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

**ISSUE DATE:** March 20, 2015 **CASE NO(S).:** PL130395
PL130396

**PROCEEDING COMMENCED UNDER** subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

| | |
|---|---|
| Appellant: | Jean Grandoni |
| Appellant: | Preservation of Agricultural Lands Society (PALS) |
| Appellant: | Thundering Waters Development Corp. |
| Appellant: | Warren Woods Land Corporation |
| Subject: | Proposed Regional Policy Plan Amendment No. 196 |
| Municipality: | Regional Municipality of Niagara |
| OMB Case No.: | PL130395 |
| OMB File No.: | PL130395 |

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| Appellant: | Jean Grandoni |
| Appellant: | Preservation of Agricultural Lands Society (PALS) |
| Appellant: | Thundering Waters Development Corp |
| Appellant: | Warren Woods Land Corporation |
| Subject: | Proposed Official Plan Amendment No. 106 |
| Municipality: | City of Niagara Falls |
| OMB Case No.: | PL130396 |
| OMB File No.: | PL130396 |

Heard: During parts of April, May, June, September and October, 2014 in Niagara Falls, Ontario

**APPEARANCES**

| **Parties** | **Counsel** |
|---|---|
| Regional Municipality of Niagara | P. DeMelo<br>S. Chisholm |
| City of Niagara Falls | K. L. Beaman |
| Club Italia, Niagara, Order of Sons of Italy;<br>Redeemer Bible Church;<br>Regency Athletic Resort Ltd.;<br>FKS, The Real Estate People Inc. and 623381 Ontario Inc.;<br>Dr. Michael and Margaret Connolly and Dr. Farouk K. Abou-Keer;<br>Niagara Sports Centre Limited<br>(together known as the Northwest Quadrant Landowners' Group) | J. Wilker<br>D. Germain |
| Thundering Waters Development Corp. | T. A. Richardson |
| Warren Woods Land Corporation | T. A. Richardson |
| Preservation of Agricultural Lands Society | D. Donnelly<br>A. Sabourin<br>D. Cortese |
| Jean Grandoni | D. Donnelly<br>A. Sabourin<br>D. Cortese |

**DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD**

**INTRODUCTION**

[1] Thundering Waters Development Corp. ("Thundering Waters"), Warren Woods Land Corporation ("Warren Woods"), Preservation of Agricultural Lands Society

("PALS") and Jean Grandoni have appealed the City of Niagara Falls ("City") Official Plan Amendment 106 ("OPA 106").

[2] OPA 106 applies to lands in the northwest quadrant of the City. OPA 106 expands the Urban Area boundary to include approximately 75 hectare ("ha") of privately-owned land and approximately 16.5 ha within an Ontario Hydro ("Hydro") corridor.

[3] The privately-owned lands are located on the south side of Mountain Road, north of the Hydro corridor, east of Kalar Road and west of Montrose Road which runs parallel to the Queen Elizabeth Way ("QEW") on the west side of the QEW.

[4] The southern edge of the Hydro corridor is the current northern limit of the urban boundary in this area. South of the Hydro corridor are well-established residential subdivisions.

[5] The lands to be added to the urban area boundary to facilitate future growth include prime agricultural lands currently under cultivation as well as some other rural uses. These other uses include: three single family dwellings, a small motel, a small trailer park, a church and a cultural centre known as Club Italia. In addition to these uses, there are natural heritage features on the lands that include a woodlot and the headwaters of the Ten Mile Creek. Lands along the Ten Mile Creek are designated as Environmental Protection.

[6] The built form uses are located on the periphery of the subject lands. Club Italia is on the west at Kalar Road. The single family dwellings, small motel and small trailer park are dotted along the south side of Mountain Road, which is the northern edge of the subject lands. The church is at the southeastern edge of the privately held lands and abuts the Hydro corridor. Agricultural lands under cultivation include the Hydro corridor and the large expanse of open space that stretches from Kalar Road on the west to Montrose Road on the east and occupies the broad centre of the subject lands.

[7] The Board was advised that there is an old permission for 25 residential units. This permission has not resulted in any development.

[8] OPA 106 establishes the south side of Mountain Road as the northern limit of the urban boundary.

[9] The north side of Mountain Road is within the Protected Countryside designation of the provincial Greenbelt Plan. Lands here are within a specialty crop area that is designated Unique Agricultural Area within the Niagara Region Good Tender Fruit and Good Grape area.

