




Hamilton

# INFORMATION REPORT

<b>TO:</b>	Chair and Members Planning Committee
<b>COMMITTEE DATE:</b>	April 20, 2021
<b>SUBJECT/REPORT NO:</b>	Update re: Local Planning Appeal Tribunal Case No. PL170858 (34 11th Concession Road East and 1800 Highway 6) (LS20032(a)) (Ward 15)
<b>WARD(S) AFFECTED:</b>	Ward 15
<b>PREPARED BY:</b>	Stephen Chisholm (905) 546-2424 Ext. 3663
<b>SUBMITTED BY:</b>	Michael Kyne Acting City Solicitor Legal and Risk Management Services
<b>SIGNATURE:</b>	

## COUNCIL DIRECTION

Not applicable

## INFORMATION

This Report is an update to Report LS20032 wherein staff were directed to take the necessary steps to continue the appeal of the Local Planning Appeal Tribunal (LPAT) decision in Case No. PL170858 to a hearing and decision before the Divisional Court. Staff also received direction to report back to this Committee not later than June 2021 on proposals, if any, for the regulation, monitoring and enforcement of residential-use tertiary septic systems, with correspondence advocating for their legislative regulation being directed to multiple Provincial ministries.

The purpose of this information report is to update Council on the outcome of the appeal before the Divisional Court of the LPAT decision.

The applicant proposes a 20-lot residential subdivision development at 34 11<sup>th</sup> Concession Rd. E. and 1800 Highway 6, Freelton. The City's objection to the

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OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

development was based primarily on the use of nitrate-reducing tertiary septic systems, which the City believes are not sufficiently regulated under the *Building Code* so as to provide adequate enforcement powers to the City in the event of a system failure.

The City's non-decision on the application was appealed to the Local Planning Appeal Tribunal (LPAT) and in August 2019 that appeal was allowed. A Request for Review of the LPAT decision was unsuccessful and, on Council's direction, a Motion for Leave to Appeal the decision to the Divisional Court was brought.

Argument on the motion was heard on February 23, 2021 by Justice Skarica sitting as a member of the Divisional Court. **The City's motion was dismissed**, meaning that the LPAT decision stands. Additionally, costs of the appeal in the amount of \$23,000 were awarded to the applicant.

To summarize the brief written endorsement—the Court did not find an error in law in either the LPAT decision or the Review Decision. While the City argued that specific determinations made by the Court – including that nitrate-reducing septic systems “will be enforceable” under the *Building Code* – constituted an erroneous legal conclusion, the Divisional Court determined that this was a factual determination based on the Tribunal's interpretation of the evidence and did not, therefore, constitute an error in law.

The Divisional Court also determined that this was not a case where there existed “convincing and compelling justification” to grant leave to appeal, citing the acceptance of nitrate-reducing technologies in other jurisdictions as some presumptive evidence of their reliability or functional enforceability.

The Divisional Court's conclusions, while disappointing, are not altogether surprising. Significant deference is given to Tribunals in the factual conclusions they reach, and Courts are generally reluctant to interfere with these administrative bodies' decisions except in the clearest of cases. There is no further appeal available from this Divisional Court decision.

It is understood that the applicant is now moving forward with the submission of materials to the relevant City departments to begin the development process. Through the planning and permit processes, including subdivision conditions, City staff will make every effort to ensure to the greatest degree possible that adequate provision for the monitoring and maintenance of the septic systems is preserved.

## **APPENDICES AND SCHEDULES ATTACHED**

Appendix “A” to Report LS20032(a) – Endorsement of Justice Skarica, dated February 23, 2021 (with typewritten copy)