

ISSUE DATE:

**MAY 11, 2011**



PL091193

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: Claudia Unterstab  
Subject: Proposed Official Plan Amendment No. 30  
Municipality: Norfolk County  
OMB Case No.: PL091193  
OMB File No.: PL091193

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Claudia Unterstab  
Subject: By-law No. 69-Z-2009  
Municipality: Norfolk County  
OMB Case No.: PL091193  
OMB File No.: PL091194

## **APPEARANCES:**

### **Parties**

Claudia Unterstab

Norfolk County

At Play Adventures

### **Counsel**

K. Jones

P. Tice

J. A. Hitchon

### **DECISION DELIVERED BY SUSAN B. CAMBELL AND ORDER OF THE BOARD**

## **The Applications:**

On June 4, 2009 At Play Adventures (the "Applicant") applied to Norfolk County (the "County") for an amendment to the County Official Plan (the "OP") and for an amendment to the Township of Norfolk Zoning By-law 1-NO85 (the "ZBL") to permit the construction of a three storey, 30-unit building to be used for seasonal occupancy. The Applications were subsequently revised to allow for a building of 24 units. The Applications were further revised to allow for a two storey building with 18 units. The two storey, 18 unit Applications are before the Board.

The subject property is located on the north side of Erie Blvd. in the Resort Area of Long Point. Long Point is a sandspit connected to the mainland by a man-made causeway. The lands are designated "Resort" and are zoned "Long Point". The site is currently occupied by a motel with 13 units and 17 travel trailers. To the east and south east of the site are cottage properties, to the west are a restaurant and a cottage, to the south is Lake Erie and its associated shoreline and to the north is a channel and a marina (Exhibit #5, Tab 1). The property is irregularly shaped with a frontage of approximately 121m on Erie Blvd. and an area of 0.48 hectares.

The Applications originally went to County Council in September 2009, at which time consideration was deferred. The three storey, 24-unit proposal came to a public meeting and a Council meeting on November 10, 2009.

In considering the Applications, Council had before it a Planning Report prepared by County Senior Planner, Scott Peck, reviewed by Jim McIntosh, Manager, Community Planning and submitted by Christopher Baird, General Manager, Planning and Economic Development Department (Exhibit #4, Tab 24). The planning report and Mr. Peck's opinion will be considered at length below, but its conclusion and recommendations are significant. The Report concluded: "it is important to note that planning staff do not object to the redevelopment of this site for a more efficient accommodation location that benefits the local economy and tourism. The bottom line with these applications is that the building proposed is of a scale and a mass that is too large and not in character with adjacent land uses or the built form of Long Point as a whole. The Applications are not consistent with the requirements of the Provincial Policy Statement or the Norfolk County Official Plan. Further, the sanitary servicing of the site is a significant issue that has not been fully addressed and the acceptability of the proposed land use on the site cannot be recommended when such a fundamental issue as sanitary servicing has not been finalized. The concept of the communal sewage servicing and the municipal responsibility agreement represent the potential for long-term liability for Norfolk County. Planning staff do not support these Applications and recommend that they be refused" (emphasis added).

At the public meeting on November 10, 2009, Council heard from Mr. Peck, John Vallee, the agent for the Applicant and a number of residents in support of and in opposition to the Applications. It appears that the only planning report that Council had

before it was the staff report prepared by Mr. Peck. Mr. Vallee, the Applicant's agent, is a planner and he told Council that "the Applicant's proposal conforms to the intent of the Provincial Policy Statement and the Norfolk County Official Plan and addresses the fact that there is a defined need for tourist accommodation" (Exhibit # 4, Tab 26). The Board cannot find that Mr. Vallee's "opinion" was that of an independent land use planner as he was clearly acting as the Applicant's agent.

Council adopted Resolution No. 6 on November 10, 2009, approving the Applications (Exhibit # 4, Tab 27). On November 24, 2009 By-law No. 11-OP-2009, Amendment No. 30 to the OP was adopted as was By-law No. 69-Z-2009 (Exhibits # 4, Tab's 28 and 29). These site specific amendments allowed for a building with a maximum height of 10m and a maximum building footprint of 1017 sq.m. The Board finds that Council approved the Applications without having before it any legitimate planning opinion that the proposal was consistent with the Provincial Policy Statement (the "PPS") or the OP.

