

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: September 26, 2018

CASE NO(S): PL131239

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Raimo Koskiniemi
Subject:	By-law No. 2013-35
Municipality:	Township of Nairn
OMB Case No.:	PL131239
OMB File No.:	PL131239
OMB Case Name:	Koskiniemi v. Nairn and Hyman (Township)

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Raimo Koskiniemi
Applicant:	Consbec Inc., Carol Massicotte
Subject:	Consent
Property Address/Description:	Lots 4-12, Concessions 1, 2 & 3
Municipality:	Township of Nairn
Municipal File No.:	B-03/2016
OMB Case No.:	PL131239
OMB File No.:	PL170488

Heard: September 26 and 27, 2017 in Nairn and Hyman, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Raimo Koskiniemi

Self-represented

Consbec Inc. and Carol Massicotte

Sharmini Mahadevan*
Diane Rioux*

DECISION DELIVERED BY MICHEL BELLEMARE AND ORDER OF THE TRIBUNAL

A. OVERVIEW

[1] Proposing to build a permanent mobile bulk emulsion explosives plant in the Township of Nairn and Hyman (“Township”), Consbec Inc. (“Consbec”) applied for amendments to the Township’s official plan and zoning by-law. The Township’s council approved those amendments, as well as an application for consent to sever part of a private road to enable a transfer of ownership from Carol Massicotte to Consbec.

[2] Raimo Koskiniemi appealed the Township council’s decisions concerning the zoning by-law amendment and the consent application, but not the official plan amendment.

[3] Based on the evidence presented in these proceedings, I allow the zoning by-law amendment appeal in part to amend the by-law. Also, I dismiss the appeal concerning the consent application and grant provisional consent subject to certain conditions. The following are my reasons.

B. BACKGROUND

[4] In 2013, the Township’s council adopted Official Plan Amendment No. 3 (also referred to as the official plan amendment) and implementing zoning By-law No. 2013-35 (the “zoning by-law amendment”) to permit the construction of a mobile bulk emulsions explosives plant (also referred to as the proposed plant or facility) on Consbec’s property (also referred to as the site).

[5] The plant would provide explosives for the construction and mining industries. As explained in the preamble of Official Plan Amendment No. 3 (Exhibit 1, Tab 10, Page 164), the “plant will be modular in nature, and will consist of seven mobile trailers that will be used for various parts of the manufacturing process”.

[6] The site is approximately 186 hectares and heavily forested, located on the south side of Highway 17, outside the Township’s main urban settlement area, Nairn Centre, in Sudbury District. The Township is on the southwest border of the City of Greater Sudbury. The lands surrounding the site are vacant, and the three nearest dwellings, including the Appellant’s cottage, are more than a kilometre away from the proposed facility. The latter is also 2.5 kilometres from the village of Nairn Centre.

[7] To accommodate Consbec’s proposed facility, the Township council adopted Official Plan Amendment No. 3 that designated about 176.5 hectares of Crown lands along with a 9.5 hectare parcel (previously designated “Rural”) as “Rural Industrial District”. With no appeals or modifications, the Ministry of Municipal Affairs and Housing approved the official plan amendment, and it came into effect March 18, 2016.

[8] Consbec is in the process of acquiring the Crown lands from the Province of Ontario, and several other approvals outside of these proceedings are required before it can build the proposed facility at this location, including:

- Environmental assessment for the acquisition of Crown land—Ministry of Natural Resources and Forestry
- Environmental assessment for municipal road access, and permits for: entrance; building and land use; encroachment; and transportation—Ministry of Transportation
- Environmental assessment for road access, building permit(s), road user agreements and entrance/access permit—Township

- Explosives Permit and Site Approval—Natural Resources Canada (Explosives Regulatory Division)
- Consent of the Director of Operations under section 6(1) of the Ammonium Nitrate Storage Facilities Regulations under the *Canada Transport Act*—Canadian Transportation Agency
- Spur line construction approval—Canadian Pacific Railway and Huron Central Railway
- Connection Impact Assessment and Connection Cost Agreement—Hydro One
- Archaeological Clearance—Ministry of Tourism, Culture and Sport

[9] Ms. Massicotte owns a private road that is also an abandoned railway bed. Her application for consent to sever sections of the private road (Exhibit 1, Tab 26) would enable her to transfer ownership to Consbec. This would consolidate Consbec's lands along Highway 17. The Township's council granted the consent application, subject to three of the Township's standard conditions, which I incorporate in the Tribunal's Order.

