

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



ISSUE DATE: May 18, 2021

CASE NO.:

15-176
20-036

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: 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)

PROCEEDING COMMENCED UNDER section 10(3) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2

Applicant: Township of Clearview
Subject of hearing: Proposed Amendment to the Niagara Escarpment Plan to add policy exceptions to permit infrastructure improvements on Sideroad 26/27

Reference No.: Proposed Niagara Escarpment Plan Amendment No. PS 215 18

Municipality: Township of Clearview
Upper Tier: County of Simcoe
NEHO Case No.: 20-036
NEHO Case Name: Plan Amendment No. PS 215 18 (Re)

APPEARANCES:**Parties****Counsel**

Township of Clearview

Harold Elston, Sarah Hahn and
Carly Emmett (student-at-law)

Niagara Escarpment Commission

Demetrius Kappos and
Andrew Bonnell (student-at-law)

Walker Aggregates Inc.

Kim Mullin, Monica Poremba and Mary Bull

Blue Mountain Watershed Trust
Foundation

Sarah Powell and Robyn Barabash

Wendy Franks and David
Stevenson

David R. Donnelly and Morgan Fletcher

HEARD:
ADJUDICATOR(S):April 28, 2021 by video hearing
Helen Jackson, 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.

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

[3] The persons listed in Appendix 1 appealed the refusal to the Niagara Escarpment Hearing Office (“NEHO”) under s. 25(5.1) and s. 25(8) of the *Niagara Escarpment Planning and Development Act* (“NEPDA”). The NEHO granted party status to the appeals of the refusal of the Development Permit Application to Blue Mountain Watershed Trust Foundation (“Watershed Trust”), and Wendy Franks and David Stevenson (“Franks/Stevenson”). Participant status was granted to Doug Dingeldein, the Clearview Community Coalition, Raymond Mueller, Mark Bell and the Municipality of Grey Highlands; and, presenter status was granted to Allan Fisher, Emelia Franks, Gary Fohr, and Victoria Selby.

[4] 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 Development Permit Application appeals before the NEHO were held in abeyance pending the outcome of the Township’s Plan Amendment application.

[5] A case management conference (“CMC”) was convened by the NEHO on March 27, 2020 and attended by the parties to the appeals of the NEC’s refusal of the Development Permit Application. Arising from the CMC, the NEHO issued a Procedural Order on June 30, 2020, which directed that should the Plan Amendment be referred by the NEC to the NEHO, then the hearing for the referral of the Plan Amendment application and the appeals of the refusal of the Township’s Development Permit Application should be heard at the same, and the evidence admitted is to be attributed to both matters.

[6] On October 29, 2020, the NEC held a Commission meeting at which time a Staff Summary Position Report was presented regarding the Plan Amendment application.

The recommendation of the staff was that because there were written objections to the proposed Plan Amendment, the NEC must ask the Environmental Review Tribunal to appoint one or more Hearing Officers to hold a public hearing pursuant to s. 10(3) of the *NEPDA*.

[7] The NEHO held a pre-hearing conference (“PHC”) on February 24, 2021, which was the first PHC for the Plan Amendment matter, and a continuation for the appeals of the refusal of the Development Permit Application. At the PHC, party status was granted to Walker Aggregates, the Watershed Trust, and Franks/Stevenson with respect to the Plan Amendment matter. Participant status was granted to the Town of the Blue Mountains (Alar Soever, Mayor), the Municipality of Grey Highlands (Michael Benner, Director of Building and Planning Services), Doug Dingeldein, Ray Mueller and Margaret (Peggy) Hutchison.

[8] At the PHC, the Hearing Officer scheduled a 28-day hearing to commence November 8, 2021 and continue to December 17, 2021; with no sitting on November 11, 2021 nor December 9, 2021. The format of the hearing will be determined closer to the hearing date and will be determined with consideration of public health measures due to the Covid-19 pandemic and the NEHO’s hearing format procedures. The format for the hearing will be communicated by the Case Coordinator closer to the time of the hearing. The parties briefly discussed what items should be provided for in a procedural order to govern the hearing, and committed to the preparation of a draft Procedural Order to be discussed at a further PHC. The Hearing Officer scheduled a further PHC for April 28, 2021, in order to address the draft Procedural Order and any other issues that may have arisen.

Pre-Hearing Conference Continuation of April 28, 2021

[9] At the PHC continuation, the Hearing Officer advised the attendees of upcoming legislative changes and addressed the draft Procedural Order which is to govern the merits hearing.

