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

ISSUE DATE: October 09, 2019 **CASE NO(S).:** PL171238

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(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Windsor Essex Community Housing Corporation
Subject:	Application to amend Zoning By-law No. 1-2014 – Refusal of Application by The Town of Kingsville
Existing Zoning:	Residential Zone 3 Urban
Proposed Zoning:	Site Specific (To be determined)
Purpose:	To permit a correction to the zoning on a total of seven properties in the Town
Property Address/Description:	194 Division Road North
Municipality:	Town of Kingsville
Municipality File No.:	ZBA/21/17
OMB Case No.:	PL171238
OMB File No.:	PL171238
OMB Case Name:	Windsor Essex Community Housing Corporation v. Kingsville (Town)

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Windsor Essex Community Housing Corporation
Subject:	Consent
Property Address/Description:	194 Division Road North
Municipality:	Town of Kingsville
Municipal File No.:	B/11/17
OMB Case No.:	PL171238
OMB File No.:	PL171239

Heard:	September 18 and 19, 2019 in Kingsville, Ontario

APPEARANCES:

Parties	**Counsel**
Windsor Essex Community Housing Corporation	Edwin Hooker
Town of Kingsville	Jeffrey Hewitt

DECISION DELIVERED BY S. TOUSAW AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Town of Kingsville ("Town") refused a Consent and Zoning By-law Amendment ("ZBA") for a property owned by the Windsor Essex Community Housing Corporation ("CHC") at 194 Division Road North in Kingsville ("property" or "site"). The CHC appealed the refusals to this Tribunal.

[2] For the reasons set out below, the Tribunal will dismiss the appeals and not approve the requested Consent and ZBA.

BACKGROUND

[3] CHC operates a 30-unit rental apartment building on the property of approximately 0.8 hectares. The lot is relatively long and narrow, with frontage on Division Road North ("Division") and also abuts the terminus of Westlawn Avenue ("Westlawn") near the property's west limit. CHC applied for consent to sever the west half of the property for future development to be accessed from Westlawn and retain the east half containing the existing apartment building and parking area fronting on Division.

[4] Around the same time, the Town was considering housekeeping amendments to its comprehensive Zoning By-law No. 1-2014 ("ZBL") to correct the zoning of several

apartment buildings in the Town, including this property, that had been inadvertently placed in a zone that did not include an apartment building as a permitted use. To facilitate CHC's Consent application, the Town included a provision in the ZBA affecting this property to permit a reduced lot frontage of 19 metres which would allow for the frontage of the proposed severed lot on Westlawn.

[5] Through the public process for both the Consent and ZBA, neighbourhood residents raised concerns about the future development of the property. The Town's Committee of Adjustment ("CoA") denied the Consent application and Town Council refused the ZBA.

LEGISLATIVE TESTS

[6] In making a decision under the *Planning Act* ("Act") with respect to these appeals, the Tribunal must have regard to matters of provincial interest as set out in s. 2 of the Act and must have regard to the decision of the municipal council or approval authority and the information it considered under s. 2.1 of the Act. The decision must be consistent with the Provincial Policy Statement, 2014 ("PPS") under s. 3(5) of the Act.

[7] The ZBA is required to conform with an applicable official plan, in this case being the County of Essex Official Plan ("COP") and the Town of Kingsville Official Plan ("TOP"), under s. 24(1) of the Act. For the Consent, the Tribunal must be satisfied that a plan of subdivision is not necessary for the proper and orderly development of the municipality under s. 53(1) of the Act, and the Tribunal must have regard for the matters listed in s. 51(24) of the Act, including conforming with an applicable official plan.

EVIDENCE

[8] Three Planners were qualified by the Tribunal to provide opinion evidence in the area of land use planning: Robert Brown, Registered Professional Planner ("RPP") is the Manager of Planning Services for the Town and testified under subpoena from

CHC; Karl Tanner, RPP is a consulting Planner retained by CHC; and Elizabeth Howson, RPP is a consulting Planner retained by the Town.