[10] Mr. Koskiniemi owns property located 1.37 kilometres southwest of the proposed facility. He appealed the municipal council's decision adopting the zoning by-law amendment on the following main grounds:

- That "it is not in the best interest of our community to have an explosive (sic) plant. It contravenes numerous statement (sic) in the town's Official Plan and Zoning By-Law".
- That "having such a plant will devalue the present homes and land [...] and

deter new residents from considering establishing their home in this community”.

- The “extremely high volume of traffic on Hwy 17 west” and “constrained sightlines” at the “existing driveway proposed to access the site”.
- That the “sale of this crown land would compromise present access roads and rights of way for owners of cottages”.

[11] Mr. Koskiniemi also appealed the approval of the consent application on the following grounds:

- That “it is not in the best interest of our community to have Consbec [...] purchase this strip of land to add to their small irregular parcel. Their intent is to purchase the privately-owned railway bed and Short Street which is established as a public road that extends for approximately 8 km that has being (sic) accessed for decades.”
- That “this application has no benefit to some land owners in the area and does not enforce the Road Access Act”.
- That “Consbec [...] are granting some property owners with deeded access and none to the other (Liliane/Raimo Koskiniemi) causing the potential access to our property very difficult. They are also trying to ensure that we would not be able to build on our property.”

[12] Mr. Koskiniemi testified in support of his appeals, and called the following witnesses: Julie McFarling, a Sudbury District planner with the Province’s Ministry of Natural Resources and Forestry (under summons), Rod MacDonald, Arthur Stokes, Doreen Mathieu, Liliane Koskiniemi, and Jim Bélanger.

[13] Testifying against the appeals and in support of the applications were Richard Walker, vice president of Consbec, Glenn Tunnock, a professional planner who was qualified to provide evidence in land use planning, and Heather Swan, also a professional planner who was qualified to give evidence in land use planning. Mr. Tunnock's and Ms. Swan's testimony were each augmented by their witness statements.

[14] With no objections from any of the parties, I granted participant status to the following individuals: Rosalind St. Pierre, Serge Ayotte, Doug Wyszynski, and Bonnie Vataja.

C. ANALYSIS AND FINDINGS

1. Authority of the Tribunal on Appeal

[15] On an appeal of a zoning by-law amendment, subsection 34(26) of the *Planning Act* ("Act") provides that the Tribunal has the authority to:

- (a) dismiss the appeal;
- (b) allow the appeal in whole or in part and repeal the by-law in whole or in part or amend the by-law in such a manner as the Tribunal may determine or direct the council of the municipality to repeal the by-law in whole or in part or to amend the by-law in accordance with the Tribunal's order.

[16] Also, section 2.1 of the Act prescribes that the Tribunal must have regard to the municipal council's decision and the information it considered in making that decision.

[17] On an appeal of a consent under subsection 53(19) of the Act, subsection 53(34) provides that the Tribunal has the authority to "make any decision that the council [...] could have made on the original application". This appeal is therefore a new hearing on the application for consent to sever the private road.

2. Policy Context

[18] Under subsection 3(5) of the Act, decisions of municipal councils and the Tribunal must “be consistent with” provincial policy statements issued under subsection 3(1) of the Act, and shall “shall conform with the provincial plans or not conflict with them, as the case may be”.

[19] Section 2 of the Act also requires municipal councils and the Tribunal to “have regard to, among other matters, matters of provincial interest”, including: the protection of public health and safety; the appropriate location of growth and development; the protection of the financial and economic well-being of the Province and its municipalities; and the resolution of planning conflicts involving public and private interests.

[20] As subsection 24(1) of the Act prescribes, a municipality must adopt zoning by-laws that conform with its official plan, a document approved by the Province or an upper-tier municipality.

