

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: July 07, 2025

CASE NO(S).:

OLT-24-000393

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	2610823 Ontario Inc.
Subject:	Request to amend the Official Plan – Failure to adopt the requested amendment
Description:	To permit a mixed-use community consisting of 1,344 dwelling units, including 679 detached dwellings, 155 on-street townhomes and 510 multi-residential dwelling units
Reference Number:	AM-2021-06
Property Address:	9015 & 8970 Stanley Avenue
Municipality/UT:	City of Niagara Falls / Region of Niagara
OLT Case No.:	OLT-24-000393
OLT Lead Case No.:	OLT-24-000393
OLT Case Name:	2610823 Ontario Inc. v. Niagara Falls (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	2610823 Ontario Inc.
Subject:	Application to amend the Zoning By-law – Refusal or neglect to make a decision
Description:	To permit a mixed-use community consisting of 1,344 dwelling units, including 679 detached dwellings, 155 on-street townhomes and 510 multi-residential dwelling units
Reference Number:	AM-2022-015
Property Address:	9015 & 8970 Stanley Avenue
Municipality/UT:	City of Niagara Falls / Region of Niagara
OLT Case No.:	OLT-24-000394
OLT Lead Case No.:	OLT-24-000393

Heard: March 25 – April 10, 2025 by Video Hearing

APPEARANCES:

Parties

2610823 Ontario Inc.

City of Niagara Falls

Regional Municipality of Niagara

Counsel

Nancy Smith
Meredith Baker
Jennifer Ricci (*in absentia*)

Paul DeMelo

Alexander Suriano
Naomi Mares (*in absentia*)

DECISION DELIVERED BY C. I. MOLINARI AND ORDER OF THE TRIBUNAL

[Link to Order](#)

INTRODUCTION AND BACKGROUND

[1] The matter before the Tribunal arises from appeals filed by 2610823 Ontario Inc. (“261”) pursuant to ss. 22(7) and 34(11) of the *Planning Act* (“Act”) with respect to the failure of the City of Niagara Falls (“City”) to make a decision within the statutory timeframes on Official Plan Amendment (“OPA”) and Zoning By-law Amendment (“ZBA”) applications (together “Applications”) for the properties known municipally as 9015 Stanley Avenue (“9015 Stanley”) and 8970 Stanley Avenue (“8970 Stanley”), as well as municipal road allowances and additional parcels of land to the east and south (together “Properties”).

THE PROPERTIES AND SURROUNDING CONTEXT

[2] The Properties are located on the east and west side of Stanley Avenue, south of the Welland River and north of Lyons Creek. They are currently vacant, with 9015 Stanley previously developed as a seasonal campground and 8970 Stanley previously

developed as a golf course. The Properties have a combined area of 82.88 hectares (“ha”), both with frontage on Lyons Creek Road and Stanley Avenue.

[3] The Properties are located at the south end of the City, within the urban boundary. Surrounding land uses include vacant industrial zoned land to the west, which exhibits Provincially Significant Wetlands and wooded areas, the Welland River and Lyons Creek to the north and south respectively, and residential to the east. Along the southern edge of the Welland River and east of Stanley Avenue is a narrow strip of land owned by Ontario Power Generation. Across the Welland River, the Stanley Avenue Business Park (“Business Park”) is to the northwest and Marineland Canada is to the northeast. The Queen Elizabeth Way (“QEW”) is located approximately 3.8 kilometres to the west.

[4] As shown below, the Properties are outlined in red in Exhibit 4.5 ‘Visual – Stanley Avenue Business Park Transportation Corridor Routes to QEW’, with 9015 Stanley shaded in blue. 9015 Stanley is located within the City’s proposed future Grassy Brook Employment Area, which is to be implemented through the approval of the Grassy Brook Secondary Plan (“Secondary Plan”). The Secondary Plan proposes commercial and residential uses for 8970 Stanley.

[5] Stanley Avenue serves as a transportation corridor route for the Business Park to and from the QEW, to the south via Lyons Creek Road, and to the north via McLeod Road. Both Lyons Creek Road and McLeod Road have residential uses along their length, with the former exhibiting rural residential typology and the latter exhibiting urban residential typology.

[6] The nearest public transit stops to the Properties are located at the intersections of Lyons Creek Road and Sodom Road to the east, and Stanley Avenue and Don Murie Street to the north.

