

## Presentation Materials

Delegation – May 27th, 2019 Council Meeting –Municipality of Northern Bruce Peninsula

Subject: Shirley Johnstone consent application File

File no: B-84-16.68

Request for Council Resolution in support of reconsideration of proposed Condition no. 1 of subject consent

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Mayor McIvor and Members of Council:

I hope today to draw a close to this long approval process to what started out as a simple consent to sever. Briefly, Mrs. Johnstone owns all of Lots 8 in Concession 1 and 2 EBR except for lands previously sold for part of the Crane River Park and 177 acres in Lots 7, Concession 1 and 2 EBR. She wants to convey the 177 acres and retain Part Lot 8, Concession 1 EBR and Lot 8 Concession 2 EBR.

This seemed simple enough until the conditions of consent were proposed to Mrs. Johnstone. These conditions included:

- An archaeological assessment be completed and recommendations implemented prior to any development within 300 metres (984) feet of the Crane River, McVicar Cemetery and Sawmill site and 100 metres of the Hidden Valley Road (since amended)
- A Scoped Environmental Impact prior to development (since removed)
- A Karst Hazard assessment prior to future development of any sewage disposal system, livestock facility or manure storage facility
- Deeding the right-of-way for the Hidden Valley Road

These conditions are to be applied to the 177 acres being severed and the lands being retained.

At your April 8<sup>th</sup>, 2019 Council meeting, Mr. Jack Van Dorp provided a chronology of Mrs. Johnstone's fairly straightforward severance application. I have reviewed the chronology provided and would note the following:

- The application process has taken too long. The early part of delay was caused by the imposition of Site Plan Control to obtain an archaeological assessment and karst assessment.

I think we have come to the understanding that one cannot use site plan control for purposes that are not included in Section 41 of the Planning Act.

Frustratingly, we had to get a legal opinion to confirm our position on site plan control matters. A copy of this legal opinion is attached. While Mr. Van Dorp's report made mention of this opinion his report omitted relevant information related to the proposal. The legal opinion noted a number of items as outlined below.

- Site Plan control cannot be applied without a Site Plan Control By-law
- A development agreement, as suggested by our office, as well as within the legal opinion, is an acceptable method of imposing conditions
- **Conditions of a consent must be related to the application and must be relevant and reasonable**
- **In the opinion of the lawyer, the conditions suggested are not related to the application and not relevant or reasonable and should not be applied to either the retained or severed lots**

The karst assessment is really not necessary as the protection of groundwater in the approval process is covered by the Ontario Building Code at the time of building permit application. **This property is no different than any other existing lot where the owner wants to put up an agricultural building or house.**

Mrs. Johnstone's son may want to replace an old barn with a drive-in shed on the same footprint. He could get a permit for such a structure today, if he applied, just like anyone else who wants to build.

The need for an archaeological assessment seems to be only required at the time of requesting permission to develop something. If there is truly a need for this type of assessment at the time of development, this requirement should be applied evenly across the municipality, perhaps through provisions in the comprehensive zoning by-law similar to the hazard designation along the Crane River which limits development.

## Summary

Mrs. Johnstone is prepared to enter into a development agreement as a condition of consent that would enable the municipality to proceed with the deeding of a right-of-way for the Hidden Valley Road and an easement from the road to the McVicar Cemetery. The width of the right-of-way and how far it will extend would be put in the agreement and be mutually satisfactory to both parties

The need for any special provisions related to building on the property would be addressed the Ontario Building Code at the time of building permit. The need for the karst assessment is redundant.

Mrs. Johnstone feels that any conditions imposed should only apply to the lands being severed.

As stated previously, the legal opinion states that the archaeological and karst assessment are not relevant as there is no development proposed at this time. We agree.

Planning staff is of the opinion that transferring the road to the Municipality creates new development potential, however, Mrs. Johnstone did not initiate this request. Is it now reasonable to hold Mrs. Johnstone to a higher standard than any owner of an existing lot?

Beyond this, it is my understanding from speaking with Mrs. Johnstone that this retained lot contains lands which are not particularly suitable for development.

