

ISSUE DATE:

July 28, 2009



PL080959

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

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellants: See Attachment "1"
Subject: By-law No. 2008-250
Municipality: City of Ottawa
OMB Case No.: PL080959
OMB File No.: PL080959

APPEARANCES:

Parties

Counsel

The TDL Group Corporation

M. Polowin

City of Ottawa

T. Marc

DECISION DELIVERED BY S.B. CAMPBELL AND ORDER OF THE BOARD

The TDL Group Corporation (the "Appellant") has appealed section 3, Non-Conforming and Non-Compliance, of the City of Ottawa (the "City") Comprehensive Zoning By-law 2008-250 (the "CZBL").

Section 3 of the CZBL provides, *inter alia*, as follows:

- (1) Nothing in this section affects subsection 34(9) of the *Planning Act*, R.S.O. 1990, Excepted Lands and Buildings, which addresses non-conforming uses.
- (2) No person will repair or rebuild any part of any building housing or otherwise used in connection with a non-conforming use except as set out in subsection (3).
- (3) When a building, structure, facility or otherwise, including septic or other servicing systems, used in connection with a non-conforming

use is damaged or demolished, the non-conforming use is damaged or demolished, the non-conforming right is extinguished if: (By-law 2008-462

- (a) the damage or demolition was involuntary;
 - (b) the building is repaired or re-occupied before the expiry of two years; and
 - (c) the building continues to be used for the same purpose after it is repaired as it was used before it was damaged or demolished.
- (4) Non-conforming rights are extinguished:
- (a) where the damage, demolition or removal of a building is not voluntary;
 - (b) where a damaged building is not repaired or re-occupied before the expiry of two years; or
 - (c) where the non-conforming use,
 - (i) is abandoned, or
 - (ii) is changed without permission from the Committee of Adjustment.
- (5) This section applies, with all necessary modification, to a non-complying building.

Section 34(9)(a) of the *Planning Act* (the "Act") provides "no by-law passed under this section applies, to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose".

The Appellant takes the position that section 3 of the CZBL restricts an owner's right to repair or rebuild a building on his property by providing that if an owner does so when the "damage, demolition or removal" is "not involuntary", then his non-conforming rights are extinguished. This may be contrasted to circumstances in which a repair or rebuilding is done as a result of "involuntary" damage, demolition or removal. In this case the property owner's non-conforming rights will not be extinguished so long as the building is repaired or re-occupied before the expiry of two years and the building continues to be used for the same purpose after it is repaired as it was before it was damaged or demolished. Therefore, it is the position of the Appellant that section 3 of the CZBL "attempts to narrow, amend and restrict the non-conforming rights of property owners, which is beyond the jurisdiction of the City pursuant to the *Planning Act*".

Having reviewed the evidence of Adam Thompson, a land use planner qualified to provide expert land use planning evidence on behalf of the Appellant, and David Leclair, similarly qualified on behalf of the City, the Board finds that section 3 of the CZBL permits a property owner to rebuild or make repairs to a building with a non-conforming use, or which is non-complying, if the rebuilding or repairs are "involuntary". That is, the repair or rebuilding is required following an event like a fire or a flood. However, if a property owner repairs or rebuilds voluntarily, to maintain, upgrade or modernize the building, the non-conforming or non-complying right is lost. Mr. Leclair, on behalf of the City, confirmed that this is the effect of section 3 of the CZBL and reflects the City's intent to gradually phase out existing legal non-conforming uses.

Therefore, the Board must determine whether, in light of section 34(9)(a) of the *Act*, the City has the right to enact such a by-law provision.

The Law – Appellant:

Counsel for the Appellant acknowledges that section 34 (1) of the *Act* generally enables municipalities to pass zoning by-laws "to permit or prohibit certain land uses and to regulate those land uses in a planning sense". However, subsection 34(9)(a) "creates an exemption to protect pre-existing lawful uses". Counsel submits that there is no provision in the *Act* which requires a property owner "to obtain permission from the municipality for extension, expansion or intensification of the building or structure". The

Board notes that subsection 45(2)(a) of the *Act* allows enlargement or extension of the building containing the existing non-conforming use, only if the committee of adjustment so authorizes. The Board takes subsection 45(2)(a) as an indication that the *Act* does not contemplate or in fact mandate that all existing non-conforming uses will disappear. On the contrary; with the authorization of the committee of adjustment, such uses may be enlarged or extended.

