

ISSUE DATE:

August 23, 2007

DECISION/ORDER NO:

2371



PL061050

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Le Conseil Scolaire de District Catholique du Nouvel-Ontario has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal to enact a proposed amendment to Zoning By-law 95-500Z of the City of Greater Sudbury to rezone lands respecting Centennial Drive and Ramsey View Court from "R4" Multiple Residential Zone to "I" Institutional (Special) Zone for Lot 13 and "R5" High Rise Multiple Residential Zone to "I" Institutional (Special) Zone for Lot 1 and part of Lot 2 OMB File No.Z060165

APPEARANCES:

Parties

Counsel

Le Conseil Scolaire de District Catholique du
Novel-Ontario

M. Bull

City of Sudbury

S. Watt

Citizens for the Preservation of
Nepahwin/Lily Creek Wetland Association
("the Citizen's Group")

R. Northey

DECISION DELIVERED BY M. G. SOMERS AND ORDER OF THE BOARD

CONTEXT

Le Conseil Scolaire de District Catholique du Nouvel-Ontario ("Conseil") proposes to construct an elementary school, Ecole St. Denis, at Centennial Drive and Ramsey View Court in the Greater City of Sudbury ("the City"). The elementary school is proposed to be located on lands which are comprised of three parcels of the Plan M-876: Lot 13, Lot 1 and Part of Lot 2 ("the subject site"). The subject site has an area of approximately 1.9 ha (4.7 acres).

On June 16, 2006, applications were submitted to the City to amend By-law 95-500Z, the Comprehensive Zoning By-law for the former City of Sudbury, to permit the development of the elementary school by re-designating Lot 1 from R5 – High-rise Multiple Residential to I – Institutional – Special; and Lot 13 from R4 – Multiple Residential to I – Institution – Special. On August 31, 2006, the application was amended to include Part of Lot 2 from R5 – High-rise Multiple Residential to I Institutional – Special (Exhibit 5, Tabs 5 & 6).

While two separate application forms were submitted to the City, due to separate ownerships, they were treated as a single application, and assigned one rezoning application file number.

On October 6, 2006, the City's Planning Staff recommended in their report the approval of the application. (Exhibit 5, Tab 10)

A public meeting was held on October 17, 2006 (deferred from September 19, 2006) with respect to the application (Exhibit 5, Tabs 16 and 17). On October 17, 2006, the Planning Committee recommended that City Counsel refuse the application. On October 25, 2006, Council refused the said application.

On November 14, 2006, the Conseil appealed the decision of Council to the Board pursuant to subsection 34(11) of the *Planning Act*.

On December 19, 2006, a new application was filed by Conseil to rezone the subject site from R4 and R5 to I-24 (Institutional – Special) (Exhibit 5, Tab 7). On March 20, 2007, the Planning staff issued a staff report, recommending the approval of the application (Exhibit 5, Tab 12). However, on March 20, 2007, there was a public meeting of the Planning Committee; it recommended that Council refuse the application (Exhibit 5, Tab 19). On March 28, 2007, the Council again refused the application (Exhibit 5, Tab 20).

However on May 9, 2007, Council approved the proposed development on the subject site, subject to the land exchange of Lot 13 and remainder of Lot 2 (Exhibit 5, Tab 22).

PRELIMINARY MATTERS

At the beginning of the hearing, representatives of a non-profit corporation, called the "Citizens for the Preservation of Nepahwin/Lilly Creek Wetland" ("Citizens Group") requested party status. The Citizens Group opposed the development of the proposed school on the subject site. The Board was advised that the Citizens Group had approximately 127 members and that its purpose was the following (Exhibit 19.a):

- a. uniting all persons interested in the conservation of flora and faun, the natural beauties of the water bodies, creek and wetlands in the City and the beautification, protection, preservation, restoration and extension of parks, green belts, green spaces and wetlands;

- b. gathering and exchanging ideas, data and statistical, scientific, horticultural and botanical information;
- c. assuring protection and enhancing appreciation of the ecology of the natural environment; and
- d. assuring improvement of the urban environment.

The two parties did not object to the Citizens Group being given party status. The Board finds that the Citizens Group does have an interest in the appeal and was given party status.

The Conseil had the following witnesses at the hearing: Donald McCullough, a land use planner; Toivo Rukholm, an engineer with expertise in transportation planning and traffic engineering; John Seyler, an expert in fisheries; Bradley Walker, a biologist with expertise in fisheries, surface water, terrestrial and aquatic vegetation, wildlife and habitat assessment. The City had one witness, Eric Taylor, a senior City planner. The Citizens Group had one witness, Dr. W. Edgar Watt, an expert in flood damage reduction and floodplain management.

On May 29, 2007, the Board scheduled an evening session to hear the concerns of the community regarding the proposed development.

ANALYSIS

1. Land Use and Compatibility

It is Mr. McCullough's evidence, on behalf of the Conseil, that the total area of the lands is approximately 1.9ha with approximately 260m frontages onto Centennial Drive and Ramsey View Court. The northerly portion of the site including all of Lot 13 is low lying. Two connected wetland features are located on parts of Lots 1 and 13. A rock outcrop is located on the south easterly part of the site on Lots 1 and 2.

