaven v. College of Teachers (British Columbia)*, (200 BCSB 1160, 2000) ("*Treleaven*"), submitted by the Appellants as it relates to the issue of procedural fairness. In this regard, the Tribunal accepts the submissions of the Applicant and Gateway and agrees

that the circumstances of that case are distinguishable from those in these Appeals and these circumstances. Upon the conclusion of the hearing process under the Tribunal's Rules, and in accordance with the decisions made in the Case Conference process, including the oral hearing, the Appellants will, in the totality of that process, have the meaningful opportunity to present their case fully and fairly without the additional filing of a further Reply Case Synopsis. There was no oral hearing in the circumstances of the *Treleaven* case. There will be an additional oral hearing in these Appeals. There is a difference.

[77] The Tribunal has, in reaching its decision on this motion, has also considered the differences that now exist between the prior hearing *de novo* appeals and appeals as they are now to be heard in the new format now directed by the Act. Since the appeal is no longer determined based upon new evidence, the hearing process is more akin to appellate proceeding before a higher appellate body. The written factums and record are thus presented as argument and submissions upon the existing evidentiary record and accordingly the need to provide a true "reply" to new evidence, as would occur in the presentation of evidence in a full hearing, is thus unnecessary and inappropriate. The evidence is that which formed part of the process associated with the application and before Council when the decisions were made. The oral hearing will permit the opportunity for each of the parties to provide further "reply" argument and submissions in response to points raised by the opposing parties

[78] In summary, the Tribunal is well capable of assessing the merits of the respective synopses on the basis of the detailed and comprehensive materials filed by all parties (including the Applicant and Gateway) and supplemental argument and submissions at the oral hearing, without the necessity of a further Reply argument from the Appellants. The Tribunal cannot conclude, as the Appellants argue, that there will be a denial of procedural fairness and an error in law. With the provision of the limited joint Case Synopsis and Responding Appeal Record from the Applicant and Gateway, the Tribunal will have fairly received written materials from all parties having an interest in the Appeals and the original Applications, in equal measure, without preference to any one

party over the other, and no party will have been denied the opportunity to put their best case forward and respond to the submissions of the other parties who are adverse to their positions on the issues.

[79] For the reasons indicated, the motion by the Appellants to file a Reply Case Synopsis is denied.

Request by the Applicant and Gateway to File Case Synopses and Appeal Records

[80] The request by the moving parties, Applicant and Gateway, for leave to file both Case Synopses and Appeal Records, including affidavit material, is opposed by the Appellants. The City did not oppose the motion of the Applicant and Gateway.

<u>The Submissions of the Applicants and Gateway</u>

[81] The Applicant and Gateway assert that the Tribunal has the discretion to direct the filing of the requested materials under Rule 26.20 which allows the Tribunal to grant them status to participate in the Appeal "on such terms as the Tribunal may determine". As to whether it is appropriate for the Tribunal to exercise that discretion, the primary basis for the request to file Case Synopses and a responding record, inclusive of affidavit material, is based upon the principles of natural justice and the common law concept of procedural fairness. The Applicant and Gateway submit that such principles of natural justice and procedural fairness arise because the Tribunal is required to make administrative decisions in this Appeal that will directly affect the rights, privileges or interests of an individual.

[82] In advancing their arguments of natural justice and procedural fairness, the Applicant and Gateway rely upon the "*Baker* factors". Their submissions with respect to the *Baker* Factors that must be examined can be summarized as follows:

(1) The nature of the decision being made by the Tribunal, and its process in

making that decision, is the first factor. The Applicant and Gateway submit that the revisions to the appeal process arising under Bill 139 have elevated the Tribunal's functions closer to the judicial functions of an appellate court and involves a process which is based upon submissions, written argument and limited affidavit materials rather than hearings *de novo*. As such, all parties have the right to present their case in a full and fair manner, similar to that provided to the Appellants and the City;

(2) The second factor is the nature of the statutory scheme, which also requires fairness of process. The Applicant and Gateway argue that given the purposes and objectives of the Act, which includes the provision of planning processes that are open, accessible, timely and efficient, and given the significance and importance of all decisions of the Tribunal made under s. 17 and 34 of the Act, the Tribunal has a statutory mandate to ensure fairness;

