ISSUE DATE:

November 25, 2011

PL100206

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

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	SEE SCHEDULE "1"
Subject:	Proposed Official Plan Amendment No. 76
Municipality:	City of Ottawa
OMB Case No.:	PL100206
OMB File No.:	PL100206

A P P E A R A N C E S :

Parties	**Counsel*/Agent**
City of Ottawa	T. Marc*
Thomas Cavanagh Construction Limited	U. Melinz*
Friends of the Greenspace Alliance	A. Kempster

DECISION DELIVERED BY N. C. JACKSON AND ORDER OF THE BOARD

This is a phased Hearing into the Appeals for Ottawa Official Plan Amendment 76. This phase is on Country Lot Subdivisions. The Parties have settled except for the proposed Five-Year Moratorium on Country Lot Subdivisions. On the Moratorium, the Board heard evidence over a five-day period and reserved its Decision.

The Board heard evidence from land use planner, Murray Chown, for the Appellant, Thomas Cavanagh Construction Limited (Cavanagh), and land use planners, Bruce Finlay and Paul Stagl for the City of Ottawa. Friends of the Greenspace Alliance (Greenspace), present as a Party, made opening and closing submissions, and questioned witnesses of other Parties. Greenspace did not call evidence.

OPA 76 appealed sections in issue:

Moratorium on Country Lot Subdivisions

10. Notwithstanding policies 6, 7, 8 and 9 permitting the creation of country lot subdivisions and conservation subdivisions, a moratorium is placed on the

creation of any new ones, which moratorium shall end at the earlier of five years from the date of adoption of this Plan or the coming into force of an official plan amendment that removes this moratorium and reinstates the existing policies or replaces them with new policies. Any changes will be based upon a critical review of country lot subdivision policies and in particular, the proposal to cluster country lot subdivisions and will examine, but not be limited to;

a. The impact on existing villages;
b. The potential impact on groundwater;
c. The development potential in these clusters;
d. The implications for the demand for communal services;
e. The costs to taxpayers;
f. The impact on the rural character;

11. To be consistent with the Provincial Policy Statement the critical review referred to in policy 10 shall also take into consideration that New Country Lot Subdivisions must be limited in scale, both in the context of the amount of development in the Rural Area as a whole and in the context of specific proposals for individual sites.

The Moratorium concept came about in the planning process as a result of a Motion adopted in Committee and then Council. Paragraph 11 is the result of a Minister's Modification # 38.

Country Lot Subdivisions were recognized specifically in the last Ottawa Official Plan (2003). In 2007, the City commenced its five-year review of that Official Plan resulting in the adoption of Official Plan Amendment 76 on June 14, 2009. The sections of OPA 76 respecting Country Lot Subdivisions were supplemented by section 8 permitting Conservation Subdivisions. Conservation Subdivisions will permit a reduction in lot size (residential footprint) if a component of the Natural Heritage system is preserved and the lot sizes still average 0.8 of a hectare. The Conservation Subdivision concept is now approved but subject to the Moratorium. OPA 76 also imposed a phasing requirement on Country Lot and Conservation Subdivisions, in lieu of the previous hard cap. That phasing is approved.

Position of the Parties

The City supported by Greenspace seeks to maintain Policies 10 and 11 as above adopted and modified by the Minister. The Appellant seeks to have the Board modify the two policies as set out in Exhibit 5. Policy 10 is proposed by Cavanagh to end the Moratorium two years from the date of adoption (June 2009), in place of five

years. Policy 11 is proposed for further modification by Cavanagh to delete the last few words "and in the context of specific proposals for individual sites" so that the consideration is in the context of the amount of development in the Rural Area as a whole.

Cavanagh Arguments

Cavanagh argues the inappropriateness of the use of a moratorium in an Official Plan review and that its length is excessive. Cavanagh relies heavily on the City planners' role in the review leading to the adoption of OPA 76 and, in particular, that the city planners did not recommend the adoption of the moratorium. The moratorium was passed by the Joint Planning and Rural Affairs Committee and then City Council.

As argued well by Cavanagh there is no specific authority in the *Planning Act* to enable the Council in an Official Plan review to pass as policy a Moratorium. The review under section 26 of the *Planning Act* and the Official Plan policy enabled under section 16 of the *Planning Act* do not mention the word moratorium nor the process intended: no further rural country subdivisions or conservation subdivisions will be "created" during the time period of the moratorium. There is, however, explicit authority for the Council to pass an interim control By-law under section 38 of the *Planning Act*.

As a consequence, is the Moratorium clothed in official plan language an abuse of process or worse a process without authority that could be struck? To answer these important questions the detail of the *Planning Act* language must be carefully reviewed .

