CITATION: CAMPP Windsor Essex Residents Association v. Windsor (City)
2020 ONSC 4612
DIVISIONAL COURT FILE NO.: DC-20-151
DATE: 20200729

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
CAMPP Windsor Essex Residents Association Moving Party (Appellant)	Eric K. Gillespie and Kathleen Coulter, for the Moving Party (Appellant)
– and –	
The Corporation of the City of Windsor, Windsor Regional Hospital and 386823 Ontario Limited Responding Parties (Respondents)	Jennifer L. King, Liane Langstaff and Peter Gross for the Responding Party (Respondent), Corporation of the City of Windsor
	Kim Mullin, Brian Gover, and Dragana Rakic, for the Responding Party (Respondent), Windsor Regional Hospital
	HEARD: May 6 and 11, 2020

REASONS ON MOTION FOR LEAVE TO APPEAL TO THE DIVISIONAL COURT
brought pursuant to s. 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1

VERBEEM J.:

Nature of the Motion

[1] CAMPP Windsor Essex Residents Association ("CAMPP"), moves for an order for leave to appeal to the Divisional Court from the order of the Local Planning Appeal Tribunal (the Tribunal or the LPAT) dated December 3, 2019 (the decision), which dismissed CAMPP's appeals against the City of Windsor's (the City) decisions to: approve Official Plan Amendment No. 120 (OPA 120); and enact Zoning By-law Amendment No 132-2018 (the ZBA).[1]

[2] OPA 120 and the ZBA enact the necessary land use provisions to, among other things, locate a new "regional" acute care hospital in the southeast part of the City. The planning process surrounding those instruments was highly publicized and attracted significant notoriety in the City and its surrounding areas. Although CAMPP does not oppose the development of a new regional hospital, it reasons that it should be located elsewhere in the City.

[3] It is common ground that an appeal from a decision of the LPAT lies to this court only with leave and then only on a question of law.[2] This court does not have jurisdiction to entertain an appeal from an LPAT decision on a question of fact or a question of mixed fact and law, absent an identified extricable legal question. Broadly stated, CAMPP asserts that in arriving at its decision, the Tribunal engaged in several errors of law, including: misinterpreting and misapplying certain policies set out in the Provincial Policy Statements (PPS) and the City's Official Plan (the OP) that are applicable to the planning instruments; providing inadequate reasons to support its decision; and misapprehending the evidence before it, by making factual determinations both in the absence of supporting evidence and without considering relevant evidence material to the issues that CAMPP raised.

[4] In its factum, CAMPP identifies four proposed grounds of appeal for which it says leave to appeal should be granted:

1. Did the LPAT err in law by finding the proposed OPA and ZBA complied with the requirements of the PPS and the City's OP regarding the provision of emergency services?

2. Did the LPAT err in law by finding sufficient consultation with First Nations took place as required under the PPS and the City's OP?

3. Did the LPAT err in law by failing to provide reasons addressing issues relating to the PPS and OP and submissions advanced by CAMPP regarding climate change impacts?

---

[1] OPA 120 was adopted and the ZBA was enacted on September 17, 2018.
[2] *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1, s. 37(1).

4. Did the LPAT err in law by relying on expert evidence provided by the City conflicting with other evidence provided by the City, that was never resolved?

[5] The responding parties submit that leave ought not to be granted for any of the identified proposed grounds of appeal because CAMPP has failed to establish the necessary criteria justifying leave, which I will outline later in these reasons. As a result, they say the motion should be dismissed.

[6] In order to properly contextualize the parties' positions, I will set out the nature of the relevant planning instruments, the nature of the evidence and proceedings before the LPAT and aspects of the findings supporting its decision. Then, I will identify and apply the legal principles applicable to the relief CAMPP requests in the context of each of CAMPP's proposed grounds of appeal and explain why CAMPP's motion must be dismissed.

Nature of the Planning Instruments

[7] The planning process that resulted in OPA 120 and the ZBA was initiated by the Windsor Regional Hospital's (WRH) desire to develop a new regional acute care hospital within the area of land that is the subject of OPA 120.[3] Regional hospitals provide a wide range of functions and serve broad geographic areas. It is anticipated that the new hospital will serve both the residents of the City and the residents of its surrounding areas in Essex County. Following the planned transition of acute care services to the new regional hospital, medical services will continue to be offered by the City's two existing hospitals, albeit with a shift in their primary focus.

[8] OPA 120 creates a planning framework for the future expansion of a 400-hectare (ha) area located in the southeast part of the City. It designates specific portions of that area, which have historically been used for agricultural purposes, for a mix of employment, residential and institutional uses. The planned institutional use relates to the hospital's proposed location. The ZBA establishes the necessary zoning to locate the new hospital within the OPA 120 area

The Uncontested Land Use Planning Background

[9] In paragraphs 24-28 of its reasons, the Tribunal sets out the relevant planning background,[4] which is uncontested and generally consists of the following.

[10] Development planning for the OPA 120 area began in 1996, as part of the City's plan for its future growth. The process resulted in the Minister of Municipal Affairs and Housing approving a Boundary Adjustment Agreement in 2002, pursuant to which the City acquired

---

[3] Tribunal Reasons, at para. 6.

[4] The evidence with respect to the planning background predating the approval of OPA 120 was detailed before the LPAT in paragraphs 9-31 of the affidavit of Justina Nwaesei sworn February 26, 2019, a professional Land Use Planner employed by the City and a member of its Planning Department.

over 2,500 ha of land from the Town of Tecumseh ("the transferred land"). The transferred land is situated in an area described in the City's OP as the "Sandwich South Planning District" and it is partially comprised of the land that is the subject of OPA 120. When acquired, the transferred land was in agricultural use, primarily, crop production.

[11] In 2007, following a mandatory Municipal Comprehensive Review[5], the City adopted Official Plan Amendment 60 (OPA 60), which brought the transferred land into the City's settlement area and designated various future urban uses (including employment areas), open spaces and natural heritage areas, within the OPA 60 area. OPA 60 was approved by the Ontario Municipal Board (OMB)[6] in 2007. The land in the OPA 60 area was not designated as agricultural. Instead, most of the land, including the area subsequently contemplated by OPA 120, was identified as an Agricultural Transition Area, in which urban development is conditional on the completion of secondary plans and the availability of municipal servicing and infrastructure.

[12] Before OPA 120 was adopted, two other Official Plan Amendments were approved by the City (and the OMB) in respect of distinct areas of land within the OPA 60 settlement.[7] Those planning instruments designated an area lying to the west of the OPA 120 area for institutional, residential and open space uses. Development has now proceeded in that area.

[13] Prior to the approval of OPA 120, the City took several other steps in preparation for the development of the OPA 60 area, including: installing a trunk sanitary sewer servicing the area; completing an Environmental Assessment that set out the future arterial road network for the area; and engaging in an on-going process to complete a Master Drainage and Stormwater Management Plan (SWM Master Plan) for the area.

The Relevant Health Care Planning Background

[14] Apart from the land use planning process that resulted in the eventual adoption of OPA 120 and the enactment of the ZBA, the Tribunal received evidence concerning the health care planning process undertaken by WRH in respect of the establishment of the new regional hospital intended to serve the City of Windsor and the County of Essex.[8] The development of the new hospital is part of a broader health care plan referred to as the Windsor-Essex Hospitals System (WEHS), which was established in 2015 in order to introduce major system reforms related to hospital and health care services for the Windsor-Essex area.

---

[5] The review was designed to assess the appropriateness of converting the transferred lands to future urban use.
[6] The LPAT's predecessor.
[7] The East Pelton Secondary Plan was adopted through OPA 74 in 2010 and OPA 94 in 2016.
[8] The evidence concerning the Health Care Planning Background was largely set out in: the Enhanced Municipal Record though a Background Report prepared by MHBC Planning, which was retained by Windsor Regional Hospital to prepare and submit planning applications to the City with respect to OPA 120 and the ZBA and Planning Justification Reports prepared by the City; as well as the affidavit of Carol Wiebe sworn February 26, 2019 (at paras. 17 and 74-75), a principal of MHBC Planning, which was filed in the LPAT appeal.

[15] As planned, the new hospital requires a site measuring 20 ha that is located near regional transportation facilities. As a result of a process that was completed *before* WRH submitted the OPA 120 and ZBA planning applications to the City, WRH selected a site for the new hospital within the OPA 120 area. In accordance with the provisions of OPA 60, development of the selected site and surrounding area required the City's approval of a related secondary plan.

[16] Consequently, WRH retained MHBC Planning (MHBC) to carry out the requisite planning work to support a proposed secondary plan for the area surrounding the hospital's selected site (the County Road 42 Secondary Plan) and a zoning amendment by-law to permit the hospital to be located at the chosen site. Among other things, MHBC completed Planning Background and Justification reports that included City-wide population and employment-growth projections for the relevant planning period of 2016-2036. The projections were relied on to establish the existence of sufficient "need" to justify the development of the OPA 120 area. WRH also obtained other studies supporting the development of the area including: servicing background investigation studies and transportation background and impact studies.

The Planning Applications

[17] On January 23, 2018, WRH submitted applications to the City for approval of the County Road 42 Secondary Plan and the ZBA. Prior to doing so, it held three well-attended public information sessions.

[18] After the planning applications were submitted, the City: made them available, together with WRH's studies, on the City's website; circulated them to relevant municipal departments, public agencies and other entities including local First Nations communities (Walpole Island First Nation and Caldwell First Nation) for comment; and ultimately, held a lengthy public meeting to discuss the applications. During that process, CAMPP provided oral and written submissions to the City, in which it opposed the County Road 42 Secondary Plan and the ZBA. Among other things, CAMPP expressed concern over: the accuracy and methodology of MHBC's growth management analysis; the secondary plan's approach to transit; and the proposed servicing of the OPA 120 area.

[19] In response to CAMPP's concerns, WRH provided the City with responding submissions from both MHBC and its transportation consultants, as well as, additional growth management analysis performed by the Altus Group Inc. (Altus Group), a land economics consultant. The Altus Group conducted a peer-review of MHBC's growth management analysis and determined that its approach was reasonable. However, Altus Group concluded that the development of an even greater quantity of land than that calculated by MHBC was required to accommodate the City's projected residential and employment land demand during the relevant planning period.

[20] In accordance with the requirements of the *Planning Act*,[9] on August 13, 2018, Windsor City Council held a public meeting to consider the County Road 42 Secondary Plan and the ZBA. Apart from the materials submitted by the WRH, Council had before it, submissions from various stakeholders, including CAMPP. Council also received reports from members of the City's planning department that concluded that the proposed secondary plan and the ZBA were consistent with the PPS and the ZBA conformed with the City's OP.[10]

[21] Council adopted the secondary plan through OPA 120 and passed the ZBA on September 18, 2018.

CAMPP's Appeals to the LPAT

[22] CAMPP commenced distinct appeal proceedings before the LPAT, respectively challenging the City's decisions to approve OPA 120 and enact the ZBA, pursuant to ss. 17(24) and 34(19) of the *Planning Act* and requested that the Tribunal allow the appeals and return OPA 120 and the ZBA to the City for a new decision.[11] WRH was granted party status in the appeal proceedings.

[23] CAMPP raised in excess of 20 enumerated issues in support of its appeals before the LPAT, which included assertions that: there was insufficient justification to support the designation of the OPA 120 area for development; aspects of OPA 120 were inconsistent with the policies expressed in the PPS; and the ZBA was inconsistent with the PPS and it did not conform to the policies in the City's OP. Pursuant to the provisions of the *Planning Act* then in effect, "*consistency*" and "*conformity*" were the only available grounds of appeal in respect of the planning instruments.[12] As the appellant, the onus was on CAMPP to establish any inconsistency or non-conformity that it asserted. Statutorily, the LPAT was required to: dismiss the appeal against the approval of OPA 120, unless it determined that it was inconsistent with the PPS; and dismiss the appeal against the ZBA unless it determined that it was inconsistent with the PPS or it did not conform to the City's OP.[13]

[24] The evidentiary record before the Tribunal was limited by the provisions of the *Planning Act* and the *Local Planning Appeal Tribunal Act, 2017* ("LPATA") to the information that

---

[9] R.S.O. 1990, c. P.13.

[10] See Planning Reports S97/2018 at pp. 45-46 and S98/2018 at pp. 28-30.

[11] In addition to CAMPP's appeals, two other entities appealed against OPA 120 to the LPAT. One of those appeals was withdrawn before it was heard. The other was heard and determined together with CAMPP's appeals. CAMPP is the only party that seeks leave to appeal the LPAT's decision to the Divisional Court. CAMPP brought the only appeal before the LPAT against the ZBA.

[12] Pursuant to s. 17(24.0.1) of the *Planning Act*, owing to the City's status as a single-tier municipality with its own OP and no applicable provincial plan, the only permissible basis of appeal (at the time) against the City's adoption of the OPA 120 was inconsistency with a PPS issued under s. 3(1) of the *Planning Act*. For similar reasons, pursuant to s. 34(19.0.1) of the *Planning Act*, at the time of CAMPP's appeal, the only permissible bases to appeal against the enactment of the ZBA were that it was inconsistent with a PPS and/or it failed to conform with the City's OP.

[13] *Planning Act*, ss. 17(49.3) and 34(26.2).

was before City Council when it adopted OPA 120 and enacted the ZBA (as set out in the Enhanced Municipal Record), the affidavits that the parties filed before the Tribunal, participant statements and the evidence of any witnesses examined by the Tribunal. In this instance, the Tribunal declined to request that any party produce a witness for examination.

[25] I will not exhaustively detail all of the challenges CAMPP raised to the planning instruments before the Tribunal, nor will I review all of the documentary evidence that was before it, which totals in excess of one thousand pages. Rather, I will refer to the specific issues and evidence before the Tribunal that are relevant to each of the proposed grounds of appeal for which CAMPP now seeks leave, when addressing the proposed grounds, respectively, later in these reasons.

[26] The LPAT heard submissions from the parties' counsel during a three-day hearing in October 2019 and issued its decision and related reasons on December 3, 2019.