On December 15, 2009 Claudia Unterstab (the "Appellant") filed an appeal setting out extensive land use planning grounds (Exhibit # 4, Tab 32). Ms Unterstab owns a neighbouring cottage property.

During the hearing the Board was presented with Exhibits # 18 and # 19 which are the OPA and ZBLA now requested. The OPA includes Site Specific Policy 4.6.3.1 Long Point – At Play Adventures Site Specific Policy Area: "on land designated Resort Residential – Site Specific Policy Area 4.6.3.1 on Schedule "B" to this Plan, in addition to the uses permitted, a seasonal apartment dwelling house with a maximum of 18 units, maximum height of 9 metres and a maximum building footprint of 1017 sq.m., shall be permitted. The dwelling's units shall be made available on a condominium, time-share or rental basis for tourism and recreational purposes".

The ZBLA provides for the addition of subsection 32.254 to Zoning By-law 1-NO85:

32.254 That on the lands delineated by this subsection, in addition to the permitted uses as outlined in section 31.1, the following shall apply:

- (a) a seasonal apartment dwelling house with a maximum of 18 dwelling units and a maximum building footprint of 1017 sq.m., shall be permitted.
- (b) Notwithstanding section 31.2(d), the maximum building height of the apartment dwelling house is 9 m.
- (c) Notwithstanding section 31.2(f), the seasonal apartment dwelling house outlined in (a) above, shall have a maximum lot coverage for the subject lands of 21%. Structures accessory to the seasonal apartment dwelling house shall have a maximum total lot coverage of 10%.
- (d) The dwelling units shall be made available on a time-share or rental basis for tourism and recreational purposes.

The ZBLA also contains a Holding (“H”) provision which requires the completion of, *inter alia*, site plan approval and site plan agreement, design approvals from the County and the Ministry of the Environment (“MOE”) for the proposed communal sewage treatment facility, the execution of a Municipal Responsibility Agreement and permits from the Long Point Region Conservation Authority (the “Conservation Authority”).

### **The Planning Context:**

Scott Peck, the Senior Planner for the County testified under summons for the Appellant. John Ariens was qualified to provide land use planning evidence on behalf of the County and Michael Higgins was qualified to provide such evidence on behalf of the Applicant. David Roe was qualified to provide expert land use planning evidence on behalf of the Appellant. The Board accepts that the four planners are familiar with the Long Point area, its planning context and its history of development. Having considered the reports of the four planners, the Board finds that the most comprehensive review of the planning context was provided by Mr. Peck and Mr. Roe. Together, Mr. Peck’s Witness Statement, Exhibit # 5, Tab 1 and his Planning Report prepared for the consideration of County Council, Exhibit # 4, Tab 24, provide a thorough consideration of the relevant planning context. Mr. Peck’s review and opinion remain consistent from the time he prepared his Planning Report in September, 2009 through to his testimony before the Board in November, 2010. Mr. Roe, in his witness Statement, Exhibit # 5, Tab 2, also provided a thorough review of the history of land use planning for Long Point and a detailed review of current relevant policies.

In his Witness Statement Mr. Peck provided the Board with a useful planning history of the subject property. The Long Point Beach Resort was first recognized by the Council of the Township of South Walsingham in October, 1938. The subject lands were included in this area. In 1974 the Township of South Walsingham Official Plan was approved and the subject property was designated "Lakeshore". This OP designation permitted new single-detached dwellings on separate and conveyable lots. A Ministry of Housing modification to this OP resulted in the deletion of the "Lakeshore" designation and redesignation to "Hazard Lands".

In 1977 a Minister's Restricted Area Zoning Order was made which prohibited the erection of a building on the subject property.

In 1980 the Township of Norfolk District Plan, an amendment to the Official Plan of Haldimand-Norfolk, designated the lands "Resort" with uses restricted to vacation homes, outdoor recreation areas and existing commercial and institutional uses. The 1985 Township of Norfolk Zoning By-law zoned the subject property Long Point "LP". Permitted uses in the zone included vacation homes, and existing commercial uses and buildings accessory thereto.

In 1997 the Township of Norfolk Official Plan was adopted. The subject property was designated "Resort" and the residential use in such an area was limited to "vacation homes". That OP also provided that "Resort oriented commercial uses of an appropriate scale and which can be adequately serviced by private sewage disposal services may be permitted".

