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PL090011

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Pemic Komoka Development Corp.
Subject:	By-law No. BL 2008-097
Municipality:	Township of Middlesex Centre
OMB Case No.:	PL090011
OMB File No.:	PL090011

IN THE MATTER OF subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Motion by:	1571145 Ontario Limited
Purpose of Motion:	Request for an Order Dismissing the Appeal
Appellant:	Pemic Komoka Development Corp.
Subject:	By-law No. BL 2008-097
Municipality:	Township of Middlesex Centre
OMB Case No.:	PL090011
OMB File No.:	PL090011

A P P E A R A N C E S :

Parties	**Counsel**
1571145 Ontario Limited	A. Patton
Pemic Komoka Development Corp. and Southmoor Development Corp.	B. Card
Municipality of Middlesex Centre	A. Wright

DECISION DELIVERED BY S. J. STEFANKO AND ORDER OF THE BOARD

1571145 Ontario Limited ("Developer") has brought a motion pursuant to s. 34(25) of the *Planning Act* ("Act") to dismiss the appeal taken by Pemic Komoka Development Corp. ("Pemic") and Southmoor Development Corp. ("Southmoor") of By-law No. 2008-097 ("Designated By-law") passed by the Municipality of Middlesex Centre ("Municipality") on December 3, 2008.

Background

In May 2006, the Developer submitted applications to amend the Municipality's Official Plan and Zoning By-law for approximately 7-78 hectares (19.23 acres) of land located on the south side of Glendon Drive, west of Komoka Road in the Community of Komoka.

The Developer's Official Plan Amendment application resulted in the County of Middlesex, as approval authority, approving Official Plan Amendment No. 19 ("OPA 19") on July 9, 2008. OPA 19 redesignated the subject property from Settlement Commercial to Residential to permit a residential development.

Despite not having made written or oral submissions as part of the Official Plan Amendment process, Southmoor appealed OPA 19 on July 25, 2008. The validity of this appeal, based on the provisions of s. 17(36) of the *Planning Act* ("Act") was immediately challenged and by correspondence dated November 27, 2008 ("Chair's Decision"), the Chair of the Board found that Southmoor did "not have a valid appeal of Official Plan Amendment 19". The Chair's finding was not appealed and OPA 19 became law.

The Developer's Zoning By-law Amendment application resulted in the Municipality passing the Designated By-law on December 3, 2008. This by-law implemented OPA 19 by rezoning the subject land from Existing Use and Highway Commercial to Residential with a holding provision. The holding provision was included because of a lack of sufficient sanitary servicing capacity. According to the Municipality, such a provision prevents premature development of the land. The provision stays in place until a subdivision agreement is entered into with the Municipality and it is shown that adequate sanitary sewage capacity is available to accommodate the development proposed.

Although Pemic did not make oral submissions at a public meeting or make written submissions to the Municipality's Council prior to the passing of the Designated By-law, Pemic and Southmoor appealed such passing in correspondence dated December 22, 2008. As Pemic and Southmoor ("Responding Parties") set out in paragraph 6 of their Factum filed on this Motion, their zoning appeal ("Zoning Appeal") raised the following grounds ("Grounds of Appeal"):

a. unjustified expansion of the settlement area;

b. defacto settlement area expansion without a comprehensive review is contrary to the PPS;

c. (residential) development of land outside the settlement boundary is not appropriate (from a land use perspective);

d. the subject site is cut off from other residential areas and is unsuited to subdivision development;

e. sanitary sewage capacity is not available;

f. the Municipality had not completed its 5 year Official Plan Review;

g. the proposed zoning is premature.

The Developer and Municipality are of the view that the Zoning Appeal should be dismissed without a full hearing on the basis that, *inter alia*, Pemic is not a proper appellant and that, in any event, the Grounds of Appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal.

