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PL090441

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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

Appellant: District School Board of Niagara, Helga and Siegfried Wiens
Applicant: Helga and Siegfried Wiens
Subject: Consent
Property Address/Description: 493 Line 2 Road, 1350 Niagara Stone Road
Municipality: Town of Niagara-on-the-Lake
OMB Case No.: PL090441
OMB File No.: PL090670
Municipal No. B05/09

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

Applicant and Appellant: Helga and Siegfried Wiens
Subject: Consent
Property Address/Description: 493 Line 2 Road, 1350 Niagara Stone Road
Municipality: Town of Niagara-on-the-Lake
OMB Case No.: PL090441
OMB File No.: PL090671, PL090672, PL090674, PL090675
Municipal No. B06/09, B07/09, B08/09, B-9/09

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

Appellant: District School Board Of Niagara
Subject: By-law No. 4316-09
Municipality: Town of Niagara-on-the-Lake
OMB Case No.: PL090441
OMB File No.: PL090857

IN THE MATTER OF subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Subject: Site Plan
Referred by: Helga and Siegfried Wiens
Property Address/Description: 493 Line 2 Road, 1350 Niagara Stone Road
Municipality: Town of Niagara-on-the-Lake
OMB Case No.: PL090441
OMB File No.: PL100156

A P P E A R A N C E S :

Parties

Counsel

Town of Niagara-on-the-Lake

C. Shedden

District School Board of Niagara
Helga & Siegfried Wiens

T. A. Richardson, B. Stokes Verworn

**MEMORANDUM OF ORAL DECISION DELIVERED BY M. C. DENHEZ ON
APRIL 12, 2010 AND ORDER OF THE BOARD**

1. INTRODUCTION

This dispute was the subject of a recent settlement. The Town of Niagara-on-the-Lake (the Town) and the District School Board of Niagara (the School Board) had different views on the location of replacement facilities for two elementary schools. The dispute had been complicated by a “PTR” (“Prohibitive To Repair”) letter from the Ministry of Education, to both drive and subsidize replacement of the two schools.

The dispute began after the School Board proposed to combine those two schools. Subsequent to the PTR subsidy offer, the School Board decided to buy a new site from Helga and Siegfried Wiens (the Owners). However, that arrangement had complications. First, the new site would require a severance for the school. Second, the Owners also proposed creating four new residential lots at the same time. Third, the school proposal would also involve site plan approval, and a change to the forthcoming zoning.

Town planning staff supported the arrangement, but there was controversy, partly because of perceived collateral implications for the single high school in Niagara-on-the-Lake, the endangered Niagara District Secondary School (NDSS). Some residents supported the alternative of co-locating the combined elementary facilities in a “campus” *with* the NDSS, in an attempt to save the latter. The Committee of Adjustment said it preferred the co-location idea, and refused consent for the severances at the proposed new site. Town Council took a similar stand, and did not support rezoning or

the site plan. The School Board and the Owners appealed to the Ontario Municipal Board (O.M.B.).

At a previous hearing on March 25, 2010, a different Panel of the O.M.B. granted provisional consent for the severance on the four new *residential* lots, as a separate issue. It also found that “a draft plan of subdivision is not required”.

The remaining points in dispute between the School Board and the Town were settled on the eve of the hearing, in favour of the School Board’s proposed location. At the hearing, the School Board gave its planning reasons for its proposed location, which the Town did not contest; indeed, the Town asked to be excused from the hearing. Two participants from the public, however, challenged the School Board’s selection.

The O.M.B. has carefully considered all the evidence, the input of the participants, as well as the submissions of Counsel. The O.M.B. concludes, as Town planning staff did, that the proposal meets the terms of the *Planning Act* for consent to the severance, rezoning, and site plan approval. The appeals are allowed accordingly. The details and reasons are set out below.

2. BACKGROUND

The Town has five urbanised areas, including the community of Virgil. Each had its own elementary school facilities, plus the NDSS toward the Town’s geographic centre, in an agricultural setting. In 1999, under rules of the Provincial Government of the day, the School Board did an accommodation review, pointing to potential under-population (and the need for further study / decisions), notably if NDSS enrolment dropped under 400.

