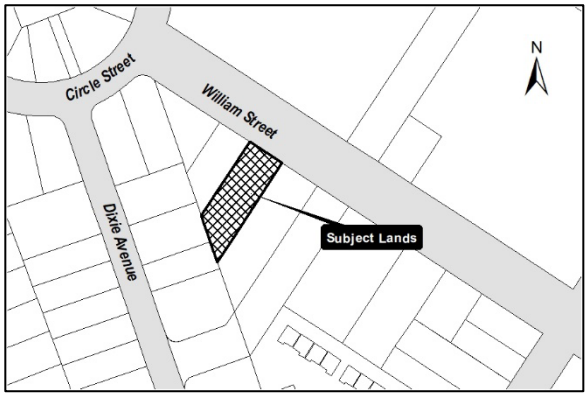
Department of Community and Development Services
1593 Four Mile Creek Road
P.O. Box 100, Virgil, ON L0S 1T0
905-468-3266 • Fax: 905-468-0301

www.notl.com

NOTICE OF SPECIAL COUNCIL MEETING

474 William Street, Niagara-on-the-Lake, Fence Variance Appeal FV-02-24



PUBLIC HEARING – Council:
Date: Wednesday, November 27, 2024
Time: 9:00 a.m.
Place: Town of Niagara-on-the-Lake
Administration Offices, Council Chambers
1593 Four Mile Creek Road, Niagara-on-the-Lake, ON

Description of the Land and Purpose and Effect of the Proposed Fence Variance:

The purpose of this notice is to advise of a Special Council Meeting to hear an appeal to the Committee of Adjustment decision regarding Fence Variance Application FV-02/24

Fence Variance Application FV-02/24 is made to recognize the existing cedar trees, which are classified as a fence pursuant to Fence By-law No. 4778-14 and requests relief as follows:

1. Maximum height from 1.0 metres in the front yard, as required in the Fence By-law, to 3.5 metres for the existing cedar trees

DECISION: Granted
REASON: The Committee of Adjustment considered the oral and written submissions and agrees with the fence variance report analysis and recommendation that this application meets the four Planning Act tests for minor variance:

1. The variance is minor in nature.
2. The variance is appropriate for the development of the lands.
3. The general intent and purpose of the Zoning By-law is maintained.
4. The general intent and purpose of the Official Plan is maintained.

The Special Council Meeting will be conducted in accordance with the Fence By-law Appeal Procedure which was approved by Council. The appeal is being held pursuant to the authority granted pursuant to paragraph 10(a)(ii) of the Fence By-law no. 4778-14.

You are hereby notified by way of this notice, and should you not attend the Special Council Meeting (Appeal Hearing), Council may proceed in the recipient's absence and the recipient will not be entitled to any further notice in the appeal proceeding.

For further information, please contact the Clerks Department: clerks@notl.com

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In the matter of the Planning Act, R.S.O. 1990, c. P.13, s. 45(1) and 45(3):

DECISION: File No.Fence Variance FV-02/24 – 474 William Street
Assessment Roll No. 2627010006040000000

Description of the Land and Purpose and Effect of the Proposed Fence Variance:

Fence Variance Application FV-02/24 is made to recognize the existing cedar trees, which are classified as a fence pursuant to Fence By-law No. 4778-14 and requests relief as follows:

1. Maximum height from 1.0 metres in the front yard, as required in the Fence By-law, to 3.5 metres for the existing cedar trees

Decision: Granted.

Reasons: The Committee of Adjustment considered the oral and written submissions and agrees with the fence variance report analysis and recommendation that this application meets the four Planning Act tests for minor variance:

1. The variance is minor in nature.
2. The variance is appropriate for the development of the land.
3. The general intent and purpose of the Zoning By-law is maintained.
4. The general intent and purpose of the Official Plan is maintained.

Date of Decision: July 18, 2024

Last date to file a notice of appeal: August 7, 2024

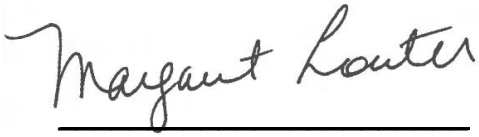
The right to appeal a Committee of Adjustment decision on a fence variance is exercised by:

1. Giving the Clerk's Department written notice of appeal that includes particulars of all grounds upon which the appeal is made; and by
2. Paying the fee that is prescribed by the Town.

Notice of appeal must be filed with the Town Clerk; clerks@notl.com
Appeals will be heard by Council and the decision is final.