The Norfolk Official Plan was approved in 2009. The subject lands are designated "Resort Residential". The provisions of the OP will be considered in detail below.

Mr. Peck concluded in his Witness Statement that "the above history acknowledges the hazardous nature of Long Point. It also provides confirmation that notwithstanding the hazardous nature of Long Point, existing uses were recognized and permitted in the Resort designated area. Vacation homes are noted as the preferred form of development and existing commercial and institutional uses are permitted". The Board finds that the planning history of the area makes it abundantly clear that

permanent residential dwellings have never been contemplated for the Long Point area. Seasonal, vacation homes have been contemplated and permitted.

**The Provincial Policy Statement:**

In their Witness Statements Messrs. Peck and Higgins thoroughly reviewed the provisions of the Provincial Policy Statement (the “PPS”) which in their opinions are relevant to the Applications.

The Board finds the following policies relevant to a consideration of the Applications.

The PPS in Part III directs how it is to be read: “the (PPS) is more than a set of individual policies. It is intended to be read in its entirety and the relevant policies are to apply to each situation”. Part IV sets out the “vision” for Ontario’s land use planning system: “the long-term prosperity and social well-being of Ontarians depend on maintaining strong communities, a clean and healthy environment and a strong economy”.

Part V contains relevant Policies. Policy 1.0 provides for “Building Strong Communities: Ontario’s long-term prosperity, environmental health and social well-being depend on wisely managing change and promoting efficient land use and development patterns. Efficient land use and development patterns support strong, liveable and healthy communities, protect the environment and public health and safety and facilitate economic growth”. The Board finds that this policy mandates a balancing of a variety of interests in the building of strong communities. Policies 1.1.1(b) and 1.1.1(c) speak to “accommodating an appropriate range and mix of residential, employment...recreational and open space uses to meet long term needs” and “avoiding development and land use patterns which may cause environmental or public health and safety concerns”. Again, the Board notes the need for balance in making land use planning decisions. Policy 1.7.1(f) provides that “long-term economic prosperity should be supported by providing opportunities for sustainable tourist development” (emphasis added).

Policy 1.6.4, "Sewage and Water", is critical in this matter as the Board heard extensive evidence on the sewage and water system proposed for the development. This evidence will be considered further below. Policy 1.6.4.1(b) provides "planning for sewage and water services shall ensure that these systems are provided in a manner that: 1. can be sustained by the water resources upon which such services rely; 2. is financially viable and complies with all regulatory requirements; and 3. protects human health and the natural environment". Policy 1.6.4.2 provides "municipal sewage services and municipal water services are the preferred form of servicing for settlement areas". However, policy 1.6.4.3 provides "municipalities may choose to use private communal sewage services...where municipal sewage services and municipal water services are not provided and the municipality has established policies that the services to be provided satisfy the criteria set out in policy 1.6.4.1".

The subject property is located in an area without municipal sewage or water services. The proposed development would rely on private communal sewage and water services.

Messrs. Peck and Higgins agree that the proposed development which would accommodate tourists in this designated Resort area could facilitate the economic growth spoken of in policy 1.0. However, Mr. Peck could not conclude that the proposed development would constitute "sustainable tourist development". On the other hand, Mr. Higgins was of the opinion that "the proposed development is the redevelopment of a site, which will improve the site to a more efficient land use with an upgraded building, upgraded water and sewage system. The development will improve the site and provide for a better environment for the area". Further, the proposed development "would supply seasonal accommodation which is similar to what presently exists on the site...and would also supply an alternative residential supply for Long Point that does not currently exist..." Mr. Higgins was also of the opinion that the proposed development "will improve on the existing situation. The existing motel and trailer units are supported by an old septic system of unknown treatment quality...a new sewage system will be installed in accordance with MOE approval. The proposal will not cause environmental or public health and safety concerns and will provide economic development opportunities by providing alternative accommodation and tourism opportunities".

Messrs. Peck and Higgins disagreed on whether the proposed development would be consistent with policy 1.6.4, Sewage and Water. In Mr. Peck's opinion "the application is not consistent with the noted policies as the application and supporting documentation have not yet demonstrated that the proposed private communal system is financially viable and the potential impacts on human health and the natural environment have not been addressed relating to the proposed sewage system outfall to the boat channel". Such discharge is no longer proposed.

