

ISSUE DATE:

March 13, 2014



PL130323

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: Friends of the Lundy's Lane Battlefield
Appellant: Janice Wing
Subject: By-law No. 2013-24
Municipality: City of Niagara Falls
OMB Case No.: PL130323
OMB File No.: PL130323

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

Appellant: Friends of the Lundy's Lane Battlefield
Appellant: Janice Wing
Subject: By-law No. 2013-26
Municipality: City of Niagara Falls
OMB Case No.: PL130323
OMB File No.: PL130324

APPEARANCES:

Parties

Counsel

Friends of the Lundy's Lane Battlefield

T.A. Richardson, J.P. Maloney

Janice Wing

City of Niagara Falls

Q.M. Annibale, J.M. Joblin

Morse & Son Ltd.

M. Digirolamo, J. Broderick

ADDENDUM TO THE DECISION DELIVERED BY M.C. DENHEZ, ON FEBRUARY 11, 2014, AND ORDER OF THE BOARD

INTRODUCTION

[1] At the Board's prehearing conference ("PHC") of February 11, 2014, the Board advised that it would be issuing its decision in two installments.

- The first would address a Procedural Order, including an Issues List, on which 15 issues elicited no objection. That Procedural Order had been discussed at an earlier PHC (November 20, 2013), at which time the parties had advised the Board that a finalized version – with an agreed Issues List – would be forwarded to the Board imminently.
- However, two proposed items for the Issues List proved contentious. After the parties reached an impasse, that situation was drawn to the Board's attention. It was discussed at the February 11 PHC, where the Board advised that it would address those two proposed items separately, in an addendum to its decision on the Procedural Order. That addendum is set out below.

[2] The Board has carefully considered the submissions of counsel, pertaining to the two contentious items. For statutory reasons, the Board finds that they may both be placed on the Issues List. The Board offers no comment on their likely weight, in helping resolve this planning dispute. However, the Board finds the wording of Issue #16 inappropriate, and directs that it be recast. The details and reasons are set out below.

BACKGROUND

[3] This dispute is about two Zoning By-laws, adopted by the City of Niagara Falls ("the City"), at the Lundy's Lane Battlefield (1814), a National Historic Site. Part of the battlefield allegedly became school property in 1877. The current elementary school is said to date from a generation ago, and the paper trail contains no suggestion of heritage value on the part of that building; the only reference to heritage value pertains to the battlefield. In mid-2011, the District School Board of Niagara declared that school surplus, and transferred that property to the City.

[4] The City decided to split this former school property into three parts, with three different uses, and three different zoning by-laws to acknowledge those uses. Zoning By-law No. 2013-24 rezoned the school building for residential use, in anticipation of a transfer, to convert that building into apartments. By-law No. 2013-26 rezoned the school's parking lot for commercial use, in anticipation of transferring it to neighbouring Morse & Son Ltd. ("Morse") for their own parking. A third By-law rezoned the school's open space, for park purposes. The first two By-laws were appealed to the Ontario

Municipal Board ("the Board"), with two appellants: neighbour Janice Wing, and the Friends of the Lundy's Lane Battlefield ("the Association").

[5] The first PHC was convened primarily to address a Procedural Order for this matter, including an Issues List. That PHC also dealt with other matters. Initially, there was apparent agreement on all procedural matters; but eventually, it became obvious that there was no agreement on two items, proposed by the City for the Issues List, and numbered Issues #16 and #17.

THE ISSUES LIST

[6] The appellants said that Issues #16 and #17 pertained to money, not planning policy, and were hence extraneous to a planning appeal; the City replied that "monetary and pragmatic" questions were nonetheless legitimate topics for the Board to consider at the forthcoming hearing on the merits of the two disputed By-laws.

[7] The City's proposed Issue #16 was in three parts. The first was a premise, namely that no one had previously wanted the land, at least as cultural property (there were other presuppositions, though not as clearly stated). Next, the question was presented as a dichotomy, namely whether the heritage interest would be better served

- by selling off *all* of the property for private development,
- or selling off *part* of the property for private development, namely "the historically and archaeologically significant portion":

Issue #16 Given that no level of government or private organization (including the Friends of Lundy's Lane Battlefield) has, for over 200 years, stepped forward to commit resources for the purchase of the Subject Lands to commemorate the Battle of Lundy's Lane,

are the cultural heritage and/or archaeological purposes of the City better served

- by allowing the lands to be purchased by private interests for private development
- or are they better served by the City acquiring the lands and financing the dedication of the historically and archeologically significant portion of the lands by selling

the remainder of the Subject Lands for affordable housing and parking lot purposes?

[Formatting and emphasis added]

[8] The latter question clearly presupposed (a) that no one had offered to acquire the property for its heritage value, (b) that the City should sell at least some of the property, and (c) that part of the property was not "historically and archaeologically significant" in the first place.