Consent was obtained by the Secretary Treasurer on July 18, 2024 to insert electronic signatures below;

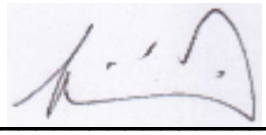
Steve Bartolini
Committee of Adjustment



Margaret Louter (Vice Chair)
Committee of Adjustment

Eric Lehtinen (Chair)
Committee of Adjustment

ABSENT
Paul Johnson
Committee of Adjustment

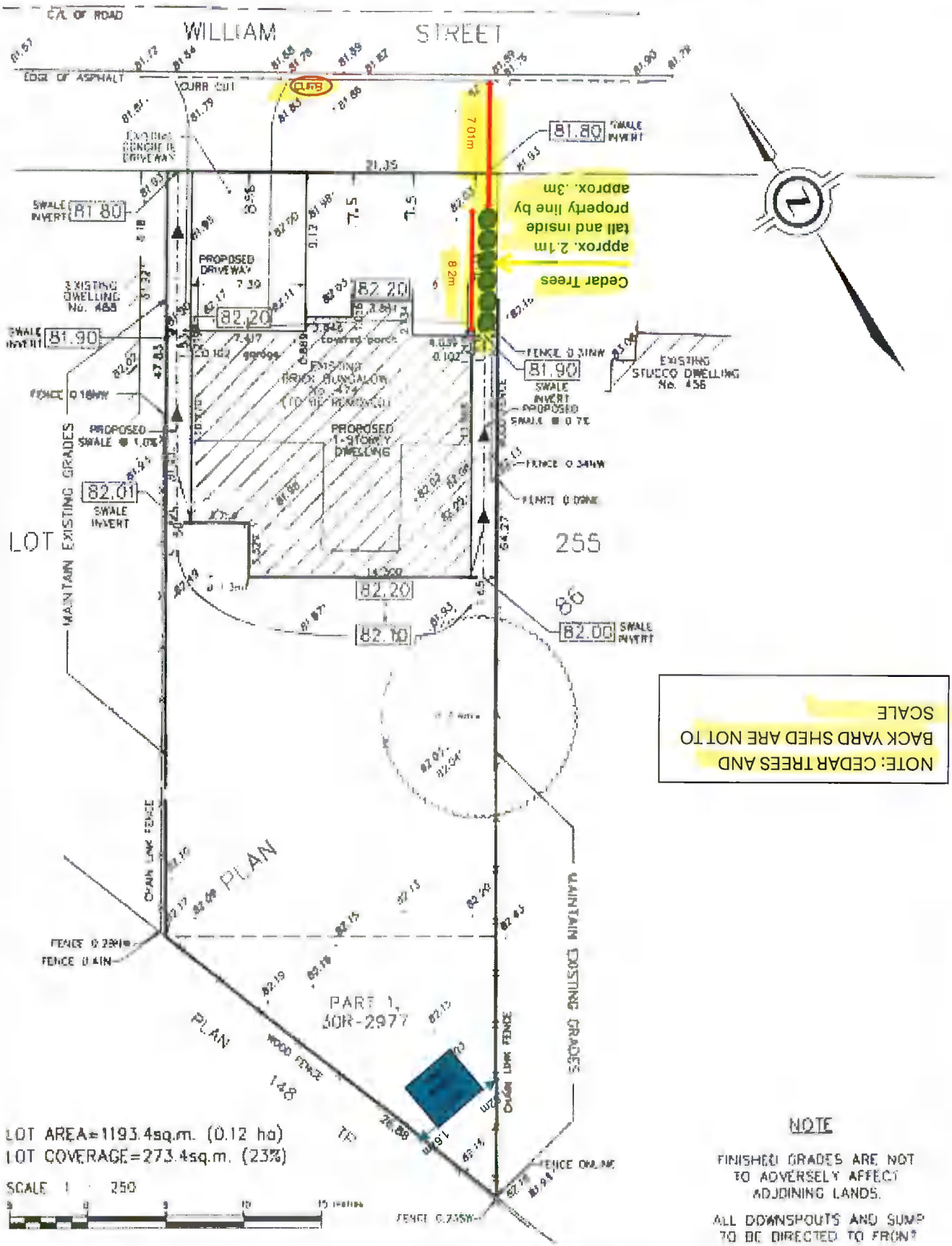


Angelo Miniaci
Committee of Adjustment

I, Natalie Thomson, Secretary Treasurer of the Committee of Adjustment for the Town of Niagara-on-the-Lake, hereby certify that the above is a true copy of the decision of the Committee of Adjustment with respect to the application recorded herein.

DATED at the Town of Niagara-on-the Lake on July 19, 2024.

Natalie Thomson, Secretary Treasurer



NOTE: CEDAR TREES AND BACK YARD SHED ARE NOT TO SCALE

NOTE

FINISHED GRADES ARE NOT TO ADVERSELY AFFECT ADJOINING LANDS.

ALL DOWNSPOUTS AND SUMP TO BE DIRECTED TO FRONT

PROPOSED ELEVATIONS

83.70	TOP OF FOUNDATION
83.00	FINISHED FLOOR
80.16	TOP OF FOOTING
82.20	GRADE (FRONT)
82.20	GRADE (REAR)

Dwg attached	DRAWN JH	CHECKED AC	ZONE ER	REF 16-16-456-00	SCALE 1:250

Proposed Grading Certification

I Hereby certify that the proposed grading shown is compatible with the abutting lands.

ANDREW CAMERON O.L.S. Date July 25, 2016

Accept by City _____ Date _____

As Constructed Grading Certification

I hereby certify that I have taken the finished grades shown, and that the grading of this lot does not impact adversely on abutting lands.