Mr. Higgins is of the opinion that the proposal is consistent with policy 1.6.4: "the supporting hydrogeological and treatment studies conclude that the proposed sewage system and communal water systems are sustainable and will not affect human health or the environment".

Policy 2.1 of the PPS deals with "Natural Heritage". Policy 2.1.1 provides "natural features and areas shall be protected for the long term". All parties agreed that a Provincially Significant Wetland ("PSW") is located adjacent to the subject property. Policy 2.1.6 provides "development and site alteration shall not be permitted on adjacent lands to natural heritage features and areas...unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions". Mr. Peck confirmed that the Applicant has completed an environmental impact study which considered the impact of the proposed development on the PSW. The study was reviewed by the Norfolk County Environmental Advisory Committee which accepted that the proposed development would not have any negative impact on the adjacent PSW.

Policy 2.1.5 provides that "development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements". Mr. Peck was of the opinion that as it was proposed by the Applicant that treated sewage would be discharged into the channel adjacent to the property, the proposal was not consistent with this provision of the PPS. By the time the matter reached the Board the Applicant's proposal had been modified such that sewage would be treated on site and then discharged into ground tile beds. Mr. Higgins testified that the Applicant's consultants had prepared a study which "has concluded that the effluent can be treated on site with no adverse effect on the site or surrounding lands or environments".

Policy 2.2.1 “Water”, provides “planning authorities shall protect, improve or restore the quality and quantity of water”. Mr. Peck was concerned about the impact of sewage outfall and stormwater on the adjacent channel. Mr. Higgins testified that the environmental impact study and the servicing reports prepared by the Applicant’s consultants set out “storm water and servicing strategies for the project...the studies that have been conducted conclude that the redevelopment will not have a negative impact on the ground water or the surface water. The proposed redevelopment would be consistent with this policy”.

Policy 3.1 deals with “Natural Hazards”. Policies 3.1.1 and 3.1.2 provide “development shall generally be directed to areas outside hazard lands adjacent to the shorelines of the Great lakes...” and “development shall not be permitted within the dynamic beach hazard”. The Applicant’s consultant Shoreline Engineering Limited completed an assessment which Mr. Higgins describes as concluding that “the site is outside the dynamic beach hazard”. Mr. Peck acknowledges that this assessment “provides direction regarding permitting the development by using construction techniques to address the hazards and further, the assessment concludes that the subject property is located outside the dynamic beach hazard”. However, he also notes that “the Conservation Authority in their correspondence recommends further detail be provided as it relates to the design of the proposed breakwall and its impact on adjacent lands”.

Finally, policy 3.1.2(c) provides “development and site alteration shall not be permitted within areas that would be rendered accessible to people and vehicles during times of flooding hazards...unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the hazard feature”. Mr. Peck noted that “the only access to Long Point is by the causeway and it is not considered to be a safe access point during flooding events”. However, he acknowledged that “the Applications as submitted can be considered as being consistent with the policy as the proposal is a replacement building and the County is developing an emergency preparedness study to deal with emergency measures in the event of a flood that isolates Long Point from the main land”. Mr. Peck remains concerned about how the occupation of the proposed units would be limited to a specific season when flooding is not a risk. The issue of “seasonal” occupation is germane to these Applications and will be considered in detail below.

With respect to the PPS, Mr. Peck concludes that “on balance the Applications are not consistent with the (PPS)”. Mr. Higgins concluded that “the development proposal is consistent with the relevant policies that have been reviewed. The use is similar to uses that exist on the site and in the immediate area; the studies that have been conducted have concluded that the proposed use will not have a negative impact on the environment or adjacent lands; and the proposal is the redevelopment of an existing site with a more efficient building and environmentally safe sewage system and water system”.

The Board finds that the proposed development could contribute to the long-term prosperity of the Province, the County and Long Point. An 18-unit residential building with units available for rent during the summer season could “constitute sustainable tourism development”. However, for the Board to conclude that the proposal does represent sustainable tourism development the Board must be able to conclude, based on the evidence adduced in this hearing, that the proposal is consistent with the sewage and water policies, the natural heritage policies and the hazard lands policies of the PPS, or at least consistent to the extent that a correct balance is struck. The Board will consider in detail below whether the evidence demonstrates that the proposal is consistent with these policies. The experts testifying on behalf of the Appellant do not agree with the experts testifying on behalf of the Applicant that the proposed sewage and water systems have been sufficiently demonstrated to meet the policy imperatives of the PPS.