Counsel for the Appellant submits that “the general rule of law is that vested rights cannot be taken away unless by specific legislation and only where the language of the statute clearly discloses an intention to interfere with the right”. Section 3 of the CZBL specifically states that nothing in section 3 affects subsection 34(9)(a) of the *Act*. However, Counsel for the Appellant submits that the City is attempting to affect rights guaranteed by subsection 34(9)(a) and is therefore “attempting to do through the ‘back door’ what it cannot do through the ‘front door’”.

Counsel for the Appellant took the Board through considerable jurisprudence which he submits confirms that legal non-conforming rights are exempt from zoning by-laws. Similarly, he submits that non-complying rights are treated in the same manner.

The Supreme Court of Canada considered legal non-conforming rights in *Central Jewish Institute v. The Corporation of the City of Toronto* [1948], S.C.R. 101. In this case Rand J. held that “the exemption is not to the existing use but to the building; and there is no implication that it is the whole of the building that must be so used or that the use must be the sole use...” Rand J. considered whether it could: “...the building as a whole would be exempt; and I think it would necessarily follow that no such extension could bring about a forfeiture of the exemption”.

Kellock J. concurred, saying “I agree with the view of the statute taken by my brother Rand that the use being made of the building here in question on the day of the passing of the by-law was sufficient to bring it within the very words of section 406(2) (of the *Municipal Act*, precursor to section 34(9) of the *Planning Act*) and as the building and the lands appurtenant were being used by the appellant for a purpose not permitted by the by-law, the by-law does not apply to them”.

In *382671 Ontario Ltd. v. London (City) Chief Building Official* (1996), 32 M.P.L.R. (2d) 1 (Ont. C.J., Gen Div.) the Court confirmed that legal non-conforming

uses may be expanded within the confines of a building, without having to obtain a variance from the committee of adjustment. In this case a property owner with an existing non-conforming apartment building sought to turn an empty storage area into an apartment. The municipality took the position that a variance was required before a building permit could be issued. In considering the matter, the Court reviewed the history of section 34(9) of the *Act* and said that without the “protective principle” enshrined in the section “the local landowner would be at the mercy of the passing whims and fancies, as well as the reasoned planning and zoning judgments, of local officials and could face indirect expropriation without compensation. Thus, the non-conforming use principle has been statutorily embedded in the zoning process to prevent retroactive injustice from being wreaked upon the landowner”. The Court therefore found that the municipality’s attempt through its zoning by-law to “deem” certain legal non-conforming uses to be lawful was “nothing more or less than a clever attempt by the municipality to trench upon and even disembowel s. 34(9) of the *Act*.” The Court went on to say “if the municipality wishes to obtain the power set out in the by-law, it must seek out an amendment to s. 34(9) itself and not take upon itself to amend the statute through the subtle but illegal slight-of-hand device set out in s. 1.3”.

The Supreme Court of Canada again considered continuity of use in *Saint-Romuald (City) v. Olivier*, 2001 S.C.C. 57. In this Quebec case, the Court dealt with the doctrine of “acquired rights” under which a party is entitled to continue to use premises as they were used when a new by-law was passed. The Court said “under the doctrine of ‘acquired rights’, the respondents were not only entitled to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use”. That “flexibility” included the ability to “adapt to the demands of the market or the technology that are relevant to it”. The Court noted that such “flexibility” also exists at common law, citing *Central Jewish Institute v. City of Toronto*.

The Court went on to say that its “objective is to maintain a fair balance between the individual landowner’s interest and the community’s interest. The landowner overreaches itself if (i) the scale or the intensity of the activity can be said to bring about a change in the type of use...or if (iii) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours, as compared with what went on before. The factors are balanced against one another”.

The Court, having reviewed the jurisprudence on acquired rights and legal non-conforming uses, summarized the approach which should be taken with respect to limitations on a landowner's acquired rights. The Board finds the following enunciation of the approach to be relevant to the case at hand:

1. It is firstly necessary to characterize the purpose of the pre-existing use (*Central Jewish Institute*). The purpose for which the premises were used (i.e., 'the use') is a function of the activities actually carried on at the site prior to the new by-law restrictions.
2. Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection. However, where the intensification is such as to go beyond a matter of degree and constitutes, in terms of community impact, a difference in kind..., the protection may be lost...
3. To the extent activities are added, altered or modified within the scope of the original purpose...the Court has to balance the landowner's interest against the community interest, taking into account the nature of the pre-existing use...