Date _____

O.L.S. _____

MATTHEWS, CAMERON, HEYWOOD - KERRY T. HOWE

RE: Fence Variance Application #FV-02/24, 474 William Street, NOTL

My name is Evi Mitchinson. My husband Tim Mitchinson and I own and reside at 456 William Street in Old Town NOTL.

We are here to formally object to the Minor Variance Application whereby the Applicants are asking to depart from the requirements of the Towns's Fence By-law governing the height restriction for their front yard hedge (see photo #1). The Applicants have requested to surpass the height restriction for a front yard hedge by **3½ times or 350%** the height allowable under Fence By-law #4778-14. We respectfully request the Committee of Adjustment to deny the Application for Minor Variance #FV-02/24 as it does not meet the 4 legal tests.

Sub-section 45 (1) of the *Planning Act* sets out 4 statutory tests which must be considered by the Committee of Adjustment, and satisfied by the Applicant, before an Application for a minor variance can succeed. If the Application fails any one of the four tests while passing the other three, then the Application must fail. These tests being created by statute are mandatory, and accordingly **all** must be met.

In the leading caselaw of *Vincent v DeGasperis,* (see attached caselaw) **COURT FILE NO.:** Toronto 775/03 & 777/03 before Justices MATLOW, JARVIS, and MOLLOY, with Matlow J. delivering the Reasons for Judgment, Justice Matlow addressed and analyzed the 4 statutory tests established by section 45 (1) of the *Planning Act*.

The decision in *Vincent v. DeGasperis* is important in that it so clearly restates what had been the historic interpretation of the four tests of the *Planning Act*, and reminds us all that each of the four tests must be addressed; merely establishing that there is no impact does not satisfy the intention of the legislation.

In the *DeGasperis* decision, the order in appeal was an order made by the Ontario Municipal Board allowing, in part, an appeal by the "DeGasperis'", from a decision of the Committee of Adjustment of the City of Toronto which had dismissed their application for certain minor variances from the zoning by-law applicable to their property.

We rely on the *DeGasperis* decision and trust the Committee of Adjustment will follow the Justices' comments and criteria set throughout this jurisprudence. A copy of this legal authority should have been provided for your reference in the meeting package that the Secretary-Treasurer makes available as part of the public record on this matter.

While I cite and rely on the *DeGasperis* decision in its entirety to support our position why the instant Application should be denied, I cannot possibly go into this decision point by point in the 10 minutes I have been allotted for my submissions. For the purposes of my submissions, I highlight key paragraphs but respectfully request the Committee of Adjustment consider *DeGasperis* in its entirely when making their analysis and decision on the matter before you today.

Paragraphs 9 through 11 of the *DeGasperis* decision state:

"[9] An application for a minor variance must meet what is often referred to as the four part test mandated by the *Act*. To satisfy the requirements of the test a variance must:

1. be minor in variance;
2. be desirable, in the opinion of the committee, for the appropriate development or use of the land, building or structure;
3. maintain, in the opinion of the committee, the general intent and purpose of the zoning by-law; and
4. maintain, in the opinion of the committee, the general intent and purpose of the official plan.

[10] These tests can, and therefore must, be interpreted in accordance with the adequately clear and ambiguous language used in section 45 (1) of the *Act*.

"[11] It is incumbent on a committee of adjustment, or the Board in the event of an appeal, to consider each of these requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirements."

Paragraphs 13 through 19 state:

[13] Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.

"[14] The second test requires the committee to consider and reach an opinion on the desirability of the variance sought for the appropriate development or use of the land, building or structure. This includes a consideration of the many factors that can affect the broad public interest as it relates to the development or use.

[15] Accordingly, in my view the Board was required to consider each variance sought and reach an opinion as to whether or not it, either alone or together with the other variances sought, was desirable for the appropriate use of the subject property. The issue was not whether the variance was desirable from the perspective of the DeGasperis' plans for their home but, rather, whether it was desirable from a planning and public interest point of view.

[16] The third test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the zoning by-law.

[17] Accordingly, in my view the Board was required to engage in an analysis of the zoning by-law to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

[18] The fourth test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the official plan.

[19] Accordingly, in my view the Board was required to engage in an analysis of the official plan to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose."

And at paragraph 27, it states:

"[27] Accordingly, on my reading of the entirety of the Board's reasons, I am persuaded that the Board committed numerous errors in its interpretation and application of the four tests. The consequence of those errors must, however, be determined only after consideration of the proper standard of review that is applicable, namely, correctness or reasonableness."

The Court in *DeGasperis* introduced "need" and "hardship" into the section 45 test, stating that the Committee and OMB can consider whether the applicant seeking the variance "needs" the relief or will "suffer hardships" if the variance is not granted, and factor this into its decision. The Applicants on the evidence, have not demonstrated a bona fide "need" for the relief sought, nor have they provided evidence and demonstrated they will suffer hardships if they are not granted a front yard hedge height that exceeds the height restriction by 3½ times or 350% of the limit imposed in Fence By-law #4778-14.