According to the City Staff Report (Exhibit 5, Tab 12), the Regional Flood elevation in this area is 251 metres asl. Most of Lot 13 and the easterly portion of Lot 1 are located in the floodplain. The westerly wetland comprises an area of approximately 0.25ha. The easterly wetland, which is to be retained and enhanced on the subject property, forms part of a larger wetland, which is located mostly on the abutting property to the east. Neither wetland is designated as being "Provincially Significant".

The abutting lands to the north include: Centennial Drive and the James Jerome Sports Complex (formerly Lilly Creek Sports Complex). To the east, the adjacent vacant lands contains the channel of the Nepahwin Creek and is zoned "I" Institutional. Council approved the abutting lands to the east in October 2006 for an office building. The related Official Plan Amendment #266 and Zoning By-law Amendment, By-law 2006-245Z are subject to appeals to the Board.

Lands further to the east are developed as a Shell service station. The balance of Lot 2, Plan M-876 to the south is vacant and is zoned "R5", High-rise Multiple Residential. Lands further to the south are developed with a multi-storey apartment building known as "Rockview Towers". Lands to the west of Ramsey View Court are developed with townhouses and multi-storey apartment buildings.

According to the testimony of Mr. McCullough there is a real need for a new school for the students of Ecole St. Denis. He advised the Board, that after a review process, the Conseil identified the subject site as the most suitable for the school, based on a number of considerations such as location relative to the catchment area of the students that attend Ecole St. Denis; a location that is close to public facilities, such as: Science North, James Jerome Sports Complex, and Lily Creek Boardwalk.

Mr. McCullough testified that the reports from the Director of Planning Services and the General Manager of Growth and Development, dated September 12, 2006, and October 6, 2006 (Exhibit 5, Tabs 9 & 10) reviewed the appropriateness of the development of the subject site for an elementary school in terms of conformity with the Official Plan, land use compatibility, traffic, site servicing, storm water management and environmental issues. According to the evidence of Mr. McCullough, public agencies such as the Nickel District Conservation Authority ("NDCA"), the Department of Fisheries and Oceans ("DFO") were consulted and had no objections to the Application subject to a number of conditions. The City Planning Staff recommended the approval of the Application subject to conditions to be met through the site plan approval process.

Mr. McCullough advised the Board that servicing of the subject site would not be an issue. He testified that the City's Development Engineering Department confirmed that sewer and water services would be available (Exhibit 5, Tab 12).

Mr. McCullough further advised the Board that the "High Density Residential" designation on the subject site would permit a school on the site, subject to the

satisfaction of the four criteria mentioned in Section 2.11(b) of the Secondary Plan (Exhibit 5, Tab 2). Section 2.11(b) provides:

- 2.11(b) Permit subject to rezoning, institutional uses on lands designated other than Institution on Map A, provided that:
- i) sewer and water services are adequate to serve the site;
 - ii) efficient traffic circulation can be provided;
 - iii) adequate parking for the public being served is provided on the site; and, where necessary, public transit services are available or can be provided economically;
 - iv) where adjacent to residential uses, the proposed institutional use can be integrated into the area.

According to the evidence of Mr. McCullough and Mr. Taylor, the City's planner, all four criteria will be satisfied.

In addition, it was the evidence of Mr. McCullough and Mr. Taylor, that the proposed school on the site would be compatible with the surrounding land uses in all respects.

Mr. McCullough and Mr. Taylor both testified that there would be no adverse impact on adjacent land uses that one would normally experience in respect to an infill development.

Mr. McCullough did acknowledge that a school on the subject site might be perceived by the neighbourhood residents, especially the residents of the Rockview Towers, to be more intrusive than the existing vacant land that they had enjoyed for approximately forty years. Nevertheless, in Mr. McCullough's opinion, this is not a measure of compatibility from a planning policy perspective.

According to the evidence of Mr. McCullough, the proposed school would have a lesser impact on the existing neighbourhood, in particular, Rockview Towers, than the development that could be placed on the subject site and the remainder of Lot 2, as of right. Mr. McCullough testified that the view of the Lily Creek wetland would be significantly blocked by a 17-storey apartment building, which could be constructed on Lot 2 as of right.

Based on the uncontradicted planning evidence of Mr. McCullough and Mr. Taylor, the Board finds the proposed development compatible with the surrounding area

and further finds that the four criteria in section 2.11 (b) of the Secondary Plan have been met.

2. Transportation

It was the evidence of Mr. Rukholm, the Conseil's expert in transportation planning, that all of the transportation issues could be satisfactorily addressed on the subject site.

Mr. Rukholm's evidence was based on his Traffic Impact Report (Exhibits 21, 22 and 23), which concluded that the traffic from the school could be accommodated on the adjacent road network with the recommended road improvements.

Both Mr. Rukholm and Mr. McCullough testified that the City has confirmed that the details of such improvements would be addressed through the Site Plan approval process.

It was the evidence of Mr. Rukholm that the proposed parking for the site would significantly exceed the requirement of the Zoning By-law and would accommodate the entire vehicle parking, and bus and car pick up and drop-off on the subject site.

In addition, Mr. Rukholm testified that the traffic generated by the school would be significantly less than the traffic that would be generated by the apartment buildings that could be located on the site pursuant to the existing as of right zoning. It is the opinion of Mr. Rukholm and Mr. McCullough that the proposed development would not have an adverse impact on transportation.