Counsel for the Appellant cited a number of Ontario cases decided since *Saint-Romuald v. Olivier* considering subsection 34(9)(a) of the *Planning Act* and the scope of legal non-conforming uses.

In *R. v. Ryan-Lee Investments Inc.* (2005), 8 M.P.L.R. (4th) 301 (Ont. C.J.), the Court said "the purpose of s. 34(9)(a) would seem to be to override any municipal by-law that tried to prohibit a lawful use so long as it continued to be in use from the day of the passing of the by-law to the time the issue arose".

In *Ottawa (City) v. Capital Parking Inc.* (2002) 59 O.R. (3d) 327 (Ont. C.A.) the Ontario Court of Appeal cited *Saint-Romuald (City) v. Olivier* and said "the legal non-conforming use doctrine rests on the principle that zoning by-laws which introduce new restrictions on the use of property should not deny landowners their right to use their property in the same manner they did prior to the introduction of those restrictions". The Court specifically noted the words of the Supreme Court of Canada which allowed for

“flexibility in the operation of (the) use”, and found that “normal evolution may occur in some uses...A use protected by acquired rights may...adapt to the demands of the market or technology that are relevant to it...”

With respect to the temporary cessation of a use (perhaps during a renovation) Counsel for the Appellant cited *Rotstein v. Oro-Medonte (Township of)* (2002), 34 M.P.L.R. (3d) 266, (Ont. S.C.J.). The Court said “intention is a relevant factor to be considered in the case of a temporary cessation of a long-established pattern of usage...there was no change of intention by the owners during this period, nor was there any act on their part or anyone else’s indicating any changed intent as to the continuing seasonal usage of the boathouse”.

In *Mohammed v. Dysart (Municipality) Building Official* (2003), 45 M.P.L.R. (3d) 282 (Ont. S.C.J.) the Court cited *Rotstein v. Oro-Medonte* and said “interruptions in use for the purpose of such things as renovations or repairs, or for reasons beyond the control of the owner have been held to come within s. 34(9) of the *Planning Act*”. The Board notes that the Court considers interruptions in use for renovations and interruptions for reasons beyond the control of the owner to have the same effect for the purposes of section 34(9) of the *Act*.

Counsel for the Appellants, citing the above cases, argues that repairs and renovations do not extinguish rights to a legal non-conforming use: “this therefore also supports (the Appellant’s) submission that renovations or repairs on buildings that have legal non-conforming uses may be allowed as long as they do not increase the degree of non-compliance”. Counsel therefore submits “as long as the intention of an owner is to continue a long-established pattern of usage, then there will be no loss of non-conforming use as a result of damage or demolition, whether it was voluntary or non-voluntary”. He argues that there is nothing in section 34(9)(a) of the *Act* or in the case law which draws a distinction between voluntary and involuntary repairs and their effect on the legal non-conforming use.

The Law – The City:

Counsel for the City also cited the decision of the Supreme Court of Canada in *Saint-Romuald (City) v. Olivier* for the proposition that “in addressing legal, non-conforming rights, the objective is to balance the rights of the individual property owner versus the interests of the community expressed through the municipality”.

Of particular significance to the City’s position that section 3 of the CZBL represents an appropriate vehicle to “encourage over time the evolution of land use to that in conformity with the zoning by-law” is *Niagara River Coalition v. Niagara-on-the-Lake (Town)*, 2009 CarswellOnt. 2910 (Ont. S.C.J.). Such an evolution to conformity was the intention of the City, on the evidence of Mr. Leclair.

In *Niagara River Coalition* the court considered a provision of the municipality’s official plan (section 6(3)) which provided “it is a policy of the Plan that incompatible non-conforming uses will be progressively eliminated by purchase or exchange of land or that they may disappear by voluntary termination in the course of time” (emphasis added).

The Board must comment on the relevance of this decision to the case at hand. First, as the Board learned during the course of the hearing, the City does not have a similar official plan policy encouraging progressive, voluntary elimination of non-conforming uses over time. Secondly, the official plan policy in the *Niagara River Coalition* case speaks explicitly to the elimination of non-conforming uses through a purchase or exchange of land, or through voluntary termination. Purchase, land exchange or voluntary termination imply that the landowner with the right to the legal non-conforming use has agreed to the termination of the right. Section 3 of the CZBL certainly does not provide for compensation through the purchase or exchange of land and does not speak to a landowner voluntarily abandoning an acquired right. The Board notes that section 34(9)(a) of the *Planning Act* was not considered in the *Niagara River Coalition* case and the Board can only conclude that no party took the position that section 6(3) of the municipality’s official plan was contrary to this section of the *Act*.

