

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



**ISSUE DATE:** October 10, 2017

**CASE NO(S):** PL160304

**PROCEEDING COMMENCED UNDER** subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	David MacHardy
Subject:	By-law No. 2016-018
Municipality:	Municipality of Middlesex Centre
OMB Case No.:	PL160304
OMB File No.:	PL160304
OMB Case Name:	MacHardy v. Middlesex Centre (Municipality)

**Heard:** September 21, 2017 by telephone conference call

**APPEARANCES:**

**Parties**

**Counsel\*/Representative**

Municipality of Middlesex Centre	Wayne Meagher* and Marcia Ivanic*
David MacHardy	Self-represented
Neil Elliott	Self-represented

**MEMORANDUM OF ORAL DECISION DELIVERED BY R. G. M. MAKUCH ON  
SEPTEMBER 21, 2017 AND ORDER OF THE BOARD**

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[1] The Council of the Municipality of Middlesex Centre (“Municipality”) enacted Zoning By-law No. 2016-018 on February 19, 2016 adding a “Place of Entertainment” as a permitted use to the Institutional (I) zoning on the subject property known municipally as 22568 Komoka Road in order to facilitate the establishment of a special

events facility within an existing funeral home building. The owner, Neil Elliott (“Applicant”), had made application for the site specific zoning by-law amendment.

[2] This enactment was appealed by David MacHardy (“Appellant”) on March 10, 2016 on the grounds that:

- The public was misinformed by Municipal Council in that the meaning of “Place of Worship” was not fully revealed to people who expressed concerns with respect to the proposed zoning by-law amendment prior to the February 17, 2016 council meeting in that only the quiet innocuous uses such as birthday parties and social gatherings were referred to and that use such as pool hall, music hall and dance halls were not mentioned;
- The discussion was prematurely cut off by the Mayor before anyone present at the public meeting could speak to this matter;
- The addition of “Place of Entertainment” to the Institutional Zone is inconsistent with all other uses and amounts to the creation of a new zone which is inconsistent with uses such as church, funeral home or school;
- The use of the subject building for these purposes is wrong and is disruptive to the existing surrounding residential uses and would cause problems respecting noise and parking. The use of the property for parties, weddings and other social gatherings will be a major irritant to the residents of the area; and
- The amendment is contrary to the goals of the official plan which is to encourage and facilitate strategic improvements to existing Village Centres in a manner that enhances their role, is in keeping with their traditional character and is compatible with adjacent residential neighbourhoods.

[3] A hearing of this matter was scheduled for August 18, 2016 but was adjourned to allow the parties to attempt to settle their differences.

[4] It is noted that the Municipality had opted not to participate in the hearing scheduled for August 18, 2016 given that the appeal was by a third party and the Municipality did not have any specific interest in the outcome of the hearing. The planning report, dated February 17, 2016 had been included with the materials filed by the Municipality with the Board in response to receiving the MacHardy Notice of Appeal. The Applicant, Appellant and the Board had been advised by the Municipality that it would not be participating in the hearing of the appeal in advance of the scheduled hearing date.

[5] The matter was again scheduled to be heard on December 12, 2016 and was subsequently adjourned in order to give the parties additional time to attempt to reach a settlement.

[6] The record shows that the Municipality offered assistance throughout to the Appellant and the Applicant to help them potentially reach a settlement respecting which types and particulars of uses were appropriate for the Applicant's property.

[7] The parties finally reached an agreement settling their differences and on July 12, 2017 the Council for the Municipality endorsed the settlement reached between the Applicant and Appellant which Council believed to represent good planning by enacting an amending by-law, which they seek to have approved by this Board.

[8] The only land use planning evidence before the Board on this appeal is the Affidavit of Benjamin Puzanov sworn September 12, 2017 and the Board is satisfied based on that evidence that the zoning by-law amendment is consistent with the Provincial Policy Statement, 2014 ("PPS"), conforms to the County of Middlesex ("County") Official Plan and the Municipality's Official Plan and represents good planning for the following reasons:

