ISSUE DATE:

February 12, 2014

PL130517

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:	Scott Morrison
Subject:	By-law No. 42-2013
Municipality:	Town of Orangeville
OMB Case No.:	PL130517
OMB File No.:	PL130517

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

Parties	**Counsel**
Scott Morrison	
848614 Ontario Inc.	M. Green
Town of Orangeville	E. Lidakis

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

INTRODUCTION

[1] In the Town of Orangeville ("the Town"), 848614 Ontario Inc. ("the applicant") proposed to build a nursing home beside a recently-completed subdivision. Recent homebuyers objected that the nursing home's access would be via their local road, instead of via the Town's main street.

[2] The project involved rezoning land previously anticipated for industry. Town planning staff agreed; so did Council. One of the homebuyers in the subdivision, Scott Morrison ("the neighbour"), appealed to the Ontario Municipal Board ("the Board").

[3] At the hearing, he was self-represented, and called no witnesses other than himself. He took issue with the public notice issued by the Town, and with the use of this local road for access. He also raised questions about frontage provisions in the By-law.

[4] The applicant and the Town defended the By-law, adding that there was simply no alternative access available. The applicant was represented by counsel, with the support of planner Alan McNair and transport engineer Roland Karl, as well as the applicant's Administrator of Care, Sandra DeCoito. The Town was also represented by counsel, with the support of its Director of Planning, Nancy Tuckett. There was one participant, Nicholas Theodoru, who supported the neighbour.

[5] The Board has carefully considered all the evidence, as well as the submissions of both sides. On consent, the Board also conducted an unaccompanied site visit. Despite the eloquence of the neighbour, the Board concludes, as the experts did, that the rezoning meets statutory standards. Procedurally, the neighbour's concerns about notice, while understandable, did not constitute grounds for Board intervention. Substantively, the Board was not persuaded, on the evidence, that traffic levels would be inappropriate – particularly not when compared to the industrial uses anticipated by the existing zoning, or other likely residential uses for the property. Finally, the Board was not persuaded of the neighbour's preferred access solution, which was that primary access to the nursing home should be across a floodplain. The appeal is dismissed. The details and reasons are set out below.

CONTEXT AND HISTORY

[6] The subject property, at 355 Broadway, covers 5.27 hectares (13 acres), on the north side of Broadway, Orangeville's main street. The applicant, doing business under the name of Jarlette Health Services, operates a pair of institutional facilities, immediately east of the site, called the Avalon Retirement Lodge and Avalon Care Centre.

[7] All but 1.7 hectares (4.2 acres) of the subject property is low-lying. It is considered by the Credit Valley Conservation Authority ("CVC") to be at risk of flooding from Mill Creek. The remaining 1.7 hectare tableland is a semicircle, with the low-lying area to its north and east, separating it from the two Avalon facilities. The same low-lying area also extends south of the tableland, separating it from Broadway (for good measure, the tableland is also separated from Broadway by a railway track).

[8] There used to be a house at 335 Broadway, but it is now closed up. Its access had been via a narrow dirt driveway, connecting not southward to Broadway (where it would be blocked by the railway track), but eastward across the low-lying area, to the parking lot of the Avalon facilities, and from there southeastward to Broadway, circumventing the tracks (which curve south at that point).

[9] The Town's Official Plan (“OP”) had designated all this low-lying area as "Open Space Conservation." It is within the jurisdiction of the CVC.

[10] The tableland, for its part, had originally been designated by the OP for "Employment", along with substantial lands further west. Though they were generically zoned “D” (“Development") in anticipation of eventual development, they had been expected to serve industrial functions.

[11] However, under a “Comprehensive Review of Employment Areas” (and a decision of this Board), those lands to the west were eventually redesignated for non-employment uses (mainly commercial and residential). That broad redesignation to the west, however, had not included this vestigial 1.7 hectare tableland, which (in the words of the planners) had been "left over" as an "orphan piece" with its pre-existing "Employment" designation.