[9] The Tribunal also heard from five citizens as Participants: Beth Grant, Ed Cornies, Sheri Lowrie, Bruce Adams and Bonnie Baldwin.

[10] Jeff Belanger, CHC's Acting Director of Asset Management, testified to the intentions of CHC in pursuing these applications. CHC operates 4,700 affordable housing units in the region and persons seeking such housing are typically on the waiting list for five years before being housed by CHC. CHC is undertaking a regeneration plan to evaluate options for asset management including funding sources, divestiture and reinvestment. CHC wishes to separate the buildable west half of this property from the existing apartment building on the east half but, at this juncture, has no plans for the property. Mr. Belanger advised that CHC may build on the site itself if funding can be secured or it may sell the severed lot on the market.

[11] The Planners generally agree that these applications are consistent with the PPS and conform with the COP in that development is to locate in settlement areas with full municipal services, provide a range and mix of housing types, utilize land and services efficiently and protect natural heritage areas. However, the Planners disagree on when and how to address various pre-development requirements of the TOP, with Mr. Brown and Mr. Tanner in favour of relying on the mandatory Site Plan Application ("SPA") to address all issues, and Ms. Howson recommending that issues be addressed now at the Consent and ZBA stage. The Planners, and indeed all witnesses, agree that the existing apartment building could be zoned to properly recognize the use, but disagree on how to address a potential development arising from the Consent and ZBA.

[12] Mr. Brown supports the applications. His original intent was to correct the transposition error in zoning that had occurred inadvertently when the new ZBL was prepared for the amalgamated municipality several years ago. When he learned of CHC's interest in severing the west part of the property for asset management purposes, Mr. Brown helpfully included the provision for a reduced frontage in the ZBA

rather than require CHC to apply for a minor variance. Mr. Brown is aware of the policies of the COP and TOP for rezoning applications and consents and considers the variety of building forms permitted by the proposed R4 zoning to be in keeping with the neighbourhood subject to standard conditions being applied to the Consent approval, including a SPA.

[13] Mr. Tanner recommends approval of the ZBA and Consent as he considers the potential use of the site for an apartment building to be suitable in this mixed use neighbourhood and that any requirements of the TOP can be addressed adequately by the mandatory SPA before development occurs. Mr. Tanner notes the variety of housing forms in the area, including detached, semi-detached, townhouses and apartments, the Town park abutting the west side of the property, the buffer of natural area to the south associated with the Palmer Drain, and convenient access over local streets to an arterial road, being Division Street North.

[14] For the hearing, Mr. Tanner produced a conceptual sketch to illustrate that the site could accommodate up to a 24-unit apartment building with associated parking area and greenspace. He considers the ZBA to be returning the property to the zone it once had and that for such a relatively small development, matters such as building and parking layout, traffic considerations, stormwater management and natural heritage setbacks can be addressed in the SPA. As added assurance for the Town, Mr. Tanner suggests the use of a holding zone to prevent any development until all of the Town's SPA requirements are satisfied and the holding is lifted as set out in the TOP.

[15] Ms. Howson emphasizes that the ZBA and Consent constitute new applications that are required to be assessed against the policies of s. 3.6.1(h) and (i) of the TOP. Ms. Howson views the applications as premature in the absence of a specific development proposal. She suggests that many of the necessary reviews of planning issues as directed by the TOP cannot be conducted because there is no firm development concept to evaluate against. Ms. Howson acknowledges that a proposed apartment supported by attendant studies could be found to conform with the TOP, but that where there is no proposal, the studies cannot be completed or evaluated.

[16] Ms. Howson notes that policy (i) lists matters to review when considering a ZBA including density and form, stormwater management, roads, off-street parking and buffers to adjacent land uses. She refers to similar matters for review under the Consent policies of s. 7.3 of the TOP and the requirements of s. 51(24) of the Act including an archaeological assessment and an environmental impact study. In the absence of a specific development proposal and the necessary studies, Ms. Howson is unable to conclude whether a Consent for a new lot and a ZBA for an apartment building satisfy the various legislative tests.

