

ONTARIO
SUPERIOR COURT OF JUSTICE (Divisional Court)

BETWEEN:

FRIENDS OF SIMCOE FORESTS INC.

Applicant

- and -

MINISTER OF MUNICIPAL AFFAIRS AND HOUSING, LOCAL PLANNING
APPEAL TRIBUNAL, CORPORATION OF THE COUNTY OF SIMCOE,
TOWNSHIP OF SPRINGWATER, NICHOLYN FARMS INC.,
EDWARD KRAJCIR and SCARLETT GRAHAM KRAJCIR

Respondents

**NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL
REVIEW**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION for Judicial Review will come on for a hearing before the Divisional Court on a date to be fixed by the Registrar at the place of hearing requested by the Applicant. The Applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, YOU OR YOUR LAWYER MUST, IN ADDITION TO SERVING YOUR NOTICE OF APPEARANCE, SERVE A COPY OF

THE EVIDENCE ON THE Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicant's application record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: October 19, 2020

Issued by _____

Registrar
Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N5

TO: Attorney General of Ontario
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9
Attention: Mr. Sean Kearney, Director

AND TO: Minister of Municipal Affairs and Housing
Legal Services Branch
777 Bay Street, 16th Floor
Toronto, Ontario
M7A 2J3
Attention: Mr. Ugo Popadic and Ms. Alexandra Robertson
Counsel for the Minister of Municipal Affairs and Housing

AND TO: The Corporation of the County of Simcoe
c/o Legal Services Department
1110 Highway 26
Midhurst, Ontario L9X 1N6
Attention: Mr. Marshall Green and Mr. Mark Vernon
Counsel for the Corporation of the County of Simcoe

AND TO: Mr. Barnet Kussner
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, Ontario M5K 1B7
Counsel for the Township of Springwater

AND TO: Local Planning Appeal Tribunal Ontario – Environment and Land Division
1500 - 655 Bay Street
Toronto, Ontario M5G 1E5
Attention: Benjamin Waters, Case Coordinator

AND TO: Mr. Eric W.D. Boate
59 Collier Street
Barrie, Ontario L4M 1 G7
Counsel for Edward Krajcir & Scarlett Graham-Krajcir

AND TO: Mr. David S. White, Q.C.
100 - 95 Barber Greene Road
Toronto ON M3C 3E9
Counsel for Nicholyn Farms Inc.

APPLICATION

(a) Overview

1. This is an application for judicial review of: (i) the Local Planning Appeal Tribunal's ("Tribunal") decision dated September 18, 2020; and (ii) subsection 4(4) of O. Reg 311/06 as amended by O. Reg 305/19 ("Transitional Regulation") enacted by the Minister of Municipal Affairs and Housing ("Minister). The Tribunal struck out certain issues from the Applicant's Issues List based on subsection 4(4) of the Transitional Regulation, which was invalidly enacted by the Minister.
2. Prior to the enactment of the Transitional Regulation, the Minister approved Amendment No. 2 to the County of Simcoe's Official Plan ("OPA 2"). OPA 2 allows the establishment of a waste processing complex in the Freele County Forest.
3. The Applicant appealed OPA 2 to the Tribunal. The crux of the Applicant's appeal was based on the environmental protections for natural heritage features in subsections 4.2.2, 4.2.3 and 4.2.4 of the *Growth Plan for the Greater Golden Horseshoe, 2017* ("2017 Growth Plan").
4. Subsequently, the 2017 Growth Plan was replaced with *A Place to Grow: Growth Plan for the Greater Golden Horseshoe* ("2019 Growth Plan"). The natural heritage policies in subsections 4.2.2, 4.2.3 and 4.2.4 in the 2019 Growth Plan are identical to the 2017 Growth Plan insofar as they relate to OPA 2.

