

ISSUE DATE:

October 28, 2009



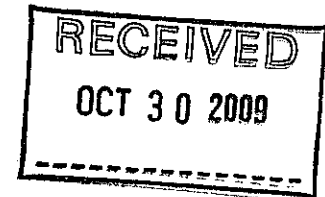
PL090545

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Gary Fox
Subject: Proposed Official Plan Amendment No. 30
Municipality: Prince Edward County
OMB Case No.: PL090545
OMB File No.: PL090545



APPEARANCES:

Parties

Gary Fox

Municipality of the County of
Prince Edward

Counsel

W. Fairbrother

DECISION DELIVERED BY M. A. SILLS AND ORDER OF THE BOARD

The matter before the Board is an appeal by Gary Fox (Appellant) of the decision by the Council of the County of Prince Edward (County) to pass By-law No. 2418-2009, being a by-law to adopt Official Plan Amendment No. 30 (OPA 30). The purpose of OPA 30 is to amend policies of the County of Prince Edward Official Plan respecting the application of the Minimum Distance Separation (MDS) formulae.

The Appeal

The Appellant is objecting to a single provision of the policy respecting the application of MDS formulae to new development on existing lots of record; specifically, subsection d) of Policy 1.2.10), which states:

For the purpose of implementing Guideline No. 7 (Existing Lots of Record), it is the policy of this Plan that MDS I will not preclude building construction on existing lots of record. To provide the greatest possible distance separation from active livestock barns, the following tiered setback requirement for non-

livestock related building construction will be implemented in the Comprehensive Zoning By-law for lands designated in this Plan as Prime Agricultural, Rural and Shoreland in the following order or priority:

- a) Locate the non-livestock related building at a distance that is not less than the minimum distance required for the new building or structure under the Minimum Distance Separation I (MDS I) Formulae and Implementation Guidelines 2006;
- b) If the setback required by a) above cannot be met, locate the non-livestock related building at a distance that is not less than the minimum distance required for the new building or structure under the Minimum Distance Separation I (MDS I) Formulae and Implementation Guidelines, 1995;
- c) If the setback required by b) above can not be met, locate the non-livestock related building at a distance that is not less than the minimum distance required to double the existing capacity of existing active livestock barn(s), with the same type of livestock and manure storage, under the Minimum Distance Separation II (MDS II) Formulae and Implementation Guidelines, 2006. For the purpose of calculating this setback requirement, any existing liquid manure storage facility will be deemed to be a vertical straight walled storage facility;
- d) If the setback required by c) above can not be met, locate the new building as far as possible from existing active livestock barns;
- e) For the purpose of calculating the foregoing setback requirements, an existing active livestock barn includes any building or structure in which livestock are kept or housed at the time the foregoing setbacks are calculated or have been kept or housed within the preceding one hundred and twenty (120) months; and
- f) All other applicable zoning requirements shall apply.

The Appellant was not represented by legal counsel and did not call any witnesses. Mr. Fox told the Board he had intended to call two witnesses, but they were unable to attend these proceedings as a result of illness.

Evidence of the Appellant

Mr. Fox informed the Board that save and except Policy 1.2.10), "he can agree with all" of the policy amendments set out in OPA 30. He further stated that "subsections a), b), c), e) and f) are satisfactory. The problem exists with subsection d)".

It was his contention that "in effect, subsection d) allows residential development to take place without any regard for distance separation from existing livestock operations". While he acknowledged the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) MDS Implementation Guidelines provides Municipalities with the option, he submitted that Guideline No. 7 strongly encourages Municipal Councils to apply MDS I setback requirements to new development on existing lots of record. He told the Board he "questions whether a thorough review has been undertaken, or if they (the Municipality) have established the suitability of development on all existing lots of record". It was his opinion that there are existing lots of record that are not suitable for development of any kind.

