

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



ISSUE DATE: February 24, 2021

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

Slawko Sywanicz

Niagara Escarpment Commission

Ken Hare*

HEARD:

January 25, 2021 by video hearing

ADJUDICATOR(S):

Laurie Bruce, Hearing Officer

Warren Morris, Hearing Officer

REPORT

[1] This report addresses an appeal of the decision of the Niagara Escarpment Commission (the “Commission”) on an application for a development permit under s. 25 of the *Niagara Escarpment Planning and Development Act* (the “Act”). Ivanka Bien-Melo (the “Applicant”) applied to the Commission for a Development Permit to construct a dwelling. The Commission approved the Development Permit Application subject to conditions. Ron Chyczij (the “Appellant”), a neighbour of the Applicant, appealed the Development Permit to the Niagara Escarpment Hearing Office (“Hearing Office”).

[2] The Hearing Office confirms that this decision is correct and should not be changed.

REASONS

Background

[3] On January 28, 2019, the Applicant applied to the Commission for a Development Permit (the “Original Conditional Approval”) 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 Poltava Country Club (“Poltawa”)¹ owned property. From 1949 to 1985, development control of Poltava was handled by the local municipality. In 1985, with the creation of the Niagara Escarpment Plan (the “Plan”), Poltava came under the development control of the Commission.

[4] In a decision dated May 29, 2020, the Commission conditionally approved the application.

¹ Poltava purchased the land in 1948 for the benefit of its members. Since then, Poltava has registered a plan of survey setting out 112 residential “lots” on the parcel. There are currently 70 residences on the Poltava parcel. “Lot owners”, or member licensees, are required to sign an indenture contract and a license agreement with Poltava.

[5] On June 28, 2020, Mr. Chyczij, a neighbour and member of the Poltawa, appealed the Commission's conditional approval. The appeal sets out a history of the various public bodies that have had authority to regulate Poltawa development and commentary on development planning, none of which directly relates to the issues to be decided at this hearing. The appeal further lists 18 bullet-point issues followed by a paragraph asserting that the Commission acted contrary to the *Act* for a total of 19 issues.

[6] During the pre-hearing process, the Hearing Office sought (through oral/written Orders dated October 9th and November 6th, 2020) more detail from the Appellant regarding the 19 issues. The clarification was required since the list of issues appeared to reflect the general wording of the Plan but did not provide enough information to allow the other parties to meaningfully respond. By further order dated December 10th, 2020, the Hearing Office reduced the Appellant's issue list to 14 items. Further, the order required the Appellant to provide written confirmation identifying any expert witnesses he had retained with confirmation as to which specific issues on the issues list that they would be addressing.

[7] The week prior to the hearing, the Hearing Office was informed that the parties had agreed to a hearing plan that included six witnesses over two days. In the days prior to the hearing, a revised hearing plan was submitted by the parties indicating that the issues list was reduced to five issues, and that only two witnesses would be testifying. At the Hearing, the Appellant agreed to withdraw a further issue, leaving the issue list at four items.

[8] At the hearing, there were two witnesses: i) the Appellant, Mr. Chyczij; and ii) Kim Peters, a planner with the Commission who was qualified as an expert in land use and environmental planning. There were also two participants who made presentations: i) Dalerose Country Homes, represented by Mary Lawson, a building contractor firm that

assisted the Applicant with the design and approval process for the proposed home; and ii) Walter Mudyk, representing the Poltava Country Club.

Discussion, Analysis and Findings

Issues

[9] The issues before the Hearing Office are:

Issue No. 1: Whether the proposed development maintains the identity and traditional character of a Minor Urban Centre (“MUC”);

Issue No. 2: Whether the stated development and growth objectives of the Plan are achieved for a MUC;

Issue No. 3: Whether hydrological features and functions are protected from a sewage system in accordance with the provisions of 2.6.1 and 2.6.2 of the Plan; and

Issue No. 4: Whether the Commission appropriately exercised its discretion in allowing the placement of a sewage system within 30 metres (“m”) from a key hydrological feature in accordance with provisions 2.6.8 of the Plan.

[10] The Hearing Officers will address each of these issues in turn, taking into consideration the evidence and submissions received.

Evidence and Analysis

[11] During the Appellant’s testimony, Mr. Chyczij presented considerable background in regard to his involvement with Poltava, both as a member and board member. He also described the history of development and planning at Poltava.

Particular efforts were made to emphasize his attempts to remove Poltawa from the Commission's planning authority under the *Act* and bring development standards for Poltawa to local planning regimes such as the Town of Caledon. Mr. Chyczij stated that it was premature for the Commission to make a decision on this development application since his evidence showed that legislative changes will remove developments at Poltawa from the Commission's Development Permit process. Nonetheless, Mr. Chyczij acknowledged that such changes have not been implemented at this time. According to s. 24(1) of the *Act*, currently, a Development Permit is required since Poltawa is within the Area of Development Control identified by Ontario Regulations 826/90.

