

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



**ISSUE DATE:** March 29, 2019

**CASE NO(S):**

PL170878  
PL091167

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(40) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Burls Creek Event Grounds Inc. et al  
Subject: Failure of Township of Oro-Medonte to announce a decision respecting Proposed Official Plan Amendment No. 2015-OPA-02  
Municipality: Township of Oro-Medonte  
OMB Case No.: PL170878  
OMB File No.: PL170878  
OMB Case Name: Burls Creek Event Grounds Inc. v. Oro-Medonte (Township)

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

Applicant and Appellant: Burls Creek Event Grounds Inc. et al  
Subject: Application to amend Zoning By-law No. 97-95 - Refusal or neglect of Township of Oro-Medonte to make a decision  
Existing Zoning: General Commercial (GC), Agricultural/Rural (A/RU), Agricultural/Rural Exception 32 (A/RU\*32), Rural Residential 2 (RUR2), Private Recreation Exception 30 (PR\*30), Private Recreation 31 (PR\*31) and Environmental Protection (EP)  
Proposed Zoning: Private Recreation Exception XX (PR\*XX), Agricultural/Rural Exception YY (A/RU\*YY), Agricultural/Rural Exception ZZ (A/RU\*ZZ) and Environmental Protection (EP)

Purpose: To permit camping, parking, concession booths and minor soccer as an accessory use  
 Property Address/Description: Part of Lot 21 & 22, Concession 8 Et Al  
 Municipality: Township of Oro-Medonte  
 Municipality File No.: 2015-ZBA-15  
 OMB Case No.: PL170878  
 OMB File No.: PL170879

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

Applicant and Appellant: Burls Creek Event Grounds Inc. et al  
 Subject: Request to amend the Official Plan - Failure of County of Simcoe to adopt the requested amendment

Existing Designation: Rural and Agricultural  
 Proposed Designated: Rural and Agricultural – Subject to Exception 3.6.13 and Agricultural Special Exception Section 3.6.13

Purpose: To permit camping, parking, concession booths and minor soccer as an accessory use  
 Property Address/Description: Part of Lot 21 & 22, Concession 8 et al  
 Municipality: Township of Oro-Medonte  
 Approval Authority File No.: SC-OPA-1601  
 OMB Case No.: PL170878  
 OMB File No.: PL170887

**PROCEEDING COMMENCED UNDER** subsection 17(40) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: County of Simcoe  
 Appellant: Midhurst Development Doran Road Inc., and Carson Road Development Inc.  
 Appellant: Midhurst Rose Alliance Inc.  
 Appellant: Township of Springwater and others  
 Subject: Failure to announce a decision respecting the Official Plan for the County of Simcoe  
 Municipality: County of Simcoe  
 OMB Case No.: PL091167  
 OMB File No.: PL091167  
 OMB Case Name: Fellman v. Simcoe (County)

**Heard:** March 4, 2019, by telephone conference call

**APPEARANCES:**

**Parties**

**Counsel**

Burl's Creek Event Grounds Inc. et al	Nicholas Macos, Adam Giel
Township of Oro-Medonte	Christopher Williams, Andrea Skinner
County of Simcoe	Marshall Green, Mark Vernon
Save Oro Inc.	David Donnelly, Alexandra Whyte
West Oro Ratepayers' Association	David Donnelly, Alexandra Whyte

**DECISION DELIVERED BY ANNE MILCHBERG AND ORDER OF THE TRIBUNAL**

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[1] This was the fifth pre-hearing conference ("PHC") of the Local Planning Appeal Tribunal ("Tribunal") concerning appeals under s. 17(40), 22(7) and 34(11) of the *Planning Act* by Burl's Creek Event Grounds Inc. et al ("Applicant"; "Appellant") regarding the property located at Part of Lot 21 and 22, Concession 8 et al ("Burl's Creek"; "the subject lands"), in the Township of Oro-Medonte ("Township").

[2] The hearing of this matter is scheduled to commence on April 1, 2019, with a hearing duration of ten days.

[3] At an earlier PHC, counsel for the Appellant had raised a concern that two other Parties, Save Oro Inc. and West Oro Ratepayers' Association could have duplicative witnesses, which in turn, could impact on the hearing length.

[4] This Motion hearing was scheduled in response to counsel's concerns. It focused on a Notice of Motion by the Appellant [Exhibit 1] that added in a number of other procedural requests, and on a Response to the Notice of Motion by counsel for Save Oro Inc. and the West Oro Ratepayers' Association [Exhibit 2].