The Board cannot find that *Niagara River Coalition* stands for the proposition put forward by the City; that despite section 34(9)(a) of the *Act*, the City can “encourage” or

“cause” the “evolution” over time from a legal non-conforming use to one in conformity with the zoning by-law.

Counsel for the City cited *Heutinck v. Oakland (Township)*, (1997) CarswellOnt 4653 (Ont. C.A.) for the proposition that “the Courts have taken into consideration the provisions in zoning by-laws speaking to non-conforming uses”. With respect, the Board cannot find that this case is relevant to the case at hand. It deals with “non-complying uses” and a situation in which “the activity now engaged in by the appellant is fundamentally different from that which had occurred at the time of the passage of the by-law”.

The Board has reviewed all the cases cited by the City and finds that they are distinguishable from the case at hand either on the facts or the law. For example, Counsel for the City cites *884709 Ontario Ltd. v. Ottawa (City)*, (1992) CarswellOnt 516 (Gen. Div.) for the proposition that if a demolition is voluntary the legal non-conforming right is lost. Section 34(9)(a) was not considered in this case, nor was regard had to relevant decisions of the Supreme Court of Canada and the Ontario Court of Appeal.

Counsel also cited *1218897 Ontario Ltd. v. Toronto (City) Chief Building Official*, (2005) CarswellOnt 5296 (Ont. S.C.J.) for the proposition that “for the cessation of use not to bring to an end the legal, non-conforming use, such cessation must be beyond the control of the property owner”. With respect, the Board has read the paragraphs of the case cited by Counsel, and the case in its entirety, and cannot find that the case stands for this proposition. The Court was dealing with a use interrupted by repairs due to a fire and found that the “requirement of continuity can nonetheless be met where there is an intention to continue the non-conforming use and that the use is continued as far as possible in the circumstances”. The Court does not say that a voluntary repair or renovation results in a loss of a legal non-conforming right.

Mr. Leclair testified that provisions similar to those found in section 3 of the CZBL were found in the zoning by-law of the former City of Ottawa, and the zoning by-laws of all the former area municipalities (Exhibit # 8). Counsel submits that this “past practice” supports the validity of section 3 of the CZBL.

Board's Findings:

As noted above, the Board finds, on the evidence of the City's witness, Mr. Leclair, that section 3 of the CZBL has the effect of causing a landowner to lose a right to a legal non-conforming use if that owner voluntarily repairs or replaces its building, even if the footprint of the building remains the same as the building which contained the legal non-conforming use. Mr. Leclair testified that the City's intent in enacting section 3 of the CZBL was to encourage the gradual disappearance of legal non-conforming uses.

The Board finds, on a clear reading of section 34(9)(a) of the *Act* that such a municipal intent and effect of a zoning by-law is not permitted by the *Act*. Section 34(9)(a) prohibits a municipality from passing a zoning by-law "to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such a purpose on the day of the passing of the by-law so long as it continues to be used for that purpose". Therefore, a by-law provision like section 3 of the CZBL which operates to prevent such a use with the intent of "encouraging" the cessation of the legal non-conforming use cannot stand.

The cases cited by the Appellant, especially the decisions of the Supreme Court of Canada, *Central Jewish Institute v. City of Toronto* and *Saint-Romuald (City) v. Olivier* affirm the right of a landowner to continue with a legal non-conforming use. In fact, the Supreme Court of Canada decisions stand for the proposition that such a use may be expanded within the confines of the building, may be "intensified" as part of the pre-existing activity, and finally, of particular relevance to the case at hand, may see "renewal and change" (*Saint-Romuald (City) v. Olivier*).

The Board finds that section 3 of the CZBL specifically operates to prohibit such "renewal and change". Mr. Leclair, on behalf of the City, agreed that if the Appellant replaced the windows in one of its stores or updated the exterior, the Appellant would lose its right to the legal non-conforming use under section 3 of the CZBL. Neither section 34(9)(a) of the *Act*, nor the decisions of the Supreme Court of Canada permit such a result.

With the respect to "continuity of use", the Board finds that the intention of the landowner is significant. The Appellant would not lose its right to its legal non-

conforming use during a closure for a voluntary repair or even replacement of the building. The Board notes the words of the Court in *Rotstein v. Oro-Medonte (Township of)*: "...intention is a relevant factor to be considered in the case of a long-established pattern of use".