New Legislation

[10] The Hearing Officer informed the attendees of the recent passing of Bill 245 – *Accelerating Access to Justice Act*. Schedule 6 of this Act amalgamates a number of Boards and Tribunals under the Ontario Land Tribunal (“OLT”) by virtue of the *Ontario Land Tribunal Act* (“*OLTA*”). Upon proclamation of the *OLTA*, the NEHO will be amalgamated into the OLT (proclamation is anticipated June 1, 2021). Of relevance to the current matter are s. 17 and s. 18 of the *OLTA* which state:

Limit on non-party participation

17 Except as may be provided for under this or any other Act, a person who is not a party to a proceeding may make submissions to the Tribunal with respect to the proceeding in writing only.

Witnesses and evidence

18 (1) At any stage of a proceeding, the Tribunal may,

- (a) examine any of the following persons:
 - (i) a party to the proceeding,
 - (ii) a witness in the proceeding, or
 - (iii) a person who has made a submission to the Tribunal with respect to the proceeding, other than a party;
- (b) require a party to the proceeding to produce evidence or a witness for examination by the Tribunal; or
- (c) require a person referred to in subclause (a) (iii) to produce evidence for examination by the Tribunal.

[11] The Hearing Officer raised this issue with the attendees in light of previous direction from the Hearing Officer that advised that participants would be permitted to make oral submissions at the hearing, currently scheduled to commence on November 8, 2021. The new legislation limits non-parties (participants) to providing their submissions in writing, as set out in the *OLTA*, s. 17. The Tribunal advises that as

set out in the *OLTA*, s. 18, the Tribunal may choose to examine and invite oral submissions from a participant, however, this is at the Tribunal's discretion.

[12] In addition, presenter status will no longer exist under the *OLTA* as of the anticipated date of proclamation of this Act. As a result, those persons who have presenter status to this matter will no longer have such status. If presenters wish to provide evidence at the hearing scheduled in this matter, which will be by written submission, they must request participant status.

[13] At the time of proclamation of the *OLTA*, new Rules will be in effect, which will outline the motion process for requesting status. Current presenters and participants may wish to consult the anticipated new Rules following proclamation, should they wish to request changes to their status in this matter.

Draft Procedural Order

[14] The parties provided a draft Procedural Order to the NEHO the day prior to the PHC continuation on April 28, 2021. The parties agreed to dates for the exchange of disclosure and the bulk of the items the NEHO requires in a procedural order in order that a hearing progress in an orderly and expeditious fashion. However, agreement amongst the parties on all of the required items was not achieved. There was disagreement in relation to one item in the Organization of the Hearing, and a number of issues in the Consolidated Issues List were in dispute.

[15] The Hearing Officer heard submissions from the parties in relation to the issues in disagreement. Based on their submissions, a review of the draft Procedural Order, and a review of the NEP, the Hearing Officer has made findings and provided procedural directions as is described further in this decision.

Organization of the Hearing

[16] Item 9 under this heading proposed the following:

The NEHO will establish an evening public presenters session on or before XXX, **2021** to allow pre-registered members of the public to have their say. **[Note to Draft: The parties received notice of the February 24, 2021, pre-hearing conference on December 18, 2020. A notice was also to be published in local newspapers on or before February 3, 2021. We believe there may be more public interest in the matter and would like to provide an opportunity for their input to be heard by the NEHO.]**

[17] The Township and Walker Aggregate object to the inclusion of the Note, given that this item suggests that the matter is open for additional persons to request (presenter) status to this matter. These parties submit that finality to the list of parties, participants, and presenters is required, and it is not appropriate to permit additional persons to request status at this time. These parties contend that all those who are interested in this matter have made themselves known by now and have sought status if they felt they wished to do so.

[18] The NEC, the Watershed Trust, and the Franks/Stevenson parties are of the view that this matter has had numerous stops and starts and state that the public is confused about the status of this matter and the Proposed Project. They contend that the normal course of a contentious matter such as this is to permit the members of the public, with limitations, to have involvement in the hearing at a time set aside, normally in the evening, so that members of the public can participate in the hearing process, in line with the notion of promoting access to justice. The Hearing Officer agrees that this matter has been ongoing for a considerable period of time, and agrees with the submissions of the Township and Walker Aggregate that those who are interested in

this matter would have sought status by this point, if they wished to participate in the hearing in such a manner.

[19] In the usual course for a NEHO matter, a request may be made for an evening session in order that participants and presenters may make their presentations. This practice is at the discretion of the Hearing Officer and is made in consideration of all relevant factors, including the number of participants and presenters, and the hardship that may arise due to the need to attend during the day at a venue in person. The need to appear in person is somewhat alleviated if the hearing is held virtually.