(3) The third factor relates to the importance of the Tribunal's decision upon those affected, and in this case the Applicant and Gateway submit that their fundamental rights relating to property ownership and their use of that property are directly impacted by the Tribunal's decision;

(4) The fourth Baker factor is the legitimate expectations of the persons challenging the decision, which is not identified by the Applicant and Gateway as significant; and

(5) Finally, as to the fifth *Baker* factor, which is the Tribunal's own directed procedures governing such appeals, the Applicant and Gateway submit that the Tribunal's Rules, as they have been revised following the implementation of Bill 139, supports their request for the right to file a Case Synopsis, as it expressly allows for the provision of affidavit evidence and additions to the record that is before the Tribunal in this Appeal.

[83] At the core of their Submissions, the Applicant and Baker refer to paragraph 22

of the *Baker* Decision:

> …the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[84] Upon these principles the Applicant and Baker submit that it would be a breach of procedural fairness if they were denied the opportunity to file Case Synopses and add to the evidentiary record to the extent necessary. Of importance to the moving parties is the fact that, although aligned, the interests, written submissions, oral argument and filed materials of the City are not necessarily identical to theirs and they should have the unrestricted opportunity to present their own cases, as added parties, since the Tribunal's decision will substantially affect their rights and interests. To do otherwise would deny the Applicant and Baker the right to a fair, impartial and open process in these Appeals.

[85] A further argument is submitted by the Applicant and Gateway – one which is not illogical, and somewhat persuasive, in the Tribunal's view. As the Case Synopses and the Appeal Record serve the purpose of setting out the respective cases of each party, the Applicant and Gateway submit that the filing of such materials by them serves to clearly disclose to the Appellants the "cases they have to meet" and the details of the positions advanced by them on the issues. The delivery of the same principal documents by the Applicant and Gateway will, they argue, assist the Tribunal in carrying out their functions. This also places the Applicant and Gateway, as the added parties, on a "level playing field" with the other statutory parties having the right to set their cases out before the Tribunal within the Case Synopses and submitted components of the evidentiary record.

The Submissions of the Appellants

[86] The Appellants submissions assert that the filing of a Case Synopses and

additional materials in the Record (inclusive of affidavit material) are "additional rights" above and beyond the right to be granted status by the Tribunal. The Appellants submit that as the Rules are constructed, and in particular, Rules 26.20, 26.11 to 26.16 only the statutory parties, the Appellants and the Municipality, have the automatic right to file such materials.

[87] As to the filing of additional affidavit evidence, the Appellants object to the fact that the Applicant and Gateway have not disclosed the additional expert opinion affidavits that they propose to add to the record and the possibility that they might introduce expert evidence, within such affidavits, that was not already presented to Council and already within the material before the Tribunal. The Appellants submit that there is an obvious lack of detail as to exactly what additional affidavits would be added to the record and why they are required, and such omission fails to support the request to add affidavits to the record.

[88] In response to the authority of the *Baker* decision, as argued by the Applicant and Gateway, the Appellants submit that the principles identified by them do not necessarily apply to the type of Appeals now before the Tribunal, as they are dissimilar to cases such as *Baker* where issues of an immigrant's personal freedom were, for example, before the Court. The legislative scheme set out in the Act, they argue, differs considerably from the scheme that was addressed by the Supreme Court of Canada in *Baker* which makes clear in paragraphs 20 to 28 that procedural fairness varies from case to case. The Appellants argue that the nature of the duty of procedural fairness, as it linked the question of how the tribunal's decision will impact a litigant and the importance of the decision to the party affected by the decision, must be examined in the context of each specific case and in this case is insufficient to support the need for a Case Synopsis or Responding Appeal record from the Applicant and Gateway.

Analysis and Findings

[89] For the reasons that follow, the Tribunal grants the motion of the Applicant and

Gateway, in part, and allows them to file a joint Case Synopsis, and a limited Responding Appeal Record. Such joint Responding Appeal Record must comply with the Rules and may not include additional affidavit material from any affiant other than the author of any report that was before Council when it made its decision.

Can the Tribunal Direct the Filing of Case Synopsis and Record by the Added Parties?