5. Although there were no transitional matters to address in this case due to the replacement of the 2017 Growth Plan with the 2019 Growth Plan, the Minister exempted OPA 2 from subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan under subsection 4(4) of the Transitional Regulation.
6. The County of Simcoe (“County”) and the Minister, thereafter, brought a joint motion before the Tribunal to strike out all issues related to the Growth Plan from the Applicant’s Issues List. The Tribunal granted the motion and thereby finally determined the core issues in the Applicant’s appeal. The Tribunal relied on subsection 4(4) of the Transitional Regulation as the basis for its decision.
7. The Transitional Regulation was enacted by the Minister pursuant to section 19(1)(d) of the *Places to Grow Act, 2005*, SO 2005, c 13 (“*PGA*”). Under that section, the Minister must meet two statutory requirements: (i) the regulation must address a “transitional matter”; and (ii) in the opinion of the Minister, it must be necessary or desirable to facilitate the implementation of the *PGA*, a provision of the *PGA* or a growth plan. The Minister failed to meet both these statutory requirements and thereby exceeded his jurisdiction by enacting subsection 4(4) of the Transitional Regulation.
8. The Tribunal’s decision, in turn, was unreasonable as it relied on subsection 4(4) of the Transitional Regulation which is *ultra vires* the *PGA*.

THE APPLICANT MAKES THIS APPLICATION FOR:

- (a) An order declaring that subsection 4(4) of the Transitional Regulation is *ultra vires* the *PGA*;
- (b) An order declaring that subsection 4(4) of the Transitional Regulation constitutes an improper exercise of statutory power by the Minister and that the Minister exceeded his jurisdiction under section 19(1)(d) of the *PGA*;
- (c) An order quashing the decision of the Tribunal dated September 18, 2020, finding that subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan do not apply to OPA 2;
- (d) An order quashing the decision of the Tribunal dated September 18, 2020, striking Issue 2 insofar as it relates to the 2019 Growth Plan and Issue 7 from the Applicant's Issues List;
- (e) An order remitting the matter back to the Tribunal with the direction that subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan apply to the Tribunal's review of OPA 2;
- (f) An order remitting the matter back to the Tribunal with the direction that the Tribunal restore Issue 2 insofar as it relates to the 2019 Growth Plan and Issue 7 to the Applicant's Issues List;
- (g) An interim order staying the decision of the Tribunal described in subparagraphs (c) and (d) herein pending the hearing of this application for judicial review;

- (h) An order extending the time for filing of this application with the Court pursuant to subsection 5(2) of the *Judicial Review Procedure Act*, RSO 1990, c J 1, if necessary;
- (i) An order requiring the Respondents to pay the Applicant's costs of this application for judicial review if requested or, in the alternative, an order that all parties shall bear their own costs;
- (j) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

(b) Proposed Waste Processing Complex in the Freele County Forest

9. On November 30, 2018, the Minister approved OPA 2 to allow for the development of a waste processing complex by the County of Simcoe ("County") in the Freele County Forest ("proposed site").
10. The waste processing complex is infrastructure that consists of a waste management facility; an organics processing facility; a materials recovery facility; a storm water management facility; a waste vehicle facility; and an administrative building.
11. The proposed site is within the Natural Heritage System of the Growth Plan, a provincial plan issued under section 7 of the *PGA*. The Natural Heritage System

is an area that is compromised of natural heritage features such as significant woodlands and significant wildlife habitat.

(c) The Planning Regime

12. The Minister has authority over the *PGA* as per Order in Council 221/2015.
13. Under section 4 of the *PGA*, the Minister is required to prepare a growth plan for designated areas.
14. Subsection 14(1) of the *PGA* requires that a decision made under the *Planning Act* that relates to the growth plan area shall conform to the Growth Plan.
15. Similarly, section 3(5)(b) of the *Planning Act* provides that a decision by a municipal council, the Minister, or the Tribunal in relation to a planning matter shall conform with provincial plans. The Growth Plan constitutes such a provincial plan.
16. Subsection 4.2.2 of the Growth Plan deals with natural heritage systems; subsection 4.2.3 deals with key hydrologic features and areas, and natural heritage features; and subsection 4.2.4 deals with lands adjacent to key hydrologic features and natural heritage features.