**Norfolk County Official Plan:**

Exhibit # 1 is the Norfolk County Official Plan (the “OP”) which was reviewed in detail by Messrs. Peck and Higgins. The Board finds the following provisions of the OP relevant to a consideration of the Applications.

Policy 1.2 sets out the basis for the OP, providing “this Plan is premised on sustainability principles...The principles of sustainability...ensure an interconnected and balanced approach to public policy, focusing on efforts to ensure continued economic vitality, maintain healthy communities and enhance the County’s natural heritage”.

Policy 2.3, Strategic Goals and objectives, includes six goals which are supported by detailed objectives. The goals relevant to these Applications are:

1. creating a planning framework which “promotes a flexible and adaptable economic environment that encourages investment and a broad range of employment opportunities, supports the growth of tourism...”; and
2. protecting and enhancing “the quality of the natural environment through a planning framework that conserves and enhances the diversity and connectivity of the natural forms, features and functions of Norfolk’s natural heritage, surface water and ground water resources...”;

The Board finds that policies 1.2 and 2.3 of the OP mandate a balancing exercise in a manner similar to the one provided for in the PPS. In Mr. Peck’s opinion the balancing of a desire for economic sustainability with the protection of the natural resources of the County is not done correctly in the Applications. Mr. Higgins testified that the correct balance has been struck as “the proposed redevelopment has regard for the environment and provides economic development through tourism”. The Board accepts that the proposed development could contribute to strengthening the economy of the County. The Objectives set out in policy 2.3.1.2 include promoting employment opportunities that utilize local economic and natural resources; and fostering tourism potential along the lakeshore. The Board accepts the evidence of the Applicant’s witnesses that the proposed development would utilize local economic and natural resources and would foster tourism. The Board heard evidence that the Long Point area would benefit from the provision of additional accommodation options for tourists. The Board will consider below whether the goal of protecting and enhancing the natural environment is met by the Applications.

Policy 3.8 of the OP deals with “The Lakeshore”. The subject property is located in a “Resort Area” along the Lakeshore. Policy 3.8 provides “Norfolk County’s geographic location on the north shore of Lake Erie is one of the County’s greatest physical assets... The County lakeshore, a significant component of ‘Ontario’s South Coast’, provides excellent tourism and recreational opportunities. While the County is in favour of further tourism and recreational development, the development pressures along the lakeshore need to be carefully managed to protect the area’s natural attributes, ecological significance and importance through its connectivity to the natural features of the County, which form the basis for much of the interest in the area” (emphasis added).

In policy 3.8 the OP recognizes that “the Long Point – Turkey Point wetland complex and associated land have world recognition by the United Nations Educational Scientific and Cultural Organization as the Long Point Bioserve”. The policy goes on to note “there are also major concentrations of vacation homes along the lakeshore within the County”. These include Long Point which is “Resort Area” on Schedule “A” to the OP. The OP provides “the Resort Areas while not designated settlement areas, are recognized as existing concentrations of vacation homes and related development. While vacation home development is permissible in some areas, the conversion of vacation homes to residential dwellings occupied permanently on a year-round basis is not permitted” (emphasis added).

Policy 3.8 contains specific policies and the Board finds (e) to be particularly germane to a consideration of the Applications. This policy provides “vacation homes are the preferred type of residential dwelling in the Resort Areas...the conversion of vacation homes to residential dwellings for permanent year-round use shall not be permitted outside of Urban Areas in the Lakeshore Special Policy Area” (emphasis added). The Board finds that the OP is unambiguous: dwellings which would be used for year-round occupation are not permitted in Long Point.

Mr. Peck noted that policy 3.8 of the OP relates to the “form” of development permitted in a Resort Area. The preferred type of development is a residential dwelling termed a “vacation home”. Policy 3.8(e) speaks to vacation homes as being something other than permanent, year-round dwellings. Mr. Peck pointed out that “vacation home” is defined in the Township of Norfolk Zoning By-law (the “ZBL”), Exhibit # 3. Section 4.24.10 provides “vacation home shall mean a dwelling house comprising only one dwelling unit and which is used for vacations and recreational purposes”. The Board finds that this definition means that a “vacation home” is not a dwelling used for year-round occupation and it is not a unit in a condominium building when there is no demonstrable way of guaranteeing seasonal use only.