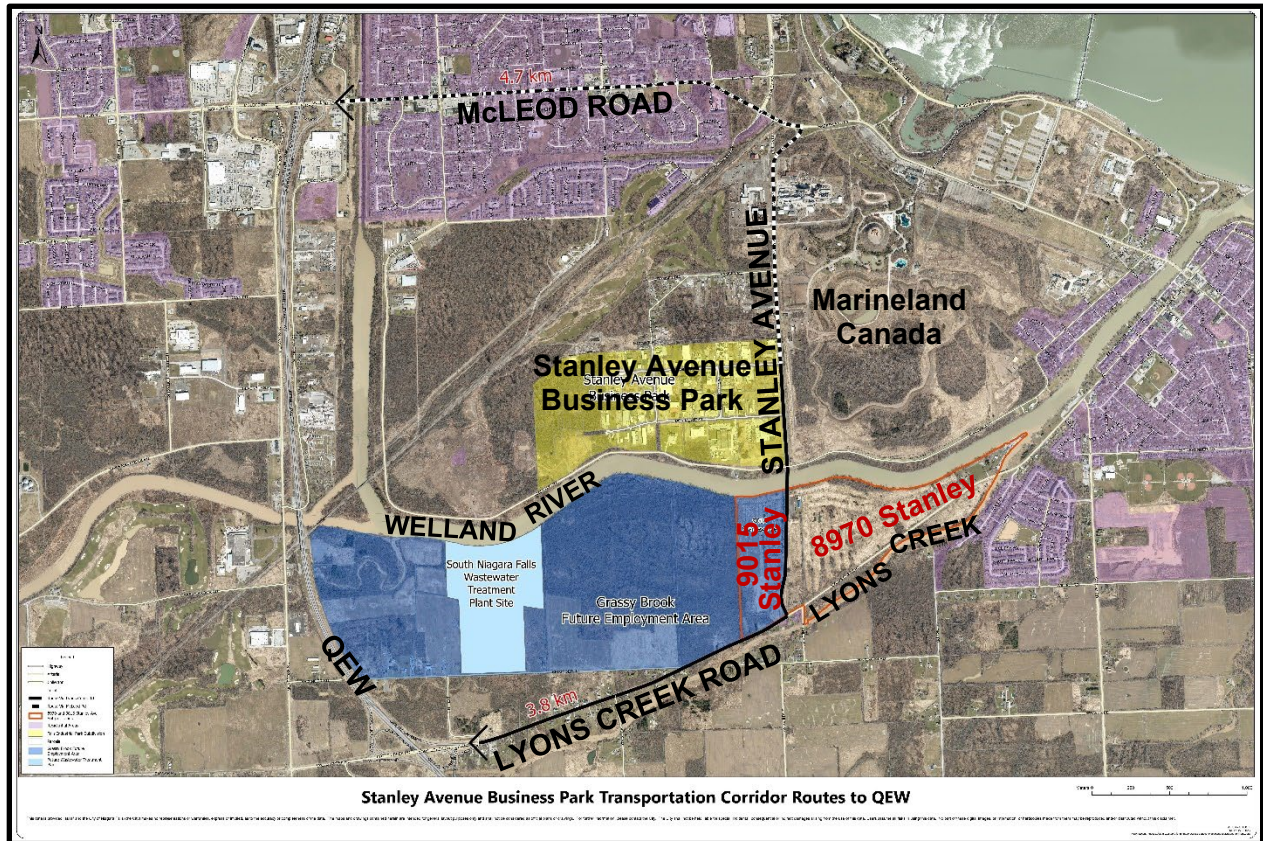


Exhibit 4.5 'Visual – Stanley Avenue Business Park Transportation Corridor Routes to QEW'
– with label overlays

THE APPLICATIONS

[7] The Applications seek approval for the redevelopment of the Properties with a residential subdivision of approximately 1,344 units through a mix of single-detached, semi-detached, townhouse, and apartment dwellings, and with a minor commercial component at the corner of Stanley Avenue and Lyons Creek Road. A Conceptual Development Plan ("Concept Plan") was provided with the Applications to "demonstrate a potential configuration of the lands and inform the OPA and ZBA applications". A Draft Plan of Subdivision ("DPS") application has not been filed.

[8] The OPA application proposes to change the City Official Plan ("COP") designation of the Properties from 'Resort Commercial', 'Open Space and Recreation', 'Environmental Protection Area', and 'Environmental Conservation Area' to 'Residential', 'Minor Commercial', and 'Environmental Protection Area'.

[9] The ZBA application proposes to remove the Properties from the Willoughby Zoning By-law (“Willoughby ZBL”) and to include them in the City’s Zoning By-law No. 79-200 (“ZBL 79-200”). The zoning is proposed to change from ‘Tourist Commercial (TC)’, ‘Industrial (I)’, and ‘Conservation – Open Space (OS)’ in the Willoughby ZBL to ‘Site Specific Residential 3 (R3-X)’, ‘Neighbourhood Commercial (NC)’, and ‘Environmental Protection Area (EPA)’ in ZBL 79-200.

[10] Neither the proposed OPA nor the proposed ZBA detail the location of the single-detached, semi-detached, townhouse, and apartment dwellings across the Properties.

[11] The Applications were considered in conformity with the Regional Municipality of Niagara (“Region”) Official Plan in force at the time the Applications were deemed complete (“ROP 2014”).

LEGISLATIVE FRAMEWORK

[12] When considering appeals filed pursuant to ss. 22(7) and 34(11) of the Act, the Tribunal must have regard to the matters of provincial interest as set out in s. 2 of the Act, and to the decision, if any, of the approval authority and the information considered in making the decision, as required by s. 2.1(1) of the Act. Although these appeals relate to a non-decision by the City, it is noted that the City does not support the Applications.

[13] Further, s. 3(5) of the Act requires decisions of the Tribunal affecting planning matters to be consistent with policy statements and conform, or not conflict, with provincial plans that are in effect on the date of the decision. In this respect, the Tribunal must be satisfied that the Applications are consistent with the Provincial Planning Statement, 2024 (“PPS”).

[14] The Tribunal must also be satisfied that the ZBA conforms with the COP and the ROP 2014, and that the Applications represent good land use planning and are in the public interest.

PARTICIPANTS

[15] A number of Participants, including the Niagara Peninsula Conservation Authority (“CA”), provided statements with concerns related to the following: features regulated by the CA; consistency with the PPS; conformity with the ROP 2014, the COP, and the Willoughby ZBL; the Environmental Impact Studies, the Traffic Impact Study, and the Geotechnical and Hydrogeology studies; archaeology and cultural heritage; prematurity of the Applications and the need for the Secondary Plan to be completed; wastewater infrastructure; the need for housing; traffic; the environment; and the public meeting process (which is not a land use planning concern that can be addressed by the Tribunal).

[16] Most of the Participants’ concerns were addressed either by the witnesses or in the Agreed Statements of Facts that came about through the meeting of like witnesses, with the remaining concerns more appropriately to be addressed through any future development applications.

WITNESSES

[17] On consent of the Parties, the Tribunal qualified the following witnesses to provide opinion evidence in their respective areas of expertise, as noted:

For 261:

- Craig Rohe – Land Use Planning;
- Robyn Brown – Land Economics;
- Matthew Di Maria – Transportation Engineering Technology;
- Benjamin Coulson – Noise, Acoustics, and Vibration Engineering; and
- Matt Costigane – Air Quality Engineering.

For the City:

- Brian Dick – Land Use Planning;
- Adam Fischer – Land Economics; and
- Kira Dolch – Land Use Planning.

For the Region:

- Giuseppe (Joe) Tomaselli – Noise and Vibration Engineering;
- Katie Armstrong – Air Quality and Odour; and
- Diana Morreale – Land Use Planning.

