

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: January 17, 2018

CASE NO(S): PL160967

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

Appellant: Emile Nabbout
Subject: By-law No. 2016-67
Municipality: Town of Tecumseh
OMB Case No.: PL160967
OMB File No.: PL160967
OMB Case Name: Nabbout v. Tecumseh (Town)

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Perry Burford
Subject: Proposed Official Plan Amendment No. 14
Municipality: Town of Tecumseh
OMB Case No.: PL160967
OMB File No.: PL161195

Heard: November 14 - 17, 2017 in Tecumseh, Ontario

APPEARANCES:

Parties

Counsel

Perry Burford, Emile Nabbout, and
Judy Wellwood-Robson

B. Langford

Del Duca Industrial Park Ltd. ("Del
Duca")

C. Riley
M.A. Keefner

Town of Tecumseh (the "Town")

E. Hooker

DECISION OF THE BOARD DELIVERED BY S. JACOBS

INTRODUCTION

[1] Del Duca wishes to develop an agricultural parcel of land into an industrial business park, to be subdivided into nine large parcels, ranging in size from 1.12 hectares (“ha”) to 6.03 ha. The land is located at the northeast corner of the 8th Concession Road and North Talbot Road in Oldcastle Hamlet (the “subject property”), which is located in the Town of Tecumseh (“Town”). Del Duca requires an amendment to the Town’s Sandwich South Official Plan (the “SSOP”) and Zoning By-law No. 85-18 (the “By-law”) to facilitate its desired development.

[2] The Town adopted the official plan amendment in the form of Amendment No. 14 (the “OPA”) to the SSOP, and the County of Essex (the “County”), the approval authority for the Town, approved the OPA on October 28, 2016. The Town passed the companion By-law amendment on September 13, 2016, in the form of By-Law No. 2016-67 (the “ZBA”).

[3] Perry Burford and Emile Nabbout, residents of Oldcastle Hamlet, appealed the OPA and ZBA to the Ontario Municipal Board (the “Board”), in accordance with s. 17(36) and 34(19), respectively, of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended (the “Act”). Messrs. Burford and Nabbout, along with Judy Wellwood-Robson, to whom the Board granted party status at the Prehearing Conference for this matter, represent an unincorporated group of residents known as the Friends of Oldcastle Development (“FOOD”). For ease of reference throughout this decision, the Board will refer to Messrs. Burford and Nabbout, and Ms. Wellwood-Robson collectively as FOOD, recognizing that Messrs. Burford and Nabbout are Appellants and Ms. Wellwood-Robson is a party. The Board notes that other residents who testified at the hearing consider themselves part of FOOD, but that they were granted participant status for the purpose of testifying at the hearing.

[4] The Board heard extensive evidence over the course of three hearing days, including an evening session to hear from participants who were not able to attend during the day. The Board heard expert evidence from Thomas Storey, a planner retained by FOOD, Tiziano Zaghi, a planner retained by Del Duca, and Brian Hillman, the Town's Director of Planning and Building Services; all three were qualified by the Board to provide opinion evidence in land use planning. John Tofflemire, qualified to provide opinion evidence in traffic matters, and Rick Spencer, qualified to provide opinion evidence in engineering, specifically regarding servicing matters, both testified briefly in support of the OPA and ZBA, as traffic and servicing matters were not in dispute.

[5] The Board also heard extensive evidence through presentations by Ms. Wellwood-Robson and Mr. Burford regarding the history and character of Oldcastle Hamlet. Mr. Nabbout also testified in support of the appeal, as did the following participants:

- Carl White
- R. Kerry Jones
- Sandy Hamilton
- Susanne Rau
- Marlene Dupuis
- Linda Shafer
- Sherri Lucier
- Wendy Pulleyblank-Cunningham
- Mara Conrad

Eleonore Zanette and Sandra Miesmer provided the Board with written participant statements in advance of the hearing, in accordance with the Procedural Order;

however, neither of them was able to attend the hearing to testify. The Board accepted their written statements for information, indicating that it could accord little weight to these statements, given that this evidence could not be tested through cross-examination as the evidence of all other participants had been during the course of the hearing.

[6] At the conclusion of the evidence, the Board directed the parties to provide written submissions regarding the issues in the hearing, as well as sub-issues that arose during the course of the hearing. These submissions were made on November 30, 2017, in accordance with the Board's direction. Based on the evidence at the hearing, both oral and documentary, and the submissions of counsel, the Board finds that the OPA and ZBA are not consistent with the Provincial Policy Statement, 2014 ("PPS"), for the reasons that follow.

The Subject Property and its Context

[7] The subject property is located in the Town of Tecumseh, a 94 square kilometer municipality that was created in 1999 through the amalgamation of the former Town of Tecumseh, the former Village of St. Clair Beach, and the former Township of Sandwich South. The shape of the Town has been described as a 'llama' or a 'camel' with the former Town of Tecumseh and Village of St. Clair Beach forming the 'head' at the north end, and the former Township of Sandwich South forming the 'body' at the south end.

[8] The former Township of Sandwich South is a vast, largely rural area, and consists of two settlement areas in the form of hamlets. Maidstone Hamlet is located at the eastern boundary of the Town, north of Highway 3, and has experienced limited development due to servicing constraints.

[9] Oldcastle Hamlet, where the subject property is situated, is located at the western edge of the Town, adjacent to the City of Windsor with Highway 401 at the hamlet's northern boundary, and adjacent to the Town of LaSalle at its western boundary. In contrast to Maidstone Hamlet, Oldcastle consists of a significant industrial

business park area. Oldcastle Hamlet also has clusters of residential development, mainly single detached dwellings on large lots ranging in size from 0.5 acre to 1 acre. The total number of residents in the hamlet was estimated at various points in the hearing to be between 300 and 400. The hamlet also enjoys community facilities, including the Ciociaro Club event facility with its substantial grounds, and its recreation areas include Weston Park at the eastern edge of the hamlet, as well as the Chrysler Greenway trail system, which bisects the hamlet. Oldcastle Hamlet is surrounded to the south and east by undeveloped agricultural areas.