In Mr. Peck’s opinion, the proposed 18 unit, two storey condominium building is not the form of development contemplated for the Long Point Resort Area. “Vacation homes”, which do not include dwellings used for year-round occupation, are the “preferred” type of residential dwelling in the Resort Area. Mr. Peck looked to the definition of “vacation home” in the ZBL and was of the opinion that it supports his view

that an 18 unit, two storey condominium building is not appropriate development for Long Point. The proposed development is not a “dwelling house comprising one unit and which is used for vacations and recreational purposes”.

Mr. Higgins, having reviewed policy 3.8 was of the opinion that “although the proposed building is not a single family dwelling, the principle of the vacation home is maintained. The guiding principle and intent of the policy is that the dwellings are to be primarily used for vacation purposes as opposed to permanent residential uses. The proposed vacation resort development is consistent with this objective. Dwelling units within the vacation resort building are to be made available on short-term basis to families wishing to tour and vacation in the Long Point and Norfolk County Area”.

With all due respect to Mr. Higgins, the Board finds that the evidence it heard does not demonstrate that the proposed development would have units which would only be made available to families on a short-term basis. During the hearing, the proposal was variously described as a “condominium development” and a “time-share development”. In either case, the units are to be individually owned and the Board heard no evidence which conclusively demonstrated how the use of the condominium units by their owners would be restricted to seasonal use only.

In Exhibit # 20, the Witness Statement of Mr. Ariens, prepared on behalf of the County, he indicated that with respect to the amendment to the OP requested, a new sentence should be added to the Special Provision, which would say “the proposed apartment dwelling house will be used on a seasonal basis only which will be defined and implemented through the Draft Plan of Condominium or Site Plan Agreement”. No such draft agreement was presented to the Board and the Board heard no persuasive evidence of how a seasonal use could be imposed through a Condominium or Site Plan Agreement.

Having reviewed all the available evidence, the Board cannot find that the proposed development would be a “vacation home” as envisioned by policy 3.8 of the OP or as defined in the ZBL. It is not a “vacation home” as defined in section 4.24.10 of the ZBL as it does not comprise one dwelling unit and the Board cannot determine that it would be used only for vacations and recreational purposes. Rather, the Board finds that it is an apartment dwelling house and there is nothing in policy 3.8 of the OP which

convinces the Board that an apartment dwelling house is envisioned as an appropriate use in Long Point.

The Board finds that the clear intent of policy 3.8, The Lakeshore, is demonstrated by the “facts on the ground” in Long Point. The Board has regard to Exhibit # 42, Long Point Cottage Photos. This exhibit was introduced by the Applicant and is apparently intended to demonstrate that the proposed condominium building would “fit” in with the new development in Long Point. The photographs show that new development of larger, taller and apparently year-round dwellings is taking place in Long Point. However, it appears to the Board that each of these new houses is a dwelling house comprised of only one dwelling unit as contemplated by the ZBL. The photographs do not depict anything like the proposed 18 unit condominium building.

Policy 4.6 of the OP, Resort Residential Designation, is also relevant to the Board’s consideration of the Applications. This policy provides “the Plan recognizes the important role of the Resort Areas for the provision of seasonal cottages and recreational facilities along the Lakeshore...Development within the Resort Residential Designation is constrained by natural and human-made limitations. Natural limitations such as soil type, topography, flood and erosion prone areas and hazard lands impact this land, affecting both existing and future land uses”. The Board finds that these words make it abundantly clear that Long Point faces natural constraints on development. Such constraints form the basis for the County’s expressed desire to permit only “vacation dwellings” in the area.

Policy 4.6.1 sets out permitted uses in the Resort Residential Areas. “Vacation dwellings”, “small scale resort oriented commercial uses”, “marine related uses”, “recreational, open space and natural heritage appreciation” and “tent and trailer parks” are permitted. The Board finds that these uses have a common theme; they are seasonal and small scale. In considering policy 4.6 Mr. Higgins is of the opinion that “although the proposed building consists of 18 units, the use is consistent with the uses in the area. The proposed use is for vacation oriented dwelling units, which is consistent with the permitted uses in the Resort Residential designation”. Mr. Peck disagrees: “the proposal cannot be considered to comply with this policy direction”. He is of the opinion that “a 24 unit, three storey (now 18 unit, two storey) condominium development at the

scale and massing proposed is beyond that originally envisioned in the NCOP as acceptable development in a Resort Area”.