ISSUES

[18] The Parties' issues and the Participants' concerns can be distilled to the following:

- consistency with the PPS;
- the Clergy Principle and prematurity;
- land economics – the need for residential versus employment lands;
- land use compatibility – including noise, odour, and transportation; and
- the level of detail in the OPA instrument ("OPA Instrument") and ZBA instrument ("ZBA Instrument") (together "Instruments").

CHRONOLOGY

[19] The chronology of the Applications is relevant to the issues of prematurity and the Clergy Principle in relation to the following municipal studies:

- the Region's Municipal Comprehensive Review ("MCR"), Land Needs Assessment ("LNA"), and Employment Area Strategy ("EAS"); and
- the City's Employment Lands Strategy ("ELS"), OPA 147 which implements the ELS, and the Secondary Plan.

[20] It is noted that none of these documents are before the Tribunal for determination in this hearing.

[21] A non-exhaustive chronology, as provided through various witnesses and Exhibits, is summarized below:

DATE	EVENT
2015	Region's MCR initiated
March 21, 2019	Pre-Consultation meeting regarding the OPA, ZBA and DPS
May 2020	Region's EAS background report
September 2020	City's ELS Phase 1 report
April 2021	Region's Official Plan draft Employment Policy Paper
April 2021	City's ELS Phase 2 report
May 2021	Region's Draft LNA Summary report
June 29, 2021	Open House (remote electronic) regarding the City's ELS – draft OPA 147 identified new proposed employment area, including 9015 Stanley 261 in attendance
July 11, 2021	OPA application submitted
July 13, 2021	Public Meeting regarding the City's Staff Report on ELS 261 in attendance
July 16, 2021	City's letter to 261 regarding: <ul style="list-style-type: none"> • incomplete OPA application; and • 9015 Stanley part of ELS study lands
August 11, 2021	Region's Staff Report regarding LNA
August 2021	Region's Revised LNA Summary report
November 12, 2021	City's ELS Phase 3 report
December 7, 2021	City Council received ELS Phase 3 report
December 13, 2021	OPA application deemed complete City's letter to 261 noting that 9015 Stanley was: <ul style="list-style-type: none"> • part of the Secondary Plan area; and • identified in the ELS for employment uses

Jan 12, 2022	Region's Staff Report regarding the draft Region Official Plan 2022 ("ROP 2022") for consultation
February 8, 2022	ZBA application submitted
March 4, 2022	261's letter to Region regarding: <ul style="list-style-type: none"> • draft ROP 2022; and • Employment designation on 9015 Stanley
April 8, 2022	Watson & Associates' response letter regarding 8970 Stanley and 9015 Stanley
May 5, 2022	Pre-Consultation meeting regarding the ZBA
May 13, 2022	Peer review of the Region's LNA
June 2022	Region's 2051 LNA report
June 9, 2022	ZBA application deemed complete
June 15, 2022	Region's Staff Recommendation Report regarding the draft ROP 2022
June 22, 2022	261's letter to the Region regarding the draft ROP 2022
June 23, 2022	Regional Council's adoption of ROP 2022 with 9015 Stanley designated as an 'Employment Area'
August 9, 2022	Public Meeting regarding the City's Staff Report on draft OPA 147 261 in attendance
August 9, 2022	City Council directed draft OPA 147 to a future Council meeting for adoption
October 7, 2022	261's letter to the Ministry of Municipal Affairs and Housing, requesting 9015 Stanley be removed from the 'Employment Area' designation
March 21, 2023	City's Staff Recommendation Report regarding the draft OPA 147
March 21, 2023	City Council's adoption of OPA 147, save and except as it applies to 9015 Stanley
May 30, 2023	City's Staff Report regarding the Secondary Plan Phase 1
March 28, 2024	OPA and ZBA appeals filed

EVIDENCE / ANALYSIS / FINDINGS

[22] The hearing centred almost entirely on 9015 Stanley and the appropriateness of it being developed for residential uses. There were no substantive submissions by any Party as to the appropriateness of residential uses on 8970 Stanley. As 9015 Stanley and 8970 Stanley are both the subject of the Applications, the Properties, as a whole, are subject to the appeals and one portion cannot succeed if the other fails. Further, the Concept Plan has no status before the Tribunal.

[23] The matters of provincial policy, the Clergy Principle, and the need for residential versus employment lands in the City emerged as the preeminent issues despite the significance of the extensive evidence tendered regarding compatibility between residential and industrial land uses in relation to noise, odour and transportation. For this reason, the land use compatibility issue and the Instruments are given only a brief analysis.

[24] For the reasons that follow, the Tribunal dismisses the appeals and the Instruments are not approved.

Provincial Policy

[25] Section 3(5) of the Act provides that the Clergy Principle (the idea that land use planning applications should generally be assessed based on the planning policies in effect at the time an application was submitted rather than those introduced afterward) does not apply to policy statements and provincial plans that are in effect on the date of a decision by the Tribunal. In this respect, the Applications are subject to the policies of the current in-force PPS regardless of the date the Applications were deemed complete.

[26] The Act requires consistency with the PPS, and the PPS requires municipalities to plan for and provide for an appropriate mix and range of employment uses, as well as to maintain a minimum 15-year land supply for residential development. As Ms. Dolch and Mr. Fischer testified, the City and the Region have determined, through their

respective LNA and ELS, that the City has a sufficient supply of residential lands and a shortfall of employment lands.

[27] Mr. Dick noted that a key objective of the ELS is to assess the City's "long term employment land needs to the year 2051, while also considering the adequacy and marketability of the City's shovel ready employment lands in the near term". He added that the goal of the ELS is to ensure that the City has the "right amount of developable employment land in the right location to meet forecasted industrial demand to the year 2051".

[28] Both Mr. Dick and Ms. Dolch testified that the ELS identified that the City needs approximately 76 ha of employment land for the City's future growth and to support the creation of a complete community. In addition, it was Ms. Dolch's opinion that the City currently has limited lands to market to potential industries due to residential conflicts and that the Applications do not "support the achievement of a mix of uses as the City does not have a mix and range of employment uses to meet long-term needs but sufficient lands for residential needs".