In addition to the legal authorities referenced above, we also rely on Section 3.4 and 3.5 of the NOTL Committee of Adjustment Terms of Reference which state:

> 3.4 *"The Committee is a quasi-judicial body, somewhat court-like in its operation, charged with observance and protection of applicable law* ***and also with protecting the rights of the individuals affected by the decisions made*****."**
>
> 3.5 *"The common law principles of* ***natural justice require the Committee of Adjustment to ensure that individuals affected by their decisions have their equivalent of "a day in court****"*

No one in the immediate area is more affected by the Applicant's hedge than we are. Our rights as affected individuals need to be protected in the course of issuing a judicious and fair decision on this Fence Variance.

COA approval of this Application would set an ominous precedent for established residential areas of Old Town, rendering the Fence By-Law unapplicable to established residential neighbourhoods. People will be doing what they want regardless of impact to anyone but themselves.

1. The Variance Must be Minor

In the interest of settling this matter and finding middle ground, we are agreeable for this hedge to be kept at the 2-metre height restriction, which is the same height regulated for side yards and rear yards under Fence By-law #4778-14, being the current By-law the Applicants Minor Variance needs to be measured against. If agreed to, this 2-metre height restriction will keep the front yard hedge the same height as the Applicant's wooden side yard fence that their White Cedar hedge abuts to. Perhaps you cannot see the wooden fence from the street because the White Cedar hedge is so tall already. The cedars are all over seven feet high and are already having an adverse impact on our clear view of the street. If this hedge is allowed to grow to 3.5 meters in height, it will double the adverse impact on our view of the street. Additionally, there is even more adverse impact given the fact white cedar hedges, which can grow 3 to 4 meters wide, are planted directly beside our driveway and there is no regulation in the current By-Law controlling their width. Please do not lose sight of the fact this is an inappropriate species of hedge to be planted less than 12 inches from the property line and immediately beside our driveway.

Just as it was the Applicants sole decision to choose this species of hedge to plant immediately adjacent to our driveway, it should be the Applicants sole responsibility to trim their hedge on a regular ongoing

basis so it does not cause us negative impacts. The Applicant's hedge and its maintenance should not be a burden on us; should not cause us a loss of enjoyment of our property; should not encroach into our driveway causing us to lose 4 – 5 feet of useable driveway space; should not create barriers for us to maintain an open space, or cause us a safety risk whether in backing out of our driveway or using a ladder to trim the hedge because of its excessive 3.5 metre height. My husband is not young anymore and has health issues that increase his risk of falling off a ladder and onto the asphalt in our driveway.

Alternatively, if the COA considers this next offer a suitable remedy, we respectfully request an order to have the hedge removed or trimmed to maintain both a height of no more than 2 meters and a width that is no closer than 1 foot from our paved driveway. The Applicants have the option of replanting with a more suitable hedge that is appropriate for its placement beside our driveway. If the Applicants choose this remedy, we will pay half the cost of Emerald Cedars like we originally offered to pay in 2017 when they tore out the existing privet hedge. Again, it would be the Applicants sole responsibility to trim the entire hedge to the conditions set forth by the Committee of Adjustment.

When determining whether a variance application is minor in nature, a main and logical consideration would be to determine the degree of adverse impact that will occur if the variance is granted. If the variance does not produce an unacceptable adverse impact on the neighbours, then it likely meets the test for minor. The variance must also be measured against the Fence By-law specifications, and not a variance to existing conditions or a simple comparison to other hedges in the neighbourhood that may or may not be legal.

The Applicant is seeking a fence variance for a front yard hedge that will be **3 ½ times higher** than permitted under Fence By-law #4778-14. Based on past decisions made by this Committee of Adjustment on front yard fence variances, I can find no other decision where a front yard fence/hedge was approved under a minor variance request having a deviation of this magnitude, and one so divergent from the Municipal Fence By-law that only governs height. A growing hedge/fence planted immediately beside a neighbour's driveway is patently too large or too high to qualify as minor if allowed to grow more than 2 metres.

Relying on the *Vincent v DeGasperis* decision, at paragraph, 12 Justice Matlow states:

[12] "A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. ***It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor****. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties."*

Relying on the *DeGasperis* decision, the COA is required, at the outset, to examine the variance sought and determine whether or not, with respect to both size and importance, which includes impact, it is minor.

Let us 1st examine the height requested in this minor variance for a front yard hedge and compare it to the height allowed under the governing Fence By-law, keeping in mind the definition of "minor" to be "*lesser or comparatively small in size or importance".*

Fence By-law #4778-14 restricts front yard fences and hedges to 1 metre in height. It would be fundamental to conclude that a 1-metre-tall hedge compared to a 3.5-metre-tall hedge is a significant deviation from the maximum allowable 1 metre height to be considered minor in nature. The Applicants are asking for a 3.5-metre-tall hedge in a front yard. 3.5 metres is not minor in nature.