- a. The subject property is designated Settlement Area in accordance with the County Official Plan and as Village Centre in the Municipality's Official Plan.
- b. Section 1.1.3 of the PPS provides direction for development within settlement areas in the Municipality, including Komoka-Kilworth where the subject land is located. Section 1.1.3.1 states that settlement areas shall be the focus of growth in municipalities and Section 1.1.3.2 dictates that land use patterns within settlement areas shall be based on a mix of land uses that efficiently use land and resources and are appropriate for and efficiently use the infrastructure and public service facilities that are planned or available. Section 1.6.6.2 of the PPS states that municipal sewage services and municipal water services are the preferred form of servicing for settlement areas.
- c. Section 1.3.1 of the PPS directs municipalities to promote economic development and competitiveness by providing for an appropriate mix and range of employment uses to meet long-term needs and providing opportunities for a diversified economic base that include maintaining a range and choice of suitable sites for a variety of economic activities and ancillary uses.
- d. The County Official Plan provides a regional policy framework within which development proposals are to be evaluated. Section 2.3.2 of the County Official Plan states that it is the goal of the plan that future development within settlement areas proceed on the basis of full municipal services. Section 3.2.1 dictates that growth within Middlesex is generally to be directed to the County's Settlement Areas in order to protect Agricultural Areas, protect natural heritage and promote efficient use of water and sewage services. It is noted that the detailed land use policies, and particularly those that pertain to development within settlement areas, are

provided in the official plans of the County's local municipalities. Section 3.2.4.1 of the County Official Plan provides for a variety of land uses to be located in the Urban Areas of Middlesex, including but not limited to commercial land uses.

- e. Section 2.3.4 of the County Official Plan notes that economic development is an important component of the County's Growth Management policy framework and that many long-term goals and objectives depend on economic activity and the opportunity for residents to live and work in the County. To this end, the County promotes diversity in its economic base.
- f. Section 1.8 c) of the Municipality's Official Plan states that the majority of growth within the Municipality will be directed to Urban Settlement Areas and that such areas will accommodate growth on full municipal servicing, with such growth being permitted where adequate servicing capacities are established.
- g. Section 5.1.1 dictates that all new proposed development in Urban Settlement Areas shall be fully serviced by municipal water and sewage disposal systems. Section 5.1.4 of the Municipality's Official Plan outlines that growth shall generally be directed to Urban Settlement Areas of the Municipality, including Komoka-Kilworth.
- h. A variety of commercial uses are permitted within the Village Centre designation, including general and convenience retail, personal services, office and institutional uses, restaurants and compatibly-scaled accommodation and entertainment uses.
- i. Section 9.2.1 of the Municipality's Official Plan provides direction to develop a diverse economic base within the Municipality. It is noted that the Municipality is required to endeavor to increase its tax base and job opportunities in a manner that improves the quality of life of existing and

future residents, and balances various economic sectors to ensure a sustainable economic base. The Official Plan also requires the promotion of the viability and economic health of village centres.

- j. The zoning by-law amendment would facilitate the adaptive reuse of a funeral home in an area that is designated to accommodate village commercial uses. The site configuration, including the existing accesses from Komoka Road (County Road 16) and Railway Avenue, as well as the parking layout are ideal for the use being requested and the existing fencing provides for adequate screening of the site from abutting properties.
- k. The settlement is suitable in the context of the Village Centre land use designation that applies to the property and would allow the applicant to repurpose an existing building in a manner that is appropriate for the neighbourhood. The proposal is compatible with adjacent development, consistent with the PPS, conforms to both the County and Municipality's official plans and constitutes sound land use planning.

[9] The amending by-law recently approved by Municipal Council specifies what uses are permitted on the subject property and the Board is satisfied that it represents appropriate land use planning.

[10] Accordingly, the appeal is allowed in part and Zoning By-law 2016-018 is hereby amended with Attachment 1 (Exhibit "E" to Affidavit of Benjamin Puzanov sworn September 12, 2017) hereto.

[11] The Appellant also brings a Motion for his Costs of bringing the appeal.

[12] The materials before the Board on this Motion for Costs consists of the following:

- a) Claim for Costs submitted by David MacHardy dated;

- b) Affidavit of Janice MacHardy, sworn August 25, 2017;
- c) Affidavit of Wendy Catherine Bradnam, sworn August 25, 2017;
- d) Affidavit of Michael Kaye McAvity, sworn September 25, 2017;
- e) Cost Submission of the Municipality of Middlesex Centre dated September 14, 2017; and
- f) Rebuttal to Cost Submission of Municipality of Middlesex Centre by David MacHardy dated September 18, 2017.

