

*Case Name:*

**St. John's Evangelical Lutheran Latvian  
Church v. Essa (Township)**

**IN THE MATTER OF subsection 53(19) of  
the Planning Act, R.S.O. 1990, c.**

**P.13, as amended**

**Applicant and Appellant: St. John's  
Evangelical Lutheran Latvian Church**

**Subject: Consent**

**Property Address/Description: 5813 20th  
Sideroad, (Pt Lot 20, Conc. 6)**

**Municipality: Township of Essa**

[2012] O.M.B.D. No. 651

74 O.M.B.R. 270

2012 CarswellOnt 13371

Municipal File No.: B4/11, OMB Case No.:

PL120045, OMB File No.: PL120045

Ontario Municipal Board

**Panel: Sylvia Sutherland, Member**

Decision: October 19, 2012.

(41 paras.)

**Appearances:**

St. John's Evangelical Lutheran Latvian Church: H. Elston, counsel.

Town of Essa, Nottawasaga Valley Conservation Authority: M. Green, counsel, C. Salazar (Student at Law), counsel.

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**DECISION DELIVERED BY SYLVIA SUTHLAND**  
**AND ORDER OF THE BOARD**

**1** St. John's Evangelical Lutheran Latvian Church ("St. John's") has appealed, pursuant to s. 53(19) of the *Planning Act* ("Act"), a decision of the Committee of Adjustment ("CoA") of the Township of Essa ("Township") refusing provisional consent to sever one new lot of approximately seven ha from a total land parcel of approximately 28ha at 5813 20th Sideroad (Pt. Lot 20, Conc. 6) ("subject property").

**BACKGROUND**

**2** St. John's, founded in Toronto in 1948, acquired the subject property, known as Camp Saulaine, in 1952, originally for the purposes of a meeting place and children's camp. The property is crossed by the Nottawasaga River. The camp portion, the proposed retained portion, includes a superintendent's house, dormitory, dining hall, library, recreation hall, playing fields and other outbuildings. As the camp evolved, building and septic permits were obtained and a number of small cottages were developed on lands, sitting high above the camp lands. This latter comprises the proposed severed, or cottage, parcel.

**3** The Canada Revenue Agency ("CRA") has advised St. John's that ownership of the lands hosting a collection of private cottages may jeopardize its status as a registered charitable foundation, which counsel for the church maintains "is vital to its continued existence."

**4** Counsel for St. John's told the Board that, once notified by the CRA of its intentions, the church's only options were to either sell the entire property or obtain a severance and transfer the ownership of the severed cottage parcel.

**5** In 1960, the lands that are proposed to be severed were originally laid out and developed under an agreement between the church and the Township (Exhibit 13, Tab1). The agreement permitted St. John's to develop these lands exempt from regulations then in effect in the Township with respect to subdivisions on the basis that:

1. The dwellings would be used by members of the congregation of the Church.
2. The dwellings would be summer dwellings only.
3. The lots and buildings would not be sold to any party outside the official

jurisdiction of St. John's.

**6** When the current application for severance came before the CoA, it was supported by the Township's planner, Colleen Healey with, as a result of discussions with the Nottawasaga Valley Conservation Authority ("NVCA"), the proviso that a condition of consent be a study to demonstrate areas which may be subject to erosion so that the lot to be created would be designed to ensure a safe area exists to which to relocate a cottage or home in the event of a natural disaster. Ms. Healey opined this would ensure conformity with s. 3.0 of the Provincial Policy Statement ("PPS") which states:

Development shall be directed away from areas of natural or human-made hazards where there is an unacceptable risk to public health or safety or property damage.

**7** Ms. Healey felt that the study would also ensure conformity with s. 3.1.1 of the PPS:

Development shall general be directed to areas outside of hazardous land adjacent to river, stream and mall lake systems, which are impacted by flooding hazards and/or erosion hazards.

**8** The Township was particularly sensitive to concerns regarding riverbank erosion as a result of the shifting pattern of the Nottawasaga River downstream in nearby Angus, where there have been complains of riverbank erosion caused by the drastic meandering pattern of the Nottawasaga River. The Township has hired Parish Geomorphic to study the river patterns at this location.

**9** The access road to the property is currently of minimal standards and, in the opinion of the Township Fire Chief, unsuitable for four season use. Chief MacDonald said the road was likely unusable by a heavy fire vehicles in spring and fall seasons, and, unless proper snow removal was assured, by emergency vehicles in the winter. It was the chief's belief that some of the dwellings in the proposed severed portion were being used year round.