Issues

The issues to be determined on this Motion are as follows:

(1) Should the Zoning Appeal be dismissed for any of the reasons set out in s.34(25)(a) of the Act? ("Section 34(25)(a)")

(2) Is Pemic a proper appellant? ("Pemic Status")

Applicable Legislation

The governing provision of the Act for purposes of this Motion is s. 34(25)(a). It reads as follows:

(25) **Dismissal without hearing** – Despite the *Statutory Powers Procedure Act* and subsections (11) and (24), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

(a) It is of the opinion that

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal.

(ii) the appeal is not made in good faith or is frivolous or vexatious.

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;

Positions of The Parties

The import of the Responding Parties' position relates to OPA 19, the location of the Komoka settlement area boundary and the designation of the subject lands in the Municipality's Official Plan as it existed prior to the amendment. They submit that the settlement area boundary was located in an east-west direction essentially dividing the lands into a north and south part. They contend the north part was within the settlement area and the south part in the agriculture area. Accordingly, when Municipal Council designated the entire property as Residential in OPA 19 without a comprehensive review, as they suggest was required by s. 1.1.3.9 of the 2005 Provincial Policy Statement ("PPS"), the Responding Parties argue that the Designated By-law is, in effect, an unjustified expansion of the settlement area that is not consistent with the PPS. They are also of the view, that since sewage capacity is not currently available, the Designated By-law is premature.

Not surprisingly, the Developer and the Municipality share a completely different opinion of the settlement area and the Designated By-law. In their view, Municipal Council properly applied s. 1.4 of the Municipality's Official Plan entitled "Interpretation and Legal Effect" and by so doing, an amendment to the settlement area was not required and no inconsistency with the PPS was created. They also suggest that some, if not all, of the Grounds of Appeal are an indirect attempt to challenge OPA 19 notwithstanding that this amendment is now law. In terms of prematurity, the Developer and Municipality contend that not only does the "h-1" holding provision conform with the Municipality's Official Plan but that it also represents sound land use planning.

Analysis

Issue (1) – Section 34(25)(a)

The language of s. 34(25)(a) makes it abundantly clear that the grounds for dismissal are disjunctive. In order for me to dismiss the Zoning Appeal I need only find that one of the grounds set out has been satisfied. Having said that, however, it is equally clear that a case has not been made out for the application of subparagraphs (ii), (iii) or (iv) of s. 34(25)(a). The evidence which was presented on this motion falls far short of showing that the Responding Parties have acted frivolously, vexatiously, not in good faith, for purpose of delay or have commenced proceedings that constitute an abuse of process. In my view, therefore, if I am to dismiss the Zoning Appeal I must find that it does not disclose any apparent land use planning ground upon which I could allow all or part of the appeal.

Grounds a., b. and c. of the Grounds of Appeal all challenge, directly or indirectly, the decision made by Council to use s. 1.4 of the Municipality's Official Plan to justify the Residential designation of the entire site in OPA 19. The relevant part of s. 1.4 reads as follows:

> All figures and quantities contained within this Plan shall be considered as approximate only. Amendments to this Plan will not be required where reasonable deviations from any of the figures and quantities are proposed, provided the general intent of the Plan is maintained. It is intended that land use designation boundaries shown in the schedules included in this Plan, be considered approximate, and absolute only where bounded by roads, bodies of water or other similar geographic barriers.

Council proceeded on the basis that since the subject lands are bounded by a sizeable pond to the south, the lands were wholly within the Urban Settlement Area of Komoka. The pond constitutes a geographic barrier and a logical boundary. In my view, this is a reasonable interpretation of s. 1.4. The affidavit evidence of Mr. Dorfman regarding the "hard line" nature of settlement boundaries simply is not enough to change the plain language of s. 1.4 and, therefore, its application.

The Responding Parties also allege that in view of the inconsistency between the text of OPA 19 and its Schedule A, the settlement area boundary did not change. I cannot accept that argument for three reasons. Firstly, the text of the amendment is

clear that it applies to all of the subject lands. Secondly, Council's resolution of December 5, 2007 stated unequivocally that the subject property was wholly within the settlement area and a settlement area expansion is not required. And thirdly, the preamble text of OPA 19 confirms, in various paragraphs, that the subject lands are located within the settlement area of Komoka.

