



Staff Report

Planning and Development Services

Report To: Committee of The Whole
Meeting Date: January 8, 2018
Report Number: PDS.18.01
Subject: Blueview Chateaux – OMB Decision
Prepared by: Michael Benner, Director of Planning and Development Services

A. Recommendations

THAT Council receive Staff Report PDS.18.01, entitled “Blueview Chateaux – OMB Decision”;

AND THAT Council direct staff to provide notice to the owners of 209553 Highway 26, via Registered Letter, that the existing on-site Short-Term Accommodation use must cease following the Family Day Weekend (by February 19, 2018), with such notice to state that failure to cease will result in enforcement action being taken by the Town.

B. Overview

This report provides a synopsis of the decision rendered by the Ontario Municipal Board on an appeal launched by Blueview Chateaux of the Town’s non-approval of an Official Plan Amendment, Zoning By-law Amendment and Site Plan Application for a Short Term Accommodation Use.

C. Background

In October 2014, the Town received an application for an amendment to the Zoning By-law from Blueview Chateaux to consider a request to rezone a portion of their property from the Residential ‘R3’ zone to a site-specific Residential ‘R3’ zone to permit the existing dwelling to be used for Short Term Accommodations (STA). That application was turned down by Council in September 2015, and an appeal to the Ontario Municipal Board (the “Board”) was launched by Blueview Chateaux in October of 2015.

In August 2016, an amendment to the Town’s Official Plan and a Site Plan application were also submitted by the applicant in support of the proposed STA use. As the associated Zoning By-law Amendment was already before the Board. These applications were also refused by Town Council and, subsequently, referred to the Board.

The Blueview Chateaux property is legally described as Plan 320, Lot 66 with the street address of 209553 Highway 26, Town of the Blue Mountains. Although 3 dwellings exist in a family

compound setting at this location, only the most westerly dwelling was subject to the applications.

After several delays in the Board hearing process, a 3-day hearing was held on October 25 through 27, 2017 with an additional 2 days scheduled for the hearing for November 16 and 17, 2017.

During the Hearing, land use planning evidence was provided by Ms. Loft, Planning Consultant acting on behalf of Blueview Chateaux, Mr. Russell, Planning Consultant acting on behalf of the Town, as well as additional evidence and general policy information provided by the Town's Director of Planning and Development Services. Additional evidence was provided by Michael Cullip, P Eng, who provided transportation evidence related to the access and highway 26, and Darryl Robins, P Eng, who provided evidence related to the on-site septic system. 5 residents and the applicant also spoke at the Hearing.

Michael Stahr acted as Counsel for Blueview Chateaux, and Leo Longo acted as Counsel for the Town in this matter.

D. Analysis

In his December 14, 2017 Decision, Hearing Officer Tousaw examined several factors that have a bearing on the proposed STA use of the property.

The issues raised in the hearing are primarily contained within the Town's Official Plan policies applying to STAs in the Town, including OPA 11. These issues included:

- STAs in low density neighbourhoods;
- highway access;
- sewage services;
- parking, and;
- separation distance and mitigation.

In rendering a decision under the Planning Act, the Board must also have regard to matters of provincial interest as set out in Section 2 of the Act, and must have regard to the decision of the approval authority, in this case the Town, and the information considered by the approval authority. The decision must, therefore, also be consistent with the Provincial Policy Statement (PPS) and the Niagara Escarpment Plan (NEP), in addition to the policies of the Grey County Official Plan and the Town's own Official Plan.

STAs in Low Density Neighbourhoods

The Board found that the intent of the Town's Official Plan is clear: that STAs, as commercial uses, are to be prohibited in low density neighbourhoods, where the primary form of development is single family detached dwellings, because of their negative effects on adjoining residents. The designation of the property and of the entire stretch of dwellings in the area along the north side of the highway is Residential Infilling. This designation restricts permitted

uses to single detached dwellings and does not permit a range of dwelling types. Nor does it permit STAs.

Accordingly, the Board found that the applications do not conform with the intent and letter of the Town's Official Plan with respect to a new STA in an area of detached dwellings.

Highway Access

The Board found that the issue of access on to Highway 26 remained unresolved. The Board felt that the applicant should have submitted clear correspondence answering the question, file affidavit evidence, or subpoena a relevant witness to address such a fundamental matter as access to a provincial highway. Given that the Board itself has no jurisdiction on MTO access, the Board was left with attempting to resolve conflicting statements from MTO and equally conflicting interpretations of MTO's position from the witnesses at the hearing.

As the Board is charged with determining a planning issue, and the onus rests with the applicant to provide the Board with the necessary evidence to make such determination, the Board felt that the access issue was not well defended and, therefore, could not be supported.

Sewage Services

The Board found that the servicing policies of the relevant planning documents were not fulfilled by these applications. The Board accepted that the Town's STA policies requires full municipal services for all new STAs. If the Town had intended to allow STAs on lots without full services, it could have said STAs "shall be required to connect to municipal services, except as permitted by Section 5 (which deals with private services)." In the absence of such exemption language in a policy applying to a specific land use, the Board found that the correct interpretation is the requirement for full services with no exceptions.

Parking

The parking plan proposed by the applicant was based on shared parking across the 3 neighbouring residential parcels contained in the family compound. While the Board found that the required parking could be accommodated within the three-lot family compound, the applicant's parking plan failed on technical grounds.

The Board agreed with the Town's submissions and with Mr. Russell that without an amendment to the Town's Zoning Bylaw for the other lots, they are not permitted to contain parking spaces accessory to a commercial use on a different lot. The present applications are for a new STA, and even the legal non-conforming status of the neighbouring lot cannot encapsulate a new use that did not exist at the date of passing of the STA Zoning Bylaw.