[21] In applying for consent to sever the private road, Ms. Massicotte must satisfy the Tribunal “that a plan of subdivision of the land is not necessary for the proper and orderly development of the municipality” pursuant to subsection 53(1) of the Act, and that the application to sever has regard to the criteria set out in subsection 51(24) of the Act.

[22] Ontario’s *Road Access Act* governs when an access road, as defined in the legislation, may be closed. The relevant sections provide as follows:

1. In this Act,

“access road” means a road located on land not owned by a municipality and not dedicated and accepted as, or otherwise deemed at law to be, a public highway, that serves as a motor vehicle access route to one or more parcels of land;

[...]

2 (1) No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless,

- (a) the person has made application to a judge for an order closing the road and has given ninety days notice of such application to the parties and in the manner directed by this Act and the judge has granted the application to close the road;
- (b) the closure is made in accordance with an agreement in writing with the owners of the land affected thereby;
- (c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or
- (d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

[23] In these appeals, the Tribunal must consider the provisions of the above-noted statutes, as well as the following policies, plans and zoning by-law: the Provincial Policy Statement, 2014; the Growth Plan for Northern Ontario; the Township's Official Plan; and the Township's Zoning By-law No. 2000-22.

3. The Zoning By-law Amendment and Consent Application

[24] The Provincial Policy Statement contains policies that promote efficient land use and development in urban and rural settlement areas, including cities, towns, villages and hamlets. It also contains policies that promote the optimization of existing municipal services such as sewage, water, storm water, and transportation. According to Mr. Tunnock's evidence, the proposed development is consistent with the Provincial Policy Statement because it would support the mining supply and services industry, and would be compatible with the surrounding rural landscape. It would also make efficient

use of existing highway and rail infrastructure. With the support of the Township through the environmental process, there are plans to build a new municipal road to the site, paid for by Consbec. In addition, the proposed development would comply with the setbacks prescribed by Natural Resources Canada, and site plan control (a condition of approval for industrial uses under subsection 3.7.4.2 .d) of the Township Official Plan) would ensure that the components of the bulk emulsions explosives plant are located appropriately.

[25] As an economic blueprint for this part of the Province, the Growth Plan for Northern Ontario identifies the mining supply and services sector as one where the region has a competitive advantage. Section 2.3.8 of that plan states:

1. Efforts by the Province, industry and, where appropriate, other partners, to grow and diversify the minerals and mining supply and services sectors should include:

[...]

3. expanding the mining supply and services industry, [...]

[26] According to Mr. Tunnock, the proposed mobile bulk emulsions explosives plant is an example of a “value-added industry” supporting the mining supply and services sector identified as a priority for this region, and “complies with the policies and direction” of the Growth Plan for Northern Ontario.

[27] The adoption of Official Plan Amendment No. 3 redesignated the site “Rural Industrial District” to permit the proposed use. As mentioned earlier, there were no appeals and no modifications, and the Ministry of Municipal Affairs and Housing approved the amendment which came into effect March 18, 2016.

[28] The Township’s Zoning By-law No. 2000-22 (also referred to as the zoning by-law) zones the subject site “Natural Resource (Rural) R” which does not permit industrial uses. Implementing the site’s new official plan designation requires a zoning

change to “Rural Industrial (M3)”. Specifically, subsection 5.12.1 of the zoning by-law lists the M3 zone’s permitted uses as follows: “Class I, II and III Industries; Public Utility, Salvage Yard; Sawmill; Warehouse; Accessory Buildings, Structures and Uses; Office”. The zoning by-law defines a “Class III Industry” as follows:

4.20(c)(iii) Class III Industrial: Describes large scale industries with substantial variations in industrial processes, shift operations, large production volumes, outdoor storage of raw and finished products and therefore emissions e.g. noise vibration, odour, particulate and gaseous discharges or combinations may be anticipated. Examples of heavy industries include refineries, salvage yard, pulp and paper mill etc. The minimum separation distance for this industrial classification from a sensitive land use (e.g. residential use, daycare centre, educational or health facility) shall be 300 m [984 ft] measured from lot line to lot line.