[10] Lands on the south side of Mountain Road are not within the Greenbelt Plan. These lands are not designated Unique Agricultural Area and are not within a specialty crop area.

[11] All the lands within OPA 106 are outside of the urban boundary and are currently designated Good General Agriculture. In bringing the lands within the urban boundary, the amendment would re-designate the lands as Gateway North Secondary Plan Area. This proposed designation is intended to permit urban development on the private lands.

[12] The Hydro corridor, currently within the General Agriculture designation, is now being cropped. While a decision on the specific use within the Hydro corridor remains with Hydro, no party suggested that it would be reasonable to expect that the corridor, with urban development on either side, would be likely to continue to be cropped. The Proponents' concept plan, for example, suggests a use of the Hydro corridor that supports the urban development of the private lands rather than continuing in agricultural production.

[13] The same interests that appealed OPA 106 have also appealed Regional Municipality of Niagara (“Region”) Regional Policy Plan Amendment 196 (“RPPA 196”). RPPA 196 applies to the same lands as OPA 106 and similarly expands the Urban Area boundary, re-designating the lands from Good General Agriculture Area to Urban Area.

[14] Thundering Waters and Warren Woods each, separately, entered into minutes of settlement. Neither party called a case or otherwise took part in these proceedings once their respective minutes of settlement were filed with the Board. These two minutes of settlement called for certain modifications to the instruments before the Board and approval of those instruments as modified.

[15] The Board accepted the filing of the two minutes of settlement but was clear that any decision on possible modifications would be a matter for the Board’s decision in the context of whether OPA 106 and RPPA 196 should be approved once all the evidence had been considered and the hearing of the merits concluded.

[16] The Minister of Municipal Affairs and Housing (“MMAH”) did not appeal either instrument and MMAH is not a party to these proceedings. The Board did, however, hear from a senior official in the Ministry of Municipal Affairs and Housing who is a full Member of the Canadian Institute of Planners and a Registered Professional Planner in Ontario. Appearing under summons, this witness was not speaking for MMAH but was providing the Board with his independent expert opinion evidence in land use planning with regard to the matters before the Board.

[17] These matters have been grouped to be heard together but are not consolidated. This decision deals with both of these matters.

## ISSUES, ANALYSIS AND FINDINGS

### The Governing Version of the *Planning Act* and Provincial Policy Statement

[18] OPA 106 and RPPA 196 arise from private applications made by parties known together as the Northwest Quadrant Landowners Group (“Proponents”) on May 25, 2004.

[19] Since the time the applications were made there have been several changes to the *Planning Act*, R.S.O. 1990, c. P.13 (“Act”) and two new Provincial Policy Statements have been issued, one effective March 1, 2005 and the second effective April 30, 2014.

[20] O. Reg. 385/04 to the Act, "Transitional Provisions Under Section 70.4 of the Act: Continuation and Disposition of Matters and Proceedings" ("Regulation"), applies to these proceedings.

[21] Section 1.1 of that Regulation reads as follows:

> (1) Subsections 3 (5) and (6) of the Act, as they read immediately before section 2 of the *Strong Communities (Planning Amendment) Act, 2004* comes into force, apply with respect to the following matters and proceedings if they are commenced on or before February 28, 2005: …
>
> 2. A request for an official plan amendment by any person or public body…
>
> (2) For the purposes of subsection (1), …
>
> (b) a request for an official plan amendment by any person or public body shall be deemed to have commenced on the day the request was received, whether or not the amendment is adopted;

[22] Subsection 3(5) of the Act, as it read on February 28, 2005, applies. The subsection states:

> (5) In exercising any authority that affects a planning matter, the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry,

> board, commission or agency of the government, including the Municipal Board, shall have regard to policy statements issued under subsection (1).

[23] The Act, as it currently reads, is different. Subsection 3(5) of the current Act states:

> (5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,
>
> (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
>
> (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. 2006, c. 23, s. 5.

[24] The first difference deals with the test. In the version of the Act that applies to these proceedings, the test is “have regard to policy statements”. In the current Act the test is “shall be consistent with policy statements”.

[25] While the language is different, the requirement to have regard to policy statements still places a considerable responsibility on the Board when applying this test.

[26] In *Concerned Citizens of King Township v. King Township* [2000] O.J., No. 3517 (Div. Ct.) A. Campbell J. gave leave to appeal and provided a working interpretation of the phrase “have regard to provincial policies”, as follows:

> 23 … [have regard] to the provincial policies in the sense of considering them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect, and determining whether and how the matter before … [the Board]…is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle.