[5] The Notice of Motion [Exhibit 1] also contains the Affidavit of Service for this hearing event.

### **MOTION AND RESPONSE**

[6] The relief sought by the Appellant in the Notice of Motion is as follows:

1. An order amending the Procedural Order in these proceedings to allow Burl's Creek to amend its List of Witnesses to add Michael McKenna ("Motion Part 1");
2. An order amending the Procedural Order in these proceedings to amend the Issues List by removing Issues 4, 6, 10 11, and 12 ("Motion Part 2");
3. An order amending the Procedural Order in these proceedings to amend the Issues List to scope such other issues as counsel may advise the Tribunal have been resolved or clarified ("Motion Part 3");
4. An order requiring Save Oro Inc. and West Oro Ratepayers Association Inc. to reduce duplicative witnesses, or in the alternative an order denying summonses for duplicative witnesses ("Motion Part 4");
5. An order abridging the time for service of this Notice of Motion ("Motion Part 5"); and
6. Such further and other relief as counsel may advise and the LPAT permit.

[7] In response to the Notice of Motion, Save Oro Inc. and West Oro Ratepayers' Association have requested the following relief:

1. An Order dismissing the Motion and procedural relief sought by Burl's Creek Event Grounds Inc. ("Response to Motion Part 1 and 4");
2. An Order of the Tribunal denying the request for abridgment of time of service for this Motion ("Response to Motion Part 5");

3. The Responding Parties, Save Oro Inc. and the West Oro Ratepayers' Association, do not oppose the removal of Issues 4, 6, 10, 11 and 12 from the Issues List ("Response to Motion Part 2"); and

4. Such further or other relief as the Board deems appropriate.

## **ANALYSIS AND DISPOSITION**

### **MOTION PART 1**

[8] The Appellant requested an order amending the Procedural Order to allow the addition of Mr. McKenna to the List of Witnesses for Burl's Creek on the basis that it would be beneficial for the Tribunal to hear from Mr. McKenna. As Grounds Manager for the subject property, Mr. McKenna "is responsible for all aspects of cultivation of the hay grown on site, preparation for events, and restoration after events." [Exhibit 1].

[9] Counsel for the Appellant contended that Mr. McKenna's evidence could inform the Tribunal on soil impacts from the proposed use, and on mitigation measures, and that Mr. McKenna would need only one hour on the witness stand for direct examination.

[10] The Responding Parties objected to the addition of Mr. McKenna, alleging that:

- the request came very late in the pre-hearing process, and at prejudice to the Parties;
- Mr. McKenna is not an expert on the matters that he intends to give testimony on, and no credentials have been disclosed for him;
- Mr. McKenna did not participate in any of the like-expert meetings ordered by the Tribunal, nor has he spoken directly to experts who are on the Witness Lists; and
- Mr. McKenna's evidence would be duplicative, cursory and unhelpful to the Tribunal.

[11] The remaining Parties, the Township and the County, had no objection to the addition of Mr. McKenna as a witness.

[12] Aside from the Responding Parties' concern about Mr. McKenna not being an expert, the Tribunal finds that the other objections are without merit. Counsel for the Responding Parties failed to demonstrate how adding Mr. McKenna would be prejudicial, and during the course of the teleconference pre-hearing, counsel for the Responding Parties also requested the addition of a new witness to their witness list. That would seem to the Tribunal to be no less prejudicial.

[13] The Tribunal finds that it would be helpful to have testimony from a non-expert who has day-to-day experience working on the subject property. This kind of testimony is not duplicative because of the unique on-site perspective of Mr. McKenna. Expert witnesses that deal with soil and agronomy at the hearing will be able to reflect and provide testimony in response to Mr. McKenna's factual evidence, as Mr. McKenna is proposed to testify before they do.

[14] The Tribunal will allow Mr. McKenna as a witness, and will order the Procedural Order to be amended to include him on the Appellant's Witness List on condition that Mr. McKenna give testimony only on facts and his observations, and not on opinions that would require qualification as an expert witness.

## **MOTION PART 2**

[15] The Appellant requested that Issues 4, 6, 10, 11 and 12 be removed from the Issues List in the Procedural Order. Those issues had been set initially by the Lake Simcoe Region Conservation Authority, which has since resolved its issues and withdrawn from the hearing. None of the other Parties oppose this request.

[16] Accordingly, on consent of all the Parties, the Tribunal orders that the Issues List in the Procedural Order be amended to remove Issues 4, 6, 10, 11 and 12.