[12] That changed when the Town adopted a recent Official Plan Amendment (“OPA”) to redesignate the tableland as "Institutional"; that OPA was not appealed.

[13] The problem was physical: this tableland was bounded on its north and east side (by the "Open Space Conservation" lowland), and on the south (by the same lowland, plus the railway track).

[14] To the west, abutting lands were being built out, including a residential subdivision (“Meadow Lands”, immediately west of the tableland). A new street called Preston Drive now crosses that subdivision, stopping at the western boundary of the subject property. On the south side of Preston Drive are townhouses, zoned “RM1”; on the north side are single detached homes, zoned “R4”.

THE PROPOSAL

[15] The applicant proposed a nursing home on the tableland, and undertook negotiations with the Town and CVC. It obtained their agreement, both to the OP redesignation of the tableland to "Institutional", and to the rezoning, also to "Institutional". In due course, however, two CVC conditions became clear:

- The CVC said low-lying areas would be not only rezoned to "Open Space Conservation" (matching its OP designation), but would be ultimately deeded to the Town. Since those lands were north, east and south of the tableland, this would cut the buildable property off from both Broadway and the Avalon complex to the east.

- Similarly, the CVC objected to a proper access route along the existing dirt driveway, because the latter crosses the low-lying lands (between the existing house and the Avalon parking lot).

[16] By process of elimination, the only remaining access to the tableland would be via the west, i.e. from Preston Drive, classified by the OP as a local road. The applicant's planner pointed to this proposed access in a letter to the Town, dated February 12, 2012: “The primary vehicle access for the redeveloped nursing home will be from Preston Drive… to the west of the proposed rezoning."

[17] However, that aspect of the proposal was not widely known. Although a Notice of Public Meeting was issued in June 2012, and the public meeting occurred the same month, there was no evidence of any formal information to the public about access being via Preston Drive.

[18] The neighbour denied having received a hard copy of that Notice. There was discussion on whether copies might have gone to the builder, if the latter was still listed as the addressee on Town tax records. The neighbour acknowledged that a sign had been posted on the subject property during the winter of 2012-13, at the end of Preston Drive, but argued that it had been essentially concealed by snow.

[19] The neighbour's purchase closed in December 2012. The neighbour concluded that "I wouldn't buy my house, knowing this now." However, he had been informed of

the proposed access over two months earlier. On September 20, 2012, the Town's then Interim Director of Planning wrote to him: "Preston Drive was deliberately extended to the west boundary of the Avalon property to provide access to that property."

[20] In March, 2013, the Town planning staff's report to Council referred to Preston as the route for access. On April 9, 2013, Town planning staff added that there would also need to be changes to the frontage provisions, because of the CVC's insistence on the applicant transferring the "Open Space" ("OS2") low-lying lands to the Town:

> When the OS2 lands are conveyed, the property will no longer have frontage on Broadway…. The result of this is that the minimum required lot frontage would be deficient. The INST (Institutional) Zone requires a lot frontage of 36 m (118 feet) and 18.5 m (60.6 feet) would be provided…. Since the lot frontage exception is for implementation purposes and not a substantive change to the proposal, the introduction of the exception in lot frontage could be considered a technical modification and therefore be appropriate to recognize at this time.

[21] On April 22, 2013, the neighbour made a presentation to Council about his concerns. Nonetheless, later at that meeting, Council proceeded to adopt Zoning By-law 42-2013 ("Nursing Home By-law"):

- the 1.7 hectare tableland was rezoned from "Development" to "Institutional";
- the low-lying areas were rezoned "Open Space Conservation ";
- frontage requirements were changed as requested, from 36 metres to 18.5 metres;
- there was an "H" ("holding") symbol, which could be lifted only after site plan approval and allocation of servicing;
- there were parenthetical changes to parking provisions at the Avalon facilities.

