

ISSUE DATE: <b>June 30, 2000</b>
DECISION/ORDER NO: <b>0964</b>



PL991219

**Ontario Municipal Board**  
**Commission des affaires municipales de l'Ontario**

977328 Ontario Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 79-79 of the City of Stratford to rezone lands respecting 210 Water Street to allow a Private School as an additional use on the property  
O.M.B. File No. Z990186

**A P P E A R A N C E S :**

<u>Parties</u>	<u>Counsel</u>
977328 Ontario Limited Nancy Campbell Collegiate Institute	Dennis A. Trinaistich
City of Stratford	Richard R. Arblaster
Festival Area Ratepayers	Michael Mitchell
Avon Maitland District School Board	John M. Skinner

**DECISION DELIVERED BY R. A. BECCAREA AND ORDER OF THE BOARD**

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The subject matter before the Board is an appeal by 977328 Ontario Limited from the Council of the City of Stratford's refusal to enact a zoning by-law amendment to Zoning By-law 79-79 to rezone all of the property legally comprising 210 Water Street, on August 30, 1999 to allow a private school as an additional use on the property.

The proposal is to have the Nancy Campbell Collegiate Institute, which currently operates at 45 Waterloo Street, in Stratford, be established and also operate at 210 Water Street, by September 2000.

The Board sat for six days on May 3, 4, 5, 15, 16, and June 8, 2000.

Prior to hearing of the merits of the application, the Board was asked to address an issue, on motion, relating to a Summons to Witness issued by Mr. Mitchell, to compel the attendance of Janet Baird-Jackson, Superintendent of Business for the Avon Maitland District School Board to produce various documentation and provide oral evidence. Mr.

Skinner, counsel for the school board requested the Board, on the basis of relevance, to strike the summons and excuse Ms. Baird-Jackson from attending, which it did, on May 3, 2000.

### **DECISION ON A MOTION TO NOT REQUIRE A WITNESSES'S ATTENDANCE**

The summons to Ms. Baird-Jackson was served by Mr. Mitchell on April 25, 2000, and responded to by Mr. Skinner on May 1, 2000 (Exhibit 2).

The Avon Maitland District School Board agreed to sell 210 Water Street to the applicant 977328 Ontario Limited, unconditionally on June 25, 1998 (Exhibit 64). The transaction closed on November 30, 1998 (Exhibit 11). The sale price was \$865,000.00.

The Huron and Perth County Boards of Education had been amalgamated and a decision was made to have their combined administrative offices located in Seaforth.

The Perth County Board of Education had used 210 Water Street for its administrative offices since 1984.

Mr. Mitchell, in his reply to Mr. Skinner, sought to obtain, through Ms. Baird-Jackson confirmation of the evidence of prior assurances that the Perth County Board of Education may have given to the neighbours, on June 4, 1998 as to the intended uses of the property they would attempt to obtain when it sold the property. Evidence as to enrolment and the location of the other schools in Stratford was also sought from Ms. Baird-Jackson (Exhibit 2 - Letter Mr. Mitchell, May 1, 2000 and enclosures).

With respect to the issues of enrolment and the location of schools, the Board did not find it to be helpful in its decision. With respect to the assurances of school board administrators or trustees, the Board agreed with Mr. Skinner and Mr. Trinaistich, both of whom opposed Ms. Baird-Jackson's attendance, that those assurances were not relevant to the issues before the Board.

The Board relied on the reasoning in the decision of Consortium Development v Clearvale 98 3 SCR 3 (S.C.C.) that unless the assurances of individual decision makers are reduced to or developed into an enforceable promise, they are not relevant. The Board was provided with no such enforceable promise or policy or agreement.

The Board accordingly, pursuant to its powers under section 37 and section 53 of the *Ontario Municipal Board Act*, ordered that it did not require either the production by, or the attendance of Ms. Janet Baird-Jackson.

### NANCY CAMPBELL COLLEGIATE INSTITUTE

The corporate organization and governance structure of the appellants becomes relevant, when the planning issues are dealt with.