**MOTION PART 3**

[17] Counsel for the Appellant requested the Tribunal to order the Issues List further scoped to delete Traffic and Natural Heritage. The other Parties did not object to this request. The Tribunal will order an amendment of the Procedural Order amending the Issues List accordingly.

[18] The Parties, however, do anticipate that participants may raise Traffic and Natural Heritage as concerns. The Tribunal notes that one of the Appellant's witnesses may be giving traffic evidence in anticipation of the concerns of Participants.

[19] If there is any further scoping to be done by the Parties, this should be dealt with by means of a Motion at the start of the hearing on April 1, 2019.

**MOTION PART 4**

[20] The Appellant requested an order requiring Save Oro Inc. and West Oro Ratepayers' Association to reduce duplicative witnesses, or in the alternative an order denying summonses for duplicative witnesses.

[21] The duplicative witnesses were not identified in any way in the Appellant's Motion, either by quantity, name or area of expertise. After repeated questioning on the Tribunal's part, the Appellant's counsel eventually honed in on two witnesses that he was concerned about: Arthur Churchyard and Ross Lashbrook. Will-Say statements for both individuals were filed with the Tribunal on March 1, 2019.

[22] Mr. Lashbrook's Will-Say statement indicates that he is a Senior Planner and Manager of Community Planning and Development (East) with the Ministry of Municipal Affairs ("MMA"), and that the subject lands are within his geographic area of responsibility. David Donnelly, counsel for Save Oro Inc. and West Oro Ratepayers' Association, proposes to have Mr. Lashbrook provide planning opinion evidence on whether the subject application is consistent with a number of policies in the Provincial Policy Statement, 2014 ("PPS").

[23] Mr. Churchyard's Will-Say statement indicates that he is now a policy advisor at the Ontario Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), and was formerly OMAFRA's rural planner for the geographical area in which the subject lands are located. Mr. Donnelly proposes to have Mr. Churchyard summonsed to give expert evidence on rural and agricultural land use planning and OMAFRA policy, and in particular, on whether the subject application is consistent with OMAFRA's guidelines and the PPS.

[24] The Tribunal asked Mr. Donnelly how the evidence of Mr. Lashbrook and Mr. Churchyard would not be a duplication of evidence from Robert Clark and Victor Doyle, two land use planning experts retained by Mr. Donnelly's clients, Save Oro Inc. and West Oro Ratepayers' Association. The witness statements of Mr. Clark and Mr. Doyle indicated that they would both be giving opinion evidence on the PPS, and the Will-Says of Mr. Churchyard and Mr. Lashbrook cited many of the same PPS policy sections.

[25] Mr. Donnelly did not provide a clear or definitive answer regarding lack of duplication, except to say that Mr. Churchyard had closer connections to the OMAFRA policy guidelines than did Mr. Clark and Mr. Doyle because he had drafted portions of the guidelines.

[26] In Mr. Lashbrook's case, Mr. Donnelly failed to make clear to the Tribunal how his evidence would differ in substance from that of Mr. Clark and Mr. Doyle. Mr. Lashbrook's Will-Say statement seemed to cover much of the same ground laid in Mr. Clark and Mr. Doyle's witness statements.

[27] In spite of this, the Tribunal will err on the side of caution and allow Mr. Lashbrook and Mr. Churchyard to be called as witnesses by Mr. Donnelly, on condition that their evidence is not duplicative in content, either with respect to each other, or with respect to the testimony of Mr. Clark and Mr. Doyle.

[28] The reasons for the Tribunal's approach are as follows. The Tribunal pointed out to the Parties that the documentation it needed in support of the Motion (a large stack of documents including several Witness Statements and the two Will-Say statements) was

not forwarded by the Parties to the Tribunal until late in the day on March 1, the Friday afternoon before this Monday PHC. It was difficult for the Tribunal to assimilate these documents in sufficient detail in time for the PHC, and the difficulty was compounded by the fact that the Appellant had not, until part-way through this Motion hearing, even identified the purported duplicative witnesses to the Tribunal.

[29] Another reason to include Mr. Lashbrook and Mr. Churchyard is that Mr. Donnelly demonstrated that the two witnesses can fit into the Time Allotment Schedule (Work Plan) prepared by the Parties during the course of this PHC, if each of his witnesses is limited to one hour of direct examination, as he has warranted they will be. The Time Allotment Schedule is described in more detail further on in this decision.

