

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: September 19, 2019

CASE NO(S):

PL160641
PL161164

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Appellant: 1486563 Ontario Inc.
Appellant: Empire Communities (St. George) Ltd.
Appellant: Walton Development and Management LP
Subject: By-law No. 61-16
Municipality: County of Brant
OMB Case No.: PL160641
OMB File No.: PL160641
OMB Case Name: Empire Communities (St. George) Ltd. v. Brant (County)

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Empire Communities (St. George) Ltd.
Subject: Request to amend the Official Plan - Failure of the County of Brant to adopt the requested amendment
Existing Designation: Agricultural (Future Growth Area)
Proposed Designated: General Commercial and Medium Density Residential

Purpose: To permit the development of 900 residential units in a variety of housing forms

Property Address/Description: 205 and 209 Beverly Street West and 239 and 241 Highway 5

Municipality: County of Brant

Approval Authority File No.: OPA-B08

OMB Case No.: PL161164

OMB File No.: PL161164

OMB Case Name: Empire Communities (St. George) Ltd. v. Brant (County)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Empire Communities (St. George) Ltd.

Subject: Application to amend Zoning By-law No. 110-01 - Neglect of the County of Brant to make a decision

Existing Zoning: Agricultural Restrictive

Proposed Zoning: Site specific to permit proposed development

Purpose: To permit the development of 900 residential units in a variety of housing forms

Property Address/Description: 205 and 209 Beverly Street West and 239 and 241 Highway 5

Municipality: County of Brant

Municipality File No.: ZBA10/08/RA

OMB Case No.: PL161164

OMB File No.: PL161165

PROCEEDING COMMENCED UNDER subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Empire Communities (St. George) Ltd.

Subject: Proposed Plan of Subdivision - Failure of the County of Brant to make a decision

Purpose: To permit the development of 900 residential units in a variety of housing forms

Property Address/Description: 205 and 209 Beverly Street West and 239 and 241 Highway 5

Municipality: County of Brant

Municipality File No.: PS2/08/RA

OMB Case No.: PL161164

OMB File No.: PL161166

APPEARANCES:**Parties****Counsel**

Parkland Fuel Corporation	M. Kemerer
Empire Communities (St. George) Ltd.	P. DeMelo
County of Brant	N. Smith
Losani Homes (1998) Ltd.	J. Meader
2482704 Ontario Inc.	B. Duxbury
Riverview Highlands (St. George) Holdings Ltd. Brant Star Developments Ltd.	J. Hitchon

DECISION DELIVERED BY K.J. HUSSEY AND ORDER OF THE TRIBUNAL

[1] These are appeals brought by Empire Communities (St. George) Ltd. (“Empire”), from the County of Brant (“County”) failure to make a decision on applications for Official Plan Amendment, Zoning By-law Amendment and for Draft Plan of Subdivision Approval, for lands municipally known as 205 and 209 Beverly Street West and 239 and 241 Highway 5(the “Subject Lands”). Empire seeks a change in the designation of the subject lands from Urban Residential to Site Specific Policy Area Mixed Use, to permit a residential plan of subdivision.

Background and Context

[2] The Subject Lands are approximately 66.83 hectares (“ha”), located in the northwest portion of the St. George Settlement Area (“St. George”). Empire owns 55.2 ha; 11.6 ha are owned by Brian and Maree Loveless (on whose behalf Empire acts).

[3] The applications were originally submitted by Empire and deemed complete in

February 2008 but were put on hold pending the St. George Area Study (the “Study”).

[4] The Study covered an area of approximately 831 ha in the designated settlement area of St. George that coincides with the proposed Primary Urban Settlement Area boundaries in the new County Official Plan. The Study was coordinated by the St. George Land Owners Group, consisting of Empire Communities, Activa Group, and Riverview Highland Homes. The purpose of the Study was to ensure that development would occur within areas and time frames that could be supported by municipal infrastructure, and appropriate for the assigned population and employment growth.

