ISSUE DATE:

November 28, 2011

PL100447

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 51(43) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant:	James and Sylvia Brown
Subject:	Conditions of approval of draft plan of subdivision (1, 8, 11, 15, 16, 19, 21 & 28)
Property Address/Description:	Part Lot 8, Conc 8
Municipality:	Township of Middlesex Centre
Municipal File No.:	39T-MC0201
OMB Case No.:	PL100447
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APPEARANCES:

Parties	**Counsel**
James and Sylvia Brown	Barry Card
Municipality of Middlesex Centre ("MC")	Andrew Wright
County of Middlesex ("County")	John Judson

DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD

[1] James and Sylvia Brown ("Appellants") have appealed pursuant to s.51(43) of the *Planning Act* ("Act"), the conditions ("Draft Conditions") attached to a draft plan of subdivision dated August 29, 2003 ("August 2003 Draft Plan").

Background

[2] In early 2002, the Appellants submitted applications to the County and MC for draft plan approval of a residential subdivision consisting of 157 lots. The applications proposed full services, namely, municipal water supply and sanitary sewers and wastewater treatment infrastructure. In relation to this proposal, initial draft plan approval was issued by the County on February 11, 2003. This initial draft plan was

amended slightly and became the August 2003 Draft Plan. The August 2003 Draft Plan was approved by the County in November 2003.

[3] With respect to the matter of full services, Condition 8 of the Draft Conditions required the Appellants to provide and install full municipal servicing and Condition 15 stated that the Appellants were required to construct a sanitary sewage treatment plant and water system in accordance with a Community Servicing Study, prior to final plan approval.

[4] After a number of years had elapsed without any progress being made with respect to the August 2003 Draft Plan, the Appellants made further redline changes to the plan and submitted these changes to the County in December 2008. The proposed subdivision, based on the December 2008 changes, would have 19 estate lots on private services as a first phase with the balance of the subdivision being developed on full services. The total number of lots was reduced from 151 to 100.

[5] The December 2008 proposed redline amendment was circulated by the County as if it were a new proposal. In that regard, adverse comments were received from the Ministry of Environment, the Ministry of Natural Resources, the Ministry of Municipal Affairs and Housing, Union Gas, the MC Chief Building Official, the MC Public Works and Engineering Department and members of the public.

[6] In May 2009, MC Council recommended to the County that the proposed December 2008 changes be refused. In July 2009, County Council adopted that recommendation and refused the changes proposed.

[7] In April 2010, the within appeal was filed and it put forward another redline proposal to the August 2003 Draft Plan. The plan of subdivision now being proposed was marked in this proceeding as Exhibit 7. This plan reflects a total of 140 lots with 7 estate lots instead of the previously proposed 19. These estate lots are shown on the west side of a street marked as “Street B” in the plan. On the east side of Street B the proposal is to reconfigure 19 lots with 18 metre frontages into 12 lots with 24 metre frontages.

[8] From the evidence heard, the 7 estate residential lots are to proceed on private services. In terms of the other lots which are too small for private services, the

proposal is for homes to be constructed on such lots with any required septic tank system being installed on an immediately adjoining lot. The evidence also disclosed that water and sewer pipes are to be put in road allowances and eventually connected once services are brought to the area. When that occurs, according to the Appellants, the septic tank lots themselves would be released for residential development.

[9] The changes proposed by the Appellants to the Draft Conditions reflect the current proposed draft plan iteration ("Current Proposal").

Issues

[10] The issues to be determined in this case are whether the Current Proposal is consistent with the 2005 Provincial Policy Statement ("2005 PPS"), conforms to the County Official Plan ("County OP") and the MC Official Plan ("MC OP"), and complies with the provisions of s.51(24) of the *Planning Act*?

[11] I will deal with each of these issues separately.

Analysis and Discussion

(i) Provincial Policy Statement

[12] The Appellants argue that the Current Proposal must be viewed in the context of the 1997 Provincial Policy Statement and when it is so viewed, the current draft plan has regard to it, including the sewage and water provisions set out in s.1.3.1.1.