Separation Distance

The Board found that the proposed separation distance from neighbouring uses and the proposed mitigation measures to be insufficient to meet the requirements of the Town's Official Plan.

The Board recognized that the Town's STA By-law establishes a maximum occupancy of eight persons, sets a minimum separation distance of 120 m between a new STA and the nearest existing STA or bed and breakfast establishment, and requires a minimum buffer of 1 m along a side lot line.

The Board also found that the Town set a high bar when regulating STAs with restrictive regulations commensurate with its concerns over the disruption these commercial uses have imparted and may continue to impart on residential areas. The premise is that STAs are not permitted in low density neighbourhoods. The Board determined that the application eliminates that separation and buffer, and transfers the commercial-residential interface to the west side of the lot where insufficient setbacks and buffering are present or planned to uphold the Town's stringent requirements.

Summary Comments

From the evidence in this case, the Board determined that the STA program is supported by the public and by many tourism operators, including the applicant, and was upheld by the Board when appealed in the first instance by a few operators. The Board heard from the Hearing participants that, while not perfect, the plan is working to hold operators to account and to regulate new entrants to the market. The Town is continuing to give attention to STA issues in the context of the deferred sections of its new Official Plan.

The Board also found insufficient regard to the provincial interests and lack of consistency with the PPS related to the adequate provision and efficient use of transportation and sewage systems, and the protection of public safety. The development also failed to conform with the NEP requirement for full services. The Board also found that the applications do not conform with the Grey County or Town's Official Plan policies related to highway access and sewage services. Finally, and most specifically, the applications were found to not conform with the intent and policy of the Town's Official Plan policies for STAs.

The Board also noted that the decision of the Board focussed on the policy matters pertaining primarily to the requested Official Plan Amendment and Zoning By-law Amendment. Having found these applications to fail the requisite tests, the related Site Plan Application was also found to be unsuitable for approval. Accordingly, the Board ordered that the appeals are dismissed.

Given this decision, the applicant must now cease the existing STA operation at 209553 Highway 26. The Town's STA Program Coordinator, Municipal Law Enforcement staff and Building Division staff have been informed of the Board's decision on the matter.

Staff are also requesting Council's authorization that the owners of 209553 Highway 26 (Blueview Chateaux) be advised through Registered Letter that the existing STA use must cease after the Family Day Weekend, February 19, 2018. This date reflects a typical 30-day notice period following the January 22nd Council endorsement of the recommendations contained in this report.

E. The Blue Mountains Strategic Plan

Goal #3: Support Healthy Lifestyles

Objective #3. Manage Growth and Promote Smart Growth

F. Environmental Impacts

N/A

G. Financial Impact

The Ontario Municipal Board Hearing for Blueview Chateaux resulted in a substantial impact on the Planning and Development Services legal budget.

H. In consultation with

Town and County Planning staff, Town Enforcement Services staff, and SMT

I. Attached

1. Ontario Municipal Board Decision PL151018

Respectfully Submitted,

Michael Benner, MCIP RPP
Director of Planning and Development Services

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Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 14, 2017

CASE NO(S): PL151018

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Blue View Chateaux Inc.
Subject:	Application amend Zoning By-law No. 83-40 - Refusal of Application by Town of The Blue Mountains
Existing Zoning:	Residential 3rd Density (R3) and Hazard (H)
Proposed Zoning:	Residential 3rd Density Exemption 258 (R3-258)
Purpose:	To permit the existing dwelling to be used for Short Term Accommodations (STA)
Property Address/Description:	209553 Highway 26
Municipality:	Town of The Blue Mountains
Municipality File No.:	P-1933
OMB Case No.:	PL151018
OMB File No.:	PL151018
OMB Case Name:	Blue View Chateaux Inc. v. Blue Mountains (Town)

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Blue View Chateaux Inc.
Subject:	Request to amend the Official Plan - Refusal of request by Town of The Blue Mountains
Existing Designation:	Resort Recreational Area
Proposed Designated:	Short Term Accommodation (STA)
Purpose:	To permit the existing dwelling to be used for Short Term Accommodations (STA)
Property Address/Description:	209553 Highway 26
Municipality:	Town of The Blue Mountains
Approval Authority File No.:	P-1933
OMB Case No.:	PL151018
OMB File No.:	PL170005

PROCEEDING COMMENCED UNDER subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Referred by:	Blue View Chateaux Inc.
Subject:	Site Plan
Property Address/Description:	209553 Highway 26
Municipality:	Town of The Blue Mountains
OMB Case No.:	PL151018
OMB File No.:	PL161299

Heard: October 25, 26, 27 and November 16 and 17, 2017 in Thornbury, Ontario.

APPEARANCES:

Parties

Blue View Chateaux Inc.

Town of the Blue Mountains

Counsel

Michael Stahr

Leo Longo

DECISION DELIVERED BY S. TOUSAW AND ORDER OF THE BOARD

INTRODUCTION

[1] As a major destination for outdoor recreation and tourism in Ontario, the Town of the Blue Mountains (the “Town”) welcomes thousands of visitors every year who enjoy the area’s summer and winter activities on land, water, snow and ice. An important economic sector in the Town involves accommodating these outdoor enthusiasts during their stay. Many individuals and small-scale operators participate in this industry by renting out their cottages, houses or apartments which are known locally as Short Term Accommodation(s) (“STA” or “STAs”). Concerns were raised as the industry grew, and following extensive studies and consultations, the Town implemented a comprehensive program in 2009 to regulate STAs, including Blue Mountains Official Plan (“BMOP”) policies, Zoning By-law (“ZBL”) regulations, and a STA Licence By-law (“LBL”).