[27] Throughout its reasons, the Tribunal was clear that the issues that were properly before it *did not include* the health care planning process that lead to the selection of the hospital site. It affirmed that its task was to determine, from a land use planning perspective, whether OPA 120 and the ZBA are consistent with the PPS and whether the ZBA conforms with the City's OP. It explained that in so doing, it was not required to determine whether the selected hospital site was the "*best site for a regional hospital*", nor was the proceeding before it "*an appeal of the health care planning process, its criteria for site selection, or the alternative sites evaluated but not chosen.*"[14] The Tribunal's findings in that regard are not challenged by CAMPP.

[28] After what it described as a full consideration of the record, the parties' submissions and the cases submitted, the LPAT found that CAMPP did not meet its onus to demonstrate OPA 120 and the ZBA fail the statutory consistency and conformity tests and it concluded that OPA 120 is consistent with the PPS and the ZBA is consistent with the PPS and conforms to the OP. [15] As a result, the Tribunal ordered that CAMPP's appeals be dismissed.

[29] CAMPP now seeks leave to appeal from the Tribunal's decision to the Divisional Court. Below, I will review the legal principles applicable to the relief CAMPP requests.

The Legal Principles Applicable to the Determination of Whether Leave to Appeal Ought to Be Granted

[30] An appeal from a decision of the LPAT lies to this court only with leave, which may only be granted on a question of law. In accordance with the legislative regime enacted by the *Local Planning Appeal Tribunal Act*, the court's role in local land use planning disputes is limited. The court functions as the "overseer of the legality of the process"[16], tasked with

---

[14] Tribunal Reasons, at para 5.
[15] Tribunal Reasons, at para. 89.
[16] *My Rosedale Neighbourhood v. Dale Inc.*, 2019 ONSC 6631 (Div. Ct.), at para. 33.

ensuring the law is understood and applied appropriately by those charged with making the planning decisions.[17] It is well understood that planning matters involve policy decisions as much or more than legal ones. It is not the role of the court to balance competing policies, weigh subjective aesthetics or to make the political compromises that underlie planning decisions.[18] The Legislature has assigned to the LPAT alone, the task of balancing factual and policy considerations underlying planning decisions. The role of the court is limited to ensuring that when the LPAT exercises its exclusive decision-making authority, it applies the proper legal principles.[19]

[31] To obtain leave to appeal in respect of a proposed ground of appeal, the moving party must generally establish each of the following criteria:[20]

(a) the proposed ground of appeal raises one or more questions of law;

(b) there is reason to doubt the correctness of the Tribunal's decision with respect to the question(s) of law raised; and

(c) the question of law is of sufficient "general or public importance" to merit the attention of the Divisional Court.

[32] Questions of law generally involve questions about the identification and scope of the correct applicable legal test. Questions of fact generally concern determinations of what took place. Questions of mixed law and fact generally concern questions about whether the facts satisfy the applicable legal test.[21] Applying the law, as interpreted, to the facts, as found, is quintessentially a question of mixed fact and law.[22] Absent an extricable legal error in the interpretation or application of the law, the result of such an exercise is not fodder for an appeal brought pursuant to s. 37 of the LAPTA.

[33] In determining whether a proposed ground of appeal raises a question of law, the factual findings of the LPAT are entitled to a very high degree of deference.[23] However, in some instances, a Tribunal's factual findings may result from an error of law alone, particularly in circumstances in which the Tribunal: finds facts in the absence of evidence; errs with respect to the legal effect of the facts as found; assesses evidence based on an incorrect

---

[17] *My Rosedale Neighbourhood*, at para. 32.
[18] *My Rosedale Neighbourhood*, at para. 32.
[19] *My Rosedale Neighbourhood*, at para. 3.
[20] *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.*, 2013 ONSC 715, at para. 11; *Snowden v. The Corporation of the Township of Ashfield-Colborne-Wawanosh*, 2017 ONSC 6777 (Div. Ct.), at para. 11; *My Rosedale Neighbourhood*, at para. 4.
[21] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35.
[22] *My Rosedale Neighbourhood*, at para. 11.
[23] *Ontario (Minister of Municipal Affairs and Housing) v. Miller*, 2014 ONSC 6131 (Div. Ct.), [2014] O.J. No. 5431, at para. 22.

legal principle; or fails to consider all of the relevant evidence.[24] Nonetheless, it remains that a Tribunal decision that is unsullied by material legal error is not amenable to appeal.

[34] In this instance, CAMPP raises a number of issues with respect to the adequacy of the Tribunal's reasons determining certain aspects of CAMPP's challenges to the planning instruments. A decision-maker's failure to provide functionally adequate reasons for its decision constitutes an error of law. I will further address the legal principles applicable to the determination of the adequacy of the Tribunal's reasons later below.

[35] The existence of a "reason to doubt" the correctness of the Tribunal's decision with respect to the question(s) of law raised by a proposed ground of appeal does not require a finding that the Tribunal's decision is "wrong" or "unreasonable", or even that it is probably so. It is sufficient that the moving party demonstrate that the legal issues that are engaged, are open to "very serious debate".[25]

[36] In determining whether there is reason to doubt the correctness of the Tribunal's decision with respect to the legal question raised, it is appropriate to consider that if leave is granted, the appellate court will review the decision on a standard of correctness, without deference to the Tribunal's determination of questions of law arising from the *Planning Act*, its "home statute". The Legislature has subjected the LPAT's administrative decision-making regime to appellate oversight by the court, thereby signaling that it expects the court to scrutinize the LPAT's decisions, on questions of law, in accordance with an appellate standard of review.[26] The standard of review for an asserted error of law is correctness.[27]

[37] An assessment of whether there is reason to doubt the correctness of the impugned decision with respect to the legal question raised must be made by considering it as a whole, while remaining mindful that the subject of an appeal is the Tribunal's decision itself and not its reasons for decision.[28] Doubt as to legal correctness must be based on the totality of the Tribunal's decision, not one isolated paragraph or phrase. "It is not appropriate, when determining the issue of leave to appeal, to select fragments of the decision and parse them under microscopic scrutiny to the detriment of an overall analysis of the decision as a whole."[29]

[38] The determination of whether the question of law raised by a proposed ground of appeal is of "sufficient general or public importance to merit the attention of the Divisional Court", is a function of the nature of the legal issue engaged by the proposed ground, as opposed to the specific parties or the specific property involved. The identified legal issue, itself,

---

[24] *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 25-32.

[25] *McCutcheon v. Westhill Redevelopment Co.*, [2008] O.J. No. 3206 (Div. Ct.), at para. 10; *Toronto (City) v. SheppBonn Ltd.*, 2014 ONSC 5964, at para. 18; *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.*, at para. 15; and *Richmond Hill Naturalists v. Corsica Developments Inc.*, 2013 ONSC 7894 (Div. Ct.), [2013] O.J. No. 5996, at para. 24.

[26] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 36 and 37.

[27] *Vavilov*, at paras. 37; and *Housen* v. *Nikolaisen*, 2002 SCC 33, [2002] S.C.R. 235, at para. 8.

[28] *Snowden*, at para. 11.

[29] *Concerned Citizens of King (Township)* v. *King (Township)*, [2000] O.J. No. 3517 (S.C.), at para. 10.

must be of sufficient importance to justify leave.[30] The asserted error of law must concern a matter that it is of general public importance or that is otherwise important to the development of the law and administration of justice. As a result, the determination of whether this analytical criterion is met may engage considerations of the frequency with which the particular legal issue arises and whether the issue has an effect for most municipalities in Ontario.[31]

[39] In accordance with the foregoing principles, I will now consider and determine each of CAMPP's proposed grounds of appeal.

The Principles Applied

[40] In my view, CAMPP has failed to demonstrate that leave to appeal should be granted with respect to any of the grounds of appeal that it proposes. As a result, its motion must be dismissed. In the reasons that follow, I will examine the nature of each of CAMPP's proposed grounds of appeal, in turn, together with the parties' respective positions. I will then explain why CAMPP has failed to establish that leave ought to be granted with respect to any of its proposed grounds.

[41] Prior to doing so, I generally observe that CAMPP's position with respect to each of its proposed grounds, apart from the second ground which I will address separately below, raises a question or questions of law, most of which relate to the adequacy of the Tribunal's reasons and its asserted material misapprehensions of the evidence. Reading the Tribunal's reasons as a whole, in the context of the evidence and submissions that were before it, it is patently discernable that the aspects of CAMPP's proposed grounds of appeal that raise actual questions of law, alone, carry no chance of success. In other words, there is no reason to doubt the correctness of the Tribunal's decision with respect to the questions of law that CAMPP has raised.

[42] In arriving at the foregoing conclusion, I remind mindful of my gatekeeping role as a judge determining a leave to appeal motion, as opposed to an appellate court determining an appeal on its merits. However, in order to determine if leave to appeal on any particular proposed ground is justified, I must assess whether the moving party, CAMPP, has demonstrated there is reason to doubt the correctness of the Tribunal's decision with respect to the identified question(s) of law. That determination necessarily requires a preliminary assessment of the merits of the proposed grounds of appeal. In this instance, a preliminary assessment of the merits of the proposed grounds that raise a question of law, fails to disclose any merit or chance of success associated with any of them. Although errors of law are asserted by CAMPP, there is no serious debate to be had as to whether the Tribunal engaged in such errors.

---

[30] *Ontario (Legislative Assembly) v. Avenue-Yorkville Developments Ltd*, 2011 ONSC 258 (Div. Ct.), [2011] O.J. No 110, at para. 37; *Snowden*, at para. 11.
[31] *Snowden*, at para. 11.

[43] As a result, although CAMPP's position with respect to proposed grounds 1, 3 and 4, respectively, raise questions of law, leave is not justified for any of those grounds because there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal questions raised.

[44] Leave to appeal is also not warranted in respect of CAMPP's position with respect to its second proposed ground of appeal. CAMPP raises a number of asserted legal errors in relation to this ground, but those asserted errors predominantly result from CAMPP's misapprehension of the Tribunal's express reasoning, as set out in its reasons. The remaining issues that CAMPP asserts in respect of its second proposed ground, raise questions of mixed fact and law for which leave cannot be granted.

[45] In the context of the foregoing findings, it is unnecessary to determine whether any of the proposed grounds of appeal raise a question of law that is of sufficient public general importance to merit the attention of the Divisional Court.

[46] I will now explain, in more detailed terms, the basis for the findings above.

Proposed Ground 1:

Did the LPAT err in law by finding the proposed OPA and ZBA complied with the requirements of the PPS and the City's OP regarding the provision of emergency services?

The Position of the Parties

[47] CAMPP argues that the Tribunal erred in law, when it found that OPA 120 and the ZBA are consistent with the applicable policies prescribed by the PPS and that the ZBA conforms to the policies of the City's OP regarding the provision of emergency services, including OP policy 4.2.7.3, which requires the municipality *"to encourage emergency services in close proximity to where people live"*.[32]

[48] CAMPP identifies three asserted errors of law in support of this ground of appeal.

---

[32] In its submissions to the Tribunal, CAMPP cited several other PPS policies with which it said the OPA 120 and ZBA were inconsistent and several policies in the City's OP with which it said the ZBA did not conform (all of which relate to the provision of emergency services) as follows:

a. The PPS directs the coordination of emergency management to support efficient and resilient communities (policy 1.2.3), and the strategic location of infrastructure and public service facilities to support the effective and efficient delivery of emergency management services (policy 1.6.4);

b. OP Policy 1.1.1(f) specifically addresses the accessibility needs of persons with disabilities and older persons by requiring that "land use barriers which restrict their full participation in society" be identified, prevented and removed. The OP also calls for an integration of institutions *within* the City's neighbourhoods (6.1.6).

[49] First, in determining that the ZBA conforms with OP policy 4.2.7.3, the Tribunal made a material factual finding in *the absence of any supporting evidence*. CAMPP contends that contrary to the requirements of OP policy 4.2.7.3, the evidence before the Tribunal established that no one lives in close proximity to the proposed regional hospital site, which is currently undeveloped greenfield land. Although OPA 120 designates certain land in the vicinity of the hospital's proposed location for residential use, it remains that: there were no constructed residences in that area, at the time of the LPAT hearing; and the Tribunal did not receive evidence that a developer (or anyone else) had committed to future residential construction "in close proximity" to the proposed hospital site. The Tribunal's conclusions with respect to the ZBA's conformity was, therefore, anchored in impermissible and unsupported speculation that the emergency services that will be provided by the regional hospital will be "in close proximity" to where people live.

[50] Second, CAMPP essentially contends that in arriving at its conclusion concerning the ZBA's conformity, the Tribunal erred in law by failing to engage in a quantitative consideration of the available evidence concerning the population densities of different areas of the City. Specifically, the evidence revealed that if fully developed, the lands designated for residential use in the OPA 120 area will support a maximum population of 7,000 residents. By contrast, Windsor's more centrally located Wards (2, 3, 4 and 5) have a combined population of approximately 100,000 people. CAMPP posits that it is "highly problematic" that the Tribunal concluded that a policy requiring the City "*to encourage the location of emergency services in close proximity to where people live*" is satisfied by having a hospital in an area with 7,000 people, while there are 100,000 people living in another area of the City.

[51] Third, CAMPP asserts that the Tribunal erred in law by failing to provide adequate reasons for its conclusions regarding the ZBA's "consistency" and "conformity", respectively, with the PPS and OP policies applicable to emergency services. In particular, it characterizes the Tribunal's analysis of OP policy 4.2.7.3, as solely limited to a conclusion that "*it is not possible for every service to be in close proximity to all residents*".

[52] Finally, CAMPP submits that the questions of law that arise from this asserted ground are public, important and merit the Divisional Court's attention because the planning for a regional hospital is, by definition, a matter of both general and public importance.

[53] The responding parties submit that this proposed ground of appeal fails to satisfy all of the requirements for leave. First, it does not raise a question of law. Instead, the essence of CAMPP's complaint concerns the weight that the LPAT afforded to CAMPP's evidence and the findings of fact that the LPAT made on the record before it. CAMPP does not seek a legal interpretation of the policy provisions it cites, nor does it expressly raise an issue with the Tribunal's interpretation of the PPS and OP policies. The application of the PPS and OP policies, as interpreted, to the specific facts, as found by the Tribunal, is "quintessentially a question of mixed fact and law." CAMPP has failed to identify any extricable legal errors that it alleges the LPAT made in that regard.

[54] Second, the LPAT's factual findings are supported by the evidence it received and its reasons reflect a careful consideration of that evidence.