[10] The Board heard extensive uncontested evidence from Ms. Wellwood-Robson about the history of Oldcastle, which the Board considers useful contextual information given the particular issues in this hearing. Ms. Wellwood-Robson has lived the majority of her life in Oldcastle, on farm land that has been in her family for 187 years. Mr. Burford's family is in its seventh generation living on their farm property in Oldcastle. Indeed, many of the residents who testified before the Board have a long family history residing in Oldcastle.

[11] By all accounts, Oldcastle Hamlet began as a rural hamlet, consisting of and surrounded by agricultural land and farm industries. Residential development in the hamlet largely took place through severances of farm properties. The hamlet continued this way until the late 1960s, when the Council of the Township of Sandwich South moved forward with a plan to focus on promoting industrial development in the hamlet, given its close proximity to the City of Windsor, Highway 401, and major transportation arteries leading to the United States. Oldcastle Hamlet proceeded to develop with a focus on industrial development and limited residential development, all on septic systems. It was not until very recently that a sanitary sewer system was installed to service the hamlet.

[12] The subject property is a 21.6 ha irregularly-shaped parcel located near the eastern edge of Oldcastle Hamlet, at the northeast corner of 8th Concession Road and North Talbot Road. It is bordered by 8th Concession Road on its western edge, with industrial lots across and fronting onto 8th Concession Road to the west. A residential

dwelling abuts the subject property at its northern edge, along with vacant agricultural land that is owned by Union Gas. The property angles at the northeast and this portion of the property abuts the former Canada Southern Railway, which is currently abandoned. Weston Park abuts the subject property at its eastern edge, and the property line angles again at the southeast, where it abuts two residential properties that front North Talbot Road.

[13] Beyond the subject property, to the east of Weston Park, is a cluster of residential development on both the north and south sides of North Talbot Road. Across from the subject property, on the south side of North Talbot Road, is vacant land that is designated as Hamlet Development in the SSOP. There is another residential cluster located to the southeast of the subject property, as well as the Ciociaro Club, a banquet and recreational facility with substantial grounds. There are residential strips along both Howard Avenue and Walker Road, and there is some commercial development also along these roads and Highway 3. The majority of the hamlet, to the north and west of the subject property, is industrial business park development. The County in its Official Plan (the "County OP") recently expanded the Oldcastle Hamlet settlement area to include an additional 57 ha of land to the northeast of the subject property for employment lands purposes.

The Proposed Development

[14] The subject property is designated Hamlet Development in the SSOP and is zoned Agricultural Zone in the By-law. Oldcastle Hamlet is designated as a Primary Settlement Area in the County OP. The OPA changes the subject property's designation to Business Park and the ZBA rezones it to Holding Industrial Zone (H) M1 and also designates it as being subject to site plan control.

[15] Del Duca's proposed development has evolved from its original application to the Town, which indicated a total of 29 industrial lots. Mr. Zaghi explained that market demand for larger industrial lots on the subject property resulted in changes to the original concept plan, such that the concept plan now indicates a total of nine industrial

lots, ranging in size from 1.12 ha to 6.03 ha. The concept plan shows an internal road being constructed from 8th Concession Road and extending through the property, curving downward to North Talbot Road. A stormwater management pond is planned at the eastern edge of the subject property, adjacent to Weston Park and a residential property.

[16] Del Duca has entered into conditional agreements of purchase and sale for four of the nine lots, with one more under negotiation at the time of the hearing. The Town has also given provisional consent to create one of the lots, conditional on a successful rezoning of the subject property. Given that the subject property is in the conceptual planning stage, the Board was not provided with specifics as to the exact types of industrial businesses to be located on the property. Mr. Zaghi indicated that the site will likely house a range of light industrial uses.

The Positions of the Parties

[17] It is clear to the Board that FOOD would prefer to see the subject property developed for residential, rather than industrial, use. The residents articulated concerns about the impact of industrial development on them, including health and safety concerns. They also spoke to the impact of the development more generally on their community, expressing a concern that the industrial development of the property would destroy the connectivity enjoyed between the residential clusters on either side of the subject property. Many residents indicated their understanding that when Town Council shifted to an industrial development focus for the hamlet in the 1960s, such development was not intended to cross the 8th Concession Road, as is now proposed. They also expressed the concern that the Town's approach to the proposed development is a piecemeal planning approach, taking the position that the Town should undertake more extensive public consultation through a planning process such as a secondary plan for the hamlet.

[18] The Board understood that FOOD is not opposed to development on the subject property, and that some residents would support a mixed-use type development that incorporates lighter employment uses with residential uses.

[19] The Town and Del Duca conveyed the significance of Oldcastle Hamlet as a centre for employment, manufacturing, and industry, not only within the Town, but within the Windsor-Essex County region, given its location adjacent to both Highway 3 and Highway 401. They submitted that industrial development is entirely appropriate for the subject property, and is even anticipated by the County OP. The planning witnesses for the Town and Del Duca share the opinion that the proposed development is consistent with the PPS, when considering the proposed development and Oldcastle Hamlet within the broader context of the Town as a whole.