[5] The study determined that St. George is well-suited for new development. Its identification as a primary urban settlement area in the new County Official Plan, extensive areas of the current designated land, and employment opportunities, all contribute to the identification of St. George as an appropriate location for growth and new development.

[6] The Study established a land use and infrastructure framework to direct and support future development in the community of St. George. It was completed, and adopted by Council, in May 2014.

[7] Empire amended its applications in 2015, and again in 2017, for development of a subdivision consisting of residential detached dwellings and townhomes, mixed-use blocks, open space and parklands, and storm water management facilities. Empire’s proposal was again amended in April 12, 2018, and it is that proposal which is before the Tribunal in these proceedings.

The Proposal

[8] The 2018 proposal was amended to respond to comments made by the County and other parties, as follows:

- 875 residential dwelling units, with no more than 32% developed and registered as townhouses;
- reduction in density to 43 from 52 residents and job per ha;
- removal of residential uses from mixed-use blocks along the southern edge of the lands along Highway 5, to commercial blocks;
- a 4.19 ha school block;
- relocation of the park block, south of the Imperial Oil transmission line;
- deletion of certain open-space blocks within which archaeological resources are located; and
- realignment of Streets A, B and E.

[9] At the start of the Hearing the Tribunal was informed that the following parties had resolved or narrowed the issues in this appeal:

1. Losani Homes (1998) Ltd. (“Losani”), Riverview Highlands (St. George) Holdings Ltd. and Brant Star Developments Ltd., owners of lands within the St. George Community resolved their issues under terms set out in a letter of Intent filed as Exhibit 9. Those parties agreed to certain principles that would form the basis of a Land Owners Agreement regarding cost sharing associated with the Study, and the implementation of services required to accommodate growth; the distribution of servicing allocation that would be made available by the County as a result of planned infrastructure and coordination of current and future planning applications, and other matters identified in the Letter of Intent (Exhibit 9). The question of road alignment and access point for the Empire Plan of Subdivision with

the Losani Plan would be resolved should approval be given to the Empire draft plan of subdivision.

2. 2482704 Ontario Inc. ("248") arrived at an agreement with the proviso that approval of the draft plan of subdivision conditions is without prejudice to any argument or position that may be raised or taken by any party in respect to appropriate draft plan conditions for any future applications that may be made by 248 to the County of Brant.
3. The County supports development in St. George and has agreed to most aspects of Empire's proposal. There was, however, one significant disagreement between the Applicant and County, and that is the alignment of Street "A" as shown on the proposed draft plan of subdivision. Empire does not agree to any modification of the plan to relocate Street A.

There was agreement on the Planning instruments (Exhibits 6, 7, and 8) to be approved, should the Tribunal approve the location of Street A.

4. Parkland Fuel Corporation ("Parkland"): The parent company of Sparling's Propane Co. Ltd. located at 183 Industrial Boulevard, St. George, narrowed its opposition to the proposed Empire development. Initially, Parkland identified issues with respect to Blocks 76–78, and claimed the proposed development would be incompatible with the legal use of its facility as it did not meet the following:
 - the D1 and D6 Guidelines;
 - the Technical Standards and Safety Authority ("TSSA") Regulations and Guidelines for the Implementation of the Level 2 Risk and Safety Management Plan;

- It did not have appropriate regard for the continued operation of the existing Parkland propane facility to the south west of the Subject Lands and to matters of public health and safety.

[10] Empire made changes to the draft plan to address issues raised by Parkland. A small triangle of land in the school block, Block 75, is within the 874 metre (“m”) risk contour, and that is the area of concern for Parkland.

[11] A Participant statement was submitted by Hillary Scholten whose primary concern is the impact of increased traffic on Andrew Street.