[27] The Board agrees with and adopts this working interpretation of the phrase “have regard to”.

[28] The second difference is that the subsection now directs the Board to a specific set of provincial policies, namely those that are in effect on the date of the decision.

[29] The version of the Act that applies to these proceedings does not direct the Board to a particular set of provincial policies. At the time the applications were received, the only Provincial Policy Statement in effect was the 1997 Provincial Policy Statement ("1997 PPS"). The Board finds that the applicable Provincial Policy Statement for these proceedings is the 1997 PPS.

[30] The third difference is the reference to provincial plans. The provincial plan that includes the subject lands is the Growth Plan for the Greater Golden Horseshoe ("GGH").

[31] O. Reg. 311/06 to *Places to Grow Act, 2005*, S.O. 2005, c. 13, "Transitional Matters – Growth Plans" is clear that the applications resulting in OPA 106 and RPPA 196 that were made on May 25, 2004 are to be continued and disposed of as if the GGH had not come into effect. Phrased another way, the Board is not required to make a finding that OPA 106 and RPPA 196 conform to the GGH.

[32] While the specific requirements of the GGH do not apply to the consideration of OPA 106 and RPPA 196, these requirements will apply to a secondary plan, zoning by-law amendment or plan of subdivision that may be prepared for these lands subsequent to these proceedings.

**Ecological Issues**

[33] PALS and Ms. Grandoni placed three issues on the Issue List that deal with ecological matters. They are:

> Does the environmental impact study adequately evaluate the loss of ecological function of the two identified Environmental Conservation Areas (Ten Mile Creek and Identified Forest)?

> Is the subject property located in a significant wildlife corridor? If yes, does the application preserve the feature and function of a significant wildlife corridor?
>
> Does the application protect or enhance the quality and quantity of groundwater and surface water?

[34] An environmental constraints report was undertaken for the Proponents and issued in February, 2007. The data was collected in 2005 and 2006. The report focused on two areas in particular: the woodlot on the subject lands and the Ten Mile Creek that traverses the subject lands.

*Agreement that Expert not be Called to Testify*

[35] The expert who undertook the study no longer engages in this work. The expert called by the Proponents is now in private practice but had held the position of Biologist with the Niagara Peninsula Conservation Authority during the time the work was undertaken for the Proponents.

[36] PALS and Ms. Grandoni waived the requirement to have the expert who did the work called to testify and agreed to hear the Proponents' current expert instead.

*Challenge to Expert Qualification as Terrestrial Biologist*

[37] PALS and Ms. Grandoni wished to have a witness qualified to provide the Board with independent expert opinion evidence in terrestrial biology. The Proponents brought a motion to challenge the proposed qualification of this witness as an expert in terrestrial biology.

[38] There are four standard tests for the admissibility of evidence that is opinion evidence. The evidence must be relevant, necessary to assist the trier of fact, given by a properly qualified expert and there must be no exclusionary rule otherwise prohibiting the receipt of the evidence.

[39] The path of least resistance in matters before the Board is sometimes to qualify the witness as an expert, admit the opinion evidence and simply deal with it in terms of weight. As set out in *Dulong v. Merrill Lynch Canada Inc.* 2006 CANLII 9146:

> …But such an approach is an abdication of the proper function of a trial judge and was explicitly rejected by Binnie J. in R. v. J. (J. L.) 2 S.C.R. 600 [2000] S.C.J. No. 52, at p. 613 S.C.R.:
>
> > [t]he Court has emphasized that the trial judge should take seriously the role of "gatekeeper".

[40] This witness holds a bachelor's degree in biology, earned in 2011. He has had no more than four months in the field. Five weeks of this field work was associated with his undergraduate degree. Of the remainder, 11 weeks were either research or employment.

[41] The witness holds no advanced degree and has barely had any professional experience. The Board finds that this witness's background and experience do not rise to the standard necessary for the Board to qualify him as an expert to provide the Board with independent expert opinion evidence in terrestrial biology.

[42] The Board refused to qualify this witness to provide the Board with independent expert opinion evidence in terrestrial biology.

[43] The witness was part of the group that visited the site prior to the start of the hearing of the merits. While the Board refused to qualify the witness to provide opinion evidence, the Board was prepared to – and did – hear his direct evidence from the site visit.