The Appellant submitted that the disputed provision is not consistent with the County's Official Plan Vision with respect to settlement patterns (subsection 2.4.10 and 2.6.3), which was intended to "maintain the quality, diversity and character of the rural landscape" by directing settlement away from agricultural and aggregate areas and protecting farm activities from incompatible encroaching development. Similarly, this provision does not conform to the County Land Use Designation Policy (subsection 5.4.1 c)) which directs that "new developments shall not be located where they endanger or may hinder any existing farming operation". He contended that OPA 30 in its present form will result in permitting incompatible residential development to take place on lots that would not be permitted by current standards. It was his opinion that "the County has not given enough consideration to the long term implications of this amendment, nor has it allowed for adequate consultation with the agricultural community".

Mr. Fox told the Board he is concerned that the pending development of the property adjacent to his could impede the ability of his sons and/or grandsons to expand his existing farming operation. In this regard he stated, "it would appear that the inclusion of subsection d) is a veiled attempt to allow for a specific development, that being the construction of a residential dwelling" on the land parcel adjacent to his livestock operation. However, although he admitted he has a direct interest in this matter, he said he is also concerned that OPA 30 "will adversely impact the entire agricultural industry" in Prince Edward County. He requested the Board issue an Order deleting subsection d) as it appears in Policy 1.2.10 of OPA 30.

Planning Evidence

Mr. Gerald Murphy is a registered professional planner, employed as the Commissioner of Planning for the Municipality of the County of Prince Edward. He is a full Member of the Ontario Professional Planners Institute and the Canadian Institute of Planners.

Mr. Murphy provided the Board with a detailed chronology of the process leading to the development of the County's Minimum Distance Separation Implementation Policy – OPA 30. Of particular significance, there were a number of public consultation sessions/meetings conducted and a Working Committee was established for the purpose of investigating potential solutions to the implementation of MDS requirements. The Working Committee included County officials and representatives of the local Agricultural Advisory Committee and Construction Association, working in consultation with staff of OMAFRA.

Mr. Murphy testified that the primary issue raised during the almost two and a half year process leading to the adoption of OPA 30, was the matter of MDS I application to existing vacant lots of record. He said for the most part, these lots were created for the express purpose and intent of being developed as residential building lots and were subjected to the policies, regulations and guidelines in effect at the time of approval. He told the Board that as a result of competing interests, those being residential development versus farming operations, this issue created a great deal of controversy in the community. Residential lot owners were concerned that their land parcels, which had been legally created as residential building lots, would be sterilized. These owners favoured a complete exemption from any livestock facility setback requirement. On the other side of this issue, farm lot owners were concerned that their ability to expand their farming operations would be adversely affected by the construction of homes on existing vacant lots. Farm operators were requesting that lots of record not be exempt from MDS I setbacks, or, in the alternative, that a similar exemption to MDS II requirements be provided for livestock related properties.

Mr. Murphy submitted the Provincial MDS Implementation Guidelines (2007) clarifies the application and calculation of MDS formulae, including specific instances where the formulae must be applied and other instances where exemptions are

permitted. In this regard, he referred the Board to Guideline #7 – Application of MDS to development on existing lots, which states:

Municipalities have the option, but are strongly encouraged to apply MDS I to development proposed through building permit, on an existing lot.

To address the potential negative impact of nuisance complaints, municipalities are encouraged to undertake a thorough review of this issue.

Municipalities should consider approaches to address the future use and suitability of development on existing lots.

The application of MDS I to development on existing lots will take its direction from the applicable municipal planning documents.

Mr. Murphy said that while Guideline #7 clearly provides municipalities with an option with respect to the application of MDS I setback requirements for existing lots, there is no option provided to exempt new or expanded livestock facilities from MDS II requirements. He said this issue has divided farmers and non-farmers in Prince Edward County for almost two and a half years. The policies set out in OPA 30 were established only after a thorough review and public consultation process involving County Council and several individuals and organizations with strongly held and competing perspectives, was undertaken. It was his opinion that OPA 30 represents a "made in Prince Edward" solution to a MDS implementation issue by establishing tiered setback requirements. While these policies do not preclude the construction of a new home on an existing vacant lot, they do require the greatest possible separation distance between existing livestock facilities and new homes.

