

ISSUE DATE:

**October 26, 2007**

DECISION/ORDER NO:

**2829**



PL061127

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Barbra Rucker and Paula Worton  
Subject: Proposed Official Plan Amendment No. 266  
Municipality: City of Greater Sudbury  
OMB Case No.: PL061127  
OMB File No.: O060217

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Barbra Rucker and Paula Worton  
Subject: By-law No. 2006-245Z  
Municipality: City of Greater Sudbury  
OMB Case No.: PL061127  
OMB File No.: R060323

#### **APPEARANCES:**

##### **Parties**

City of Greater Sudbury

Barbra Rucker and Paula Worton

All Nations Church (Sudbury)  
Ed Masotti

##### **Counsel**

G. S. Watt

R. Northey

M. Bull

#### **DECISION DELIVERED BY J. E. SNIJEK AND ORDER OF THE BOARD**

##### **Introduction**

Barbra Rucker and Paula Worton (the appellants) appealed the approval of Official Plan Amendment (OPA) #266 that changes the designation from "High Density Residential District" to "Linear Mixed Use District" and the approval of By-law 2006-245Z that changes the zoning from "I" Institutional to C4-16 (Office Limited Uses) that will permit an office building with a maximum height of 7 storeys. It should

be noted that the portion of the site designated "Private Open Space" will not be changed.

All Nations Church (Sudbury) and Ed Masotti (the applicants) and the City of Greater Sudbury (the City) appeared in support of the amendments to the Official Plan and Zoning By-law.

The Board heard evidence from Don McCullough, a consulting planner for the City, Bradley Walker, consulting biologist for the applicants, Ivan Lorant, consulting engineer for the applicants, Robert Lehman, a planning consultant for the applicants, and Dr. Edgar Watt, consulting engineer for the appellants. The Board also heard from fourteen residents who were in support of the appeal.

Based upon submissions by the solicitor for the applicants, the Board ruled that Dr. Watt could only testify in areas in which he has expertise; namely flood plains, flood risk quantification and reduction. He limited his testimony to the Provincial Policy Statement (PPS) and areas involving Natural Hazards, Surface Water Features, and Natural Heritage. Dr. Watt has no expertise in land use planning, more specifically the interpretation of the Zoning By-law and the Official Plan.

## **Background**

The site consists of four acres of land that fronts on the south side of Centennial Drive with a frontage of 245 feet. The site has a high portion of land at the front where the proposed office building will be located. The remainder of the site is low lying and will contain the parking area. The Nepahwin Creek forms the westerly boundary of the lot and the development.

The surrounding land uses consists of the following: to the north James Jerome Sports complex; to the east Shell gas station and carwash and Lions Resource Centre for the Deaf and Hard of Hearing; to the west the recently approved lands for an elementary school and City owned park; and to the south vacant land and mixed use of office building.

Other uses in the immediate area include a day care centre, Sudbury District Health Unit Office Building, Sudbury Regional Health Centre, hotel, hotel and restaurant and Science North along Paris Street and an elementary school and Lockerby Secondary School along Walford Road, apartment buildings including 13 storey Rockview Towers and townhouse complex along Ramsey View Court.

The Official Plan consists of the Regional Policy Plan approved in 1978, the Sudbury Secondary Plan approved in 1987 and the new Sudbury Secondary Plan approved in March 2007 and subject to appeal. The Zoning By-law was approved in 1995 and updated in 1998.

The subject site is designated "High Density Residential District" and Conditional Development Area E that permits "new high density residential development". The "private open space" designation on the site will not change. The proposed OPA #266 changes the designation to "Linear Mixed Use District". A further modification would change the use in the conditional development area E from "high density residential" to "new mix use office building".

The by-law now zones the site I (Institutional) with a zoning overlay of DA1 that prohibits development in the flood plain. The proposed by-law (Exhibit 1, Tab 12) rezones the site C4-16 (Office Commercial Special) with a maximum height of seven storeys.

The portion of the site where the proposed building would be located is not subject to flooding in the regional design storm. At issue is whether or not this portion of the site can be considered part of the flood plain. There is no dispute that the parking area would be flooded in the regional design storm with approximately 0.9m of water flowing at a low velocity. The flood plain policy that applies to this site is the one zone concept. The one zone concept is explained in the Provincial Policy Statement (PPS) (Exhibit 1. Tab 1. pages 30 and 33), "Where the one zone concept is applied, the *floodway* is the entire contiguous *flood plain*."

The italicized terms are defined as follows:

“Floodway: for *river, stream and small inland lake systems*, means the portion of the *flood plain* where development and site alteration would cause a danger to public health and safety or property damage”.

“Flood plain: for *river, stream and small inland lake systems*, means the area usually low lands adjoining a watercourse, which has been or may be subject to *flooding hazards*”.