*Challenge to Expert Qualification for Environmental Impact Assessment*

[44] PALS and Ms. Grandoni wished to have a witness qualified to provide the Board with independent expert opinion evidence in the fields of aquatic biology and

environmental impact assessment. The Proponents have brought a motion to challenge the proposed qualification of this witness as an expert in environment impact assessment.

[45] The witness is an acknowledged expert of long standing in aquatic biology and this aspect of his qualification was not challenged. His evidence is geared to matters associated with the Ten Mile Creek.

[46] On reviewing this witness's credentials and experience the Board finds that the witness is qualified to provide independent expert opinion evidence in aquatic biology and independent expert opinion evidence on environmental impact on aquatic biology.

*Environmental Work not Current*

[47] As noted above, the field data for the environmental constraints report was collected in 2005 and 2006. On the evidence of the Proponents' biologist, qualified by the Board to provide independent expert opinion evidence, the Board is satisfied that the 2005/2006 field work was done appropriately at the time. However, there has been no update of that work, either by the initial researcher or by another qualified expert.

[48] The Proponents submit that it would be premature to require a further environmental study within the proposed secondary plan process outlined in OPA 106 since the environmental constraints are known from the earlier work.

[49] By the time of the hearing, the data was already somewhere between seven and eight years old. It may be that this data continues to be accurate in explaining current conditions and identifying current environmental constraints. In the absence of a proper update that confirms the earlier work as still accurate for current conditions, the Board is not persuaded that the report should be relied upon as reflecting the current environmental constraints.

[50] Before determining whether OPA 106 should be modified to require further environmental studies, the Board turns to the question of whether an urban boundary expansion into prime agricultural lands is appropriate, given the requirements of the 1997 PPS.

**Need for an Urban Boundary Expansion**

*1997 PPS Requirements*

[51] The 1997 PPS is quite clear in establishing a priority for the protection of prime agricultural lands and directing growth to urban areas. This is readily seen in the following extracts of policies from the 1997 PPS:

> 1.1.1 a) Urban areas and rural settlement areas (cities, towns, villages and hamlets) will be the focus of growth…
>
> 2.1.1 Prime agricultural areas will be protected for agriculture.
>
> 2.1.3 An area may be excluded from prime agricultural areas only for:
>
> a) an expansion of an urban area or rural settlement area, in accordance with policy 1.1.1c);
>
> 1.1.1 c) Urban areas and rural settlement areas will be expanded only where existing designated areas in the municipality do not have sufficient land supply to accommodate the growth projected for the municipality. Land requirements will be determined in accordance with policy 1.1.2. …
>
> Expansions into prime agricultural areas are permitted only where:
>
> 1. there are no reasonable alternatives which avoid prime agricultural areas; and
>
> 2. there are no reasonable alternatives with lower priority agricultural lands in the prime agricultural area…

[52] The requirements of policy 1.1.1 c) become the starting point in the analysis and the first question is whether there is sufficient land supply within the urban boundary to accommodate the projected growth as set out in this policy.

[53] Policy 1.1.2 speaks to land requirements.

> 1.1.2 Land requirements and land use patterns will be based on:
>
> a. the provision of sufficient land for industrial, commercial, residential, recreational, open space and institutional uses to promote employment opportunities, and for an appropriate range and mix of housing, to accommodate growth projected for a time horizon of up to 20 years…
>
> b. densities which:
>
> 1. efficiently use land, resources, infrastructure and public service facilities;
>
> 2. avoid the need for unnecessary and/or uneconomical expansion of infrastructure;
>
> 3. support the use of public transit, in areas where it exists or is to be developed;
>
> 4. are appropriate to the type of sewage and water systems which are planned or available; and
>
> 5. take into account the applicable policies of Section 2: Resources…
>
> c. the provision of a range of uses in areas which have existing or planned infrastructure to accommodate them;
>
> d development standards which are cost effective and which will minimize land consumption and reduce servicing costs; and
>
> e providing opportunities for redevelopment, intensification and revitalization in areas that have sufficient existing or planned infrastructure.

[54] The question of whether there is sufficient existing land supply within the City's designated urban boundary to accommodate projected growth has been the subject of several studies. The studies have all been undertaken since the GGH came into effect. They have used the GGH growth figures and the allocation of growth to the City. The

GGH emphasizes complete communities and, along with later iterations of the PPS, encourages intensification and the efficient use of land and infrastructure. A simple reading of Policy 1.1.2 in the 1997 PPS demonstrates that these same matters are encouraged here.

