

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



ISSUE DATE: December 10, 2020

CASE NO.:

20-026

PROCEEDING COMMENCED UNDER sections 25(5.1) and 25(8) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2

| | |
|-------------------------------|--|
| Appellant: | Ron Chyczij |
| Applicant: | Ivanka Bien-Melo |
| Respondent: | Niagara Escarpment Commission |
| Subject of appeal: | Approval of a Development Permit Application to construct a 2 storey with partial rear walk-out, attached garage, decking, installation of a sewage disposal system and driveway |
| Reference No.: | P/R/2018-2019/408 |
| Property Address/Description: | Part lot 28, Concession 5 WHS |
| Municipality: | Town of Caledon |
| Upper Tier: | Regional Municipality of Peel |
| NEHO Case No.: | 20-026 |
| NEHO Case Name: | Chyczij v. Ontario (Niagara Escarpment Commission) |

APPEARANCES:

Parties

Counsel*/Representative

Ron Chyczij Self-represented

Ivanka and Jeff Bien-Melo Self-represented

Niagara Escarpment Commission Ken Hare*

HEARD: December 2, 2020 by video hearing
ADJUDICATOR(S): Laurie Bruce, Hearing Officer
Warren Morris, Hearing Officer

ORDER

BACKGROUND

The Development Application

[1] Ivanka Bien-Melo (“Applicant”) applied to the Niagara Escarpment Commission (“Commission”) for a Development Permit to construct a two-storey single dwelling with partial rear walk-out, attached garage and decking, a sewage disposal system and a driveway on a 0.17-hectare parcel located at 47 Baturyn Street within the Poltawa Country Club property. The Commission approved the Development Permit Application subject to conditions.

The Appeal

[2] Ron Chyczij, a neighbour of Ms. Bien-Melo, appealed the Development Permit to the Niagara Escarpment Hearing Office (“NEHO”) citing 19 issues.

The Previous Pre-hearing Conference

[3] Following the previous pre-hearing conference (“PHC”), the NEHO issued an order which removed five of the Appellant’s issues from a Preliminary Issues List (prepared by NEHO, reflective of Mr. Chyczij’s appeal). The 14 remaining issues form the Revised Preliminary Issues List, attached as Appendix 1 to this Order.

[4] The NEHO found that these remaining 14 issues, while generally reflecting wording from the Niagara Escarpment Plan, lacked detail in terms of how the objectives and criteria therein were not adequately addressed as alleged by Mr. Chyczij. Mr. Chyczij was therefore directed to provide more specificity. The purpose of setting out issues for a hearing is to clearly focus the dispute on specific questions that the

Parties can address during the hearing through the provision of evidence and submissions to the NEHO. To assist Mr. Chyczij and facilitate the refinement of the Issues List, Ken Hare, counsel for the Commission, subsequently provided Mr. Chyczij with several examples of how issues have been worded in other unrelated NEHO matters.

[5] Further, to assist with the continued refinement of the Issues List, the NEHO directed that disclosure among the Parties of relevant documents occur by November 13, 2020. The Commission advised the NEHO that disclosure occurred on or before this date.

[6] Also, to assist with the refinement of the Issues List, Mr. Chyczij was directed orally during the October 30th PHC and in the written Order dated November 6, 2020 to confirm to the Parties and NEHO that he has retained a consultant(s) who would be able to undertake a technical assessment of the issues that he has raised. This was to be completed by Friday, November 27, 2020. Mr. Chyczij sought and was granted an extension to Monday November 30, 2020 despite objections from the Applicant.

- [7] The materials provided by Mr. Chyczij on November 30, 2020 included:
- a. A list of five consultants which he indicated he was consulting with but with no indication any of them had been retained.
 - b. A revised and expanded Issues List that raised new issues beyond those originally included in his appeal. This new Issues List, while referencing parts of the Niagara Escarpment Plan, did not provide refinement to the original Issues List. Further, it was not evident how the new issues on the revised list were related to the scoped issues set out in his appeal.

The December 2, 2020 Pre-hearing Conference

[8] The NEHO convened a PHC continuation on December 2, 2020 during which the NEHO advised Mr. Chyczij that he failed to comply with the October 30, 2020 oral order and November 6, 2020 written order.

[9] Mr. Chyczij submitted that he had difficulty reaching potential consultants. The NEHO finds that Mr. Chyczij has had several months to retain any experts he wished to retain to support his case on the alleged technical issues.

[10] Mr. Chyczij stated that the new issues were consistent with the memo provided by Mr. Hare and it was reasonable for him to expand on the issues list once seeing the staff report. Mr. Hare submitted that what he provided to Mr. Chyczij was clearly identified as examples.

[11] The NEHO advised Mr. Chyczij that additional issues beyond those raised in his appeal would not be permitted.

[12] The NEHO has a number of remedies available where a party has not complied with an order. These were reviewed with the Parties during this PHC.

[13] Rule 16 of the Environmental Review Tribunal's *Rules of Practice and Practice Directions* ("Rules"), which apply to hearings before the NEHO, states:

Non-compliance

16. If a Party or Participant
 (a) fails to comply with these Rules, an Order or a written request from the Tribunal, or an undertaking;

...

the Tribunal may:

- (a) deem the Party or Participant to have accepted all of the material facts set out in materials provided by another Party or Participant;

- (b) determine that the Party or Participant is not entitled to present evidence or make submissions;
- (c) proceed in the Party's or Participant's absence without any further notice to him or her;
- (d) decide the matter based solely on the materials before it;
- (e) dismiss the proceeding; or
- (f) make any other order it considers appropriate.