(d) The Applicant's Appeal and the 2017 Growth Plan

17. The Applicant, Friends of Simcoe Forests Inc., is an incorporated not-for-profit citizens group with a mandate to protect the forests of Simcoe County and to preserve and extend parks and greenbelts.

18. On or about January 19, 2019, the Applicant filed a Notice of Appeal of OPA 2 with the Tribunal.

19. The 2017 Growth Plan was in effect when the Applicant filed its Notice of Appeal.

20. The Applicant relied on the environmental protections for natural heritage features in the 2017 Growth Plan as its main grounds of appeal. In particular, the Applicant noted that a new development within the Natural Heritage System must demonstrate that there are no negative impacts on key natural heritage features, such as the significant woodlands, the significant wildlife habitat, and potentially the habitat of endangered and threatened species at the proposed site.

21. The Applicant retained three ecological experts to examine the natural heritage features of the proposed site and undertake a peer review of the County's expert reports. In their report, the Applicant's ecological experts concluded that the County experts had repeatedly understated the significance of the forest habitat. The ecological experts also concluded that the proposal to construct a waste processing complex at the proposed site would have a negative impact on

significant wildlife and would result in the fragmentation of significant woodland and loss of 19 hectares of the forest interior.

22. The Applicant also retained a professional planner to provide an expert opinion on whether the proposal to construct the waste processing complex in the Freele County Forest conforms to the natural heritage protections in the 2017 Growth Plan. In preparing her report the planner considered and relied on the analysis and findings of the ecological experts. The planner concluded that the proposal to establish a waste processing complex within the Freele County Forest was not consistent with the natural heritage provisions in the 2017 Growth Plan.
23. On March 26, 2019, the Applicant served its expert reports and its written legal argument on all parties, including the County and the Minister, and filed the documents with the Tribunal. In its legal argument, the Applicant argued that OPA 2 did not conform with subsections 4.2.2, 4.2.3 and 4.2.4 of the 2017 Growth Plan.
24. On or about May 1, 2019, the County and the Minister jointly filed their expert reports and written legal argument with the Tribunal, which also included analysis of the natural heritage protections in the 2017 Growth Plan.

(e) The 2019 Growth Plan and the Transitional Regulation

25. On May 16, 2019, the Lieutenant Governor in Council issued Order in Council 641/2019 revoking the 2017 Growth Plan and approving its replacement with the 2019 Growth Plan.

26. The Minister also enacted a Transitional Regulation on May 16, 2019, following the approval of the 2019 Growth Plan.

27. On September 6, 2019, approximately five months after the Applicant filed its expert reports and legal arguments with the Tribunal, the Minister amended the Transitional Regulation by adding subsection 4(4).

28. Subsection 4(4) of the Transitional Regulation singles out OPA 2 from all other planning matters in the Greater Golden Horseshoe region and states that the 2019 Growth Plan applies to OPA 2 “except subsections 4.2.2, 4.2.3 and 4.2.4 of the Plan”.

29. The natural heritage policies in subsections 4.2.2, 4.2.3 and 4.2.4 in the 2019 Growth Plan, however, are identical to the 2017 Growth Plan insofar as they relate to the proposed site.

30. Subsections 4.2.2, 4.2.3 and 4.2.4 are fundamental to the Applicant's appeal at the Tribunal as outlined in its Notice of Appeal, its expert reports, and its written legal arguments, all of which had been previously filed with the Tribunal.

(f) The Tribunal's Decision on Motion to Strike the Applicant's Issues List

31. At the Tribunal's direction, the Applicant filed an Issues List with the Tribunal on December 10, 2019.

32. On December 30, 2019, the County and the Minister filed a joint motion with the Tribunal to strike out a number of issues from the Applicant's Issues List, including issues 2 and 7. These issues relate to the applicability of the natural heritage protections of the Growth Plan to OPA 2.

