

ISSUE DATE:

**November 29, 2011**



PL101076

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: Hendrika Rutherford  
Subject: Proposed Official Plan Amendment No. OPN-011/2009  
Municipality: County of Norfolk  
OMB Case No.: PL101076  
OMB File No.: PL101076

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

Appellant: Hendrika Rutherford  
Subject: By-law No. 44-Z-2010  
Municipality: County of Norfolk  
OMB Case No.: PL101076  
OMB File No.: PL101077

IN THE MATTER OF subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Hendrika Rutherford  
Applicants: Leighton & Betty Brown  
Subject: Consent  
Property Address/Description: 142 Erie Boulevard  
Municipality: County of Norfolk  
Municipal File No.: BNPL2010170  
OMB Case No.: PL101076  
OMB File No.: PL110148

**APPEARANCES:**

**Parties**

H. Rutherford  
County of Norfolk  
Leighton and Betty Brown

**Counsel**

K. Jones  
P. Tice  
T. A. Cline

**DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD**

There are three planning instruments before the Board:

- An Official Plan Amendment No. OPN-011/2009 for Norfolk County (“OPA 32”);
- A Zoning By-law Amendment No. ZN-065/2009 for Norfolk County referenced as Zoning By-law No. 44-Z-2010 (“ZBA”); and
- A Consent filed by Leighton and Betty Brown (“the Applicants”) for property located at 142 Erie Boulevard (“the subject property”) in Norfolk County (“the County”).

In each case, appeals were launched by Hendrika Rutherford (“the Appellant”). Each party was represented by Counsel and the Applicants and Appellant put in a full case. Although the County was in attendance through its Counsel, it did not call any evidence.

The Applicants applied to the County to permit the construction of a vacation home on the easterly part of the subject property and to expand on the current commercial uses permitted in the zone. The westerly portion of the subject property contains a restaurant, an existing dwelling and garage whereas the easterly portion is vacant with gravel area for parking. The septic system for the property is located on the westerly portion and the Applicants could not confirm that the existing dwelling did not encroach into the proposed westerly portion. The Applicants wished to sever the property into two portions and required an Official Plan Amendment and Zoning By-Law Amendment. OPA 32 redesignates most of the easterly portion of the subject property from “Hazard Lands” to “Resort Residential” to permit the construction of a vacation home. The westerly portion is already designated Resort Residential. The ZBA rezones the easterly portion of the subject property from “Hazard Lands (HL)” to “Long Point (LP)” and changes the permitted uses for the “Long Point (LP)” zone on the westerly portion by adding certain uses. Those are: a personal service shop, restaurant, antique shop, fruit and vegetable outlet, museum, art gallery, home occupation, office, and one dwelling unit. County Council passed the ZBA and OPA 32 on or about August 24, 2010 against the advice of their in-house Planning Staff. The Appellant appealed citing issues of parking, on-site services, flooding, environmental constraints and disregard for public safety resulting in inconsistencies with Provincial Policy, lack of conformity with County

Official Plan and Secondary Plan policies, and generally not representing good and proper planning.

The Board has carefully reviewed the evidence and the submissions of Counsel to determine that the appeals are allowed and the three planning instruments are not approved. The Board determines that the foregoing planning instruments are not consistent with the policies of the Provincial Policy Statement 2005, do not conform to the applicable County Official Plan policies, do not represent good planning and are not in the public interest. My reasons follow.

The Board heard from Shirley Cater and Ian Seddon, both qualified and accepted as experts in land use planning. Ms. Cater was the in-house Senior Planner who wrote the report recommending against the planning instruments. Mr. Seddon was the Planner retained by the Applicants to support the instruments before the Board. In the end, the Board prefers the testimony of Ms. Cater and relies on it to come to its decision. Specifically Ms. Cater provided a history of the municipality and the various policies pertinent to the instruments. She also provided a general overview of the property and its location. It is situated on Long Point, a popular summer tourist destination spot in Southern Ontario along Lake Erie. She explained that following receipt of the completed applications, they went through the standard review process and were circulated to commenting agencies.