The application requires further work to finalize the location and design of the parking area. The building can be constructed on a portion of the site above the regional storm and with pedestrian and vehicle access to the building that would provide safe access in times of flood. The parking area would be flooded in a regional design storm to a depth of 0.9m.

### **Position of the Appellants**

The appellants assert that the City and applicant have focussed on the design aspects of the proposed development and have forgotten about the planning aspects of the proposal. This assertion was made in argument and had no evidentiary basis.

The appellants allege that the proposed amendments to the zoning by-law and official plan are not “in accord with local planning documents”; are not consistent with the PPS; are not in conformity with the wetlands policy in the Sudbury Secondary Plan; and the advice of the Planning Department and the Nickel District Conservation Authority (NDCA) is not consistent with the direction of the PPS and lacks concern for potential flooding hazards. This assertion was made in argument and was not supported by the evidence.

The appellants contend that the DA1 overlay zoning prohibits development on the site. The appellants further contend that the fact that the zoning by-law was passed in 1995 after the Official Plan was passed (1987) results in a change to the conditional development designation in the secondary plan due to application of the deemed conformity rule. This assertion was made in argument and has no evidentiary support. It also is in direct opposition to the current passed, but not yet approved, Official Plan that contains the same conditional development area policies.

The appellants claim that the policies of the PPS prohibit development in a “floodway”, prohibit development on the site and prohibit the development of non structural elements in the flood plain. This was based upon the contradicted testimony of Dr. Watt. Mr. Lorant, Mr. Lehman, and Mr. McCullough did not support this position. The comments from NDCA supported the “*viva voce*” evidence of the applicant and the City.

The appellants allege that the marsh shown on the hazard land maps of the NDCA (Exhibit 14) and the DA1 zoning overlay provide sufficient support to protect the existing wetland from development notwithstanding the policies in the Secondary Plan. This assertion was made in argument and was not supported by the evidence of Mr. Bradley Walker, consulting biologist for the applicant, Mr. McCullough and Mr. Lehmann, consulting planners for the City and the applicant respectively.

The appellants maintain that NDCA did not adequately consider the PPS in terms of its comments to the City and the City planners did not adequately consider the PPS in their comments to City Council. This assertion lacked evidentiary support.

The appellants’ evidence was based only on the testimony of Dr. Watt who has impeccable academic qualifications and a sound theoretical understanding of the basis for flood plain calculations and damage reduction strategies. Dr. Watt lacked an understanding of local implementation strategies used by local conservation authorities and this lack of understanding was compounded by the fact that he failed to contact the local conservation authority (NDCA).

A number of the assertions by the appellants were made in argument and were unsupported by the evidence and in some instances in direct contravention of the evidence received by this Board.

### **The position of the City and the Applicants**

The City and the applicants assert that the principle of development has been established on the site with the existing I (Institutional) zoning and the Conditional

Development Area E designation in the Sudbury Secondary Plan. This was supported in the City's planning reports and the evidence of Messrs. Lehman and McCullough.

The City and the applicants contend that the appellant provided no evidence in support of the wetland issue. The evidence of Mr. Walker was that the wetland is not a Provincially Significant Wetland (PSW); is not a sensitive wetland as defined in the PPS and has a low potential for species of concern. The evidence of both planners (Messrs. McCullough and Lehman) was that the subject wetland was not identified as a wetland requiring protection on Schedule C1 of the Sudbury Secondary Plan.

The City and the applicants claim that proposed zoning amendment and OPA are consistent with the PPS and development in the floodplain is based upon the assessment of risk and the NDCA is the agency assigned the responsibility of permitting development in the floodplain. The practise of NDCA and other authorities is to permit development in the flood plain where flood risks are minimal and or can be mitigated.

The City and the applicants state that the site is well serviced and there are no negative impacts associated with the proposal. This is supported by the various City reports and the evidence of Messrs. Lorant, Lehman and McCullough.

The City and the applicants declare that the City did not ignore the PPS. There is no evidence that the NDCA ignored the PPS and the appellants could have called the NDCA if they wanted to. It was supported by the uncontested evidence of Mr. Lehman and Mr. McCullough.

The City and the applicants contend that the applications before the Board represent good planning and do not represent, as asserted by the appellants', that they only represent design solutions and lack the fundamental planning policy support. This is supported by the uncontested evidence of Mr. McCullough and Mr. Lehman.

Mr. McCullough proposed that the proposed OPA #266 be amended to change the use in the Sudbury Secondary Plan Conditional Development Area E

from “high density residential development” to “a new mixed use office building” Mr. McCullough opined that this was a technical clarification. The position of Mr. McCullough was supported by Mr. Lehman.