In addition, the City will require, as part of the site plan control agreement, to have a "Bulb Out", constructed in the northwest corner of the intersection of Centennial Drive and Ramsey View Court to improve pedestrian and vehicle safety. Furthermore, the City will require the construction of a sidewalk along the school's road frontage. The City Staff Report dated March 6, 2007, notes that other issues such as: access, fencing, parking and internal circulation will be reviewed as part of the site plan process.

A traffic impact study was prepared by the Conseil to review issues related to access and pedestrian safety (Exhibit 21). The Traffic Report concluded that the proposed school would have a minor impact on the Paris Street/Centennial Drive intersection. In addition, the Report concluded that the new hospital and the proposed office building on Centennial Drive would be the major reasons for the need for

improvements at that intersection, but the school would contribute a small portion to the requirement.

Based on Mr. Rukholm's uncontradicted expert evidence on traffic issues, the Board finds that the proposed development will not have an unacceptable adverse impact on the traffic and parking.

3. Fisheries

Mr. McCullough testified that the City Planning Staff identified fish habitat on the site as a potential concern.

Mr. Seyler, a consultant with Golder Associates ("Golder"), and the Conseil's fisheries expert, testified that he helped prepare a fish habitat evaluation report ("Golder Report"), dated July 2006, which assessed the impact of the development on fisheries habitat based the application denied by Council in October 2006.

It was the evidence of Mr. Seyler that there would be no alteration to the lower wetland on the site and as such there would be no adverse impact on any potential fish habitat in the lower part of the wetland.

Mr. Seyler testified that the only area of the site that would be of concern in regard to fisheries would be the upper wetland.

According to the evidence of Mr. Seyler no fish were observed in the standing waters or pools in the upper wetland. The only potential for the upper wetland to be used as a fish habitat would be at high water levels on a seasonal basis if the upper wetland were physically connected to the lower wetland. Even though such a connection was not observed, a conservative assumption was made that the upper wetland could potentially be a fish habitat. In the opinion of Mr. Seyler, the Conseil should provide compensation for loss of potential fish habitat by creating a permanent fish habitat on the site.

As a result of the above analysis, Mr. Seyler recommended that the concept plan for the development be revised to provide a permanent pool adjacent to the lower wetland. It is Mr. Seyler's opinion that a permanent pool would provide a net gain to fish habitat value.

Mr. Seyler directed the Board to section 2.1.5 of the PPS, which provides:

2.1.5 Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal regulations.

Mr. Seyler testified that his recommendations would be implemented through the permitting system of the DFO and the site plan approval process and therefore would be in compliance with section 2.1.5 of the PPS.

In a letter dated February 19, 2007 to the Conseil, Golder advised Conseil that it believes that it will be possible to design and implement a fish habitat plan to address all remaining fisheries concerns and adequately compensate for fisheries impacts associated with development in the upper wetland area. Golder recommended that the Conseil proceed with their plans to create a permanent habitat in the northeast corner of the property as per the new design (Exhibit 5, Tab 13).

In addition, Mr. McCullough gave evidence, based on the work of Mr. Seyler, that the proposed school would result in an enhancement of the fish habitat on the subject site as contemplated by policy. Furthermore, it was Mr. McCullough's evidence that the details of such improvements would be confirmed through the DFO permitting process and the site plan approval process as recommended by the City's planners.

Based on Mr. Seyler's uncontradicted expert evidence on fish habitat, the Board finds that the proposed development would have a minimal impact on fish habitat on the site. In fact, the proposal based on the Golder Report, would result in an enhancement of the fish habitat for the proposed site.

4. Wetland

Mr. Walker, a consultant with Golder, and a biologist with expertise in: fisheries, surface water, terrestrial and aquatic vegetation, wildlife and habitat assessment provided evidence regarding the assessment of the wetlands on the site.

According to Mr. Walker's testimony, the upper wetland is a series of isolated pools that is not draining into any other area. It is Mr. Walker's evidence that there is no vegetation or species of significance on the subject site. In addition, Mr. Walker testified that there is no Provincially Significant Wetland ("PSW") on the subject site. None of the Lily Creek Wetland to the north, the Nepahwin Creek Wetland, or the small upper wetland is a PSW.

Mr. Walker advised the Board that section 2.1.3(b) of the PPS does not permit development or site alteration in a PSW. Section 2.1.3(b) provides,

2.1.3 *Development and site alteration* shall not be permitted in:

b) *significant wetlands* in Ecoregions 5E, 6E and 7E; and

It is the evidence of Mr. Walker that there is no PSW on the subject site. Therefore, this section of the PPS does not apply to the subject site.

Mr. McCullough and Mr. Taylor both testified that the Secondary Plan identifies that wetlands are to be protected. Section 3.2.2.4(b) of the Secondary Plan entitled "Specific Policies, Wetland," specifically identifies that wetlands shall be protected and identified in Schedule C1 (Exhibit 16). Mr. McCullough advised the Board that Schedule C1 was introduced by an amendment to the Secondary Plan. In addition, it was the evidence of Mr. McCullough and Mr. Taylor, that there is absolutely no requirement pursuant to the Secondary Plan to protect the wetland, if the wetland is not specifically identified on Schedule C1.