In *Mohammed v. Dysart (Municipality) Building Official* the Court specifically considered "interruptions in use for purposes of such things as renovations or repairs, or for reasons beyond the control of the owner" and found they come within section 34(9) of the *Act*. The Board notes that repairs and renovations as contemplated in this case are specifically voluntary, or instigated by the landowner, as contrasted to "reasons beyond the control of the owner". Certainly that Court found, and this Board finds, that there is nothing in section 34(9)(a) of the *Act* that provides that a right to a legal non-conforming use is lost if renovations or repairs are voluntary or within the control of the owner.

Finally, the Board has considered the validity of the two-year limitation period set out in subsection 3(3) and 3(4) of the CZBL. Again, there is nothing in section 34(9)(a) which allows for the extinguishment of a landowner's right to a legal non-conforming use if repairs or renovations are not completed before the expiry of two years. As noted above, "intention" is determinative. If a landowner demonstrates a continuous intention to continue a long-established pattern of usage, there is no loss of its right, regardless of the time it takes to complete repairs.

The Board allows the appeal and finds that section 3 of the CZBL, in its entirety, improperly narrows, amends and restricts the right of a property owner to a legal non-conforming use, contrary to section 34(9)(a) of the *Planning Act*. Section 3 of the CZBL is beyond the jurisdiction of the City.

This is the Order of the Board.

"S. B. Campbell"

S. B. CAMPBELL
VICE CHAIR

ATTACHMENT 1

555 March Road Inc. (555 March Road)

595799 Ontario Limited

2024644 Ontario Inc.

Arnold Kimmel Limited & Hartman Management Corporation (“Quickie Convenience Stores”)

Arnon Corporation

Bells Corners Properties Limited (c/o Colonnade Development Incorporated)

Bayshore Shopping Centre Ltd.

Campanale Homes

Canadian Tire Real Estate Limited & Canadian Tire Corporation Limited

Capital Parking Inc.

Central Canadian District of the Christian and Missionary Alliance in Canada (“Redeemer Alliance Church”)

Claridge Homes (Centretown) Ltd.

College Square Properties Inc.

Colonnade Development Incorporated (15 Colonnade Road)

Colonnade Development Incorporated (various properties)

David Gladstone

David Rossetti

Denis Labelle

DIR Investments Inc. (591 March Road)

Emparrado Corporation

Gary Underwood & Stephen Shingler

Greater Ottawa Home Builders Association

HG & GB Investments Ltd. (915 Klondike Road)

James & Pamela Cain

Kanata Research Park Corporation (940 and 945 Klondike Road)

Kanata Research Park Corporation (various properties)

Loblaws Properties Ltd.

Mildred Marshall

Minto Commercial Properties Inc. (775 - 795 March Road)

Minto Commercial Properties Inc. (907 Eagleson Road)

Minto Commercial Properties Inc. (1926 St. Joseph Boulevard)

Ottawa Macdonald-Cartier International Airport Authority

PCM Kanata South Inc.

Pierre Grandmaitre

Raymond Perrin

Richcraft Homes Ltd.

Riotrin Properties (Hazeldean) Inc; Riotrin Properties (Belcourt) Inc.; Woodway Developments Limited; Riotrin Properties (Merivale) Inc.; Riotrin Properties (Orleans) Inc.; Riotrin Properties (Barrhaven) Inc. & 2024201 Ontario Ltd.

RJ Motors (168672 Ontario Inc.)

Rockcliffe Park Residents Association

Saint Mary's Land Corporation (c/o Taggart Realty Management)

Signature Centre Ltd. (c/o Taggart Realty Management)

Strandherd Meadows Inc. & Petro Canada

Sunset Lakes Developments (1374421 Ontario Inc) & Sunset Lakes Owners Association Inc.

The TDL Group Corp.

Thomas Cavanagh Construction Ltd. (Almonte Quarry and Kinburn Quarry)

Thomas Cavanagh Construction Ltd. et al

Timburwal Developments Inc.

Timothy & Edith Fauquier

Trim Road Land Holdings Ltd. & Canada Mortgage and Housing Corporation (c/o Taggart Realty Management)

Trinity Property Holdings Inc.

Urbandale Corporation

Urbandale Corporation & KNL Developments Inc.

Woodpark Community Association

Zena Kinder Holdings Limited