Section 38 of the *Planning Act* permits the Council without prior notice to pass an interim control By-law where the council directs a review or study in respect of land use planning policies in a defined area or areas of the Municipality for a period of one year (renewable for a second year), "prohibiting the use of land, buildings or structures within the Municipality or within the defined area or areas therefore, for or except for, such purposes as are set out in the by-law." Although Messrs. Marc and Chown agree that the interim control By-law can be free standing, it is clear that its effect is to prohibit use of land during the study and that enabling subsections of section 38, namely 38(5), 38(6), 38(6.1) and 38(8) make reference to the enabling section of the *Planning Act* for zoning - that is section 34. Section 34 itself in paragraph 1 authorizes zoning by-laws

"for prohibiting the use of land for, and except for, such purposes as may be set out in the by-law within the Municipality or within any defined areas"...

Where it is argued there may be abuse is that the moratorium is for up to five years whereas, an interim control by-law is for one year and extension to two and no further interim control by-law can be passed for a period of three years. In addition, the tests of good faith and expediency are applied to interim control by-laws due to their extraordinary nature - no notice before passing.

Finding on Moratorium Authorization

The Board agrees there are similarities in the language of section 38 of the *Planning Act* that could have been the basis for some consideration of its use in this case. The language "review or study of land use planning policies being authorized by by-law or resolution" and the need to stand back for a second thought are common to the Moratorium and section 38. However, there are significant differences. OPA 76 does not, in the moratorium, prohibit all new country lots. While the subdivision process for new country lots is prohibited in the study period, the consent process is not restricted and new lots continue to be created. Further, lots existing may be developed. There is not, therefore, the type of land use prohibition during the study as contemplated in section 38 of the *Planning Act*.

What there is in the impugned Policy 10 of the Official Plan is a Policy of Pause, in the words of Planner Stagl. That Pause, the Board finds is contemplated in the language of section 16 of the *Planning Act,* where the Act directly references "policies primarily to manage and direct physical change" that the Official Plan shall contain and a description of the "measures and procedures" proposed to attain objectives that the plan may contain. While broad in language, the Board finds a Pause in Official Plan language to be authorized under section 16 of the *Planning Act*.

This interpretation is assisted and reinforced by planning practice. While there ought to be caution with the wide ranging interpretation of the word moratorium that evolved in discussion at Committee, there is strong and consistent support for the use of a Pause. Stagl's evidence is that it is apparent in other Official Plans across the Province. That, of course, does not make it correct or authorized in Ottawa. However,

in this same OPA review in Ottawa, a similar five-year study and restriction on development was imposed in the Flewelling Special Study Area and upheld by the Ontario Municipal Board on Appeal. In that separate phased Hearing, Cavanagh, as a Party, did not oppose that five-year Pause (not called a moratorium) perhaps in part since it secured some success otherwise in its Appeal. In an earlier case, *Ottawa Official Plan Appeal Riverview Park Community Association v. City of Ottawa*, (2006) O.M.B.D. Order 3360 at page 6, the Ontario Municipal Board otherwise constituted, upheld a study time restriction in the Official Plan.

The Board accepts the planning logic of Stagl when he was confronted in cross-examination with the question of a freeze as that term is more commonly used in the context of an interim control by-law. His response was that Policy 10 had not and could not remove *Planning Act* rights regarding the filing of Applications for Subdivision nor Appeals from the failure to act. Rather, it was his opinion that the Pause could still be raised in the Appeal Hearing. Policy 10 would be raised as the response of the City on the Appeal.

The Board accepts the City's evidence that if good faith and expediency are applied, they meet those tests. The City publicly provided for a grandfathering of rural subdivisions applied for in a six-month grace period and did process such applications. The study itself contemplated in the five-year period has commenced and proceeded. It is not complete as per a work schedule exhibited but the work commenced has demonstrated good faith. The Board will discuss further the expeditious nature of the study later under planning merits.

While a Party should not be faulted for recognizing some merit of the other side in their continuing Appeal, it is noted that the Cavanagh evidence in this Hearing, both oral and in writing, is supportive of a shortened Moratorium. That shortened period for up to two years from the time of adoption is considered in more depth on the planning merits of policies 10 and 11.

For all the reasons above, the Board finds the Moratorium, in the sense of a Pause as set out in Official Plan language, is authorized under the *Planning Act* and in planning practice. But on the planning merits should it be upheld given the position of the Planning Department, the planning process itself, and the manner of its implementation?

The Planning Merits

The City does not oppose the assertion of the Appellant that City planning recommendations did not include a Moratorium. In the approximate two-year review of section 26, city planners on a number of occasions, in writing, recommended to permit country lot subdivisions. That policy had been in the 2003 Ottawa Official Plan now under review. City planners went further recommending permission for Conservation Subdivisions and to remove the cap on country lot subdivisions, and in conjunction therewith impose a required phasing. The end result, at the time of adoption, was to supplement country lot subdivisions with conservation subdivisions and phasing. Such, additional policies are now in effect but subject to the moratorium. There has been a thorough review so that the nature of the approvals and moratorium were clearly on the public record.