The Nancy Campbell Collegiate Institute (NCCI) was founded by Gordon Allan Naylor. Mr. Naylor advised the Board that he and his wife Ellen Naylor had become dissatisfied with the publicly funded high school education system, and sent his daughter to a private school in British Columbia. He saw a need, in Ontario, for a school that had like values to both those of the British Columbia school, and his own.

Mr. Naylor described NCCI as a non denominational school, with a strong moral framework that is based on the concept of service and academic excellence.

Mr. Naylor defined NCCI as a private international, co-educational, residential secondary school, that begins with Grade 7 and ends at now Grade 12.

NCCI registered its business name under the *Ontario Business Names Act* on December 15, 1994. NCCI's principal place of business is at 45 Waterloo Street, South, Strathroy (Exhibit 13). Mr. Naylor indicated, NCCI began operations in September 1994.

NCCI is a division of Hatts Off Specialized Services Inc. whose head office is 12 Hatt Street, Dundas, Ontario. Mr. Naylor is the signing officer (Exhibit 13). The Directors of Hatts Off Specialized Services Inc. (Hatts Off) are Gordon Allan Naylor and Ellen Young Naylor (Exhibit 14). Mr. Naylor advised the Board that his five children are also "partners in every sense" in Hatts Off.

977328 Ontario Limited owns the building at 210 Water Street, which NCCI is proposed to be the sole tenant. Gordon A. Naylor and Ellen Y. Naylor are the sole directors of 977328 Ontario Limited. 977328 Ontario Limited has its head office at 12 Hatt Street, Dundas, Ontario and lists its activities as finance/insurance industries, including holding and investing (Exhibit 8).

NCCI has been authorized by the Ministry of Education and Training to operate as a private school since 1994. NCCI offers its students an Ontario Secondary School Diploma.

Any private school that plans to be accredited by the Ministry of Education and Training must file a Notice of Intention to operate a Private School (NOI) annually, file

Annual Reports with the Ministry, and submit to school inspections by an education officer employed by the Ministry.

Mr. Naylor filed with the Board, the 1999-2000 NOI (Exhibit 16), the September 1999 Report (Exhibit 18), and the June 18, 1999 Private School Inspection Reports of Nigel Gough, the Ministry's Education Officer (Exhibit 17).

The Board heard from Nigel Gough, who is currently, and was the first Ministry's Education Officer, when NCCI began operations at 45 Waterloo Street in 1994. Mr. Gough, during the first few years of NCCI's operations acted as its corollary principal, and exercised a degree of detailed supervision, which he slowly but surely released those supervisor protocols to NCCI's principal. Mr. Gough advised the Board that NCCI has complied with, and continues to comply with the *Education Act* and Ministry policy, as a private secondary school.

A "private school" is defined in the *Education Act* (Exhibit 69) as:

An institution at which instruction is provided at any time between the hours of 9:00 a.m. and 4:00 p.m. on any school day for five or more pupils who are of or over compulsory school age in any of the subjects of the elementary or secondary school courses of study and that is not a school as defined in this section.

The other schools defined in the *Education Act*, are elementary or secondary schools operated under the jurisdiction of a public district school board, a public school authority or an educational institution operated by the Government of Ontario.

Mr. Gough was of assistance to the Board in explaining the differences between a private secondary school and a publicly funded secondary school.

Compulsory attendance of children between the ages of 6 and 16 is excused if those children are attending a private school. The indirect effect of regulations governing mandatory school holidays and the provision of a maximum of four professional development days, could result in a difference between the schools in the minimum instruction days provided.

Mr. Gough indicated that education officers, as part of their inspections, do not consider zoning qualifications or whether a private school is run by a board of trustees or governors to be within their mandate. He indicated for his purposes, he also does not look to see who the owner of the school is.

Mr. Gough advised the Board that the *Education Act* is silent on whether a private school is non profit or can earn a profit. He indicated that the *Private Vocational Schools Act* governs those private schools that offer instruction or courses post secondary in nature. Those private schools operate on a year round basis, with their focus being on adults, looking for instruction in vocational and job preparation courses. A commercial private school operated for profit, could, in Mr. Gough's opinion be a private school under the *Education Act*. A private school can also provide as part of its extended curriculum, a curriculum of any kind, provided the basic elements, contained in the Guideline for the Inspection of Private Schools in Ontario 1999/2000 (Exhibit 15) are also provided. He confirmed NCCI offered satisfactory instruction and proper delivery of its curriculum.

