Turkstra Mazza

Hamilton London Toronto

Jennifer Meader
Turkstra Mazza Associates
15 Bold Street
Hamilton Ontario Canada L8P 1T3
Office: 905.529.3476 x2740
Cell: 416.605.0508
jmeader@tmalaw.ca

VIA EMAIL

August 23, 2023

Haldimand Count
53 Thorburn Street South
Cayuga, ON N0A 1E0

Attention: Mayor & Members of Council

Dear Mmes. And Messrs.:

Re: NEED FOR COST SHARING AGREEMENT
Dunnville Northwest Quadrant Pump Station and Related Works
Meritage Landing Phases 3A & 3B
Mountainview Homes (Niagara) Ltd. & 918965 Ontario Limited

We are counsel to Mountainview Homes (Niagara) Ltd. and 918965 Ontario Limited ("**Applicants**") with respect to the development of their adjoining lands located within the community of Dunnville ("**Applicants' Lands**").

We are respectfully requesting that Halidmand County ("County") enter into a cost sharing agreement ("CSA") with the Applicants in order to ensure the equitable sharing of costs for the construction of the Northwest Quadrant Pump Station and Related Works (hereinafter referred to as the "Community Infrastructure") benefiting multiple land parcels within the Northwest Quadrant of Dunnville intended for development, including the Applicants' Lands and a property owned by the County.

THE DEVELOPMENT

The Applicants applied for site plan approval on 2021 to implement the development of their lands with 43 townhouses (Mountainview) and a 36-unit quadraplex seniors' apartment project. These uses are permitted in the Official Plan and Zoning By-law. At thee direction of Planning Services, the proposed development was exempt from draft plan approval. The Applicants are now in the final stages of the site plan process.

HISTORY OF SITE PLAN PROCESS & COMMUNITY INFRASTRUCTURE

The Applicants have been working cooperatively with the County over an extended period, to site plan approval. However, County staff are taking the position the Applicants that they should take financial

responsibility for front-ending the costs of a pumping station, conveyance infrastructure, and road reconstruction ("**Community Infrastructure**") that would service several development parcels within north-west Dunnville, including a 7.2-hectare parcel owned by the County and recently added to the settlement boundary ("**County Parcel**"). A portion of the County Parcel was added to the settlement boundary well after the site plan application was submitted. The details relating to the Community Infrastructure have been provided to you by Mr. Richard J. Pellerin, Civil engineering consultant to the Applicants. **Mr. Pellerin has determined that the Applicants' Lands amount to about 12% of the developable lands benefitting from the Community Infrastructure.** County staff have offered a mere "best efforts" commitment to collect from lands benefitting from the Community Infrastructure to be constructed by the Applicants, including for the County Parcel.

SITE PLAN CONDITIONS

As part of a site plan application process, a municipality is permitted to impose conditions against the approval of the site plan so long as the conditions relate to one of the matters enumerated in subsection 41(7) of the Planning Act. That exhaustive list of matters is as follows:

> 1. Subject to the provisions of subsections (8) and (9), widenings of highways that abut on the land.
>
> 2. Subject to the Public Transportation and Highway Improvement Act, facilities to provide access to and from the land such as access ramps and curbings and traffic direction signs.
>
> 3. Off-street vehicular loading and parking facilities, either covered or uncovered, access driveways, including driveways for emergency vehicles, and the surfacing of such areas and driveways.
>
> 4. Walkways and walkway ramps, including the surfacing thereof, and all other means of pedestrian access.
>
> 4.1 Facilities designed to have regard for accessibility for persons with disabilities.
>
> 5. Facilities for the lighting, including floodlighting, of the land or of any buildings or structures thereon.
>
> 6. Walls, fences, hedges, trees, shrubs or other groundcover or facilities for the landscaping of the lands or the protection of adjoining lands.
>
> 7. Vaults, central storage and collection areas and other facilities and enclosures for the storage of garbage and other waste material.
>
> 8. Easements conveyed to the municipality for the construction, maintenance or improvement of watercourses, ditches, land drainage

works, sanitary sewage facilities and other public utilities of the municipality or local board thereof on the land.

None of the matters in the exhaustive list above includes the construction of external services. It is beyond the jurisdiction of the County to require the Applicants to construct significant municipal infrastructure (the Community Infrastructure) as a condition of site plan approval. These are matters that should be addressed through a condition of draft plan approval.