Mr. Northey suggested to Mr. McCullough in cross-examination that the Secondary Plan, section 3.2.2.2(e), should be interpreted to require the protection/retention of all wetlands in the City. However, the Board notes that if section 3.2.2.2(e) required that all wetlands in the City be protected, then section 3.2.2.4(b) and Map C1, which requires the protection of specific wetlands, would be redundant and meaningless. The Board further notes that as section 3.2.2.2(e) and Map C1 were introduced by an amendment to the Secondary Plan, it should be assumed that City Council had a meaningful intent in adopting the Official Plan Amendment which introduced Map C1 and identified the wetlands to be protected. In addition, if the Secondary Plan did require the protection of all wetlands, not just PSW, it would impose a higher standard of wetland protection in the City of Greater Sudbury, than that imposed throughout the Province, by the PPS. No evidence was presented to suggest that this was the City's intent. As such, the Board does not accept that section 3.2.2.2(e) requires that all wetlands, not just PSW, are to be protected.

Based on Mr. Walker's uncontradicted expert evidence on wetlands, the Board finds that there is no PSW on the site and that section 2.1.3(b) of the PPS does not apply. Furthermore, The Board accepts with the uncontradicted evidence of Mr. Walker, that the impact on the wetlands will be acceptable.

5. Flooding

Dr. Watt, was retained by the Citizens Group, and provided evidence in the area of flood damage, reduction and floodplain management. According to the evidence of Dr. Watt, the portion of the 2005 PPS relevant to the case at hand is "3.1 Natural Hazards". In particular, section 3.1.2 provides:

3.1.2 Development and site alteration shall not be permitted within:

...

- d) a floodway regardless of whether the area of inundation contains high points of land not subject to flooding.

It was Dr. Watt's evidence that Nepahwin Creek is part of a "river, stream and small inland lake system" ("RSSILS"). Dr. Watt testified that for a RSSILS, the flood plain is the entirety of the "flooding hazard". It was his evidence that for a RSSILS, the floodway is either all of the flood plain, or the inner portion of the flood plain, depending on whether the "one-zone" or "two-zone" concept is applied. It is Dr. Watt's opinion, that in this particular case, it is the "one-zone" concept that applies. As such, the floodway is the entire "flood plain".

Dr. Watt advised the Board that the meaning of the "one-zone" concept for flood risk mapping, is as follows:

One-zone concept: Using this, planning authorities determine the flooding hazards limit, based on the 100-year flood or major storm-centred event, and prohibits all development or site alteration within those boundaries. This is the most effective way of minimizing threats to public health or safety or property damage. The one-zone concept is the preferred approach for the management of flooding hazards within river and stream systems as it provides the most cost effective means of minimizing potential threats to life and risks of property damage and social disruption. Where the one-zone concept is applied, the entire flood plain or the entire flooding hazard limit defines the floodway.

Dr. Watt testified that in 1979, the Nickel District Conservation Authority ("NDCA"), published Flood Risk Maps for Junction Creek. The mapping was conducted by the National Flood Damage Reduction ("FDR"). It was Dr. Watt's evidence that three of the dominant points of the FDR program are:

- a. will not build, approve or finance flood prone development in designated flood risk areas,

- b. will not provide disaster assistance for any development built after the area has been designated (except for flood proofed development in the flood fringe),
- c. will encourage zoning authorities under their jurisdiction to zone on the basis of flood risk.

It was Dr. Watt's evidence that further restriction on developments in *designated flood risk areas* was provided in Ontario under the *Conservation Authorities Act*. He testified that the relevant map for the Nepahwin Creek area applies the "one-zone" concept of flood plain mapping, which makes no distinction between the "floodway" and the "flood fringe".

Dr. Watt further testified that in 1978, the Council of the Regional Municipality of Sudbury adopted an Official Plan that was approved by the Province and contained policies on "Hazard Lands". According to section 9.29:

"It shall be the policy of Council to:

...

- b. Prohibit all new buildings, structures, and development expansion in flood plain areas, except such buildings, structures or fill which are intended for flood or erosion control or are normally associated with floodplains, and are approved by Regional Council, the Nickel District Conservation Authority, or are permitted in Section 9.29.(c) and (d);
- c. Permit minor infilling and redevelopment ...
- d. Permit the following uses in hazard areas, provided the hazard will not be aggravated:
 - i. agriculture and related uses, excluding habitable buildings, and structures;
 - ii. selected recreation uses;
 - iii. open space;
 - iv. forestry;
 - v. resource extraction;
 - vi. uses which assist in conserving or managing water supplies, wildlife, or other natural features.

In Dr. Watt's opinion, the abovementioned land use restrictions and permitted uses are generally consistent with accepted flood plain management practices.

Furthermore, it was Dr. Watt's evidence that the zoning map for the area had two shades covering the lands in the area of Nepahwin Creek, south of Centennial Drive. According to the By-law map legend, the two shaded areas represent "Designated

Flood Plain Restricted Areas – DA1” and “Designated Flood Plain Restricted Areas – DA2”.

Dr. Watt testified that the DA1 Area appears to be consistent with the floodway/floodplain. One of the restrictions set out in the text of the Zoning By-law for DA1, is no building or structure requiring a building permit, etc. In Dr. Watt’s opinion this appears to be consistent with the objectives of the flood risk-mapping program.

However, Dr. Watt notes that the zoning map also indicates that the same area is zoned “R4”, “R5” and “I”. According to Dr. Watt, these zoning categories are not consistent with the flood risk for these lands.

In Dr. Watt’s opinion, the proposed development is not consistent with the PPS, as it involves “development” and “site alteration” on lands within the floodway, established by the NDCA “regulatory flood line” in its 1979 mapping. In particular, the proposed development places a parking lot, playing field, and access road within the floodway.