[90] Dealing first with the question of the ability of the Tribunal to allow the Applicant and Gateway to file the requested materials in the Appeals, the Tribunal would agree with the submissions of the Appellants that the Tribunal's Rules do not specifically provide for any filing of materials by the Applicant *prior to* the CMC which is limited to the Appellants (under Rules 26.11 and 26.13) and the "municipality or approval authority", (under Rules 26.14, 26.15 and 16.16).

[91] The filing of materials in this type of appeal is essentially now a three-part process. The municipality or approval authority will file, with the Tribunal, its Enhanced Municipal Record. The Appellants, as the parties initiating the Appeals, will file their Case Synopsis and Appeal Record inclusive of any affidavit material, (including expert's evidence supported by the Acknowledgement and Resume). Thereafter, should it choose to do so, the Municipality will file a Responding Case Synopsis and Responding Appeal Record containing any additional documents in support of the response to the Appeal, inclusive of any affidavits they may wish to provide.

[92] The only material to be provided by a prospective added-party, *before* the CMC, is the Submission identified in s. 40 of the LPATA and Rule 26.19. The Rules are silent as to the specific required responsibility, or permitted ability, of any added-party to file any materials with the Tribunal *after* the CMC is conducted and the order is made adding parties to the appeal.

[93] While the Tribunal's Rules may not provide specific direction on the subject of the possible filing of a Case Synopsis or Appeal Record and affidavits, by added parties, they do clearly allow the Tribunal the full and unfettered discretion to allow for such

materials to be filed. Of significance is the fact that the Rules are also supported by the statutory authority granted to the Tribunal in the LPATA which grants the Tribunal powers to provide orders and directions necessary or incidental to its powers.

[94] As has been noted already by the Tribunal in cases examining the "new" statutory scheme provided for under Bill 139, the legislation has been drafted with the expectation that the Municipality is the statutory responding party expected to respond to any appeal of their enacted and adopted planning instruments. It is a reasonable conclusion, upon that analysis, that an added party should play a supplemental role, able to submit evidence and submissions in response to the issues arising from the Appeals, as raised by the statutory parties – i.e. the Appellants and the municipality/approval authority, but otherwise is not the first recognized statutory party to the appeal. The involvement of the Applicant however is seldom refused by the Tribunal in such appeals.

[95] The relative role to be played by an applicant non-statutory party that has been conferred party status by the Tribunal, is addressed in the Tribunal's Rules where an added party is aligned with the interest of the Appellant. Rule 8.03 provides:

> **8.03 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.

[96] Rule 8.03, and its predecessor, applies to added parties who are not Appellants but has also generally been applied in the same manner by the Board and the Tribunal with respect to added-parties to appeals which are aligned with the respondent municipality rather than the Appellant. Upon that basis, generally the applicant developer (or alternatively aligned ratepayers supporting a decision of Council refusing an application) may not raise or introduce new issues in the proceeding and may only shelter under issues raised by the municipality (in response to the Appellant's appeal

and issues as raised in the proceeding) and has no independent status to continue an appeal that may be resolved or determined by the Tribunal with the approval of the municipality.

[97] In the decision of the Tribunal in *Dell v. Kawartha Lakes (City)* the Tribunal has examined the issue of the filing of Case Synopses and Appeal Records in the context of an appeal where the municipality elects not to file such material (or even appear) in an appeal, entirely ceding such responsibility for a response to the appeal to the Applicant.

[98] That of course is not the case here where the Municipality has filed the Enhanced Municipal Record and a Case Synopsis and Responding Appeal Record. In this case it is unnecessary for the Applicant, and Gateway, to "step into the shoes" of the Municipality, and assume sole and primary responsibility for the carriage of the response to the Appellants' case, as was the case in the circumstances of *Dell* v. *City of Kawartha Lakes*.

[99] The question, accordingly, is whether the Applicant and Gateway should also be permitted to file Case Synopses, and add to the evidentiary record, in addition to the Municipality.