**Environmental Issues:**

The Building Department required a septic inspection; Public Works required lot grading and site plans; the Long Point Region Conservation Authority (“LPRCA”) identified that the subject property was adjacent to a Provincially Significant Wetland (“PSW”) and the area was subject to flooding. LPRCA did not object to the proposed additional uses for the westerly portion (“Part 1”) of the subject property but did object to the redesignation and rezoning of the easterly portion (“Part 2”). In their correspondence dated November 20, 2009, LPRCA stated:

The LPRCA Shoreline Management Plan – December 1989 inventoried and studied the shoreline process and made recommendations for managing development within the Lake Erie shoreline hazards. Specific to this section of shoreline, the document recommends that “ ... common aspects of the preferred plan important to the entire Detailed Study Zone is that no land should be allowed to be subdivided or allocated for

new development” and “... Lots already restricted for development should not be allowed to be development [sic].” Based on these recommendations, the Long Point Region Conservation Authority cannot support an application which would allow for future development on the eastern portion of the subject property [see Exhibit 2, Tab 12].”

The Ministry of Municipal Affairs and Housing (“MMAH”) forwarded the comments of its partner Ministry, the Ministry of Natural Resources (“MNR”). MNR identified the subject property as being within the Long Point Life Science Area of Natural and Scientific Interest (“ANSI”) and within 120 metres of the Long Point Provincially Significant Wetland. MNR cited policy 2.1.6 of the PPS to indicate that “development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas unless the ecological functions 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 [see Exhibit 2, Tab 12].” A scoped Environmental Impact Study (“EIS”) was done and further to MNR’s review of the wetland boundary along Part 2, the “MNR support[ed] the recommendation as indicated in the EIS to erect a 1.2 metre fence and allow the remainder of the mowed area between the wetland boundary and the property line to regenerate [see Exhibit 2, Tab 12].” They further recommended “that the area between the wetland boundary and the property line [be] excluded from the area to be designated as Resort Residential to allow this area to effectively regenerate [see Exhibit 2, Tab 12].” MNR identified specific species at risk under the *Endangered Species Act, 2007* which were in the general vicinity: the Eastern Foxsnake and Queensnake and the Fowlers Toad, Blanding’s Turtle and Spotted Turtle. They recommended that the proponent undertake visual site investigations for occurrences of these species at risk and report to the MNR. The scoped EIS did not mention these at risk species so the Board does not have the benefit of knowing if such investigations would be conducted or if they have been what information arose from such investigations.

To address the environmental issues raised by the LPRCA and the MNR, Mr. Seddon prepared a Planning Report. The first one (Exhibit 23a) was circulated in May 2011, when this hearing began. Because the hearing took longer than the days allotted, the hearing continued in August 2011. Mr. Seddon’s second Planning Report (Exhibit 23) revised portions of his earlier report. Concerning the comments made by the MNR, there was no change in the two reports. No discussion was provided in either report

concerning the species at risk. In reciting the MNR correspondence, Mr. Seddon did not include their reference to the species at risk. In his testimony, he suggested that the County would have taken such species into account when it allocated 900 m of parking alongside Erie Boulevard, with the suggestion being made that if the species identified by the MNR were endangered, the County should have taken appropriate measures for their protection instead of allowing street parking along an area where the species (particularly the turtles) would be known to exist. Mr. Seddon was candid to state that the EIS had not addressed the turtles noted by MNR. Unfortunately, pointing to the County's alleged failure in protecting the species does not justify this issue not being properly addressed by the Applicants. While not fatal to the applications in and of itself, this omission adds to reasons why the Board did not approve the instruments.

**Parking and On-Site Servicing Issues:**

Mr. Seddon opined that there was sufficient parking on the proposed retained lot (Part 1) for the restaurant use currently on the property. He said nine parking spaces were required. If the dwelling was to be included, then an additional two spaces would be required bringing the total to 11. He testified that 14 spaces could be accommodated on Part 1 but admitted that that did not account for where the septic system would be located. Under cross-examination, he stated that if the additional uses as sought by the rezoning were included, it would bring the required parking to 21 spaces on Part 1. On the point of the maximum number of parking spaces required, there was no dispute between Mr. Seddon and Ms. Cater. She also indicated the worst case scenario of 21 spaces. Ms. Cater's concern regarding parking was heightened by the fact that Long Point is a popular summer tourist spot. She explained parking on summer weekends and during the traditional vacation periods was at a premium. She was concerned that the parking problem associated with the additional uses requested for Part 1 might spill into the public roadways and cause further disruption.

