

Niagara Escarpment Hearing Office
Bureau des audiences sur
l'escarpement du Niagara



ISSUE DATE: June 30, 2020

CASE NO.:

15-176

PROCEEDING COMMENCED UNDER section 25(5.1) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2

Appellant:	See Appendix 1 – Appellant List
Respondent:	Niagara Escarpment Commission
Subject of appeal:	Refusal of a Development Permit Application to reconstruct 26/27 Sideroad from seasonal to year round open road
Reference No.:	S/T/2013-2014/9152
Property Address/Description:	Lots 25 to 31, Concession 10 & 11
Municipality:	Township of Clearview
Upper Tier:	County of Simcoe
NEHO Case No.:	15-176
NEHO Case Name:	Urbaniak v. Ontario (Niagara Escarpment Commission)

APPEARANCES:

Parties

Counsel/Representative+

Melksham Holdings Ltd.

Richard Young+

Walker Aggregates Inc.

Wayne Fairbrother

Township of Clearview

Harold Elston

Niagara Escarpment Commission

Demetrius Kappos and Nancy Mott+

Blue Mountain Watershed Trust
Foundation

Sarah Powell

Wendy Franks and David
Stevenson

David R. Donnelly and Morgan Fletcher

HEARD:
ADJUDICATOR:

In writing
Maureen Helt, Hearing Officer

PROCEDURAL ORDER

BACKGROUND

[1] By way of background, the Township of Clearview (“Township”) submitted Development Permit Application S/T/2013-2014/9152 (“Development Permit Application”) to the Niagara Escarpment Commission (“NEC”) on January 31, 2014, seeking permission to reconstruct 26/27 Sideroad from the 10th Concession westerly to Grey County Road 31. The proposed works include converting the eastern portion of 26/27 Sideroad, which is currently a seasonal road, to a year-round, open road, overall within the road corridor, improving the vertical alignment, improving the road base, clearing and grubbing, and controlling drainage through properly designed road side ditches (the “Project”). The Project was proposed to occur on lands designated by the Niagara Escarpment Plan (“NEP”) as Escarpment Natural, Escarpment Protection and Escarpment Rural areas, located in the Township within the Region of Simcoe.

[2] On November 27, 2015, the NEC refused the Development Permit Application.

[3] Between December 8 and December 11, 2015, Harry and Eleonore Urbaniak (the “Urbaniaks”), Melksham Holdings Ltd. (“Melksham Holdings”), Allan Fisher, the Township and Walker Aggregates Inc. (“Walker Aggregates”) appealed the refusal to the Niagara Escarpment Hearing Office (“NEHO”) under s. 25(5.1) of the *Niagara Escarpment Planning and Development Act* (“NEPDA”).

[4] Blue Mountain Watershed Trust Foundation (“Watershed Trust”), Wendy Franks and David Stevenson were all granted Party status.

[5] The Township advised the NEHO and the parties that it would be seeking a Niagara Escarpment Plan Amendment (“Plan Amendment”) related to the Development

Permit Application that is the subject of these appeals. As such, the appeals before the NEHO were held in abeyance pending the outcome of the Township's Plan Amendment application.

[6] On February 6, 2018, the Township made an application to amend the NEP and set out specific proposed amendments. In 2018 and 2019, the NEHO required the parties to present status updates with respect to the application for the Plan Amendment.

[7] By way of email, dated February 4, 2020, the NEC wrote to the NEHO advising that it had determined that the proposed Plan Amendment will require recirculation for comments on the basis of the Township's recently proposed changes to wording. The NEC also advised that after recirculation, the NEC staff summary report would need to be finalized and go before the NEC after which the proposed Plan Amendment may or may not be referred to the NEHO. The NEC suggested a pre-hearing continuation in the fall of 2020, by which time it will have been determined whether to refer the Plan Amendment to the NEHO. If the Plan Amendment is referred to the NEHO, it could be consolidated with the ongoing appeals of the related Development Permit Application.

Request for Directions

[8] A case conference was held on March 27, 2020 wherein the Township requested that the NEHO direct the NEC to appoint a Hearing Officer to consider the Township's application to amend the NEP. The Township also requested that the appeals of the Township's Development Permit Application be heard at the same time as the Hearing Officer considers the Township's requested amendment to the NEP. Arising from this request is the question of the NEHO's jurisdiction to direct the NEC to appoint a Hearing Officer.

[9] The NEHO asked the parties to file written submissions with respect to the above requests made by the Township. This Procedural Order sets out the NEHO's findings based on the submissions of the parties.

RESULT

[10] For the reasons set out below, the NEHO finds that it has no authority to direct the NEC to appoint a hearing officer. The NEHO also finds that, on consent of all the parties, should the matter of the proposed Plan Amendment be referred to the NEHO in September 2020, a pre-hearing conference to set procedural directions will be scheduled in early October 2020 for both the proposed Plan Amendment referral and the appeals of the Development Permit Application.

ANALYSIS

[11] As noted by the NEC in its submissions, the NEC has jurisdiction under s. 10 of NEPDA to process Plan Amendment applications. In the NEC's submission, the issue is one of scheduling with respect to the review of the Plan Amendment application by the NEC and the Development Permit appeals.