The applicants gave notice to the Board that costs would be sought from the appellants. The applicants noted that two issues (traffic and fisheries) were raised and then dropped by the appellants. A traffic study was prepared by the applicant in response to the issue raised by the appellants and a fisheries study conducted for the same reason. The applicants allege that the conduct of the appellants was unreasonable and costs should be awarded.

### **Board findings and conclusions**

The Board finds that the basic principle of development on the site has been established with the existing Institutional zoning and the Conditional Development Area E designation in the Secondary Plan. The only question before this Board is whether the use should change from “High Density Residential District” to “Linear Mixed Use District”. The Board accepts the evidence of Mr. Lehman that there is demand for the office space and the development in the area of the site constitutes a growth pole including the regional hospital, Science North and the Sudbury Health Unit office.

The Official Plan Schedule C1 sets out the wetlands deserving protection. The subject wetland is not located on this schedule. The City and the applicants provided evidence that the wetland on the site is not a PSW and does not exhibit any characteristic deserving of protection according to Mr. Walker. The appellants provided no evidence in support of their position. The Board finds that the wetland on the site is not deserving of protection.

The Board finds that the most appropriate vehicle for the application of the PPS is the local Official Plan. Conditional Development Area E exists in the new Official Plan and the in force Official Plan. The position of the appellants is that the PPS should be interpreted strictly like a statute and that the local documents must be tested and retested against the PPS. It was the evidence of Mr. Lehman that the New Official Plan has been tested against the PPS by the Ministry of Municipal Affairs and Housing and has not been found wanting. Although the new Official Plan

is under appeal none of the policies affecting this site are under appeal. The appellants' position is unsupported by the evidence. The only planning evidence (by Messrs. Lehman and McCullough) is that the proposed Zoning By-law and OPA are consistent with the PPS.

The position of the appellants that the zoning by-law prohibits development as a result of the DA1 overlay zone is not supported by the planning evidence. Both planners indicated that the DA1 overlay zone could be amended as a result of further study or information provided to the NDCA. The planners (Lehman and McCullough) also were of the opinion that non-structural elements of the development such as the access, parking areas and storm water management pond could be located in the flood plain in conformity with the zoning by-law provisions and the PPS. This conclusion was supported by the testimony of Mr. Lorant, a consulting engineer with broad practical experience in the field of flood plain management and implementation. The uncontradicted evidence from the NDCA the agency assigned with the responsibility of flood plain management is that subject to seven conditions the NDCA "has no objection to the above noted applications for Rezoning and Official Plan Amendment" (Exhibit #1, Tab 7, pages 229-230).

The position of the appellants that the change to the zoning by-law in 1995, following the approval of the Sudbury Official Plan (1978) and Secondary Plan (1987), results in the deeming of a new set of Official Plan Policies, is not supported by the evidence by two professional planners (Lehman and McCullough) or the facts. The new plan contains essentially the same policies as far as the flood plain and the conditional development areas. The Board rejects the deemed "conformity argument" of the appellants as unsupportable based upon the facts and the uncontested planning evidence of Lehman and McCullough.

The position that the City and the NDCA ignored the PPS is not supported by any evidence. The NDCA was involved in the drafting of the new and existing Official Plan and the designation of conditional development areas. The NDCA and City comments do not specifically refer to the PPS but one could conclude that because the subject lands were within a conditional development area; the City and NDCA were not compelled to review the PPS. The appellants did not call any witness from



the NDCA to respond to the suggestion and the Board draws an adverse inference from that fact.

The evidence from Dr. Watt was theoretical in nature. He was relatively unfamiliar with the regulations and implementation procedures of Conservation Authorities generally and the NDCA in particular. Dr. Watt made no contact with the NDCA to familiarize himself with local practises, procedures or regulations. The Board prefers the evidence of Mr. Lorant, Mr. Lehman and Mr. McCullough on the issues related to Flood Plain Management. The appellants provided no evidence on the matter of wetland protection and the Board prefers the evidence of Mr. Walker. The Board heard no planning evidence from the appellants and prefers the uncontested planning evidence of Mr. Lehman and Mr. McCullough.

The Board finds that the zoning amendment and OPA represent good planning and are supported by the evidence.

The Board Orders that the appeals to the Zoning By-law 2006-245Z are dismissed.

The Board further Orders that the appeals are allowed in part and the Official Plan for the City of Sudbury is modified as set out in Attachment 1 to this Order, and as modified is approved (Exhibit 1, Tab 15, pages 279 and 280).

Should any party wish to pursue costs, the Board will entertain written submissions filed in accordance with the Board's Rules of Practice and Procedure.

So Orders the Board.