#### NCCI AT 45 WATERLOO STREET, SOUTH, STRATFORD

NCCI currently has 75 students attending the Waterloo facility. There are 8 elementary school students, 14 Grade 9 students, 20 Grade 10 students, 13 Grade 11 students and 20 students taking OAC courses. Mr. Naylor advised the board there were 7 part-time and 9 full time teachers (Exhibit 18).

Of NCCI's current enrollment of 75, 1% or 30 students reside in Stratford. No statistics were provided how many of the remaining 45 students live in Canada or elsewhere. 44% or 33 students are dormitory students and 56% or 42 students are day students.

The site was the former location of the YMCA gymnasium since 1938, and later became a youth hostel. NCCI initially used the third floor for bedrooms, and later converted them into classrooms. The gymnasium and auditorium on the ground floor are used as such. A kitchen, cafeteria and dining room also occupy the first floor. The second floor is used for classrooms and offices.

Mr. Naylor indicated he likes to keep his classroom sizes to 20 students. He wants NCCI to grow to 200 students, and expects if he can use 210 Water Street as a private school, he can achieve that objective very soon.

NCCI's dormitory students currently live at a nearby hospital nurses' residence, except for a set of dormitory parents and two students, who live on the third floor of 45 Waterloo Street.

A bus transports NCCI's dormitory students from the nurses' residence at 7:30 a.m.

to 45 Waterloo Street for breakfast. Lunch for the students is provided at 45 Waterloo Street. School classes run from 8:35 a.m. to 4:00 p.m.

It is clear from the evidence that accommodating any where near 200 students attending school at 45 Waterloo Street cannot be achieved. Warren Hastings, a competent and qualified witness, who is the Director of Building and Planning for the City of Stratford, indicated he would have concerns, with accommodating a much larger student body from both a building code and planning perspective, at 45 Waterloo Street.

Mr. Naylor purchased 210 Water Street, through his company 977328 Ontario Limited, in order to accommodate the expansion objectives of NCCI. It is clear from the description given by several witnesses, of the land and buildings at 210 Water Street, that the most of operations of NCCI, namely the classroom, office, dormitory, cafeteria, and outdoor activities, could easily be accommodated there.

210 Water Street is a large property, with ample parking, spacious grounds, and has access to Water Street and Ballantyne Avenue.

210 Water Street has only had 5 owners since 1842. Mr. Alex Smith provided a history of the property (Exhibit 85). The existing home was built in 1907 and was used as a residence until 1948, when the Perth Mutual Insurance Company acquired it for their offices. A large rear addition faithful to the architecture of the house, was added in the early 1950's. The Perth County Board of Education bought the property in 1984 for \$602,000.00 and used it as the Board offices until Mr. Naylor's company purchased it in 1998.

Neighbourhood opposition to Mr. Naylor's use of the property ensued prior to his company closing the transaction on November 30, 1998. Mr. Mitchell on behalf of the neighbours wrote to Mr. Naylor as principal of NCCI on September 10, 1998 (Exhibit 60) advising him he would be facing vigorous opposition.

Faced with the knowledge that he had a fight on his hands, and faced with concerns expressed by the City's planning department, Mr. Naylor began to consider a compromise, to the school uses he would propose at 210 Water Street. The proposed school uses at 210 Water Street changed at various stages of the planning process, and during the course of the Board's hearing.

The Board finds that the changes were made to obtain a favourable result both before Stratford's City Council and before the Board. The Board finds however that the

final proposal put before it, becomes an unworkable and undesirable one for both the neighbourhood and for the school.

### **NCCI AT 210 WATER STREET, STRATFORD**

Mr. Naylor provided the Board with an extensive binder, which summarised the contributions that NCCI has made to the Stratford Community. Those contributions from 1994 to 2000 are exemplary.

The Board noted the comments of Stratford's Mayor Dave Hunt and others (Exhibit 21) that NCCI deserves special recognition for its contributions to the City of Stratford.

The difficulty for Mr. Naylor is his selection of 210 Water Street, as a location, amidst and abutting 15 residential homes, to continue the good work that NCCI provides to the community of Stratford.