[29] Mr. Rohe opined that the proposed 'Minor Commercial' designation allows for the establishment of commercial land uses that would support the 'employment' element of complete communities cited in policy 2.1.6 of the PPS. Further, in his witness statement, he stated that he considered the range of potential employment opportunities provided by the proposed 'Residential' and 'Minor Commercial' land use designations "to represent an adequate provision of employment opportunities" on the Properties and noted that employment uses can encompass many forms of employment.

[30] With respect to PPS policy 2.8.2.1, which states that "[p]lanning authorities shall plan for, protect and preserve *employment areas*...", in his witness statement Mr. Rohe opined that the policy "does not direct private applicants to undertake such initiatives – the direction contained within the policy is that "Planning Authorities" (i.e. municipalities) are the body which is "required" to undertake such endeavours" (*sic*).

[31] Further, he acknowledged that the municipal studies and implementing OPAs undertaken by the City and Region are consistent with policy 2.8.2.1 of the PPS, are required, and are “the appropriate vehicle to plan for, protect and preserve employment lands”, yet opined that the Clergy Principle applies in this respect and that the implementing OPAs are not determinative in relation to the Applications.

[32] The direction in the PPS for ‘planning authorities’ to plan for employment areas was the subject of lengthy deliberation. Mr. Rohe interpreted the wording in the PPS as putting the onus on the City and the Region and, in doing so, not directing private applicants to undertake such initiatives or consider such policies. He did not extend his argument further, other than to acknowledge that both the Region and the City have undertaken employment studies and implemented amendments to their Official Plans.

[33] Mr. Rohe did however consider the direction to ‘planning authorities’ in policy 2.2.1 of the PPS to provide for an appropriate range and mix of housing. In this instance, Mr. Rohe expounded on how the Applications meet this policy.

[34] Further, as addressed in paragraphs [75] and [76], Ms. Brown testified that there was a misalignment between the City’s LNA and the Region’s LNA with respect to the need for additional designated employment lands. This testimony was challenged on cross-examination and she conceded that, despite her findings otherwise, there was no such misalignment.

Finding

[35] The Tribunal prefers the evidence of the City and the Region related to provincial policy. It is clear that the PPS does not direct private applicants to plan for, protect, and preserve employment lands, as relied on by Mr. Rohe. However, in the context of a municipality considering an OPA application made by a private applicant, the municipality must take into consideration the requirements of the PPS and evaluate an application against the needs of the municipality as a whole. In this regard, a private applicant ought to review an application through the lens of the municipality and, in part,

address the requirements of the PPS in that regard. Such an evaluation of the PPS should have been undertaken by 261 in justifying the Applications.

[36] Given s. 3(5) of the Act requires decisions of the Tribunal to be consistent with provincial policy statements that are in effect on the date of the decision, the Tribunal finds Mr. Rohe's assertion contradictory; that the Clergy Principle applies to the Applications, despite acknowledging that the municipal studies and implementing OPAs undertaken by the City and Region are required and are consistent with the PPS.

[37] Further, the Tribunal finds that Mr. Rohe's assertion that the proposed 'Minor Commercial' designation would support the 'employment' element of a complete community is not reasonable. With respect to employment area uses, policy 2.8.2.3 of the PPS lists "manufacturing, research and development in connection with manufacturing, warehousing and goods movement, and associated retail and office uses and ancillary facilities", but does not include commercial uses.

[38] Despite the chronology of events related to the municipal planning process to secure employment lands and the timing of the OPA application, the Tribunal finds that 261 had a responsibility, through their planning consultants, to consider the policy implications of the PPS as it affects 9015 Stanley and the greater Secondary Plan area.

[39] 261 was aware of the City's evolving LNA work and continued on a path inconsistent with, and unresponsive to, the emerging identified needs of the City. Employment lands could have been accommodated on 9015 Stanley, and both residential and commercial lands on 8970 Stanley, to ensure consistency with the PPS. This was not done.

[40] 261 did not opine on the City's and the Region's positions that the City has sufficient designated residential lands until 2051. With no need for the City to secure additional residential lands, and a need for employment lands on 9015 Stanley identified through the LNA, the Tribunal finds that consistency with the PPS justifies the City's identified need for 9015 Stanley to be secured for employment uses.

[41] The Tribunal finds that the Applications are not consistent with the PPS and therefore the appeals fail on this finding alone.

[42] Given that the PPS consistency test is disjunctive and therefore fatal to the appeals, there is no requisite need for the Tribunal to deliberate, or render findings, on the testimony given regarding the other aspects of the appeals. However, in order to be comprehensive, the following analysis of the issues related to prematurity and the Clergy Principle, land use compatibility, and the absence of detail in the Instruments is provided as further rationale for the Tribunal's findings.

Clergy Principle / Prematurity

[43] As evidenced in the chronology listed above, and as highlighted by Ms. Dolch, as early as June 29, 2021, 261 was made aware of, and participated in, the ELS initiative for the planned 'Employment Area' designation through OPA 147 and the proposed Secondary Plan area, which included 9015 Stanley.

[44] Application of the Clergy Principle by the Tribunal would result in the Applications being tested against ROP 2014, which would not preclude a residential designation on the Properties, while if the Tribunal finds that the Clergy Principle should not apply, the Applications would be tested against ROP 2022, which would preclude a residential designation.

[45] The Clergy Principle was relied on by Mr. Rohe to justify the OPA application without an employment component and without consideration of the City's ELS and the Region's LNA process in the Planning Justification Report ("PJR") submitted in support of the Applications. In his witness statement, he opined that the Properties are an appropriate location for a secondary plan based on the direction of policy 14.1.3.1 of the ROP 2014, related to regional phasing to assist in the management of growth in urban areas. Nevertheless, he opined that the Applications should be considered independently, and in advance, of the Secondary Plan process, based solely on the Applications being deemed complete prior to the Secondary Plan project initiation.

[46] Mr. Rohe relied on policy 7.12.2.5 in the ROP 2022 ("Policy 7.12.2.5") in this regard, which states that "[d]evelopment applications deemed complete prior to the date of this Plan's approval shall be permitted to be processed, and a decision made under the Local and Regional Official Plan policies ... that existed when the application was deemed complete".