In 2004, the Province introduced a temporary moratorium on school closures. This was followed by new Provincial guidelines in 2006. In 2007, the School Board started another accommodation review. By that point, NDSS enrolment was well under 400.

The Accommodation Review Committee (ARC) considered 12 options. Several involved combining Virgil’s two elementary schools – “not a difficult Decision”, according to ARC’s Chair. At the time, the expectation was that Virgil’s elementary school

population would be combined at one of the existing two locations. The fate of NDSS, however, remained particularly problematic, as enrolment continued to drop.

As ARC narrowed its options from 12 to 3, one of the preferred scenarios was to attempt to salvage the high school by moving the new combined Virgil elementary school to a "campus" shared by NDSS. The synergy was apparently expected to be salutary, and there were some precedents elsewhere. NDSS also had 30 acres of land, set aside in the 1950's at the intersection of Regional Road 55 (Niagara Stone Road, an arterial) and another high-volume road – though it was outside Urban Boundaries, in an area designated Agricultural (Specialty Crops), and indeed was zoned Agricultural, on Greenbelt land under the Greenbelt Plan and *Greenbelt Act*. The entire area is arguably the jewel in the crown of Ontario's agricultural system.

That is when the Province intervened. In January 2008, the Ministry of Education sent its PTR message. It included an offer of money for school removal. This did nothing to assist the community's high school dilemma – but it affected schools in other ways.

PTR is a system that began years ago. The Provincial Government of the day hired an outside consulting company to inspect schools. In 2003, the company reported to the Ministry of Education, to compare "renewal needs" of structures with their "replacement value". That comparison could prompt the Ministry to list a school on its "PTR-candidate inventory" – "Prohibitive To Repair", leading to more closures. That system exists to the present day.

In due course, that label also came with a substantial subsidy – making PTR very attractive. Indeed, a draft document, prepared locally for a submission to the Ministry (Exhibit 10) says there were three unsuccessful applications to have NDSS declared PTR (to help "build a new secondary school facility"). However, matters were different for the two elementary schools in Virgil: they went on the Ministry's list – triggering a proposed subsidy of \$6.6 million for their replacement.

For months, however, school trustees resisted acquiring new land for Virgil's combined elementary school, "due to the prohibitive costs"; eventually, however, they agreed with School Board staff that part of their newly-amplified budget could be directed to land acquisition. The proposed new location was on part of the Owners'

property (called “Part 1” on the Survey Sketch, reproduced at Tab 4 of Exhibit 4a), along Regional Road 55, but within Virgil’s Urban Boundaries, at the intersection of Line 2 Road. The Owners simultaneously undertook to create four additional residential lots there as well.

However, that put the School Board on a collision course with those who preferred the campus alternative – particularly those who viewed that alternative as the best remaining hope for saving NDSS.

The School Board’s selection drew no objection from Town staff (though Public Works would have preferred a plan of subdivision). Planning staff recommended approval, subject to various conditions of an essentially technical nature:

While there is a question with respect to how the proposal meets the (Provincial and Official Plan) policies with respect to co-location, optimizing public service facilities and service integration, on balance the consent applications to create a new school site and four residential lots are consistent with Provincial policies as they provide for efficient use of urban land and provide a public service facility in Virgil to replace two older existing schools....

Town planning staff also opined that the School Board’s selection met locational criteria specified in the Town’s Official Plan (OP), notably access to major roads, compatibility, buffering, and parking. Zoning, however, was more complicated. Under the Town’s *existing* Zoning By-law 500A-74, no rezoning was required for schools, since they were permitted as-of-right in such areas, as a “Public Use”. However, in July 2009, Town Council adopted a new comprehensive Zoning By-law 4316-09, which placed schools in a separate zoning category distinct from other “Public Uses”. This would trigger a requirement for rezoning, to “Institutional”.