ISSUES AND ANALYSIS

[20] In order to approve an OPA to a local official plan, the Board must be satisfied that it is consistent with the PPS and conforms to the upper-tier official plan. The same is true to approve a ZBA, which, in addition to being consistent with the PPS and in conformity with the upper-tier official plan, must also conform to the lower-tier official plan. The parties in this case presented an issues list to the Board, which addresses the issues of consistency and conformity, and included sub-issues that are particular to this application. Upon hearing the evidence and reviewing the submissions of the parties, the Board characterizes and groups the issues as follows:

1. Are the OPA and ZBA consistent with the PPS?
 - a. What is the appropriate 'community' to be considered for the purpose of determining consistency with the PPS?
 - b. How do both the community-based and more broadly applicable policies in the PPS apply to the OPA and ZBA?

2. Do the OPA and ZBA conform with the County OP?
3. Does the ZBA conform with the SSOP?
4. Are the OPA and ZBA premature?

[21] The Board notes that the parties included as an additional issue whether there is a 'prima facie' case for the expansion of the residential designation in Oldcastle Hamlet. This issue was included on the revised issues list at Mr. Storey's request. There was much debate during the hearing regarding the use of the term 'prima facie' in a planning context, as neither Mr. Hillman nor Mr. Zaghi were familiar with the term in that sense. The Board understood Mr. Storey's use and application of the term to be for his own purposes in accepting the retainer from FOOD. In other words, the Board understood that Mr. Storey needed to satisfy himself, before accepting the retainer, that the subject property could support residential development as FOOD suggests. Regardless, the Board does not find this to be a critical issue in its analysis of consistency with the PPS and conformity with the OPs.

I. Consistency with the PPS

[22] Messrs. Zaghi and Hillman share the opinion that the OPA and ZBA are consistent with the PPS. Mr. Storey, however, is of the opinion that Messrs. Zaghi and Hillman did not take into account relevant policies in the PPS, particularly those relating to healthy, liveable and safe communities, and that the applications are therefore premature. The Board found the evidence in this hearing relating to the PPS to be somewhat cursory. This was in part due to the position of the Town and Del Duca that many of the PPS policies raised by Mr. Storey and by the Board are to be more broadly applied to the Town as a whole and are not limited to Oldcastle Hamlet and the proposed development. Accordingly, the Board will first address the intended application of the PPS.

[23] Part III of the PPS provides guidance on how to read the document and contains particular guidance relating to the geographic scale of policies:

Geographic Scale of Policies

The Provincial Policy Statement recognizes the diversity of Ontario and that local context is important. Policies are outcome-oriented, and some policies provide flexibility in their implementation provided that provincial interests are upheld.

While the Provincial Policy Statement is to be read as a whole, not all policies will be applicable to every site, feature or area. The Provincial Policy Statement applies at a range of geographic scales.

Some of the policies refer to specific areas or features and can only be applied where these features or areas exist. Other policies refer to planning objectives that need to be considered in the context of the municipality or planning area as a whole, and are not necessarily applicable to a specific site or development proposal.

[24] The planning evidence tendered by Del Duca and the Town, as well as their submissions, urged the Board to adopt an interpretation of the PPS that applies to the Town as the whole, rather than to the subject property specifically. At the core of the dispute between Del Duca, the Town and FOOD is the meaning of ‘community’ in the PPS, and the application of policies which refer to communities. While Messrs. Hillman and Zaghi interpreted ‘community’ to mean the Town as a whole, FOOD’s witnesses identified Oldcastle Hamlet as their community, or as a significant component of their community. The Board will first address the meaning of ‘community’ in the PPS and will then analyze how both the community-based and broader policies of the PPS apply to the proposed development.

A. What does ‘Community’ mean in the PPS?

[25] The overwhelming evidence from planning witnesses and residents in this hearing was that the definition of ‘community’ is a subjective one. The PPS recognizes ‘community’ as an important concept, and the theme of healthy, liveable, and resilient communities runs throughout the document. Policy 1.0 speaks to the general goal of

“promoting strong, liveable, healthy and resilient communities, protecting the environment and public health and safety, and facilitating economic growth.”

Specific policies to achieve this goal are set out in s. 1.1:

1.1 Managing and Directing Land Use to Achieve Efficient and Resilient Development and Land Use Patterns

1.1.1 Healthy, liveable and safe communities are sustained by:

- a) promoting efficient development and land use patterns which sustain the financial well-being of the Province and municipalities over the long term;
- b) accommodating an appropriate range and mix of residential (including second units, affordable housing and housing for older persons), employment (including industrial and commercial), institutional (including places of worship, cemeteries and long-term care homes), recreation, park and open space, and other uses to meet long-term needs;
- c) avoiding development and land use patterns which may cause environmental or public health and safety concerns;
- d) avoiding development and land use patterns that would prevent the efficient expansion of *settlement areas* in those areas which are adjacent or close to *settlement areas*;
- e) promoting cost-effective development patterns and standards to minimize land consumption and servicing costs;
- f) improving accessibility for persons with disabilities and older persons by identifying, preventing and removing land use barriers which restrict their full participation in society;
- g) ensuring that necessary *infrastructure*, electricity generation facilities and transmission and distribution systems, and *public service facilities* are or will be available to meet current and projected needs; and
- h) promoting development and land use patterns that conserve biodiversity and consider the impacts of a changing climate. [Emphasis in original]

[26] There is no question that the development of employment areas is a priority in the PPS, however, embedded in the policies specific to employment is the theme of supporting “liveable and resilient communities”:

1.3 Employment

1.3.1 Planning authorities shall promote economic development and competitiveness by:

- a) providing for an appropriate mix and range of employment and institutional uses to meet long-term needs;
- b) providing opportunities for a diversified economic base, including maintaining a range and choice of suitable sites for employment uses which support a wide range of economic activities and ancillary uses, and take into account the needs of existing and future businesses;
- c) encouraging compact, mixed-use development that incorporates compatible employment uses to support liveable and resilient communities; and
- d) ensuring the necessary *infrastructure* is provided to support current and projected needs. [Underlined emphasis added; italics in original]

[27] The subjectivity of the term ‘community’ is no doubt why a definition of the term is not included within the PPS’ multitude of defined terms. It is also not surprising that the Board heard different ideas of community from the planners’ perspective versus that of the residents. For instance, it was Mr. Hillman’s opinion that ‘community’ for the purpose of the Board’s analysis should be the Town as a whole. If this were the case, the Board could certainly understand how the proposed development would benefit the Town on the whole, and perhaps achieve the healthy community objectives of the PPS. However, the Board cannot reconcile such an interpretation with the language of the PPS.