[29] In the interest of clarity, Consbec has requested that the Tribunal amend the zoning by-law amendment to specify that “permitted uses shall include a mobile bulk emulsions explosives plant”.

[30] As stated by Mr. Tunnock, the site “complies with all of the requirements of the M3 zone without the need for any variance”. Also, a “Class III industry represents the worst case scenario” and “describes facets of an industry that exceed the characteristics of the proposed industrial use” because “there is a low probability of fugitive emissions and no outdoor storage”. As for the 300-metre minimum separation distance (the most restrictive prescribed by the zoning by-law), Mr. Tunnock’s evidence highlighted that it is superseded by the Explosives Regulatory Division of Natural Resources Canada’s prescribed setbacks from explosives facilities, the most restrictive of which is 920 metres to inhabited buildings. According to Mr. Tunnock, the proposed plant exceeds this standard, as well as the one-kilometre “potential influence area” under the Ontario Ministry of the Environment, Conservation and Parks’ D-6 guideline. As mentioned above, the nearest sensitive use is more than a kilometre from the proposed facility.

[31] Also, as Mr. Tunnock pointed out, subsection 3.7.4.2d) of the Township’s Official

Plan provides that industrial uses are subject to site plan control, illustrating the details of the proposed development “notably to reinforce the setbacks from property lines, parking, shipping and receiving, off-site traffic improvements if necessary”, and so on.

[32] As for the consent application, Mr. Tunnock testified that his positive evaluation took into account the relevant criteria under subsection 51(24) of the Act.

(a) No Cogent Land Use Evidence Supporting Appeals

[33] In addition to his own testimony, Mr. Koskiniemi called six witnesses in support of his appeals. The first was Ms. McFarling who appeared under summons in her capacity as a Sudbury District planner with the Province’s Ministry of Natural Resources and Forestry. Ms. McFarling is not a professional land use planner and her testimony revealed no expert or even specific knowledge of this matter.

[34] The second was Mr. Macdonald, a former member of the Township council who voted against the zoning by-law amendment, and failed to convince his colleagues to hold a referendum on the matter.

[35] Mr. Koskiniemi’s third witness, Mr. Stokes, highlighted his concerns relating to transportation, including the proposed development’s impact on road access and Highway 17, which I address below.

[36] During her testimony, Ms. Koskiniemi (the Appellant’s spouse) raised concerns about a lack of notification regarding the Ministry of Municipal Affairs and Housing’s approval of Official Plan Amendment No. 3. However, the March 24, 2016 sworn declaration (Exhibit 1, Tab 25, Page 312) of Matt Alexander, a planner with the Ministry of Municipal Affairs and Housing, attests that notice was indeed given, as required under subsection 17(35) of the Act. With Ms. Koskiniemi disputing that fact, the Tribunal notes that subsection 17(28) of the Act provides that a “sworn declaration of an employee of the municipality or of the approval authority that notice was given as

required by subsection (23) or (35) [...] is conclusive evidence of the facts stated in it”.

[37] Ms. Mathieu testified concerning her interest in her sister’s (Ms. Koskiniemi) property. So did Mr. Bélanger (Ms. Koskiniemi’s brother) who wants to build on his sister’s property but was concerned about the difficulties that she encountered in that regard. He was also worried about road access.

[38] Participants at the hearing expressed various concerns. Ms. St. Pierre’s related to the potential impact of the proposed plant on outdoor activities such as hunting and horseback riding.

[39] For his part, Mr. Ayotte stated that the proposed facility would not be “an economic driver”, would not provide any real benefit to the area, nor would it help increase the Township’s population. (According to Statistics Canada’s 2016 census, the Township’s population was 342.)

[40] Mr. Wyszynski, who owns property in the area, testified that the area has always been only accessible by private road. He welcomed the Township’s decision to update the site’s zoning to reflect its official plan designation.

[41] Ms. Vataja expressed opposition to the proposed plant, concerned that the only direction for the Township to grow is west, and that the location of the proposed plant would make it impossible for that to happen. She was also concerned that if the proposed plant were to close in the future, Consbec would still own the land and could apply for a rezoning.