[55] Although the Board is not required to make a finding of conformity of OPA 106 and RPPA 196 with the GGH, by using the GGH growth numbers the various studies are using growth numbers that have embedded within them inescapable assumptions about intensification and growth that are rooted in the GGH.

[56] Policy 1.2.1 of the 1997 PPS stresses the importance of all planning jurisdictions making appropriate provision to meet projected housing needs and it does so with a strong emphasis on intensification and efficient use of land and infrastructure:

> 1.2.1 Provision will be made in **all planning jurisdictions** for a full range of housing types and densities to meet projected demographic and market requirements of current and future residents of the housing market area by: [emphasis added]
>
> a. maintaining at all times at least a 10-year supply of land designated and available for new residential development and residential intensification;
>
> b. maintaining at all times, where new development is to occur, at least a 3-year supply of residential units with servicing capacity in draft approved or registered plans;
>
> c. encouraging housing forms and densities designed to be affordable to moderate and lower income households;
>
> d. encouraging all forms of residential intensification in parts of built-up areas that have sufficient existing or planned infrastructure to create a potential supply of new housing units available from residential intensification; and
>
> e. establishing cost-effective development standards for new residential development and redevelopment to reduce the cost of housing.

[57] The term “housing market area” is a defined term in the 1997 PPS:

> **Housing market area:**
>
> refers to an area, generally broader than a lower tier municipality, that has a high degree of social and economic interaction. In southern Ontario, the county or **regional**

> **municipality will normally serve as the housing market area.** Where a housing market area extends significantly beyond county or regional boundaries, it may include a combination of counties and/or regional municipalities. [emphasis added]

[58] This definition of housing market area in the 1997 PPS does not relieve the City of the responsibility to undertake appropriate analyses to meet the provisions of policy 1.2.1. That policy places a clear responsibility on all planning jurisdictions and the City is a planning jurisdiction.

[59] The Board finds that having an area municipality undertake an analysis of its municipality to assess how the growth allocated to it will be achieved is in keeping with the scheme of the planning regime under which these two plan amendments are to be considered. Where a local housing market study is appropriate in that context it may assist and inform, but does not replace, an analysis of the City's land supply required by policy 1.1.1(c).

*City's Analysis to Support an Urban Boundary Expansion*

[60] The starting point of the analysis is the allocation of growth to the municipality for the planning period to 2031. Each of the studies, including the City's 2012 review, did just that.

[61] The focus of the Proponents' study, and that of the City, was the provision of single family detached and semi-detached dwellings. Both assumed a high demand for these two house forms and both assumed that this demand would have to be met through new construction in the City.

[62] For its modeling purposes, the City assumed that the single family detached and semi-detached dwellings, as a percentage share of new development in the City, would start at 75% in 2012 then slowly decrease to 60% by 2031.

[63] A plain reading of policy 1.2.1 in the 1997 PPS shows an emphasis on intensification within built-up areas to meet forecasted growth.

[64] Single family detached and semi-detached dwellings can be quite land extensive or they can be provided in a form that represents intensification. This depends greatly on the applicable planning instruments that govern, for example, minimum lot frontage, minimum lot size, maximum lot coverage and permissible units per hectare.

[65] The housing analysis under policy 1.2.1 must work in harmony with the approach to land use requirements and land use patterns that is set out in policy 1.1.2.

[66] Determining whether any given percentage of single family and semi-detached dwellings can be accommodated within the urban boundary to implement the forecasted growth, or warrants a boundary expansion, requires careful analysis of the lands within the urban boundary of the municipality and the capacity and capability of those lands to respond appropriately to the forecasted growth. In doing so, policy 1.1.2 calls for the efficient use of land, identifying opportunities for redevelopment and intensification.

[67] The 1997 PPS does not use the term “comprehensive review”, as does the 2014 PPS, as something that a municipality is required to undertake to assess whether an urban boundary expansion should intrude into prime agricultural lands and convert those lands from an agricultural designation to an urban designation. The Board finds, however, that a reasonable understanding of the policies and objectives of the 1997 PPS is to ensure that municipalities have done a thorough review and assessment of the development capability of lands within the urban boundary before expanding the urban boundary into prime agricultural areas and removing those lands from an agricultural designation.

[68] In its 2012 study, the City did not do a detailed site analysis to identify under-utilized lands that could accommodate development within the urban boundary utilizing

intensification -- whether for single detached dwellings, semi-detached dwellings or any other residential form -- as an appropriate response to forecasted growth.