[17] The Participants suggest that without a proposed plan for the site, they can only speculate on the proposed use of the property and as a result they have several general concerns about such matters as building type and size, traffic safety, privacy and the protection of the valley and wildlife habitat associated with the Palmer Drain.

FINDINGS

[18] Before assessing the primary question of prematurity, the Tribunal addresses two related matters.

[19] First, although the Town originally envisioned the ZBA as a housekeeping amendment to correct a past oversight in zoning, what is before the Tribunal is not a housekeeping matter.

[20] CHC argues that the ZBA is simply restoring the zoning for an apartment building that existed for many years before the 2014 ZBL inadvertently removed such provision. While that argument is factually correct, it does not follow that the current ZBA should somehow be relieved of the rigorous review mandated by the TOP and other planning requirements of the Act. In fairness, CHC argues that such review will be addressed fully under the SPA. However, as reviewed later, the Tribunal finds that many of the matters in question should not be deferred to the SPA.

[21] CHC did not appeal the 2014 ZBL and its coming into force resulted in the apartment building constituting a legal non-conforming use under s. 34(9) of the Act. No expansion of the use may occur without a formal application under either s. 34 or s. 45 of the Act. Moreover, CHC has made a development application in the form of the requested Consent and the ZBA permitting the proposed frontage. Whether anyone knew it or not, for some five years no further development has been permitted on the property without a planning application. Now that such application has been made, it is required to satisfy all legislative requirements before receiving approval. A permission today for an apartment building on a separate lot requires various questions and issues to be answered fully, which, as outlined below, are incomplete owing to a possible, but as yet undescribed, development.

[22] Second, although these applications are advanced by CHC, these applications are not about providing affordable housing. CHC is clear that it has no development plan at present for the property and that, as part of its asset management and regeneration plans, one option is to sell the severed parcel. While the Tribunal would anticipate that CHC will construct affordable housing units if it develops the site, a different owner could construct executive homes or luxury condominiums.

[23] CHC argues that the Town's refusal of the Consent and ZBA may have been influenced by public opposition arising from concerns over affordable housing that contravene human rights legislation. The Tribunal does not find this argument to be supported by the facts.

[24] The CoA Decision on the Consent notes that the "potential use is not compatible with surrounding single detached residential and severance is premature until zoning issue has been resolved" and the Council's Notice of Refusal states that "the decision was based on the zoning of the property no longer being appropriate for the existing make-up of the area."

[25] CHC refers to the record of public meetings to emphasize that neighbourhood opposition included reference to issues associated with the tenants of the existing

apartment building. However, the Tribunal found the Participants to be fair and genuine in their testimony. They noted that the social issues associated with the existing apartment building are bound to surface in any application for further development in the area. The Tribunal finds that the issues raised by the Participants in the hearing relate to the potential neighbourhood impacts from a possible apartment building and are not differentiated based on whether CHC develops the property or someone else.

[26] The Tribunal finds that the primary failing of the Consent and ZBA, as opined by Ms. Howson, is that these applications are premature in the absence of a concept plan against which the requirements of the TOP and the Act can be evaluated. Contained within policy 3.6.1(h) of the TOP are two statements central to this matter:

> The Zoning By-law will zone only existing medium and high density residential uses as such. Any new medium or high density residential development or redevelopment proposal will require an amendment to the Zoning By-law. (emphasis added)

[27] In this case, although the existing apartment on the east half of the property is entitled proper recognition in the ZBL in accordance with the above policy, these applications propose a new lot on which a new apartment building could be established. The necessary ZBA for a new "proposal" must be considered against the matters listed in policy (i). The specific wording in the policy is "shall have regard to" the matters listed.