However, Mr. McCullough testified that the City and the NDCA canvassed the issue of flooding, which resulted in a Concept Plan that specifically did not locate the school building within the flood plain. It was decided that the only uses that would be located in the floodplain, were: (i) playground, (ii) parking lot, and (iii) driveway. It was Mr. McCullough’s evidence that the driveway would provide safe access from the school building to Centennial Drive, in the event of a regional flood event.

Mr. McCullough directed the Board to Section 3.2.3 of the Secondary Plan, which recognizes that the NDCA is the authority that is charged with the responsibility for regulation for the placing of fill in a floodplain. Section 3.2.3 of the Secondary Plan provides:

3.2.3 Flood Plains

Flooding has historically occurred along Junction, Nolin, Copper Cliff, and Lily Creeks. The Maley and Nickeldale dams presently help to control potential flooding along Junction Creek. However, flooding problems due to downstream obstructions and lack of flood water storage still occur particularly in the Flour Mill/New Sudbury and Copper Cliff areas.

The Nickel District Conservation Authority has prepared and approved detailed flood plain mapping and established fill lines for each of the major watercourses and lakes. Map A indicates the extent of these flood plains. For the accurate determination of flood plain boundaries, NDCA maps should be referred to.

Within these areas all development is subject to Ontario Regulation 171/80, of the Nickel District Conservation Authority which regulates construction, the placing of fill and the alteration of the waterways. The provisions of this Chapter also apply. ...

The NDCA did not have any objections regarding the location of the school, as it was outside the designated floodplain area. In a letter dated September 19, 2006, from Dennis Lenzi, a Regulations Officer with the NDCA to the City (Exhibit 5, Tab 14), Mr. Lenzi states:

Based on the plans submitted, we have no objection to the proposed location for the school as it is outside the designated floodplain area. The upper wetland area can have the peat removed and be filled to the existing elevation at 250.5 metres to accommodate the development. The parking lot must be built on existing grad (250.5 metres) – no additional fill may be brought in. The driveway may be elevated and flood proofed.

The lower pond wetland adjacent to Nepahwin Creek must be protected and no encroachment or filling may occur in this area. The natural storm water drainage, which flowed into the upper wetland, must continue flowing to the lower wetland and into Nepahwin Creek. The land adjacent to Nephawin Creek will remain in its natural state. All construction near the lower wetland will require that sedimentation and erosion control measures be in place.

The NDCA had a number of conditions that the Conseil had to follow, such as:

1. Sediment and erosion control measures such as silt fences should be implemented prior to work and maintained during the work phase, to prevent entry of sediment into the water.
2. All sediment and erosion control measures should be inspected daily to ensure that they are functioning properly and are maintained and/or updated as required.
3. If the sediment and erosion control measures are not functioning properly, no further work should occur until the sediment and/or erosion problem is addressed.

4. All disturbed areas of the work site should be stabilized as soon as possible after project completion.
5. Sediment and erosion control measures should be left in place until all disturbed areas of the work area have been stabilized.
6. Materials to be used for the project should not be taken from the shoreline or below the high water level of any water body.
7. All materials and equipment used for the purpose of site preparation and project completion should be operated and stored in a manner that prevents any deleterious substance (e.g. petroleum products, silt, etc.) from entering the water.

All of the abovementioned conditions will form a part of the Site Plan Agreement. In addition, an application will have to be made to the NDCA and the DAO for the cut and fill operations, and any plans to include culverting or alterations to the watercourse.

Both Mr. McCullough and Mr. Taylor testified that the passive uses, such as a playground, parking lot, and driveway are permitted in the floodplain, subject to the normal approval and permitting process.

Mr. McCullough directed the Board to section 3.0 "Protecting Public Health and Safety" of the PPS. He testified that the objectives of the PPS policies in this section relate to the avoidance of unacceptable risk to public health or safety or property damage. In his opinion, the policy did not require the complete elimination of all risk, but the assessment of the extent of the risk.

It is Mr. McCullough's opinion that the issues pertaining to flooding do not apply to the school building, since the school building is not going to be located on the floodplain or the floodway. According to Mr. McCullough, the proposed development is consistent with section 3.1.2(c) of the PPS. Section 3.1.2(c) provides:

3.1.2 Development and site alteration shall not be permitted within:

- (c) areas that would be rendered inaccessible to people and vehicles during times of flooding hazards, erosion hazards, and/or dynamic beach hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard; and ...

It was Mr. McCullough's evidence that the concept plan for the subject site would ensure that there is safe access to the school building during a flooding hazard, given the design of the proposed driveway and the preliminary comments of the NDCA as

noted above. According to Mr. McCullough, section 3.1.2(c) would permit the playground, parking lot and the driveway to be located in the floodplain.

However, it was Dr. Watt's evidence that Section 3.1.2(c) only applied to the flood fringe area of a Two-Zone system. Dr. Watt testified that section 3.1.2(c) would be very difficult to implement, since there were very few people that were qualified to interpret whether a site would have safe access. However, the Board notes, that the wording of section 3.1.2(c) does not specifically state that it applies only to the flood fringe area of a Two-Zone system.

Mr. McCullough did acknowledge that section 3.1.2(d) did not permit development and site alteration within the floodway. However, it was his evidence, that in interpreting the definition of floodway in the PPS, that the floodway in a One-Zone system includes only the contiguous portion of the floodplain, where development and site alteration would cause a danger to public health and safety, property damage and would not include the entire floodplain. It was Mr. McCullough's evidence that the subject site is not considered to be within the floodway.