Let us now consider the next feature in the definition of "minor" in *DeGasperis* which is "importance". This major height increase from 1 metre to 3.5 metres is extremely important to both myself and my husband as we share the property line with 474 William Street. The proposed 3.5 metre hedge height will affect and adversely impact our lands in the way we use it. Do not lose sight of the fact that this hedge is growing **less than 12 inches** from the property line **beside our driveway**. Location and individual characteristics of this particular species that is planted adjacent to our driveway form an integral and important consideration. The growing habits of White Cedars need to be considered. They can achieve heights of 25 to 40 feet and spread about 10 to 12 feet. This particular species of cedars is totally unreasonable and inappropriate for a front yard hedge particularly when growing immediately adjacent to someone else's driveway, namely ours. It quickly takes over valuable real estate on our property directly in our driveway. The Applicants have never trimmed the side of the hedge beside our driveway, nor have they trimmed its height, which is also an important factor. It goes without saying that when one plants trees, hedges, shrubs, etc. that good stewardship follows where the owner accepts full responsibility of looking after their plantings which includes to ensure that the adjoining property is not negatively impacted by their choice of plantings.

Turning to impact, if the variance does not produce an unacceptable adverse impact on the neighbours, then it likely meets the test for minor. We will suffer many adverse impacts from a 3.5 metre hedge. We are significantly and negatively impacted by the overgrowth of this hedge, both in height and in width, where it takes away from not only the available space we have in our driveway, but also in how we use our driveway. We object to this hedge as it is out of proportion in both scale and size, and is planted and growing into our driveway; it blocks our views to open spaces; it creates shadows and cuts down on lack of sunlight especially in the winter months where the sun melts the ice and snow on the driveway; in an ice storm as we sometimes get, tips and ends of branches are loaded with ice and become heavy and sag. The ice at some point will break off of the hedge and land on our vehicles. This hedge if allowed to reach heights of 11 ½ feet will require a ladder to climb in order to reach the top. I am not allowing my husband to risk falling off the ladder and onto our asphalt driveway. We are seniors and should not be forced to maintain something so onerous and large. That responsibility rightfully belongs to the owners of this hedge.

There is an acceptable solution to this matter and it is not to approve a 3.5-metre-tall hedge beside our driveway. We love trees too as anyone can see from our yard. I would say we have close to 100 trees and shrubs planted on our property. We never at anytime stated that we don't like the hedge. It is the **species of hedge** due to its characteristics along with the location of its planting immediately beside our driveway that is causing us a loss of enjoyment of our property and the creation of nuisances and adverse impacts that is the issue. We are okay with a 6-foot tall hedge as long as the applicants trim all sides, including our driveway side, and do not let it grow over 6 feet high, which will keep it the same height as the wooden fence in their side yard that their white cedar hedge abuts.

Whether a variance is either minor or not must be determined on sufficient evidence, failing which the necessary conclusion that it is minor cannot be reached. The Applicants have asked for a 3.5 metre hedge height for a front yard hedge beside our driveway, when the Fence By-law regulates 1 metre in height. **A 350% increase over that which is prescribed by the Fence By-law is not considered to be a minor variance**, and therefore the Application must fail and must be denied.

Taller fences are appropriate for back yards to allow homeowners more privacy. The Committee should look at size; the importance of the decision to the person challenging it; and any extenuating circumstances in determining whether the variance is minor.

CONCLUSION

The variance is not minor in nature and therefore fails the first test. If an Application fails any one of the Four Tests, while passing the other three, then the Application must fail.

2. The Variance Must be "Desirable", in the Opinion of the Committee, for the Appropriate Development or Use of the Land, Building or Structure

This second test requires consideration of "desirability" and not "compatibility". In *DeGasperis*, Justice Matlow at Paragraph 15 stated:

> *"[15] Accordingly, in my view the Board was required to consider each variance sought and reach an opinion as to whether or not it, either or together with the other variances sought, was desirable for the appropriate use of the subject property. The issue was not whether the variance was desirable from the perspective of the DeGasperis' plans for their home but, rather, whether it was desirable from a planning and public interest point of view."*

Accordingly, the question in test #2 that must be answered is: is this White Cedar hedge "desirable" for the appropriate use of the land? To answer this question, one must first understand the characteristics of this species of hedge and then apply that knowledge to the subject property and its location, and consider what structures or objects may be impacted by the hedge's growth in relation to the close proximity.

Factors needing consideration:

(a) Characteristics of White Cedars:
A White Cedar hedge can achieve heights of 25 to 40 feet and spread about 10 to 12 feet. Regular and constant pruning is required so that it does not get out of hand.

(b) Location of planting
Select a wide-open space that will not impede anything or cause problems for anyone as White Cedars will spread. It is not an appropriate species when planted close to a driveway because of its growing and spreading habits which will take over a section of the driveway if not trimmed on a regular basis.

The Applicant's hedge is not desirable for the use of the land as it is not an appropriate species of hedge for its location immediately beside a neighbouring property's driveway. As any good horticulturist will advise, location is an important factor to consider for the type of hedge that is being planted. The

Applicants' property does not have special circumstances or conditions that apply to the lot, building or use of the land that prevent them from adhering to the 1 metre height restriction for front yard fence/hedges. The strict application of the provisions of the Fence By-law in the context of the special circumstances applying to the lot, building, or use, would NOT result in practical difficulties or unnecessary and unusual hardship for the applicant of a type and nature inconsistent with the general intent and purpose of the Fence By-law or the Official Plan. A 3.5-metre-tall hedge for a front yard that has been planted beside our driveway, and with no amenities such as a swimming pool, hot tub etc. in a front yard requiring privacy, must not be approved as it does meet the 4 statutory tests under section 45(1) of the *Planning Act*.