[55] Third, the proposed ground does not raise a question of law of "sufficient general or public importance" to merit the attention of the Divisional Court. The dispute concerns the use of a specific property. The importance of the institution involved (a hospital), alone, does not render the legal issues assertedly raised by this ground to be of sufficient importance to justify leave.

Disposition

[56] For the following reasons, I am not persuaded that leave to appeal ought to be granted with respect to this proposed ground. While I am satisfied that the issues of whether the Tribunal made factual findings in the absence of evidentiary support and the asserted inadequacy of its reasons raise "questions of law", the moving party has failed to establish that there is reason to doubt the correctness of the Tribunal's decision as it relates to those questions. I will explain by first addressing the adequacy of the Tribunal's reasons concerning issues of "consistency" and "conformity" with the "emergency services" policies that CAMPP raised before the Tribunal.

(i) Adequacy of the Tribunal's Reasons for its Findings of Consistency and Conformity with "Emergency Services" Policies

The Applicable Legal Principles

[57] The adequacy of the Tribunal's reasons must be evaluated in accordance with a functional and contextual approach.[33] The reasons must be sufficient to: explain why the Tribunal arrived at its decision (by demonstrating a logical connection between the decision and the basis for the decision); provide public accountability; and permit effective appellate review.[34] On appellate review of their adequacy, the Tribunal's reasons must be considered and evaluated as a whole, in the context of the evidence and the submissions before it, and with an appreciation of the purpose for which its reasons were delivered.[35] The basis for the Tribunal's decision must be discernable, when its reasons are considered in that context[36].

[58] The Tribunal is not required to expound upon "how" it arrived at its conclusion in a "watch me think" fashion. In other words, a detailed description of the Tribunal's process in arriving at its decision is unnecessary.[37] When explaining the basis for its decision and its

---

[33] The legal principles applicable to the determination of the adequacy of the Tribunal's reasons, as set out below, were largely developed in the context of judicial proceedings. Generally, they apply equally to the determination of the adequacy of an administrative Tribunal's reasons for decision: see *Vavilov* at paras. 79-81.
[34] See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 24; and *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15 and 55.
[35] See *R.E.M.*, at paras. 35 and 55.
[36] See *R.E.M.*, at para. 55.
[37] See *R.E.M.*, at para. 17.

logical link to the decision itself, the Tribunal is not required to: set out every one of the findings or conclusions it reached in arriving at its ultimate decision; expound upon evidence which is uncontroversial; detail its findings on each piece of evidence or controverted fact; or recite well-settled legal principles, where the ultimate result turns on the application of such principles to the facts, as found after a consideration of conflicting evidence.[38]

[59] Brevity alone does not render a Tribunal's reasons inadequate. The degree of detail required is a function of the case-specific circumstances. Even brief reasons will be adequate, provided that when read in the context of the evidence and submissions before the Tribunal, the reasons demonstrate that the Tribunal seized and disposed of the substance of the proceeding.[39]

The Principles Applied

[60] Applying the foregoing principles, there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the adequacy of its reasons for finding the requisite consistency and conformity between the planning instruments and the PPS and OP policies related to the location of emergency services. Patently, the Tribunal's reasons, read as a whole, clearly demonstrate that in arriving at its decision dismissing CAMPP's appeals, it seized the substance of the "location of emergency services" issues that CAMPP raised, which it then determined through findings made on accepted aspects of the evidence available to it. The Tribunal's reasons explain why the Tribunal arrived at its findings, in a manner that permits meaningful appellate review. I will explain the foregoing conclusions below.

[61] In its submissions, CAMPP characterizes an isolated phrase from the Tribunal's reasons, in which it states that "*it is not possible for every emergency service to be located in close proximity to all residents*", as being "inadequate" to explain the Tribunal's conclusion that the ZBA conforms with OP policy 4.2.7.3. The balance of CAMPP's identified issues, concerning this proposed ground, also relate to OP policy 4.2.7.3. However, the scope of this proposed ground of appeal is expressed in broader terms. Its wording refers to the consistency between both OPA 120 and the ZBA and the emergency services policies of the PPS and the ZBA's conformity with the OP policies related to those type of services.

[62] During its submissions before the Tribunal, CAMPP raised a number of PPS and OP policies, apart from OP policy 4.2.7.3, in support of its positions that the planning instruments were inconsistent and non-conforming, which the Tribunal comprehensively addressed in its reasons at: paragraphs 52-61, under the heading "Location and Design"; and paragraphs 62-73, under the heading "Mobility". In so doing, the Tribunal's reasons disclose that the reasoning process underwriting its related consistency and conformity

---

[38] See *R.E.M.*, at paras. 18-20.

[39] See *R.E.M.*, at paras. 35, 43-44, 51 and 55-56.

findings is not limited to a single statement that "*it is not possible for every emergency service to be located in close proximity to all residents.*"

[63] Instead, in its analysis of the "Location and Design" issues that were raised through CAMPP's evidence and submissions, the Tribunal:

a) adverts to the specific PPS and OP policies founding CAMPP's "location and design" challenges, including those related to the location of emergency services (para. 54);

b) sets out the parties' positions with respect to the consistency and conformity of the planning instruments, arising from CAMPP's asserted location and design challenges (paras. 52-53);[40]

c) adverts to aspects of the affidavit evidence concerning consistency and conformity with the specific PPS and OP policies that CAMPP cited in support of its location and design challenges, as adduced by: CAMPP from Jennifer Keesmaat, registered professional planner; the City from Justina Nwaesei, registered professional planner; and the WRH from Carole Wiebe, consulting planner with MHBC (paras. 55, 57 and 61)[41];

d) finds that OPA 120 is consistent with the PPS because: it comprehensively plans for the City's growth (as justified by evidence of the needs analyses that the Tribunal accepted) and it provides a mix of uses, densities, modes of transportation and a fiscally responsible approach to phasing and costs of municipal services (para. 57);

e) finds that the "ZBA for the new hospital location" is consistent with the PPS and conforms with the OP (para. 58). In so doing, the Tribunal acknowledges the possibility that a hospital located in another area of the City could also be found to satisfy the policies of the PPS, but reiterated that its task was to not to review the

---

[40] Before the Tribunal, CAMPP contended that the "OPA 120 location and design" is inefficient, car dependent not transit supportive, costly to service and contrary to downtown support. CAMPP raised similar concerns over the ZBA, with an emphasis on downtown viability, brownfields redevelopment and accessibility.

[41] The functional adequacy of the Tribunal's reasons must be considered in the context of not only CAMPP's submissions but the evidence that was before it. In paragraphs 28-63 of her affidavit evidence, Ms. Wiebe explains why the provisions of OPA 120, including the location of the planned hospital institutional use, are consistent with each policy of the PPS that CAMPP raised in its submissions to the Tribunal. In paragraphs 64-143 of her affidavit, she explains why the provisions of the ZBA, including the location of the planned regional hospital, are consistent with the PPS and conform with each of the OP policies that CAMPP raised. Similarly, in her affidavit evidence (paragraphs 64-66, 71, 72 and 92) Ms. Nwaesei explains why OPA 120 is consistent with the PPS policies that CAMPP raised. Conversely, in her affidavit, Ms. Keesmaat did not specifically identify any inconsistency or non-conformity between the emergency services policies of the PPS or the OP and the planning instruments, although she did adopt the positions that CAMPP itself expressed in its appeal case synopses before the Tribunal.

site selection process for the new hospital, but rather, to determine, on the evidence, whether the ZBA permitting a hospital at the proposed location met the requisite consistency and conformity tests (para. 58)[42];

f) finds that: OPA 120 and the ZBA adequately respond to the PPS requirement to provide public service facilities to meet current and projected needs; the proposed hospital location will be in a planned area of the city adjacent to residential and commercial areas accessible by walking, cycling and transit; the planned transit services to the hospital will ensure access for those persons from a distance who cannot, or choose not, to drive; area road connections and improvements, as well as, provisions for active modes of travel have been planned through EA approvals; and, to support downtown employment and services, existing hospital sites in and closer to the City centre are planned for adaptive re-use, including the provision of numerous health care services guided by the region-wide WEHS plan (para 59);

g) finds that the policies expressed in the City's OP reflect the same planning themes as the PPS and that its analysis of OPA 120's consistency with the PPS applies equally to the ZBA's conformity with the OP (para. 60); and

h) finds, specifically, at para. 61 of its reasons:

> The OP encourages emergency services in close proximity to where people live (s. 4.2.7.3) and seeks to integrate institutions within the City's neighbourhoods [OP policy 6.1.6]. Campp argues that the ZBA fails to achieve both intentions. The Tribunal concurs with Ms. Wiebe's response that emergency services include fire, police, ambulance and other services, as well as an acute care hospital, and that it is not possible for every service to be in close proximity to all residents. The proposed site will provide service to all residents whether nearby, across the City or in the outlying areas served by the [Windsor-Essex Hospitals System]. Again, the hospital site is part of a comprehensively planned growth area of the City that will be connected to adjacent residential, commercial, business park and natural areas.

[64] The Tribunal's full reasons demonstrate that when determining that the ZBA conforms with the OP policies that CAMPP raised in this aspect of its LPAT appeal, the Tribunal did not restrict its analysis to the single isolated phrase upon which CAMPP now relies. On the evidence it accepted, it determined that there was a need to designate land in the OPA 120 area for residential use because the City's anticipated demand for new housing during

---

[42] The Tribunal also concludes that: the question of "how best to deliver health care services" was not a land use planning issue; and rather than seeking approval for the proposed hospital location, the relevant planning applications sought approval for the *implementing land use policies and regulations that arise from the decision to locate the new regional hospital* at the planned location.

the applicable planning period (2016-2036) could not be accommodated entirely by infilling and intensifying residential land otherwise available in previously developed areas of the City. It made similar findings with respect to the need to designate land in the OPA 120 area for employment use. In turn, those findings support its conclusion that the hospital will be connected to adjacent residential and commercial areas, among others, that are accessible by walking, cycling and transit. Those findings directly inform the Tribunal's determination that the ZBA conforms to OP Policy 4.2.7.3. The Tribunal also expressly considered the evidence concerning the planned transit services and active modes of transit for those residents at a distance who cannot, or choose not, to drive, and made corresponding factual determinations supporting its findings of consistency and conformity with the PPS and OP policies raised by CAMPP in relation to the issue of accessibility of emergency services said to be posed by the hospital's proposed location.[43]

[65] As a result of the foregoing, I am not persuaded that CAMPP has demonstrated any reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the asserted inadequacy of its reasons. In the context of the evidence and submissions before it, the Tribunal's reasons, read as a whole, adequately explain the basis for its determination that OPA 120 and the ZBA are consistent with the PPS and the ZBA conforms to the OP, including "location of emergency services" policies. The reasons reflect that the Tribunal had regard for: the evidence before it, the submissions of the parties; and the applicable PPS and OP policies. Its findings are responsive to the substance of the issues raised by the parties, founded in the evidence before it, and they support its decision.

[66] I now turn to CAMPP's assertion that the Tribunal made a material finding of fact without any evidentiary support.

(ii) CAMPP's Assertion of a Factual Finding Unsupported by the Evidence

[67] As a question of law, there is no reason to doubt the correctness of the Tribunal's decision, on the basis that there was no evidence to support its factual finding that the new hospital will be located in close proximity to where people live, which was material to its conclusion that the ZBA conforms with the emergency services polices expressed in the OP. In arriving at its conclusion, aspects of the Tribunal's factual findings were made with direct evidentiary support and other aspects constituted reasonable inferences that were reasonably capable of being drawn from the evidence before it. I will explain.

[68] Paragraph 61 of the Tribunal's reasons, which is set out previously, founds this aspect of CAMPP's proposed ground of appeal. The responding parties correctly submit that the Tribunal's finding that "it is not possible for every [emergency] service to be in close proximity to all residents" is directly supported by the affidavit evidence of Ms. Wiebe, which the Tribunal accepted. At paragraphs 137-138 of her affidavit, Ms. Wiebe deposes:

---

[43] At paragraphs 62-73 of its Reasons, the Tribunal specifically addresses and ultimately finds consistency between the planning instruments and the PPS policies and conformity between the ZBA and the policies of the OP related to the mobility, transportation and accessibility issues that CAMPP raised.

> The new regional acute care hospital site will provide a major institutional use in an area that is planned to accommodate projected future growth over the 20 year planning horizon. Further, the hospital will be a regional facility serving residents of the City as well as the surrounding municipalities that are part of the Windsor-Essex Hospitals System.
>
> Emergency services include the provision of fire, police, ambulance and emergency preparedness services. The full range of services including health care services will be available throughout all parts of the City including the downtown and the County Road 42 Secondary Plan [OPA 120] Area. It is not possible for a single emergency service, such as a hospital, to be in close proximity to every resident in the City.

[69] However, CAMPP reasons that the Tribunal did not receive evidence that the new hospital will be located in close proximity to where people live because *no one* presently lives in the OPA 120 area and there was no evidence establishing an existing commitment to future residential development in that area. Therefore, it argues that on the evidence, the Tribunal could not find that the ZBA conformed with OP policy 4.2.7.3.

[70] CAMPP's position fails to appreciate the totality of the evidence before the Tribunal, from which a reasonable inference can be drawn that the portions of the OPA 120 area designated for residential use will, in fact, be used for such a purpose during the applicable 20-year planning period and therefore, people will live in close proximity to the proposed hospital site. The projected future residential growth in the area of the hospital's planned location, to which Ms. Wiebe refers in her affidavit, was quantitatively addressed through MHBC's evidence calculating that 133 ha of land designated for residential use is *required* in the OPA 120 area, in order to accommodate the City's projected demand for new housing (a function of both population growth and a decline in household size), during the relevant planning period. The Tribunal also received evidence from land economist, Daryl Keleher of the Altus Group, who concluded that while reasonable, MHBC's analysis likely *underestimated* the amount of residential land that will be *required* to accommodate the City's housing demand to 2036.

[71] The Tribunal accepted the evidence of Ms. Wiebe and Mr. Keleher and found that: the area designated for residential use in OPA 120 was reasonable, especially given its likelihood to underrepresent the potential demand (para. 50); there was no evidence to support CAMPP's submission that the MHBC and Altus Group growth projections and land needs calculations are flawed (para. 50); roughly half of the City's anticipated demand for new housing derives from population growth and the other half derives from a decline in household size (para. 51); a City-wide total estimate of 6,900 new dwelling units are required through 2036 (para. 51); and one half of the new units were expected to be accommodated through infilling and intensification (in existing developed areas of the City) with the other half being accommodated within the OPA 120 area (para. 51).