[14] In addition, s. 25(8.1) a of the *Niagara Escarpment Planning and Development Act* (the "NEPDA") provides that:

(8.1) Despite subsections (8) and (10), an officer appointed under subsection (8) may refuse to conduct or to continue a hearing if,

(a) in the opinion of the officer, the appeal does not disclose a planning justification for the appeal, is not in the public interest, is without merit, is frivolous or vexatious, or is made only for the purpose of delay;

...

(c) the person who appealed the decision has not responded to a request by the officer for further information within the time specified by the officer.

[15] The NEHO explained to Mr. Chyczij that the onus is on him to bring evidence and make submissions in support of his position that the Commission erred in granting of the Development Permit. Further, procedural fairness requires that he disclose the basis for his case and the specific issues he intends to bring expert evidence on. The NEHO will consider the remedies set out under Rule 16 and the provisions of s. 25(8.1) of *NEPDA*, referenced above, if there continues to be non-compliance by Mr. Chyczij.

[16] The NEHO directed Mr. Chyczij, by **Thursday, December 17, 2020**, to provide the NEHO and the other Parties with written confirmation identifying any expert witnesses that he will rely on. The expert witness(es) shall provide a letter on the expert's letterhead confirming retention and will include a list of the specific issues that the expert will address at the merits hearing. The issues will be limited to those listed in Appendix 1 of this Order but should provide more specificity, as had previously been set out in paragraph 11 of the Order issued by the NEHO on November 6, 2020.

[17] The NEHO directed that the matter will proceed to a hearing set for three days on **January 25, 26 and 27, 2021**.

[18] Once Mr. Chyczij has identified how many experts he intends to rely on, the number of days for this hearing may be reduced.

[19] The Parties shall exchange and file a list of witnesses and a list of all documents that the Parties intend to rely on at the hearing in accordance with the schedule below. The list of witnesses shall include all witnesses that each party intends to call (recognizing that expert witnesses will already have been identified by Mr. Chyczij), a witness statement for each witness, a *curriculum vitae* for each expert witness and any reports an expert witness intends to rely on. A witness statement should consist of one or more paragraphs stating what the witness plans to say at the hearing. If a Party intends to call an expert witness to give opinion evidence, the witness must sign an Acknowledgement of Expert's Duty form (see Form 5, Appendix F of the Rules and Rule 170) and the Party must file this with the NEHO. The dates for exchange between parties and filing of these materials are as follows:

- a. January 12, 2021 filing by Appellant;
- b. January 19, 2021 filing by the Commission and Applicant; and
- c. January 22, 2021 reply filing, if any, by Appellant.

ORDER

[20] The Hearing Officers order that a three-day hearing is scheduled to start on **Monday, January 25, 2021 at 10 a.m.** This will be carried out by video hearing, details of which will be provided by the Tribunal's Case Coordinator.

[21] Further, the NEHO orders Mr. Chyczij, by **Thursday, December 17, 2020**, to provide the NEHO and the other Parties with written confirmation identifying any expert witnesses he has retained with confirmation on the expert's letterhead and including a

list of the issues that the expert will address at the merits hearing. The issues are limited to those listed in Appendix 1 of this Order.

[22] The dates for the exchange between parties and filing of materials with NEHO including witness lists, witness statements and documents to be relied upon at the hearing are as follows:

- a. **January 12, 2021** filing by Appellant;
- b. **January 19, 2021** filing by the Commission and Applicant; and
- c. **January 22, 2021** reply filing, if any, by Appellant.

*Procedural Directions Ordered
Hearing Scheduled*

“Laurie Bruce”

LAURIE BRUCE
HEARING OFFICER

“Warren Morris”

WARREN MORRIS
HEARING OFFICER

Appendix 1 – Revised Preliminary Issues List

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

**Niagara Escarpment Hearing Office
Environmental Review Tribunal**

A constituent tribunal of Ontario Land Tribunals

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Revised Preliminary Issues List

1. Failure to adequately consider not only current but also future possibilities pertaining to water seepage, water runoff and other issues.
2. Failure to protect existing vegetation, the natural environment and environmental sustainability over the long term.
3. Failure to protect existing drilled wells.
4. Failure to maintain the identity and traditional character of a MUC.
5. Failure to apply stated development and growth objectives of the NEP regarding a MUC.
6. Failure to consider the visual impact of a development.
7. Failure to protect hydrological features and functions.
8. Failure to establish and/or comply with targets, criteria and recommendations of applicable water, wastewater and storm water master plans, approved watershed planning and/or sub-watershed plan in land use planning.
9. Failure to consider flooding hazards, erosion hazards or other water-related hazards.
10. Failure to identify planning, design and construction practices that will minimize erosion, sedimentation and the introduction of nutrients and pollutants.
11. Failure to impose sediment control devices after construction.
12. Failure to identify vegetation protection zone including an analysis of land use, soil type and slope class.
13. Failure to restrict a sewage system from being closer than 30 m from a key hydrological feature.
14. Failure to avoid changes to natural drainage.