

ISSUE DATE:

**Jan. 26, 2010**



PL090885

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

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

Appellant: 656508 Ontario Limited and Holiday Inn (Niagara Falls) Limited  
Appellant: Canadian Niagara Hotels Inc.  
Appellant: Harvey Gordon  
Subject: By-law No. 2009-139  
Municipality: City of Niagara Falls  
OMB Case No.: PL090885  
OMB File No.: PL090885

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

City of Niagara Falls

K. L. Beaman\*

Hospitality Resorts Inc.

E. P. Lustig

Canadian Niagara Hotels Inc.

N. J. Pepino\*

Harvey Gordon

Representing Himself

**MEMORANDUM OF ORAL DECISION DELIVERED BY J. V. ZUIDEMA  
ON JANUARY 5, 2010 AND ORDER OF THE BOARD**

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This was the first Pre-Hearing on the above-noted matter. Through correspondence submitted by Brian Duxbury, counsel to 656508 Ontario Limited and Holiday Inn (Niagara Falls) Limited and acknowledged by the Board, those two appellants had withdrawn their appeals. Therefore the remaining two appellants are: Canadian Niagara Hotels Inc. and Harvey Gordon.

Parties represented by counsel had dialogued on the structure of the hearing outlining possible hearing, mediation and further pre-hearing dates. Mr. Gordon, who appeared on his own behalf had not been involved in those discussions but indicated no difficulty with what was being proposed.

As such, the Board scheduled the following:

1. Pre-Hearing #2: Thursday February 4, 2010 at the Niagara Falls Municipal Offices, 4310 Queen Street, Niagara Falls ON commencing at 10:30 a.m. I remain seized. There will be no further notice.
2. Hearing: Two weeks commencing June 21, 2010 at 11:00 a.m. at the same venue as noted above. No further notice is required.

The Parties advised that they would be seeking two (2) days for mediation sometime in March of 2010 and would submit their written request to the Board.

Finally a draft Procedural Order will be submitted and that has been done. It is attached to this disposition and marked as "Attachment 1" and forms part of the Board's Order.

This is the Board's Order.

"J. V. Zuidema"

J. V. ZUIDEMA  
VICE-CHAIR

**ATTACHMENT 1**

**ONTARIO MUNICIPAL BOARD**

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

Appellants: Canadian Niagara Hotels Inc.  
Harvey Gordon  
Subject: By-law No. 2009-139  
Municipality: City of Niagara Falls  
OMB Case No.: PL090885  
OMB File No.: PL090885

**PROCEDURAL ORDER**

1. The Board may vary or add to these rules at any time, either on request or as it sees fit. It may alter this Order by an oral ruling, or by another written Order.

**Organization of the Hearing**

2. The hearing will begin on June 21, 2010 at 10:00 a.m. at Niagara Falls City Hall, 4310 Queen Street, Council Chambers, Niagara Falls, Ontario.

3. The length of the hearing will be about 8 days, being June 21, 22, 23, 24, 25, 28, 29 and 30, 2010.

4. The parties and participants identified at the prehearing conference (see Attachment for the meaning of these terms) are listed in Attachment 1 to this Order.

5. [The Issues are set out in the Issues List attached as Attachment 2 to this Order.] There will be no changes to this list unless the Board permits, and a party who asks for changes may have costs awarded against it. **[NTD: \*The parties are attempting to reach consensus on the Issues List, if not agreed upon and sent to the Board's caseworker prior to Monday, February 1, 2010, a second Pre-Hearing Conference is scheduled for 10:30 a.m. on Thursday, February 4, 2010 at Niagara Falls City Hall for the purposes of addressing the Issues List.]**

6. The order of evidence will be as set out in the Order of Evidence list attached as Attachment 3 to this Order.

7. Any person intending to participate in the hearing should provide a telephone number, facsimile number and electronic mail address to the Board as soon as possible. Any such person who will be retaining a representative should advise the other parties and the Board of the representative's name, address, phone number and electronic mail address as soon as possible.

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**Requirements Before the Hearing**

**8.** Expert witnesses in the same field shall have a meeting after the exchange of witness statements and before the commencement of the hearing to try to resolve or reduce the issues for the hearing. The experts shall prepare a list of agreed facts and the remaining issues to be addressed at the hearing, and provide this list to all of the parties and the municipal Clerk.

**9.** A party who intends to call witnesses, whether by summons or not, shall provide to the Board and to the other parties and the municipal Clerk a list of the witnesses and the order in which they will be called. This list must be delivered on or before April 22, 2010.

**10.** An expert witness shall prepare an expert witness statement which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in section 13. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Board may refuse to hear the expert's testimony.