There is not, despite the planning recommendation to proceed with country lot subdivisions, a gap in process or notice. The no country lot development sentiment was clearly a part of the public discussion as an option early in the 2008 Rural Discussion Paper. Before that, as far back as the 2003 Official Plan, planning staff had then in a juxtaposition recommended not to permit country lot subdivisions but Council had permitted country lot subdivisions. After adoption of the 2003 Official Plan permitting Country lot subdivisions, Greenspace Alliance had appealed. Late in 2006 Greenspace in a settlement agreed to withdraw their Appeal if prohibition of Country lot subdivisions as an option was brought forward in the next Official Plan review. Planning staff did bring forward the Greenspace position to prohibit country lot subdivisions in the current Official Plan review.

One ought not to get carried away with prohibition of country lot subdivisions since the Moratorium provides a time for further study. One could say, “hasn’t there been enough study?” Listening carefully to Planner Finlay, it is apparent that the issues are broad and have not been yet conclusively studied. The City of Ottawa, on the one hand since restructuring in 2000, is largely rural – approximately 80 percent. On the other hand, the 2005 Provincial Policy Statement introduced for the first time the concept by policy of limited residential use in the Rural Area. Limited was not defined in the Provincial Policy Statement and as set out in *Scotton v. Drummond North Elmsley* PL091195, planning at the lower tier level varies from no rural subdivisions in Mississippi Mills to the phased permission in Drummond North Elmsley.

In Ottawa, rural subdivisions are complicated by their relationship to each other in various forms of what is called clustering. Although clustering has been mentioned from the early days of Official Plan review in Ottawa, it has not been resolved. On the contrary, it can be a consideration of growth management including growth in Villages where the PPS states Settlement Areas (Villages in the Ottawa Official Plan) shall be the focus of growth and growth in the Urban Area. Some evidence in this Hearing suggests growth in the Rural Areas may rival or exceed growth in Villages.

The Study terms in the Moratorium policy are relevant planning considerations. Clustering, impact on Villages, groundwater, communal services, costs and rural character are not disputed as relevant planning considerations for the study in the Moratorium period. The Board accepts the nature and purpose of the study.

The Appellant disputes the expeditiousness of the study. A comprehensive Rural Review has been commenced by the Planning Department, in June 2010, following the Minister's notice of adoption of OPA 76 in January, 2010. A report to Rural Affairs Committee dated June 18, 2010, discloses further details of the study undertaken, in particular clustering, reviewing the study terms from the Moratorium policy but adding a review of the Land Evaluation and Area Review, the need for additional Mineral Resource Areas and a review of the Village Plans. All are related from the last OP review and now are to be part of a comprehensive Rural Review. That review was to include a detailed consultation strategy.

In a report dated January 25, 2011, addressed to the Rural Affairs Committee planning staff detailed the Consultation process and Timelines as:

a. Phase 1: February 2011, Contact Community Associations;

b. Phase 2: February to April 2011, Discussion paper and Questionnaire to be distributed to the rural community to solicit feedback;

c. Phase 3: May to September 2011, Evaluation and staff recommendations.

The first two phases were met but the Phase 3, May to September 2011, report has not been met. The work to date overlaps with the next Official Plan review committed for early 2012. It is proposed for continuation of the Rural Review in early

2012. Although there is delay, it is clear from the January 2011, report that substantial work has been undertaken. A Discussion Paper on the impact of clustering on country lot subdivision development, facts on country lot subdivisions, providing arguments for and against, and Decision Points is helpful background. Discussion is included on how much residential development is in rural Ottawa, past discussions in the rural community, quantum of clustering, and whether clustering will impact groundwater and villages. The Board finds the planning work undertaken to date to be genuine and authentic. The work points out the comprehensive nature of the undertaking, respecting the many facets and uses in rural life.

Although canvassed in the past, there is now a new comprehensiveness that is best completed in the 2012 OP review. The Board will not shorten the time of the Moratorium. It is part of a balanced approach to complex interrelated planning issues that should be permitted to play out. There is a natural correction in the wording of the Moratorium itself. At the end of the five-year period, unless new policy is introduced, the Moratorium dies and the former country subdivision policies still in the Official Plan, as enhanced, will take effect.

That is a reasonable position amounting to good planning.

There is no clear evidence of hardship on a landowner.

The Ministers modification # 38 now Policy 11, while general, does assist by directing review throughout the rural area and in more specific proposals. The Board finds limited planning merit in Policy 11, which is sufficient to inform the Critical planning review now underway.

For the above reasons, the Board dismisses the Cavanagh Appeal on the Moratorium policy 10 and related policy 11. Both are approved of.

Settlement

Exhibit 14 is a summary of sections of OPA appealed in this phased Hearing. Exhibit 14 introduces further modified wording now agreed to, lists sections appealed which are now to be approved of as adopted and makes mapping changes. Based upon the planning evidence of Bruce Finlay, the Board is satisfied with the planning

nature of the adopted sections not to be modified and with those being modified as representing good planning and being consistent with the Provincial Policy Statement. Accordingly, where modified, the Board allows those Appeals to the extent necessary to modify. Otherwise, all appeals to the sections listed in exhibit 14 are dismissed. The policies in exhibit 14, as adopted and as modified, are approved of.

The Board so Orders.

"N. C. Jackson"

N. C. JACKSON
VICE-CHAIR

SCHEDULE "1"

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