[2] Blue View Chateaux Inc. (the “Applicant” and “Appellant”) sought permission to

operate a STA on Lot 66, Registered Plan 320, known as 209553 Highway 26 (the “property”). It first applied for a Zoning By-law Amendment (“ZBA”) which was refused by the Town and appealed to this Board by the Applicant. After further discussions, the Applicant agreed to also file applications for Official Plan Amendment (“OPA”) and Site Plan Application (“SPA”). The Town refused these applications and the Applicant appealed the decisions to this Board.

[3] For the reasons set out in this Decision, the applications fail to satisfy the requisite legislative tests, and the appeals are dismissed. In seeking relief from virtually every regulation that the Town has implemented in an effort to apply principles of good planning to STAs, these applications do not uphold and fulfill the expectations of the community as embodied in the Town’s comprehensive STA program.

THE PROPERTY AND APPLICATIONS

[4] Along the north side of Highway 26 (the “highway”) to the west of Craigeith is a narrow ribbon of land between the highway and the shoreline of Georgian Bay, or more precisely, Nottawasaga Bay (the “Bay”). Some 34 residential lots are located along this ribbon, each containing either a home or a cottage, and each with its south side on the highway and its north side on the Bay. The property (Lot 66) is located midway in this stretch of development. This ribbon of land is bookended by Northwinds Public Beach on the east and Craigeith Provincial Park on the west. On the south side of the highway in this area is a mix of land uses including detached and multi-unit dwellings and commercial establishments.

[5] The property for which a STA is sought is the westerly lot of three lots, each owned by a different member of the Sakkejha family, owners of the Applicant company. The lots are operated as a single compound, with a perimeter fence, except along the shoreline, and with one shared entrance to the highway and a shared internal driveway leading to parking spaces and a house on each lot. The dwellings were all completed in 2010 and present as “triplets” matching in size, design and exterior finishes. The middle dwelling on Lot 67 has been recognized by the Town as a legal-nonconforming and

licenced STA. The east dwelling on Lot 68 is used by the family as a recreational residence.

[6] The west dwelling, for which STA approval is sought, has been operated as a STA since it was built. The Town successfully prosecuted the Applicant for operating a STA in contravention of the by-laws, and the resulting settlement allowed the Applicant to continue operating the STA while planning applications were processed. Those planning applications are the subject of this Decision.

[7] The existence of the interim STA on the property is neither an advantage nor a disadvantage to the Applicant in this proceeding. It has no bearing on the Decision, as the Board generally ignores its existence. The only exception is that the Board heard testimony from the abutting neighbours and from the Applicant related to the operation of the STA on the property.

[8] The OPA (Exhibit 10) proposes an exemption for the property within the Residential/Recreational designation to permit a STA and the use of a private sewage system. The designation in the OPA is incorrect as addressed later in this Decision.

[9] The ZBA (Exhibit 6) proposes to: allow a STA in the R3 zone; permit an occupancy of 10 persons; exempt the rear property line buffer (along the shoreline); acknowledge the existence of the STA next door on Lot 67 and thereby exempt the standard 120 metres ("m") separation between STAs; allow sewage services by a private septic system; require five parking spaces of which some may be offsite (on Lot 67) by way of an easement; allow a reduced frontage of 9 m (due to the Ministry of Transportation ("MTO") reserve along the balance of the frontage); and exempt the buffer strip along the east property line. The ZBA contains a Holding provision which would not be lifted until an easement for parking is registered in favour of the proposed STA on Lot 66.

[10] The SPA seeks approval of a site plan (Exhibit 2, page 230) showing all three lots, highway entrance, driveway, parking spaces, fences, buildings and septic systems.

LEGISLATIVE TESTS

[11] In making a decision under the *Planning Act* (the “Act”) with respect to these appeals, the Board must have regard to matters of provincial interest as set out in s. 2 of the Act, and must have regard to the decision of the approval authority and the information considered by the approval authority under s. 2.1(1) of the Act. The decision must be consistent with the Provincial Policy Statement (the “PPS”) and must conform with the Niagara Escarpment Plan (the “NEP”) under s. 3(5) of the Act.

[12] In addition to the above, the ZBA must also conform with the Grey County Official Plan (the “GCOP”) and with the BMOP under s. 24(1) of the Act.

ISSUES AND ANALYSIS

[13] Three Registered Professional Planners (“RPP”) were qualified to provide opinion evidence in the area of land use planning. Kristine Loft, RPP, was retained by the Applicant and testified in support of the applications. Michael Benner, RPP, the Town’s Director of Planning and Development Services, testified under summons from the Applicant. Gordon Russell, RPP, was retained by the Town and testified against the applications.

[14] The Board qualified and heard engineering opinion evidence from two Professional Engineers (“P Eng”) retained by the Applicant. Michael Cullip, P Eng, provided transportation evidence related to the access and the highway. Darryl Robins, P Eng, provided evidence related to the on-site septic system.

[15] In addition, helpful background and perspectives were received from five Participants who spoke against the applications. Janet Jardine and Ken Mehi are residents abutting the property to the west. Sherri Ogilvie and Rene Vogrin are residents of other properties within the ribbon of land containing the subject property. Terry Kellar does not reside nearby but chairs the STA Committee of the Blue Mountains Ratepayers Association and lives next door to a STA.

[16] Mark Faiz Sakkejha (“Mr. Faiz”) operates the Applicant company and spoke in favour of the applications.

[17] The issues raised in the hearing are primarily contained within the BMOP policies applying to STAs in the Town. OPA 11, an amendment to the BMOP for STAs, was adopted by the Town in 2009 and approved by the Board in 2011. Although the Town has since adopted a new BMOP in 2016, approval of the new STA policy was deferred by Grey County (the “County”) at the request of the Town, and therefore the policies of OPA 11 and certain related parts of the former 2007 BMOP remain in effect pertaining to STAs.

[18] The primary issues are: STAs in low density neighbourhoods; highway access; sewage services; parking; and separation distance and mitigation.