The Board notes that it was Dr. Watt's evidence that in a One-Zone system the floodway is the entire floodplain. Accordingly, section 3.1.2(d) would prohibit all development and site alteration in the floodplain in a One-Zone system. As such, it is Dr. Watt's opinion that the proposed playground, parking lot and driveway would not be permitted on the site.

However, Ms Bull noted, in her submissions, that even if Dr. Watt were correct, the exception contained in section 3.1.3(b) would permit the playground, parking lot and driveway to be located on the subject site as proposed. Section 3.1.3(b) provides:

3.1.3 Despite policy 3.1.2, *development* and *site alteration* may be permitted in certain areas identified in policy 3.1.2:

- b) where the *development* is limited to uses, which by their nature must locate within the *floodway*, including flood and/or erosion control works or minor additions or passive non-structural uses, which do not affect flood flows.

Mr. McCullough testified that section 3.1.3(b) permits development and site alteration in floodplains and floodways, where the development is limited to passive non-structural uses, which do not affect flood flow levels. It was Mr. McCullough's evidence that the proposed uses in the floodplain would fall within this exception.

Mr. McCullough further testified that the proposed parking lot, playground and driveway properly designed would not affect flood flows. In addition, Mr. McCullough noted that the designs would be subject to the NDCA's approval process.

It is Mr. McCullough's opinion, that all of the uses proposed to be located in the floodplain, or the floodway as defined by Dr. Watt, would fall within this "exception" to the prohibition in section 3.1.2(d) of the PPS.

It was Dr. Watt's testimony, that in a One-Zone system, no development or site alteration would be permitted on the entire floodplain. As such, it is Dr. Watt's opinion that the already existing James Jerome Park, with tennis courts, baseball field and soccer field should not have been built in its present location.

According to Dr. Watt's evidence, once the flood mapping is completed, no further assessment of flood risk is required, other than enforcing the flood line drawn on the map.

Ms Bull notes in her submissions, that Dr. Watt's interpretation of the PPS would impose a complete prohibition on development within the floodplain. Ms Bull argues that if this interpretation were correct, then the sections of the NDCA Regulations authorizing the NDCA to permit such development by way of permit would be meaningless. She further argued that this would not make sense, since the NDCA regulations were promulgated after the PPS. In the final analysis, Ms Bull argues that an interpretation should not be given to the PPS, which would make it directly conflict and render the regulations meaningless.

The Board accepts Ms Bull's submissions and finds that Dr. Watt's interpretation of the PPS does not reflect the policy intent.

In the opinion of Mr. McCullough, the proposed development is consistent with Section 3.1.4(a) of the PPS, in regard to the location of institutional uses. Section 3.1.4(a) provides:

3.1.4 *Development* shall not be permitted to locate in *hazardous lands and hazardous sites* where the use is

- a) an institutional use associated with hospitals, nursing homes, pre-school, school nurseries, day care and schools, where there is a threat to the safe evacuation of the sick, the elderly, persons with disabilities or the young during an emergency as a result of flooding, failure of flood proofing measures or protection works, or erosion.

As previously mentioned, Mr. McCullough testified that the school is not being built on the floodplain and the road, the playground and parking lot are passive non-structural uses, which will not affect flood flows, and will be assessed at the time of permit issuance by the NDCA and the City through site plan approval.

It is the opinion of Mr. McCullough and Mr. Taylor that the land use regulations in place for the City is consistent with the provisions of the PPS.

It was the evidence of Mr. McCullough, that the Zoning By-law provisions regarding the Designated Flood Plain Restricted Areas (DA1) are consistent with the interpretation of the PPS. The DA1 area does not permit buildings or structures, but does permit non-structural uses, such as, playgrounds, parking lots or driveways.

It is Mr. McCullough's opinion that the Concept Plan for the subject site is consistent with the DA1 provisions of the Zoning By-law, subject to the approval and permit process of the NDCA.

In summary then, it was Mr. McCullough's evidence that section 3.1.2(c) permits development and site alteration, if it can be demonstrated that the site has safe access, appropriate for the nature of the development and the natural hazard. Mr. McCullough testified that the Concept Plan for the site would ensure that there was a safe access to the school building during flooding hazards.

Furthermore, it was the evidence of Mr. McCullough that section 3.1(b) permits development and site alteration in floodplains and floodways, where the development is limited to passive non-structural uses and the uses do not affect flood flow levels. It was Mr. McCullough's evidence that the proposed uses in the floodplain would fall within this exception.

In addition, it was Mr. McCullough's evidence, that all of the uses proposed to be located in the floodplain, would fall within this "exception" to the prohibition in section 3.1.2(d) of the PPS.

Mr. McCullough and Mr. Taylor testified that the development of the site is subject to the approval and permit process of NDCA. It was their evidence that the NDCA Regulations (O. Reg. 156/06), gives the NDCA discretion to permit development in hazard lands/flood plains, if, in the NDCA's opinion, the control of flooding would not be affected by the development.

The NDCA reviewed the proposed development and as noted in Mr. Lenzi's letter dated September 19, 2006, the NDCA has no objections to the proposed development as the location of the school is outside the designated floodplain. The NDCA has a number of conditions that the Conseil has to follow and that the conditions will form a part of the Site Plan Agreement. In addition, an application will have to be made to the NDCA and the DFO for the cut and fill operation and any plans to include culverting or alterations to watercourse.