Mr. Murphy opined that OPA 30 is consistent with the Provincial Policy Statement, conforms to the general intent and purpose of the County Official Plan and represents sound land use planning. He said OPA 30 is consistent with the options identified in the Provincial MDS Implementation Guidelines and represents an acceptable and reasonable compromise to the issue of application of MDS I requirements for existing lots of record.

Disposition

The Board accepts and relies on the uncontradicted expert planning evidence of Mr. Murphy to find that OPA 30 is consistent with Provincial and municipal planning policies and represents good planning.

The Provincial Policy Statement and the Provincial MDS Implementation Guidelines clearly provide the Municipality with a choice as to whether or not MDS requirements will be applied to existing lots of record. The County initially concluded they had two options; 1) to require that the MDS I formulae be applied to lots of records, or, 2) to exempt existing lots of record from MDS I setback requirements. However, either scenario would have resulted in the creation of adverse impacts for several local property owners. After an extensive review of potential implementation options, the Working Group was able to agree on a tiered setback approach which they felt was a fair and reasonable manner in which to resolve this issue. While Mr. Fox has concerns that a pending development proposal for the property adjacent to his farm could potentially limit future expansion of his livestock operations, the Board finds that the interests of the community at large outweighs the speculative impact/outcome of a single property owner. And while Mr. Fox submitted that he could agree with the provision set out at Policy 1.2.10), subsection d) provided a similar exemption was extended to livestock related properties, he did concede that he was aware it was not within the purview of either the Municipal Council or the Board to authorize exemptions to MDS II requirements. In any event, the Board finds that OPA 30 serves to protect the greater interest of the public at large and accordingly, is consistent with the general intent and purpose of the Official Plan and represents good land use planning.

The geography and landscape of Prince Edward County is such, that while it presents an enviable destination for residential living, it is also rich in attributes conducive to agricultural operations. The reality is that while there is a long history of functioning farm operations within the County, there are also several existing lots of record of which property owners intended to, and expected to be able to, develop as residential building lots. The challenge for municipal officials and the community is to establish planning policies which will facilitate a harmonious co-existence of residential and agricultural land uses. In this instance, after a thorough review of potential options, Municipal officials and members of the community, including two clearly competing

interests (farmers and non-farmers), agreed that the tiered setback requirements outlined in OPA 30 were a reasonable and an acceptable approach to MDS requirements. Nevertheless, Mr. Fox contends that the County has not given enough consideration to the long term implications of OPA 30, nor has it allowed enough time for adequate consultation with the agricultural community. The Board cannot agree with this assertion. The process involving the development of the MDS Implementation policies (OPA 30) took more than two years, it allowed for significant public consultation and it directly involved representatives from the local Agricultural Advisory Committee. Throughout the process, several different options were considered by Council, the Working Group and members of the public. The Working Group ultimately reached a consensus and recommended the tiered setback requirements forming part of OPA 30. Although the County solicitor did not deem it necessary to call them as witnesses, a representative from both the Agricultural Advisory Committee and the Construction Association were available to give evidence at the Board proceedings. Mr. Fox took part in the public process, making his objections known to Council and the public. The Ontario Municipal Board received only one appeal and no other members of the public spoke in opposition to the passing of OPA 30. The Zoning By-law Amendment for the purpose of implementing the policies of OPA 30 was not appealed.

Subsection 2.1 of the *Planning Act* requires the Board to have regard to any decision of a local Council. In doing so, it is incumbent upon the Board to scrutinize the decision of Council, to the extent possible, in accordance with the criteria set out in Provincial and municipal planning policies. Subsection 2.1 (b) requires the Board to have regard for the information and material that the municipal council considered in making the decision. In this regard, the evidence before the Board overwhelmingly supports the decision of Council. The Working Group, in consultation with OMAFRA staff, considered various implementation options and ultimately reached a compromise which results in the competing interests having an equal advantage/disadvantage. The Board is satisfied that the decision by County Council with respect to OPA 30 is appropriate.

The Board Orders the appeal is dismissed.

So Orders the Board.

"M. A. Sills"

M. A. SILLS
MEMBER