Residential Neighbourhoods

[19] The Board finds that the applications do not conform with the BMOP policies directing STAs away from low density residential neighbourhoods. The Board’s reasons are provided following a review of the evidence.

[20] The policies of s. “3.4.2 Short Term Accommodation Uses” were added to the 2007 BMOP by OPA 11 in 2009 and remain in effect as noted above. In these policies, STAs are declared to be commercial uses and should not be considered conventional residential uses (s. 3). STA’s “shall be prohibited within a single detached residential neighbourhood” (s. 5). Opportunities are provided to permit new STAs in residential designations permitting a range of housing types (s. 6(a)) subject to mitigation measures to avoid disrupting adjacent residences (s. 1, 6(b) and 7). Authorization is provided for Council to implement a licencing by-law under the *Municipal Act* for STAs (s. 9).

[21] The land use designations in the 2007 BMOP remain in effect related to STAs. The property is located within the Residential Infilling designation. The applicable

policies state that “redevelopment of residential lands shall generally be restricted to similar uses, unless a change of use, such as ... commercial use, is specifically provided under this Plan and/or the implementing Zoning By-law” (s. 3.15(6)). The BMOP intends “that the character and stability of existing neighbourhoods shall generally be maintained with redevelopment of similar uses” (ibid).

[22] In keeping with the BMOP directive prohibiting STAs in single detached residential neighbourhoods (“detached neighbourhoods”), the ZBL prohibits STAs in the low density residential zones of R1, R2, R3 and R4 (s. 5.24.1(a)), and permits STAs in the higher density residential zones of R5, R6, R7 and R8 where multiple-unit dwellings are permitted (s. 10.6 through 10.9).

[23] Ms. Loft interpreted the BMOP’s prohibition of STAs in detached neighbourhoods as an intention to protect quiet residential neighbourhoods from these commercial uses. Ms. Loft found the neighbourhood surrounding the property to include a mix of uses, including a commercial plaza directly across the road, multi-unit housing to the west, and all bisected by a busy highway. Ms. Loft relied in part on the new Recreational/Residential designation in the BMOP which permits a range of residential uses and does not limit the area to detached housing. She did acknowledge that the relevant designation pertaining to STAs is Residential Infilling which limits uses to single detached houses (and for this reason, if the Board were to approve the OPA, the designation would require correction in Exhibit 10). Ms. Loft also relied on supportive policies in the NEP and the GCOP related to tourism development.

[24] Ms. Loft concluded that the mixed use character of the area would not be compromised by permitting a STA on Lot 66 and that the Town should expect applications for new STAs where the general intent of the policies is maintained.

[25] Mr. Benner was hired as the Town’s new Director of Planning and Development Services in 2014, and in August of that year, he provided a favourable report recommending approval of the ZBA (the OPA and SPA had not yet been filed at that time). Mr. Benner was forthright in his evidence before the Board when he

acknowledged that he has learned much about the planning issues associated with STAs between then and now, and that today he feels he was wrong in recommending approval. He testified that some 180 STAs existed, either as complying uses or legal non-complying uses, under the STA policies, and that today there are as many as 240 licenced STAs in the Town. Mr. Benner explained that the issues surrounding STAs in residential areas warrant careful planning and that these are the matters being considered in the deferral of the STA policies in the updated BMOP. While Mr. Benner considered this property as a reasonable location for a STA given the mixed use area, he was concerned that insufficient buffering was being provided to address issues with adjoining neighbours (buffers will be reviewed in more detail later). He also noted that these applications eliminate the standard 120 m separation between STAs in a zone where STAs are not permitted at all.

[26] Mr. Russell testified that because the BMOP prohibits STAs in detached neighbourhoods, and implements this policy through the ZBL which correspondingly prohibits STAs in the R1 to R4 zones, that the R3 zone along the shoreline in this neighbourhood should not be subjected to a new STA. Mr. Russell confined his definition of neighbourhood in this instance to the residential uses and shoreline to the north of the highway. He did not consider the mix of residential and commercial uses to the south of the highway to be part of the neighbourhood. Mr. Russell testified that the negative effects of a STA on the adjoining detached dwellings cannot be mitigated on the property, and that without mitigation, the very effects the BMOP intends to avoid in detached neighbourhoods would be imparted on the adjoining residents. Mr. Russell found the applications satisfied neither the intent nor the wording of the STA policies.

[27] The Participants provided the Board with their actual experiences living next to or nearby a STA. This testimony provided context and background for the reasons why the Town instituted the various policies to regulate STAs. Dwellings used to house the travelling and visiting public for short durations have been found to result in a use of land that is different from a dwelling occupied by an owner or long-term tenant.

[28] Ms. Jardine and Mr. Mehi, who abut the west side of the property, spoke to the noise and disruption associated with the frequent turnover of occupants, the on-site parties of large groups, loud music and not infrequently, fireworks, the late-night return of occupants after the bars close, and occasional trespass onto their parking area and beach. Ms. Ogilvie, who resides four doors to the east of the property, gave corroborating evidence of large groups, noise and fireworks.

[29] Ms. Jardine and Mr. Mehi, as well as Mr. Vogrin who resides nine doors west of the property, see their neighbourhood as comprising the 34 dwellings along the north side of the highway and uninterrupted by any other land use, other than the legal non-conforming STA on Lot 67. They note that many owners have been present in the area for decades, that neighbours know each other, and that one former STA in this stretch eliminated the problems it caused when it returned to a detached dwelling use.

[30] Mr. Kellar, in his experience with the STA Committee of the ratepayers association and from personal experiencing living next to a large STA, explained that the long history of STA complaints in the Town support the policy position that STAs are commercial uses which change the character of residential neighbourhoods. He testified that the noise, traffic and parking associated with STAs can be intolerable, and that despite the Town's efforts to regulate and monitor through the LBL, problems persist. In Mr. Kellar's view, allowing a new STA in this residential area would undermine the progress made to date by the Town.