[12] Given that the legislative changes that the Appellant speaks of have not occurred, nor is there any evidence that such changes will occur imminently, if at all, the Hearing Office rejects the Appellant's assertion that the Commission should not exercise its mandate by issuing this Development Permit.

Issue No. 1: Whether the proposed development maintains the identity and traditional character of a Minor Urban Centre ("MUC")

[13] Poltawa has been designated in the Plan as a MUC. The objectives of an MUC are listed in Part 1.6.1 of the Plan. The designation identifies rural settlements, villages and hamlets throughout the escarpment area. The Appellant specifically cites the MUC objective set out in Part 1.6.1.5:

5. To ensure that new development is compatible with the identity and traditional character of Minor Urban Centres.

[14] Mr. Chyczij described the character of the neighbourhood and stated that the proposed development was not compatible with the architecture, set back, size and height with the other residences of Poltawa. Mr. Chyczij testified that he believed the Commission relied on the Poltawa's board to assess the project's compatibility with the identity/character of the neighbourhood. He submitted that the Poltawa's board is

bound by rural residential zoning as stated in Article 4.2 of Poltawa's By-laws (Tab K, Exhibit 1), and that the proposed height of the structure of 13.4 m exceeds the Town of Caledon Zoning By-Law's maximum of 10.5 m (page 3 of Tab L, Exhibit 1). During cross-examination by the Commission's counsel, Mr. Chyczij acknowledged that the Hearing Office is not required to apply the zoning by-law.

[15] During her testimony, Ms. Peters clarified that the MUC designation applied not to just the neighbourhood context within Poltawa, but also to Terra Cotta and the areas between the two. Ms. Peters referenced a map that showed a wide variety of properties within the MUC that included small lots within the hamlet of Terra Cotta, as well as large estate lots in the area between Terra Cotta and Poltawa. Ms. Peters acknowledged that the immediate surrounding neighbourhood is a factor in assessing consistency of the identity and character of the project. She testified that she conducted a site visit and sought input from Poltawa. Photographs were shown of the wide variety of homes within Poltawa community. Ms. Peters clarified that the 3,400 square feet in the plans appear larger than actuality since most homes do not include the basements in the square footage calculation. The area of the basement in the proposed build is included in the square footage since it is a walk out basement. She estimated that the square footage without the basement was approximately 2,400 square feet, which is bigger than the immediate neighbours, but smaller than other homes at Poltawa. Ms. Peters confirmed that the proposed structure would have a six-metre set back from the road. Contrary to the testimony of Mr. Chyczij, Ms. Peters testified that there were several other structures in the community situated a similar distance from the road. Ms. Peters concluded that in her opinion, the type, age, style, size and set back of the proposed home was not inconsistent with Part 1.6.1.5 of the Plan.

[16] The Hearing Officers conclude, based on the opinion evidence and submissions of the Commission's expert witness, that the proposed development maintains the identify and traditional character of a MUC.

Issue No. 2: Whether the stated development and growth objectives of the Plan are achieved for a MUC

[17] Mr. Chyczij submitted that the Commission must apply the development and growth objectives for an MUC as set out in the Plan. Specifically, he referred to Part 1.6.1.7 of the Plan which states the following objective:

To ensure that any growth will be in accordance with a municipal official plan and/or secondary plan that is not in conflict with the Niagara Escarpment Plan.

[18] Mr. Chyczij identified the Official Plan land uses by referring to a letter from the Town of Caledon dated March 11, 2019 (Tab T, Exhibit 1). The land use designation identified in the Official Plan was that of *Rural Lands*, which included a single-detached dwelling. Mr. Chyczij also made reference to s. 5.1.1.4 of the Official Plan itself (Tab 2, Exhibit 3) which outlines a number of permitted uses, including a "...single-detached dwelling on an existing lot of record..." (emphasis added). Given that the Letter and Official Plan only permit one dwelling per lot, and that Poltawa consists of one lot, Mr. Chyczij argues that no additional dwellings can be constructed at Poltawa. Mr. Chyczij further cites the Town of Caledon's General Committee Budget Meeting Report dated December 10, 2019 (Tab H, Exhibit 1) and Annual Budget for Fiscal Year 2020 (Tab I, Exhibit 1) to support his claim that the Town of Caledon was intending to initiate an Official Plan and Zoning By-law Amendment that would bring the Poltawa within the development control of the Town.