[47] Both the witnesses for the City and the Region proffered that the Applications were premature given that the Secondary Plan is warranted and that 9015 Stanley is planned for employment uses through the ELS. Further, Ms. Dolch opined that the Secondary Plan process will ensure that both residential and employment needs can be balanced and accommodated, together with natural and cultural heritage resources. Additionally, she noted that the Secondary Plan is the most appropriate way to plan a community holistically to determine the vision for the area and that this was communicated to 261 in the pre-consultation meeting held in March, 2019, and again in correspondence to 261 in June, 2022.

[48] If the Clergy Principle were to be applied, the City and Region witnesses opined that the proposed residential use of 9015 Stanley would prevent the City from achieving its employment forecast, and in particular, from meeting objective 4.A.19 and policy 4.B.4 1 of the ROP 2014 with respect to ensuring the availability of sufficient employment land to 2031. Ms. Dolch noted that policy 8.14 of the COP prohibits, 'as far as possible', traffic generated by industrial uses from penetrating designated Residential areas. In her opinion, if the Applications are approved, the Business Park generated traffic to the QEW via Stanley Avenue to Lyons Creek Road would then penetrate a designated Residential area, contrary to policy 8.14. Further, with reliance on the evidence of Mr. Tomaselli, Ms. Morreale opined that the Land Use Compatibility study undertaken in support of the Applications does not meet policy 3.C.3 of the ROP 2014 to ensure that the sensitive use of the Properties would not impact the long-term viability of the Business Park.

[49] On cross-examination, Mr. Rohe acknowledged that 261 had no immediate plans to develop the Properties, which is evidenced by the lack of a submission of a DPS

application ahead of the Tribunal hearing. He further agreed that good land use planning is not determined by the date an application is deemed complete and that there is “no magic to the date of an application”, that it does not determine land use, and is only a justified expression of the intent of an owner. He added that the same could be said regarding municipal OPAs, that they are only a justified expression of the intent of a municipality.

[50] Mr. Rohe also acknowledged on cross-examination that he was aware of, but did not monitor, the City’s ELS process or the Region’s LNA process, nor did he reference either in the PJR submitted with the OPA application.

[51] Both 261 and the City submitted caselaw in support of their legal submissions on the Clergy Principle, as follows:

Caselaw for 261:

- *Claremont Development Corporation v Pickering (City)*, 2022 CanLII 21239 (ON LT) at paragraphs [8] and [11];
- *1213763 Ontario Inc. v Toronto (City)*, 2019 CanLII 298 (ON LPAT) at paragraphs [20]-[21];
- *Toronto (City) v Toronto (City)*, 2019 CanLII 5555 (ON LPAT) (“Toronto v Toronto”) at paragraphs [58]-[60] and [65]-[66];
- *Fullerton Investments Inc v Burlington (City)*, [2007] OMBD No 764 at paragraphs 11-15; and
- *Ottawa (City) v. Minto Communities Inc.*, 2009 CanLII 65802 (ON SCDC) (“Ottawa v Minto”) at paragraph [30].

Caselaw for the City:

- *64 Prince Arthur Limited Partnership v Toronto (City)*, 2021 CanLII 6246 (ON LPAT) (“Prince Arthur v Toronto”) at paragraphs 139-144 and 201.

[52] In the caselaw submitted by 261, the Tribunal (and its predecessor tribunal, the Local Planning Appeal Tribunal (“LPAT”)) found that the Clergy Principle was appropriate to apply in each of those specific instances.

[53] However, in *Toronto v Toronto*, the LPAT recognized, in the following finding, that there may be instances where the Tribunal has flexibility in applying the Clergy Principle:

[59] The City argues that other decisions of the former Board, such as *James Dick Construction Ltd. v. Caledon (Town)* 2003 CarswellOnt 6221, [2003] O.M.B.D. No. 1195 (O.M.B.) and *Dumart v. Woolwich (Township)* 1997 CarswellOnt 5706 [1997] O.M.B.D. No. 1817 (O.M.B.), allow for the Tribunal to decide whether the circumstances of the case warrant a different approach that may not adhere to the Clergy principle. The Tribunal indeed recognizes that the Board previously, and the Tribunal, has had some flexibility, on a case-by-case basis, in deciding whether the strict application of the Clergy principle should be invoked. [emphasis added]

[54] Further, in *Prince Arthur v Toronto*, the LPAT quoted from *9218 Yonge Street Incorporated v. Richmond Hill (Town)*, 2017 CarswellOnt 4157, which in turn quoted from *James Dick Construction Ltd. v. Caledon (Town)*, 2003 CarswellOnt 6221 (“*James Dick v Caledon*”), wherein the Ontario Municipal Board (“OMB”) found that the Clergy Principle should not apply where procedural fairness may conflict with other values that may be of greater importance:

40 In short people should continue to expect that the policies that are in place when they apply will be made to apply to them. In the vast majority of cases, this should continue to be the practice before the Board as it has been in the past.

41 However, it also must be acknowledged that the Clergy Principle is not a law or an inviolate rule. It is a practice meant to promote fairness in the planning process. Even so, there are occasions where fairness conflicts with other values that may be of equal, or in some cases, much greater importance to the planning process, and while abandoning a fair practice may result in some prejudice to one party, this must be weighed in the balance against the other values that are at stake.

42 The Board agrees with the Town in its interpretation of the meaning that underlies the *Clergy* principle. On its face, *Clergy* appears to stand for the proposition that an application should be judged by the policies that exist at the

time that the application is filed. But more deeply, as the court acknowledged in its reasoning, the case stands for the proposition that the Board has the authority to formulate a procedural policy such as the Clergy principle and that it is equipped to judge those circumstances in which it is appropriate to apply it and, by corollary when it is appropriate to set it aside.

43 The court said the following in its ruling upholding the Board's determination in the Clergy case:

In carrying out its mandated duties, the OMB has exclusive jurisdiction to determine the scope of the issues before it, the procedures to be followed, and the appropriate policy choices to be made and applied in order to arrive at sound planning decisions.