**10** As a result of these concerns, the Township agreed to support the concept of a severance in order to assist the Church with its tax issues, but asked that the following conditions be fulfilled as part of a provisional consent:

\* That the applicant (St. John's) conduct the necessary engineering studies to confirm the location on both the proposed severed and retained parcels of a building envelope that would be suitable for the re-location of any buildings on the retained parcel that are potentially subject to flooding, and on the proposed severed parcel for any building that would potentially be subject to collapsing down the slope in the event of further erosion. No buildings have to be moved at this point, only a suitable envelope located.

\* That the access road is brought up to minimum standards for a rural fire and emergency access road and that a winter maintenance agreement is confirmed for same.

\* That a development agreement be entered into under s. 51(25) to confirm the arrangements and understanding of the original 1960 agreement to be signed by St. John's, and to be binding on those who might take a transfer of the proposed severed portion.

**11** St. John's, maintaining that the severance was a purely technical change in ownership, stated that it would result in no new buildings, structures, additions, roads, driveway, residents, visitors, vehicular or pedestrian traffic. The only result would be a change in the status of the cottagers from tenants to member of an owner group. It challenged the "reasonableness and relevance" of the proposed conditions, and refused to accept the proposed conditions. With this, the CoA refused the application, and the church appealed to the Board.

## **WITNESSES**

\* Tracy Atkinson and Colleen Healey gave expert land use planning evidence in behalf of the St. John's and the Township respectively.

\* Paul Neals gave expert environmental planning evidence with particular expertise in slope analysis and floodplain issue on behalf of St. John's.

\* Patty Young gave expert evidence as a land use planner with particular expertise in conservation and hazard issues on behalf of the Township

\* Glenn Switzer gave expert professional engineering evidence with particular expertise in water resources and conservation issues on behalf of the NVCA.

\* Paul MacDonald gave expert evidence in fire-fighting, fire prevention and emergency management on behalf of the Township.

\* Sheila Perri gave expert evidence on municipal road standards and

costing on behalf of the Township.

\* Arturs Jansus, a board member of St. John's since 2008, spoke on behalf the church, of which his father was a founding member.

## **MOTION**

**12** At the commencement of the hearing, Mr. Elston, counsel for the St. John's, introduced a motion for an Order that the conditions proposed by the Township and the NVCA being not reasonable, having regard to the nature and consequences of the proposed development, the Board approve the proposed consent with conditions (Exhibit 1, Tab U) recommended by Ms. Atkinson. After some discussion, Mr. Elston stood down his motion and the Board heard the merits of the case.

## **FINDINGS**

**13** The core of St. John's position was that conditions must relate to the consequences of the development, and that, in this instance, there are no consequences as a result of the severance. The boundary of the cottage parcel is identical to the boundary of the cottage parcel, which has been in place for 52 years. Only ownership, nothing else, will change.

**14** The Township and the NVCA argued that the PPS defines "development" to include the creation of a new lot, and that, notwithstanding that it is not proposed, at this time, to construct any further structures on the proposed retained or severed parcels, a new lot, with a new owner, is proposed to be created. A firm boundary is replacing what had been a figurative line, and that it is important that science determine the new boundary line in order that both post-severance owners will have a safe and secure situation in the future. It is their position that the exact location of the severance line on this application should be drawn so that both the severed and retained parcels cannot be determined until the requested studies are done.

**15** It is also their position that the owners on the proposed severed parcel will be at risk without a reconstructed road.

**16** When asked why St. John's objects to the studies, estimated by the Township to cost approximately \$10,000 to \$15,000, and the road reconstruction, estimated by Ms. Perri to cost approximately \$37,775. Mr. Jansus replied that "serious money" would be spent to solve issues "that would not arise." He acknowledged that the entire Camp Saulaine property is currently listed for sale at \$2,400,000. This, he explained is driven by the position of the CRA, and it is the hope of the church that "it won't sell."

**17** A site visit illustrated that the property is beautiful, both the camp portion along the banks of the Nottawasaga River and the cottage portion, sitting on the heights above the river. The visit also

served to illustrate some of the environmental challenges the site faces, as well as the condition of the road.