Besides accommodating the parking, Ms. Cater was concerned about the location of the septic system. Space for a septic system would be on top of 21 spaces. To address these obstacles, Mr. Seddon testified that if sufficient parking was not attainable for certain uses, then those uses would simply not be implemented. Further, he stated that the existing dwelling and garage could be removed to make room for the additional parking and septic system. However, exactly where the septic system was to

be located was unknown. Ms. Cater opined that with the severance, the retained parcel, namely Part 1, just did not have the area for 21 parking spaces and a septic system given the existence of the three structures currently on the property. The Board agrees with Ms. Cater's assessment. Mr. Seddon focussed on the proposed severed parcel (Part 2) which could have an on-site system, such as the Waterloo Biofilter which does not require as much area as a traditional system (see Exhibit 23 p. 14), but the same was not said for the proposed retained parcel (Part 1).

**Planning Analysis:**

Although the Board has identified areas of concern with respect to the proposed development, my decision is primarily based on the failure of the proposal to meet the tests required by the PPS, the County's Official Plan (OP) and Lakeshore Secondary Plan along with the principles of good planning. The Planners were at odds with respect to the planning rationale and I will focus my reasons on the areas of disagreement.

**Provincial Policy Statement (2005):**

Ms. Cater opined that the PPS directs development to areas outside of "*hazardous lands adjacent to the shorelines of the Great Lakes – St. Lawrence River System and large inland lakes which are impacted by flooding hazards, erosion hazards and/or dynamic beach hazards [policy 3.1.1 PPS]*" and further pursuant to policy 3.1.2 "[d]evelopment and site alteration shall not be permitted within (c) areas that would be rendered inaccessible to people and vehicles during times of *flooding hazards, erosion hazards and/or dynamic beach hazards*, unless it has been demonstrated that the site has safe access appropriate for the nature of the *development* and the natural hazard." Ms. Cater explained that the subject property is located on a sand spit which is affected by severe storms and flooding. All of Long Point is classified as hazard lands by the LPRCA. In past years, the causeway, which is the only connection from the mainland, has been flooded such that access has been either severely restricted or eliminated entirely. Even when there isn't flooding, the link to Long Point can be dangerous due to fog. Ms. Cater testified that the road is tar and chip, and has been raised in recent years to mitigate flooding. However, it is not an ideal situation and while the County is still working towards finding a solution, namely an emergency response protocol, not much progress has been made. Such a response system is not in place and it is unknown

when such a system will be put into place. She explained that no consent on Long Point has been granted since 1989 when the LPRCA Shoreline Management Plan came into effect. Ms. Cater testified that granting the consent requested by the Applicants would be a first in over 20 years and would undermine the rationale, namely the protection of public safety, of the LPRCA Plan.

Further, Ms. Cater opined that the subject property falls into the category of hazardous lands adjacent to the shoreline of the Great Lakes under the PPS definition. She stated that this policy prohibits the development proposed because of the risk to public safety. "*Flooding hazard*" means "the inundation, under the conditions specified below, of areas adjacent to shoreline or a river or stream system and not ordinarily covered by water: a) Along the shorelines of *the Great Lakes-St. Lawrence River System* and *large inland lakes*, the *flooding hazard* limit is based on the *one hundred year flood* level plus an allowance for *wave uprush* and *other water-related hazards*." For completeness, the italics require the reader to review additional definitions found in the PPS:

"One hundred year flood level" means "a) for the shorelines of the Great Lakes, the peak instantaneous Stillwater level, resulting from combinations of mean monthly lake levels and wind setups, which has a 1% chance of being equaled or exceeded in any given year."

"Other water-related hazards" means water-associated phenomena other than flooding hazards and wave uprush which act on shorelines. This includes, but is not limited to ship-generated waves, ice piling and ice jamming.