To go back to the *DeGasperis* decision at paragraph 15 wherein Justice Matlow states: *"The issue was not whether the variance was desirable from the perspective of the DeGasperis' plans for their home but, rather, whether it was desirable from a planning and public interest point of view".*

This question is relative to where you are in the scheme of things and needs to be analyzed from that perspective. From afar, the hedge is nice to look at, but practically speaking when its by your driveway, its another story. I've addressed adverse impacts we will experience under test #1 above and will refrain from repeating them here.

I find it important however to address photos of other properties having tall front yard hedges as contained in the Applicant's photos and also in the Planning Report photos. This end of William Street is designated Established Residential. Original homes in this neighbourhood are older, smaller homes that have been built 60 plus years ago. It seems to me that everyone is trying to justify and argue that because these other properties have tall hedges in their front yard, the Applicant should be able to as well.

Having lived in the same house for 44 years, we have seen many changes in our neighbourhood. There are no original homeowners left on our block so the history of the neighbourhood is also disappearing. Some of these original homes have been sold, demolished and replaced with much larger homes that leave the remaining original houses undesirable in comparison.

Since many people do not know the history of our neighbourhood or how and when other hedges came to exist, here is a short history on the time before our Fence By-law came into effect. Our hedge on the east side of our front yard was planted in 1990 to hide the 12-foot wooden fence, also erected in 1990, in our side yard. At that time there was no fence by-law, which makes both our hedge and wooden fence legal-non-conforming. This holds true for most, if not all of the hedges in the photos the Applicants have in their presentation as well as those photos contained in the Senior Planner's Report. The first Fence By-law #3408-99 came into force and took effect on December 13, 1999. It then was repealed in its entirety and the current Fence By-law #4778-14 took effect on December 15, 2014. Prior to 1999, those older fences and hedges were "**grandfathered**", which means any fence in existence prior to the date of the enactment of the Fence By-law shall be deemed to comply with the Fence By-law and may be maintained with the same material, height and dimensions as previously existed including any repair work that may be done to such fence. Under the grandfather designation, our front yard hedge is a "legal" non-conforming hedge, whereas the Applicant's hedge is an illegal non-conforming hedge and is subject to Fence By-law #4778-14. All of the hedges in the original older homes the Applicants show in their materials are "grandfathered" hedges and are deemed to comply with the Fence By-law and thus allowed to be maintained at the same height and dimensions as previously existed, which includes our front yard White Cedar hedge. For all intents and purposes, the

Applicants are attempting to qualify their new white cedar hedge and proposed variance under a grandfather clause that does not apply to them.

The Applicants are claiming they need a 3.5 metre hedge for front yard privacy but do not state what the privacy is for. Although negligible, our house is set back further from the street than the Applicant's house. There is nothing in the front yard to need privacy from, as there is only our driveway and our vehicles. The Applicants have no amenities in their front yard, such as a swimming pool, or a hot tub that they need privacy for. As a matter of fact, the Applicants house has full 100% exposure to anyone passing by on the street which demonstrates they have no genuine privacy issue, and the same is true for the west side of their property. Their application is for one purpose only: to cut our house out of view because it's too old, and in the meantime, they create a complete barrier for us with a 3.5 metre hedge to totally block us from having an open view to the street. Open views was one of the reasons we purchased our house 44 years ago because of the open green space across the street and beyond. The Applicants have no privacy issue to need protection from as there is no visual intrusion. There are no windows between our houses now that we erected 2 sheds between our house and theirs. Privacy is maintained in the side and rear yard.

The Applicants have demonstrated no hardship or compelling reason why they cannot abide by the 1 metre height restriction for their front yard hedge. We had been maintaining the hedge to a height of 6 feet, the same height of their wooden fence at their side yard which their white cedar hedge abuts. We are still willing to have the Applicants keep their white cedar hedge to 6 feet as it caused us no problems when it was being trimmed and maintained by my husband. My husband however will not be responsible for trimming any part of the hedge anymore due to his health. The Applicants have no genuine need that can be demonstrated for a 3.5-metre-tall front yard hedge. We've had our car broken into and a boat motor stolen from our driveway, which is easier to do when there is a tall hedge nearby acting as shield or cover.

As stated above, this second test requires consideration of "desirability" and not "compatibility", along with the appropriate use of the land or structure. I disagree with the Planning report under test #2. The hedge cannot be desirable and an appropriate use of the land if it has an adverse impact on the use of surrounding land, specifically our driveway.

Desirability relates to whether the proposed variance is desirable from a planning and public interest perspective, not whether the applicant considers it to be desirable. The requested variance is not desirable for the use of the land as it is in a front yard immediately adjacent to a neighbour's driveway, being our driveway, and is now, and will cause, us significant detrimental impacts.