[31] Mr. Faiz described his significant experience operating several STAs in the Town and supports the LBL as a means to call operators to account if they don't follow the rules. He considers his properties to be among the finer STA accommodations offered in the area and endeavours to select appropriate tenants and to enforce the rules. Mr. Faiz recently engaged a security firm to monitor his properties through the night in an effort to both protect his property and reduce possible noise issues affecting neighbours.

[32] The Board finds that the intent of the BMOP is clear: that STAs, as commercial

uses, are to be prohibited in detached neighbourhoods because of their negative effects on adjoining residents. The designation of the property and of the entire stretch of dwellings in this area along the north side of the highway is Residential Infilling. This designation restricts permitted uses to single detached dwellings and does not permit a range of dwelling types. Within such an area, the BMOP prohibits new STAs.

[33] The Board acknowledges that the property is located within a neighbourhood that does contain a mix of uses. In the Board's view, one cannot ignore the existence of the commercial uses across the road, or the multi-unit dwellings further to the west, or the busy highway as being contributors to the character of the neighbourhood. However, this mix of uses does not reduce the onus on the Applicant to satisfy the requirements of the BMOP. "Accommodation uses shall avoid disruption to adjacent residences ..." (s. 3.4.2(1)), and should "ensure that the principal residential character is generally maintained" (s. 3.4.2(5)). Insufficient evidence was provided in favour of the applications, apart from a boundary fence and more recent additional screening of the outdoor deck, to demonstrate how a new STA would avoid disrupting the residential area of this neighbourhood, and specifically the abutting and nearby dwellings.

[34] Despite Mr. Faiz's genuine intent to be a first-rate operator, he acknowledged that incidents will occur. The Board found the experiences of the neighbouring Participants to not be exaggerated and not contradicted by Mr. Faiz.

[35] In addition to the BMOP prohibiting STAs in detached neighbourhoods, it also enables a prohibition in detached designations (emphasis added by the Board): "new short term accommodation uses may not be permitted in residential land use designations which restrict the use of the land to only single detached residential dwellings" (s 3.4.2(6)(c)). Given the opinion evidence of the Planners and the experiential evidence of the Participants, the Board finds additional rationale in this policy to disallow a new STA in this Residential Infilling designation.

[36] Accordingly, the Board finds that the applications do not conform with the intent and letter of the BMOP with respect to a new STA in an area of detached dwellings.

Highway Access

[37] The Board finds that the requirements of the GCOP and BMOP are not met with respect to confirming permitted access onto a Provincial Highway from the property. The Board's reasons are provided following a review of the evidence.

[38] The GCOP identifies the five provincial highways within the County, including Highway 26 in front of the property, that are within the jurisdiction and control of the MTO. "New entrances or the upgrading of entrances" are "subject to the approval of the MTO" (s. 5.2.2). The policy goes on to advise OPA and ZBA applicants to consult with MTO "prior to making formal submission of their application."

[39] In its written comments to the Town at the time of the original circulation of the ZBA application, the County noted its policy that applications abutting a provincial highway shall be referred to the MTO (s. 5.2.2(6)(f)) and that if positive comments are received, that County staff has no further concerns.

[40] Under the new BMOP, a traffic impact study may be required to support a ZBA application for a commercial use "to the satisfaction of the Town, County and/or Ministry of Transportation" (s. B2.3).

[41] Mr. Cullip prepared the traffic impact study for the Applicant that was requested by the Town. Using conservative assumptions for highway capacity, traffic volumes, and trips to be generated by the proposed STA, Mr. Cullip concluded that no transportation system improvements are necessary and that the existing site access location and configuration are appropriate. Although his study mistakenly noted the posted speed limit in the vicinity of the property to be 60 kilometres per hour ("km/h"), Mr. Cullip's conclusions remained unchanged when considering the actual 80 km/h speed limit due to the excellent site lines from the property in both directions.

[42] Mr. Cullip did not contact the MTO during the course of his study to ascertain whether there were any issues with the existing access permit for the property. He did

not consider the use to be changing to commercial, and determined there was no appreciable difference to the highway system when considering one vehicle for a dwelling as compared to five vehicles for a STA, even if all of the vehicles were assumed to be coming or going during peak periods. Mr. Cullip referenced the MTO Entrance Permit (Exhibit 2, p. 234) which authorizes a 5 m wide “mutual residential access” to the three properties and the MTO letter (Exhibit 2, p. 235) which states the “access does not qualify for an upgrade to a commercial [sic] due to proximity to other commercial properties/public road intersections and access density.”

[43] Ms. Loft testified that she accepted and agreed with Mr. Cullip’s conclusions that safe and suitable access existed to the property. She noted that no comments were received from MTO during the ZBA circulation, which she took as positive given that no objections were raised, and that an entrance permit was in place for the property. Ms. Loft further testified that if it were determined that a new permit is required from MTO, then the applicant must comply.

[44] Mr. Benner and Mr. Russell were aligned in their opinions that conformity with the GCOP could not be concluded without supportive comments from MTO. Mr. Russell, on behalf of the Town, having discovered that MTO had not commented on the applications and that the Applicant had not secured definitive approval from MTO, made enquiries with MTO in an attempt to bring finality to the question. Mr. Benner testified to advising MTO that a commercial use in the form of a STA was being sought and clarity was required on whether the existing entrance permit was sufficient for the purpose. MTO’s response to Mr. Russell is noted above in Exhibit 2, p. 235.

[45] Subsequently, Mr. Faiz sought further clarification from MTO in a series of emails (Exhibit 2, p. 231). The MTO responded by attaching the letter sent previously to Mr. Russell and stated in the body of the email that “Provided the property remains a residential – low traffic generating use, we are not opposed to the zoning change. As noted in the (attached) letter the property is not eligible for a commercial access, [sic] if there is a significant change to traffic generation to (and from) the subject property and

the subject entrance begins to function as a more intensified use that warrants highway improvements, MTO does have a concern.”