Evidence and Analysis

[12] The Tribunal heard expert opinion evidence from the following witnesses:

- Paul E. Johnston, Planning Consultant retained by Empire. Mr. Johnston, on consent, provided overall contextual evidence and factual background, including the history of the applications and the evolution of the plan to respond to comments from the County and other parties, and he provided evidence on the Area Study and its conclusions. Mr. Johnston testified in support of the applications.
- Wendy Nott, Walker Nott, Dragicevic Associates Limited, retained by the St. George Landowner’s Group to prepare the Area Study for St. George. Ms. Nott presented evidence on the key findings of the study, servicing strategy and the recommendations from the study.
- Rushika Angrish, Senior Land Use Planner for the County. Ms. Angrish presented evidence on the background to Empire’s applications; the St. George Official Plan Amendment and area study addendum; the municipal class environmental assessment for water and wastewater in St. George;

provided opinion evidence on the applicable planning instruments; and she responded to the issues identified in Attachment 3 to the Procedural Order.

- Stephen Fournier retained by the County to provide evidence on Traffic and Transportation analysis related to the construction of roadways and the proposed subdivision layout.
- Richard Pernicky, retained by Empire to provide Transportation Planning and Traffic Engineering evidence.
- Andy Bite, Chief Development Officer, Slegers Engineered Products Inc., retained by Sparling's Propane Co.Ltd. to provide consulting services for a Risk and Safety Management Plan for the facility located at 183 Industrial Boulevard, St. George, Ontario.
- Harry Froussios, land use planner retained by Parkland Fuel Corporation

The Alignment of Street "A"

[13] Street A is on the western edge of the Subject Lands. It is proposed to be single loaded, meaning, residential dwelling lots are only on the east side of the street, and services would be installed on one side only. The west side of the street would be flanked by a block intended as a pedestrian trail. The western edge of the Subject Lands is the west limit of the proposed pedestrian trail, and the Urban Boundary of the County.

[14] The County argued that a single loaded street is unacceptable, when considering that lands abutting the west side of the right-of-way are outside the developable area. It is inefficient for servicing and maintenance. The County's position was that it would not assume or take title to the street and the pedestrian trail, nor would the County accept

that it has to assume the municipal services constructed within the streets.

[15] Empire's expectation, on the other hand was that the County, as is typical, would take the street into its road inventory, would take title to the pedestrian trail block and administer it as part of its open space system.

The Motion

[16] Questions arose about whether the presiding panel could determine matters of ownership raised by the County and whether the County's position should affect the panel's conclusion on the proposed draft plan of subdivision (Exhibit 11).

[17] Empire and the County agreed that those questions ought to be put to a motion before a different panel of the Tribunal not privy to the opinion of the witnesses on the issue, and the arguments and submissions on that issue, heard by the presiding member in these appeals.

[18] The decision on the motion, which was not challenged either by the County or Empire, provided the following guidance to this panel.

1. The appropriateness as to location, width and adequacy of the proposed public highways on the draft plan should be assessed from a planning perspective based upon the evidence which was adduced in the hearing.
2. Unless the evidence has disclosed some reason to cause the matter of the future assumption of the public highways to be a planning issue, the matter of assumption is a future contingency and is not relevant to the determination of the present appeal before the presiding panel.
3. If there is a planning reason for reconsideration of the circumstances relating to the future assumption of the public highways which should be

remitted to the County to address, the presiding panel may consider the use of the Tribunal's authority to render a decision which employs a contingent Order, fashioned as the presiding panel sees fit, based upon the evidence heard by the presiding panel.

[19] Street "A" is the County's only outstanding issue. All other matters are subject to the Conditions of final approval set out in Exhibit 8. To determine whether the layout of Street "A" is appropriate, the Tribunal must consider the criteria for approval of a draft plan of subdivision, set out under s. 51(24) of the *Planning Act*. Of particular relevance is the following criterion:

(e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;

[20] Street "A" is characterized as a local road. The County commented on the proposed width for Street "A" which was previously 26 m. It was the opinion of the County's transportation consultant that 26 m is "inappropriate" for a single loaded street and that a width of 20 m would be more suitable. This comment was not opposed by Empire and the adjustment to 20 m was made in response to the County. The additional 6 m were added to the Pedestrian trail.