[12] The Township submits that the proceedings with respect to the Development Permit appeals and the consideration of the proposed Plan Amendment be heard together on the basis that the Tribunal has authority to do so under its Rule 173 (b) of the Environmental Review Tribunal *Rules of Practice* ("Rules") that govern NEHO hearings, and further, that the Development Permit appeals and the consideration of representations on the proposed Plan Amendment involve the same or similar questions of fact, law or policy.

[13] The Township also relies on s. 10 (3) of NEPDA, stating that the language of that section is mandatory, and that the NEC must now appoint one or more Hearing Officers to conduct a hearing to receive representations respecting the Plan Amendment.

[14] In addition, the Township states that to properly determine the Development Permit appeals, it will be necessary for the Hearing Officer to consider the Development Permit in the context of the policy regime established by the requested amendment to the NEP.

[15] The NEC, in its submission, consents to a joint hearing involving both the existing Development Permit appeals and the Plan Amendment (should the Plan Amendment be referred to the NEHO) and further requests that both matters be heard together in the same proceeding and that the evidence admitted be attributed to both.

[16] The NEC states that it expects the NEC Staff Report regarding the Plan Amendment application to be presented to the NEC in September 2020, at which time the NEC may refer the application to the NEHO. The NEC requests a pre-hearing conference be scheduled in early October 2020 to allow sufficient time for the receipt and assessment of informed comments including from the Public Interest Advisory Committee with respect to the proposed Plan Amendment.

[17] Wendy Franks and David Stevenson (the “Stevensons”) support having the Development Permit appeals heard at a pre-hearing conference in the first week of October but oppose the referral order sought by the Township submitting that it is premature to consent to a joint hearing. The Stevensons submit that the Township is seeking this relief in the wrong forum. They view the Township’s request as being in the order of a mandamus to compel referral and beyond the NEHO’s jurisdiction.

[18] Walker Aggregates also consents to the Township’s request for a joint hearing of the Development Permit appeals and Planning Amendment application and further supports the NEC’s request for a further pre-hearing conference in October 2020 for the purpose of scheduling a hearing.

[19] The Watershed Trust submits that the NEHO, as a creature of statute, is confined to the powers conferred on it by its constitute legislation. As such, the

Watershed Trust argues that the proposed Plan Amendment is properly before the NEC and remains before the NEC until it renders a decision on the Plan Amendment application. The Watershed Trust submits that the NEHO does not have the authority to assume the jurisdiction to hear the Proposed Plan Amendment.

[20] In reply submissions, the Township states that it no longer seeks direction that a Hearing Officer be appointed under s. 10(3) of the NEPDA, but requests that the NEHO acknowledge the NEC's timetable commitment as set out in its submission. The Township is also in favour of the parties providing a confirmed Issues List for the purpose of the pre-hearing conference in October 2020.

Findings

[21] As noted above, the Township no longer seeks direction that a Hearing Officer be appointed under s. 10(3). Further, on consent of all the parties, should the matter of the Plan Amendment application be referred to the NEHO, the NEHO will schedule a pre-hearing conference in October 2020. The pre-hearing conference will address the scheduling of both the appeals of the Development Permit and the Plan Amendment matters together in the same proceeding. The Hearing Officer finds that should the Plan Amendment application be referred to the NEHO, the Development Permit and the Plan Amendment matters are to be heard together and the evidence admitted is to be attributed to both appeals. The Hearing Officer finds that it is appropriate and helpful that an Issues List be confirmed at least one week before the scheduled pre-hearing conference.

[22] The appeals of the Development Permit Application will continue to be held in abeyance until September 30, 2020 or until it is confirmed whether the Plan Amendment application will be referred to the NEHO.

ORDER

[23] Based on the above findings, the NEHO orders:

1. Should the NEC refer the Plan Amendment application to the NEHO, the NEHO will schedule a pre-hearing conference in October 2020; at which time the appeals regarding the Plan Amendment and the Development Permit are to be heard together.
2. The NEC is directed to confirm with the NEHO immediately once the decision on whether to refer the Plan Amendment application is made, whereupon the Case Coordinator will arrange with the parties and participants a date for a pre-hearing conference.
3. The parties are to provide an Issues List at least one week before the scheduled pre-hearing conference that addresses issues for both matters.

Procedural Directions Ordered

“Maureen Helt”

MAUREEN HELT
HEARING OFFICER

Appendix 1 – Appellant List

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

**Niagara Escarpment Hearing Office
Environmental Review Tribunal**

A constituent tribunal of Tribunals Ontario - Environment and Land Division
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

APPENDIX 1**Appellant List**

Appellant Name	File No.
Eleonore Urbaniak	15-176
Harry Urbaniak	15-177
Richard Young	15-178 (File Closed)
Marilyn Young	15-179 (File Closed)
Melksham Holdings Ltd.	15-180
Alan Sampson	15-181 (File Closed)
Allan Fisher	15-182
Walker Aggregates Inc.	15-183
Township of Clearview	15-184