(b) No Change to Road Access

[42] On the consent application and access of area residents to the private road (the “access road”, as defined in the *Road Access Act*), it was Mr. Tunnock’s evidence that (1) the “*Road Access Act* will continue to apply since there has been no blockage of the

road in the past from its use as an access road”, and (2) there “is no intent by Consbec to apply to the courts for closure of the road”, a statement confirmed by the testimony of Mr. Walker, Consbec’s vice president. Ms. Swan concurred with Mr. Tunnock’s assessment.

[43] Based on the evidence in these proceedings, I find that there will be no change to road access.

(c) Apprehension Not a Basis for Land Use Planning

[44] Mr. Koskiniemi’s appeal of the zoning by-law amendment asserts that the proposed development “will devalue the present homes and land”; however, he submitted no credible evidence in support of his assertion. Regardless, property value is usually not a legitimate land use planning consideration for the Tribunal. Also, apprehension is not a basis for land use planning.

[45] As for Mr. Koskiniemi’s concerns regarding highway access to the proposed development, Ms. Swan’s evidence highlighted that the “Short Street” access would only be used during construction until the new access, farther east, becomes operational, with sightlines exceeding 1.5 kilometres in both directions. According to Ms. Swan, the results of a traffic impact study for the proposed development also showed that “the site access with Highway 17 is anticipated to operate at excellent overall levels of service”.

[46] Mr. Koskiniemi provided no evidence justifying his assertion that Consbec is “trying to ensure that we would not be able to build on our property”. Instead, Mr. Tunnock’s evidence offered another reason for limited residential development in the area: Mr. Koskiniemi’s cottage and surrounding lands “fall within the Natural Resource Area of the Official Plan where residential development is not permitted except on a lot of record with frontage on a public road”.

[47] As the company's vice president, Mr. Walker's testimony highlighted the importance of the proposed plant to Consbec, a large family-owned mining and construction firm serving the region's mining, quarrying, and construction industries. According to Mr. Walker, Consbec's site selection process was based on four key criteria: "highway access, railway access, power (electricity), and size of the property". The result was that Consbec found the site to be the most suitable property for the proposed development.

4. Proposed Development Represents Appropriate Land Use Planning

[48] In these proceedings, Mr. Koskiniemi offered, on the one hand, no cogent land use evidence on which the Tribunal could rely in support of his appeals. On the other hand, Mr. Tunnock's and Ms. Swan's land use planning evidence was both complementary and conclusive.

[49] Taking into account the municipal council's decision and the information it considered in making that decision, I am satisfied, based on the evidence, that the proposed zoning by-law amendment has regard to matters of Provincial interest, is consistent with the Provincial Policy Statement, conforms with the Growth Plan for Northern Ontario, conforms with the Township's Official Plan because it implements the Rural Industrial designation of Official Plan Amendment No. 3, and represents good land use planning.

[50] As for the consent application, I am also satisfied, based on the evidence, that a plan of subdivision of the land is not necessary for the proper and orderly development of the municipality, that it has adequate regard for the criteria found at s. 51(24) of the Act, and is in the public interest.

D. ORDER

[51] The Tribunal allows the appeal of By-law No. 2013-35 in part, and amends the

zoning by-law amendment by inserting the following before the period at the end of clause 1: “, and that on the lands described above the permitted uses shall include a mobile bulk emulsions explosives plant”. By-law No. 2013-35 is approved, as amended, in accordance with Attachment 1 to this Order.

[52] The Tribunal dismisses the appeal concerning the consent application, and grants provisional consent subject to the Township’s standard conditions as follows:

1. (a) An original executed Transfer/Deed of Land form, a duplicate original, one photocopy and one digital copy for the Township’s records shall be submitted to the Clerk of the Township and shall include a Schedule to the Transfer/Deed of Land form on which is set out the entire legal description of the parcel(s) in question. This Schedule must also contain the names of parties as indicated on page 1 of the Transfer/Deed of Land form; and

(b) A reference plan of survey, which bears the Land Registry Office registration number and signature as evidence of its deposit therein, illustrating the parcel(s) to which the consent approval relates; or a copy of the instrument for this transaction upon which an Order from the local Land Registrar appears, exempting this transaction from the requirement to provide a reference plan or survey under Section 149(3) of the *Land Titles Act* or subsection 74(2) of the *Registry Act* or a letter to that effect from the local Land Registrar.
2. That the draft reference plan of survey be submitted to the Township.
3. That the payment of the balance of any outstanding taxes, as of the date of the certification of the Transfer/Deed with respect to the property that is

subject to the application shall be made to the Treasurer of the Township.