[13] Section 103 of the Board's *Rules of Practice and Procedure* provide as follows:

**103. Circumstances in Which Costs Order May be Made** The Board may only order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith. Clearly unreasonable, frivolous, vexatious or bad faith conduct can include, but is not limited, to:

- (a) failing to attend a hearing event or failing to send a representative when properly given notice, without contacting the Board;
- (b) failing to give notice without adequate explanation, lack of co-operation with other parties during prehearing proceedings, changing a position without notice to the parties, or introducing an issue or evidence not previously mentioned or included in a procedural order;
- (c) failing to act in a timely manner or failing to comply with a procedural order or direction of the Board where the result is undue prejudice or delay;
- (d) a course of conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;
- (e) failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Board has determined to be improper;
- (f) failing to make reasonable efforts to combine submissions with parties of similar interest;
- (h) acting disrespectfully or maligning the character of another party; and
- (i) knowingly presenting false or misleading evidence.

- (j) The Board is not bound to order costs when any of these examples occur as the Board will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Board may decide to reduce the amount awarded. The Board will not consider factors arising out of a mediation or settlement conference in determining whether there should be an award of costs.

[14] The Board agrees with Mr. Meagher's submission that no costs should be awarded in this matter against the Municipality because the Municipality did not conduct itself in a manner that would fall under any of the types of behavior outlined above. The conduct of the Municipality did not in any manner even come close to being considered unreasonable, frivolous or vexatious and it is evident that it did not act in bad faith in any way. Accordingly, the Board will not exercise its discretion to make an award of costs in this instance.

[15] While it is evident that the Appellant was/is frustrated with the process leading up to and following the enactment of Zoning By-law No. 2016-018, there is nothing in the materials filed in support of his claim for costs, upon which the Board can rely to convince it to exercise its discretion to make an award of costs against the Municipality. The Board finds that at all times the Municipality followed the directions of the Board and provided the Appellant and the Applicant with reasonable assistance in good faith to help them potentially reach the settlement, which they eventually did. The claim for costs is totally without any merit whatsoever and is hereby denied.

*"R. G. M. Makuch"*

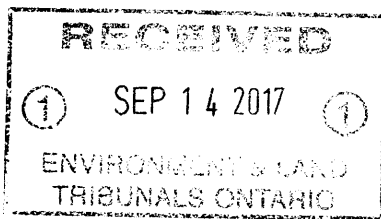
R. G. M. MAKUCH  
VICE-CHAIR

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

**Ontario Municipal Board**

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ATTACHMENT 1

OMB Case No. PL160304

**ONTARIO MUNICIPAL BOARD**

**IN THE MATTER OF** an appeal made to the Ontario Municipal Board by David MacHardy pursuant to section 34(19) of the *Planning Act*, R.S.O. 1990, c. P 13, as amended, against the passing of a zoning by-law amendment by the Municipality of Middlesex Centre; for land legally described as Block A and Part of Lots 1 to 5, Plan 76, geographic Township of Lobo (now in the Municipality of Middlesex Centre).

Appellant: David MacHardy  
Subject: Zoning By-law Amendment  
Property: Block A and Part of Lots 1 to 5, Plan 76, geographic Township of Lobo (now in the Municipality of Middlesex Centre)  
Municipality: Middlesex Centre  
OMB File No. PL160304

**AFFIDAVIT OF BENJAMIN PUZANOV**

September 12, 2017

**MIDDLESEX COUNTY BARRISTER & SOLICITOR'S OFFICE**

County Building  
399 Ridout Street North  
London, ON N6A 2P1

**Wayne P. Meagher**

Tel: (519) 434-7321 x2283  
Fax: (519) 434-0638  
Email: wmeagher@middlesex.ca

Counsel for the Respondent,  
Municipality of Middlesex Centre

I, BENJAMIN PUZANOV, of the City of London in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

**A: QUALIFICATIONS & INTRODUCTION**

1. I am a Registered Professional Planner with the Ontario Professional Planners Institute and a member of the Canadian Institute of Planners. I have been qualified previously as an expert witness before the Ontario Municipal Board (“OMB” or the “Board”). A copy of my Curriculum Vitae is attached as Appendix “A” and my Acknowledgement of Expert’s Duty is attached as Appendix “B” to this Affidavit.
2. The Municipality of Middlesex Centre (the “Municipality” or “Middlesex Centre”) is the approval authority for zoning by-laws and zoning by-law amendments within its geographic area.
3. I was employed as a Senior Planner by the County of Middlesex during the review of the subject zoning by-law amendment application and in the course of my duties was charged with providing professional planning advice to Middlesex Centre. I have been directly involved in the subject file since it was submitted to the Municipality.
4. This Affidavit pertains to an appeal launched by David MacHardy against the decision of the Municipality to pass a zoning by-law amendment for a property known municipally as 22568 Komoka Road (OMB File No. PL160304).