[20] At this time, the Hearing Officer is not prepared to direct that an evening session is to be held in this matter. Such direction is left to the discretion of the presiding member to determine, either during the preparation of the hearing plan, or at the commencement of the hearing, whether it is appropriate, necessary, or warranted in the circumstances.

[21] The anticipated legislative changes outlined above in this decision will impact the merits hearing. For example, participants will be limited to providing their submissions in writing, and those persons who have presenter status will no longer have such status. The NEHO advises those with participant and presenter status to consult with the Case Coordinator if they wish to upgrade their status.

[22] Participants are required to pre-file their written submissions as outlined in the Procedural Order, which will be issued to govern the merits hearing.

[23] The Hearing Officer reminds the parties that a NEHO hearing is a public hearing. Persons who wish to observe the hearing are welcome to do so. However, there are limitations given the current situation with restrictions due to Covid-19 pandemic. The Hearing Office requests that anyone who wishes to observe a hearing contact the Case

Coordinator so that arrangements can be made for that person to have the appropriate access code, should the hearing be on a virtual platform.

[24] The Hearing Officer directs that Item 9 is to be modified as follows:

The NEHO will consider an evening session to allow participants and presenters (presenter status is to be eliminated following proclamation of the *Ontario Land Tribunal Act*) to provide their evidence. The scheduling of an evening session is to be determined at the time the hearing plan is developed or at the commencement of the hearing, at the discretion of the Hearing Officer presiding over the merits hearing, and in consideration of the anticipated changes resulting from the proclamation of the *Ontario Land Tribunal Act*.

[25] The Hearing Officer directs that as a matter of house-keeping the “note to draft” at the conclusion of Item 10 is not necessary and should be deleted.

Consolidated Issues List

[26] The parties were unable to agree on an appropriate term to describe the intended work to be done for which approval is being sought. The Township, supported by Walker Aggregate, submits that the appropriate descriptor is “Infrastructure”; whereas, the NEC is of the view that the most neutral term is “Development”. Support for each of these terms was found in the NEP by each party, depending on which provision was referenced. The Hearing Officer finds that, rather than embark upon a determination of which descriptor is correct – given that this issue may be engaged as part of the hearing process itself – the Hearing Officer directs that the term “Project” is to be used. This is the term used by the NEHO in past Procedural Orders, and is defined above in paragraph [1] of this decision.

[27] The Hearing Officer directs that the descriptor “Project” or “Proposed Project” is to be used where required in the Procedural Order being prepared for governing the hearing in this matter.

[28] Mr. Elston, on behalf of the Township, re-organized Issue 9 of the first draft of the Procedural Order to three separate issues: 9, 10, and 11, which incorporate and clarify the issues intended to be addressed. The NEC confirmed that this clarification of the NEC policy direction is appropriate. The Hearing Officer is satisfied that this clarification is appropriate and directs that the new Issues 9, 10, and 11 are to be included in the Consolidated Issues List, and replace the previous Issue 9.

[29] The below are the new Issues 9, 10, and 11:

Issue 9: In areas of key hydrologic features (NEP 2.6), is it appropriate to deem the Proposed Project to be “necessary to the public interest after all other alternatives have been considered”?

Issue 10: In areas of key natural heritage (NEP 2.7), is it appropriate to deem the Proposed Project to be “necessary to the public interest and there is no other alternative”?

Issue 11: In Escarpment Natural Areas (NEP 2.12), is it appropriate to deem the Proposed Infrastructure to be “necessary to the public interest after all other alternatives have been considered”?

[30] The previous Issue 10 stated as follows:

Has the Township of Clearview satisfied the requirements in the NEP that “all other alternatives” must be considered or that there is “no other alternative”? In evaluating alternatives, has the Township of Clearview:

- a. undertaken a Legal Survey to locate the actual Sideroad 26/27 Right of Way in order to:
 1. confirm that the proposed road footprint design can be constructed in accordance with appropriate standards and fit into the road allowance without impacting adjacent sensitive environmental areas; and
 2. identify all water courses that would be within the road allowance;
- b. undertaken a proper comparative assessment of the proposed Sideroad 26/27 and the existing County Road 91 transportation solution; and
- c. considered the additional environmental costs to efficiently supply aggregates, farm products and exchange other heavy goods between the Grey Highlands Osprey-Clearview Townline area and the Collingwood/Stayner market place in the event that County Road 91 is closed without a viable heavy truck and agricultural equipment travel route?