[72] It the context of its factual findings set out above (which are amply supported by the evidence that was before it), the Tribunal was well positioned to draw a reasonable

inference – as opposed to merely speculating – that the emergency services associated with the proposed location of the new hospital within the OPA 120 area will be in close proximity to where people live. The accepted evidence established that the City's projected housing demand over the relevant planning period cannot be accommodated solely through infilling and intensification and the City's additional demand for housing *will be met* through the designated residential land in the OPA 120 area. Logically and reasonably, it was open to the Tribunal to infer that as new residential demand materializes during the applicable planning period, it will be met, in part, by the development of new housing in the OPA 120 area and, as a result, the emergency services associated with the hospital will be located in close proximity to where people live.

[73] Since the challenged aspect of the Tribunal's findings has evidentiary support, there is no reason to doubt the correctness of the Tribunal's fact finding, as a matter of law, on the basis that the impugned finding was made in the absence of any evidence. This aspect of CAMPP's proposed ground of appeal does not merit leave.

(iii) CAMPP's Assertion that the Tribunal's Findings of Consistency and Conformity are Not Rationally Supported by the Evidence

[74] With respect to a question of law, there is no reason to doubt the correctness of the Tribunal's decision on the basis of CAMPP's submission that the available evidence does not rationally support its consistency and conformity findings concerning the PPS and OP emergency services policies, respectively. Indeed, in its submissions, CAMPP does not suggest that the evidence fails to rationally support the Tribunal's findings of consistency with the PPS. Rather, its focus is the Tribunal's finding of conformity between the ZBA and OP policy 4.2.7.3. In support of its position, CAMPP effectively posits that when it determined that issue of conformity, the Tribunal was not only required to consider whether the ZBA "encouraged the location of emergency services in close proximity to where people live", it was also required to engage in a comparative analysis of the projected population of the OPA 120 area with the population of other areas of the City and ultimately, to find "non-conformity" because other areas are more populated.

[75] There is no reason to doubt the correctness of the Tribunal's decision, with respect to a question of law, because it did not expressly engage in the quantitative analysis that CAMPP urges. The Tribunal's finding that the hospital's emergency services will be located in close proximity to where people live, which had evidentiary support, satisfies the express language of the subject OP policy. CAMPP's position suggests that notwithstanding the OP's express policy of "encouraging emergency services in close proximity to where people live", the OP *impliedly* requires such encouragement with respect to where *"most"* people live. That approach is neither mandated nor supported by the express language of the OP policy at issue. CAMPP has not identified any legal principle or authority establishing that, as a matter of law, a comparative assessment of the number of people that will reside in close proximity to emergency services in a proposed development and those that would reside in close proximity to such services if located elsewhere, was required to be undertaken by the Tribunal, in order to reach a finding of conformity with the subject OP policy.

[76] As a result of the foregoing, there is no reason to doubt the correctness of the Tribunal's fact finding, as a matter of law, on the basis that it is not rationally connected to the evidence that was before it. Its factual findings are clearly supported by the evidence and its finding of conformity is consistent with the express language of the OP. CAMPP has not demonstrated that in the circumstances anything more was required, as a matter of law.

(iv) Conclusion on The Proposed Ground of Appeal Related to the Tribunal's Findings of Consistency and Conformity with the PPS and OP "Emergency Services" Policies

[77] While CAMPP may quarrel with the aspects of the evidence that the Tribunal preferred in arriving at its findings of consistency and conformity, absent an identified extricable error of law, the manner in which the Tribunal weighed the evidence cannot constitute a ground of appeal restricted to a question of law, alone. CAMPP has not identified any legal error or error in principle disclosed by the record or the Tribunal's reasons that supports any apprehension that the Tribunal erred, in law, in the manner in which it weighed and accepted the evidence, in arriving at its conclusions of consistency and conformity in respect of the PPS and OP policies related to emergency services.

[78] For all of the reasons above, the moving party has failed to demonstrate that leave to appeal should be granted for this proposed ground of appeal.

Proposed Ground 2:

Did the LPAT err in law by finding sufficient consultation with First Nations took place as required under the PPS and the City's OP?

Nature of the Issue

[79] CAMPP asserts that in arriving at its decision, the Tribunal erred, in law, in its interpretation and application of: PPS policy 1.2.2, which states that "*Planning authorities are encouraged to coordinate planning matters with Aboriginal communities*"; and policy 10.2.1.14 of the City's OP, which provides that "*Consultation with First Nations will take place as part of a development application or detailed planning study*". Specifically, CAMPP contends that contrary to the PPS and OP, the City did not coordinate planning matters with Aboriginal communities, nor did it consult with any First Nations as part of the process surrounding WRH's planning applications.[44]

The Evidence and Submissions Before the Tribunal

[80] The Tribunal received uncontradicted evidence that on March 5, 2018, the City attempted to send an email communication together with copies of WRH's planning applications to

---

[44] The basis for this proposed ground of appeal is founded solely in the asserted inconsistency and non-conformity between the planning instruments and the PPS and OP. In its submissions before the LPAT, CAMPP acknowledged that it did not allege that the City engaged in a breach of a legal duty to consult pursuant to s. 35 of the *Constitution Act, 1982*.

relevant municipal departments and external entities including the local First Nations communities of Walpole Island First Nation and Caldwell First Nation.[45] The City's accompanying email correspondence requested that its recipients provide their comments to Ms. Nwaesei no later than March 26, 2018. Unfortunately, the City's original correspondence intended for Walpole Island First Nation was sent to the wrong email address[46]. Understandably, the City did not receive a response from Walpole Island First Nation by March 26, 2018.

[81] Ms. Nwaesei forwarded "reminder" email correspondence to Walpole Island First Nation (together with other entities from which a response had not yet been received) on March 26, 2018, in which, among other things, she advised that "*today is the date for comments regarding [the WRH planning applications]*" and further directed "*if you have not sent your comment, please do so ASAP.*" The delivery of the reminder email initially failed because it was also sent to the wrong email address. Subsequently, Ms. Nwaesei identified the error and sent the reminder to the correct address, during the late afternoon of March 26, 2018.

[82] The Walpole Island First Nation did not respond to the reminder email, at any time and it did not contact the City in relation to WRH's planning applications, at all, prior to the approval and enactment of the planning instruments in September 2018.

[83] The uncontradicted evidence before the Tribunal also indicates that Ms. Nwaesei spoke with an individual ostensibly associated with the Caldwell First Nation on April 10, 2018. After their conversation, she sent him email correspondence indicating that she was "*Looking forward to a response from the Caldwell First Nations.*" There was no evidence before the Tribunal that the Caldwell First Nation sent a response to the City or that it attempted to further communicate or consult with the City, with respect to the planning applications. There was also no evidence before the Tribunal that the City engaged in any further efforts to *directly* contact or consult with either of the First Nations in respect of the planning applications.

[84] In accordance with the requirements of the *Planning Act*, the City published notice of the August 13, 2018 public meeting related to OPA 120 and the ZBA in the Windsor Star newspaper on June 27, 2018 and again on July 7, 2018.

[85] In the context of the evidence set out above, CAMPP posited before the Tribunal that the City failed to fulfill what CAMPP characterized as its obligations under PPS policy 1.2.2 and policy 10.2.1.14 of the OP "*to consult with affected indigenous communities in the hospital site selection process*".[47] In so doing, CAMPP submitted that a process of consultation consisting of a single email is inconsistent with a municipal government's

---

[45] Affidavit of Justina Nwaesei, para 63.

[46] The email correspondence was sent to "janet.macbeth@wifu.org". The correct address was ostensibly "janet.macbeth@wifn.org."

[47] See Written Outline of oral submissions of CAMPP (before the Tribunal) – Issue 23 "Failure to consult with Indigenous communities".

obligation under the Truth and Reconciliation Commission's Call to Action; and asserted that "*not only was there inadequate consultation, there was no consultation at all.*"

The Tribunal's Findings

[86] The Tribunal addresses CAMPP's submissions concerning inconsistency and non-conformity as a result of inadequate consultation at paragraphs 35-42 of its reasons. Ultimately, it was satisfied that OPA 120 and the ZBA are consistent with the PPS and the ZBA conforms with the OP regarding consultation with Aboriginal communities. In arriving at its conclusion, the Tribunal accepted that "*coordination and consultation connote discussion, which implies a two-way conversation*". The Tribunal was also mindful that the PPS "*encourages*" but does not "*mandate*" the coordination of planning matters with Aboriginal communities. It reasoned that in furtherance of a consultation process: the City is required to provide reasonable notice, but it cannot force a party to the table; and an interested stakeholder bears some responsibility to respond to an invitation to participate in the process, whether the invitation arises from direct email, published notice, or general knowledge in the community (paras. 39-40).

[87] From a factual perspective, the Tribunal found that: WRH's planning applications "were highly publicized throughout the City"; the hospital planning process was "extensive and controversial"; and by the time WRH made its applications, "the record suggests that a full understanding of the proposal was widespread" (para. 39). It then determined that "in the circumstances of these community-wide and publicly known issues, the City encouraged full participation of all stakeholders" (para. 41). Finally, it found that "through the various channels, the City took reasonable steps to invite First Nations to enter into consultation as contemplated by the OP" (para. 41).

[88] The Tribunal concluded its analysis by: observing that in hindsight, more could have been done to consult with local Indigenous communities; and acknowledging the Truth and Reconciliation Commission of Canada's directives "in support of finding new ways to engage fairly, openly and equally" (para. 42). It then found that "*in the case at hand, the statutory requirements of notice were satisfied, and even in the absence of more, the City's efforts at consultation are considered sufficient to satisfy the policies*" (emphasis added) (para. 42).

The Position of the Parties in Relation to the Proposed Ground of Appeal

[89] CAMPP presently asserts that as a matter of law, through its interpretation and application of the PPS and OP, there is reason to doubt the correctness of the Tribunal's determination of the issues related to the sufficiency of the City's "consultation" with First Nations, and correspondingly, its findings of consistency and conformity. Specifically, CAMPP suggests that the Tribunal erred by:

(i) conflating the concepts of "notice" and "consultation", while elsewhere finding that consultation involves a "two-way" communication, which did not take place, in fact;

(ii) failing to consider CAMPP's submissions regarding policies promoting reconciliation, as expressed in a portion of the recommendations of the Truth and Reconciliation Commission of Canada, which it referenced in its submissions to the Tribunal; and

(iii) failing to give proper effect to its own conclusion that "more could have been done to consult", which CAMPP characterizes as an explicit finding that the OP was not followed. CAMPP reasons that if more *could have been* done then, as a matter of law, *more had to be done* to discharge the OP's mandatory requirement to consult.

[90] Finally, CAMPP submits that proper consultation with First Nations is an issue of both general and public importance.

[91] The responding parties contend that the challenges CAMPP asserts in relation to the Tribunal's findings on the issue of consultation, raise questions of mixed fact and law that cannot form the basis of an appeal to the Divisional Court. They submit that CAMPP: has failed to articulate any extricable legal errors that it would rely on in its proposed appeal; it does not engage with the text of the PPS or the OP that it relies on; and it cites no case law to support its position. Finally, to the extent that CAMPP impugns the Tribunal's legal analysis, its criticisms are based on a mischaracterization of the Tribunal's reasons.

Disposition

[92] For the reasons that follow, I accept the responding parties' position that leave to appeal ought not to be granted for this proposed ground, as it does not raise a question of law with respect to which there is reason to doubt the correctness of the Tribunal's decision.

[93] It is patently discernable from a plain reading of the Tribunal's reasons that many of the issues that CAMPP identifies as "legal errors" result from its misapprehension of the Tribunal's express reasoning. I will explain.

[94] First, in reading the Tribunal's reasons as whole, there is no doubt that the Tribunal did not conflate the notions of "notice" and "consultation". Instead, it treats them as distinct concepts in its analysis. The Tribunal recognized that "consultation" implied a two-way communication process. It then made specific findings as to why that type of communication did not occur in this instance, which focused on the lack of response from the First Nations, to what the Tribunal determined to be the City's reasonable steps: to provide the First Nations with notice of the planning applications, through several methods including, but not limited to, direct email; to invite the First Nations to enter into consultation; and to encourage the full participation of all potential stakeholders.

[95] In finding consistency and conformity with the PPS and the OP, respectively, the Tribunal did not find that "reasonable notice" will always equate to "sufficient consultation". Rather, its findings suggest that consultation in the form of two-way communication

between the City and the First Nations did not occur because the First Nations did not respond to reasonable notice and reasonable steps by the City to invite the First Nations to participate in that process. CAMPP has not identified an extricable "question of law" or legal error upon which it challenges the findings above, nor has it cited any legal authority suggesting that such findings result from an error in principle.

[96] To the contrary, I accept WRII's submission that the Tribunal's approach and reasoning with respect to the issue of consultation, generally, accords with the principles expressed in the jurisprudence concerning the Crown's constitutional duty to consult. Pursuant to those principles, consultation requires an adequate process, not a perfect one. Consultation is regarded as a "two-way street" where the Crown is obligated to provide notice, disclose information and discuss any issue raised by the Indigenous group in response to the notice. The Indigenous group also has obligations, which include asserting its right as clearly and early as possible.[48] Once afforded a meaningful opportunity to participate, affected Aboriginal rights-holders are empowered to decide whether to become involved in the consultation process, or not. They are not required to do so.[49]

[97] Although the Tribunal was not dealing with an assertion that the City had a constitutional duty to consult, its reasoning is consistent with the foregoing principles. CAMPP has failed to identify any legal authority suggesting that the Tribunal erred in law by applying those principles, when determining the issues of consistency and conformity. There is no reason to doubt the correctness of the Tribunal's decision in that regard.