[22] On May 4, 2013, the Mayor sent an e-mail to the neighbour, suggesting that an alternative access route might still be possible:

> I am still working on a solution for the entrance! I am following up with the Credit Valley Conservation Authority regarding their designation of the wetlands to see if another solution could be arranged. This is been at the root of the issue one way entrance was moved to your street.

[23] However, on May 13, 2013, the CVC issued "confirmation" that it opposed any primary access for the project heading east, north, or south: “Given the presence of wetland, CVC does not support the existing gravel lane being enlarged or altered to facilitate the primary access for the western (tableland) portion of the Avalon property."

[24] Yet another Town “information meeting” occurred the next day, at which there was considerable controversy. On May 17, 2013, the neighbour appealed to the Board. At the hearing, he said that a project entrance off Broadway (i.e. across the low-lying area) "would eliminate 99.9% of the concerns," but he also raised other issues, notably notice and frontage.

APPLICABLE CRITERIA

[25] A challenge to such a By-law may involve several factors, notably whether it complies with the *Planning Act* (“the Act”), the Provincial Policy Statement (PPS), the applicable Official Plan(s), and the fundamentals of good planning.

ANALYSIS

[26] The neighbour's objections were procedural and substantive. Procedurally, he argued that the Town’s process in this file was flawed, notably in informing the public of the stakes involved. Substantively, he objected to the prospect of a nursing home using Preston Drive for access. Those issues are discussed in turn.

A. Process

[27] On the process issue, the parties provided the Board with written submissions. The Act and regulations outline a specific sequence of events, to adopt a zoning by-law. Some steps are statutory, meaning that non-compliance would raise questions about the jurisdictional feasibility of adopting the By-law in question. Other steps are not.

[28] The relevant statutory provisions for notice, in subsections of s. 34 of the Act, insist on "sufficient information":

> 12. Before passing a by-law under this section…
> (a) the council shall ensure that,
> (i) sufficient information and material is made available to enable the public to understand generally the zoning proposal that is being considered by the council, and
> (ii) at least one public meeting is held….
>
> 13. Notice of the public meeting…
> (a) shall be given to the prescribed persons and public bodies, in the prescribed manner; and
> (b) shall be accompanied by the prescribed information.

[29] The "prescribed information", in turn, is itemized at s. 5(11) of *Ontario Regulation 545/06* ("O.R. 545/06"):

> A notice… shall include the following:
>
> 1. The date, time and location of the public meeting….
>
> 2. An explanation of the purpose and effect of the proposed by-law.
>
> 3. A description of the subject land, (and) a key map showing the subject land….
>
> 4. Where and when additional information and material about the proposed by-law will be available to the public for inspection….

[30] Since the statute refers to "sufficient information… to enable the public to understand generally the zoning proposal that is being considered," the neighbour said key information was not properly included in the materials brought to the public's attention; and the information – such as it was – was mailed to the wrong parties (or, in the case of signage, was concealed by snow). Furthermore, the public notice indicated a Broadway street address, potentially leading some area residents to infer that access

would be via Broadway, not Preston. Indeed, in the notice of public meeting, not only was there no mention of Preston Drive; neither Preston nor its surrounding subdivision even appeared on the key map. For good measure, there was also no mention of any change of frontage, let alone where that frontage would be.

[31] The neighbour specified that he was not claiming to have been "misled", but he said the combination of the above gaps in notice procedures represented a "denial of natural justice (because of) poor due diligence and decision making."

[32] The Town and the applicant replied that there was no breach of either statutory provisions or natural justice. Furthermore, in practice, the neighbour had indeed been informed. He had had ample opportunity to address Town staff and Council (and did so).