To placate neighbourhood opposition, to accommodate the City's concerns, and to obtain a favourable result before the Board, Mr. Naylor advanced a final proposal in part contained in a proposed by-law (Exhibit 103), the fourth presented to it, which in the Board's opinion dilutes the effectiveness of NCCI to function properly as a private secondary school, having a residential component.

210 Water Street would contain NCCI's classrooms and administrative offices. Some of the dormitory facilities would be located at 45 Waterloo Street and some also would need to continue at the hospital nurses' residence or elsewhere. No food preparation but possibly food service would be provided at 210 Water Street. There would be no outdoor sports activities, band practices, theatre performances, gymnasium or auditorium activities. Those activities would continue to be provided, to the extent possible, for up to 200 students at 45 Waterloo Street.

The remaining school activities, which would basically be classroom instruction and school offices, would be confined to the existing building, with no expansion possible. The parking and landscape or open space at 210 Water Street would be limited to what is currently on site. Student enrollment would be capped at 200 students.

45 Waterloo Street would function as the location where the dormitory students would be fed. The dormitory students who would live elsewhere than 45 Waterloo Street would be transported there for breakfast at 7:30 a.m. and then with the dormitory students at 45 Waterloo would walk or be driven to 210 Water Street for classes beginning at 8:30

a.m.. 45 Water Street would be remodelled so that all food preparation and possibly food service for the expanded student enrollment would occur there. It is assumed by the Board, but unclear from the evidence, that those day students residing in Stratford, would be able to take advantage of the cafeteria and transport facilities should they want to join their classmates for breakfast.

Some of the required dormitory space would be provided at 45 Waterloo Street. Two plans (Exhibits 25 and 34) were provided one which indicated that 35 students could live on the third floor (Exhibit 34).

The remaining dormitory space for 55 students (assuming the same 44% split between day students and dormitory students, at a 200 student population), would be provided at the hospital nurses residence or elsewhere. The gymnasium would continue to provide the location for sports activities, band practices and theatre practice performances.

At lunchtime, the students attending classes at 210 Water Street, some 200 in number, would walk at once or on a split schedule, back to 45 Waterloo Street to be fed, and then return to 210 Water Street for afternoon classes. Mr. Arblaster described this arm in arm pedestrian activity along Water Street of between 100 and 200 students as being "a Sound of Music sort of thing". Mr. Mitchell was less charitable.

The Board finds that Mr. Naylor's attempt to incorporate 210 Water Street in such a manner, as part of NCCI's private residential secondary school campus, dilutes the effectiveness of each of its components, namely the classrooms, the dormitories, the school offices, the cafeteria, the gymnasium, the auditorium and the outdoor grounds.

The Board further finds on the basis of and after considering all of the planning evidence, that the application does not constitute good planning.

#### **THE IMMEDIATE NEIGHBOURHOOD**

The Board heard from 9 residents from the immediate vicinity of 210 Water Street, Dr. Shawn Blaine, George Tsaltas, Susan Bailey, George Kalbfleisch, Ron Gough, Sharon McKenzie, Alex Smith, Robert Ritz and Dawn Feore.

These residents, after describing the neighbourhood between Front Street and Queen Street, along both Water Street and Ballantyne Avenue, left no doubt in the Board's mind, that a private secondary school, as proposed by the Appellants, would have a



negative adverse impact on that immediate neighbourhood and south of it to Cobourg Street and Ontario Street. There are 15 rear yards that 210 Water Street abuts. There are 14 additional homes on the opposite side of Water Street, and 13 additional homes on the opposite side of Ballantyne Avenue, between Front Street and Queen Street.

The neighbourhood contains well kept, large, stately 2 ½ storey homes (Exhibit 73), in the core of Stratford, near the Festival and Queens Park. The neighbourhood was described as stable, quiet, desirable and prestigious. The office uses that were previously located in 210 Water Street were according to George Tsaltas never high intensity uses. George Kalbfleisch indicated the previous office uses enjoyed a good relationship with the neighbourhood. He was concerned about the impact a secondary school with 200 “exuberant teenagers” and the activities associated with the school, would have. His home is 59 feet away from the existing building at 210 Water Street. Mr. Robert Ritz’s home on the opposite side is 46.6 feet from the existing building at 210 Water Street.