[46] The Participants did not provide comments on the MTO access issue but did confirm that the highway is busy, that accidents have occurred, usually involving vehicles turning into the commercial plaza, that vehicles passing on the shoulder are a common safety problem, and that the MTO has been asked to lower the speed limit in this area.

[47] There was no dispute that MTO approval is required for highway access. The Applicant relied on Mr. Cullip and Ms. Loft’s interpretations of the MTO permit and correspondence to suggest that MTO approval is in place, and in the alternative, a condition of the Board’s approval can be imposed to obtain MTO approval. The Town relied on Mr. Cullip’s lack of contact with the MTO and Mr. Russell’s review of the MTO material to suggest that the issue remains unresolved.

[48] The Board finds that the Applicant did not perfect his case regarding MTO access. The Board finds that the issue of access remains unresolved and that it is the Applicant’s responsibility to provide an unequivocal answer at the hearing. On such a fundamental matter as access to a provincial highway, and one which the Board itself has no jurisdiction, the Applicant had several options: submit clear correspondence answering the question, file affidavit evidence, or subpoena a relevant witness. Instead, the Board is left with conflicting statements from MTO and equally conflicting interpretations.

[49] The Board heard that a STA is a commercial use but all of MTO’s references are to a residential use. The Applicant’s entrance permit is for a “mutual residential access” for Lots “66, 67, 68.” The bottom of the permit states “Such permit shall not be used as a means of access to any type of establishment other than described herein.” The MTO letter to Mr. Russell similarly states “the access shall be a mutual residential access limited to three residential property owners” and goes on to say that the access does not qualify for an upgrade to commercial. New wording is then introduced by MTO’s

email to Mr. Faiz where MTO states “Provided the property remains a residential – low traffic generating use, we are not opposed to the zoning change.”

[50] The question that remains unanswered is: Does MTO considers a STA to be a residential use or a commercial use for the purposes of an entrance permit? Even MTO’s email statement that “we are not opposed to the zoning change” is predicated on the proviso that “the property remains a residential – low traffic generating use” (emphasis added by the Board). The Board may have a hunch as to what MTO would ultimately clarify, but it is unprepared to make a ruling on a hunch. The Board needs to know the clear position of the MTO and that clarity was not provided by the Applicant.

[51] Recognizing the ambiguity, the Applicant suggested that the Board could approve the applications with the condition that a MTO permit be obtained for the STA. If these applications were to be approved, which they are not, the Board would not defer its responsibility to MTO in this case and effectively request that the agency make the decision for the Board. The Board is charged with determining a planning issue and the onus rests with the moving party, the Applicant, to provide the Board with the necessary evidence to make such determination.

Sewage Services

[52] The Board finds that the servicing policies of the relevant planning documents are not fulfilled by these applications. The Board’s reasons are provided following a review of the evidence.

[53] The property is located within the Escarpment Recreation Area of the 2017 NEP. This area is subject to several development policies, including a servicing policy that applies to the specific locale containing this property. Municipal water and sewer services “in the Town of the Blue Mountains, will be required in the Service Districts of Craigeith, ...” (s. 1.8.5.12).

[54] Consistent with the PPS, the GCOP sets out the preferred hierarchy of water and

sewer servicing methods being municipal services, then private communal services, followed by partial services, and finally individual on-site services (s. 5.3.2(2)). Existing partial services are permitted for development only where reserve sewer and water capacity exists and site conditions are suitable for the long-term provision of services. Within the GCOP's Recreational Resort Area designation containing the property, the policy notes that full services are provided and new development must facilitate further municipal service infrastructure (s. 2.6.7(1) and (2)).

[55] The specific STA policies of the BMOP state "All short term accommodation uses shall be required to connect to municipal water and sewage services in accordance with Section 5, Servicing Policies, of this Plan" (s. 3.4.2(10)). The ZBL implements this policy with a provision mandating connection to municipal services (s. 5.24.1(g)).

[56] Grey County's notice of decision letter (Exhibit 8, Tab 21), approving the 2014 BMOP, lists the policies of the 2007 BMOP which remain in effect for the purpose of STAs only. The list does not include the relevant servicing policies of s. 5 of the 2007 BMOP, but Mr. Russell found it necessary to interpret their inclusion via the direct reference in STA policy s. 3.4.2(10), a section clearly remaining in force. No objection was raised to relying on the servicing policies of the 2007 BMOP, and the Board agrees it is necessary to consider them when determining the requirements for STAs.

[57] Development within the Craigeith Service District is required to connect to municipal water and sewage services (s. 5.1(1) and Appendix Map H). Intensive land use activities are directed to service districts with full services, and where full services are not available, development shall be restricted to small scale uses only (s. 5.1(4)). The Town has initiated an Environmental Assessment for the future extension of services within the service district containing the property. For existing lots in areas without full municipal services, the requirement for municipal services does not apply "for single detached dwelling purposes, or other limited non-residential purposes" (s. 5.6(1)). The ZBL may establish provisions for private services, including prohibitions or limitations (s. 5.6(5)).

[58] Mr. Robins provided testimony for the on-site septic system for which he obtained permits and oversaw its planning and installation. Lot 66, like all of the lots in this ribbon of land, are provided with partial services, being municipal water and private on-site sewage systems. The property utilizes a Waterloo Biofilter septic system consisting of an anaerobic septic tank, aerobic biofilm tanks, filter bed and mantle. An agreement is in place for annual inspections and maintenance of the system by a certified service provider. Mr. Robins advised that this tertiary system was designed for the number of bedrooms and fixtures in the dwelling, and he is confident the system will properly treat all of the waste water from the dwelling including up to 10 persons. He does not see a difference in the sewage treatment demand of a STA as compared to a detached dwelling because the system is sized based on the full utilization of bedrooms and fixtures.