The Board accepts Mr. Peck’s opinion and finds that the proposed 18 unit two storey condominium building does not have proper regard to the County’s policies for Resort Residential lands. The proposed building is patently not a “vacation home” or a “vacation dwelling” as envisioned by the OP.

The Applicant submitted that as the subject property is currently occupied by a motel, a resort-oriented commercial use, the proposed building in keeping with the OP and what is currently there. The Board cannot accept this submission. Either the Applicant wants to develop an 18 unit two storey condominium “vacation home” or “vacation dwelling” or it wants to develop a “small scale resort-oriented commercial use”. The Applicant cannot have it both ways as it attempts to blur the uses and relevant policies.

Policy 4.3.2.2 of the OP, Shoreline Policies, is also relevant to these Applications. Policy 4.3.2.2(f) provides “the replacement of an existing building or structure may be permitted provided the hazard has been adequately addressed through the use of accepted engineering and resource management practices. Acceptable replacement shall not result in an increase in the original usable floor area of the building or structure or alter the original use, or affect shoreline processes” (emphasis added). Mr. Higgins addresses this policy by saying “although there is an increase in the usable floor area on the site, the development is a larger building that is in accordance with the economic development policies of the plan that encourage these types of uses in the lakeshore area”. With all due respect, the Board finds that Mr. Higgins’ opinion is not supportable. The OP does not say that specific shoreline policies may be ignored if economic development may result from a proposed development. The Board finds that the proposed 18 unit, two storey condominium building in no way represents “acceptable replacement” of the existing motel and trailers for the purposes of policy 4.3.2.2(f).

Policy 5.4 of the OP, Tourism, provides “this Plan encourages growth in tourism and travel to the County...to the Lake Erie shoreline, resort and recreation areas...”

The Board finds that the proposed development would comply with this policy as it would provide for some tourist accommodation.

Policy 6.4, Natural Heritage Systems, requires that an applicant complete an Environmental Impact Statement (“EIS”). Such an EIS was completed on behalf of the Applicant and was reviewed and accepted by the County.

Policy 8.9.2, Services Outside of Urban Areas, is relevant to these Applications. Policy 8.9.2(d) provides “communal service systems to service new development shall not be permitted except under specific circumstances outlined in this plan. Communal servicing systems may be considered in an existing...Resort Area to resolve existing servicing malfunctions, physical constraints and/or deficiencies, posing potential health risks”. The policy goes on to provide “the County shall not assume any communal servicing systems in the County and shall generally not execute responsibility agreements in relation to such systems. However, in the event that execution of a responsibility agreement is required as a result of the circumstances outlined in this subsection, prior to executing the agreement, the County shall be satisfied with the design and economic sustainability of the system and shall require that certain securities be posted, and that a separate financial and maintenance agreement be executed between the owner of the system and the County.

In Mr. Higgins’ opinion policy 8.9.2(d) “does not speak to the situation that is now before us” as “the policy speaks to new development only. The proposal is for redevelopment of an existing residential site. The NCOP does not address redevelopment and therefore does not specifically speak to the issue for this proposal”. The Board has difficulty with Mr. Higgins’ opinion. The proposal is not for the “redevelopment of an existing residential site”. The site is currently used for commercial purposes, a motel and vacation trailers. The Board finds that the proposal may be a form of redevelopment but for all intents and purposes it is new development. The proposal provides for a change of use and for a new building, considerably larger than the existing motel. The OP cannot be construed to be silent on the servicing of a proposed development consisting of 18 units at Long Point.

The provision of water and sewage services in any area is crucial to a land use planning decision and it is even more crucial to a decision involving shoreline and

hazard lands. The fact is the subject property sits on a narrow sandspit extending into Lake Erie. This Board cannot accept that a new development or even a redevelopment of such lands could go forward without due regard being had to the viability of the proposed sewage and water services.

The Board has regard to policy 1.6.4 of the PPS. Municipal sewage services and municipal water services are the preferred form of servicing for settlement areas. Communal sewage and water services may be used if the municipality has established policies to ensure that the services would be provided in a manner to satisfy the criteria set out in policy 1.6.4.1. These criteria include ensuring the systems are provided in a manner that can be sustained by the water resources, that is financially viable and meets all regulatory requirements, that protects human health and the natural environment and that integrates servicing and land use considerations at all stages of the planning process. Having considered policy 8.9.2 of the OP, Services Outside of Urban Areas, the Board cannot find that the County has established policies to ensure that private communal sewage and water services are provided in accordance with section 1.6.4.1 of the PPS. Policy 8.9.2 does not speak to the sustainability of water resources, or to the protection of human health and the natural environment. It does however address financial viability via a municipal responsibility agreement.