[69] As such, the Board finds that the City has not had regard for the 1997 PPS, its analysis has not met the requirements of the 1997 PPS and, as such, has not demonstrated that there is a need for an urban boundary expansion.

*Region's Analysis to Support an Urban Boundary Expansion*

[70] The matters set out in the 1997 PPS are echoed in the Regional Policy Plan. Policy 5.6 sets out the criteria for urban boundary expansions.

[71] Like the 1997 PPS requirements, the Region focuses on whether there is a need for the urban boundary expansion.

[72] The Region accepted the City's 2012 analysis of need. The Region also accepted the City's analysis of land within the urban boundary and whether such land could accommodate the forecasted demand. This is at the core of the basis for the Region's support of OPA 106 and its adoption of RPPA 196.

[73] The Region has specifically excluded the subject lands from its assessment of lands necessary to accommodate growth in the context of the GGH. In doing so, the Region relied in part on the fact that these applications are transitioned from later iterations of the PPS, the Act and the GGH. Specifically, the Region's planning reports observe that later applications for urban boundary expansions would be subject to comprehensive reviews to determine if there are lands available within the urban boundary that are capable of accommodating an appropriate response to the forecasted need.

[74] This justification fails to recognize the requirement in the 1997 PPS for a proper land capacity analysis before need for an urban boundary expansion can be determined.

[75] The Board finds that the Region has not had regard to the 1997 PPS and has not demonstrated that there is a need for the urban boundary expansion.

*The Proponents' Analysis to Support an Urban Boundary Expansion*

[76] The Proponents' analysis to support an urban boundary expansion rests on three principal points: a housing market analysis, a planning review of the site and area, and a vision for development of the subject lands.

[77] Since the Proponents' housing market analysis was accepted and built upon by the City, and since the Board has reviewed the City's analysis in the preceding section, the Board finds that it is unnecessary to deal in depth with the Proponents' study here. The Board simply observes that the Proponents' did not do an analysis of the capability of lands within the urban area to accommodate the projected need.

[78] The Board further notes that a key element of the Proponents' need analysis is rooted in the particular characteristics of the subject lands. The Board finds that this part of the analysis is appropriate after the question of need for the urban boundary expansion has been demonstrated and does not, itself, support the question of need for the urban boundary expansion.

[79] The planning review of the site and area is dealt with primarily in the context of the analysis, below, of prime agricultural lands.

[80] The last element is the Proponents' emphasis on their vision and interest in providing housing for seniors in an adult lifestyle development. This is a consistent

thread through the planning justification reports and responses to information requests from planning staff throughout consideration of the Proponents' applications.

[81] This vision for the development of their lands is tied directly to the particulars of some of the current land owners and does not address the need for the urban expansion. As such, the Proponents' vision can only be understood as a development opportunity if the urban boundary is expanded. To be clear, the Proponents may well be sincere in their wish to implement this vision but that does not bear upon the question of whether a need for the urban boundary expansion has been demonstrated in the first instance.

[82] In addition, the Board observes that the City has not agreed to an adult lifestyle form of development or the vision it represents.

[83] OPA 106, which re-designates the lands as Gateway North Secondary Plan Area, specifically calls for the preparation of a secondary plan:

> 2. The Gateway North Secondary Plan … shall be prepared in accordance with the secondary plan policies of this Plan and shall include, but not be limited to:
>
> - a vision for the development as a complete community
> - a comprehensive land use strategy incorporating a mix of housing types and densities, commercial facilities, employment areas and parks/open space
> - the protection of natural heritage features
> - a comprehensive servicing strategy and sustainable transportation network
>
> 3. Further, the Gateway North Secondary Plan shall be … developed at a density of 53 people and jobs per hectare.

[84] The Board applauds the intention to explore a very full range of housing types and alternatives for a complete community and notes that this is both appropriate and in accordance with current PPS and GGH requirements once the need for the urban

boundary expansion has been demonstrated. The results of any future secondary plan process may result in the inclusion of an adult lifestyle community or it may not. Whatever the result of a future secondary plan process may be, the requirement for a secondary plan does not replace the requirement to establish the need for the urban boundary expansion in the first instance.

**Assessment of Agricultural Lands**

[85] While the Board has found that none of the Proponents, the City or the Region has demonstrated that there is a need for an urban boundary expansion, for completeness the Board will now examine whether the requirements of policy 1.1.1(c) have been met for an urban expansion in to prime agricultural lands.