[28] A different panel of the Board has, on a previous occasion, considered the meaning of ‘community’ in the PPS, finding that it does not have the same meaning as ‘municipality.’¹ This panel must agree for the same reasons articulated by Vice-Chair Schiller, that is, that the PPS uses the terms ‘community’ and ‘municipality’ throughout the document; if ‘community’ were meant to encompass an entire municipality, it would

¹ *Tribute (Unionville) Ltd. v. Markham (City)*, 2013 CarswellOnt 1242.

have made sense for the drafters to have used one term: 'municipality'. This panel further agrees that the term 'community' in the PPS is meant to convey something different from a municipality, something smaller.

[29] The definition of 'community' in a particular case is necessarily subjective and contextual. The residents who testified before the Board had a good understanding of what community means to them, describing the place that reflects their day-to-day experience of where they live, attend school, church or recreational activities, shop, and, perhaps, work. The residents who testified agreed that Oldcastle Hamlet is a significant component of their community.

[30] Many of the residents also consider Maidstone Hamlet to be part of their community, because they attend church there or their children attend school there, and they make daily or weekly trips to that area. None of the residents considered the Town as a whole as their community; many of them noted that, due to the geographic expanse of the Town, it can take 30 minutes to drive to the Town hall, and that they only venture into this part of the Town if they have business to conduct there. Many of the residents also noted that they shop in the large commercial area along Walker Road in the adjacent City of Windsor, as this is a short drive from Oldcastle Hamlet. Some therefore consider this area to be part of the community.

[31] Despite Mr. Hillman's planning opinion that 'community' should be taken to mean the Town as a whole, the Town and Del Duca agreed, in their written submissions, that the community in this case is Oldcastle Hamlet. While the residents must, out of necessity, venture out of the hamlet for work, shopping, church, and school, the Board understood their testimony to indicate that they consider the hamlet to be where they live and spend much of their time. The Board notes that the discussion of liveable and resilient communities in the PPS is consistent with this interpretation; that is, the PPS requires an analysis of impact of development on communities, and this must surely mean the immediate area one lives in and experiences on a daily basis. The emphasis in the PPS on liveable communities supports the Town and Del Duca's submission that Oldcastle Hamlet is the community the Board should consider in order to determine

consistency with the PPS. The Board finds that this accords with the testimony of the residents, who are most concerned with the impacts of the proposed development on the place in which they live and experience on a daily basis, which is the hamlet. The Board therefore agrees that the ‘community’ in this case, for the purpose of applying the relevant PPS policies, is Oldcastle Hamlet.

B. Application of Community-Based and Broader Policies of the PPS

[32] The PPS is meant to be read in its entirety; the document itself clearly states this in Part III. The Board agrees with the Town and Del Duca that the geographic scale of policies, cited earlier, is critical to properly interpreting and applying the PPS. All three planners cited policies as being relevant to this application, some of which are specific to communities, and others that are of broader application to settlement areas or to the Town.

[33] All three planning witnesses referred in some way to Policy 1.1.1, regarding sustaining healthy, liveable, and safe communities. Particularly relevant to this case is Policy 1.1.1(c), which seeks to achieve the healthy community goal by “avoiding development and land use patterns which may cause environmental or public health and safety concerns.”

[34] The Board heard very little evidence from Messrs. Hillman and Zaghi regarding Policy 1.1.1(c). While they share the opinion that the application is consistent with the PPS, the Board neither heard in their oral evidence, or read in their witness statements or reports, any sort of analysis to indicate that they had considered the community of Oldcastle Hamlet or its residents in the way anticipated by this policy. They both considered the benefit of the proposed development in the Town and the Windsor-Essex County region, given that Oldcastle Hamlet is recognized as a significant industrial area in the region. Their analysis of the PPS, however, overlooks the PPS’ overarching concern with sustaining healthy, liveable, safe, and resilient communities.

[35] The Board agrees with Mr. Storey that neither the Town nor Del Duca had appropriate regard for Policy 1.1.1(c) with respect to the proposed development. The Board questioned Mr. Zaghi as to his interpretation of “healthy, liveable and safe communities” within the context of this and other policies using this language within the PPS. Mr. Zaghi’s interpretation was contextual and takes into account the Town in its entirety, finding that in offering proper services, protecting natural heritage features, providing opportunities for shopping, living, working, and attending school, the Town satisfies the intent of this policy. Mr. Hillman agreed that the interpretation of this policy should be for the Town as a whole. The Board cannot agree, in light of its earlier finding that the use of ‘community’ in the PPS is not synonymous with ‘municipality’, and that the community to be considered in this case is Oldcastle Hamlet, as conceded by counsel for Del Duca and the Town.

[36] While the Board heard very little planning evidence regarding healthy, liveable, safe, and resilient communities, it heard extensive testimony from the residents of Oldcastle Hamlet about what their community means to them and how they perceive the proposed development will impact their community. The residents of Oldcastle view their residential clusters as connected; they all use and enjoy Weston Park, and in their view, the development of the subject property as industrial will disconnect these residential clusters and negatively change their daily experience. In addition to this general concern about the connectivity of the residential clusters, they raised specific concerns regarding the health, safety, and liveability of their community should the proposed development proceed.