Further, the Board has regard to policy 1.6.4.1(d) of the PPS which requires that planning for sewage and water services shall “integrate servicing and land use considerations at all stages of the planning process” (emphasis added). The PPS does not permit the Board to make a land use planning decision in a vacuum. The land use planning decision is inextricably linked to the issue of servicing.

It is the position of the Applicant that the detailed water and sewage servicing issues would be dealt with after the Board determines the land use planning issue. This position seems to contradict the title of the technical reports which the Applicant filed in support of the Applications. At Exhibit 3 16, Tab 3 is the “Long Point Resort Final Hydrogeological Investigation Report” on which the project is apparently based. At Tab 4 is the “Long Point Final Servicing Study” which concludes “the proposed site can be fully serviced with water, storm, sanitary and fire protection services”.

These “final reports” were reviewed by Eric Gunnell, a professional engineer who testified on behalf of the Appellant. Mr. Gunnell specializes in “onsite septic/sewage system investigation, evaluation, design and construction supervision for both conventional and tertiary treatment sewage systems”. In Exhibit # 5, Tab 3, is the review completed by Mr. Gunnell of the 13 technical reports prepared by the Applicant’s consultants. These include the “Final Hydrogeological Investigation Report” and the “Final Tertiary Treatment System Design Report”. Mr. Gunnell’s review is thorough and the Board finds that it raises questions and issues which the Applicant must address before this Board could determine that the land use changes requested by the Applicant are appropriate. Again, the Board has regard to the PPS, policy 1.6.4.1(d) which requires a decision maker to “integrate servicing and land use considerations at all stages of the planning process”.

Mr. Gunnell identified “deficiencies” in the work of the Applicant’s consultants and concluded “the most recently proposed 18-unit condominium development is not feasible from a sewage system standpoint”. In his report and his testimony he went into some detail about what he identified as deficiencies.

In response to Mr. Gunnell’s report, the Applicant produced Exhibit # 48, which sets out “Gunnell Issues” and “MTE Responses”. MTE is the Applicant’s consultant. Repeatedly to issues raised by Mr. Gunnell, MTE responds that “the comment will be addressed during detailed system design”. Such “detailed system design” will be based, variously, upon, “additional study, field information and will be required for an MOE Certificate of Approval”; “additional study and field information if necessary”; and “soil samples can be collected and the shallow geologic sequence can be observed”.

Having reviewed Exhibit # 48 together with Mr. Gunnell’s report, the Board can only conclude that the Applicant has not completed and presented to the Board the work required for the Board to conclude that servicing to support the land use requested can be satisfactorily completed. The Applicant may well, with additional work, obtain requisite permits from the Ministry of the Environment. However, that does not provide a sufficient basis upon which the Board could appropriately “integrate servicing and land use considerations” at this stage of the planning process.

The issues which Mr. Gunnell raised are germane to the Board's land use planning decision. If the subject property, with the proposed development cannot be satisfactorily serviced, the development cannot be approved by the Board. The Board, in balancing the policy imperatives set out in the PPS and the OP, must be able to determine whether the site can be appropriately serviced. While servicing is a live issue, the Board will not approve the Applications.

**Conclusion:**

The Board finds, based on all evidence adduced, that the proposed development is not consistent with the PPS. In balancing various policy imperatives of the PPS, the Board cannot find that the desire to build a strong, economically sustainable community based on tourism outweighs the potential challenges to Long Point associated with inadequate water and sewage servicing. The Applicant has not satisfactorily addressed the vital issues raised by Mr. Gunnell.

The Board finds that the proposed development does not have proper regard to the provisions of the OP. It is in no way the type of development contemplated by the County for Long Point. The proposed 18 unit, two storey condominium development which could easily be occupied year round does not constitute good planning for Long Point.

The appeal is allowed. The Applications for an Official Plan Amendment and Zoning By-law amendment are denied.

This is the Order of the Board.

"Susan B. Campbell"

Susan B. Campbell  
Vice Chair