[33] In considering the neighbour's argument that public notice had been fatally deficient, the Board is mindful of several factors. First, an alleged breach of statutory preconditions, such as notice provisions, would normally be a matter more for the courts than for this Board. As the Board said in *Re Cavan-Millbrook-North Monaghan (Township) Official Plan Amendment No. 3,* (2006) 51 O.M.B.R. 441, “the Board has the power to approve or not approve the by-law but does not have the power to declare the by-law void; that jurisdiction is left to the courts.”

[34] However, although the Board would not normally declare a by-law void for procedural irregularities, the Board has done the reverse, namely to dismiss procedural objections when it considered them unwarranted, e.g. in *Re Flamborough (Town) Zoning By-law 99-91-Z,* (2000) 40 O.M.B.R. 286, and in the *Cavan-Millbrook* Case above.

[35] Here, the Board has no reproach concerning the Town's information for the public meeting. Granted, Preston Drive and its subdivision did not appear on the key map attached to the June 2012 Public Notice – presumably because the street and houses were still under construction at the time. Similarly, the change of frontage could not have been mentioned at the time, because the CVC’s insistence on deeding the Open Space lands (and blocking alternative access to Broadway) had not yet been fully

ascertained. In short, there was little more, at the time, that the municipality could have done in that regard.

[36] As for the neighbour's primary argument (i.e. that access, via Preston drive, would have such dire consequences that its omission from public notification offended the statute), the Board addresses that assumption later in this decision.

[37] Next, as for the argument that area residents could not read signage because of the snow, the Board merely notes that most Ontarians familiar with winter do not appear to have such a problem.

[38] For good measure, even if there had been a shortcoming, this would not necessarily invalidate the Town's process. In the *Cavan-Millbrook* Case, the Board found that the procedural objections to that municipality's OPA could be discounted because (a) there was substantial compliance with the statutory framework, and (b) there was no significant harm to the interested parties, particularly since the Board hearing would be *de novo*, i.e. it would hear the merits afresh anyway. The Board explained:

> It is clear that the Township's notice… was flawed. It is equally clear from the evidence that notice of public meeting was published… as prescribed by the regulations…. The question is whether or not the notice… was so fatally flawed to invalidate Amendment No. 3. The Board finds that the Township substantially complied with the regulations….
>
> The Board finds that notice of its hearing on the planning merits of Amendment No. 3 is sufficient to correct any flaws in the notice procedure that occurred at the Township and that there is no prejudice…. The Board's hearing *de novo* also corrects any perceived prejudice….

[39] The Board reaches a similar conclusion here. The Board cannot find that the neighbour was misled in fact, or that any supposed inadequacies in public notice caused him actual harm. He was on notice since at least September, 2012, when he received the written message that "Preston Drive was deliberately extended to the west boundary of the Avalon property to provide access to that property." This was months before adoption of the By-law, and he did engage in discussion with staff and Council. He was not deprived of his opportunity to advance his arguments, and make them known. There was no denial of natural justice on that account.

[40] As for the argument that the Town should have included public notice of the change in frontage, the Act confirms unequivocally that if a modification becomes necessary to a proposed by-law, subsequent to the public meeting, any further notification is entirely at the option of the municipal council, under s. 34(17):

> Where a change is made in a proposed by-law after the holding of the public meeting mentioned in subclause (12)(a)(ii), the council shall determine whether any further notice is to be given in respect of the proposed by-law and the determination of the council as to the giving of further notice is final and not subject to review in any court irrespective of the extent of the change made in the proposed by-law.

[41] The Board is therefore compelled to find that there was no breach of the Act or of O.R. 545/06, and no digression from the principles of natural justice, to warrant Board intervention. That leaves the more important question of the substantial merits of the neighbour's objections to what he called the prospect of "exuberant amounts of traffic on the street."

B. Substance

[42] In terms of content, the By-law under appeal had three main dimensions: a change of use, a change of frontage, and implications for traffic.

[43] Leaving aside the traffic question for now, the proposed change of use was not seriously disputed. The proposed Institutional zoning would match that of the Avalon facilities next door; and it would be far more compatible with the neighbouring subdivision than the property's existing zoning, which anticipated uses like a hotel, a factory, an automobile storage and/or recycling yard, or a welding operation.