[98] Similarly, CAMPP does not identify any legal authority specific to the "duty to consult" that supports its contention that since the Tribunal found that "in hindsight more could have been done to consult local Indigenous communities", then, as a matter of law, the City was necessarily required to engage in more steps to consult with First Nations than those in which it was found to have engaged. Conversely, the legal authorities cited by the responding parties demonstrate that even when the Crown discharges its constitutional duty to consult, it is not required to meet a standard of perfection and that the determination of issues such as the adequacy of notice in the context of the duty to consult, must be made based on the case-specific circumstances.[50]

[99] The Tribunal's express reasoning is clearly consistent with the foregoing principles. Despite finding that in hindsight more "could have been done", the Tribunal expressly found that in the *case-specific circumstances before it*, the City's efforts to initiate consultation, to which a response was not received, were sufficient to satisfy the relevant PPS and OP policies. CAMPP has failed to persuasively establish any reason to doubt the correctness of the Tribunal's decision in relation to a question of law, in that regard.

---

[48] *Wauzhushk Onigum Nation v. Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div. Ct.), at paras. 144 and 159.
[49] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, at paras. 22, 47 and 51.
[50] *Chippewas of the Thames First Nation*, at paras. 44-46 and 51.

[100] Finally, contrary to CAMPP's position that the Tribunal failed to consider its submissions regarding the recommendations of the Truth and Reconciliation Commission of Canada, the Tribunal expressly cited and considered the Commission's directives in its reasons, before it arrived at its findings with respect to consistency and conformity.

[101] The balance of the issues that CAMPP raises in support of this proposed ground of appeal serve to challenge the Tribunal's findings of fact and mixed fact and law, rather than to identify an asserted error of law, alone. Leave to appeal cannot be granted with respect to such challenges. In arriving at that conclusion, I adopt the reasoning expressed in *Cardinal* v. *Windhill Green Fund LP*[51], in which this court held that the determination of the adequacy of a municipality's efforts to discharge its duty to consult with Indigenous communities, which arises from a PPS policy or a policy set out in the municipality's OP, is a question of mixed fact and law. I accept that as an accurate characterization of the nature of such a finding and one that is applicable in this instance, notwithstanding CAMPP's position to the contrary.

[102] I remain mindful that CAMPP posits that the circumstances in *Cardinal* distinguishingly differ from those in this instance, because in the former an actual consultation process occurred, while in the latter, no consultation occurred, notwithstanding the mandatory requirement to consult prescribed by the City's OP. However, I am not persuaded that a distinguishing difference exists. In each instance, the operative issue remained whether, in the *case-specific circumstances*, the subject municipality engaged in adequate efforts to discharge its duty to consult.

[103] In the present case, the Tribunal clearly recognized and accepted the existence of the City's duty to consult and found on the evidence that the City discharged its duty through: its reasonable steps to provide notice of the planning applications to the First Nations; its reasonable steps to invite the First Nations to enter into consultation as contemplated by the OP, to which no response was received; and its encouragement of full participation of all potential stakeholders. In turn, those findings of mixed fact and law were supported by the Tribunal's specific factual determinations, which have been previously detailed above. While I am mindful that CAMPP disputes aspects of the foregoing findings, given their respective factual and mixed legal and factual nature, leave to appeal cannot be granted on the basis of those disputes, alone. Moreover, CAMPP has failed to identify any extricable question of law related to any of the foregoing findings. As a result, the statutory requirement for leave is not met with respect to the issues CAMPP raises in relation to those findings.

[104] For the foregoing reasons, the moving party has failed to establish that leave to appeal ought to be granted in respect of this proposed ground of appeal.

---

[51] 2016 ONSC 3456 (Div. Ct.), at paras. 23 and 26-27.

Proposed Ground 3:

Did the LPAT err in law by failing to provide reasons addressing issues relating to the PPS and OP and submissions advanced by CAMPP regarding climate change impacts?

Position of the Parties

[105] CAMPP asserts that the Tribunal erred in law by failing to provide adequate reasons addressing CAMPP's submissions that OPA 120 and the ZBA are inconsistent with the PPS policies related to climate change and the ZBA does not conform to similar policies expressed in the City's OP. CAMPP posits that although the Tribunal *stated* the relevant PPS and OP climate change polices in its reasons, it failed to specifically assess climate change issues and related evidence, in the form of participant statements that were before it. As a result, there is reason to doubt the correctness of the Tribunal's decision. Since climate change is one of the most important issues facing every community in Ontario, the issue raised by the proposed ground of appeal is a matter of general and public importance.

[106] The responding parties contend that CAMPP has failed to demonstrate that there is a reason to doubt the correctness of the Tribunal's decision on the basis of the adequacy of its reasons related to the planning instruments' consistency and conformity with PPS and OP policies related to climate change. To the contrary, read as a whole, in the context of the evidence, the arguments and the proceedings, the Tribunal's reasons: are responsive to the live issues in the proceeding and the parties' key arguments; and disclose an intelligible basis for the outcome, capable of meaningful appellate review. Finally, the legal issue raised by the proposed ground is whether the Tribunal failed to provide adequate reasons related to certain PPS and OP policies. That question is case specific and not of sufficient public or general importance to merit the attention of the Divisional Court.

Disposition

[107] I accept the responding parties' position that leave ought not to be granted for this proposed ground of appeal. When measured against the legal principles applicable to the determination of the adequacy of the Tribunal's reasons, there is no reason to doubt the correctness of the Tribunal's decision. I will explain.

[108] Reasons for a decision must be adequate, not perfect. The functional adequacy of the Tribunal's reasons is determined in the context of the evidence and submissions before it, with a recognition that a reviewing court cannot expect a decision-maker to "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion".[52] In its reasons, the Tribunal expressly referred to the relevant PPS and OP "climate change" policies that CAMPP cited and it made findings relevant to the primary aspects of CAMPP's "climate change policies" positions which, in turn, support its consistency and conformity

---

[52] *Vavilov*, at para. 128.

conclusions. In the case-specific circumstances, there is no reason to doubt the correctness of the Tribunal's decision on the basis that its reasons related to consistency and conformity with PPS and OP climate change policies are, as a matter of law, inadequate. The reasons, read as whole, in the context of the evidence, the submissions and the proceeding, adequately explain the basis of the Tribunal's findings of consistency and conformity, in a manner that permits meaningful appellate review. I will explain below.

[109] The evidence before the Tribunal came in the form of a voluminous written record. Apart from its oral submissions before the Tribunal, which were detailed, CAMPP also delivered a "Written Summary of oral submissions"[53], that set out 23 main issues forming the basis of its LPAT appeals. "Climate change impact" and policies related thereto, were not among CAMPP's identified main issues. Instead, CAMPP cited certain PPS and OP policies related to climate change (together with other policies unrelated to climate change) and provided corresponding written commentary, as part of other aspects of its challenges to the planning instruments, namely: (i) Issue 5 – "Unjustified, Uneconomical Expansion"; (ii) Issue 17 – "Public Health and Flooding"; (iii) Issue 19 – "Delivery of Healthcare Services, Efficient and Resilient Communities"; and (iv) Issue 20 – "Transit & Active Transportation".[54]

[110] Correspondingly, in its reasons, the Tribunal seized the substance of the issues that CAMPP identified as key or central to its consistency and conformity challenges, addressing them as follows: (i) Unjustified, Uneconomical Expansion – paragraphs 52-61; (ii) Public Health and Flooding – paragraphs 74-81; (iii) Resilient Communities – paragraphs 74-81; and (iv) Transit & Active Transportation – paragraphs 62-73.[55] In so doing, the Tribunal also made findings that address the issues and evidence that CAMPP now relies, in support of this asserted ground of appeal.

[111] Specifically, as part of its submissions that OPA 120 constituted "unjustified, uneconomical development", CAMPP asserted that OPA 120 was inconsistent with PPS policy 1.1.3.2(a)[56] and it referred to participant statements; asserting that air quality and

---

[53] That document also forms part of the record on this motion.

[54] PPS and/or OP policies related to climate change are also reproduced in CAMPP's Written Summary of oral submissions under headings: Issue 2 – Not an Efficient Development Pattern; Issue 3 – Premature Development; and Issue 18 – Brownfield Land, Premature Development.

[55] Issues related to Inefficient Development Pattern, Premature Development and Brownfield Land, are addressed by the Tribunal at paras. 52-61 of its reasons.

[56] PPS policy 1.1.3.2(a) states:

> Land use patterns within settlement areas shall be based on: a) densities and a mix of land uses which: 1. efficiently use land and resources; 2. are appropriate for, and efficiently use, the infrastructure and public service facilities which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion; 3. minimize negative impacts to air quality and climate change, and promote energy efficiency; 4. support active transportation; 5. are transit-supportive, where transit is planned, exists or may be developed; and 6. are freight-supportive (emphasis added).

pollution will likely be worsened by the development of the OPA 120 area (and related infrastructure); and predicting that greenhouse gas emission will increase as a result of "expanding the established footprint of the City of Windsor, in particular, coupled with the limited availability of transit to and from the new subdivision". CAMPP further posited that the environmental impacts associated with both the development of the OPA 120 area and the location of the hospital therein, would result in: loss of greenfield land used for agricultural purposes; flooding risk in the OPA 120 area; and an increase in greenhouse gas emissions, resulting from an increase in the frequency of vehicular travel and travel distance associated with accessing hospital services in the OPA 120 area, which CAMPP asserted was inconsistent with PPS 1.1.8.[57]

[112] As explained below, there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the adequacy of its reasons related to the foregoing issues.

[113] First, CAMPP's concerns over the potential increased pollution and greenhouse gas emissions posed by the development of the OPA 120 area (and related infrastructure) and the "expansion of the City's urban foot print" (and similar concerns expressed in the participant statements that CAMPP relied on before the Tribunal), posited against the wisdom of <u>any</u> development of, or urban expansion in, the OPA 120 area, <u>at all</u>.

[114] Nonetheless, the Tribunal found that the City's plan to develop the OPA 120 area was long standing. Since its acquisition in 2007, the OPA 120 area has consistently formed part of the City's settlement, intended to accommodate its future growth. The Tribunal accepted the uncontradicted evidence that the provisions of OPA 120, itself, did not bring the OPA 120 area into the City's urban settlement. OPA 60 had previously designated the OPA 120 area for various future urban uses and ceased its designation for agricultural purposes.

[115] The Tribunal also found that OPA 120 constituted a "comprehensive planning framework to guide the development of the next phase of Windsor's anticipated development" (para. 2). It then found that consistent with the City's obligation pursuant to PPS policy 1.1.2, which the Tribunal recognized, the evidence established the requisite *present need* to justify the development of the OPA 120 area for, among other things, residential and employment uses. The Tribunal determined that even with brownfield redevelopment in

---

[57] PPS policy 1.1.8 states: Planning authorities shall support energy conservation and efficiency, improved air quality, reduced greenhouse gas emissions and climate change adaptation through land use and development patterns that:

(a) Promote compact form and structure of nodes and corridors;
(b) Promote the use of active transportation and transit in and between residential, employment (including commercial and industrial) and institutional uses and other areas;
(c) Focus major employment commercial and other travel-intensive land uses on sites which are well served by transit where this exists or is to be developed, or designing these to facilitate the establishment of transit in the future;
(d) ...
(e) Improve the mix of employment and housing uses to shorten commute journeys and decrease transportation congestion.

the City's existing urban areas, the development of the OPA 120 greenfield area is "required to meet the land needs for residential and employment uses in the City over the planning period to 2036" (emphasis added) (para. 57).

[116] In the result, despite CAMPP's reliance on participant statements that expressed concern over potentially worsening air quality, pollution and greenhouse gas emissions posed by the "construction, development, land intensification and maintenance" of infrastructure in the OPA 120 area, it remains that the Tribunal's reasons intelligibly explain its findings that the planning instruments, permitting the development of that area, were consistent with the PPS and conformed with the OP. Specifically, in the context of its finding of the City's longstanding plan to develop the area to accommodate its future growth, the Tribunal found that the development of the OPA 120 area was now *required*, in order to meet the City's land needs in a manner consistent with PPS policy 1.1.2.

[117] Second, the Tribunal expressly addresses CAMPP's submissions that OPA 120 will result in urban development of agricultural land in active use, thereby resulting in an inconsistency with PPS policy 1.1.3 (which is designed to protect resources and greenfield land). In so doing, the Tribunal expressly found that while active farmland exists in the OPA 120 area, from a planning perspective, that land has not been designated as "agricultural" since 2007, when OPA 60 was approved and the area was placed in the City's settlement boundary and designated for future urban use (para. 85). The Tribunal also determined that the development of the active farmland in the OPA 120 area was not premature because the needs analysis that it accepted justified development of that land since "*both the [OPA 120] area and existing infill cites within the City are required to meet the population's growing demand for urban land uses*" (emphasis added) (para. 84).

[118] The Tribunal's reasons also explain the manner in which OPA 120's agricultural transition policy supports its findings of consistency. At paragraphs 84-87 of its reasons, the Tribunal expressly considered the provisions of OPA 120 that prescribe a demand-based approach to the conversion of active farmland to urban use, pursuant to which tracts of land in the subject area are permitted to remain in crop production until it is actually necessary to utilize the land for urban use. The Tribunal found that OPA 120's approach to agricultural transition: is consistent with the PPS policies that "*fervently protect agricultural land, especially prime land, unless fully justified for other uses*"; constitutes the very basis of land use planning envisioned by the PPS; and results in "*the efficient use of urban land and avoids the premature conversion of agricultural land*" (paras. 85-87).

[119] Third, the Tribunal's reasons expressly address and dispose of the substance of CAMPP's identified "climate change" policies issues founded in concern over flooding in the OPA 120 area. As part of its challenge to the ZBA before the Tribunal, CAMPP submitted, among other things, that the ZBA did not conform to relevant PPS policies because "locating the new hospital (and surrounding subdivision) on greenfield land will place Windsor at a greater risk of flooding".[58] At paragraphs 80-81 of its reasons, the Tribunal

---

[58] See CAMPP's Written Outline of oral submissions "Issue 17 – Public health and flooding".

reviews aspects of the evidence that it received concerning "stormwater management and drainage", and makes related findings of fact in support of its conclusion that "*[OPA 120] and the ZBA satisfy the consistency and conformity tests and...the City will ensure that the new hospital and other developments with[in] the [OPA 120] area will not be located on hazardous land.*" In the foregoing paragraphs, the Tribunal explains the basis for its consistency and conformity conclusions, in a manner that permits appellate review.