"J. E. Sniezek"

J. E. SNIEZEK  
MEMBER

**Attachment 1**

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**SCHEDULE "A"  
to By-law 2006-244P**

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**AMENDMENT NUMBER 266  
TO THE OFFICIAL PLAN FOR THE  
SUDBURY PLANNING AREA**

**Components of the Amendment:** Part A, the Preamble, does not constitute part of this Amendment.

Part B, the Amendment, which consists of the following text and map entitled Schedule "A", constitutes Amendment #266 to the Official Plan for the Sudbury Planning Area.

**PART A - THE PREAMBLE**

**Purpose of the Amendment:** This amendment changes the "High Density Residential District" land use designation on the subject property from to "Linear Mixed Use District" to permit the site to be rezoned for commercial use.

**Location:** Part of PIN 73583-0205, being Part of Parcel 34624 S.E.S, Lot 6, Concession 2, Township of McKim, City of Greater Sudbury.

**Basis:** Official Plan Amendment (File: 701-6/06-8), Rezoning (File: 751-6/06-23) were recommended for approval by the Planning Committee Recommendation # 2006-217 and ratified by Council on October 11, 2006.

**PART B - THE AMENDMENT**

(a) City of Sudbury Secondary Plan Map A - Land Use Plan of Secondary Plan 9 of Part two of the Official Plan for the Sudbury Planning Area is hereby amended by changing the land use designation of Part of PIN 73583-0205, being Part of Parcel 34624 S.E.S, Lot 6, Concession 2, Township of McKim, City of Greater Sudbury from "High Density Residential District" to "Linear Mixed Use District" as shown on Schedule "A" of this amendment.

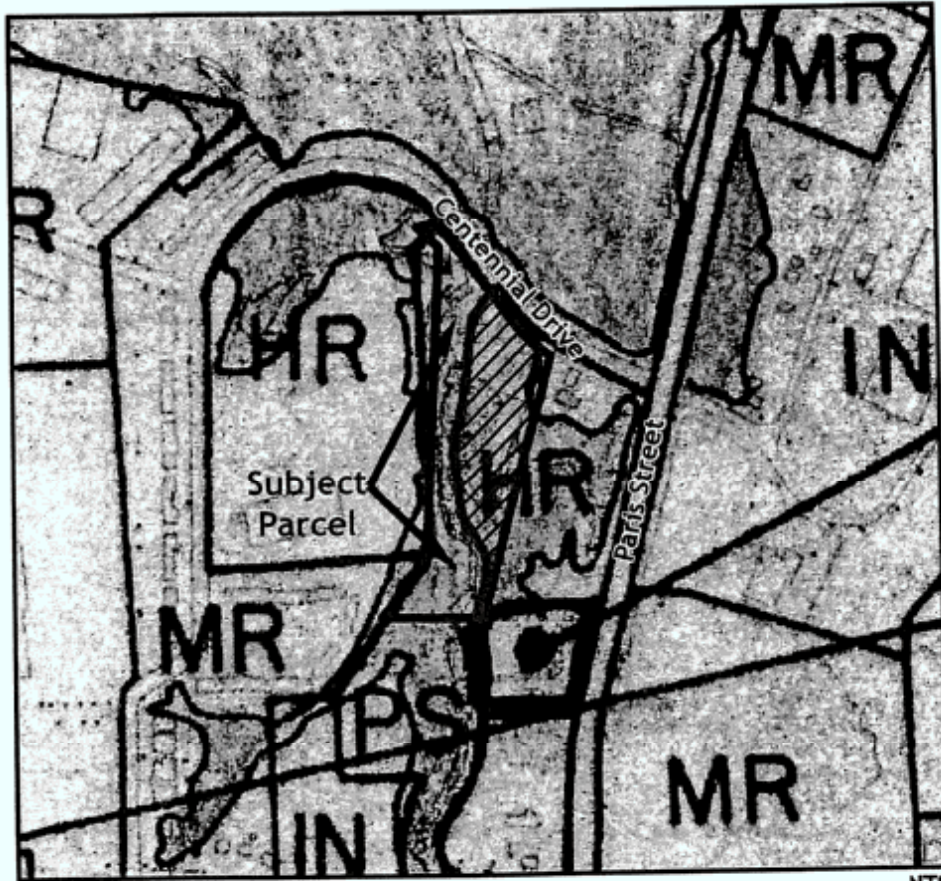
(b) City of Sudbury Secondary Plan 9 (Secondary Plan for the Settlement of Sudbury) of Part Two of the Official Plan for the Sudbury Planning Area is hereby amended by deleting the text of Section 3.2.3.3(d)(v) and replacing it with the following:

"within Conditional Development Area E, a new mixed use office building may be permitted;"

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Schedule A to By-law 2006-244P being  
Schedule A to Official Plan Amendment #266

Part Map A Land Use Plan  
Secondary Plan for the Settlement of Sudbury



NTS

 OPA #266  
Lands designated Mixed Use Linear District (LM)  
from High Density Residential District (HR)