[28] What the TOP intends when only zoning existing medium and high density uses could be framed another way: 'new medium and high density residential uses will not be prezoned.' If the property had been zoned in the ZBL to permit an apartment, Mr. Tanner correctly points out that a second apartment building would be permitted, and that such development would be subject only to the SPA process. The Town would have to rely on the SPA to ensure that all relevant matters are suitably addressed. However, the Consent and ZBA here would result in the prezoning of a new lot without a review of a full proposal with planning justification under the applicable policies, a result that is expressly not permitted by the TOP.

[29] The Tribunal agrees with Ms. Howson, and to a certain extent with Mr. Tanner, that several of the requirements may be readily justified, but that fact does not exempt an applicant from demonstrating adequate “regard” for the policies in the form of supporting documentation. The difficulty for CHC is that without a development proposal in mind, it is unable to address how the proposal has regard to the density and form of adjacent development, how stormwater can be accommodated on site, whether access to a collector or arterial road is sufficient, whether sensitive natural features are protected, and how compatibility with adjacent land uses is achieved through buffering measures, among other requirements in the TOP for archaeological assessment, environmental impact and flooding hazards.

[30] As noted by the Planners, these applications also invoke the requirements of s. 2 and s. 51(24) of the Act, some of which are referenced in s. 7.3 of the TOP for Consents. Mr. Tanner took the Tribunal to Schedule B1, Natural Heritage System of the COP which shows “Significant Terrestrial Features” immediately south of this property, and to Schedule C2, Regulated Areas of the COP which identifies the Palmer Drain valley as regulated by the Essex Region Conservation Authority (“CA”). The CA confirmed in its correspondence (Exhibit 3, p. 257) that the property is within or adjacent to a significant valleyland and significant wildlife habitat under the PPS. Mr. Tanner relies on the CA recommendation that an environmental impact assessment (EIA) “is not required at this time” provided it is completed at the SPA stage “when details of the development can be identified.”

[31] In the Tribunal’s view, what the CA deferred and what CHC has failed to demonstrate is how the Consent and ZBA before the Tribunal are consistent with the PPS requirement to have no negative effect on natural features and their ecological function. These applications propose a new lot zoned to the limits of that lot to permit an apartment building. The Tribunal received no evidence to confirm that no part of the lot is within a significant valleyland or significant wildlife habitat, or that a larger setback is not necessary from the south lot line than provided for by the proposed R4 zone. On the contrary, the CA advised that the property is within or adjacent to identified natural heritage features.

[32] A promise of complying with legislated requirements at the SPA stage is not sufficient to support a Consent and ZBA when those matters are fundamental to where and how development may proceed on a lot. A common planning axiom is applicable here, as alluded to by Ms. Howson: 'site plans cannot prohibit what zoning permits.' Not only do the legislative requirements necessitate, and the TOP expressly mandate, the resolution of these matters when considering a Consent or ZBA, the ability of the Town to implement the results of an EIA or other necessary study is far more secure when reflected by zoning lines, setbacks and other appropriate provisions under s. 34(1) of the Act.

[33] This case also highlights a core feature of the broader public interest in planning. Part, but certainly not all, of the public interest considered by this Tribunal is informed by the views of residents and others affected by planning decisions. The opportunity for their input is mandated in the Act for Consents and ZBAs. It is not for SPAs. The Tribunal finds that deferring important planning matters to the SPA stage where the public is neither guaranteed input nor has a right of appeal is at odds with the scheme of the Act for public engagement and procedural fairness. The TOP is found to properly mandate regard for various planning issues at the ZBA and Consent application stage with reference to a proposal and the necessary supporting justification as appropriate in the circumstances. Certainly, in cases of infilling, a reasonable expectation of the public and other stakeholders is to understand what a development entails and how it might affect them when exercising their statutory right to voice informed support or opposition to a proposal.

[34] The Tribunal finds that the Consent and ZBA are not approved for failure to satisfy the legislative tests.

ORDER

[35] The appeals are dismissed.

"*S. Tousaw*"

S. TOUSAW
MEMBER