"Wave uprush" means the rush of water up onto a shoreline or structure following the breaking of a wave; the limit of wave uprush is the point of furthest landward rush of water onto the shoreline.

Mr. Seddon, although not qualified as a coastal engineer or an expert in geotechnical evidence, provided evidence to suggest that the Applicants' property was outside of the flood vulnerable area as identified by the Flood Damage Reduction Program mapping. He came to this conclusion by reviewing the mapping at the LPRCA's office. His view was that the subject property should not be considered hazard lands at all, as it is situated some distance from the shoreline. This is contrary to Ms. Cater's opinion and the classification identified by the LPRCA. Ms. Cater did not dispute the Conservation Authority's determination and deferred to its expertise in this area. Mr.

Seddon, however, challenged this conclusion and despite a disconnect in his evidence, stated:

“Ont. Reg. 178/06 establishes the regulation limits administered by the LPRCA. According to this regulation, the LPRCA can issue permits for development provided that all building entrances and first floors are above 176.5 masl in order to clear the 100-year flood hazard (pers. comm. with Heather Surette, LPRCA, Oct. 27<sup>th</sup>, 2009) [Exhibit 23 p. 9].”

Then he stated that “the Brown property (the subject property) is between 175.8 to 175.9 masl as shown on the Flood Damage Reduction Program contour mapping (Exhibit 23 p. 9).”

While the Appellant was unable to challenge the personal communication to which Mr. Seddon alluded in his witness statement, his data suggested that the Applicants’ property is not above the threshold of 176.5 masl as required by the regulation noted above. He did say that the “property is negligibly susceptible to flooding (Exhibit 23 p. 9).”

Under cross-examination by Mr. Jones, Mr. Seddon confirmed Ms. Cater’s testimony in that:

- The causeway is the only access to lands along Long Point which includes the subject property;
- The causeway does flood on occasion which either restricts or limits this access; and
- Access to Long Point is not restricted on a seasonal basis.

Mr. Seddon referenced policy 3.1.6 of the PPS to justify his opinion to support the proposed development. That policy states:

Further to policy 3.1.5, and except as prohibited in policies 3.1.2 and 3.1.4, *development and site alteration* may be permitted in those portions of *hazardous lands* and *hazardous sites* where the effects and risk to public safety are minor so as to be managed or mitigated in accordance with provincial standards, as determined by the demonstration and achievement of all of the following:

- a) *development and site alteration* is carried out in accordance with *floodproofing standards, protection works standards, and access standards*;

- b) vehicles and people have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies;
- c) new hazards are not created and existing hazards are not aggravated; and
- d) no adverse environmental impacts will result.

Mr. Seddon surmised that in his opinion, development could be permitted on the subject property because the effects and risk to public safety are minor and are being mitigated by the County's proposed emergency response plan. The Board does not accept this rationale because quite simply, policy 3.1.6 states that development may be permitted if all of the criteria are satisfied, and in this instance, criterion (b) cannot be satisfied when the one access to Long Point is inaccessible due to flooding. There is no other access available and both Planners confirmed that. The Applicants did not provide sufficient evidence to satisfy this criterion.

Further, PPS policy 3.1.2 is mandatory: development shall not be permitted within areas that would be rendered inaccessible 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 natural hazard.

The County's emergency response plan is not in place; it is not known when it will be in place; and even if it were in place, does not equate to the provision of safe access during times of emergency. The two are not interchangeable. The Board heard from residents near the subject property who detailed their own personal experiences of times when the causeway had been dangerous due to flooding. The PPS is clear that vehicles and people have safe access during times of flooding and at this point, that has not been established. The Board is not satisfied that the requirement under the PPS has been met. While it is true that there are many seasonal and permanent residences on Long Point, having been established over the decades, the issue is whether to allow more development.