[59] Ms. Loft found the applications to conform with the BMOP in that small scale uses, which include STAs in her opinion, are permitted on existing lots where full municipal services are not available. She considers the approved septic system to be a permitted form of servicing until such time as full services are available in the area. Although the servicing policies of the 2007 BMOP remain in effect for STAs, Ms. Loft agreed under cross examination that under the 2016 BMOP, as an indication of the municipality's intentions for servicing, all development within settlement areas, except for Clarksburg, require full municipal services. Ms. Loft also agreed that the applications did not conform with the NEP requirement for full services in the Craigleith Service District, but maintained that this existing lot was already serviced.

[60] Mr. Russell testified that all of the policy documents require full services in the area of the property and that the existing septic system does not satisfy those requirements when considering a new development. Moving from the specific to the general, he found the ZBL provisions and the STA policies of the BMOP to state clearly that full services are required, as supported by the general BMOP policy requiring full services in the Craigleith Service District, and further supported by the GCOP noting full services in the Recreational Resort Area designation. Further, Mr. Russell referred to

the specific reference in the NEP for development in the Craigleith Service District to be on full services, and to the PPS policies for planning and utilizing full municipal services as the preferred method within settlement areas.

[61] On a question from the Board, Mr. Russell acknowledged that a STA could be considered a “limited non-residential” use as noted in s. 5.6(1). However, Mr. Russell concluded that the policy intent of all of the documents was to require full services for all new development in the area of the property, and that introducing a new commercial STA constituted new development.

[62] The Board accepts and prefers the servicing evidence of Mr. Russell, and as agreed to in part by Ms. Loft. There exists a somewhat circular and confusing argument when dealing with development on existing lots. The BMOP requires development within the Craigleith Service District to connect to municipal services. The requested change from a detached dwelling to a commercial STA is a form of development. But, existing lots in areas where full services are not available may be developed for a “detached dwelling” or “other limited non-residential” use. This policy may be interpreted on its face to exempt a new STA from full services if on an existing lot serviced by a septic system.

[63] However, the Town made a clear decision in OPA 11 to require STAs to be serviced by municipal water and sewage services. Perhaps for reasons of land use intensity or additional servicing security for these commercial uses, the Town established a policy to not allow STAs on private water and sewage services. The Board finds that the specific and intentional servicing policy for STAs must be given greater weight than the general policy applying to existing lots. The existing dwelling and septic system on the property were granted permits under the exemption policy, but it does not necessarily follow that a new commercial use of that dwelling would be similarly exempted, especially when a specific policy requires STAs to be on full municipal services. This interpretation is consistent, as Mr. Russell emphasized, with all of the policies preferring or requiring full services in settlement areas in the PPS, NEP,

GCOP and BMOP.

[64] In addition, the Board accepts the Town's argument related to the syntax of the STA servicing policy (s. 3.4.2(10)). The policy reads that STAs "shall be required to connect to municipal water and sewage services in accordance with Section 5, Servicing Policies, of this Plan" (emphasis added by the Board). The Board accepts that this policy requires full services, and then directs the reader to Section 5 for more details. If the Town had intended to allow STAs on lots without full services, it could have said STAs "shall be required to connect to municipal services, except as permitted by Section 5." In the absence of such exemption language in a policy applying to a specific land use, the Board finds that the correct interpretation is the requirement for full services with no exceptions.

Parking

[65] The Board finds that while the required parking could be accommodated within the three-lot family compound, the Applicant's parking plan fails on technical grounds. The Board's reasons are provided following a review of the evidence.

[66] There was no dispute among the Planners on the calculation of required parking spaces. For STAs, the ZBL calls for "0.5 parking spaces per occupant or 1.0 parking space per guest room used for sleeping, whichever is greater" (s. 5.14(a)(xxiv)). The subject dwelling has four guest bedrooms and a total occupancy of 10 persons, counting the additional sleeping facilities for two persons on a pull-out couch. As a result, five parking spaces are required.

[67] Ms. Loft, in consultation with Town staff, drafted the ZBA to allow some of the parking off-site in accordance with a registered agreement (yet to be created). This proposal was necessary because the common access to the highway for all three lots is located on Lot 66 and consumes some of the area that might otherwise be available for parking. The proposal was that some of the required parking for the new STA would be located on Lot 67, and some of the existing parking for the legal non-conforming STA on

Lot 67 would be located on Lot 68. With these arrangements, the practical usage of the parking area would be common to all three lots, whereby a STA tenant driving into the compound would find a parking space and walk to the appropriate STA.

[68] Mr. Russell, with the agreement of Mr. Benner, found this “domino effect” of bumping parking spaces to the next lot unacceptable. Mr. Russell testified that parking is an accessory use which must be located on the same lot as the principal use, and as such, Lot 66 is incapable of providing sufficient parking for a STA with 10 occupants. Further, he concluded that the R3 zoning of Lots 67 and 68 does not permit parking accessory to a commercial use, and thus the proposed parking arrangement would contravene the ZBL. He argued that the Applicant made no application to permit commercial parking on the other lots, and the Board has no instrument in front of it to effect the parking plan.

[69] The Planners agreed that the legal non-conforming status of the existing STA on Lot 67 extends to its associated on-site parking. It has been licenced for 12 occupants and four parking spaces. The Town argued that if Lot 67 had six parking spaces, then its required parking for the STA would be six spaces. The Town argued that the licence does not establish its legal-nonconforming status, but rather the use of the land on the day the ZBA for STAs was passed. The Applicant argued that although the licence recognizes four parking spaces, only the two spaces that were required before the STA zoning provisions took effect establish the legal non-conforming parking.