Though Council had the opportunity to rezone the site accordingly at the time, it visibly chose not to do so: it zoned the site for “Residential Development” instead. It also deferred any decision on the site plan. A few weeks before, the COA turned down the application for consent to sever. Its lengthy Decision cited many grounds, e.g.:

The proposed Virgil school site is not an efficient use of urban land and infrastructure and is not in the public interest, as a school sited at the... NDSS property would better serve to build a complete community...

Unlike the proposed Virgil school site, an elementary school at the NDSS would provide educational facilities in a coordinated, efficient and cost-effective

manner, would allow facilities planning to be integrated with planning for growth, would optimize use of existing infrastructure and public services, would be strategically located in the Town and co-located with an existing educational facility...

The proposed school site location would result in sprawl.

The school site would be on a busy / dangerous Regional road.

(The school) would take a large parcel out of an urban area and would not provide revenue to the Town.

The School Board and the Owners appealed the new comprehensive Zoning By-law, notably its exclusionary definition of "Public Use". They also appealed the lack of a determination of the site plan application, along with the COA refusal of the severance.

The hearing on the severance, zoning and site plan was scheduled to begin on Monday, April 12, 2010. On Saturday, April 10, the Town and the School Board agreed on Minutes of Settlement (Exhibit 3). The Town withdrew its objections to the School Board's proposed location. The School Board, in turn, would withdraw its appeal of new By-law 4316-09; it would also cooperate, e.g., on a possible public library, computer labs etc. At the hearing, Counsel for the Town explained the Town's position, and then asked and received permission to withdraw from the hearing.

3. APPLICABLE CRITERIA

Criteria for approving consents for severances are outlined in separate sections of the *Planning Act*. The provision for consents, Section 53(12), refers to the criteria in Section 51(24):

...Regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and to,

- (a) The effect of development... on matters of provincial interest...;
- (b) Whether the (proposal) is premature or in the public interest;
- (c) Whether the plan conforms to the Official Plan...;
- (d) The suitability of the land for the purposes...;
- (e) (Highways)
- (f) The dimensions and shapes of the proposed lots;

- (g) The restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on the adjoining land....
- (h)-(l) (Natural resources, floods, services, schools, land dedications, energy)

The Act also deals with whether the transaction should proceed instead by way of subdivision; but that question was already decided by the Board.

In the category of “matters of Provincial interest”, Section 2 also lists topics which “the Council of a municipality... shall have regard to” in its decisions, including zoning and site plans. Section 3(5)(a) adds that instruments shall be “consistent” with Provincial Policy Statements. Under Section 14 of the *Places to Grow Act*, decisions must also “conform with” the Growth Plan for the Greater Golden Horseshoe. Section 7 of the *Greenbelt Act* adds that decisions must also “conform with” the Greenbelt Plan. Finally, under Section 24 of the *Planning Act*, By-laws must also “conform with” applicable Regional and Local Official Plans.

4. OBSERVATIONS AND FINDINGS

Only one expert witness testified at the hearing – Mr. Brady, the School Board’s planner. It was his professional opinion that all relevant statutory criteria had been met, and he went through each one. The School Board was clearly mindful that the O.M.B. has an ongoing interest in good planning, which Counsel and Mr. Brady sought to satisfy. In particular, he argued that the COA’s Decision and reasons had been rendered in the absence of any visible underlying professional opinion.

The points in real contention, however, were identified by the participants. Much of the public concern focused on the fate of NDSS, and how it could be affected by the proposed demise of the co-location “campus” option.

Pedagogy is not normally part of the mandate of the O.M.B. The location of schools, however, is intimately linked with complete communities, which is a topic of stated Provincial interest.

However, there is absolutely no doubt about Provincial planning policy: where there is a choice between construction inside Urban Boundaries and outside, it prefers

the former, not the latter. The same can be said about the Regional and local Official Plans. This is true several times over, on lands which the Provincial Policy Statement considers Specialty Crop Agricultural Areas which, for good measure, are also Greenbelt lands under the Greenbelt Plan. That is the fundamental planning problem with the NDSS site. Its selection, for further construction beyond its original vocation, raises questions under a myriad of statutory provisions and Provincial Plans.