**B: BACKGROUND**

5. The zoning by-law amendment application was submitted by Neil Elliott on January 20, 2016. The purpose and effect of the zoning by-law amendment application was to add “Place of Entertainment” as a permitted use to the Institutional (I) zoning of the subject property in order to facilitate the establishment of a special events facility within an existing funeral home building. A notice of public meeting was circulated on January 26, 2016.
6. A public meeting of Middlesex Centre’s Council was held on February 17, 2016 in accordance with the *Planning Act*. My planning report, dated February 17, 2016 and attached to this Affidavit as Appendix “C”, was included with the public agenda posted in accordance with the Municipality’s Procedural By-law. The Municipality’s zoning by-law is publicly available on <http://middlesexcentre.on.ca/Public/Planning-Services> and contains the definition of a “Place of Entertainment.” I was present at the February 17, 2016 meeting. Municipal Council approved the zoning by-law amendment after the public meeting and a notice of passing was circulated on February 19, 2016. I do not recall anyone being prevented from making submissions to Municipal Council. Official minutes of this meeting were provided to the Board as part of the appeal package. To my knowledge, the Municipality has not received any communication from any person indicating that they wished to speak at the February 17, 2016 meeting and were not provided with the opportunity to do so.

7. On March 10, 2016 Middlesex Centre received an appeal from David MacHardy against Council's decision to approve the zoning by-law amendment application. It is an Appellant's own responsibility to obtain any planning, legal, and/or other advice he or she requires to forward an OMB Appeal. I informed the Applicant and Appellant of the above on multiple occasions and I recommended that they obtain independent legal and planning advice.
8. Middlesex Centre opted not to participate in the OMB hearing of August, 2016 given that the appeal was of a third party variety and the Municipality did not have any specific interest in the outcome of this hearing. The planning report, dated February 17, 2016 was included with the Board materials filed by the Municipality in response to receiving a notice of appeal. The Board case coordinator, Applicant and Appellant were advised that the Municipality would not be participating well in advance of the scheduled hearing date and no objection was received by the Municipality. I asked the Appellant and Applicant whether they would need to subpoena my evidence in this matter and both advised that they did not think that such was necessary.
9. The Board adjourned the matter on August 18, 2016 until such time that the Appellant and Applicant attempted to reach a settlement with the Municipality's assistance.
10. The matter was scheduled to be heard on December 12, 2016 and was subsequently adjourned in order to give the parties additional time to attempt to reach a settlement.
11. At all times between March 10, 2016 and May 2, 2017, the Municipality provided the Appellant and the Applicant with reasonable and good faith assistance to help them potentially reach a settlement, however, disagreements between them continued until May 2, 2017.
12. An e-mail string between October 17, 2016 and May 2, 2017 attached as Appendix "D" (the "E-mail String") is helpful in confirming that the Applicant and Appellant (along with some other neighbours in which the Appellant purported to represent) continued to have disagreements in relation to which types and particulars of uses they believed in their own opinion were appropriate for the Applicant's property. On behalf of the Municipality, I have authority to confirm that it waives privilege with respect to any statement in the E-mail String in which I marked as "without prejudice" given that the Appellant (despite settling with the Applicant) is directly challenging the Municipality's conduct in this matter.
13. The E-mail String also helps to demonstrate that a number of exchanges and meetings took place between the Applicant and Appellant between the dates of October 17, 2016 and May 2, 2017 and that reasonable and good faith assistance was provided by the Municipality to help the Applicant and Appellant reach a settlement which was not confirmed by the Appellant until May 2, 2017.
14. On July 12, 2017 Middlesex Centre Council endorsed the settlement reached between the Applicant and Appellant which Council believed to be within the realm of good planning. The settled Zoning By-law Amendment is attached to this Affidavit as Appendix "E". Municipal staff subsequently advised the Board accordingly.