44 In short, the Board is authorized to conclude when it is fair to apply the Clergy principle and should undoubtedly do so in the vast majority of cases. And equally, it has the authority to conclude when the circumstances of a case warrant the application of another principle. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest.

45 To conclude otherwise is to require that current practices and policies, no matter how reasonable, must be ignored or given so little weight as to be made virtually trivial, in all cases where the date of the application precedes them. This would amount in some cases to a willful blindness that would prevent the decision-maker when determining the merits of an application - even when it is reasonable to do so – to apply criteria, standards and tests that are based on the most current research and information. [emphasis added]

[55] In *James Dick v Caledon*, the Tribunal continued that:

46 The question in this case is: do the circumstances of this application and the corresponding policy process warrant the extraordinary practice of setting aside the Clergy principle? The Board agrees ... that this case is one of the rare instances where the prejudice to the applicant ... is balanced by the value of applying the more stringent policies of OPA 161. [emphasis added]

[56] Further, as referenced in *James Dick v Caledon*, the Ontario Superior Court of Justice ("Court"), in upholding the *Masters v. Claremont Development Corporation*, 2021 ONSC 3311, noted that, in *Dumart v. Woolwich (Township)*, (1997), 36 O.M.B.R.

165 (O.M.B.) (“Dumart v Woolwich”), the OMB “cited another related practice which is that any policies that were passed after the application date, but before a final decision is made on the application, could be considered by the [Tribunal] or other decision-making authority in making the final decision”. Additionally, the Court noted that “[i]nsofar as municipal planning documents are concerned the Clergy principle continues to be available to be applied by the ... Tribunal, as a policy within its exclusive jurisdiction”.

[57] Finally, as considered in Dumart v Woolwich, the OMB found that:

8 [...] if elements of the new plan are compelling in terms of the usual planning considerations ... [including] orderliness of development, then it must be considered and regard must be had to these policies, if for no other reason than to satisfy the usual concern that the application represents good planning and is in the public interest. It would be an error to ignore the policies of the new plan simply because it is new, especially if the policies contained in it reflect the most current, modern, approved and sensible planning principles. In all circumstances the Board is nevertheless compelled to consider the test of good planning. To the extent that the new plan may be informative of this, it should be available to the Board as evidence and given as much value as is appropriate in the circumstances.
[emphasis added]

[58] Counsel for 261 stressed the importance of Policy 7.12.2.5 in relation to the Applications, that it is a codification of the Clergy Principle, is “good planning”, and “articulates the public interest”. She quoted Ottawa v Minto, wherein the Court found that:

[30] ... the appeal process before the Ontario Municipal Board is not merely a *lis* between parties, but a process requiring the OMB to exercise its public interest mandate. The decision to be made by the Board transcends the interests of the immediate parties because it is charged with responsibility to determine whether a land planning proposal is in the public interest. At first instance, that public interest is determined by Municipal Council, but on an appeal the Board has the obligation to exercise its independent judgment on the planning merits of the application and to assess the proposal and the positions of the parties from the perspective of applicable legislation, regulations, provincial plans, the provincial policy statement,

official plans and bylaws and even the potential impact on neighbouring municipalities. In doing so, it brings its own expertise to bear.

[emphasis added]

[59] Counsel for 261 drew a parallel between this finding by the OMB in *Ottawa v Minto* and Policy 7.12.2.5, propounding that the Tribunal must apply the Clergy Principle to the Applications and that it is good planning and in the public interest to do so.

[60] Counsel for the City noted that the Clergy Principle “is not a sword but a shield” related to new policies being determinative and that it does not preclude consideration of evolving policy. He added that the Tribunal has “consistently applied and considered evolving policy where required to determine good planning”.

Finding

[61] Very similar to the *James Dick v Caledon* decision, this case is unique in that it is an occasion where fairness in the planning process must be balanced against particular circumstances where it may be appropriate to set the Clergy Principle aside.

[62] It is evident from the chronology that, when the OPA application was filed, the City and Region were both in the early stages of their LNAs and on the path of planning for, and protecting, lands required for employment uses. It is also evident that 261 was aware of the LNA process being undertaken, and that 9015 Stanley was included in the proposed employment area boundary, as shown on mapping presented at the Open House held on June 29, 2021.

[63] In this regard, and since 261 acknowledged having no immediate plans to develop the Properties, the timing of the submission of the OPA application could be inferred as an attempt to pre-empt the planning process being undertaken by the City and the Region in order to capitalize on, and rely on, the Clergy Principle.

[64] The Tribunal finds that the City’s efforts to plan for a complete community by securing land use designations for employment uses, as dictated by the Province

through the PPS, was attempted to be frustrated through the submission of the OPA application by 261.

[65] In this regard, the Tribunal finds that the Applications are premature, in terms of having been submitted during the LNA process, having no analysis in the PJR submitted with the OPA application on the impact of not including 9015 Stanley in the employment area, and by the general and broad nature of the residential land use designation proposed through the OPA Instrument, as addressed in paragraphs [86] through [90] below.

[66] Ultimately, the Clergy Principle refers to the Tribunal's discretion to consider the Official Plan policies in effect at the time of an application. It is not law and, as legislated in s. 3(5) of the Act, can not be applied to the PPS. Therefore, with respect to the COP, the Clergy Principle is a non-compulsory option for the Tribunal to employ if deemed appropriate, and by extension, to opt not to employ if deemed not appropriate. Such is the occasion in this instance. This is a moot point given the Tribunal's finding that the PPS policies are not met, but provides a step further to ensure certainty to the Tribunal's ultimate finding that the appeals should be dismissed.

[67] Although the Clergy Principle is applied in the vast majority of planning applications and has been upheld by the Tribunal on the vast majority of decisions, it is plain that it is more akin to an administrative policy, and the Tribunal has the discretion to apply it, or not, to municipal planning documents, such as official plans, given the particulars of a case.

[68] In this respect, it is reasonable on its face for Mr. Rohe to have relied on the Clergy Principle in his justification for the OPA application. The issue in applying the Clergy Principle in this case stems from the requirement to fulfil provincial policy directions to plan for complete communities, and to acknowledge and respect the needs of the City and Region in their planning functions in this regard. Unfortunately, none of this was considered in the pursuance of the Applications, and the Clergy Principle should not be a tool to rely on when policy change, as directed by the Province, is underway before applications are filed.