[37] With regard to health concerns, the Board heard extensive uncontested evidence from Ms. Conrad about her two-year battle with a nearby industry that was not operating in accordance with Ministry of Environment and Climate Change (“MOECC”) standards, causing noxious fumes from painting. While the Board appreciates that industry is regulated by the MOECC, and trusts this will continue to be the case with any future development, Ms. Conrad’s testimony illustrates the potential for the negative impact of industry located adjacent to residential areas, even when that industry is regulated by the MOECC.

[38] Many residents spoke to safety concerns regarding the increase in traffic that will arise from the proposed development. The concern relates not only to the increased traffic from employees of the businesses to be located on the subject property, but also to the likely truck traffic associated with industry. Residents throughout the hamlet walk to Weston Park, and question the safety of walking along North Talbot Road with the increase in traffic from the proposed development. The Board understands that there are currently no sidewalks on North Talbot Road, and that this is something that could later be addressed in a draft plan of subdivision. The Board also accepts Mr. Tofflemire's uncontested evidence that the increased traffic volume from the proposed development can be supported based on the existing road network and proposed internal road. However, this does not address the issue of the increase of the particular type of traffic related to industry, and how this could impact the safety of pedestrians walking to their neighbourhood park, even if sidewalks are to be installed. The Board has previously recognized this as a valid concern of residents when assessing the compatibility between employment and residential uses.²

[39] The Board is not convinced, based on the planning evidence before it in this hearing, that the proposed development would sustain a healthy, liveable and safe community as envisioned by Policy 1.1.1(c).

[40] The question of impact is addressed elsewhere in the PPS, in Policy 1.2.6, which Mr. Zaghi cited and relied on his planning report:

1.2.6 Land Use Compatibility

1.2.6.1 *Major facilities and sensitive land uses* should be planned to ensure they are appropriately designed, buffered and/or separated from each other to prevent or mitigate *adverse effects* from odour, noise and other contaminants, minimize risk to public health and safety, and to ensure the long-term viability of *major facilities*

[41] In order to determine whether adverse impacts are mitigated in the proposed development, Mr. Zaghi relied on the MOECC Guideline D-6, a document that is

² *O'Shanter Development Co. v. Durham (Regional Municipality)*, [2006] O.M.B.D. No. 1010 ("O'Shanter").

referenced in the SSOP to be used in assessing impact of development. Guideline D-6 recommends separation distances between industry and sensitive land uses. Mr. Zaghi depicts the effect of Guideline D-6 in Figure 9 of his planning report. The result is that the recommended 70-metre (“m”) separation distance crosses North Talbot Road and covers a portion of the vacant agricultural land on the south side of the road. The 300 m “potential influence area” crosses the settlement area boundary and covers a larger portion of the agricultural land to the south.

[42] Mr. Zaghi explained that Figure 9 illustrates a worst-case scenario, presuming that all of the industries on the subject property will be Class II industries. While these are permitted by the proposed ZBA, Mr. Zaghi believes that in fact lighter industries will develop here, which could reduce the separation distances and minimize the impact on sensitive land uses. He acknowledges that the specific types of industries and their respective impacts cannot be assessed at this stage in the planning process. The Board notes that while it may be the case that this worst-case scenario does not materialize, it is a scenario that is permitted by the ZBA.

[43] The Board agrees with Mr. Zaghi that there is no issue of compatibility with other industrial lands in the surrounding area. Mr. Zaghi, however, acknowledges in his planning justification report that residences to the north, east, south, and west may be impacted and should be evaluated under the Guideline D-6. While the Board appreciates the importance of the guideline, it is but a piece of the puzzle in determining land use compatibility.

[44] There have been many cases before this Board where compatibility could not be found between residential and proposed industrial areas, including the *O’Shanter* case submitted by FOOD.³ Much like the panel in that case, this panel appreciates that while fine-tuning can be done through the draft plan of subdivision and site plan control processes, these processes do not address the larger question of compatibility of adjacent land uses. Former Member Rogers articulated the problem of locating these land uses together as a general land use planning principle:

³ *Ibid.*

While it may be that the impacts of employment uses on residential uses can be mitigated to a certain extent, it is not, as a matter of principle, good planning practice to locate sensitive residential uses adjacent to general industrial uses. It would also be difficult to mitigate impacts, when the actual uses to be located around the site are currently unknown.⁴

Similar to this case, the precise uses of the subject property and future uses of vacant surrounding properties are unknown, which poses greater difficulty for determining compatibility. This panel agrees that as a general principle of land use planning, it is not good planning practice to locate industrial uses adjacent to sensitive residential land uses, of which there are some existing adjacent to the subject property.

[45] The dangers of locating industrial land uses adjacent to residential uses were addressed by the residents who testified before the Board, and were discussed above with reference to Policy 1.1.1(c). It is also worth noting that the residents of Oldcastle Hamlet, while acknowledging that the majority of the hamlet has become industrial, have enjoyed a buffer from this industrial activity in the form of 8th Concession Road and the agricultural use of the subject property. If the subject property were to develop as proposed, the perception that these residents are surrounded by industry is inevitable. As noted above, many of them will be walking past this industrial area to use Weston Park or to visit friends in one of the residential clusters, or for residents at the eastern edge of the Hamlet to use the Ciociaro Club's recreational facilities. There is an anticipated increase in traffic related to these new industrial uses. Like the panel in *O'Shanter*, this panel cannot find compatibility between the proposed use and the adjacent residential uses.

[46] The Board also finds problematic the seeming disregard by Mr. Zaghi and Hillman of Policy 1.3.1(c), which speaks to the promotion of economic development and competitiveness by encouraging compact, mixed-use development with compatible employment uses, again to support liveable and resilient communities. Mr. Zaghi did not address this in his written or oral evidence, and when the Board questioned him about

⁴ *Ibid.* at para. 152.

this policy, he referred to the overall context of the Town in support of his opinion that the development is consistent with this policy.