[86] All parties agree that this proposed new urban boundary is an expansion into prime agricultural lands. As noted above, the 1997 PPS is explicit in policy 1.1.1(c) that:

> Expansions into prime agricultural areas are permitted only where:
>
> 1. there are no reasonable alternatives which avoid prime agricultural areas; and
>
> 2. there are no reasonable alternatives with lower priority agricultural lands in the prime agricultural area…

[87] The 1997 PPS defines prime agricultural land as:

> **Prime agricultural land:**
>
> means land that includes specialty crop lands and/or Canada Land Inventory Classes 1, 2, and 3 soils, in this order of priority for protection.

[88] The parties agree that the City is surrounded by prime agricultural lands.

[89] The 1997 PPS defines specialty crop lands as those

> … areas where specialty crops such as tender fruits (peaches, cherries, plums), grapes…are predominantly grown…

[90] Having considered the evidence on specialty crop lands advanced by the Proponents, PALS and Ms. Grandoni, the Board finds that the subject lands are not specialty crop lands but do fall within the Canada Lands Inventory ("CLI") classes 1, 2 and 3.

[91] In order to determine if there are reasonable alternatives for urban expansion into lower priority agricultural lands within the prime agricultural area two things need to happen. First, there needs to be an evaluation of the subject lands to determine the amount of land in each CLI class 1, 2 or 3. Once that has been established there then needs to be an analysis of alternative locations in prime agricultural lands of lower priority than those on the subject site.

*Determining the Agricultural Class of the Subject Lands*

[92] The Proponents' agrologist testified that the agricultural capacity of the subject lands was equal to or lower than lands to the south of the City by virtue of several items he cited as being factors that constrain agricultural capacity.

[93] The first item is what was described as the presence of non-agricultural uses. The reference is to the uses that are now along the periphery of the site. All of these uses are often found in rural, agricultural areas. The Board repeats the uses here: a social club, a church, a small trailer park, a small motel, three single family dwellings. Perhaps most telling is the fact that all of these uses now exist, and are existing compatibly, with existing, ongoing agricultural crop production on the subject lands. The Board attaches no weight to this portion of the analysis.

[94] The second item noted was a lack of agricultural infrastructure or improvements. The lands are currently in agricultural crop production. The Proponents' agrologist cited no requirement that lands in successful agricultural production without agricultural infrastructure or improvements are required to have certain agricultural infrastructure or improvements. The Board attaches no weight to this item.

[95] The third item is the fragmentation of ownership of the lands that are in production. The land owners have leased the lands for agricultural production. The fact of lots being in different ownership has not resulted in the lands not being leased for agricultural production. Moreover, the Board was not presented with any evidence of provincial or municipal requirements for a minimum parcel size before that parcel could be put into agricultural production. If the land owner intends to lease the lands for agricultural production then the issue is whether there is a farmer interested in taking up the lease. Apparently there has been a farmer interested in taking up the lease to utilize these lands for agricultural production.

[96] The fourth item deals with drainage and wet conditions and the fifth item refers to the existence of a cold sink on the lands. The existence and size of a cold sink and areas subject to wet conditions simply speak to what agricultural production will occur on the lands. Here again, the Board notes that the lands are now in agricultural production so the existence of the cold sink and some wet conditions have not led to the lands being deemed unsuitable for agricultural purposes.

[97] Finally, the last item refers to the fact that some of these lands had been altered previously for non-agricultural use. Specifically, some of the lands had been altered for use as playing fields.

[98] The Proponents' agrologist sought to alter his initial analysis about the amount of the subject lands that should be considered when assessing agricultural land class. Part of his proposed alteration was to remove the lands that had been used at one time as playing fields from the mapping of Class 1, 2 and 3 agricultural lands.

[99] This witness acknowledged to the Board that he did no soil surveys on the subject lands but simply took the advice of a representative of the Proponents as to the agricultural condition of the lands previously used for playing fields. He further acknowledged in answer to the Board's questions that, while not mandatory, in his expert opinion soil samples to support a soil survey would provide a much clearer picture of the appropriate agricultural classification of the lands and would be preferable. By way of explanation, he advised the Board that he was instructed by a representative of the Proponents not to take any soil samples on the site.