[120] Finally, the Tribunal's reasons address and dispose of the substance of CAMPP's submission that the location of the new hospital will result in increased greenhouse gas emissions, as a result of an anticipated increase in vehicular travel associated with the new site. In its Written Outline of oral submissions before the Tribunal under the heading "Issue 20 – Transit & Active Transportation Issues, CAMPP posited that the ZBA is inconsistent with PPS policy 1.8.1[59], because the distance and frequency of vehicle trips to the new hospital will be greater for residents living in the central part of the City than that which they currently experience when accessing the City's two existing hospital sites. In turn, CAMPP reasoned that increased vehicle use and travel distance will increase traffic congestion, energy use and greenhouse gas emissions, contributing to climate change.

[121] In its reasons, the Tribunal expressly acknowledged: CAMPP's submission that OPA 120 is inconsistent with several PPS policies because, among other things, it's location and design are inefficient, *car dependent* and not transit supportive (para. 52) and; that CAMPP raised several issues of mobility, *including distance*, transit, accessibility, active transportation and *vehicle trips* (para. 62). Through the course of its reasons, the Tribunal made findings that specifically address the multi-part criteria of PPS policy 1.8.1, including:

(i) OPA 120 comprehensively planned for the City's growth as justified by the needs analysis it accepted (para. 57);

(ii) OPA 120 provides for a mix of uses, densities and modes of transport (para. 57);

(iii) the hospital's location within a planned area of the City, will be adjacent to residential, commercial, business park and natural areas accessible by walking, cycling and transit (paras. 59 and 61);

(iv) planned transit services will ensure access for persons traveling from a distance who cannot, or choose not, to drive (para. 59)

(v) separate Environmental Assessment approvals related to OPA 120 provide for active modes of travel in relation to the OPA 120 area (para. 59);

---

[59] Reproduced previously above.

(vi) the new hospital is intended to serve a region and the proposed hospital site will provide service to all residents whether nearby, across the City or in the outlying areas served by the WEHS (paras. 61 and 71)

(vii) the policies set out in OPA 120 provide that a full range of transportation options are promoted at every opportunity, guidelines for each phase of the development within the OPA 120 area will address transportation including trails and cycling routes and mixed-use areas will support public transit, walking and cycling (para. 67); and

(viii) OPA 120 was prepared in conjunction with transportation planning and "provisions and plans" have been made to ensure transit and active forms of transportation are incorporated in the build-out of the OPA 120 area (para. 68);

[122] In the context of its findings above, the Tribunal expressly acknowledged CAMPP's submission that when compared to the City's two existing hospital sites, the proposed site for the new hospital will generate, on average, a 27 percent increase in travel distance (para. 69). The Tribunal then explained that its task was not to compare one hospital site to another, or the existing hospital sites to the proposed site. Instead, its focus was whether the planning instruments met the consistency and conformity tests set out in the *Planning Act* (para. 71). The Tribunal further reasoned that although it may be "ideal" to locate all large services and facilities, such as a hospital, in the centre of an urban area, which would minimize the total travel distance of all residents to those facilities, such ideals are not practical or possible in the actual and gradual evolution of a City. In particular, it found that Windsor's downtown area is not presently "centered" in the City, which has grown from its northern river-side location (para. 72). Finally, the Tribunal determined that the mobility and accessibility issues related to the OPA 120 area that CAMPP raised, are addressed by the City's policy commitment to servicing the hospital site with public transit and by its integration with existing and future neighbourhoods, business areas and transportation corridors (para. 72).

[123] The foregoing findings: were immediately preceded by the Tribunal's recitation of various PPS policies, including policy 1.8.1[60]; and were made, in part, in response to CAMPP's submissions with respect to the anticipated increased distance that some residents will be required to travel in order to attend the new hospital location. CAMPP's position and submissions about increased vehicular traffic and travel time/distance comprised the substance of this aspect of its position with respect to the "increased greenhouse gas" emissions posed by the OPA 120 and the ZBA. In the context of its factual findings, the Tribunal's reasons explain why it found that OPA 120 and the ZBA were consistent with the PPS and the ZBA conformed with the OP, notwithstanding the travel frequency and distance issues raised by CAMPP.

---

[60] Tribunal Reasons, at para. 63.

[124] In summary, the Tribunal addressed the substance of CAMPP's various "climate change policies" submissions as part of its determination of the broader enumerated main issues raised by CAMPP. The Tribunal identified the relevant PPS and OP "climate change" policies, acknowledged CAMPP's positions, and explained its dispositive findings of consistency and conformity. The Tribunal was not required to discuss all the evidence (including participant statements), expressly consider every issue, explain the basis for every one of its findings, or address every argument raised by CAMPP. In the foregoing context, there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the adequacy of its reasons related to CAMPP's submissions concerning "climate change policies". Leave for this proposed ground of appeal is therefore denied.

Proposed Ground 4:

Did the LPAT err in law by relying on expert evidence provided by the City conflicting with other evidence provided by the City, that was never resolved?

The Issue

[125] In this proposed ground of appeal, CAMPP effectively contends that in arriving at its findings that the requisite "need" to justify the development of the OPA 120 area existed, the Tribunal "misapprehended the evidence" because it failed to reconcile: a discrepancy between the employment-growth projection evidence it ultimately accepted and other asserted conflicting evidence adduced by the City; and an asserted incompatibility between evidence of City-wide employment-growth projections and population-growth projections. CAMPP also takes issue with the adequacy of the Tribunal's reasons because the Tribunal did not expressly refer to the asserted conflicting evidence about employment-growth projections.

[126] Some context is warranted.

The Evidence and Proceedings Before the Tribunal

[127] In finding that the requisite "need" prescribed by PPS 1.1.2 existed, the Tribunal accepted Ms. Wiebe's (MHBC) evidence about the City's projected employment growth over the applicable 20-year planning period. It also found favour with the evidence of the Altus Group's Mr. Keleher concerning his subsequent peer-review analysis of MHBC's growth projections. CAMPP did not adduce evidence about the City's projected employment growth, from its own qualified expert.

[128] MHBC concluded that during the planning period, designated land is required in the OPA 120 area to accommodate the City's anticipated 20-year demand for new "employment land", after accounting for infilling and intensification of the City's existing developed areas. MHBC began its analysis by referring to a "Study of the Need for Employment

Lands" prepared for the City in 2008.[61] The study projected that between 2007 and 2026 the number of jobs in the City at "fixed places of work" would grow by 21,140 under a base case scenario. That projection was then incorporated into the provisions of the City's OP. Not all of the projected jobs were expected to be on lands specifically designated for employment. Rather, the study projected a demand for employment lands sufficient to accommodate an additional 9,445 jobs in the period from 2007 to 2026.

[129] In its analysis, MHBC recognized that the employment rate in Windsor declined in the period from 2006 to 2011, and steadily increased thereafter. To account for the City's economic history, MHBC used the prior study's anticipated job growth on lands specifically designated for employment (i.e. 9,445 new jobs), as a projection to the year 2031 instead of 2026. MHBC also determined that the available supply of employment land within the developed areas of the City, in January 2018, was sufficient to accommodate 6,880 new jobs. It calculated that there was "need" to designate an additional 143.5 ha of land in the OPA 120 area for employment use, to accommodate the remaining 2,565 projected new jobs "on lands specifically designated for employment".[62]

[130] Mr. Keleher opined that MHBC conducted its growth analysis in a reasonable manner, and he adopted its methodology in his own analysis of the City's projected employment land need. Unlike MHBC, Mr. Keleher had the benefit of 2016 census data available to him when he performed his analysis. Ultimately, he concluded that MHBC's projection of the amount of land required in the OPA 120 area for employment use was understated by approximately 30 ha. Mr. Keleher also deposes that: MHBC's estimate of employment-land need is consistent with the City-wide employment forecast already set out in s. 1.1.3 of the City's Official Plan; and MHBC's estimate of employment-land need strives to "implement the policies and forecasts of the OP by ensuring that the City has sufficient employment land available to plan for 2036".

[131] Mr. Keleher 's evidence discloses that apart from MHBC's analysis, the City received employment projections relevant to the OPA 120 area as part of Hemson Consulting Limited's (Hemson) 2018 Sandwich South Development Charge Amendment Background Study. That study projects that between 2018 and 2036, 10,997 new jobs will be added in the City's Sandwich South area, which includes the OPA 120 area. Relevant excerpts from the study are appended to Mr. Keleher's affidavit. Prior to swearing his affidavit, Mr. Keleher made similar observations in correspondence to City council dated August 9, 2018. In his correspondence, among other things, he cited Hemson's employment-growth projections from its 2018 Development Charge Amendment Study and indicated that the

---

[61] The prior study was not prepared by MHBC or the Altus Group.

[62] MHBC also projected that a total of 6,993 jobs would be generated through development of the OPA 120 area, but not all of them would be "new" jobs. It acknowledged that many of the jobs would not be realized until sometime after 2031. Further, MHBC concluded that although the hospital itself would generate approximately 3,000 jobs, many of those jobs would be transferred from the other existing hospital sites in the City. It projected that a planned business park in the OPA 120 area should reach employment densities of 50 jobs per ha, but the development of lands for that purpose would likely be undertaken after 2031. Finally, it estimated that excluding the hospital jobs, a total of 1,900 jobs would be accommodated in the OPA 120 area by 2031.

City had also received employment-growth projections, on a City-wide basis, in a 2015 City-wide Development Charge Background Study that was also conducted by Hemson. The results of the 2015 study are not set out in Mr. Keleher's correspondence nor his affidavit evidence before the Tribunal.

[132] In the appeal record it filed with the Tribunal, CAMPP excerpted a *very brief portion* of the 2015 Hemson Development Charge Study, ostensibly forecasting employment growth of an additional 2,600 jobs in the City by 2025[63], which CAMPP asserts is evidence that conflicts with the employment-growth projection evidence from MHBC and Altus Group. The excerpt was accompanied by a "hyperlink" provided by CAMPP to a full copy of the 2015 Hemson study, maintained on the City's website. CAMPP did not refer to the content of the 2015 Hemson study nor its asserted conflict with the growth projection evidence, in either of its LPAT case synopses or its Written Summary of oral submissions that it filed with the Tribunal. Instead, CAMPP raised the 2015 Hemson study excerpt in support of a very brief reply submission to the Tribunal that Hemson's 2015 projection of 2,600 additional jobs could not be reconciled with the evidence relied on by the responding parties, which projected 21,000 additional jobs.

[133] The City and WRH objected to CAMPP's submission, arguing that the 2015 Hemson study was not part of the record and, in any event, the full document was not available to the Tribunal. In response, CAMPP posited that since the 2015 study was "mentioned" in Mr. Keleher's August 2018 correspondence, which formed part of the Enhanced Municipal Record, the entire content of the 2015 Hemson study formed part of the LPAT record. Nonetheless, after raising the asserted conflicting employment-growth projections, CAMPP withdrew its efforts to file additional documentation from the 2015 Hemson study with the Tribunal.

[134] The Tribunal found OPA 120 to be consistent with PPS policy 1.1.2. In arriving at that finding, the Tribunal:

(i) expressly acknowledges CAMPP's position that: OPA 120 is premature and unnecessary for the City to meet its population and employment projections; and the methodology used to calculate land needs that the responding parties relied on, is flawed (para. 44);

(ii) expressly acknowledges the responding parties' position that CAMPP fundamentally misunderstood the results of the growth management analyses conducted by MHBC and the Altus Group (para. 45);

(iii) cites PPS 1.1.2 (para. 46);

---

[63] The excerpt, in its entirety states: "Employment in Windsor is forecast to grow by approximately 2,600 employees over the next ten-years, 600 of which will be in new non-residential space."

(iv) expressly refers to the substance of MHBC's analytical approach to the City's projected growth in demand for both residential and employment land during the 20-year planning period (para. 47);

(v) finds that MHBC's growth management analysis justifies the need for residential and employment land in the OPA 120 area (para. 47);

(vi) expressly refers to the substance of Mr. Keleher's evidence (paras 48-49);

(vii) finds that no apprehensions were raised by Altus Group's peer-review of MHBC's land needs study, as to the justification for the residential and employment areas in OPA 120 and its peer-review suggests that the OPA 120 area could have been larger (para. 49);

(viii) finds that the needs analysis required by the PPS is met through the MHBC study, the "robust" Altus Group peer-critique and the conservative MHBC results (all of which the Tribunal found to be "thoroughly substantiated studies") (para 50);

(ix) finds the land designated for employment uses in the OPA 120 area is reasonable, especially given its likelihood to understate potential demand (para. 50);

(x) finds there is no evidence to support CAMPP's assertion that the projections and land needs calculations adduced by the responding parties are flawed (para.50);

(xi) finds two-thirds of the City's projected employment land needs will be met through existing properties and the remaining one-third will be accommodated in the OPA 120 area, which are allocations that represent a reasonable approach, consistent with the PPS when planning for a growing City (para. 51).

Position of the Parties

[135] CAMPP asserts that the Tribunal erred in law by failing to address evidence and submissions that CAMPP now says were *central* to its position that there was insufficient "need" to justify the designation of "employment land" in the OPA 120 area. It reasons that MHBC's evidence projecting 21,140 new jobs in the City during the planning period, which the Tribunal accepted, conflicts with the excerpt from the 2015 Hemson City-wide Development Change Study, which projected total job growth of 2,600 jobs from 2015 to 2025. The Tribunal failed to address that conflict in its reasons, despite CAMPP's reply submission on the point. As a result, it erred in law.

[136] CAMPP also contends that the Tribunal erred in law by failing to expressly address the reasonableness of MHBC's evidence of projected employment growth of 21,140 jobs, in the context of OPA 120's own projection of City-wide population growth of 7,751 persons by 2031 (and a potential decline in population from 2031 to 2036, owning to "an aging demographic"). CAMPP asserts that it is not possible to reconcile the evidence of 21,000 plus new jobs in a Region with a population growth of less than 8,000 prospective

employees. It says the Tribunal erred in law by failing to expressly confront and resolve that issue.

[137] Finally, CAMPP argues that proceeding with a development that will affect hospital services for the Region, as well as hundreds of acres currently used as farmland, is a matter of general and public importance.