[19] To address the development and growth concern of the Appellant, Ms. Peters cited Part 1.6.8 of the Plan (Tab 45, Exhibit 4) titled "Development and Growth Objectives". Ms. Peters methodically reviewed the first 10 policies of Part 1.6.8 explaining how the Commission considered and applied each policy to the proposed project. Ms. Peters concluding by confirming that it is her professional opinion that the proposed project conforms with the Plan and the proposed planning framework.

[20] The Hearing Officers reject Mr. Chyczij's argument that it is premature for the Commission to decide on this development application simply because the Town of Caledon is considering future changes affecting Poltawa that may or may not affect the Commission's Development Permit process. NEHO is to consider the regulatory regime as it currently applies in assessing the merits of the appeal and determining whether the NEC's decision to issue the Development Permit would be correct and should not be changed.

[21] The Hearing Officers also reject the Appellant's argument that only one dwelling is permitted at Poltawa since Poltawa is a single legal parcel/lot of land. There is insufficient evidence submitted by the Appellant to satisfy the Hearing Officers that the lots on the Plan of Survey within Poltawa do not constitute legal lots for building (development and growth) purposes.

[22] The Hearing Officers find that the proposed development is in accordance with the development and growth objectives of the Plan for a MUC.

Issue No. 3: Whether hydrological features and functions are protected from a sewage system in accordance with the provisions of 2.6.1 and 2.6.2 of the Plan

[23] Mr. Chyczij submits that the septic system for the proposed development is improperly located within a key hydrologic feature and does not fall within the exceptions in Part 2.6.2(a) of the Plan.

[24] Relying on a map titled Regulation Screening – Credit Valley Conservation (Tab Y, Exhibit 1), Mr. Chyczij claims that the shaded area looking like “a finger” jutting westward identifies a hydrologic feature covering a substantial portion of the subject property at 47 Batruryn Road, and that the Commission is required to protect the feature. Mr. Chyczij made reference to Part 2.6.1 of the Plan which defines key hydrologic features as, among other things, “...permanent and intermittent streams;...” Part 2.6.2 of the Plan states the following:

Development is not permitted in key hydrologic features with the exception of the following, which may be permitted subject to compliance with all other relevant policies of this Plan:

- a) accessory facilities to a single dwelling outside of a wetland on an existing lot of record, provided that the disturbance is minimal and where possible temporary;

[25] Mr. Chyczij then quoted the definition section of the Plan which defines *accessory facilities* as follows:

Accessory facility: A detached building, structure or other installation that is not used for human habitation, the use of which is naturally and normally incidental, subordinate, and exclusively devoted to the principal use located on the same lot.

[26] Mr. Chyczij then argued that a sewage system is a structure but is not *detached*, and does not meet the definition of *accessory facilities*. Thus Mr. Chyczij concludes that the sewage system is not an exempt structure and therefore should not have been approved.

[27] Conversely, Ms. Peters argued that the septic system does not contravene the Plan for a number of reasons.

[28] Firstly, Ms. Peters argued that it is questionable whether the drainage area in question meets the definition of “key hydrologic feature”. To qualify, the feature would have to be a permanent or intermittent stream. The definition section of the Plan defines *stream* as “a feature having defined bed and banks, through which water flows at least part of the year”. While Ms. Peters acknowledged that the drainage feature appears to have water flow during part of the year, she submitted photographs (Tab 15, Exhibit 4) that showed various images of the drainage feature, some of which showed the water dispersing on a sodded area having no defined bed or bank.

[29] Ms. Peters stated that in the abundance of caution, the Commission treated the drainage course as if it were a key hydrologic feature. Ms. Peters testified that the septic system did not physically overlap with the feature. In her expert opinion, there was no structure within the feature.

[30] She further testified that even if part of the septic field encroached on the feature, it would be exempt as an accessory facility as defined in the Plan. While Ms. Peters acknowledged that a septic system is generally connected to the structure it serves, it can be relocated independent from the dwelling to another location on a lot.

[31] Finally, Ms. Peters took issue with the map used by the Appellant that appeared to show a significant area of the property shaded as being within a hydrologic feature. Ms. Peters stated that the shaded area does not identify a key hydrologic feature but in fact shows the area in which Credit Valley Conservation (“CVC”) has regulatory authority. Given the CVC’s regulatory authority, Ms. Peters testified that the Commission contacted the CVC and received their input and approval.

[32] Based on the expert evidence from the Commission’s witness, the Hearing Officers find that no part of the septic system encroached on the alleged key hydrologic feature.

[33] The photographic evidence shows the alleged *key hydrologic feature* as having segments with no defined bed or bank. The Hearing Officers are therefore of the view that the drainage feature does not meet the definition of “key hydrologic feature”. As such, the Hearing Officers find that Issue No. 3 is moot and is not determinative of whether the sewage systems are exempt under Part 2.6.2 of the Plan.