[100] The Board notes that the factual evidence before the Board is that these lands used previously for playing fields are among the lands that are now in agricultural production. The suggestion that they are unsuitable for agricultural purposes is belied by the fact of their current agricultural use. Given this fact, any suggestion that they should receive a lower classification or not be mapped should be preceded by a proper soil survey that includes soil samples. Such a proper soil survey has not been done and the Proponents' agrologist testified that the Proponents' representatives specifically directed it not be done.

[101] The Board attaches no weight to this attempt to remove lands from the amount of lands to be assessed and considered when determining their priority in accordance with the 1997 PPS.

[102] The evidence before the Board is that the majority of the lands that are included within the boundaries of OPA 106 and RPPA 196 are in agricultural production.

[103] The evidence before the Board is that a substantial portion of these lands are either class 1 or class 2 agricultural lands and relatively few are lower.

[104] The City and the Region both acknowledge that they did not do an analysis of the agricultural capacity, and therefore priority, of the subject lands.

[105] Both the City and the Region, like the analysis done in early planning work for the Proponents, focused instead on other characteristics of the subject lands and area that do not speak to the agricultural class in which the lands sit.

[106] Instead, the Region and the City focused on matters generally articulated by the Proponents' agrologist in his testimony in these proceedings and which the Board reviewed in the preceding paragraphs.

[107] Issues of the existence of non-agricultural uses and ownership fragmentation appear at the forefront. The Region, the City and the Proponents also suggested that Mountain Road would be a better boundary than the existing Hydro corridor and that using Mountain Road would round out the urban boundary.

[108] While all three asserted that Mountain Road would be a better urban boundary than the Hydro corridor, no persuasive evidence was presented to the Board that a road is a better boundary marker in planning terms than a Hydro corridor. With the existence of well-established residential subdivisions that border the Hydro corridor to the south, the Board finds that the Hydro corridor makes a clear and highly visible urban boundary border.

[109] On the suggestion that the expansion of the urban boundary would round out the City's northwest urban boundary, the Board observes that rounding out an urban boundary is not one of the clear criteria established by the 1997 PPS when considering an urban boundary expansion in to prime agricultural lands.

*Determining if there are Lower Priority Alternative Agricultural Lands*

[110] The City and the Region both acknowledge that neither did an analysis of alternative agricultural lands to determine if there are alternative agricultural lands with a lower priority than the agricultural lands within the OPA 106 and the RPPA 196 boundaries.

[111] The Proponents' agrologist did not do an analysis of alternative locations with lower CLI classes than the subject lands.

[112] The Proponents' planner indicated that there were livestock operations to the south of the City that might have the effect of limiting either the opportunity of new residential uses or negatively constraining the existing livestock operations.

[113] The parties were in agreement that a new livestock operation on the subject lands would not be possible in view of the requirements of the Minimum Distance Separation guidelines and the fact that there are already sensitive uses that are too close.

[114] Livestock operations are not the only farm operations and do not, themselves, speak to agricultural land classification. The fact alone that a livestock operation is on agricultural lands neither increases nor decreases the priority of the prime agricultural lands. The classification is based on soil quality and agricultural capacity. Specifically, it is based on what agricultural production in terms of crops that soil can support not on whether the soil can also support some form of livestock production.

[115] The Board understands that the presence of certain livestock operations to the south may lead to a planning decision that the expansion of the urban boundary to the south would not be desirable. This conclusion, if made, does not lead to the conclusion that an urban boundary expansion to the north is appropriate or has met the tests set out in the 1997 PPS.

[116] In the result, the Board finds that the agricultural lands analysis has not had regard to policy 1.1.1(c) (1) or (2) of the 1997 PPS.

[117] On the evidence presented in this hearing, and having regard to the requirements of the 1997 PPS, the Board finds that the proposed urban boundary

expansion set out in OPA 106 and RPPA 196 is not warranted and has not met the requirements for an urban expansion into prime agricultural lands.

[118] In light of this finding, the Board will not deal further with any modifications proposed by the two minutes of settlement or the possible modification to respond to certain ecological matters.

**ORDER**

[119] The Board order that:

1. The appeals by Jean Grandoni, Preservation of Agricultural Lands Society, Thundering Waters Development Corp. and Warren Woods Land Corporation are allowed.

2. The City of Niagara Falls Official Plan is not modified by Official Plan Amendment 106.

3. The Region of Niagara Regional Policy Plan is not modified by Regional Policy Plan Amendment 196.

*"Susan de Avellar Schiller"*

SUSAN de AVELLAR SCHILLER
VICE-CHAIR