[138] The responding parties contend that the true nature of CAMPP's complaint is one of mixed fact and law, for which leave cannot be granted. Specifically, CAMPP quarrels with the Tribunal's final conclusion, following the weighing of affidavit evidence and argument. Further, the Tribunal's decision with respect to the evidence of "need" accords with the parties' submissions before it. The Tribunal understood CAMPP's submissions asserting that there was "insufficient need to justify OPA 120" and gave reasons why the needs analyses provided by WRH's consultants was accepted. There is no reason to doubt the correctness of the Tribunal's reasons.

[139] Finally, this proposed ground of appeal does not raise a question of law that is of sufficient public or general importance to merit the attention of the Divisional Court. The controlling issue is not whether planning for a hospital is important. The issue is whether the specific legal questions raised by CAMPP, concerning alleged conflicting evidence and the adequacy of the Tribunal's reasons, meets the requisite legal criteria for leave. They do not because the questions are specific to the circumstances of the present case.

Disposition

[140] I accept that this proposed ground of appeal raises questions of law, with respect to the adequacy of the Tribunal's reasons and its asserted failure to address evidence and submissions now said by CAMPP to have been central to its position before the Tribunal. However, I do not find that when the Tribunal's reasons are considered in the context of the totality of the evidence and the parties' submissions, there is reason to doubt the correctness of the Tribunal's decision, with respect to a question of law, because it made findings consistent with the MHBC employment land needs analysis, without expressly referring to the 2015 Hemson study excerpt. I will explain by first identifying the legal principles applicable to CAMPP's assertion that the Tribunal erred in law through a misapprehension of evidence, by failing to consider evidence that was relevant to a material issue.

[141] A misapprehension of evidence may involve: a failure to take into account an item or items of evidence relevant to a material issue; a mistake about the substance of the evidence; or a failure to give proper effect to evidence.[64]

[142] A stringent standard of review applies to a ground of appeal advanced as a misapprehension of evidence. Not every misapprehension of evidence renders a trial unfair or results in a

---

[64] *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 538.

miscarriage of justice. An appellate court must determine the nature and extent of an alleged misapprehension and its significance to the decision under review.[65] The relevant evidence must: relate to matters of substance rather than detail; must be material, rather than peripheral, to the decision-maker's reasoning; and must relate to essential parts of the reasoning process rather than narrative. In other words, the evidence must play *an essential part* in the reasoning process resulting in the ultimate decision.[66] When assessing this proposed ground of appeal, it is important to distinguish between minor variations in evidence and major inconsistencies. A decision-maker is not required to refer to every inconsistency in the evidence.[67] However, where a piece of *critical* evidence is omitted from the reasons and the appellate court concludes it was a piece of evidence the decision-maker was required to examine, it can be reversible error.[68]

[143] In arriving at its decision, the Tribunal was required to consider all of the relevant evidence material to the issues of consistency and conformity, but it was not obliged to expressly discuss all of the evidence on any given point or answer each and every argument of counsel, in its reasons. While the failure to consider all of the evidence is an error of law, unless the reasons demonstrate this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in that respect.[69]

[144] Guided by the legal principles above and for the reasons below, assuming the excerpt from the 2015 Hemson study was properly before the Tribunal as evidence, the Tribunal's failure to specifically *refer* to that evidence in its reasons, does not provide reason to doubt the correctness of the decision on the basis that the Tribunal failed to "*consider* all of the evidence". I reach that conclusion for a number of reasons, which are set out below.

[145] First, the Tribunal's reasons, as a whole, do not demonstrate that it *failed to consider* all of the relevant evidence in arriving at its decision. After acknowledging CAMPP's position regarding the alleged flawed analysis and calculations underwriting the MIIBC and Altus Group's respective projections, the Tribunal engaged in a reasoned and considered acceptance of MHBC's evidence about projected employment growth during the planning period from 2016 to 2036. Among other things, the Tribunal concluded that MHBC's analysis was reasonable, its study was thoroughly substantiated and there was no evidence to support CAMPP's suggestion that the MHBC's projections and calculations were flawed. As I will explain below, the latter finding is consistent with the nature and evidentiary quality of the 2015 excerpt, measured in the context of the evidence as a whole. It is also consistent with the Tribunal considering the excerpt and determining in the context of the totality of the evidence, that it did not support CAMPP's contention that MIIBC's analysis and calculations were flawed.

---

[65] *Morrissey*, at p. 541.
[66] *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. *732*, at para. 2.
[67] *R. v. Sweitzer*, 2013 ONCA 60, at para. 1; *R. v. D.T.*, 2014 ONCA 44, at para. 78.
[68] *R. v. K.A.*, 2013 ONCA 410.
[69] *R v. Tippett*, 2015 ONCA 697, at para. 51.

[146] Second, although the Tribunal did not expressly refer to the 2015 excerpt in its reasons, it was not required to do so, in the circumstances before it. It was not necessary for the Tribunal to refer to every inconsistency in the evidence, or to expressly consider every issue raised, discuss all the evidence, or address every argument made by CAMPP.[70] As presented, the 2015 Hemson study excerpt did not give rise to a "major inconsistency" or "significant evidentiary conflict" and it did not unequivocally contradict MHBC's employment-growth analysis evidence. The excerpt is not temporally comparable to the MHBC growth-projection evidence. The job growth projections in the excerpt are made over a 10-year period that ends 11 years before the end of the planning period applicable to OPA 120, the latter of which informed the MHBC and Altus Group analyses.

[147] Third, the 2015 excerpt, on its face, does not inform one of the primary challenges to the MHBC and Altus projections that CAMPP advanced before the Tribunal, namely, "flawed methodology and calculations". The methodology and analysis engaged in by both MHBC and the Altus Group is transparently disclosed in the report and affidavit evidence that was before the Tribunal. Conversely, the 2015 excerpt that CAMPP quoted and relied on before the Tribunal is limited to a single conclusory statement of opinion in the absence of: an articulated basis for the opinion; disclosure of the methodology upon which it is based; and disclosure of the identity and qualifications of the individual expressing the opinion. The Tribunal's ability to place weight on the excerpted opinion was circumscribed, in the foregoing circumstances. After objection, CAMPP abandoned its efforts to put further documentation from the 2015 Hemson study before the Tribunal, which, if admitted, may have informed the issues above.

[148] Fourth, the 2015 excerpt was not Hemson's "final word" on employment-growth projections. The Tribunal received evidence of a more contemporaneous analysis from Hemson, in the form of its 2018 Development Charge Amendment Study, that projected employment growth of nearly 11,000 jobs in the City's Sandwich South area (which includes the OPA 120 area), during the planning period applicable to OPA 120. The uncontradicted evidence before the Tribunal indicates that Hemson's 2018 projections were consistent – not in conflict – with MHBC's employment-growth analysis.

[149] Fifth, apart from the issues that detract from the significance of any evidentiary conflict arising from the 2015 Hemson study, the record discloses that CAMPP did not position the 2015 excerpt as "central evidence" on a key issue before the Tribunal. CAMPP did not reproduce or integrate the impugned excerpt nor advance any arguments specific to its asserted effect on the assessment of the employment growth evidence relied on by the responding parties, in its LPAT case synopses nor its written outline of oral submissions before the Tribunal, and it did not reference the 2015 Hemson study when it identified the key issues in its case synopsis related to OPA 120.[71] Instead, CAMPP first raised the 2015

---

[70] *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 30.

[71] See Case Synopsis: PL180842 at para 4.

Hemson study excerpt in a brief reply submission, which its counsel characterized as a "small portion" of the reply submissions[72], stating[73]:

> The response that we are making is to paragraph 86 of the Hospital submissions, page 27, where there's a projection of 21,000 jobs. Again, it does not appear to be reconcilable to say that Hemson is saying 2600 jobs, which is in the evidence at the location I've just said, with the 21, 000 job number.

[150] CAMPP's limited submission concerning the excerpt from the 2015 Hemson study did not address: the potential disparity between the employment projections set out in the excerpt and the employment projections that were already incorporated in the City's OP (which were consistent with MHBC's analysis); the disparity between Hemson's 2015 projection and Hemson's 2018 projections; the fact that the 2015 excerpt's growth projections applied to a time period that significantly differed from the planning period applicable to OPA 120; nor the Tribunal's ability to safely rely on the excerpted opinion, in the absence of evidence concerning the methodology from which it was derived and the identity and qualifications of the individual expressing it.

[151] In all of the circumstances, there is no reason to doubt the correctness of the Tribunal's decision simply because it did not expressly refer to the 2015 excerpt in its reasons. Even in the absence of an express reference to the excerpt, the Tribunal's reasons explain why it accepted the employment-growth projection evidence that it did. It was not necessary for the Tribunal to specifically state in its reasons that it was accepting MHBC's evidence "notwithstanding the 2015 Hemson excerpt". It is clear that the Tribunal's reasons do not demonstrate that it failed to undertake a consideration of all the evidence in relation to the ultimate issue of consistency. Therefore, the fact that the excerpt was not expressly referred to in its reasons is not a proper basis for concluding that there is reason to doubt the correctness of its decision.

[152] The moving party has failed to demonstrate that there is reason to doubt the correctness of the Tribunal's decision in respect of a question of law arising from the assertion that it engaged in a material misapprehension of the evidence by accepting projected employment growth evidence from MHBC and Altus Group, without expressly referring to the excerpt from the 2015 Hemson study in its reasons.

[153] Similarly, CAMPP's submission that the Tribunal erred in law, by failing to provide adequate reasons addressing the effect it gave to the 2015 Hemson study excerpt does not constitute a reason to doubt the correctness of the Tribunal's decision. The focus of this aspect of the Tribunal's reasons is whether OPA 120 is consistent with PPS policy 1.1.2 because sufficient need existed to justify development of a designated growth area. The Tribunal's reasons explain why it accepted the evidence of projected employment growth

---

[72] Transcript of CAMPP's Reply Submissions before the Tribunal at page 6.
[73] Transcript of CAMPP's Reply Submissions before the Tribunal at page 61-62.

from MHBC. It made positive findings with respect to the quality of that evidence and the corroborative support it received from the Altus Group peer-review study, which are set out above. The Tribunal's reasons make clear that its reasoned acceptance of MHBC's evidence founds its determination that the development of the OPA 120 area is not premature, and that OPA 120 is, therefore, consistent with PPS policy 1.1.2. In arriving at its conclusion, the Tribunal's reasons seize and dispose of the central issue before it, by intelligibly explaining the basis for its decision in a manner that permits meaningful appellate review.

[154] I now turn to the second aspect of this proposed ground of appeal. CAMPP posits that the LPAT erred in law by failing to resolve its submission that "it is not possible to reconcile 21,000 plus new jobs in a Region with a population growth of less than 8,000".[74] CAMPP reasons that if *the City's* population only grows by 7,750 people during the planning period and its working-age population is in decline, it will be impossible to fill 21,000 projected new jobs.

[155] There is no reason to doubt the Tribunal's decision with respect to a question of law, as a result of this aspect of the proposed ground. The totality of the evidence before the Tribunal does not support the "irreconcilable conflict" urged by CAMPP. There was ample evidence before the Tribunal capable of supporting its findings with respect to projected employment growth in a manner that is consistent with the population-growth projection set out in the OPA 120, itself.

[156] Mr. Keleher provides uncontradicted evidence that the employment-growth projection that formed part of the City's OP before OPA 120, which is consistent with the projection of 21,140 new jobs in Windsor by 2031, had already accounted for the City's shifting population dynamics upon which CAMPP now relies.[75]

[157] Further, there was no evidence before the Tribunal suggesting that the City-wide employment growth projected by MHBC was limited to new employment positions filled exclusively by residents of the City, itself. Instead, the Tribunal received uncontradicted expert evidence concerning: the anticipated population growth in the County of Essex surrounding the City; and the potential impact of such growth on the City's employment growth. Mr. Keleher deposes that data from the 2016 census demonstrates that between 1996 and 2016, the County experienced a greater growth in its population (29,108 persons) than the City (19,494 persons); and the Essex County Official Plan projects that the County's population will grow by 30,745 persons between 2016 and 2031, which is also greater than the growth projected for the City over a similar period of time.[76] He explains that depending on the inflow of employees from outside the City, it will be possible for the City to experience employment growth even though the City's working-age population is projected to decline. Economic centres, such as Windsor, often have the highest activity

---

[74] Both figures refer to City-wide growth projections.
[75] Keleher Affidavit, at paras. 67-68.
[76] Keleher Affidavit, at paras. 92-95.

rates (the ratio of population to jobs) while surrounding areas typically have lower activity rates. Therefore, while "population" and "the number of jobs" in a City are related, there can be deviations in their respective rates of growth.[77]

[158] Therefore, the evidence, as a whole, does not support the existence of the "irreconcilable evidentiary conflict" that is said to found this aspect of CAMPP's proposed ground of appeal. The evidence before the Tribunal explains why, in general, a municipality's population growth and employment growth can deviate, and provides data with respect to the County's anticipated population growth that is capable of explaining the case-specific deviation that founds CAMPP's position. In the absence of a demonstrable "irreconcilable conflict" in the evidence, there is no reason to doubt the correctness of the Tribunal's decision, as a matter of law, on the basis that it failed to expressly confront the alleged evidentiary conflict in its reasons.

[159] For the foregoing reasons, the moving party has failed to demonstrate that there is reason to doubt the correctness of the Tribunal's decision with respect to any question of law that arises from this proposed ground of appeal. As a result, leave to appeal with respect to this proposed ground is denied.

Conclusion on Motion for Leave to Appeal

[160] For all of the reasons set out above, I am not persuaded that the moving party has met its onus to establish that leave to appeal should be granted with respect to any of its proposed grounds of appeal. The motion shall therefore be dismissed. I will address the issue of costs below.

Costs

[161] Pursuant to the parties' partial agreement on costs, given their success on the leave to appeal motion, each of the responding parties is to be awarded partial indemnity costs of that motion in the amount of $10,000 plus HST, *in the event* that costs are determined to be payable by CAMPP. In the ordinary course, costs would follow the event and costs of the motion would be awarded against CAMPP.

[162] However, CAMPP submits that the court should exercise its discretion to order that no costs are payable by it, on the basis that it is a public interest litigant. In that regard, it relies on the reasoning expressed in *Citizens for Riverdale Hospital v. Bridgepoint Health Service and City of Toronto* (October 9, 2007) Ontario 85/07 (Div. Ct.) and *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (S.C.).