[100] In the Tribunal's view, the statutory scheme and the Tribunal's Rules, do provide the discretionary authority and basis to allow an added party to file a Case Synopsis or supplement the Record by the addition of documents, or, possibly, affidavit material and in this regard, accepts the submissions of the Applicant and Gateway. Sections 33(1) and 40(1) of the LPATA grant the discretionary authority to the Tribunal to procedurally control the extent to which added parties will be involved in the hearing process. The general jurisdictional powers of the Tribunal identified in Part III of the LPATA also confers exclusive jurisdiction in respect of all matters in which jurisdiction has been conferred by the LPATA or any other Act. This includes the power to determine its own procedures and practices.

[101] The Tribunal accordingly concludes that it has the discretionary ability to best

determine the manner in which an Appeal brought before it, under the new planning regime, should be heard and that it can make such orders or give directions as may be necessary or incidental to the power conferred upon the Tribunal under the LPATA and the Act. This includes the ability, when appropriate, to direct that added parties to the Appeals, such as the Applicant and Gateway, be permitted to file a Case Synopsis and a Responding Appeal Record, inclusive of such affidavit material as they may deem appropriate and is permitted.

Is it Appropriate to Permit the Added Parties to File a Case Synopsis and Record?

[102] The issue then is whether, in the circumstances of these Appeals, it is appropriate for the Applicant and Gateway to be granted that ability.

[103] The Tribunal is persuaded by the submissions of the Applicant and Gateway as it relates to the *Baker* factors and the significance of the principles of natural justice and the common law concept of procedural fairness as it relates to the Applicant and Gateway. The Tribunal finds that any decision to be made in these Appeals will indeed affect the rights, privileges or interests of the Applicant and Gateway in a manner that calls into play the protections necessary to ensure there is procedural fairness.

[104] The Tribunal is unable to agree with the Appellants' assertion that the nature of the determinations to be made by the Tribunal in this case are a type of administrative decision that is different from that dealt with in the *Baker* case, such that the considerations of procedural fairness do not apply to permit the filing of a Synopsis and Record. The *Baker* case dealt with fundamental personal rights relating to immigration and the Court concluded that the decision to be made was important to the lives of the affected parties and was of a type that had an immediate and profound impact "in a fundamental way" upon the lives of the parties (which had, in that case, been satisfied by the opportunity accorded to the appellant through the participatory right to produce full and complete written documentation in relation to all aspects of the appellant's application).

[105] While the issues that are at stake to the Applicant and Gateway certainly cannot be placed within the same category as the personal rights at stake for immigration applicants appearing before an Immigration Officer, this does not necessarily mean that the importance or impact of the decision for the Applicant and Gateway should be minimized and summarily placed outside the range of impact or importance that gives rise to the need to consider procedural fairness protections in the context of these Appeals under the new regime created under Bill 139.

[106] As a general premise, property rights possessed by owners of property (or developers enjoying and exercising such property rights under contract) are, in the Tribunal's view, fundamentally affected by any decision relating to planning matters governed by the planning systems in place under the Act regime in Ontario which, in its stated purposes, provides for a land use planning system led by provincial policy and for "planning processes that are fair by making them open, accessible, timely and efficient".

[107] A fundamental aspect of the planning regime and laws that guide planning and development in Ontario is the fact that a property owner's personal rights relating to the ownership of property, and in particular the uses that can be made of their property, are not absolute and unrestricted. The construct of the planning system recognizes that it is necessary and appropriate that the larger public interest in that planning system operates to impose restrictions and limitations on an owner's right of use of their property. There is a clear balancing of the private interests of owners wishing to make use of their property against the larger public interest in maintaining an orderly system of planning and development led by provincial policy and implemented by municipalities and approval authorities that control the uses of property in Ontario. This comprehensive planning process undertaken and administered by the Province and municipalities, through its legislation and policies, and the decisions made by the respective decision-making authority under that system, directly affects the manner in which any owner of a property may use that property.

[108] The Tribunal's mandate is to hear and determine disputes arising in relation to

the planning system described above. Any decision of the Tribunal in an appeal, including the Appeals now before the Tribunal, will have a direct and profound impact upon the manner in which the owner will, or will not, use their property. It would be reasonable to conclude that a decision of this Tribunal which ultimately affects the manner in which an owner may use a property that they have invested in, be it personal or business, is of a degree of importance or impact that may be less "personal" and somewhat different than a tribunal's decision that affects such things as the means to earn a livelihood, human rights, entitlement to benefits or a right to housing.