[70] The Board will not comment on the legal non-conforming status of the STA on Lot 67, a lot for which no applications are in front of the Board. However, regardless of how many parking spaces are required for the legal non-conforming STA, the proposed new STA on Lot 66 cannot accommodate all of its required parking on site. It must find another lot or lots on which to provide necessary parking. All of the Planners agreed that parking itself is a commercial use of land when associated with a commercial principal use.

[71] The Board agrees with the Town’s submissions and with Mr. Russell that without

an amendment to the ZBL for the other lots, Lots 67 and 68 are not permitted to contain parking spaces accessory to a commercial use on a different lot. The present applications are for a new STA, and even Lot 67's legal non-conforming status cannot encapsulate a new use that did not exist at the date of passing of the STA ZBL.

Separation Distance and Mitigation

[72] The Board finds the proposed separation distance and the proposed mitigation measures to be insufficient to meet the requirements of the BMOP. The Board's reasons are given following a review of the evidence.

[73] The STA policies in the BMOP require mitigation measures such as noise control, setbacks and buffering "to ensure the quiet and undisturbed enjoyment of residential living which people expect" (s. 3.4.2(1)). "The scale and intensity" of a STA "may affect the degree of potential disruption" and "should be regulated to ensure that the principal residential character is generally maintained" (s. 3.4.2(5)). STAs are directed to commercial or other appropriate designations and prohibited within detached neighbourhoods (ibid). The policies authorize regulations in the ZBL related to occupancy, separation distances, setbacks and buffering, and call for regulating STA location, size and scale "compatible with surrounding uses" (s. 3.4.2(7)).

[74] Of importance to these applications, is that the ZBL establishes a maximum occupancy of eight persons, sets a minimum separation distance of 120 m between a new STA and the nearest existing STA or bed and breakfast establishment, and requires a minimum buffer of 1 m along a side lot line (s. 5.24.1(b), (c) and e(iii)).

[75] The Planners' opinions and the residents' concerns echoed their positions taken on neighbourhood compatibility reviewed earlier. Ms. Loft and Mr. Faiz considered the exemptions acceptable because of the range and mix of uses already present in the area, whereas Mr. Russell and the neighbours found the proposal wholly lacking in measures to maintain the residential character and to avoid disrupting quiet residential living.

[76] The Board finds that the Town set a high bar when regulating STAs with restrictive regulations commensurate with its concerns over the disruption these commercial uses have imparted and may continue to impart on residential areas. The premise is that STAs are not permitted in detached neighbourhoods. They are permitted in zones for multi-unit dwellings, but even there, only for up to eight occupants and subject to a 120 m separation distance between STAs. Mr. Benner's evidence was uncontroverted when he testified that the purpose of the separation distance is to prevent the clustering of STAs.

[77] In this case, a STA with a higher occupancy is proposed in a land use designation and zone where STAs are not permitted, immediately next to an existing STA, and with only a common 2 m side yard and boundary board fence separating it from the abutting dwelling to the west. Ms. Loft offered that additional buffering if desired could be provided in the side yard but acknowledged the practical difficulty given that the space is occupied by a revetment of large boulders to control the higher grade of the property relative to the abutting lot. The Board finds that the location, scale and size of the proposed STA do not meet the intentionally stringent requirements established by the Town to achieve a reasonable level of compatibility with the residential area.

[78] At present, within this family-owned group of three lots, the outside Lots 66 and 68 somewhat buffer the neighbours from the existing legal non-conforming STA on the middle Lot 67. Even though reportedly well-managed, some of the occasionally disruptive effects of the STA that do occur are mitigated by the separation and buffering afforded by the intervening dwellings. The proposal in question eliminates that separation and buffer, and transfers the commercial-residential interface to the west side of Lot 66 where insufficient setbacks and buffering are present or planned to uphold the Town's stringent requirements.

Summary

[79] The Town's comprehensive plan to address the issues associated with STAs has

been in place since 2009. From the evidence in this case, the STA program is supported by the public and by many tourism operators, including Mr. Faiz, and was upheld by the Board when appealed in the first instance by a few operators. The Board heard from the Participants that, while not perfect, the plan is working to hold operators to account and to regulate new entrants to the market. The Town is continuing to give attention to STA issues in the context of the deferred sections of its new BMOP.

[80] In these applications, the Applicant asked for: a STA in a designation and zone where STAs are prohibited; servicing by septic system where full services are required; occupancy of 10 persons where eight is the limit; offsite parking where on-site is required; a 0 m separation distance to the next STA where 120 m is required and in the proper zone; and 0 m buffer strip along a side lot line where 1 m is the minimum. The number of requested amendments and degree of variance from the Town's regulations, while not determinative in themselves, speak to the difficulty in finding such exemptions appropriate. For the key matters described in this Decision, the applications fail on substantive grounds.

[81] Regarding the legislative tests outlined at the beginning of this Decision, the Board finds insufficient regard to the provincial interests and lack of consistency with the PPS related to the adequate provision and efficient use of transportation and sewage systems, and the protection of public safety, as summarized by Mr. Russell. The development fails to conform with the NEP requirement for full services, with which all three Planners agreed. The Board finds the applications do not conform with the GCOP and BMOP policies related to highway access and sewage services. Finally, and most specifically, the applications are found to not conform with the intent and policy of the BMOP for STAs.

[82] The Board has had regard to the decisions of the approval authorities and notes that this Decision is consistent with the comments of the County regarding highway access and with the decisions of the Town.

[83] This Decision has focussed on the policy matters pertaining primarily to the

requested OPA and ZBA. Having found these applications to fail the requisite tests, the related SPA is also found to be unsuitable for approval.

ORDER

[84] The Board orders that the appeals are dismissed.

“S. Tousaw”

S. TOUSAW
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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