33. On September 18, 2020, the Tribunal issued its decision and held that the natural heritage policies in subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan did not apply to OPA 2.

34. The Tribunal erred by finding that subsections 4.2.2, 4.2.3 and 4.2.4 of the 2019 Growth Plan did not apply to OPA 2 because it relied on subsection 4(4) of the Transitional Regulation, which is *ultra vires* the *PGA*.

35. The Tribunal's ruling is a final determination on the main grounds of the Applicant's appeal.

36. The Tribunal's decision does not meet the standard of justification, transparency or intelligibility. Both the reasons for the Tribunal's decision, and the outcome, are unreasonable.

(g) The Transitional Regulation is *ultra vires* the *PGA*

37. To enact a regulation under section 19(1)(d) of the *PGA* the Minister must meet two statutory requirements: (i) the regulation must address a "transitional matter"; and (ii) in the opinion of the Minister, it must be necessary or desirable to facilitate the implementation of the *PGA*, a provision of the *PGA* or a growth plan. In this case, the Minister failed to meet both these statutory requirements.

38. Section 19(1)(d) of the *PGA* provides authority to the Minister in relation to planning matters, including proceedings, only in circumstances where there has been a change in the applicable provisions of a growth plan. The existence of a "transitional matter" is a necessary precondition which must be met before the Minister can exercise his powers under s. 19(1)(d).

39. There were no transitional matters that needed to be addressed in relation to OPA 2 due to the 2019 Growth Plan coming into effect because the natural heritage provisions in subsections 4.2.2, 4.2.3 and 4.2.4 of the 2017 Growth Plan and the 2019 Growth Plan, insofar as they apply to OPA 2, are identical. Consequently, the Minister failed to meet a necessary precondition in s.19(1)(d) of the *PGA*

before enacting subsection 4(4) of the Transition Regulation, and thereby exceeded his jurisdiction.

40. The Transitional Regulation was also enacted by the Minister at the behest of the County to facilitate the development of the waste processing complex and to promote the goals and objectives of the *Waste Free Ontario Act, 2016*, the *Resource Recovery and Circular Economy Act* and *Ontario's Food and Organics Waste Policy Statement, 2016*. These statutes and policy, however, are beyond the scope of the jurisdiction of the Minister and the purposes of s. 19(1)(d) of the *PGA*.

41. The Minister's decision to enact the Transitional Regulation was unreasonable and without jurisdiction. The Tribunal's decision, in turn, was unreasonable as it relied on subsection 4(4) of the Transitional Regulation.

THE APPLICANT RELIES ON:

- a. *Judicial Review Procedure Act*, RSO 1990, c J 1, ss. 5(2) and 10.
- b. *Places to Grow Act, 2005*, SO 2005, c 13, ss. 4, 14(1) and 9(1)(d).
- c. *Planning Act*, RSO 1990, c P 13, s.3(5)(b).
- d. *Transitional Matters – Growth Plans*, O. Reg 311/06, as amended by O. Reg 305/19, subs.4(4).
- e. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

- a. The record to be filed by the Tribunal pursuant to section 10 of the *Judicial Review Procedure Act*, RSO 1990 c J 1;
- b. Affidavit of Amanda Montgomery to be sworn;
- c. Supplementary Affidavit of Amanda Montgomery, to be sworn in the future, if the Information and Privacy Commissioner orders the Ministry of Municipal Affairs and Housing to disclose any further relevant records relating to subsection 4(4) of the Transitional Regulation;
- d. Such further or other material as counsel may advise and this Honourable Court may permit.

October 19, 2020

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Forests Inc.**

Court File No.

FRIENDS OF SIMCOE FORESTS INC.
Applicant

v.

MINISTER OF MUNICIPAL AFFAIRS AND HOUSING et al.
Respondents

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT: TORONTO

NOTICE OF APPLICATION

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