[44] Indeed, the proposed nursing home use would be permissible even if the property were given the *same* zoning as the houses on Preston Drive, namely R4 or RM1. The Town said it chose the "Institutional" zoning label, simply because this was the same term as in the OP designation; but if the subject property were instead rezoned RM1 (like the townhouses on the south side of Preston Drive) or R4 (like the single detached houses on the north side), a nursing home or retirement home would still be permitted, just as it is in an “Institutional” zone. The Board finds no intrinsic objection to that change of use.

[45] The Board also finds no substantive objection to the changing frontage requirements, from 118 feet to 60 feet. That change is exclusively attributable to the fact that the rest of the frontage is now being deeded to the Town for open space. Furthermore, there was no suggestion that the remaining 60 feet of frontage was functionally inadequate.

[46] That leaves traffic, representing "99.9% of the concerns." On that question, the Board finds that the potential nursing home traffic is not a significant objection, either intrinsically, or relative to the likely alternative uses of the property, for the following reasons.

[47] Intrinsically, the applicant's traffic engineer testified that the subdivision roads to this site had been designed for a capacity of 900 vehicles per hour. Here, the projection was 81 vehicles per hour, or about one vehicle every 40 seconds. The engineer agreed that these would include ambulances, but according to standard calculations, their number would not exceed an average of one per week. The Board found no traffic load that would exceed the road's capacity.

[48] Perhaps more importantly, the traffic would be relatively light – compared to the likely alternatives. If development were to unfold in accordance with the existing documents, and the site were used as a hotel or automobile storage/recycling facility, the expected traffic would be far worse. Indeed, even if the site had a residential use, prospects were not expected to be significantly different. According to the planning testimony, if the property were not developed as an institutional complex, the most likely alternative would be a "block development" of up to four storeys, and density of 99 units per hectare. The traffic engineer testified that this would cause more traffic on Preston Drive than the nursing home would.

[49] The traffic engineer's report concluded that although "alternative development scenarios would still be acceptable from the traffic capacity point of view…, (they) have the potential to generate traffic volumes that match or exceed those anticipated by the current nursing home proposal. These volumes would also be generated at the same time as those from the other uses along the street, resulting in a more pronounced peaking situation."

[50] The Board therefore finds that the evidence supports counsel for the applicant, when he said this rezoning was "as good or better (for neighbours) than anything else that could have gone on”.

[51] Counsel added that it was also "better than running a roadway through a floodplain." The Board again agrees. The Board was not persuaded that the primary street access to a nursing should be vulnerable to flooding. That would not be consistent with principles of good planning.

[52] The Board can only add, in closing, that even if an entrance off Broadway "would eliminate 99.9% of the concerns”, the railway track and the decision of the CVC, which is not reversible in this appeal, make that a practical impossibility.

CONCLUSION

[53] The Board finds that, although the neighbour spoke lucidly and eloquently, his position is not supported by the relevant law and policy.

[54] The lawyers for the applicant and the Town nonetheless alluded to the possibility of further neighbourhood participation, at the future Site Plan stage. Counsel for the Town said "that is something that the Town could possibly consider, and assist in that process." Counsel for the applicant added: "he (the neighbour) can and should have input… at the relevant time…. I've never seen a situation where ratepayers said ‘we want to have a say', and they couldn't be accommodated."

[55] It was also suggested that there may be other forms of mitigation, e.g. the applicant and the Town may wish to discuss the timetable for staff shift changes at the new facility, to reduce peak traffic on Preston Drive. However, that is up to them.

ORDER

[56] The Town’s comprehensive zoning by-law is amended in accordance with the Nursing Home By-law and the appeal is dismissed.

“M.C. Denhez”

M. C. DENHEZ
MEMBER