[47] Mr. Hillman also referred to the Town in its entirety to demonstrate that the proposal is consistent with this policy, given that this policy speaks to the promotion of economic development on a broad scale. The Board agrees with Mr. Hillman that this policy is meant to apply broadly, in this case to the Town's promotion of economic development, however, it cannot ignore the direction of Policy 1.3.1(c) to encourage

compact, mixed-use development that incorporates compatible employment uses to support liveable and resilient communities.

While the Board appreciates that the Town is working toward this objective on a Town-wide basis, it is troubling that the Town has not considered this objective in the context of the Oldcastle Hamlet community. There is no planning evidence before the Board to indicate that this policy was considered in the proposed development, and the Board has already addressed the issues relating to compatibility, as well as liveable communities, above.

[48] The theme of complete communities is carried through the PPS, including in the transportation policies, where it is envisioned that land use patterns should minimize the length and number of vehicle trips. While Messrs Zaghi and Hillman believe that Policy 1.6.7.4 is meant to address larger-scale developments, Mr. Storey believes that it must be considered for the proposed development, and that the provision for more employment lands in an area where there is little residential property available will not reduce vehicle trips. The Board understands, as both Mr. Zaghi and Mr. Hillman point out, that Oldcastle Hamlet is in close proximity to residential areas in the City of Windsor and the Town of LaSalle. However, the Board fails to understand how the proposed development would minimize the number and length of vehicle trips, rather than increasing both, in light of a traffic study that supports increased traffic volume from the proposed development. The Board does note the availability of public transportation and active transportation routes in or near Oldcastle Hamlet. However, it agrees with Mr. Storey that adding more industrial development to an area that is already designated

approximately 45% industrial versus approximately 9% residential may not be in line with the vision of the PPS that people can live near enough to their workplaces that modes of transportation other than a personal vehicle are viable options.

[49] Similarly, the Board has considered the more broadly applicable policies in Policy 1.1.3 of the PPS, which speaks to the vitality of settlement areas. In particular, the Board finds Policies 1.1.3.1 and 1.1.3.2 relevant to the proposed development, as Oldcastle Hamlet is a designated settlement area:

1.1.3.1 *Settlement areas* shall be the focus of growth and development, and their vitality and regeneration shall be promoted.

1.1.3.2 Land use patterns within *settlement areas* shall be based on:

a) densities and a mix of land uses which:

1. efficiently use land and resources;
2. are appropriate for, and efficiently use, the *infrastructure* and *public service facilities* which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion;
3. minimize negative impacts to air quality and climate change, and promote energy efficiency;
4. support *active transportation*;
5. are *transit-supportive*, where transit is planned, exists or may be developed; and
6. are *freight-supportive*; and

b) a range of uses and opportunities for *intensification* and *redevelopment* in accordance with the criteria in policy 1.1.3.3, where this can be accommodated. [Emphasis in original]

These, and the other relevant PPS policies addressed above, speak to the balance the PPS envisions for communities, settlement areas and municipalities, and was discussed by the Board in *O'Shanter*, when describing the policy in the 1996 version of the PPS directing a sufficient land supply:

Furthermore, the Board finds that this provision of the PPS 1996 emphasizes the necessity to provide sufficient lands for all of the uses which comprise a community. Inherent in this concept is the idea of balance. There is to be a balance in the provision of lands for the various competing uses to ensure that a municipality can provide for all components of a healthy community.⁵

While the panel was addressing a provision of the 1996 PPS, it is clear from reading the current PPS that the idea of healthy, balanced communities remains a priority.

[50] The Board agrees with Messrs. Hillman and Zaghi that these settlement area policies are of broader application than to the proposed development. However, the proposed development comprises a significant land area within the settlement area of Oldcastle Hamlet, and there appears to have been little, if any, regard by the Town or Del Duca for the balancing components of these policies.

[51] The Board notes that there was also considerable discussion about the relevance of Policy 1.1.1(d), as Mr. Storey's opinion is that the proposed development could prevent the future efficient expansion of the settlement area. The Board agrees with the Town and Del Duca that the wording of this policy clearly indicates that it is meant to apply to development in areas "adjacent or close to settlement areas." Because the subject property is located within the settlement area of Oldcastle Hamlet, the Board finds that Policy 1.1.1(d) is not applicable in this case.

[52] Based on the evidence from the residents, all three planners, and the Board's own reading of the PPS, the Board finds that the OPA and ZBA are inconsistent with the PPS. The Board wishes to note, however, that it can envision an alternative proposal, as described by some of the residents that could be consistent with the PPS. A mixed-use type of development, incorporating employment uses that would have no adverse impact on surrounding uses, with a residential component could achieve the balancing anticipated by the PPS, and from a good planning perspective, could serve as an effective connecting link between the existing residential clusters. The Board of course

⁵ *Ibid.* at para. 38.

recognizes that this was not the proposal before it and will address this notion further in its disposition.

II. Conformity with the County OP

[53] Given the Board's finding that the OPA and ZBA are not consistent with the PPS, it is not necessary for the Board to determine whether the instruments conform with the County OP or SSOP. However, given the extensive evidence the Board heard regarding these policies, it will offer its findings in the hope that they may be of assistance to the parties moving forward.