[13] Since the Current Proposal is fundamentally different from the August 2003 Draft Plan and because it was submitted after the promulgation of the 2005 PPS, I believe the relevant Provincial Policy Statement, for purposes of this hearing, is the 2005 PPS. However, in the interest of completeness, I will comment on both the 1997 Provincial Policy Statement ("1997 PPS") and the 2005 PPS.

[14] Section 1.3.1.1(a) of the 1997 PPS states very clearly that "full municipal sewage and water services are the preferred form of servicing." If such services are not or cannot be provided, then communal services may be permitted. However, communal services by definition require a municipality to enter into what is known as a

"responsibility agreement". The evidence in this case disclosed that MC has not, and will not, enter into such an agreement. Accordingly, the Appellants are unable to comply with the basic sewage and water requirements of the 1997 PPS. How can it be said therefore that the Current Proposal had regard for the 1997 PPS? It cannot.

[15] When I apply, what I believe are the relevant provisions of the 2005 PPS to the Current Proposal, a similar result ensues.

[16] Section 1.1.3.8 of the 2005 PPS encourages the establishment and implementation of phasing policies to ensure the orderly progression of development within designated growth areas and the timely provision of infrastructure and public service facilities to meet current and projected needs. Other than the initial 7 estate lots, there is no indication of any specific phasing being proposed by the Appellants. In my view, there is a level of uncertainty associated with the Current Proposal and that uncertainty is only exacerbated by the reference to septic tank lots, and their release to development, if and when services become available.

[17] Section 1.6.4.2 of the 2005 PPS provides that municipal sewage and water services are the preferred form of servicing for settlement areas. In addition, the relevant portion of s.1.6.4.4 states that, in the absence of municipal sewage and water services, individual on-site sewage and water services shall be used. However, such individual services are limited to new development of five or less lots. In the Current Proposal, at least 7 lots are to be on private services. Once again, it is apparent that what is contemplated simply flies in the face of existing policies.

[18] In my estimation, the Current Proposal is not consistent with the 2005 PPS.

(ii) County OP

[19] The County OP is similar to the 1997 PPS and the 2005 PPS in that it too encourages, in s.2.4.5, new development to proceed on the basis of full municipal services. That policy is supplemented by s.2.4.5.1(e) which requires site specific development proposals to be accompanied by an evaluation of servicing options within the Settlement Area.

[20] The only type of servicing evaluation which has been prepared was the Servicing Hierarchy/Options Report prepared by R.W. Stratford Consulting Inc. in relation to the December 2008 redline proposal of the Appellants, referred to earlier in these reasons. That report however, focused on what was economically feasible and not what was technically feasible. In my view, s.2.4.5.1(e) of the County OP requires implicitly, if not otherwise, that the necessary evaluation be completed on the basis of what is technically feasible. Simply put, this type of evaluation has not been done.

(iii) MC OP

[21] One of the arguments advanced by the Appellants in support of their position related to the Settlement Area provisions found in s.5.1 of the MC OP. The Appellants point out s.5.1.2 which deals with Community Settlement Areas and which allows for the approval of interim development on other than municipal services. It is submitted that since the subject property is in a Hamlet Settlement Area, it is below, from a hierarchy point of view, the Community Settlement Area ("CSA"). Therefore, according to the Appellants, the official plan provisions relating to the CSA should or could apply and development on other than municipal services may be allowed. I am not persuaded by this argument because as Mr. Bancroft, the planner for MC, pointed out, a CSA is in a transition state; it is on the verge of becoming an Urban Settlement Area. Hamlets however, are not in any such transition state and accordingly, such provisions should not apply.

[22] The Appellants also argue that because of MC's OPA 27, the municipality does allow for residential development on other than full municipal services. Again I am not persuaded. The simple explanation to this submission is, as Mr. Bancroft pointed out: the development contemplated by the land exchange referred to in OPA 27, will make for an efficient use of infrastructure, i.e. the Denfield Road and a water main, and therefore, such development is appropriate in the circumstances and is not a precedent for the Current Proposal.