[109] It would be incorrect however to summarily conclude, as the Appellants suggest, that because the decision of the Tribunal is not in such a category of "personal" interests that it is not of significant importance to, and will not have a profound impact upon, the owner of property. The personal attachment of a property owner to, or financial investment in, real property is generally of great significance to that owner and any decision relating to real property, such as those decisions made by this Tribunal under the Act, may in some cases have a far greater financial impact upon a party than a tribunal's decision dealing with a claim for benefits or employment rights. Importance and profundity are subjective things and involve matters of context. In the Tribunal's view, its decisions, as they may affect a proposed multi-million dollar economic development or the ability of a home owner to create the home of their dreams personal to their lives and circumstances, can be considered to have a profound effect upon a property owner in most cases, and of great importance to them.

[110] For these reasons, the Tribunal has carefully considered the factors of the *Baker* decision, the facts of this case and, significantly, the form and nature of the appeal process now implemented under Bill 139 for these Appeals. It is the view of the Tribunal that given the more focused and limited manner of these types of planning appeals under Bill 139, as compared with the former hearings *de novo* (where the Applicant and Gateway would have had the ability, having been granted party status, to provide additional evidence) there is a heightened importance to ensuring that procedural fairness is afforded to the property owner/developer in regards to any decision of the

Tribunal that will ultimately affect their ability to use the Subject Properties. In this case, the Tribunal finds that refusing to permit the Applicant and Gateway the opportunity to jointly file their own Case Synopsis, and contribute to the record, inclusive of appropriate filings of affidavits as permitted by the Rules, would unfairly exclude them from the hearing process and prevent them from contributing to the submissions, argument and material to be considered by the Tribunal in deciding the issues placed before it. The proposed development of the property to be developed by the Applicant and Gateway is not insubstantial and the decisions to be made by this Tribunal will significantly affect their ability to move forward. The impact upon the Applicant and Gateway, if the decision is adverse to their plans for the use of the property, will be significant, profound, and hugely important to them. To exclude them from the processes for the filing of written materials as set out in the Rules would represent procedural unfairness.

[111] In regards to the submission provided by the Applicant and Gateway, that the filing of the Synopsis and Record will assist all of the parties, and the Tribunal, the Tribunal must agree. In the Tribunal's view, the filing of a Case Synopsis, and any necessary contribution to the Record, will be helpful to all of the parties, as well as the Tribunal, in understanding the additional arguments and position of the Applicant and Gateway, as it relates to the original applications filed with the City that give rise to the proposed development and these Appeals. The ability of all parties to "know the case they have to meet" when the oral hearing is conducted is beneficial to everyone, including the Tribunal.

[112] Furthermore, of importance to the Tribunal is the fact that these Appeals now being determined under the new Bill 139 regime are based upon: (a) the existing written evidentiary record; (b) any oral examination of affiants that might thereafter occur; and (c) the subsequent presentation of the written and oral argument. The Appeals cannot be heard as hearings *de novo* and it is essential that the Tribunal receive the benefit of a thorough written response to the Appellants' written Case Synopses which addresses all issues, provides articulated arguments and submissions and summarizes the

complete response to the case presented by the Appellant. The Tribunal also requires that it have before it all relevant and pertinent materials necessary to support that responsive summary as sourced from the materials prepared and originally submitted to the City and Council in support of the Applications.

[113] While the City has, in this case, provided its response to the Appellants' case, the Tribunal agrees with the submission of the Applicant and Gateway that they may take positions and advance arguments that are different from, and not necessarily duplicating, the positions and arguments provided by the City. The interest of the Applicant and Gateway in the outcome of the decision is different from that of the City's interest. For that reason, including the Applicant and Gateway in the adjudicative process, and receiving their additional synopsis and record, will ensure that all interested parties and their contributions to the matters to be considered by the Tribunal are before it.