CONCLUSION

The variance fails the 2nd test "*The Variance Must be Desirable, in the Opinion of the Committee, for the Appropriate Development or Use of the Land, Building or Structure*". If the Application fails any one of the Four Tests, while passing the other three, then the Application must fail.

3. The Variance Must Maintain, in the Opinion of the Committee, the General Intent and Purpose of the Fence By-law

The Fence By-law was created with purpose and intent, hence the 2 distinct and separate fence heights; 2 metres for side and rear yards to maintain privacy for entertaining and also where people have their amenities such as swimming pools, hot tubs, etc.; and 1 metre height restriction for front yards to allow separation between properties but maintain open views.

If front yards were meant for privacy, then the By-law restrictions would have been uniform across the board at 2 metres for all sides of a yard; but front yards are not meant for privacy, hence the shorter fence height restriction.

I've checked the Fence By-laws for the 12 Municipalities in the Niagara Region and they all have a 1 metre height restriction for front yards with the exception of the Town of Pelham and the Township of Wainfleet having the most generous height restriction of 1.22 metres for front yards, followed by the City of Thorold with 1.2 metres. The Township of West Lincoln has the most stringent height restrictions. West Lincoln's Fence By-law specifically for "hedges" have a height restriction of 0.8 metres, the same for closed fence designs at 0.8 metres, and open fence designs are restricted to a maximum height of 1.2 metres. The *Municipal Act*, 2001, provides Municipalities with the authority to pass by-laws concerning fences. Each municipality, after careful and thoughtful consideration developed their Municipality's fence by-law and took into consideration how people use their yards, and all of them limited the front yard height between 0.8 metres and 1.22 metres. There must be a very good reason for doing so, possibly preventing burglaries, and spotting burning buildings.

Front yards are not meant to be used as private areas, hence the shorter front-yard fence heights to promote and maintain open views so no one feels closed in or blocked out. Other considerations are to avoid microclimatic conditions like shadowing, and other problems that have adverse impacts on adjacent properties including safety. A 3.5 metre hedge beside our driveway will have microclimatic effects on our property.

The Applicants minor variance request being 3 ½ times more than the allowable for a front yard hedge under the Fence By-law does not maintain the general intent and purpose of the Fence By-law. The Applicants have no potential restrictions at their site that do not allow them to comply with the Fence By-law.

The general intent and purpose of the Fence By-law is not maintained and therefore the Application fails this third test. If the Application fails any one of the four Tests, while passing the other three, then the Application must fail.

4. <u>The Variance Must Maintain, in the Opinion of the Committee, the General Intent and Purpose of the Official Plan</u>

The fourth test requires the Committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the Official Plan. As the learned judge in *DeGasperis,* at paragraph 19 states: "*Accordingly, in my view the Board was required to engage in an analysis of the official plan to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.*"

The Town of Niagara-on-the-Lake's new Official Plan was adopted by By-law No. 5180-19 passed by Town Council on October 22, 2019 as shown in the "Notice of Adoption Official Plan" dated at the Town of Niagara-on-the-Lake on November 6, 2019. The recommendation contained in Planning Report CDS-24-120 is based on the **old** Official Plan from 2017 that is no longer in effect.

The 4th test under section 45 (1) of the *Planning Act* must therefore fail on the basis the Official Plan used for analysis to determine whether the variance maintains the general intent and purpose of the Official Plan is no longer in effect. Notwithstanding the foregoing, I will proceed and provide reasons why this Application should fail when measured against the new Official Plan dated August 15, 2019.

Section 4, of the 2019 Official Plan pertains to "Settlement Areas". Sub-section 4.5 "Intensification Strategy" discusses "Established Residential". Sub-section 4.5.3.10 calls for Council to ensure infill and intensification development and redevelopment respects and reflects the existing pattern and character of adjacent development by adhering to development criteria that is outlined in that section. Referencing items (e) (f) and (i) respectively, these items state: *"new building(s) shall have a complementary relationship with existing buildings, while accommodating a diversity of building styles, materials and colours"; **existing trees and vegetation shall be retained** and enhanced through new street tree planting and additional on-site landscaping; **impacts on adjacent properties shall be minimized in relation to grading, drainage, access and circulation, privacy and microclimatic conditions such as shadowing".***

Section **4.10 "Residential Areas", "**Background and Identification", states: "*The Established Residential designation generally applies to older, stable residential neighbourhoods.* It goes on to state under Section **4.10.2.1** the objectives for residential development areas: item (d) "*to ensure that existing housing and existing residential areas are conserved and improved".* Continuing with Section **4.10.4 "Established Residential Designation,** this section focuses on "***Character***", stating: "*The Established Residential areas represent older, stable neighbourhoods. **The existing character of the Established Residential areas shall be maintained**."* Still in this same section of "Established Residential Designation", section 4.10.4.3 under "***Policies*",** it states:

> ***"e)** Development will **respect** and reinforce the **existing physical character of the neighbourhood, including in particular:***
>
> > *iii. Heights, massing, scale and dwelling type of nearby residential properties;*
> > *vi. Prevailing patterns of rear and side yard setbacks **and landscaped open space;***
> > *vii. Continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood;*

I find it of vital importance to emphasis this section under Section 4.10.4.3 (e)(vi), "*respect*" for "*existing physical character of the neighbourhood including in particular*": "prevailing patterns of rear and side yard setbacks **AND LANDSCAPED OPEN SPACE"**.