[21] There is no disagreement between the County and Empire on the adequacy of Street "A" to accommodate the low traffic volume that is anticipated for this local road.

[22] The County also raised concerns about the spacing between the access points to Empire's development from Beverly Street. There were three access points in the previous draft, namely, Streets "A", "G" and "B". The County suggested removing the access at Street "A". Instead, Empire eliminated Street "G", which was located between Streets "A" and "B". Empire submits that this is a superior solution as it maintains appropriate intersection spacing of approximately 400 m between the Streets "A" and "B" access points. It also affords access to both commercial blocks 73 and 74, as well

as leaving the stormwater management block 76 to remain in its location.

[23] The County further suggested shifting Street “A” by 80 m, presumably, to create additional space for houses on both sides of the street. This change would require significant re-drafting. Among many other disruptions it would mean relocating the stormwater system and all that is associated with that, and it would create an awkward approach to the intersection of Street “A” and Andrew Street. Little would be achieved by that action because, as Mr. Johnston observed, the City’s desire to double load the street would not be an option as the 875-unit limit for the sub-division would be exceeded.

[24] Empire noted that it submitted seven versions of the plan since 2008, which showed Street “A” was always located where it is currently, on the western edge of the Subject Lands. The location was never questioned. The Tribunal finds that at this late stage it is not reasonable to send Empire back to the drawing board without justification.

[25] The Tribunal also heard evidence from Mr. Pernicky that Street “A” as shown on the draft proposal, is generally consistent with the location identified on the approved St. George Settlement Area Study, and the Transportation Impact Study Updated March 7, 2018, which identified no issues or concerns with the proposed development.

[26] Mr. Pernicky concluded that the proposed internal road network is very well planned and well connected with minimum interruption. It provides sufficient connectivity for pedestrians and cyclists, and it was his opinion, that there are no resulting adverse traffic impacts. The Tribunal accepts this evidence and is also satisfied that the participant’s concerns would be answered.

[27] The Tribunal agrees with Mr. Johnston that there is no evidence to support the County’s contention that the street as proposed, is inefficient and would increase cost to the County. Ms. Angrish’s evidence was that “the County does not need additional infrastructure to maintain, grass cutting, refuse removal etc. at taxpayer’s costs”.

However, Ms. Angrish did not provide any explanation why servicing this road would require additional maintenance and impose greater costs on the County.

[28] The Tribunal accepts Mr. Johnston's opinion evidence that there is nothing in the layout of the Street "A" that would be at odds with Official Plan policies on character and street patterns, or with any other planning document.

[29] Based on all the evidence the Tribunal finds that Street "A" satisfies the criteria under s. 51(24) of the *Planning Act*; it is adequate as a local road and its location and width are appropriate.

Is the Proposed Development Incompatible with the Legal Use of Parkland's Facility?

[30] Parkland and Sparling operate two propane storage facilities located at 150 and 183 Industrial Boulevard, within the employment lands south-west of the Subject Lands.

[31] Propane facilities are required under the *Technical Standards and Safety Act* and associated regulations and guidelines, to develop and implement risk and safety management plans that identify a hazard distance associated with the propane operations. In this case it was established that the applicable hazard distance is 874 m.

[32] The only area on the Subject Lands affected by the hazard zone is a triangle of 28 x 22 m of the school block, or less than 1% of the overall property. Schools, including school yards, are considered sensitive places.

[33] The County's evidence is that, as required, it advised Parkland of the potential land use changes from urban residential, a designation which was established on the Subject Lands since 2008, to Site Specific Policy Area Mixed Use to permit a residential plan of subdivision. The County's land use planner, Ms. Angrish testified that the lands have been designated in the Official Plan for future residential development since 2000.