The Board does agree with Mr. Naylor’s planner, James Collishaw that beyond Queen Street on the east and Front Street on the west, the predominantly low density character changes. To the west, the area becomes more diverse in its character and there are a wide range of uses and a range of the types and scale of such uses. In the context of a broader neighbourhood, the area is not homogeneously zoned. There are R1, R2 and R3 zonings that exist as far west as Waterloo Street (Exhibit 61).

Mr. Collishaw did concede in cross examination that the immediate neighbourhood however was a “lovely” one. He was challenged in cross examination as to the reasons why he did not capture all of the parkland in his Exhibit 61 and agreed he should have done so, and it was an error on his part to leave it out.

The Board is satisfied that the 9 residents description of their neighbourhood accurately depicts it, as one where a secondary school, whether it be public or private would clearly be an incompatible use.

### **PLANNING EVIDENCE**

The Board, as noted earlier, was impressed with the manner in which Warren Hastings, gave his evidence. The Board does however find that he was misled as to the nature and character of the governance of NCCI.

The Board also agrees with Mr. Arblaster that Mr. Naylor’s proposal respecting the use of 210 Water Street has changed dramatically both before and after Mr. Hastings gave

his evidence. This reduces the extent to which this evidence can be relied upon. Furthermore, when the City through Barbara Dembek asked Mr. Collishaw on August 23, 1999 (Exhibit 7) to confirm that NCCI met the definition of a "private school" in Zoning By-law 79-79, the Board finds she obtained a misleading and incorrect answer (Exhibit 7) from Mr. Naylor on August 26, 1999.

Mr. Hastings did indicate that after hearing Mr. Naylor's evidence regarding the manner in which NCCI is governed, he would have concerns if NCCI was considered, to be by zoning by-law definition, a "commercial school".

Mr. Hastings believed however that NCCI functions as a private high school. He told the Board a commercial school would have to be analysed, and he would need to examine the commercial policies contained in the City's Planning documents to determine whether it could be permitted at 210 Water Street without an Official Plan amendment.

Stratford's Zoning By-law 79-79 has three definitions for schools as follows:

"Public school" means a school under the jurisdiction of a public agency.

"Commercial school" means a school operated by one or more persons for gain or profit.

"Private school" means a school, other than a public school or a commercial school, under the jurisdiction of a private board of trustees or governors, a religious organization or a charitable institution.

The Board heard from Mr. Naylor's planner James M. Collishaw. Mr. Collishaw was of the opinion that a "private school" is a relatively benign use in terms of impact, particularly when compared to what could go in at 210 Water Street. He was careful not to provide an opinion as to whether or not a secondary or high school was benign.

210 Water Street has a Special Residential R1-1 zoning to permit, in addition to residential uses, "a business or a professional office on the lot".

Mr. Collishaw believed the use by NCCI represented an excellent use of a fine heritage building. At the time, Mr. Collishaw prepared his March 22, 1999 report (Exhibit 29, page 23), the female dormitories and lunch facilities were to be accommodated at 210 Water Street.

Mr. Collishaw was in attendance for all of Mr. Naylor's evidence. Mr. Naylor admitted that while NCCI does have a 10 person "advisory board", it has no written mandate or fixed term of office, is appointed by him, has no power to independently hire

or fire, or spend money and can be replaced by him if he wishes.

Mr. Collishaw, when faced with these facts, and asked in cross examination how NCCI's advisory board, fit the definition of a "private board of trustees or governor", contained in By-law 79-79's definition of a private school, he answered he was "surprised" to see "this type of definition of a school in a land use document".

Mr. Naylor also in his evidence, indicated that he intended NCCI to operate for a "gain or profit", which it currently does not.

Mr. Collishaw, when faced with these facts, and asked about the references to "profit or gain", in By-law 79-79's definition of a "commercial school", answered by saying in his opinion whether a school operates at a profit or loss of profit has no difference or meaning in terms of land use impact. Ms. Jean Monteith provided a reasoned opinion to the contrary.