[54] The County OP, adopted and approved in 2014, echoes many of the goals of the PPS regarding healthy, sustainable, and resilient communities. The goals for a healthy county, particularly s. 1.5(e) and (h) relate to settlement areas and are therefore relevant to Oldcastle Hamlet. These goals echo the balancing intent that was discussed earlier regarding the PPS:

1.5 Goals for a Healthy County

The long-term prosperity and social well-being of the County depends on maintaining strong, sustainable and resilient communities, a clean and healthy environment and a strong economy. To this end, the policies of this Plan have been developed to achieve the following goals for a healthy County of Essex:

...

- e) To create more mixed use, compact, pedestrian-oriented development within designated and fully serviced urban settlement areas.

...

- h) To create and maintain an improved balance between residential and employment growth in each of the Primary Settlement Areas, as detailed in Section 3.2 of this Plan, by increasing employment opportunities closer to where people live.

The planning witnesses disagreed as to the significance of these goals in determining the proposed development's conformity with the County OP. Messrs. Hillman and Zaghi

are of the view that it is necessary to look to the specific policies that implement the goals in order to determine the proposal's conformity with the OP, while Mr. Storey believes that the goals are also important in determining conformity.

[55] The Board agrees with the planning witnesses and submissions of the parties that a goal represents an aspiration, desire, or value, and that a policy may be considered a course of action to implement a goal. To that end, it stands to reason that a goal articulated in an official plan can be of assistance in interpreting a related policy. Put another way, an official plan policy should not be interpreted in such a way that would frustrate its related goal.

[56] Section 1.5(h) refers to s. 3.2 of the County OP for its detailed related policies. Section 3.2.1 provides more specific direction relating to settlement areas:

It is the vision and purpose of this Plan to direct the majority of future growth and development into the Primary Settlement Areas in order to strengthen the County's settlement structure, focus public and private investment in fewer areas and to preserve the lands designated "Agricultural" and "Natural Environment" for the purposes outlined in the policies of this Plan. Local Official Plans will detail where within the "Settlement Areas" designations various types of land uses will be located; however, healthy community principles shall be incorporated into the long-range planning and development review process.

Schedule A2 of the County OP designates Oldcastle Hamlet as a Primary Settlement Area. While s. 3.2.1 directs local official plans to designate specific land uses within Settlement Areas, it also mandates "healthy community" principles to be incorporated into both long-range planning and development review. Specific goals to that end are set out in s. 3.2.2; similar to the PPS, these goals describe settlement areas where residents can live, work, and enjoy recreation (s. 3.2.2(b)), attracting business and industry (s. 3.2.2(f)), and, in s. 3.2.2(c):

To promote development within Primary Settlement Areas that is compact, mixed-use, pedestrian oriented, with a broad range of housing types, services and amenities available for residents from all cultural, social and economic backgrounds.

[57] The companion policies for these Primary Settlement Area goals are set out in s. 3.2.4.1:

The following policies apply to Primary Settlement Areas:

- a) Primary Settlement Areas shall be the focus of growth and public/private investment in each municipality.
- b) Primary Settlement Areas shall have full municipal sewage services and municipal water services and stormwater management services, a range of land uses and densities, a healthy mixture of housing types including affordable housing options and alternative housing forms for special needs groups, and be designed to be walkable communities with public transit options (or long-term plans for same).
- c) Local municipal Official Plans shall establish appropriate land uses in accordance with the policies of this Plan.
- ...
- h) All types of land use are permitted within the "Settlement Areas" designation subject to the specific land use policies of the local Official Plans.
- i) Cost effective development patterns and those which will minimize land consumption and reduce servicing costs are encouraged. Land use patterns which may cause environmental, heritage preservation or public health and safety concerns shall be avoided.

[58] The planning witnesses focused on the more specific policy direction in s. 3.2.4, which identifies the County's Primary Settlement Areas. Section 3.2.4 lists all of the Primary Settlement Areas in the County, and, only in the case of Oldcastle Hamlet, provides a detailed description of the hamlet:

Primary Settlement Areas are the largest and traditional centres of settlement and commerce in the County. Protection of these communities by focusing growth and investment is a priority of the County. The locations and boundaries of the Primary Settlement Areas within the County have been identified on Schedule "A2", and include the following:

- i) Oldcastle Hamlet (Town of Tecumseh)

Oldcastle Hamlet has historically been the focus of manufacturing due in part to its proximity to the City of Windsor. The recent investment in sanitary services and the existing forms

of development make it an ideal location to focus employment growth subject to the following policies:

- i. Oldcastle Hamlet shall be primarily developed with employment uses, while recognizing that limited opportunities may exist to expand upon the few existing residential clusters that are situated in the area. The local Official Plan will more specifically designate the lands in appropriate land use designations.
- ii. A mixture of lot sizes shall be provided, including large lots that would be suitable to employment uses that may not be appropriately located within other nearby Primary Settlement Areas due to their size or impacts.
- iii. The local Official Plan shall contain policies to ensure orderly and appropriate development.
- iv. All new development shall be on full municipal sewage services and municipal water services.
- v. Cost effective development patterns and those which reduce servicing costs are encouraged. Land use patterns which may cause environmental, heritage preservation or public health and safety concerns shall be avoided. [Emphasis added]

[59] Messrs. Zaghi and Hillman share the opinion that s. 3.2.4(i), subparagraph (i), directs employment uses to be the primary form of development in Oldcastle. The Board agrees, and it is well-established through all of the planning evidence that this has already been achieved in Oldcastle. Industrial and business park development is the largest land use category in the hamlet, representing 36% of existing development, with an additional 9% of designated industrial land that is vacant. In fact, the vacant land category may now be significantly larger given the addition of lands to the settlement area through the County OP, which are intended for business park/industrial use, though not yet designated.

