

Niagara Escarpment Commission

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Niagara Escarpment Commission
An agency of the Government of Ontario

November 19, 2020

INFORMATION REPORT

Re: Niagara Escarpment Commission Use of Agreements on Title & Development Permit Application W/R/2020-2021/132

Summary:

The purpose of this report is twofold:

1. To provide general information to the Commission regarding the requirement for landowners to enter into agreements that are registered on the title of their land.
2. To provide additional information on the reason why staff have recommended such an agreement as a condition of approval for NEC file W/R/2020-2021/132, submitted for 155 Winona Road in the former City of Stoney Creek.

Agreements Registered on Title

When it is deemed necessary, the Niagara Escarpment Commission has applied conditions to the approval of Development Permits requiring that landowners enter into specific agreements with the Commission, and that these agreements are registered on the title of property. In these instances, satisfactory proof that the agreement has been registered must be provided prior to the issuance of a Development Permit.

The authority to apply such conditions is explicit, as Section 24 (2.1) of the *Niagara Escarpment Planning and Development Act* states:

Agreements

(2.1) The Minister may, as a condition of issuing a development permit, enter into an agreement with an owner of land, the agreement may be registered against the land and the Minister is entitled to enforce the provisions of the agreement against the owner and, subject to the *Registry Act* and the *Land Titles Act*, against any subsequent owners of the land. 2000, c. 26, Sched. L, s. 7 (10).

In recent years, NEC staff have applied such conditions to applications proposing large, serviced accessory buildings that could easily be used as secondary dwelling units. For example, a large accessory building containing a washroom and sitting area could be used as a dwelling unit with minimal internal alterations. Where internal renovations change the use of a building, a Development Permit is required. However, if the change in use is not a permitted use in the Niagara Escarpment Plan (NEP), a Development Permit cannot be approved. Secondary dwelling units are currently not permitted in the Escarpment Natural and Escarpment Protection Area designations and are prohibited within the Escarpment Rural Area designation as standalone buildings. Therefore, an accessory building cannot contain a dwelling unit anywhere in these designations. An agreement on title ensures that this is understood by both current and future landowners.

Significant staff time and resources are routinely devoted to resolving instances of unauthorized secondary dwelling units and vacation rentals. Since the beginning of the 2017-2018 fiscal year, NEC staff have become aware, through public complaints, of 39 instances of unauthorized use of buildings as a secondary dwelling units and 28 instances of unauthorized use of buildings as short-term vacation rentals. Responding to such complaints presents a significant strain on NEC resources.

In the opinion of NEC staff, the requirement of an agreement on title serves the public interest by explicitly informing a landowner that a certain use of land, a building, or a structure is prohibited. Agreements on title can also provide such notification to potential future owners of a property. Undertaking a title search is a standard component of proper due diligence before purchasing a property. While potential purchasers are undertaking such research, an agreement registered on title would clearly identify prohibited uses that may not otherwise be evident. Such information is highly valuable and may prevent the purchase of lands on the incorrect assumption that a certain use is allowed (e.g., use of an accessory structure as a dwelling unit).

It is worth noting that agreements registered on title can be relatively simply amended or removed from title with the permission of the Commission in order to reflect any changes to policy that may permit previously prohibited uses.

Development Permit Application W/R/2020-2021/132

This application proposes a two-storey, 472 square metre accessory building at 155 Winona Road in the former City of Stoney Creek. The building is proposed to be connected to municipal services, having a lower level vehicle parking area, upper level recreation space and two washrooms.

As discussed in the separate staff report for the application, NEC staff are recommending that the application be approved subject to conditions. One of the conditions (Condition #9) requires that an agreement be registered on the title of the lands, and is worded as follows:

Prior to the issuance of a Development Permit by the Niagara Escarpment Commission, the Landowner shall enter into an Agreement under Section 24(2.1) of the *Niagara Escarpment Planning and Development Act*, in a form acceptable to the Niagara Escarpment Commission. The agreement shall be registered on title of 155 Winona Road, being Part Lot 5 Concession 3 SLT SC RP;62R14766 PART 7 (former City of Stoney Creek) at the Landowner's expense, stating that no accessory building on the property shall be used as a dwelling unit or as a short or long-term vacation rental. The Landowner shall provide proof satisfactory to the Niagara Escarpment Commission that the agreement has been registered against the lands [i.e., copy of the parcel registry extract and a letter from the Landowner's solicitor that the registration is complete], and that the Landowner under this Development Permit is the Landowner of the lands at the time of registration. The agreement shall not preclude the owner, or subsequent landowners, from applying for further Development Permits in future in accordance with the NEP as amended from time to time.

The size of the proposed accessory building and the extent of the amenities within it are of a nature that could allow for use as a secondary dwelling unit or vacation rental with little or no internal modifications. Such use is not permitted on the subject lands by the Niagara Escarpment Plan or the Rural Hamilton Official Plan. Additionally, the total floor area and height of the proposed building greatly exceed what would be permitted by the City's zoning if the lands were not subject to NEC Development Control. Considering the above, NEC staff are of the opinion that an agreement on title is necessary to mitigate the future risk of unauthorized use while accommodating the applicant's desire for a large accessory building.

Shortly before the October 29, 2020 Commission meeting, the applicant expressed concerns to NEC staff regarding Condition # 9. A letter from the applicant's solicitor (attached as an appendix) asserts that the fulfillment of Condition # 9 will impact the marketability of the subject property. A specific concern is that if policy changes occur that allow the use of detached structures as secondary dwelling units, the agreement would still prohibit such use and there is no obligation for the Niagara Escarpment Commission to remove the restrictive agreement on title.

As an alternative, the applicant has proposed a formal undertaking, by which they agree that the proposed building will not be used for human habitation during their ownership of the property (unless the NEP permits) and which purports that all future sellers of the land must notify potential purchasers that human habitation within the proposed building is not allowed (unless permitted by the NEP). The proposed undertaking is included within the attached appendix.

While NEC staff appreciate the efforts of the proponent to develop a proposed solution that is satisfactory to all parties, staff are of the opinion that an agreement registered on title is a far more effective measure. The undertaking proposed by the applicant is only binding upon them. Conversely, an agreement on title ensures that prospective purchasers are notified of the prohibited use when they undertake a title search and is binding upon all future owners of the land.

Conclusion:

The requirement to register an agreement on the title of a property is commonly applied by the NEC as condition of Development Permit approval. Such a condition is applied when necessary to accommodate a development proposal that meets NEP policy but could in the future be easily converted to a use that is not permitted, either intentionally or unintentionally, by current or future landowners.

Agreements on title can be relatively simply amended or nullified entirely to account for changes to land use policy that render them unnecessary. The NEC has granted requests from landowners to remove title agreements on this basis.

Given the size and full servicing of the accessory building proposed by Development Permit Application W/R/2020-2021/132, NEC staff finds that an agreement on title is the most appropriate means of ensuring that the accessory building is not used for a non-permitted use now or in the future.

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Appendix: Letter from the applicant's solicitor