Mr. Collishaw's evidence was damaged by effective cross examination by both Mr. Arblaster and Mr. Mitchell.

The Board prefers the evidence of Ms. Monteith to that of Mr. Hastings and Mr. Collishaw. Ms. Monteith was retained by Mr. Mitchell's clients in June 1999 and provided three reports/witness statements, dated July 2, 1999, May 1, 2000 and May 11, 2000 (Exhibits 94,95,96).

Ms. Monteith faced the planning issue head on. In her opinion, Mr. Naylor is operating a "commercial school" with the definitions of schools in By-law 79-79 (Exhibit 5).

Ms. Monteith does agree that Institutional uses may be located in all land use designations. She also agrees that section 7.2.1 of the Official Plan gives preference to institution uses being located in the downtown core and in residential areas.

Section 7.2 Institutional Uses of the Official Plan speaks to "secondary schools" constituting larger institutional uses, and "private schools" constituting smaller institutional uses.

Section 6.3.1 Policies for Residential Areas states that "secondary uses such as institutional uses,... are also permitted subject to conditions regarding their location and development".

Ms. Monteith reads section 6.3.1 as a “maybe”. In her opinion, any and all types of Institutional uses, are not permitted everywhere with the City’s residential designations. The Official Plan is intended to permit Institutional uses that serve the residential community to be within that residential community.

Ms. Monteith drew a distinction between an elementary school and a secondary school. The desire within a specific community is to keep elementary school children as close as possible to their homes and away from arterial roads.

Institutional uses, intended to serve a larger residential community, like a secondary school or international co-educational secondary school with a residential option like NCCI have different locational criteria in her opinion and are to be located peripheral to the residential community, on arterial or collector roads, so as not to intrude into the quiet enjoyment and privacy of the primary residential uses within the residential areas.

Ms. Monteith points to the Goals and Objectives for Residential Areas listed in Section 6.3 of the Official Plan. Those policies do speak to maintaining essential neighbourhood qualities, quiet enjoyment, safety and the need, when allowing certain, but not all or every non residential uses in residential areas that they be complementary to or compatible with these residential uses. Those non residential uses must also meet the neighbourhood needs and not undermine the neighbourhoods essential qualities.

The Board agrees with Ms. Monteith that NCCI as conceived originally or as later conceived by each of the four By-laws (Exhibits 6, 30, 58, 103), would undermine and negatively effect the goals and objectives of the City’s Official Plan. NCCI according to Ms. Monteith is simply not compatible and introduces a level of intense activity that is not appropriate.

Ms. Monteith stated that there was a good reason why By-law 79-79 makes the distinctions it does between “public”, “commercial” and “private” schools. In her opinion, the requirement that a private school have a board of trustees or governors is in order to have “a one step back”, from an individual owner of a private school to let them, make an independent assessment of what is in the best interest of the community. It is to Ms. Monteith, an issue of the accountability and assessment of the public good, that requires a mandated, fixed term board of trustees or governors. The Board agrees with that assessment. No evidence was given that NCCI’s advisory board had such level of independent governance.

The Board agrees with Ms. Monteith when she indicated she was left very cold and at a loss to write a by-law to protect the neighbourhood and at the same time accommodate NCCI at 210 Water Street.

The Board also has no difficulty with the City of Stratford drawing a distinction in By-law 79-79 between the definition of a private school for zoning purposes and the definition of a private school for the purposes of granting diplomas under the *Education Act*. Private schools provide for some, a needed alternative to the publicly funded school system. Having said that, a particular municipality can still within its powers decide where those private schools, elementary or secondary are to be located.

The Board orders that the appeal from Council's refusal to enact the proposed amendment to By-law 79-79 of the Town of Stratford is hereby dismissed.

Mr. Mitchell asked the Board to award him costs. Neither Mr. Arblaster or Mr. Trinaistich sought costs.

The Board has carefully reviewed its Practice Direction 1 pertaining to awarding costs and cannot find any grounds to support such an award. There has not been any evidence of clearly unreasonable, frivolous or vexatious conduct by the Appellants.

The Board orders that Mr. Mitchell's motion for costs be denied.

"R. A. Beccarea"

R. A. BECCAREA  
MEMBER