[60] The planners agree that 'primarily' refers to the largest of a number of categories, and not a majority; there is no question that industrial use/business park is the largest land use category in the hamlet. The Board does not interpret s. 3.2.4(i) subparagraph (i) to mean that all development in the hamlet must be for employment uses. The provision clearly recognizes that there are limited opportunities to expand on the

residential clusters in the area. Reading this policy together with the healthy community principles throughout the County OP, and the specific Primary Settlement Area policies in s. 3.2.4.1, the Board interprets this to mean that while employment will be the primary use, there should be a range of land uses in the hamlet, including a healthy mix of housing types (s. 3.2.4.1(b)). The recognition of the limited opportunities for residential expansion in Oldcastle Hamlet cannot be read to mean that there will be no residential growth in the hamlet, as this would be contrary to the goals that underlie this policy.

[61] The Board does not view the proposed development as essential to satisfying the policy direction of s. 3.2.4(i) subparagraph (i), as the development of primarily employment uses has already been achieved in Oldcastle Hamlet. The continued development of employment uses while overlooking other land uses may well frustrate the healthy community goals of the County OP, for the same reasons discussed by the Board in its analysis of the PPS.

[62] The Settlement Area policies of the County OP direct that local official plans shall specifically designate lands in Oldcastle Hamlet in appropriate land use designations. The SSOP, adopted in 1997, has not yet been updated in light of this County OP policy, which forms the basis for the next issue the Board was asked to consider.

III. Conformity with the SSOP

[63] A threshold issue regarding the SSOP is whether it should be applied, given that it is 20 years old, and has not been updated to reflect the latest PPS or the County's 2014 OP. From a legal standpoint, it is a well-established principle that the Board typically applies the policies in force and effect at the time of the application, unless there are compelling reasons to do otherwise.⁶ There is no question that the SSOP, while arguably outdated, is the local official plan in force and effect now and at the time of the application; there is no other local official plan policy that the Board could apply in this case.

⁶ See *Clergy Properties Ltd. v. Mississauga (City)* (1996), 34 O.M.B.R. 277; *James Dick Construction Ltd. v. Caledon (Town)*, [2003] O.M.B.D. No. 1195; and *Re Sunlife Assurance Co. of Canada*, [2007] O.M.B.D. No. 1277.

[64] Mr. Hillman explained that the Town currently has three separate official plans for each of its pre-amalgamation municipalities, and that it is in the process of preparing a new official plan for the Town. To do this, the Town has prepared a series of discussion papers on various topics, including an Employment Lands Discussion Paper (the “ELDP”). All planners acknowledged that, while useful for providing insight into the current policy thinking of the Town, the discussion papers, including the ELDP, have no bearing on the Board’s determination of conformity with either the County OP or SSOP. The Board notes, however, that Town Council relied on the ELDP in requesting that the County expand the Oldcastle Settlement Area in its 2014 Official Plan and that the County did so.

[65] In the Board’s view, it is also important to note that the County OP directs that specific and appropriate land uses for Oldcastle Hamlet are to be designated in the local official plan. This has not yet been done, and many properties, including the subject property, are designated as Hamlet Development, a type of holding designation that provides for a range of urban land uses, including residential, commercial, and industrial. While it is not necessary to make a determination on this, given the Board’s findings regarding the PPS, this lack of alignment of the SSOP with the County OP lends credence to Mr. Storey’s opinion that the proposed development is premature.

IV. Prematurity of the Proposal

[66] FOOD argued that the proposed development is premature given the badly dated SSOP and the limited public consultation by the Town. While FOOD agreed that the Town followed all statutory public meeting requirements, the consensus among the residents is that the Town’s approval of the OPA and ZBA is a piecemeal approach to planning, and that it would be desirable to have a more extensive planning process with consultation of the residents and other stakeholders, perhaps in the form of a secondary plan process or a local comprehensive review. The Board notes that a secondary plan process is not unprecedented in the Town, as there has been a secondary plan prepared for both Maidstone Hamlet and Tecumseh Hamlet. The Board also notes that the ELDP explores the possibility of a Community Improvement Plan (“CIP”) regarding

employment lands in the Town. While the ELDP indicates that further information on the CIP process is forthcoming, it indicates to the Board that there may be an appetite and opportunity for the Town to engage in a more in-depth planning process involving Oldcastle Hamlet.

[67] There is no requirement, policy, legal, or otherwise, to compel the Town to undertake any such exercise, nor is there jurisdiction for the Board to order one in these circumstances. Given the Board's findings regarding the relevant community in this case, it trusts that the Town is in a position to determine the most appropriate process for moving forward with this or any future development in Oldcastle Hamlet.

CONCLUSION AND DISPOSITION

[68] The Board appreciates that Oldcastle Hamlet is an important centre for industry within the Town and, indeed, within the Windsor-Essex County region. However, based on all of the evidence at the hearing, as well as the extensive documentary evidence reviewed during and after the hearing, the Board concludes that the proposed development is not consistent with the PPS mandate that development sustain healthy, liveable, and resilient communities.

[69] The Board is mindful that Ms. Wellwood-Robson and other residents took care to note that they are not opposed to development on the subject property, even suggesting a type of mixed commercial-residential development that could act as a better transition from the existing industrial area to the residential clusters and Weston Park. While the Board heard no evidence on such a proposal, it can, as described earlier, envision such a proposal that could be consistent with the PPS. The Board, having heard extensive evidence about Oldcastle Hamlet and the policies relevant to development there, is prepared to withhold its Order to allow the parties to explore such an alternative.

[70] The Board will therefore withhold its Order allowing the appeal for a period of one year from the date of issuance of this decision. This will allow the parties to explore an alternative proposal in accordance with this decision, should they desire, recognizing

that Town Council may choose the appropriate planning process to facilitate this. Should the parties find that they are moving toward resolution in one year's time and that they require additional time, they make request an extension. This panel will remain seized.

"S. Jacobs"

S. JACOBS
MEMBER

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Ontario Municipal Board

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