[23] The Appellants also submit that certain Draft Conditions are no longer reasonable or appropriate because their language is imprecise. Specific reference, in this regard, was made to Condition 15 which requires, *inter alia*, a Community Servicing Study that addresses water, sanitary sewage and stormwater management measures. It

is true that the phrase Community Servicing Study is not defined. However, that phrase was inserted into Condition 15 at the suggestion of the Appellants, through their previous planner. It is also noteworthy, in my estimation, that MC has taken steps, by way of new terms of reference set out at Tab 79 of Exhibit 3, to further clarify the meaning of this phrase on a go forward basis. What is not reasonable, in my view, is to delete, as is suggested by the Appellants, the phrase Community Servicing Study in Condition 15 and replace it with the undefined phrase, “Servicing Study”.

[24] In this case, it is also very difficult, if not impossible, to overlook the very clear and compelling language of s.5.1.3 of the MC OP which reads in part:

> Significant or major new development, such as the development of more than three new lots through plan(s) of subdivision, will require provision of full municipal services.

[25] The Current Proposal is significant or major, it is new and it involves more than three lots. Since the Current Proposal falls within the requirements of s.5.1.3, there is no reason for the proposed development to be excluded from the application of s.5.1.3.

[26] In summary, when I assess the Current Proposal in the context of the MC OP, the contemplated development falls far short of being in conformity with the MC OP.

(iv) Subsection 51(24)

[27] Subsection 51(24) lists a number of criteria to which one should have regard when considering a draft plan of subdivision. Included in this list is whether a plan conforms to the official plan, the number and location of proposed highways and their adequacy, and any restrictions on the land proposed to be subdivided.

[28] As I have indicated above, the Current Proposal does not conform with either the County OP or the MC OP.

[29] The response to the 2008 redline draft plan from MC’s Public Works and Engineering Department was that the proposed street pattern had indicated a number of very short streets. A similar street pattern was laid out in the August 2003 Draft Plan and was considered appropriate because that plan was at a higher density with full

municipal services. However, the density changed and full services no longer applied. As a result, in relation to the 2008 redline draft plan, Public Works and Engineering commented that the very short streets negatively affect transportation operations and maintenance. Those short streets were continued in the Current Proposal and, as a result, they face the same level of scrutiny and are equally problematic.

[30] Based on the proposed wording by the Appellants to Condition 21 of the Draft Conditions, it is clear that where lots are too small for private services, homes would nevertheless be constructed on such lots with the septic tank systems for these lots being installed on adjoining lots. This concept would appear to ignore the provisions of the Ontario Building Code ("OBC") and the *Building Code Act* S.O.1992,c.23 ("BCA").

[31] Subsection 8(1) of the BCA states that "no person shall construct…a building unless a permit has been issued therefor…." Subsection 8(2) stipulates however, that a permit will not issue if the proposed building contravenes the BCA, the OBC or any other applicable law.

[32] Since a building includes a sewage system under the BCA and since a sewage system requires, under the OBC, that a septic tank system be wholly within the boundaries of the lot on which is located the building it serves, installing a septic tank as contemplated above, would contravene "the BCA, the OBC or any other applicable law." Accordingly, a building permit would not issue. This would appear to be an insurmountable restriction on the land intended to be subdivided.

[33] In the final analysis, I do not believe that the Current Proposal satisfies the requirements of s.51(24) of the Act.

Disposition

[34] If I were to accede to the position of the Appellants in this case and accept their proposed changes to the Draft Conditions, arguably the entire development could proceed on private services because there is nothing in the appeal which speaks to or limits such services to only the 7 estate lots. This would be, in my view, entirely inconsistent with not only the clear understanding which existed in 2003 and the basis upon which draft plan approval was given, but also the planning considerations applicable to this appeal.

[35] Moreover, the suggestion that the Appellants have proceeded since 2003 on the legitimate expectation that MC would initiate or cause to be initiated, full services in the Poplar Hill–Coldstream hamlet is simply not borne out by the evidence and the early correspondence in this matter.

[36] Based on all of the foregoing therefore, I see no need to change any of the Draft Conditions and I do not accept the Current Proposal. Accordingly, the appeal is dismissed.

[37] It is so ordered.

"Steven Stefanko"

STEVEN STEFANKO
VICE CHAIR