THE DC ACT & LOCAL SERVICE POLICY

The Development Charges Act ("**DC Act**") prohibits a municipality from imposing a condition requiring a specific development to construct a service related to broader development and which is not local in nature. Sections 59 and 59.1 state:

> Planning Act, ss. 51, 53
> 59 (1) A municipality shall not, by way of a condition or agreement under section 51 or 53 of the Planning Act, impose directly or indirectly a charge related to a development or a requirement to construct a service related to development except as allowed in subsection (2). 1997, c. 27, s. 59 (1).
>
> Exception for local services
> (2) A condition or agreement referred to in subsection (1) may provide for,
>
> (a) local services, related to a plan of subdivision or within the area to which the plan relates, to be installed or paid for by the owner as a condition of approval under section 51 of the Planning Act;
>
> (b) local services to be installed or paid for by the owner as a condition of approval under section 53 of the Planning Act. 1997, c. 27, s. 59 (2).
>
> Limitation
> (3) This section does not prevent a condition or agreement under section 51 or 53 of the Planning Act from requiring that services be in place before development begins. 1997, c. 27, s. 59 (3).
>
> …
>
> No additional levies
> 59.1 (1) A municipality shall not impose, directly or indirectly, a charge related to a development or a requirement to construct a service related to development, except as permitted by this Act or another Act. 2015, c. 26, s. 8.
>
> …

Again, any conditions requiring the construction of infrastructure are to be imposed at the draft plan or consent stage of development – not site plan approval. Furthermore, any services to be constructed by a development proponent, must be "related to a plan of subdivision or within the area to which the plan relates". In this case, the Community Infrastructure services a much broader area, with the Applicants' Lands representing about 12% of that area.

The Local Service Policy contained in the County's Development Charges Background Study contains the following policies for sanitary services:

> The costs of the following items shall be direct developer responsibilities as a local service:
> …
> d) Sanitary pumping stations, and transmission mains servicing developments in one basin area.
>
> The costs of the following items shall be paid through development charges:
> …
> b) sanitary pumping stations not required for the individual development;
> …

The Community Infrastructure, including the higher capacity pumping station, is required for a much greater area than the individual development and would constitute a DC-eligible project. If the pumping station were to be considered a local service, when the Applicants' Lands represents only 12% of the benefitting lands, there would be virtually no circumstance in which a pumping station could be considered a DC project. The Local Service Policy must be interpreted pragmatically and in a way that implements the intent of the policy. An interpretation that would have a minor benefitting landowner responsible for front-ending significant costs, with only a 'best efforts' commitment to rely upon, would fall woefully short of meeting the objectives of the policy.

Given the County oversight in including the Community Infrastructure in the last Development Charges Background Study, a CSA is a fair and appropriate mechanism to achieve the objectives of the Development Charges Act (which is discussed in further detail below) and avoid any further undue delay in approving the site plan. The County would not be precluded from adding the Community Infrastructure to the DC By-law, after it has been constructed and front-end financed.

COST SHARING PRINCIPLES

The key principle of cost sharing requires all landowners benefiting from the installation of municipal services to pay their fair share of the costs of such services, proportionate to the benefit received. The determination of what services a particular development benefits from, and the proportional share of the costs, is usually determined through engineering analysis.

Every development application in Ontario must be consistent with the Provincial Policy Statement ("**PPS**").

Among other things, the PPS requires the efficient use of existing and planned infrastructure. The Ontario Land Tribunal's predecessor, the Ontario Municipal Board, has applied the PPS requirement for efficient use of infrastructure in the context of the cost sharing of services. The corollary, of course, is that the PPS is intended to avoid the unnecessary use of parallel services and roadways.

The case law confirms that municipalities, and ultimately the Tribunal, have broad jurisdiction to impose cost sharing by way of conditions to consent and subdivision approval. The Board relies on both section 59 of the *Development Charges Act* (the "DC Act"), as well as section 51(25) of the *Planning Act*, for the authority to impose cost sharing through conditions of draft plan approval.

The Court of Appeal had found that if cost sharing is not imposed on benefiting landowners, it would defeat the principles of good planning and the purpose of the statutory regime, by giving future benefiting developers an unfair windfall at the expense of the developer that paid for the services upfront (see *Eastpine*[1]). In such instances, there may be a claim for unjust enrichment or illegal bonusing (see *Conrad*[2]).

THE ASK

In an effort to move the Applicants' development proposal forward to construction, the Applicants are proposing that the County and the Applicants enter into a CSA according to the following principles:

1. The Applicants would be the proponents of the Community Infrastructure;
2. The Applicants would front-end the costs of the Community Infrastructure;
3. The County would reimburse the Applicants for the costs attributable to all lands other than the Applicants' Lands upon substantial completion of the Community Infrastructure;
4. The County would bear the responsibility of collecting the reimbursed costs from benefitting lands as they come forward for development.

There are precedents for this proposed approach, which can be provided to the County upon request.

The Applicants look forward to working in partnership with the County to bring about much-needed residential development within the community of Dunnville in a fair, equitable, and transparent manner, and in a manner that provides the financial certainty required by the Applicants in order for them to proceed with their developments.

Yours truly,

Jennifer Meader

[1] *Eastpine Kennefy-Steeles Ltd. v. Markham (Town)* 2004 CarswellOnt 679, [2004] O.J. No. 644
[2] *Conrad v. Feldbar Construction Co.* 2004 CarswellOnt 1234, [2004] O.J. No. 1290