OPA 19 is now in place. If I were to accede to grounds a., b. and c. of the Grounds of Appeal, I would be allowing the Responding Parties to indirectly challenge that which they were prevented from challenging by the Chair's Decision.

Grounds e. and g. of the Grounds of Appeal are essentially the same issue but stated in different ways. The Responding Parties do not believe that the "h-1" holding provision is an effective way to deal with future sewage capacity needs. I do not agree. The Municipality's Comprehensive By-law No. 2005-005 specifically refers to "h-1" holding provisions and, in my view, implements appropriate safeguards for development. Section 3.7(b)(i) states that an "h-1" holding provision can only be removed if the development is connected to a public water supply system and a public sanitary sewer system. The holding provision is, in my opinion, a legitimate planning tool and sufficiently abrogates any prematurity argument.

Ground f. of the Grounds of Appeal refers to the Municipality's 5 year Official Plan review and suggests that the Designated By-law should not be approved because such review has not been completed. This suggestion is also flawed. It is, in my view, the type of argument properly suited to an Official Plan amendment appeal. In this case, however, OPA 19 has been approved and is not under appeal. The argument therefore has a distinct hollow ring to it.

Lastly, ground d. of the Grounds of Appeal refers to subdivision development and suggests that the Designated By-law should not be approved because the site is unsuited for such development. In view of the Residential designation of the site in OPA 19, this ground of appeal is in my view, mitigated significantly, if not entirely. Moreover, no evidence was put forward of a persuasive nature which would justify the contention that the area is not suited for subdivision development. In this regard, I also believe that the comments of Susan Campbell in Ontario Municipal Board Decision No.

1704, dated June 30, 2005 are particularly relevant. She states on page 4 of that Decision:

> The Board finds that the body of case law developed with respect to motions for dismissal makes it apparent that it is not sufficient for an appellant to raise a 'triable issue' or to cite grounds for appeal that are 'within the realm of land use planning concerns'. For a matter to proceed to a full hearing, the Board finds that an appellant may not simply raise apprehensions without demonstrating that there are legitimate land use planning concerns.

Issue (2) – Pemic Status

In view of my comments in relation to Issue (1) it may very well be unnecessary to provide additional commentary regarding the status of Pemic in this matter. However, I will canvass this issue briefly.

In my opinion, s. 34(19) of the Act prescribes, in a clear and exhaustive way, those parties that are, in law, capable of pursuing a by-law appeal. This section makes no mention of corporate relatedness. Whether the principal of Southmoor and Pemic is the same is therefore irrelevant in determining the appellant status of Pemic. Since this company did not make oral submissions at a public meeting or written submissions to Council in relation to the Designated By-law, it is not a party contemplated by s. 34(19) and therefore, not a proper appellant.

Disposition

In determining the appropriateness of the Grounds of Appeal, I am guided by the comments of the Divisional Court in Zellers Inc. v. Royal Coburg Centres Ltd. (2001), 42 O.M.B.R. 193. At pages 203-204, Epstein J. stated:

> The legislation and related jurisprudence make it clear that it is not sufficient that appellants raise land use issues in the Notice of Appeal. Such issues have to be worthy of adjudication and the responsibility falls on the shoulders of the appellants to demonstrate through their conduct in pursuing the appeal, including their gathering of evidence to make their case, that the issues raised in the Notice of Appeal justify a hearing. (Board emphasis added)

When assessing the Grounds of Appeal in the context of s. 34(25)(a)(i), I am also influenced by the comments of Mr. Howe, the principal of Pemic and Southmoor, during his cross examination. When he was asked about the Zoning Appeal and OPA 19, he

acknowledged that the intent of the Zoning Appeal was to “revisit” OPA 19. It is impossible for me to overlook this testimony.

Based on all of the foregoing therefore, I am not satisfied that the Grounds of Appeal disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal. Accordingly, the Motion to Dismiss is granted and the Zoning Appeal is dismissed. If the Developer wishes to pursue a claim for costs, I may be spoken to.

It is so Ordered.

“S. J. Stefanko”

S. J. STEFANKO
MEMBER