[34] Ms. Angrish, referred to the Fuel Safety Programs Advisory that was issued by the TSSA on January 10, 2010, which requires the County to advise propane operators of potential land use changes within the hazard distance that may result in an increased risk profile and may require a propane operator to institute additional mitigation measures.

[35] It is the County's position that the propane operator has the responsibility to review the existing and future land-use surrounding the propane facility as part of the licensing requirement, and it is the propane operator who must upgrade its risk management plan to address any risks associated with proposed residential development. Empire was in concurrence with the County's position.

[36] Empire further argued that the guidelines for the implementation of the level 2 Risk and Safety Management Plan apply to operators and not to land owners. That was conceded by Parkland. Empire rejected Parkland's solution to rezone the affected triangle of land from the school block to Open Space and recoup the loss space from elsewhere, Empire argued that there is nothing in the TSSA that puts the burden of mitigation on the land use.

[37] Mr. Froussios opined that School Block 75, does not comply with the Provincial Policy Statement, 2014 ("PPS") which provides development and land use patterns which may cause environmental or public health and safety concerns which should be avoided. Similarly, Mr. Froussios opined that School Block 75 does not comply with the County's Official Plan policy which speaks to appropriate buffers and separation distances to support public safety, and minimise negative impacts to resources, the environment and adjacent users. Empire maintained its position that the responsibility for mitigation is only the propane operator's; any suggestion that private lands are to be used as a buffer is neither appropriate nor anticipated in those documents. It was Mr. Johnston opinion that there is no policy in the PPS that supports a reverse obligation under the TSSA.

[38] Mr. Froussios took the Tribunal to the general provision in the County's Official Plan which states that propane fuel storage and handling facilities shall comply with the TSSA requirements. Mr. Froussios opined that if the necessary separation distance is not achieved and the facility no longer complies with the TSSA, it may have to be shut down. It was his opinion that the facility should not be placed in jeopardy because of the proposed use. Again, he recommended excluding the school use from the triangle and amending the zoning.

[39] The Tribunal has considered the evidence and submissions and finds that the intended use of the Subject Lands for residential purposes was established since 2000 and given the use, Parkland ought to have anticipated that there could be a need for additional precautionary measures. Parkland submits, and the Tribunal agrees, that propane operators have rights and require orderly development. The Tribunal finds that there is no evidence that Empire or the County proceeded in a disorderly fashion.

[40] The Tribunal finds that the County fulfilled its obligation to advise Parkland of the potential land use changes within the hazard distance that could result in an increased risk profile and require additional mitigation measures.

[41] The Tribunal finds nothing in this case that would suggest a reason to shift the obligation to mitigate from Parkland to Empire. That said, Empire made changes to the draft plan of subdivision to respond to Parkland's concern; if there is a further opportunity to reduce the impact on Parkland's facility, it ought to be considered. Both Empire and Parkland agreed that until there is a decision to build the school, the obligation to mitigate is not triggered.

[42] Based on all the foregoing, the Tribunal finds that the proposed planning instruments, which would facilitate the development of the Subject Lands, meet the requirements of the *Planning Act*, conform to the County's Official Plan, are consistent with the PPS, conform to the Growth Plan for the Greater Golden Horseshoe, 2017 and constitute good planning.

[43] Accordingly:

1. The Amendment to the Official Plan of the County of Brant, presented as Exhibit 6 is approved.
2. By-law Number 61-16 for the County of Brant is amended in accordance with the Zoning By-law Amendment presented as Exhibit 7.
3. The Draft Plan of Subdivision is approved subject to the Draft Plan Conditions presented as Exhibit 8

[44] This is the Order of the Tribunal.

“Karlene Hussey”

KARLENE HUSSEY
VICE-CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal
A constituent tribunal of Tribunals Ontario - Environment and Land Division
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-224