Concerning new development, Counsel for the Applicants relied on another Board decision issued just prior to the resumption of this hearing. In that decision, the Board differently constituted, allowed the creation of 4 new lots on Long Point. The suggestion was made that in order to ensure consistency; I must make a similar finding

concerning this one lot development proposal. Firstly, while the Board strives for consistency in decision-making, unlike Court decisions, Board decisions are not binding. Secondly, I must make a decision based on the evidence presented and cannot comment on the nature of the evidence presented at another hearing. Thirdly, the referenced Board decision withheld its Order pending fulfillment of specific conditions and as such, at the time this hearing concluded, the OPA and ZBA for the other proposed four lots had not been finalized.

**Norfolk County Official Plan Policies:**

Policy 4.3.3.2 Shoreline Policies repeats the requirements of the PPS concerning safe access. In fact, the language of the OP closely resembles that found in the PPS. My findings and rationale therefore similarly apply to the conformity required by this section of the OP. The Board determines that the proposed development reflected in OPA 32 and ZBA fail to conform to this policy.

The Applicants argued that section 4.3 Hazard Lands Designation should not apply because the subject property does not exhibit the characteristics of hazard lands as enunciated by the policy. They are “lands that have inherent environmental hazards such as flood susceptibility, erosion susceptibility, instability and other physical conditions which are severe enough, if developed upon, to pose a risk to occupants of loss of life, property damage and social disruption.” Mr. Seddon opined that “none of these hazard conditions exist” on the subject property and there is “no flood hazard, and certainly no erosion hazard, on the Brown’s property, and therefore, there shouldn’t be any hazard land designation on the Brown’s property [Exhibit 23, p. 10].” This is so despite his conclusion that the “property is negligibly susceptible to flooding [Exhibit 23, p. 9].” The OP policy mentions flood susceptibility without specifically qualifying it. Flooding of any kind can result in damage to property and social disruption, and the policy is clear that development should be avoided where there is flooding susceptibility.

Policy 11.3.2.3 Resort Areas identifies Long Point and recognizes existing development but it states that “Resort Areas are not intended to expand and accommodate additional growth as would typical settlement areas since limited use is envisaged in Resort Areas.” It unequivocally states that: “No expansions to the existing Resort Areas shall be permitted.” Ms. Cater opined that OPA 32 does just that –

expands the Resort Area designation to include the easterly portion (Part 2) of the subject property. Mr. Seddon argued that this policy should not apply because the OPA and ZBA applications were made on October 6, 2009, exactly one week prior to the adoption by Norfolk County Council of this policy, referred to as OPA 28. Mr. Seddon relies on the Clergy principle which stipulates that applications should be tested against the policy regime in place at the time such applications are made. Mr. Seddon takes a technical view stating that OPA 28, the Lakeshore Secondary Plan which prohibited the expansion of Resort Area designations, was adopted one week after the applications were made.

The Board does not take issue with this sequence of events or the Clergy principle. If this was the sole reason for the failure or success of OPA 32 and the ZBA, this one-week timeframe might have been important. In this case, these two instruments fail due to a myriad of other planning related reasons, including lack of conformity to the other OP policies.

**Consent Application:**

The consent application, however, was filed following the adoption of OPA 28 and pursuant to subsection 51(24)(c) of the *Planning Act* must be tested against this policy. Ms. Cater testified that she had “very serious concerns” with respect to the proposed consent. Problems with the small size of the lot which she explained would not provide sufficient attenuation space for a traditional septic system, and that problem would be exacerbated by its location next to the PSW. She opined that the proposed consent was not in the public interest, did not conform to the OP policies, was not consistent with the PPS, simply did not represent good planning and that it would be a dramatic deviation from a practice held since 1989, to not permit consents on Long Point given the existence of the LPRCA Shoreline Management Plan.

Mr. Seddon maintained that the three instruments should be considered together and in his view, all should be viewed as a bundle prior to the adoption of OPA 28. Further, he discounted the status of LRPCA Shoreline Management Plan stating that it did not hold the standing of official plan policies. He explained that Ms. Cater’s concerns about attenuation could be easily addressed with new technology.