**11.** A witness or participant who is not being called by a party must provide to the Board, the parties and the municipal Clerk a witness or participant statement on or before May 7, 2010 or the witness or participant may not give oral evidence at the hearing.

**12.** Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence, as in section 13.

**13.** On or before May 7, 2010 the parties shall provide copies of their witness and expert witness statements to the other parties and to the municipal Clerk.

**14.** On or before June 11, 2010 the parties shall provide copies of their visual evidence to all of the other parties. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing.

**15.** On or before June 4, 2010 the parties may provide to all other parties and to the municipal Clerk Reply Witness Statements, if any, to any written evidence.

**16.** A person wishing to change written evidence, including witness statements, must make a written motion to the Board.

*(see Rule 38 of the Board's Rules, which requires that the moving party provide copies of the motion to all other parties 10 days before the Board hears the motion.)*

**17.** A party who provides a witness' written evidence to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Board at least 7 days before the hearing that the written evidence is not part of their record.

**18.** Documents may be delivered by electronic mail, personal delivery, facsimile or registered or certified mail, or otherwise as the Board may direct. The delivery of documents by fax shall be governed by the Board's Rules [26 – 31] on this subject.

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Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.

**19.** No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Board's Rules 61 to 65 apply to such requests.

**This Member is not seized.**

**So Orders the Board.**

## ATTACHMENT TO SAMPLE PROCEDURAL ORDER

### **Purpose of the Procedural Order and Meaning of Terms**

The Board recommends that the parties **meet to discuss this sample Order before the prehearing conference** to try to identify the issues and the process that they want the Board to order following the conference. The Board will hear the parties' comments about the contents of the Order at the conference.

Prehearing conferences usually take place only where the hearing is expected to be long and complicated. If you are not represented by a lawyer, you should prepare by obtaining the Guide to the Ontario Municipal Board, and the Board's Rules, from the Board Information Office, 15th Floor, 655 Bay Street, Toronto, M5G 1E5, 416-326-6800, or from the Board website at [www.omb.gov.on.ca](http://www.omb.gov.on.ca).

### **Meaning of terms used in the Procedural Order:**

**Party** is an individual or corporation permitted by the Board to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an **unincorporated group** wishes to become a party, it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorisation from the party.

**NOTE** that a person who wishes to become a party before or at the hearing, and who did not request this at the prehearing conference, must ask the Board to permit this.

**Participant** is an individual, group or corporation, whether represented by a lawyer or not, who may attend only part of the proceeding but who makes a statement to the Board on all or some of the issues in the hearing. Such persons may also be identified at the start of the hearing. The Board will set the time for hearing this statements. **NOTE** that such persons will likely not receive notice of a mediation or conference calls on procedural issues. They also cannot ask for costs, or review of a decision as parties can. If a participant does not attend the hearing and only files a written statement, the Board will not give it the same attention or weight as submissions made orally. The reason is that parties cannot ask further questions of a person if they merely file material and do not attend.

**Written and Visual Evidence:** **Written evidence** includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. **Visual evidence** includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.

**Witness Statements:** A **witness statement** is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness' opinions on those issues; and a list of reports that the witness will rely on at the hearing. An **expert witness statement** should include his or her (1) name and

address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing. A **participant statement** is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any, which the participant will refer to at the hearing.

**Additional Information**

**Summons:** A party must ask a Board Member or the senior staff of the Board to issue a summons. This request must be made before the time that the list of witnesses is provided to the Board and the parties. (See Rules 41 and 42 on the summons procedure.) If the Board requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Board is not satisfied from the affidavit, it will require that a motion be heard to decide whether the witness should be summoned.

**The order of examination of witnesses:** is usually direct examination, cross-examination and re-examination in the following way:

direct examination by the party presenting the witness;

direct examination by any party of similar interest, in the manner determined by the Board;

cross-examination by parties of opposite interest;

re-examination by the party presenting the witness; or

another order of examination mutually agreed among the parties or directed by the Board.

**ATTACHMENT 1**

**PARTIES AND PARTICIPANTS**

**Parties**

**The Corporation of the City of Niagara Falls**

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Niagara Falls, ON L2E 6X5

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**Canadian Niagara Hotels Inc.**

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**ATTACHMENT 2**

**ISSUES LIST**

**[See Section 5 of the Draft Procedural Order]**

**ATTACHMENT 3**  
**ORDER OF EVIDENCE**

1. City of Niagara Falls (overview only)
2. Hospitality Resorts Inc.
3. City of Niagara Falls (opinion evidence)
4. Canadian Niagara Hotels Inc.
5. Harvey Gordon
6. Hospitality Resorts Inc. in reply (as required)

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