**C: ZONING BY-LAW AMENDMENT**

15. The Parties have a settlement of the matter before the Board for approval. This section sets out my opinion regarding the zoning by-law amendment put forward in the settlement. It is my opinion that the zoning by-law amendment is consistent with the Provincial Policy Statement ("PPS"), conforms to the County of Middlesex Official Plan and the Middlesex Centre Official Plan and represents good planning. The reasons are as follows:
- a. The subject property is designated Settlement Area in accordance with the County of Middlesex Official Plan and as Village Centre in the Middlesex Centre Official Plan.
  - b. Section 1.1.3 of the PPS provides direction for development within settlement areas in the Municipality, including Komoka-Kilworth where the subject land is located. Section 1.1.3.1 states that settlement areas shall be the focus of growth in municipalities and Section 1.1.3.2 dictates that land use patterns within settlement areas shall be based on a mix of land uses that efficiently use land and resources and are appropriate for and efficiently use the infrastructure and public service facilities that are planned or available. Section 1.6.6.2 of the PPS states that municipal sewage services and municipal water services are the preferred form of servicing for settlement areas.
  - c. Section 1.3.1 of the PPS directs municipalities to promote economic development and competitiveness by providing for an appropriate mix and range of employment uses to meet long-term needs and providing opportunities for a diversified economic base that include maintaining a range and choice of suitable sites for a variety of economic activities and ancillary uses.
  - d. The County Official Plan provides a regional policy framework within which development proposals are to be evaluated. Section 2.3.2 of the County Official Plan states that it is the goal of the plan that future development within settlement areas proceed on the basis of full municipal services. Section 3.2.1 dictates that growth within Middlesex is generally to be directed to the County's Settlement Areas in order to protect Agricultural Areas, protect natural heritage and promote efficient use of water and sewage services. It is noted that the detailed land use policies, and particularly those that pertain to development within settlement areas, are provided in the official plans of the County's local municipalities. Section 3.2.4.1 of the County Official Plan provides for a variety of land uses to be located in the Urban Areas of Middlesex, including but not limited to commercial land uses.
  - e. Section 2.3.4 of the County Official Plan notes that economic development is an important component of the County's Growth Management policy framework and that many long-term goals and objectives depend on economic activity and the opportunity for residents to live and work in the County. To this end, the County promotes diversity in its economic base.
  - f. Section 1.8 c) of the Middlesex Centre Official Plan states that the majority of growth within the Municipality will be directed to Urban Settlement Areas and that

such areas will accommodate growth on full municipal servicing, with such growth being permitted where adequate servicing capacities are established.

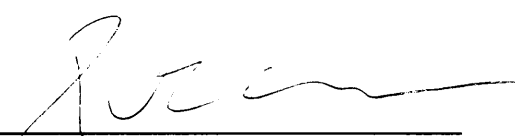
- g. Section 5.1.1 dictates that all new proposed development in Urban Settlement Areas shall be fully serviced by municipal water and sewage disposal systems. Section 5.1.4 of the Middlesex Centre Official Plan outlines that growth shall generally be directed to Urban Settlement Areas of the Municipality, including Komoka-Kilworth.
- h. A variety of commercial uses are permitted within the Village Centre designation, including general and convenience retail, personal services, office and institutional uses, restaurants and compatibly-scaled accommodation and entertainment uses.
- i. Section 9.2.1 of the Middlesex Centre Official Plan provides direction to develop a diverse economic base within the Municipality. It is noted that the Municipality is required to endeavor to increase its tax base and job opportunities in a manner that improves the quality of life of existing and future residents, and balances various economic sectors to ensure a sustainable economic base. The Official Plan also requires the promotion of the viability and economic health of village centres.
- j. The zoning by-law amendment would facilitate the adaptive reuse of a funeral home in an area that is designated to accommodate village commercial uses. The site configuration, including the existing accesses from Komoka Road (County Road 16) and Railway Avenue, as well as the parking layout are ideal for the use being requested and the existing fencing provides for adequate screening of the site from abutting properties.
- k. It is my opinion that the settlement is suitable in the context of the Village Centre land use designation that applies to the property and would allow the applicant to repurpose an existing building in a manner that is appropriate for the neighbourhood. I am satisfied that the proposal is compatible with adjacent development, consistent with the Provincial Policy Statement, conforms to both the County and Middlesex Centre official plans and constitutes sound land use planning.

#### **D: RECOMMENDATION**

- 16. Regarding the settlement before the Board, it is recommended that the Board approve the settlement reached as a matter of good planning.

17. With respect to costs shifting, it is recommended that the Board deny the Appellant's request for a costs award against the Municipality. The Appellant used the Board appeal process to engage a third party appeal and used such as a vehicle to reach a settlement with the Applicant concerning types of uses permitted at a property of personal interest. At all times, the Municipality followed the directions of the Board and provided the Appellant and the Applicant with reasonable and good faith assistance to help them potentially reach the settlement.

**SWORN BEFORE ME** )  
at the City of London, )  
in the Province of Ontario )  
this 12<sup>th</sup> day of September, 2017. )  
)  
)  
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\_\_\_\_\_)  
A Commissioner for taking affidavits )

  
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**BENJAMIN PUZANOV**  
B.A. (Hons.), M.PL., M.P.A., MCIP, RPP

SWORN AND AFFIRMED  
before me on this 12th day of September, 2017  
at the City of London, Province of Ontario