## **MOTION PART 5**

[30] The Appellant requested an order of the Tribunal abridging the time for service for the Notice of Motion. The Township and the County of Simcoe had no objection to this request. However, Save Oro Inc. and West Oro Ratepayers' Association. requested that this motion be dismissed, on the basis that it was filed late, in contravention of s. 10.05 of the LPAT *Rules of Practice and Procedure* ("Rules"). In their Response to the Notice of Motion, the objecting Parties also commented that "[i]n any event, the Motion should have been brought months earlier".

[31] Section 10.05, for the service of the Notice of Motion, states:

A notice of motion and all supporting material, as set out in Rule 10.04, shall be served at least 15 days before the date of the motion to be held in person or by electronic hearing unless the Tribunal orders otherwise. A notice of motion shall be served on all parties, on any other person as directed by the Tribunal, and on the Registrar. An affidavit of service shall be filed with the Tribunal prior to or at the hearing of the motion.

[32] Pursuant to these Rules, the Notice of Motion should have been served by February 17, 2019. It was served on February 20, 2019, three days later. At issue was three days.

[33] The objection to the abridgement of time was not accompanied by any reason by

the objecting Parties other than that s. 10.05 had not been complied with. There appeared to be no prejudice to the objecting Parties to the extent that they were able to prepare and submit their materials in advance of this hearing.

[34] To make its finding, the Tribunal will refer to s. 1.03 and s. 3.04, two other sections of the Rules to be read in conjunction with s. 10.05:

**1.03 Interpretation of the Rules** These Rules shall be liberally interpreted to secure a fair, just and expeditious determination of every proceeding on its merits.

**3.04 Extension or Reduction of Time** The Tribunal may extend or reduce any time required in these Rules or in an Order, with any terms or conditions, unless a statute or regulation provides otherwise. The Tribunal cannot extend a time period to file an appeal prescribed in a statute, but may be authorized to extend a time period prescribed by regulation, upon terms or conditions provided for that purpose in the regulation. A request for a change in time requirements established in the proceeding may be made by bringing a motion, or the Tribunal may change a time requirement on its own initiative, with or without a hearing event, either before or after the time period expires.

[35] In this instance, the Tribunal will take a liberal interpretation of the rules in light of the fact that there had just been another Motion Hearing regarding the appeals on February 15, 2019. Counsel for the Appellant explained to the Tribunal that a little more time was needed to prepare the Motion materials for the March 4, 2019 due to matters raised at the February 15, 2019 Motion Hearing. The Tribunal had agreed to this on February 15, 2019. Mr. Donnelly did not appear at the February 15, 2019 Motion Hearing, so perhaps his proxies at the hearing did not make him aware of this.

[36] The Tribunal therefore orders the abridgement of time for service for the Notice of Motion.

[37] As for the objecting Parties' comment that "the motion should have been brought months earlier", this Motion hearing was scheduled on order of this Tribunal.

### **NEED FOR A TIME ALLOTMENT SCHEDULE**

[38] This Member has managed the Pre-hearing process for this matter from its inception, and has observed conduct by counsel for certain Parties that verges on being

disorderly and not respectful of time, processes, or even, in certain instances, the Tribunal's directions. This PHC event was a prime example.

[39] This hearing began as a teleconference at 9 a.m. and broke at 10 a.m. in time for Mr. Donnelly to attend another hearing. As this matter was far from being concluded, and needed to resume at some point during the day, the Tribunal requested Mr. Donnelly to work out an arrangement at the other hearing whereby he could provide certainty to this Tribunal and its numerous Parties as to when he would be next available to participate in the teleconference. The Tribunal's reasonable expectation was that Mr. Donnelly would get back to the Tribunal and the Parties with his availability within a reasonable time.

[40] Four hours passed, and the Tribunal heard not a word from Mr. Donnelly. In consideration of the other Parties and mindful of its own time resource constraints, the Tribunal then directed that the telephone conference call ("TCC") reconvene at 2:45 pm, whether Mr. Donnelly and his co-counsel were present or not. Mr. Donnelly did attend, advised that he was not yet available, and was resistant to providing the Tribunal with a time that he would be available. He suggested that the TCC should be put over to another day.

[41] The Tribunal advised Mr. Donnelly that the matter could not be put over to another day. Finally, the Tribunal directed him to approach the presiding member at the other hearing to ascertain when Mr. Donnelly would be able to rejoin this TCC, and admonished him for not having done this on his own initiative at the start of the other hearing, leaving all other Parties hanging. Mr. Donnelly should have known about his own scheduling conflict months in advance, but took no proactive steps to resolve it, inconveniencing this Tribunal and the other Parties in these matters.

[42] Ultimately, the TCC resumed at 4 p.m. with all Parties in attendance.

