

ISSUE DATE:

Jan. 05, 2010



PL090330

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Dario and Janet Maola
Subject: Proposed Official Plan Amendment No. 32
Municipality: City of Sarnia
OMB Case No.: PL090330
OMB File No.: PL090330

APPEARANCES:

Parties

Dario and Janet Maola

County of Lambton

City of Sarnia

Counsel

P. Brooks

D. Broad

S. McEachran

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

Dario and Janet Maola ("Appellants") have appealed the County of Lambton's refusal of Official Plan Amendment 32 ("OPA 32").

The Proposal

The Appellants own approximately 10.8 acres of land municipally known as 5961 Blackwell Side Road in the City of Sarnia ("City"). Currently there is a single detached dwelling and a detached garage on the northeast corner of the property and a pond with an area of approximately 1.6 acres is located in the middle of the property. The property is otherwise vacant.

The Appellants have applied to amend the policies of the City's Official Plan ("City OP") to permit the creation of three non-farm residential lots. Although a

severance application has not yet been made detailing the size of the lots, it is proposed that they range in area from 4.2 acres to 3.19 acres. The existing home and approximately one third of the existing pond would be on one of these lots. The other two lots would be vacant building lots.

The current land use designation in the City's Official Plan is Rural. OPA 32 is a site specific amendment to allow for the creation of the three non farm residential lots in question.

Planning History and Council Decisions

Even though the Planning Department for the City recommended refusal of OPA 32 because it was not consistent with the 2005 Provincial Policy Statement ("PPS") and did not conform to either the City or County of Lambton ("County") Official Plans, City Council approved the amendment on December 15, 2008. A recorded vote was taken but the Council meeting minutes did not reflect any rationale for City Council's decision.

Since the County is the Approval Authority for Official Plan Amendments adopted by the City, the matter then went to the County for its consideration and approval. In that regard, another planning opinion was obtained; this time, from the County's Planning staff. In a report authored by Mr. Posliff, Manager of Planning and Development Services, he recommended refusal of OPA 32, because it was not consistent with the PPS and did not conform with the County's Official Plan ("County OP"). County Council adopted his recommendation. Following refusal by the County, the Appellants appealed to the Board.

Positions of the Parties

The Appellants argue that s. 2.3 of the PPS does not apply to OPA 32 for a number of reasons, including the historical fragmentation of the lands in question, their size and shape and their inability to be amalgamated with other lands. In relation to the County and City Official Plans, the Appellants submit that the lands are special and unique and therefore, the amendment should be approved. Mr. Knudson gave expert evidence in support of the position of the Appellants.

The County, on the other hand, argues that because of specific policies dealing with Agricultural lands and areas in the PPS, the County OP and the City OP, the

amendment should not be approved. Mr. Posliff, Mr. Crinklaw and Ms Bourgeois all provided expert evidence on behalf of the County.

Although the City was a party to this hearing, it adopted an observer status throughout and did not call any evidence or make any submissions.

The Issues

The issues to be determined in this matter are as follows:

- (i) Is OPA 32 consistent with the PPS?
- (ii) Does OPA 32 conform with the County OP?
- (iii) Does OPA 32 conform with the City OP?

Mr. Knudson acknowledged that if any of the foregoing issues are answered in the negative, OPA 32 must fail.

Discussion and Analysis

(i) PPS

The subject property is designated Rural under the City OP and Rural/Agriculture in the County OP. Both Plans, not surprisingly, are highly supportive of agriculture. Notwithstanding this emphasis on agriculture and the preponderance of Class 1, 2 and 3 soils in close proximity to the subject lands, the Appellants argue that this is not a Prime Agricultural Area as that phrase is defined in the PPS. To support their contention, Mr. Knudson points out that the site is comprised of organic soils and when this fact is coupled with the non farm residential character of immediately adjacent property, the site is not a Prime Agricultural Area. I do not agree. The homes along Blackwell Side Road complement the clearly existing rural/agricultural character of the area. In fact, as reflected by Exhibit 4 in this proceeding, a number of properties immediately north and south of the subject land are lands under cultivation and clearly exhibit the agricultural flavour of the area. I am also influenced by the testimony of Mr. Crinklaw and the position advanced by the Ministry of Municipal Affairs and Housing in this matter. The Ministry reviewed OPA 32 and, by correspondence dated November 19, 2008 confirmed that the subject lands were part of a broader prime agricultural area

and that OPA 32 did not appear to be consistent with Section 2.3 of the PPS. Mr. Crinklaw assisted in the preparation of that correspondence.