[31] The Township submits that the above, as stated in previous Issue 10, are not properly issues for the issues list, and contends that the statements within are items that a party may wish to address in providing evidence to support (or not) the determination of whether alternatives have been appropriately evaluated. Walker Aggregate supports the Township's submissions.

[32] Mr. Donnelly noted that his clients, Franks/Stevenson, wish there to be an evaluation of the viability of the transportation route resulting from the Proposed Project, and an assessment of the alternatives. The NEC submits that these words provide direction and clarification and should be included.

[33] The Hearing Officer acknowledges that the concern regarding transportation routes is a live concern in this hearing. However, the Hearing Officer is of the view that the determination of whether “all alternatives” have been assessed is addressed in Issues itemized as 9, 10, and 11, provided above, and it is up to the parties to adduce the evidence they wish in order for the Hearing Officer hearing the merits to make findings in relation to whether the alternatives have been appropriately assessed. The Hearing Officer finds that the issue laid out in previous Issue 10 above is not necessary to be included and directs that it should be removed from the Consolidated Issues List.

[34] The previous Issue 11 stated as follows:

Is the Proposed Amendment consistent with the Growth Plan for the Greater Golden Horseshoe (2019) and the Greenbelt Plan (2017)?

[35] The Township and Walker Aggregate requested that the parties who raised this concern as an issue advise which policy sections of the planning documents noted are at issue.

[36] The Hearing Officer finds that it is appropriate to identify which policies in the Growth Plan for the Greater Golden Horseshoe and the Greenbelt Plan are at issue as this will help to focus and expedite the hearing process. The Hearing Officer directs the parties to provide this information for this issue in the Consolidated Issues List as is directed under “Next Steps” later in this decision.

[37] Issue 1 under the list of issues in the appeals of the NEC’s refusal of the Development Permit Application originally stated:

Is the Proposed Development consistent with the objectives of the NEP’s applicable land use designations: Escarpment Natural Area and Escarpment Protection Area?

[38] This issue was modified by the Township to state:

Does the Proposed Infrastructure offend the objectives of the NEP's applicable land use designations: Escarpment Natural Area and Escarpment Protection Area?

[39] The Township removed "consistent with" and replaced it with "[does/does not] offend" on the basis that "consistent with" is not the test set out in the NEP. This clarification was confirmed by the NEC and was not objected to by any party. The Hearing Officer finds it appropriate that the issue be modified as indicated by the Township, however, the term "Infrastructure" is to be replaced with "Project".

[40] Issue 5 under the list of issues in the appeals of the NEC's refusal of the Development Permit Application states:

Is the public interest in a safe and viable arterial road in this vicinity served by the Proposed Development, including with respect to the potential closure of County Road 91?

[41] The Township submits that this issue is captured in the new Issues 9, 10 and 11, as described above in paragraph 29, and therefore the issue is redundant and should not be included here. The party Franks/Stevenson is of the view that this issue is necessary as it captures the concern regarding the (alternate) route for the delivery of goods that is safe and in the public interest. The NEC submits that this issue provides specificity, and reflects the broad concept of public interest.

[42] The Hearing Officer finds that the inclusion of this issue is appropriate as it will allow for a more thorough consideration of the public interest mandate, in addition to the need to consider this as noted in new Issues 9, 10 and 11, as provided in paragraph 29

above. The Hearing Officer directs that the term “Infrastructure” is to be replaced with “Project”.

Next Steps

[43] The Hearing Officer directs the Township, in consultation with the parties, to modify the draft Procedural Order according to the direction provided for in this decision. The modified draft Procedural Order is to be provided to the Case Coordinator within two weeks of the date of issuance of this decision. The Hearing Officer may be spoken to if there are issues in implementing this order. The NEHO will issue the Procedural Order that will govern the hearing in this matter once satisfied that it is appropriate for issuance. If there are requests for upgraded status, these should be made to the Case Coordinator as soon as possible.

ORDER

[44] The NEHO directs the Township, in consultation with the parties, to modify the draft Procedural Order according to the direction provided for in this decision, and provide the modified draft to the Case Coordinator within two weeks of the date of issuance of this decision. If there are requests for upgraded status, these should be made to the Case Coordinator as soon as possible.

[45] The NEHO will issue the Procedural Order that will govern the hearing in this matter once satisfied that it is appropriate for issuance.

[46] The Hearing Officer may be spoken to if there are issues in implementing this order.

[47] There will be no further notice and this Hearing Officer is not seized of the merits hearing.

Procedural Directions Ordered

"Helen Jackson"

HELEN JACKSON
HEARING OFFICER

Appendix 1 – List of Appellants for 15-176 (Development Permit Application)

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

Appendix 1**Appellant List for 15-176**

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