Issue No. 4: Whether the Commission appropriately exercised its discretion in allowing the placement of a sewage system within 30 m from a key hydrological feature in accordance with provisions 2.6.8 of the Plan.

[34] Part 2.6.8 of the Plan states:

Sewage Systems

8. No sewage system shall be allowed closer than 30 metres from a key hydrologic feature. Where the setback cannot be achieved on the *existing lot of record*, the distance may be varied depending upon the sensitivity of the feature, to the satisfaction of the *implementing authority*.

[35] For the proposed development, the sewage system is located approximately 15.1 m from a drainage feature.

[36] The implementing authority referred to in Part 2.6.8 of the Plan is both the Commission and the Ministry of the Environment, Conservation and Parks (the “MECP”). Ms. Peters engaged the MECP in preliminary consultations regarding the site plan and the location of the septic system. The Commission requires correspondence from the MECP confirming that an Environmental Compliance Approval for the septic system approval could be obtained should the Commission proceed to issue a Development Permit (email dated March 12, 2020, Tab 24, Exhibit 4).

[37] In her testimony, Ms. Peters acknowledged that while the proposed location of the septic system does not achieve the 30 m required in the Plan, the Plan also allows for a reduction in setback when the 30 m cannot be achieved. In this case, a 30 m setback could not be achieved. In exercising her discretion to vary the setback, Ms. Peters considered a number of factors, including: i) the quality of the septic system; ii) the sensitivity of the drainage feature; iii) the Ontario Building Code set back requirements; and iv) the Provincial Policy Statement, 2020 (“PPS 2020”). Firstly, Ms. Peters described the proposed septic system (Waterloo Biofilter) as a modern superior system that significantly reduces nitrogen and phosphorous compared to conventional systems. She described the drainage feature as not being sensitive, given

the size, the intermittent water flow and the fact that there was no fish/aquatic or other natural habitat in the drainage area. In considering whether the 15.1 m was sufficient setback, Ms. Peters referred to the Ontario Building Code, which has a minimum setback of 15 m.

[38] Finally, Ms. Peters referred to the PPS 2020, under the *Planning Act* (the “Policy”), specifically Policy Section 2.2.2 which states:

Development and site alteration shall be restricted in or near sensitive surface water features and sensitive ground water features such that these features and their related hydrologic functions will be protected, improved or restored.

[39] It was Ms. Peters’ opinion that the drainage feature did not meet the definition of “Sensitive” as set out in the Policy, since the area was not “...particularly susceptible to impacts from activities or events including, but not limited to, water withdrawals, and additions of pollutants”.² Since the development is for a residential home, and there are no water withdrawals or discharges (other than a high-performance sewage system), it is Ms. Peters’ opinion that the risks to the drainage area are very low.

[40] Part 2.6.8 of the Plan clearly states that for the 30 m setback, “...the distance may be varied...” (emphasis added), which provides the opportunity to apply discretion. Discretion must be exercised reasonably, taking into consideration factors such as the “...sensitivity of the feature...” and “...the satisfaction of the implementing authority”. The Hearing Officers find that the Commission reasonably exercised its discretion by considering relevant factors in the circumstance.

² Exhibit 5, paragraph 185; Witness Statement of Kim Peters.

Conclusion

[41] The Appellant failed to provide compelling evidence that the Commission's decision to issue the Development Permit was not correct.

[42] Conversely, the Commission submitted substantial expert evidence which demonstrated that their conditional approval of the Development Permit was correct and that Mr. Chyczji's appeal should be dismissed.

[43] Accordingly, the Hearing Officers' finding are as follows:

1. The Development Permit approval is consistent with the identity and character of a MUC as set out in the Plan;
2. The Development Permit achieves the stated development and growth objectives for a MUC as set out in the Plan;
3. The hydrologic features and functions are protected from the sewage systems in accordance with the provisions of Part 2.6.1 and 2.6.2 of the Plan; and
4. In this case, the Commission appropriately exercised its discretion in allowing the placement of a sewage system within 30 m from a drainage feature in accordance with Part 2.6.8 of the Plan.

DECISION

[44] It is the Hearing Officers' opinion that the Commission's decision to issue development permit P/R/2018-2019/408 with the conditions therein was correct and should not be changed. The Commission's decision is confirmed pursuant to s. 25(12) of the *Niagara Escarpment Planning and Development Act*. The appeal is dismissed.

*Appeal Dismissed
Niagara Escarpment Commission Decision Confirmed*

“Laurie Bruce”

LAURIE BRUCE
HEARING OFFICER

“Warren Morris”

WARREN MORRIS
HEARING OFFICER

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**Niagara Escarpment Hearing Office
Environmental Review Tribunal**

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