[69] Additionally, and counter to the argument made by counsel for 261 in relation to Policy 7.12.2.5, that the Tribunal must apply the Clergy Principle to the Applications as it is good planning and in the public interest to do so, the Tribunal finds that it would be contrary to the public interest and only in the private interest of 261 to do so. Furthermore, it is discrepant reasoning for 261 to rely on a policy in ROP 2022 related to the Clergy Principle, while asserting that ROP 2022 should not apply due to the Clergy Principle.

[70] The Tribunal agrees with the City, as expressed in the City's Staff Recommendation Report dated March 21, 2023 (Exhibit 1.4, Tab 31), that "[t]hinking over the long-term and in a broad and contextual manner is key, compared to favouring a single application at the expense of the broader vision for the area and its future and the City's responsibility to meet Provincial employment targets".

[71] Further, with respect to competing public and private interests, the principles of procedural fairness, natural justice, and the needs of the greater good must be balanced against potential prejudice to 261. The Tribunal finds that, in this instance, the former weighs more heavily than the latter, as protecting for employment uses is vital for the future development of the City.

[72] Any perceived prejudice to 261 could feasibly be remedied, in part, through future applications for residential development with respect to 8970 Stanley, as there was no evidence proffered by the City or the Region concerning 8970 Stanley. The Tribunal offers no position on the merits of any such future applications.

Land Economics / Need for Residential vs Employment Lands

[73] In his assessment of PPS policy 2.8.2.1, Mr. Rohe noted that the direction to planning authorities to "plan for, protect and preserve employment lands" does not direct 'private applicants' to undertake such initiatives, but he acknowledged that both the Region and the City had undertaken such initiatives and that they are consistent with the direction of the PPS. He opined on this reasoning regarding the PPS directive to 'planning authorities' to undertake required steps in relation to employment areas

several times in his witness statement, somewhat absolving himself and 261 of the need to consider the PPS directives to plan for employment uses. Instead, Mr. Rohe relied on the relatively small commercial component on the Concept Plan to satisfy the PPS directive for planning authorities to promote economic development and competitiveness, suggesting that it would support the ability of the City to meet its prescribed growth targets.

[74] Mr. Rohe noted that the City's and the Region's amendments related to employment areas were not in effect or considered by Council of either the City or the Region until after the OPA application was deemed complete. He relied solely on the Clergy Principle and did not extend consideration of the PPS policies in this regard.

[75] Mr. Rohe relied on the work and findings of Ms. Brown regarding employment needs in the City, which ultimately proved to be flawed through the course of the hearing. Ms. Brown testified that the process that the Region and the City undertook for their LNAs was iterative and that the land surplus or shortfall numbers varied through the various draft reports. She opined that, ultimately, the Region and the City were not aligned in their employment need statistics. Specifically, she opined that the Region's LNA and the City's ELS are misaligned as the Region's LNA determined no new employment land need in the City, yet the City's ELS determined a shortfall of 76 ha. She concluded that the City's work in this regard is "premature, and needs to incorporate the land needs assessment that the Region of Niagara is [c]urrently completing as part of their MCR".

[76] There was much evidence put forward regarding the Region's 2051 LNA report, dated June 2022, related to the wording used to describe the updated employment area boundary for the Montrose Road Industrial Area, which included lands to the west of the Property. Specifically, it states:

Similar to Employment Area densities, Employment Areas boundaries in the City of Niagara Falls and Township of West Lincoln have been refined based on input from municipal planning strategies.

The Niagara Falls Employment Strategy identified a larger preferred Employment Area boundary for the Montrose Road Industrial Area. The updated boundary is based on the

re-designation of adjacent lands to the previously identified Employment Area (PDS 17-2021, Appendix 10.2, page 106). The adjacent lands are to be re-designated from Tourist Commercial to Employment and brought into the Employment Area. The additional area is 40 hectares of developable lands.

As a result, there is no longer a land need for additional Employment Area lands in Niagara Falls, as previously identified in the August 2021 draft LNA before the above-noted employment area was adjusted. [emphasis added]

[77] Through cross-examination, counsel for the City submitted, and requested agreement from Ms. Brown, that the reference to 'adjacent lands' to be redesignated from 'Tourist Commercial' was a reference to 9015 Stanley, and that the addition of 9015 Stanley explained the conclusion in the Region's 2051 LNA report that no additional employment land is required. Ms. Brown disagreed that the reference was to 9015 Stanley and noted that there is no such designation in the COP and that 9015 Stanley is designated 'Resort Commercial'. She submitted that, since no mapping was included in the report, she did not interpret the text to be referring to 9015 Stanley while undertaking her analysis. However, she did ultimately agree that 9015 Stanley is zoned 'Tourist Commercial' and that, in retrospect, it is a reasonable interpretation that the report was referring to 9015 Stanley.

[78] Through further cross-examination, Ms. Brown acknowledged that there was no misalignment between the Region and the City with respect to employment needs for the City, as it became clear that the Region had included the 76 ha shortfall as part of the existing vacant supply of employment lands in the City, and that the Region and the City are consistent in their findings.

[79] As Mr. Fischer noted, regardless of the characterization of these lands as a shortfall, or as existing supply, both the City's ELS and the Region's LNA identify that 9015 Stanley is required to accommodate long-term employment area growth to 2051.

Finding

[80] Both the City's and the Region's evidence demonstrated the need for additional employment lands in the City, and in particular, the need for 9015 Stanley to form part of the City's employment lands within the Secondary Plan area.

[81] Further, the flaws in Ms. Brown's evidence regarding the need for additional employment lands weakened the cogency of Mr. Rohe's evidence with respect to justifying the redesignation of 9015 Stanley to 'Residential'.

[82] Additionally, the evidence of Mr. Coulson on land use compatibility between 9015 Stanley and the future planned employment lands to the west, which highlighted the extent of the environmentally significant features on the lands to the west, further highlights the need for 9015 Stanley to be developed for employment uses to satisfy the City's shortage of employment lands within the Secondary Plan area.