**18** Ms. Young, a senior planner with the NVCA, stated that the Nottawasaga is a large, actively meandering river, and that the subject property also hosts a 24m slope. An in-house review of aerial photography shows that the river on this property has migrated a range of four to 62m over a 54 year period (Exhibit 20).

**19** She said that St. John's has not submitted a floodline or erosion study, first requested by the NVCA in 2011. (Exhibit 21 illustrates the bank movement between 1954 and 2008.) Ms. Young said these studies are required by the NVCA to determine the location of safe building envelopes, and to evaluate the configuration of the proposed lot. In other words, where the severance line should be drawn.

**20** Ms. Young said there are currently no assurances that the proposed severance line is in a location where each of the two separate owners will have safe building envelopes.

**21** She directed the Board's attention to s. 3.1.1(b) of the PPS, which states:

Development shall generally be directed to areas outside of hazardous lands adjacent to river, stream and small inland lake systems which are impacted by flooding hazards and/or erosion hazards.

**22** She also directed the Board to the definition of "development" in the PPS:

**Development** means the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act*..."

**23** In a letter to the Board dated December 29, 2011, outlining the reasons for St. John's appeal of the CoA decision, Mr. Elston stated that the NVCA "incorrectly considered the application to be 'development', based it seems on a literal interpretation of the term 'development' in the PPS." He termed this interpretation "erroneous". The Board is at a loss to see how a "literal interpretation" of a defined term could be "erroneous". The PPS states quite clearly that development means "the creation of a new lot." Under Bill 51, the Board must be "consistent" with the PPS, as must the Township and the NVCA. The PPS is unlike an OP, where a less than literal interpretation is sometimes appropriate.

**24** It is the Board's determination that the creation of the proposed new lot represents development, and as such, affords the Township and the NVCA the opportunity to request whatever studies they feel necessary for an adequate review of the application.

**25** Ms. Young also made reference to s. 3.1.2 (c) of the PPS:

Development and site alteration shall not be permitted within 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 for the nature of the development and the natural hazard.

**26** She also referenced s. 3.1.2 (d):

Development and site alteration shall not be permitted within a floodway regardless of whether the area of inundation contains high points of land not subject to flooding.

**27** Ms. Young said that NVCA planning guidelines direct lot lines outside of hazard features for a variety of reasons, and that the proposed severance splits the hazard between the two proposed lots. She pointed out that the future owners or use of the lots lot cannot be guaranteed, and the use of one lot may aggravate a hazard on an adjacent lot. She stated that the requested hazard studies would identify the location of the hazards which, in turn, would assist in determining the most appropriate lot configuration.

**28** Ms. Young said that the presence of multiple structures on the proposed severed lot, some of which are set back less than a few metres from the top of slope, creates additional complications. She said that if the slope experiences erosion and the houses are at risk, it is very likely that the homeowner will call upon the Township or other public agency to finance the protection of their structures. It is therefore important, she said, that the NVCA determine that sufficient land exists outside the hazard areas to relocate or rebuild the structures. She made clear that relocation would occur at the owner's expense.

**29** It was Ms. Young's conclusion that the NVCA requires the technical information requested since March, 2011 to determine if there is an appropriate safe building envelope on the severed and retained portions, and to advise on the location of the proposed severance line.

**30** To this, Mr. Switzer, director of engineering and technical services at the NVCA, added that Policy 3.0 of the PPS indicates that the Province's long term-health and prosperity, environmental health and social well-being "depend on reducing the potential for public cost or risk" to its residents "from natural or human-made hazards, and that "development should be directed away from areas of natural or human-made hazards where there is an unacceptable risk to public health or safety or property damage."

**31** Mr. Neals, an environmental planner since 1970, said that he saw no need for a floodplain study since the floodplain line has already been determined. He said there is a 60m buffer area before the river would get to the toe of slope and place the cottages in any jeopardy. Mr. Neals did not however, in the Board's view, deal comprehensively with the relevant sections of the PPS, perhaps because he did not consider the severance to be "development."

**32** For her part, Ms. Atkinson seemed to consider the fact that the proposed boundary of the severance is identical to the boundary of the cottage parcel to be of critical importance. She stated that the severance would change nothing but ownership. There would be no new hazard lands created, therefore no new risk. A study would not change where the existing buildings are, and the application was not going to change the risk factor. Again, the Board does not feel that Ms. Atkinson adequately addressed the relevant sections of the PPS regarding where development should be directed when hazard lands are involved; nor did she consider the issue weighing most heavily on the NVCA, namely whether sufficient lands exist in either parcel outside the hazard area to relocate structures if necessary. This is, in the Board's view, a reasonable and relevant concern.