Section 4.7 "Land Use Compatibility" states that "*Intensification within the Built-up Areas should be compatible with surrounding existing and planned land uses*". Section 4.7.2.2. states, "*Development proposals shall demonstrate compatibility and integration with surrounding land uses*".

Furthermore, section 4.7.3 entitled "*Conflicts between Built Form and Intensification*" states under 4.7.3.1. "***In circumstances where a proposed development satisfies the Town's intensification target but does not support the compatibility policies of the Plan, <u>the compatibility policies shall prevail</u>***."

<u>CONCLUSION:</u>

As stated in *DeGasperis* at paragraphs 18 and 19,

"[18] The fourth test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the official plan.

[19] Accordingly, in my view the Board was required to engage in an analysis of the official plan to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose."

I disagree with the Planning Department Report findings in respect of the 4th test under Section 45 (1) of the *Planning Act*. The analysis used by the Planning Department was based on an outdated Official Plan.

In the event I am wrong in my reasoning, I rely on my submissions and reasons contained in my written documents used today at this hearing, which have been submitted previously to the Secretary-Treasurer for the Committee of Adjustment. The outcome reaches the same conclusion which is the Minor Variance does not maintain the general intent and purpose of the Official Plan as I've set out, and therefore must fail and be denied.

The impacts on us as the adjacent property have <u>not</u> been minimized as outlined under the subsections of Section 4, Settlement Areas, but rather the impacts on us have been maximized to create a loss of enjoyment of our lands and have and will further create undue hardship for us and significant detrimental impacts. We will suffer more negative impacts caused by shadowing created on our driveway from this proposed 3.5-metre-tall hedge. In the winter, the shadowing will affect the ability for the snow and ice to melt from our driveway. The open space we had prior to the installation of this White Cedar hedge provided us with open space to the street front from the front area of our house and from our kitchen window. A 3.5-metre-tall fence/hedge will take away our open space that we previously enjoyed and which everyone is entitled to enjoy. Existing trees and vegetation were not retained by the Applicants when they tore out an existing privet hedge. The previous privet hedge caused no hardship and did not create a detriment to our property. The area has not been enhanced by the planting of a 3.5-metre-tall White Cedar hedge immediately adjacent to our driveway and has instead detracted from our property because of the opaque barrier wall installed beside our driveway causing us undue hardship; it is not suitable for the area of planting beside our driveway; it also creates an unnecessary maintenance issue for us, and is a safety issue in more ways than one. Air circulation will also be impeded from this solid wall of 3.5-metre-tall dense hedge, which is a major concern for us given our close proximity to a sewage pumping station that the Regional Municipality of Niagara determined by means of a smoke test study had an adverse impact on our land, especially our driveway.

The strict application of the provisions of the Fence By-law in the context of the special circumstances applying to the lot, building, or use, would <u>NOT</u> result in practical difficulties or unnecessary and unusual hardship for the applicant of a type and nature inconsistent with the general intent and purpose of the Fence By-law **<u>or the Official Plan</u>**. The Established Residential Designation in the Official Plan states that *Development will **<u>respect</u>** and reinforce the **<u>existing physical character of the</u>***

neighbourhood, including in particular landscaped open space. The Applicant's White Cedar hedge does not respect the existing physical character of our house, nor does it keep landscaped open space, as the Official Plan requires.

The most compelling section of the 2019 Official Plan of why the Application should fail is contained in **Section 4.7 "Land Use Compatibility" states that "*Intensification within the Built-up Areas should be compatible with surrounding existing and planned land uses*". Section 4.7.2.2. states, "*Development proposals shall demonstrate compatibility and integration with surrounding land uses*".**

The general intent and purpose of the Official Plan is not maintained. If the Application fails any one of the Four Tests, while passing the other three, then the Application must fail.

All of the above is respectfully submitted. Based on the arguments submitted, I maintain that the Application fails to meet any of the 4 statutory tests and therefore respectfully submit the Application fails and must therefore be denied.

Whether this Application is refused, granted in part, or granted with conditions, we respectfully request the COA to add conditions into their decision regardless ordering the Applicant to trim the entire hedge, width included, on our property side by our driveway, and that these conditions, or any additional conditions that the COA deems fit, remain in force for the entire length of time this hedge occupies the same space. Further, that the Applicants, at all times, will adhere to all of the conditions set forth in the decision of the Committee of Adjustment and in the event the Applicants are found to be in non-compliance with conditions issued by the COA in this matter, the By-Law Enforcement Division will issue an immediate order for the removal of the white cedar hedge.

Respectfully submitted,
Evi Mitchinson
456 William Street
Niagara-on-the-Lake, ON

<u>PHOTO #1</u>, 474 William Street Demo Day, Aug 15, 2016 showing height of original privet hedge.