The Board accepts evidence of Mr. McCullough, that section 3.1.2(c) permits development and site alteration in the floodplains and floodways, where the development is limited to passive non-structural use, which does not affect flood flow levels which is the case here.

Furthermore, the Board finds that the NDCA does have the authority to permit development in hazard lands/floodplains, if in its opinion; the control of flooding will not be affected by the development. Based on the evidence of Mr. Taylor and Mr. McCullough and the NDCA's letter dated September 19, 2006, the Board accepts the evidence that the NDCA supports the proposed development subject to a number of conditions.

Based on sections 3.1.2(c) and 3.1(b) of the PPS and the regulatory approval of the NDCA, the Board finds that the playground, access road and parking lot can be located on the floodplain.

6. Community Participation and Public Interest

On May 29, 2007, the Board scheduled an evening session to hear the concerns of the community regarding the proposed development. In all, sixteen citizens provided statements; ten opposed the development; while six supported it. The Board in rendering its decision carefully considered all of the participants' statements.

A petition was filed that was signed by over 3,000 people over a two-week period that opposed the proposed development (Exhibit 31). The Board notes that the petition did not provide the signatories with any details that an elementary school was to be built on the subject property. The Board will accept the petition; however, it will give it little weight. Another petition was filed with the Board, this time it was signed by 649 parents of the children that go to Ecole St. Denis.

It was Mr. McCullough's evidence there are many public benefits associated with the proposed development. He notes that the development has the support of the Conseil and City Council, which are elected to represent the public interest in the Greater City of Sudbury.

As previously noted, Mr. McCullough testified that there is an urgent need for a new school to replace the existing Ecole St. Denis. A number of the parents gave statements to the Board regarding the need of a new school.

Mr. McCullough testified that the school would provide additional parking for the recreational activities at the James Jerome Sports Complex, when the school is not in session.

Mr. Seyler testified that there would be a net benefit to the fish habitat on the site.

The Citizens Group opposed the proposed development and it was their position that it was not appropriate. The Board notes, that the proposed school would have a lesser impact on the neighbourhood and surrounding area than the residential uses that are permitted on the subject site as of right, in terms of traffic and visual impact.

Further, Mr. McCullough testified that the approval of the proposed development and the transfer of the remainder of Lot 2 to the City would ensure that a 17-storey apartment building would not be constructed on Lot 2, immediately in front of the Rockview Towers.

The Board finds that there are public benefits associated with the proposed development for the surrounding area and the Greater City of Sudbury.

CONCLUSION

Having considered all of the *viva voce* and documentary evidence, as well as the submissions of Counsel, the Board finds that the establishment of a school on the subject site is an appropriate use.

It was Dr. Watt's evidence that the proposed development was not consistent with the PPS, as it invited "development" and "site alteration" on lands within the floodway established by the NDCA "regulatory flood line" in its 1979 mapping. In particular, the proposed development, places a parking lot, playing field, and access road within the floodway. However, it was Mr. McCullough's evidence that the City and

the NDCA canvassed the issue of flooding, which resulted in a Concept Plan that specifically did not locate the school building within the floodplain.

In addition, it was the evidence of Mr. McCullough and Mr. Taylor that the “High Density Residential” designation on the site permits a school. Further, Mr. McCullough testified that the four criteria set out in section 2.11(b) of the Secondary Plan had been met and that the proposed development was compatible with the surrounding land. The Board accepts with the evidence of Mr. McCullough and Mr. Taylor and finds that the location of the school is outside of the floodplain. In addition, the Board finds that the site is designated High Density Residential, which permits schools on the subject site.

The issue then becomes, whether the regulatory scheme in the Province permits the location of the playground, the driveway and parking lot in a floodplain, provided the regulatory approval is given by the NDCA.

It was Dr. Watt’s evidence that once the flood mapping was complete, no further assessment of flood risk would be required, other than enforcing the floodline drawn on the map. It was Dr. Watt’s evidence, no building and/or non-structural use may be placed on a floodplain. Furthermore, it was Dr. Watts’ opinion, that the NDCA did not have the authority and/or discretion to allow any building, non-structural use on the floodplain.

Both Mr. McCullough and Mr. Taylor testified that the passive uses, such as a playground, parking lot, and driveway are permitted on the floodplain, subject to the normal approval and permitting process.

As previously mentioned, the Board does not accept Dr. Watt’s interpretation that the PPS would impose a complete prohibition on the development within the floodplain. If Dr. Watt’s interpretation were correct, then the sections of the NDCA Regulations authorizing the NDCA to permit such development by way of permit would not make sense.

The Board accepts the evidence of Mr. McCullough that section 3.1.2(c) permits development and site alteration, if it can be demonstrated that the site has safe access, appropriate for the nature of the development and the natural hazard. Furthermore, the Board accepts Mr. McCullough’s evidence that section 3.1(b) permits development and site alteration in floodplains and floodways, where the development is limited to passive

non-structural uses and the uses do not affect flood flow levels. The Board finds that the proposed uses in the floodplain would fall within this exception.

Further, the Board finds that all of the uses proposed to be located in the floodplain, would fall within the “exception” to the prohibition in section 3.1.2(d) of the PPS.