[43] To bring time discipline to the proceedings scheduled to begin on April 1, 2019, the Tribunal directed the Parties to produce, on consensus, a Time Allotment Schedule (Work Plan) for each day of the 10 day hearing. The Tribunal explained to the Parties

that the purpose of the Time Allotment Schedule was to ensure that the hearing of the matter fits within the 10 days allotted, including the purported duplicative witnesses.

[44] The Parties demonstrated that the hearing could fit into 10 days as long as Participants are heard at a supplementary evening session and the final submissions of counsel are in writing. These are matters for the discretion of the panel presiding at the hearing.

[45] The Time Allotment Schedule is Attachment 1 to this decision. The Tribunal orders that it form part of the Procedural Order, as amended, and reiterates that the schedule is subject to the discretion and modification of the panel presiding over the hearing.

[46] The Tribunal notes that the “Issues to be addressed” section of the Time Allotment Schedule provided by the Parties was left blank in some parts. Accordingly, the Tribunal directs that all missing information be added by the Parties in time for the start of the hearing.

[47] After the exercise was completed, Mr. Donnelly asked about adding another witness. In response, the Tribunal gave general direction to all Parties that any further changes to the Procedural Order (e.g. adding witnesses) would have to be requested of the Tribunal by Motion at the start of the hearing.

[48] So orders the Tribunal.

*“Anne Milchberg”*

ANNE MILCHBERG  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Local Planning Appeal Tribunal**

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## ATTACHMENT 1

### HEARING TIMETABLE

#### Day 1

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
Preliminary Motions/Procedural Matters	2 hours	

#### **Opening Submissions**

Burl's Creek	15 mins	
Simcoe County	15 mins	
Oro Medonte	15 mins	
Save Oro/WORA	15 mins	

#### **Burl's Creek Case Starts**

Darren Vella (background/outline only)		
Examination in Chief	30 mins	
Cross-Examination	0 mins	

Bob Rimrott		9
Examination in Chief	1 hour	
Cross-Examination	1 hour	

#### Day 2

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
Michael Cullip		traffic evidence
Examination in Chief	1 hour	
Cross-Examination	1 hour	
David Hodgson		1, 2, 3, 5, 7, 8 and 9
Examination in Chief	2 hours	
Cross-Examination	1 hour	

**Day 3**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
David Hodgson Cross-Examination	1 hour	
Michael McKenna Examination in Chief Cross-Examination	30 mins 30 mins	site maintenance and testing
Peter Thoma Examination in Chief Cross Examination	1 hour 1 hour	1, 2, 3, 5, 7, 8 and 9
Darren Vella Examination in Chief	1 hour	all issues

**Day 4**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
Darren Vella Examination in Chief Cross-Examination	2.5 hours 3 hours	
<b>Burl's Creek Case Ends</b>		

**Day 5**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
<b>County of Simcoe's Case Starts</b>		
Greg Marek Examination in Chief Cross-Examination	2.25 hours 3 hours	1, 3, 5, 7, 8, 9 and 13
<b>County of Simcoe's Case Ends</b>		

**Day 6**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
<b>Township of Oro-Medonte's Case Starts</b>		
Andria Leigh Examination in Chief Cross-Examination	2.25 hours 3 hours	1, 3, 5, 7, 8, 9 and 13
<b>Township of Oro-Medonte's Case Ends</b>		

**Day 7**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
<b>WORA/Save Oro's Case Starts</b>		
Wendy McKay		
Examination in Chief	1 hour	
Cross-Examination	1 hour	
Bob Wiggins		
Examination in Chief	30 mins	
Cross-Examination	30 mins	
Arthur Churchyard		
Examination in Chief	1 hour	
Cross-Examination	1 hour	
Bob Clark		
Examination in Chief	0.5 hours	

**Day 8**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
Bob Clark		
Examination in Chief	2.5 hours	
Cross-Examination	3 hours	

**Day 9**

	<u>Time Estimate</u>	<u>Issues to be Addressed</u>
Ross Lashbrook		
Examination in Chief	30 mins	
Cross-Examination	30 mins	
Victor Doyle		
Examination in Chief	3 hours	
Cross-Examination	1.5 hours	

**Day 10**

Victor Doyle		
Cross-Examination	1.5 hours	

**WORA/Save Oro's Case Ends**

Burl's Creek's Reply to Save Oro, if needed

**Final Arguments**

Burl's Creek  
Simcoe County  
Oro Medonte  
Save Oro  
Burl's Creek Reply

**Evening(s)**

Lay Witnesses/Residents  
Participant Witnesses