I would respectfully request Council to advise the Bruce County Land Division Committee that the only condition it requires is for Mrs. Johnstone to enter into a development agreement to arrange for the deeding of the right-of-way for the Hidden Valley Road.



DEVRY SMITH FRANK *LLP*  
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December 6, 2018

Our File # CUEPL851

By E-mail: [cuesta@cuestaplanning.com](mailto:cuesta@cuestaplanning.com)

Cuesta Planning Consultants  
978 1<sup>st</sup> Avenue West  
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Attention: Don Scott

Dear Don:

**Re: Part Lot 7, Concession 1 EBR & Part Lot 7, Concession 2 EBR (the "Subject Lands")**  
**Former Township of St. Edmund's**  
**Municipality of Northern Bruce Peninsula (the "Municipality")**  
**County of Bruce (the "County")**

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Your client Mrs. Johnstone has filed an application (the "**Application**") with the Municipality to sever 177 acres (the "**Severed Lands**") from the Subject Lands in order to gift the Severed Lands to one of her sons. The remaining 200 acres (the "**Remainder Lands**") will be gifted to her other son. The Remainder Lands contain an aging agricultural building that would likely be rebuilt using the same building footprint. No other form of development is proposed for either Lands.

The County's Planning Department is requesting that, as a condition of approval of the Application, the Municipality confirm that it has a site plan control by-law (the "**By-law**") to require, for both the Severed and Remainder Lands:

1. an archaeological assessment for any new buildings to be constructed within 300 metres of the Crane River, 100 metres from Hidden Valley Road or 300 metres from McVicar Cemetery and the Sawmill site. That site is associated with a historic settlement area (perhaps 2 or 3 buildings) in the area; and
2. receipt by the Municipality, the County and the Grey Sauble Conservation Authority of a karst hazard assessment prior to the future development of an onsite sewage disposal system, livestock facility or manure storage facility. This issue can however be addressed instead as part of the building permit process through the Building Code requirements.

(the "**Condition**")

As the Municipality has not passed the By-law there is no site plan control process in place.

You have a number of questions relating to the Condition:

1. Can conditions be imposed on the Remainder Lands?
2. Without the By-law in place what authority is there for the Municipality to require the Condition?

In my opinion:

1. It is not unusual for an approval authority, including the Local Planning Appeals Tribunal, to impose conditions on retained lands. This is most likely in cases where both or all lots are the subject of a development proposal. There are times however when an approval authority imposes conditions on the remainder lands even when they are not going to be developed. There is no prohibition in the Planning Act on this direction, but, as set out below, the conditions must be relevant to the approval sought. It is on this basis that conditions can be resisted.
2. Conditions on a consent application have to be related to the application and be relevant and reasonable. They should also have regard to the criteria set out in section 51(24) of the *Planning Act* (the “Act”). Based on this:
  - a. Requiring that the By-law be in place is not related to the Application. It is a different process and out of the control of the client. This is not reasonable. It would reply on the whim and timing of the Council of the Municipality and it could be appealed. This process could thus extend past the two year deadline for meeting the Condition. It would be void for vagueness.
  - b. Even if the By-law was in existence, both the Act and section 5.10, *Site Plan Control*, of the Municipality’s Official Plan are restrictive in terms of what can be required under site plan approval (road widenings, loading and parking, easements, landscaping etc.). Any requirement for an archeological assessment would not be an appropriate use of site plan control powers. It is not clear that a karst assessment would fit within those confines.
  - c. It is doubtful that the archeological and karst assessments are relevant to the Application since there is no development proposal for the proposed lots. This may be the reason that the By-law is a condition of approval as a site plan agreement would cover such a future possibility. However these assessments could be required as a condition of any future development application(s) if/when made. There is thus no need for the By-law.

Based on the above, the Condition is not relevant or reasonable and it is beyond the jurisdiction of the Municipality to require it. If it is imposed it should be appealed.

I trust the above has been of assistance. Please let me know if you require any further clarification.

Yours truly,

DEVRY SMITH FRANK *LLP*

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

Marc P. Kemerer  
MPK/jrg