For that matter, the hearing demonstrated no persuasive land-use planning advantage to the NDSS site on other grounds. Though school construction in Virgil would expand that community's urbanized footprint, it is difficult to agree with the COA's label of "sprawl", if that construction is within longstanding Urban Boundaries, and remains reasonably compact for its function. If anything, it connotes "sprawl" far less than construction in an Agricultural zone.

The participant Ms Redekop, along with the COA, also cited traffic. However, the paper trail included traffic reports satisfactory to the agencies involved. Furthermore, the alternative NDSS site has traffic at higher speeds and volumes than the School Board's selected side, and would be outside walking distance for most of the targeted school population.

Finally, the COA had said that a school within Urban Boundaries would represent an opportunity cost, since it would not generate the same property tax revenues as other development. It was not shown that this was a sufficient or even appropriate land-use planning reason to veto a school, let alone that it took precedence over the clear locational preference in the Provincial Policy Statement, the Regional and Local Official Plans, the Greenbelt Plan, and the Growth Plan for the Greater Golden Horseshoe.

That leaves the question of co-location, and the relationship with the fate of the high school. There is no surprise in public concern about the risk of a domino effect: if the "campus" does not materialize, will NDSS close? And if it closes, won't the overall community be less "complete"? And isn't co-location of facilities itself a matter of Provincial interest?

The problem, however, is that there was no proof at the hearing that even a combined elementary / secondary campus – itself an uncommon pedagogical approach – would save NDSS, if high school population figures remained problematic. Co-location

should presumably have a purpose; it was not clear that it would necessarily be served here.

That is not to say that the fate of the high school should be treated lightly. It is indeed part of the question of community “completeness”. The O.M.B. notes the Town Council’s concerns. Indeed, school closures are among the most wrenching of public issues; one can only hope that another solution can be found – and quickly.

5. CONCLUSION

Based on the planning evidence, the Ontario Municipal Board is prepared to give effect to the consensus reached by the Town and the School Board.

The O.M.B. also takes note that the School Board is withdrawing its appeal of the Town’s By-law 4316-09, as it pertains to the definition of “Public Use”.

The appeals by the School Board and the Owners sought three main outcomes for their proposed school site, which they called the “Subject Lands”, or “Part 1” on the Survey Sketch, reproduced at Tab 4 of Exhibit 4a:

That the Ontario Municipal Board approve the application and grant permission to partially discharge the mortgage on the Subject Lands and convey the Subject Parcel to the District School Board of Niagara for school site use, in accordance with the application.

That the Board amend the subject Zoning By-law to zone the Subject Lands within an Institutional (I) Zone.

That the Board allow this appeal and approve the application for Site Plan Agreement to permit the construction of a new public elementary school on the Subject Lands.

There was an acknowledged caveat. Town planning staff had recommended standard Conditions for the Consent (Tab 9 of Exhibit 4a). Some are now moot; there were, for example, to be reports, including a Phase 1 Environmental Site Assessment; but Counsel agreed that this Condition had been met, since those reports had now been done. For the sake of simplicity, however, it is sufficient to say that there is no dispute about the necessity of compliance with those Conditions.

Under the Minutes of Settlement, the Town agreed to “the approval of the Consent application and to the approval of the Site Plan for the school as submitted”. It also agreed “to the rezoning of the Site to ‘Institutional’ to permit the construction of the school”.

For the reasons outlined in this Decision, the appeals are allowed:

1. Provisional Consent, to the severance of “Part 1” on the Survey Sketch (reproduced at Tab 4 of Exhibit 4a), is to be given (including permission to partially discharge the mortgage on the said lands and convey same to the District School Board of Niagara for school site use, in accordance with the application), subject to the Conditions recommended by Town planning staff (Tab 9 of Exhibit 4a).
2. Zoning By-law 4316-09 of the Town of Niagara-on-the-Lake is amended, to zone “Part 1” on the Survey Sketch, (reproduced at Tab 4 of Exhibit 4a) as “Institutional” (I).
3. The application for Site Plan and Site Plan Agreement for the above is approved.

It is so Ordered.

“M. C. Denhez”

M. C. DENHEZ
MEMBER