[163] The responding parties submit that costs in the agreed upon amount should be awarded in their favour. They dispute CAMPP's status as a public interest litigant. They reason that CAMPP's status as a "residents group" is only one factor to be considered in the court's

---

[77] Keleher Affidavit, at paras. 69-71.

exercise of its discretion with respect to costs. It does not automatically entitle CAMPP to preferential costs treatment. In all the circumstances, the interests of justice require CAMPP to pay costs. In addition, the City argues that its citizens should not be compelled to bear all of the City's legal costs because a small group of citizens brought unsuccessful motions before the court.

[164] In determining the parties' differences, I will start by deciding whether CAMPP ought to be regarded as a "public interest litigant" for the purpose of the disposition of costs issues. The criteria applicable to that determination is set out in *Durham Citizens Lobby for Environmental Awareness and Responsibility Inc. v. Durham (Regional Municipality)*, 2011 ONSC 7143, at para. 51 as follows:

> (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;
>
> (b) the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;
>
> (c) the issues have not been previously determined by a court in a proceeding against the same defendant;
>
> (d) the defendant has a clearly superior capacity to bear the costs of the proceeding; and
>
> (e) the litigant has not engaged in vexatious, frivolous or abusive conduct.

[165] CAMPP argues that it meets all the criteria set out above. It says that it has raised previously undetermined issues that address community interests outside of its membership, including: the provision of emergency services; the consideration of climate change; and adequate consultation with Indigenous communities. Further, it has no pecuniary interest in the outcome of the proceeding and there is no evidence that it has engaged in "vexatious, frivolous or abusive conduct."

[166] The responding parties do not dispute that CAMPP satisfies the second and third criteria applicable to the "public interest litigant" determination. They also take no issue with the fifth criterion, in the context of CAMPP's leave to appeal motion, but they do not make the same concession in respect of CAMPP's preliminary motions to adduce fresh evidence and to amend its notice of motion for leave to appeal, which I will discuss later in these reasons.

[167] For the reasons that follow, I am satisfied that CAMPP meets the criteria of a public interest litigant in the context of its leave to appeal motion.

[168] In the circumstances of this proceeding (a motion for leave to appeal), the issues that CAMPP raised transcend the interests of the parties and engage broad societal concerns of importance to the community. In arriving at that conclusion, I have remained mindful that the determination of whether the importance of the issues in the proceeding transcend the

interests of the parties, requires the court to consider the importance of the specific issues raised in the legal proceeding, as opposed to the grand goals of the purported public interest litigant: see *Durham Citizens Lobby*, at para. 54. I, therefore, accept the responding parties' position that CAMPP's wider goal of opposing the selected site for the new hospital does not inform the first requirement of the public interest litigant test.

[169] However, I do not accept the responding parties' submission that CAMPP's "complaints and questions" about the adequacy of the Tribunal's reasons that founded its leave to appeal motion fail to transcend the interests of the parties. Although the responding parties' position finds some support in the costs endorsement quoted in *Yerex v. CYM Toronto Acquisition LP*, 2019 ONSC 2862, at para. 17, the circumstances of this case are more nuanced.

[170] Although the determination of the public interest litigant issue is not informed by CAMPP's broader goal related to the chosen hospital site, in my view, when deciding that issue, it is appropriate to consider the underlying subject matter to which the Tribunal's asserted legal errors are said to relate. The majority of CAMPP's proposed grounds of appeal were primarily founded in its assertions that the Tribunal erred in law, because: several aspects of its reasons were inadequate; and it materially misapprehended evidence. All of the issues that were the subject of CAMPP's claims of inadequate reasons and misapprehension of evidence were, by their nature, matters of public interest in the sense that they engaged broad societal concerns of significant importance to the community, in particular ensuring that land use planning is implemented in a manner that is consistent and conforms with applicable policies related to: residents' accessibility to emergency services; permitting the development of greenfield land only when necessary; and minimizing the impact of urban development on air quality and greenhouse gas emissions.

[171] The legal issue of "adequacy of reasons", itself, also consists of a public interest element since adequate reasons function, in part, to ensure public accountability in the decision-making process. I do not suggest that an assertion of inadequate reasons will be sufficient to satisfy the first requirement of the public interest litigant test, in every case. However, in this instance, based on the subject matter of the asserted inadequacies in the Tribunal's reasons, I am satisfied that CAMPP has established that "the proceeding involves issues, the importance of which extends beyond the immediate interest of the parties involved".

[172] I now turn to the disputed fourth criterion of the public interest litigant test, specifically, whether the responding parties have "a clearly superior capacity to bear the costs of the proceeding". I accept that both the City and WRH have the capacity to bear their own costs of the motion for leave to appeal and that their respective capacities to bear costs are likely greater than CAMPP's capacity, in that regard. But, as the City correctly submits, that does not necessarily dispose of the issue.

[173] I accept the City's position that its financial resources are entirely dependant on its taxpayers and, as a result, a determination that CAMPP is not obligated to pay any costs to the City, despite the City's success on the motion, would effectively shift the financial burden of CAMPP's unsuccessful motion from one group of concerned citizens (CAMPP)

to all of the City's citizens. Since the parties have agreed that in the event CAMPP is ordered to pay costs, it will do so on a partial indemnity basis, the City's residents will be forced to bear a portion of the legal expenses the City incurred in responding to CAMPP's leave motion, even if costs in the agreed upon amount are awarded in the City's favour. In the event that a costs award is not made in the City's favour, those residents will likely be required to pay even more. In the circumstances of this proceeding, such a result would not be fair, just or reasonable.

[174] Despite CAMPP's pursuit of the result it believed was in the public interest, it remains that its effort to secure leave to appeal to the Divisional Court was unsuccessful because its proposed grounds of appeal failed to identify any question of law, for which there was reason to doubt the correctness of the Tribunal's decision. In short, its motion for leave lacked any merit.

[175] In the circumstances of this case, I am persuaded to follow the reasoning in *Southgate Public Interest Research Group v. Southgate (Township)*, 2012 ONSC 6961, at paras. 54-56. The City's ability to bear its costs is entirely offset by the fact that an order that CAMPP pay no costs, would compel the City's residents to bear all the City's costs occasioned by CAMPP, in its pursuit of relief that was patently unjustified. Therefore, while I accept that CAMPP may be characterized as a public interest litigant, I am not persuaded that it should be relieved of an obligation, as the unsuccessful party, to pay costs to the City. Its status as a public interest litigant does not automatically immunize it from an award of costs, rather, it remains a factor to be considered by the court in exercising its discretion with respect to costs. After such consideration, I am of the view that in the circumstances of this case, it would be unjust, unfair and unreasonable to deny the City its costs of the leave motion.

[176] Similarly, I am not persuaded that CAMPP's status as a public interest litigant ought to immunize it from an award of costs in favour of WRH. As I indicated above, CAMPP's position on each of its proposed grounds of appeal was without merit. Nonetheless, WRH, a publicly funded hospital, was required to incur legal expenses to respond to CAMPP's leave motion. In my view, a costs disposition that compelled WRH to bear the entirety of its costs, in the circumstances of this case, would be an unfair, unjust and unreasonable result. In the absence of the parties' partial agreement on costs, I would have concluded that owing to CAMPP's status as a public interest litigant, the quantum of costs it would otherwise be obligated to pay to WRH should be reduced. I would have found the appropriate reduction to be 25 percent of the partial indemnity quantum otherwise determined by the court. For reasons set out previously, I would have found that no basis existed to justify a reduction in the quantum of costs payable by CAMPP to the City.

[177] However, based on the parties' written costs submissions, they have apparently framed the impact of a finding of public interest litigant as a binary issue for the court's determination specifically whether CAMPP should be relieved of <u>any</u> obligation to pay costs on the leave motion, should it be found to be a public interest litigant. If it is determined that CAMPP should not be so relieved, the agreement contemplates that CAMPP will be

ordered to pay costs in the agreed upon amount. In that regard, CAMPP's submissions state:

> In the event that costs are awarded, the parties have agreed to the following quantum:
>
> - On the Motion for Leave to Appeal, **$20,000.00 +HST** is to be awarded to CAMPP if CAMPP is successful. **$10,000.00 +HST each** is to be awarded to the City of Windsor and Windsor Regional Hospital if the respondents are successful. [Emphasis added by underline.]
>
> At the same time, CAMPP respectfully takes the position that no costs should be awarded against it because it is a public interest litigant.

[178] For reasons set out above, I do not give effect to CAMPP's position that no costs should be awarded against it. Instead, I find that costs should be awarded in favour of the responding parties. In those circumstances, the parties have agreed to a fixed quantum expressed to the court as follows, "in the event costs are awarded the parties have agreed to the following quantum ... $10,000 plus HST each is to be awarded to [the City] and [WRH] if the respondents are successful."

[179] Therefore, as a term of the order dismissing the leave to appeal motion, CAMPP will be ordered to pay, as costs of its motion for leave to appeal: the sum of $11,300, inclusive of HST in the amount of $1,300, to the Corporation of the City of Windsor and the sum of $11,300, inclusive of HST in the amount of $1,300, to Windsor Regional Hospital.

[180] I now turn to the issues of costs related to CAMPP's unsuccessful preliminary motions to: amend its notice of motion for leave to appeal to include considerations of COVID-19 in this case; and to adduce fresh evidence with respect to COVID-19, in the context of its leave to appeal motion. These motions were argued and dismissed for oral reasons on May 6, 2020, with the issue of costs reserved for determination together with the costs issues arising from the leave to appeal motion.

[181] Similar to the leave to appeal motion, the parties dispute whether CAMPP should be relieved of any obligation to pay costs, despite its lack of success on the preliminary motions. In the event that costs are awarded against CAMPP, the parties dispute the appropriate indemnity basis (partial or substantial) for the award. They have, however, agreed on a quantum for each basis. The agreed upon partial indemnity quantum, in the event costs are awarded, is $5,000, plus HST to be split between the responding parties. The agreed upon substantial indemnity quantum is $8,000, plus HST, to be split between the responding parties.

[182] I have previously determined that CAMPP should not to be insulated from a costs award in relation to its leave to appeal motion, despite its status as a public interest litigant. CAMPP's similar request in relation to its preliminary motions carries even less merit. The

preliminary motions had no chance of success, as a matter of law. The binding appellate authority that this court was compelled to apply established that fresh evidence is not admissible on a motion for leave to appeal. On that basis alone, CAMPP's fresh evidence motion could not succeed. In addition, from a policy perspective, there was good reason not to accede to CAMPP's request to reopen the evidentiary record on an issue that was not raised before the LPAT (COVID-19), particularly in circumstances in which the Tribunal's decision could only be appealed on a question of law, alone.

[183] In its submissions on the preliminary motions, CAMPP also conceded that if its request for leave to adduce fresh evidence was not granted, its motion to amend its notice of motion for leave to appeal should be dismissed. In my view, from their inception, the preliminary motions were destined to fail.

[184] In the circumstances, I am persuaded that costs in respect of the preliminary motions should be awarded against CAMPP in favour of both responding parties. In that regard, I adopt, by analogy, the reasoning expressed in *Hamiltonians for Progressive Development v. Hamilton (City)*, 2014 ONSC 420, at para. 2:

> Counsel, in their submissions, have quite properly addressed the several issues that arise when public interest litigation is before the court. Those issues must be considered when determining whether costs should be awarded on the dismissed leave to appeal motion, but it is not so clear that they should govern a disposition on a threshold or preliminary procedural point. Surely, a public interest litigant, represented by experienced counsel who has been made aware that no time indulgence will be granted, must be held to the same procedural requirements as a private litigant. For that reason alone, [Hamiltonians for Progressive Development] cannot be permitted to avoid an award of costs being made against it.

[185] In this instance, CAMPP brought preliminary motions to expand the evidentiary record before this court on a factual issue that was not before the Tribunal and could not have influenced its decision. As a matter of law, its effort in that regard was misguided. The relief sought could not be granted. The responding parties were compelled to incur legal expenses to respond to CAMPP's motions. As a result, it would be unfair, unjust and unreasonable to permit CAMPP to avoid an award of costs against it.

[186] In determining the disputed issue of the appropriate "indemnity basis" for the costs to be awarded, I am mindful of the discretion afforded to the court pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the factors that ought to be considered when making an award, which are set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (including whether any step in the proceeding was improper, vexatious or unnecessary). Although I find CAMPP's preliminary motions to be misguided and wholly unnecessary, I do not find that the motions were vexatious, motivated by bad faith, or brought for an extraneous purpose. In my view, the motions resulted from CAMPP's excessive cautiousness in the context of a developing global pandemic. In all of the circumstances, the absence of legal merit associated with CAMPP's preliminary

motions provides good reasons to make an award of costs against it. However, I do not find the circumstances justify an order of costs made on a substantial indemnity basis. In my view, a costs award on a partial indemnity basis accords with a fair, just and reasonable result.

[187] For the foregoing reasons, CAMPP shall be ordered to pay costs in the agreed upon amount of $2,825, inclusive of $325 in HST, to each of the responding parties as costs of CAMPP's preliminary motions.

Terms of the Order

[188] An order will go with the following terms:

1. CAMPP's motion for leave to appeal is dismissed;

2. CAMPP shall pay the sum of $11,300, inclusive of HST in the amount of $1,300, to the Corporation of the City of Windsor and the sum of $11,300, inclusive of HST in the amount of $1,300, to Windsor Regional Hospital, as costs of the leave to appeal motion.

3. CAMPP shall pay the sum of $2,825, inclusive of HST in the amount of $325, to the Corporation of the City of Windsor and the sum of $2,825, inclusive of HST in the amount of $325, to Windsor Regional Hospital as costs of its motions to adduce fresh evidence and amend its notice of motion for leave to appeal.

Gregory J. Verbeem
Justice

Released: July 29, 2020

CITATION: CAMPP Windsor Essex Residents Association v. Windsor (City)
2020 ONSC 4612
DIVISIONAL COURT FILE NO.: DC-20-151

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

CAMPP Windsor Essex Residents Association

Appellant

– and –

The Corporation of the City of Windsor, Windsor Regional Hospital and 386823 Ontario Limited

Respondents

REASONS ON MOTION FOR LEAVE TO APPEAL TO THE DIVISIONAL COURT brought pursuant to s. 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, sched. 1

Released: July 29, 2020