[114] Circling back to the argument advanced by the Applicant and Gateway, as articulated by the Court in the *Baker* decision, the Tribunal accepts and finds that it is appropriate that the Applicant and Gateway have the opportunity to present their case fully and fairly, and that the Tribunal's ultimate decision, as it will affect their rights, interest and privileges of use of the subject property, be made using a fair, impartial and open process appropriate to the statutory context of the decision. Permitting the Applicant and Gateway to file their own joint Case Synopsis and file a joint Record, with the same permissive right to include such affiant material as is permitted by the Tribunal's Rules, will ensure that the processes leading to the Tribunal's decision is fair, impartial and open as the Tribunal will be required to make its decision based solely upon such written materials, supplemented by oral submissions. Finally, but not of least importance for the Tribunal, is the necessity of ensuring that the Tribunal receives the benefit of all necessary submissions, affidavits and evidence as are required to assist it in determining whether the decision of Council meets the consistency and conformity tests as provided for in the Act. The Tribunal is of the view that the receipt of the Case Synopsis and Record, and the provision of such further affidavit material from the

Applicant and Gateway are, in this case, required in order to permit the Tribunal to satisfy its responsibilities.

Format of the Joint Case Synopsis and Joint Responding Appeal Record

[115] It is the view of the Tribunal that the filing of the Case Synopsis and the Appeal Record, inclusive of such affidavit evidence as is necessary and permitted by the Rules, should be a joint exercise and the filings should not be individual as requested. The materials and submissions filed to this date make it abundantly clear that the interests of the Applicant and Gateway are aligned, and furthermore, the interests of Gateway, as the developer of the casino, are derivative of the property interests of the Applicant as owner of the properties which are the subject of the Applications.

[116] It is important that such material filed by the Applicant and Gateway not duplicate or repeat submissions, argument or material already presented by the City and that one joint Case Synopsis and Responding Record be submitted by them to supplement and contribute to those materials which have been already filed by the City. The Tribunal will not benefit from repetitious material, and as the Applicant and Gateway already have the benefit of the response materials filed by the City which obviously is supportive of their position, it is necessary, and consistent with the factors in the *Baker* decision, if the additional material is supplementary in nature providing only what the Applicant and Gateway feel is necessary and in their interest to respond to the case advanced by the Appellants.

[117] The Applicant and Gateway shall accordingly serve and file a joint Responding Case Synopsis and joint Responding Appeal Record in the same form and manner as provided for in Rules 26.15 and 26.16. The materials shall be served upon the Appellants and the City, and filed with the Tribunal, not later than 25 days following the issuance of this Decision and Order.

CONCLUSION AND ORDER

[118] The Tribunal orders that the motion brought by the City is allowed and Issues 1, 2, 3, 4, 18 and 19 shall be struck from the Appellants' issues list;

[119] The Tribunal orders that the Appellants' motion related to production is refused except with regard to the relief requested for the City to produce the documents set out in Mr. Petch's October 17, 2018 correspondence to Mr. Watt, found at Tab B of the Appellants' Motion Document Book;

[120] The Tribunal orders that the Appellants' motion to file a Responding Case Synopsis and Responding Appeal Record is refused;

[121] The Tribunal orders that the motion by the Applicant and Gateway to file a Responding Case Synopsis and appeal record is allowed as directed above. The Applicant and Gateway shall file a joint Responding Case Synopsis and joint Responding Appeal Record in the same form and manner as provided for in Rules 26.15 and 26.16. The materials shall supplement and contribute to those already provided by the City and shall be served upon the Appellants and the City, and filed with the Tribunal, not later than 25 days following the issuance of this Decision and Order.

[122] Having come to the above conclusions on the motions, the Tribunal has determined that it is appropriate to move the appeals forward and has scheduled another Case Management Conference to take place on **August 8, 2019 at 10 a.m.** at:

Tom Davies Square
Boardroom A-B
200 Brady Street
Greater Sudbury, ON

[123] No further notice is required for the CMC.

[124] Previously, Mr. Artenosi had expressed an intent to bring a motion to dismiss one of the appeals. If this is still the case the motion will be heard at the beginning of the

CMC. The motion and any responses should be filed according to the Tribunal's Rules.

[125] The above is the direction and order of the Tribunal.

"C. Conti"

C. CONTI
VICE-CHAIR

"David L. Lanthier"

DAVID L. LANTHIER
MEMBER

"S. Jacobs"

S. JACOBS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal
A constituent tribunal of Tribunals Ontario – Environment and Land Division
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