[9] Issue #17 asked whether the City should pay for this heritage:

Issue #17 Is there any obligation on the City to finance the acquisition, development and dedication of the Subject Lands for historical or archeological purposes?

[10] Parenthetically, the rest of the (agreed) Issues List is substantial. Some questions are substantive, notably about compliance with the policy thrust of applicable governing documents (Provincial, Regional, and City). Other questions were more process-oriented, notably whether Council's decision should have been preceded by specific steps under the *Ontario Heritage Act*, or specific studies (including a Financial Impact Study).

[11] The impasse over the Issues List eventually came to the attention of the Board. Instead of waiting for a Motion to strike the disputed issues, the Board convened another PHC, by teleconference, scheduled on February 11, 2014. The question for the PHC was whether the two disputed items should indeed be included on the Issues List, for presentation at the hearing on the merits. The City, the Association and Ms. Wang forwarded extensive written submissions on this "procedural" question; counsel for Morse endorsed the submissions of the City. On February 11, 2014, the Board also heard oral submissions on whether the two items should be on the Issues List.

THE POSITIONS

[12] The appellants both began by objecting to the presuppositions of Issue #16, notably that no one had made a serious effort to acquire this property for its heritage value. They called that suggestion "factually incorrect."

[13] Next, the Association argued that the City's two proposed issues failed to address the core subject-matter of the appeal, namely "whether those two by-laws generally represent good land-use planning, considering Provincial Policy as well as Regional and City policy"; instead, those questions digressed into the allegedly extraneous question of whether "one course of action over another was pragmatically correct... (and) to consider the financial decision of City Council". "The determination of a financial obligation, or whether to justify the decision made by City Council based solely on financial considerations, is irrelevant to planning."

[14] The Association added that if it were proper for the Board to address such "non-planning" and "pragmatic" questions, it would be equally proper for the Board to address whether public purposes would be "better served by conveying the lands to a not-for-profit organization" – like the Association itself.

[15] The Association also argued orally that those two proposed issues were redundant, because there was abundant room to allude to financial realities elsewhere in the Issues List, notably at the lengthy Issue #13, about a Financial Impact Study.

[16] The Association finally argued that a Board finding, based on who should pay for a given initiative, was outside Board jurisdiction in any event. "Both issues should not be listed as proposed issues since the Board cannot rule on either of them."

[17] The City replied that if a Council could consider monetary matters, and if the Board (on appeal) was in the same legal position as Council, then the Board could consider exactly the same factors. The City denied any jurisdictional objection. The City also argued that the question of money was implicit in the planning documents themselves. Finally, the City asserted that inclusion of those two items caused no prejudice, and that it would be in the public interest to have "a fulsome discussion."

ANALYSIS

[18] Although economics are not usually part of a debate driven by land-use policy, s. 2.1(b) of the *Planning Act* authorizes the Board to “have regard” not only for decisions of Council, but also the “supporting information and material” that Council considered in its decision. If money was part of the “information” on which Council based its decision, the Board may “have regard” for this information. For that statutory reason, the Board will not exclude the topic.

[19] To be clear, however, the Board offers no opinion on how helpful those two items will be in resolving the zoning dispute currently before the Board. There is indeed some redundancy with Issue #13, about “Financial Impact.” More importantly, the Board has no intention of suggesting that it would issue a monetary Order, stipulating how the parties should allocate capital expenditures. That is not normally part of a zoning appeal.

[20] The next question is wording. There was no debate about the wording of Issue #17, but Issue #16 was a different matter, with its conspicuous presuppositions of fact, namely that (a) no one offered to acquire the property for its heritage value, (b) that the City should sell at least some of the property, and (c) that part of the property had no heritage significance anyway.

[21] That wording is clearly inappropriate, for an elementary reason. Unless the question were entirely recast as a hypothetical question, it is not proper to phrase an issue, based on a supposed factual premise which is itself in issue in the appeal.

[22] The Board should mention, parenthetically, that in relation to another presupposition to Issue #16, it was not entirely clear what the respective positions of the parties were, concerning the geographic scope of areas which each might treat as part of the cultural landscape; nor was it clear whether the agreed Issues List addressed that question. For that matter, although the Board's attention was drawn to what the appellants opposed, the Board's attention has not yet been drawn to what the appellants supported.

ORDER

[23] The proposed Issue #17 will form part of the Issues List. The Board offers no opinion on the weight which may eventually be attached to that issue in resolving this zoning appeal.

[24] The Board may have regard – at least substantively – to the proposed Issue #16, for the same reason. The Board also attaches the same caveat.

[25] The Board, however, expects that the wording of Issue #16 will be recast, so as not to include the presuppositions mentioned above.

[26] The Board gives the parties three weeks, from the date of issue of this decision addendum, to agree on wording accordingly, and to so advise the Board, whereupon the Board will consider incorporating the revised wording into the Issues List.

[27] In doing so, the Board would expect the parties to endeavour to avoid duplication with other issues on the List.

“M. C. Denhez”

M. C. DENHEZ
MEMBER