The proper analysis of the agricultural principles of the PPS was succinctly stated by Member Denhez in Ben Vanderburg and City of Kawartha Lakes, Ontario Municipal Board, June 25, 2008. On page 2, he stated as follows:

The Provincial Policy Statement of 2005 (PPS) sets out the general principle, at Section 1.1.3.1 that "settlement areas shall be the focus of growth", whereas agricultural areas (at Section 1.1.4.1) shall be "protected by directing non-related development to areas where it will not constrain these uses." The PPS states even more unequivocally (at Section 2.3.4.3) that "the creation of new residential lots in prime agricultural areas shall not be permitted, except in accordance with policy 2.3.4.1(c)", the exception for existing "residences surplus to a farming operation as a result of farm consolidation". It was undisputed that this case does not fall into that exception.

The ban in Section 2.3.4.3 applies "in prime agricultural areas", which are not synonymous with "prime agricultural lands". Not all the properties in a prime agricultural area need to be prime agricultural lands: according to the PPS Definition Section, a prime agricultural area, is one where prime agricultural lands "predominate". The ban applies to the entire area, even if there are pockets of substandard soils which the owner wants to sever.

There is no doubt in my mind that the subject property falls squarely within an area where prime agricultural lands predominate. Moreover, the reasons advanced for the creation of the three lots do not fall within any of the exemptions of Section 2.3.4.1. Accordingly the prohibition regarding lot creation applies.

(ii) County OP

The County OP in Section 3.2 states, among other things, that "The majority of growth will be directed to Urban Centres and Urban Settlements." The Plan also deals with specific Agricultural severance policies in Section 4.2. Although the Appellants concede that their proposal does not conform with the Section 4.2 policies they maintain that the more general severance policies in Sections 10.3 and 10.9 apply and OPA 32 should therefore be approved. Again I do not agree. Even if the general severance policies of 10.3 and 10.9 apply they do not, in my view, diminish in any way the application of the specific Section 4.2 agriculture severance policies or undermine their importance. The proposal does not meet the s. 4.2 policies and therefore it does not conform to the County OP.

(iii) City OP

The Appellants argue that even though OPA 32 does not meet the non farm severance policies of Section 2.2.11 in the City OP, their property is special and unique and therefore by application of Section 2.2.18, the amendment should be approved. I am not persuaded by this argument for three reasons. Firstly, as Mr. Bourgeois pointed out in her testimony, many properties are surrounded by different land uses. The different land uses in the area therefore do not create a special and unique parcel of land. Secondly, the size of the subject land is not a factor which contributes to uniqueness. Section 2.3.3.2 of the PPS states that “In prime agricultural areas, all types, sizes and intensities and normal farm practices shall be promoted and protected...” And thirdly, no rationale was put forward suggesting why I should over look or ignore the fact that the proposal does not meet the requirements of Section 2.2.11.

Even if I am wrong in my conclusion concerning the uniqueness of the property and therefore the potential application of Section 2.2.18, the City OP would, based on my comments above regarding the County OP, still be in conflict with the County OP. That conflict is resolved and the County OP is deemed to prevail based on s.27(4) of the *Planning Act* which reads as follows:

(4) Conflicts. – In the event of a conflict between the official plan of an upper-tier municipality and the official plan of a lower-tier municipality, the plan of the upper-tier municipality prevails to the extent of the conflict...

Based on the foregoing, OPA 32 does not, in my view, conform with the policies of the City OP.

Disposition

Each of the issues referred to above has been answered in the negative. Accordingly, OPA 32 is not approved and the appeal is therefore dismissed.

It is so ordered.

“S.J. Stefanko”

S.J. STEFANKO
MEMBER