**33** Chief MacDonald's concerns regarding the adequacy of road for the year-round access of emergency vehicle raises an issue regarding the existence of year-round residents on the cottage lot. The agreement with the Township was that the dwellings on this portion of the property would be seasonal. It was also that they would be occupied only by church members. Chief MacDonald said that the Fire Department is now aware of the fact that certain residents reside there year round. This was neither confirmed nor denied by Mr. Janus. Neither was the status of all of the residents so far as being congregants of St. John's confirmed nor denied. While their status within the church has no relevance so far as the Board is concerned, the occupation of property the year round does since it relates to the condition of the road.

**34** In her testimony, Ms. Healey cited s. 51(24) of the Act which states that when considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and the welfare of the present and future inhabitants of the municipality.

## **DECISION**

**35** Both Ms. Healey and Ms. Atkinson were content that the application conforms to the County Official Plan ("COP") and the OP, and complies with all applicable provisions of the ZBL. The Board concurs.

**36** The Board does not concur with Ms. Atkinson's opinion that it satisfies the criteria of s. 51(24) of the Act or is consistent with the PPS.

**37** Mr. Elston gave a compelling and moving summation. He maintained that the imposition of the suggested conditions on the approval of the application would be a "kiss of death" for St. John's, that the requested conditions are neither relevant nor reasonable. Nothing, he said, is changing but the ownership of the cottage parcel. Mr. Green countered, that an official boundary line is being drawn creating two separate parcels with two separate owners and two separate futures. No one wishes to give the "kiss of death" to St. John's, but the planning regime in the Province of Ontario is policy-led. Provisional consent cannot be given if an application fails to meet the clearly outlined statutory criteria in the Act, or if it is inconsistent with the PPS.

**38** The PPS is clear -- severance of the lots comprises development. There is no requirement in the PPS that something be built on the created lot. It is, by definition, considered development. With that in mind, the NVCA, which is delegated natural hazard responsibilities in s. 3.1 of the 1995 PPS, and is responsible for representing the "provincial interest" concerning natural hazards in planning matters, took a close look at the subject property and concluded certain studies were necessary to meet the requirements of the PPS. Specifically to guarantee that the severance line be drawn in such a way that the future interests of the owners of both proposed parcels be secured should a natural disaster require the relocation of any dwelling or structure. This is not, in the Board's view, an unreasonable consideration, and it reasonably relates to the permitted development.

**39** In this instant, provisional consent is possible, but only if the conditions proposed by the NVCA and the Township, are met.

**ORDER**

**40** The Board orders that the appeal is allowed and the provisional consent is to be given subject to the conditions set out in Attachment "1" to this Order.

**41** Clearance of the conditions will not be unreasonably withheld, and the Board may be spoken to if St. John's believes that is happening.

SYLVIA SUTHERLAND  
MEMBER

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**Attachment 1**

**Proposed Conditions of Severance**

1. A reference plan of the severed parcel(s) be prepared by an Ontario Land Surveyor and copies provided to the Secretary-Treasurer.
2. That the applicant provide to the Secretary-Treasurer of the Committee of Adjustment transfer documentation, in triplicate, to be signed prior to registration of any lands.
3. That all municipal taxes be paid up-to-date.

4. That the access road be constructed to a standard to provide year round access for emergency vehicles including heavy fire trucks, at the applicant's expense to the satisfaction of the Municipality.
5. A floodline and erosion/slope study be completed to the satisfaction of NVCA (and other agencies). *This information should be used to determine the configuration of the proposed severed lot.*
6. The applicant demonstrates the retained lot has a suitable building envelope outside of the hazard area, to the satisfaction of the NVCA.
7. The applicant demonstrates the severed lot has a suitable building envelope outside of the natural hazards to relocate existing buildings in the hazard, in the event that they are required to be rebuilt as a result of fire, flood, erosion or other cause. This should be completed to the satisfaction of NVCA.
8. The vegetation on the slope of the valley wall be protected from future land use activities.
9. That Township, NVCA and other agencies be indemnified from future costs associated with natural hazards on the property.
10. That a suitable agreement be entered into between the applicant and the appropriate agencies to implement the conditions of 7,8,9 above.

qp/e/qlspi/qlacx/qljac