“Michel Bellemare”

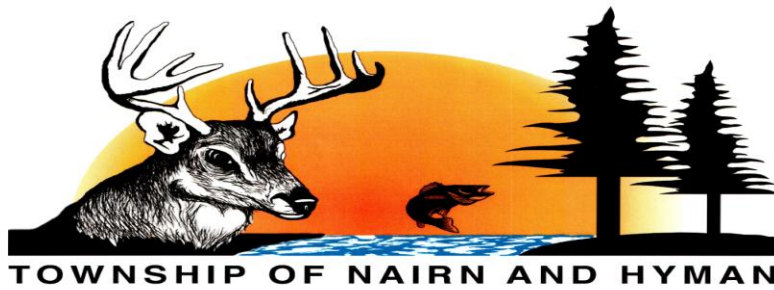
MICHEL BELLEMARE
MEMBER

If there is an attachment referred to in this document,
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Local Planning Appeal Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario

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BY-LAW NO. 2013-35

BEING A BY-LAW TO AMEND BY-LAW NO. 2013-6, AS AMENDED

WHEREAS pursuant to the provisions of the Planning Act, R.S.O. 1990, Section 34, the Council of a Municipality may enact by-laws regulating the use of lands and the erection of buildings and structures thereon;

AND WHEREAS the Corporation of the Township of Nairn and Hyman wishes to rezone lands west of Nairn Centre to permit a bulk emulsions explosives plant;

NOW THEREFORE, the Council of the Corporation of the Township of Nairn and Hyman enacts as follows:

1. That Schedule 'A2' to By-law No. 2013-5 is amended by changing the zoning of certain lands, Part of Lot 7 & 8, Concession 3, and Parts 1 and 3 of Plan 53R4195 in the Geographic Township of Nairn, in the Township of Nairn and Hyman from the Natural Resource – Rural (R) and Crown Land (R) Zone to **Rural Industrial (M3) Zone**, and that on the lands described above the permitted uses shall include a **Mobile bulk emulsions explosives plant**.
2. That the zone boundaries of the **Rural Industrial (M3) Zone** are shown on Schedule "A" to this by-law which zone boundaries and map are hereby declared to form part of this by-law;
3. That Section 2 – Definitions is amended by adding the following new definition:

"Mobile bulk emulsions explosives plant

An industrial facility and related accessory uses for the production of emulsions explosives in accordance with the requirements of the Explosives Regulatory Division of Natural Resources Canada and the Explosives Act and Regulations."
4. That all other applicable provisions of By-law No. 2013-6 shall continue to apply.

Read a first and second time this 7th day of October, 2013.

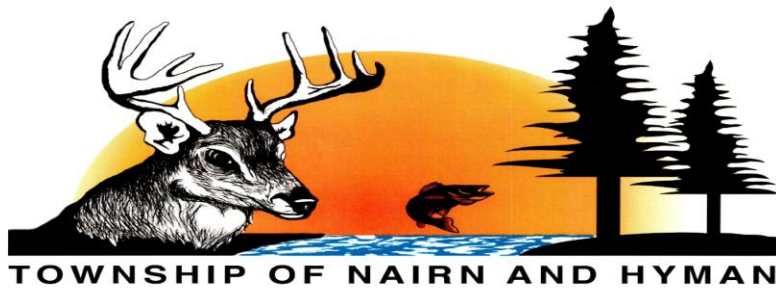
Read a third time and passed in open Council this 7th day of October, 2013.

(Original Signature on File)

Mayor

(Original Signature on File)

Clerk



This is Schedule 'A' to By-law No. 2013-5 passed this 7th day of October, 2013.