Dan Salembier of the County's Building Department was called under summons to testify on behalf of the Applicants. His evidence, in summary, was that the proposed lot to be severed could accommodate a septic system for a two or three bedroom cottage but an existing system is already situated on Part 2. It is used to service the structures currently located on Part 1. That septic system was constructed in 2006 without the necessary permits. He opined that a system should be located close to the PSW as the vegetation would assist in filtration. This evidence was in stark contrast to the EIS which recommended the septic beds "must be located as close to the road and away from the wetland as possible [Exhibit 2, p. 45]." When asked about this, Mr. Salembier said that one "can't assume that this EIS is correct." He did say that he had not read the EIS in its entirety and only made such a conclusion from the excerpt put to him. Concerning Part 1, he surmised that given the space needed for a septic system on that proposed parcel only ten parking spaces could be accommodated. He could not see how 21 parking spaces could be allocated on Part 1 given the area needed for a septic system. His ten space calculation differed from Mr. Seddon's figures.

The Board finds that while Mr. Salembier endeavoured to be helpful, his evidence contradicted that of other evidence presented by the Applicants, specifically in relation to the number of available parking spaces for Part 1 and the location of the septic system on Part 2. The fallout from the disconnect in the Applicants' evidence means the Board has given it lesser weight.

**Regard for Council's Decision:**

Counsels for the County and the Applicants submitted that the Board have regard to Council's decision pursuant to subsection 2.1 of the *Planning Act*. In arriving at its decision, the Board has taken Council's decision along with the Committee of Adjustment's decision into consideration before arriving at its decision. Subsection 2.1(b) requires regard to be had to "any supporting information and material that the municipal council or approval authority considered in making the decision..." Planning Report (No. P.E.D. 10-85) recommending refusal was before Council. It was authored by Eric Gilbert, in-house Planner with the County. Council's decision reflected in the Regular Council Minutes of July 13, 2010 approved the OPA and ZBA by resolution (Res. No. 7, Exhibit 2, Tab 26). The Report recited the same concerns as expressed by Ms. Cater at this hearing. She made these concerns known to Council as is reflected in

its Council Minutes. No other professional planning advice, other than that of Mr. Gilbert's planning report and Ms. Cater's opinions recommending refusal, are shown in the Council Minutes of July 13, 2010 (Exhibit 2, Tab 25). Council nonetheless approved the two planning instruments.

A similar Planning Report dated January 20, 2011 recommending refusal was before the Committee of Adjustment which also approved the consent. That Report, authored by the same Planner, also expressed the same concerns raised before Council and those articulated by Ms. Cater at this hearing. However, in its Minutes, Members of the Committee expressed the following:

Dan Ciona stated that he feels that with the approval granted by Council for the related Official Plan Amendment and Zoning Application, they have signaled to Committee how they want to proceed and he feels Committee should not argue with Council. ...Rick replied that although there seems to be a fairly clear message from Council that they want the application approved, that does not mean that Committee is required to follow suit. ...Dennis then stated that he feels Council is pretty clear where they want to go with this situation which is messy enough without more lawyers around the table and reluctantly supports the application for severance [Exhibit 2, Tab 43 p. 143].

In making its decision, the Committee approved the consent with the following reason: "The application conforms with the intent of the official plan regarding creation of a lot within the resort residential area [Exhibit 2, Tab 44 p. 146]". No specific reference is made to any policy of the Official Plan nor is there any discussion whatsoever concerning the issues raised by those in attendance or that were contained in the Planning Report. From the commentary reflected in the Committee's Minutes, it seems patently obvious that the Committee's decision was made to file in line with Council's earlier decision and was not based on legitimate planning reasons.

In ensuring compliance with subsection 2.1 of the *Act*, the Board has reviewed carefully the decisions of both the County Council and the Committee of Adjustment along with the supporting material and information that was before them at the time of those decisions. "Having regard" requires a thoughtful review which includes an independent analysis. That has been done in this instance and the Board cannot agree with these earlier decisions.

For the foregoing reasons, the Board allows the appeals and determines that the planning instruments before it are not approved.

**THEREFORE THE BOARD ORDERS** that the appeals are allowed and the Official Plan Amendment, Zoning By-Law Amendment and Consent are not approved.

These are the Board's Orders.

"J. V. Zuidema"

J. V. ZUIDEMA  
VICE-CHAIR