[83] The Tribunal finds therefore, that the land economics reveal a need for 9015 Stanley in order for planning authorities to secure sufficient employment areas for current and future uses, as required by the PPS. It is noted that this finding does not determine the appropriateness of a 'Residential' designation on 8970 Stanley.

Land Use Compatibility

[84] The Region and 261 each called witnesses to address the issues of land use compatibility, including noise and odour, and 261 called a witness to address the issue of transportation. Significant testimony was proffered by both Parties related to the potential for adverse effects from residential use of the Properties on the Business Park and on the employment lands to the west, but also related to the potential effects from the Business Park and the employment lands to the west on the residential use of the Properties.

Finding

[85] Despite the conflicting testimony from the two Parties, the Tribunal finds that the land use compatibility evidence has no practical significance or impact on the determination of the Applications based on the findings related to provincial policy, land economics, and the deficient Instruments. In this respect, no considered analysis of the testimony is necessary for the determination of the appeals.

The OPA and ZBA Instruments

[86] The Instruments lack detail with respect to the location of dwelling typologies across the Properties. Mr. Rohe opined that the draft Urban Design Guidelines (“UDG”) submitted with the ZBA application provide direction on built form, the appropriate location of taller buildings, permitted uses, public spaces, and complete streets, among other matters. He advised that the ZBA Instrument would be subject to the directions of the UDG, with reference to the UDG, as approved, having been written into the ZBA Instrument with respect to providing site-specific criteria for ‘Block Townhouses’ and ‘Apartments’. According to Mr. Rohe, the draft UDG “will be required to be updated and finalized to reflect any future Draft Plan of Subdivision applications”.

[87] It was Mr. Rohe’s opinion that the proposed flexible zoning approach “allows for changes in the market, allowing all forms of housing to be considered and established in any portion of the development, subject to the direction of the UDG” and in conformity with the ‘Residential’ policies of the COP. He noted that it would also allow for flexibility in refining the final subdivision design, “as there may be additional constraints that are discovered through future studies, such as archaeological preservation areas or larger natural heritage buffers, that require land dedication”.

[88] Ms. Dolch noted that, in the absence of a concurrent DPS application, the proposed “catch all” ZBA Instrument does not allow for the appropriate implementation of the COP. Further, she noted that the maximum building height and density for apartment dwelling units (related to the proposed minimum lot area), as proposed in the ZBA Instrument, do not comply with the COP and that the OPA Instrument does not address this discrepancy. As such, it was her opinion that the ZBA Instrument does not comply with the OPA Instrument. She also noted a concern regarding the proposed 0 metre front and exterior yard setbacks for apartment buildings related to potential sight line issues.

[89] Mr. Rohe acknowledged the height discrepancy and noted that he supported a revised maximum height of six storeys to ensure conformity with the COP. Further, he advised that the lot area for apartment dwelling units would have to comply with the density limits in the COP. He added that the City could request a “site line [sic] analysis to confirm if any negative impacts would result”, and that, in his opinion, it is preferable “to have the flexibility to utilize compact development forms within minimal setbacks as of right, rather than requiring applicants to apply in order to achieve desirable designs”.

Finding

[90] The Tribunal finds that the Instruments lack sufficient detail and specificity to implement the proposed development as proposed through the UDG. Further, the request by 261 to approve the ZBA Instrument while acknowledging that the draft UDG will require updating and finalization is concerning. The Tribunal finds that, by definition, this is an acknowledgment by 261 that, at a minimum, the ZBA application is premature.

[91] Granting approval of the Instruments would make for an indeterminate ruling by the Tribunal and would sanction the entire developable area of the Properties to be built out, at the extremes, entirely with single-detached dwellings, or entirely with apartment dwellings. Such an approval would represent poor land use planning and requesting the Tribunal to consent to such is unreasonable and unjustifiable.

SUMMARY OPINION

[92] Mr. Rohe opined that the Clergy Principle applies to the Applications and that they are consistent with the PPS, conform with the ROP 2014 and the COP, are reasonable, represent good planning, and are in the public interest. It was his recommendation that the Tribunal allow the appeals and approve the Instruments.

[93] Collectively, the land use planning witnesses of both the City and the Region do not support the Applications. They opined that the Applications are not consistent with the PPS and do not conform to the ROP 2014 or the COP. It was their opinion that 9015 Stanley is required to accommodate the 76 ha shortfall of employment lands

identified in the ELS, and that the City has a sufficient supply of residential designated lands to accommodate the population forecast to 2051. They do not support the redesignation to 'Residential', nor do they support the Instruments, as they lack sufficient detail. They recommended that the Tribunal not approve the Instruments as they do not represent good land use planning and that the appeals be dismissed.

SUMMARY FINDINGS

[94] The Applications are determined by the requirement of the PPS for planning authorities to plan for employment areas over the long-term. The chronology shows the intent of, and the steps taken by, the Region and the City to meet this PPS requirement, and the actions taken by 261 to develop 9015 Stanley for residential uses, despite being well aware of the Region's and the City's processes in this regard.

[95] As stated above, the Clergy Principle is not law and can not be applied to the PPS. In this rare instance, the matter of the Clergy Principle, which is at the Tribunal's discretion to invoke, is therefore eclipsed by the established need for employment lands in the City, as determined through the process required by the PPS. This issue emerged as the key determinant of the Tribunal's finding that the Applications do not have regard for the applicable matters of provincial interest in s. 2 of the Act and are not consistent with the PPS. Consequently, the Applications also do not represent good land use planning, nor are they in the public interest.

[96] Moreover, despite being in conformity with the COP, it is the Tribunal's further finding that the Instruments lack sufficient detail to ensure good land use planning, and the Applications would therefore fail by this measure alone.

ORDER

[97] **THE TRIBUNAL ORDERS THAT** the appeals are dismissed and the requested amendments to the Official Plan and Zoning By-law No. 395-1966 of the City of Niagara Falls are refused.

“C. I. Molinari”

C. I. MOLINARI
MEMBER

Ontario Land Tribunal

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