The Board finds that the development of the site is subject to the approval and permit process of NDCA. The Board further finds that the elements of the NDCA approval are consistent with the PPS and the Secondary Plan. The details and conditions of the permitted alteration of the site will be secured through the NDCA’s permitting system and the site plan approval process. The key conditions regarding the NDCA’s approval for the development of the site, includes the matters set out below:

1. Require the school building to be located outside the designated floodplain.
2. Permit the driveway within the floodplain provided that it is flood proofed.
3. Permit the playground and parking areas to be located within the floodplain provided that they remain at the existing elevation.

Furthermore, based on Mr. Rukholm’s uncontradicted traffic and transportation evidence, the Board finds that the proposed development will not have an unacceptable impact on the traffic.

In addition, based on Mr. Seyler’s uncontradicted expert evidence on the fish habitat, the Board finds that the proposed development will have a minimal impact on fish habitat on the site.

The Board finds that there are no PSW on the subject site, based on Mr. Walker’s uncontradicted expert evidence on wetlands. In addition, the Board finds that proposed development will have a minimal impact on the wetlands.

The Board notes that City Council and the City’s planning staff have approved the proposed development subject to conditions to be contained in the site plan agreement.

The Board finds that the preponderance of the evidence supports the finding that the approval of the proposed Zoning By-law is consistent with the PPS.

The Board notes that the *Planning Act* requires that decisions made in the development approval process of the NDCA, DFO and the City have to be consistent with the PPS and as previously mentioned the proposed development will progress in light of the regulatory approval process.

The Board finds that proposed Zoning By-law conforms to the Secondary Plan and that it represents good planning.

The Board Orders that the appeal be allowed and that the proposed Zoning By-law 2007-150(Z) as set out in Exhibit 5, Tab 4, attached hereto as Attachment "1", be approved, subject to the following conditions:

1. Prior to the enactment of the amending by-law, the applicant shall provide a registered survey identifying that part of Lot 2, Plan M-876, to be rezoned to "I", Institutional Special Zone.
2. Prior to the issuance of a building permit the owner shall have entered into a site plan control agreement for the development of the property, addressing along with other matters, the implementation of a traffic impact study addressing access, pedestrian safety, sidewalk requirements, on-site circulation, along with the requirements of the Department of Fisheries and Oceans, Nickel District Conservation Authority, fencing, landscaping, geotechnical considerations, storm water management and site servicing, all to the satisfaction of the City.

The Board so Orders.

"M. G. SOMERS"

M. G. SOMERS
MEMBER

Attachment 1

BY-LAW 2007-150Z

**A BY-LAW OF THE CITY OF GREATER SUDBURY
TO AMEND BY-LAW 95-500Z, THE COMPREHENSIVE
ZONING BY-LAW FOR THE FORMER CITY OF SUDBURY**

WHEREAS it is desirable to amend By-law 95-500Z, the Comprehensive Zoning By-law for the former City of Sudbury;

**NOW THEREFORE THE COUNCIL OF THE CITY OF GREATER SUDBURY
HEREBY ENACTS AS FOLLOWS:**

1. Property Description: Lots 1 and 13 of Plan M-876 and
Parts 2 and 4, Plan 53R-18305
In Lot 6, Concession 2
Township of McKim
City of Greater Sudbury
2. By-Law 95-500Z, the Comprehensive Zoning By-law for the former City of
Sudbury, and Schedule 'A' attached thereto is hereby amended by changing the zoning
classification of the lands to which this By-law applies from "R4", Multiple Residential
and "R5", Highrise Multiple Residential to "I-24", Institutional - Special.
3. By-law 95-500Z, the Comprehensive Zoning By-law for the former City of
Sudbury is hereby amended by adding the following subsection to Section 5 (1) Special
Institutional Zones - I:

*x) I-24 (School)

MCKIM MAP (3.4)

Notwithstanding any other provision hereof to the contrary, within any area
designated I-24 on the Zone Maps, all provisions of this by-law applicable
to I Zones shall apply subject to the following modifications:

(i) The minimum interior sideyard setback shall be 5 metres."

4. This by-law is in conformity with the Official Plan for the Sudbury Planning Area.

READ A FIRST AND SECOND TIME IN OPEN COUNCIL this day of
2007

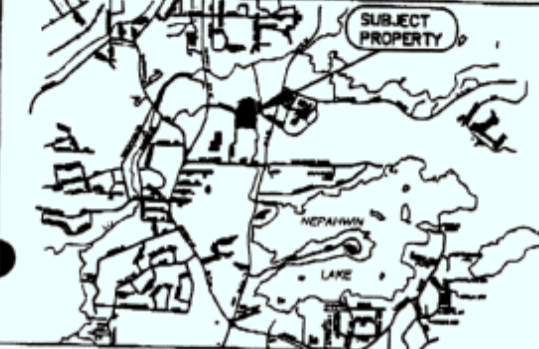
_____ Mayor

_____ Clerk

READ A THIRD TIME AND FINALLY ENACTED AND PASSED IN OPEN
COUNCIL this day of , 2007

_____ Mayor

_____ Clerk



Growth and Development Department

Subject Property being Lots 1, 13 & part of Lot 2, Plan M-876, Lot 6, Con. 2, Twp. of McKim, Ramsey View Court & Centennial Drive, Sudbury, City of Greater Sudbury.

751-6/06-21
Date: 2006 06 28

Not to Scale