

ISSUE DATE:

**AUGUST 20, 2012**



PL120425

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

Applicants: Michael and Kristine Adams  
Appellant: Veronica Veal  
Subject: By-law No. 2012-14  
Property Address/Description: 4080 Hickson Avenue  
Municipality: City of Niagara Falls  
OMB Case No.: PL120425  
OMB File No.: PL120425

**APPEARANCES:**

**Parties**

Michael and Kristine Adams

Veronica Veal

City of Niagara Falls

**Counsel**

Rocco Vacca

Ken Beaman

**DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD**

Veronica Veal ("Appellant") has appealed to the Board to not amend Zoning By-law No. 79-200 (passed in 2008) with a site-specific Zoning By-law Amendment that would rezone the property of Michael and Kristine Adams ("Applicants") at 4080 Hickson Avenue in the City of Niagara Falls to permit their existing, single detached dwelling to be used as a cottage rental dwelling with a maximum of three bedrooms. If approved, the Applicants' dwelling could be used as a cottage rental dwelling that could be rented to a single group of tourists/travellers for periods of less than 28 days. The proposal seeks to recognize the cottage rental use and a number of existing site conditions. The Committee of Adjustment approved the Zoning By-law Amendment.

Counsel Rocco Vacca represented the Applicants. The City appeared in support of the Applicants' application and City planner Andrew Bryce provided planning evidence in

support of the amendment. Mr. Bryce was qualified to provide his professional land use planning and opinion evidence for this case.

The Appellant, Ms Veal, represented herself at this hearing and she lives next door to the subject property at 4090 Hickson Avenue. She is the adjacent property owner to the south of the subject property. She called area resident Kenneth Westhues as a witness to provide additional information related to his understanding of the City's practice of approving site-specific amendments to permit single-property cottage rentals in Niagara Falls.

The subject property is located on the southeast corner of Leader Lane and Hickson Avenue in the Silvertown neighbourhood of Niagara Falls. The Applicants, who do not reside in the subject dwelling, rent the house as a cottage rental dwelling, which is contrary to the by-law. They filed their application following a number of complaints by Ms. Veal to the City. The property is zoned Residential Single Family and Two Family (R2), which permits the existing detached dwelling but not this use. If approved, the Applicants' site-specific zoning amendment would add the "cottage rental dwelling" use to the list of permitted uses. The Applicants would also like the amendment to recognize the existing lot area, the front and exterior side yard setbacks and to permit part of the dwelling to be located in the basement/cellar.

The subject property is part of a small residential neighbourhood to the south and east of it (comprised mainly of other single detached dwellings). South of this neighbourhood are lands zoned Industrial although the City is contemplating a future Light Industrial designation to permit other uses. To the immediate north of the property sits the Great Wolf Lodge resort. Farther west along Leader Lane is located Niagara Helicopters, a company that provides scenic air tours of the region. To the immediate east of the dwelling is a small apartment building with nine units. Beyond that is River Road, which provides easy access to the dwelling from Leader Lane. River Road has two other approved cottage rental dwellings operating at or near its intersection with Ferguson Street. As stated, immediately south of the subject dwelling sits Ms. Veal's home on a property very similar in size and features to that of the Applicants' property.

Ms. Veal purchased her house in 2003. She expressed a number of concerns to the Board that prompted her to appeal Council's approval of the Applicant's site-specific by-

law amendment. Of these, the Board was not persuaded by her argument that the amendment impacts the character of the neighbourhood. Ms. Veal suggested that the subject lot is too small for this use and it already has reduced side yard setbacks. However, the Board notes that the proposed amendment seeks to recognize what already exists and no external changes are planned that would impact the neighbourhood character. By extension, Ms. Veal's own property is virtually the same size as the subject property and she too enjoys reduced front and exterior side yard setbacks similar to what the Applicants seek to regularize through the amendment. The dwelling has been in existence since 1954 and has always been used as a single detached dwelling. The Applicants have proposed no external changes to the dwelling or to the property and the City planner opined that the amendment has no effect on the residential character of the neighbourhood. The Board finds this opinion to be highly persuasive and it takes note of the existence of two other Council-approved cottage rental dwellings a couple of streets away on Ferguson Street near River Road. The Board heard no evidence that these were the subject of opposition or that they have detracted from the physical character of the neighbourhood. Also, Ms. Veal provided no evidence to support her statement that the impact of guest parking on the subject property has a direct impact on her, on her neighbours or on traffic flow or the functioning of the street. The City planner also opined that the amendment creates no negative impact on traffic or parking along Leader Lane.

Ms. Veal had other concerns, however. The Board heard that after the previous owners of the subject property had sold it to Jim Pattison Entertainment Ltd. (the operator of a number of resort properties and related interests across Canada and the operator of Great Wolf Lodge to the immediate north), this company began to rent the subject dwelling to tourists where the by-law makes no provision for this cottage rental dwelling use. Ms. Veal advised the Board that in fact, the property has been improperly rented out to guests as a cottage rental dwelling for the past five years. She expressed her ongoing concern that typically, several different groups will arrive over a weekend and use the property for short periods. Where people used to stay for longer periods in the past (between two to four weeks in duration), the problems have been exacerbated by the fact that renters now come for much shorter stays, resulting in a higher turnover of guests.

In addition to the high turnover of guests, Ms. Veal recounted various other problems that began after the Applicants purchased the property in 2010. She said she began to complain to the City about the frequent turnover of guests and their behaviour on site between May and September 2011 (the months when rental activity is at its highest). She has documented 25 separate occasions in that period alone when partying and noise has disrupted her right to the peaceful enjoyment of her property and that of her neighbours. Ms. Veal argued that the proposed amendment is not compatible with the residential uses around it and the City's existing Noise Control By-law (No. 2004-105). She argued that this by-law is an ineffective and insufficient means of municipal enforcement as one must provide two witnesses of any noise incident in order for the City to act upon the complaint. Noise logs must be kept and while she has complied, she argued that this is a tedious and ineffective way to enforce the by-law's noise standards generally and as it relates to the Applicants' frequent renters specifically. She added that when summoned, the response from the attending police (Regional force) has not always been prompt and they have advised her that it is a matter for the City.

Beyond the matter of neighbourhood character, on which the Board has ruled, Ms. Veal's central concerns are two-fold: first, that the Applicants are seeking to regularize a non-permitted use in this area because of the complaints lodged and second, that after five years of illegal operation of the subject dwelling as a cottage rental property and after her ongoing complaints to the City, instead of helping her, the City instead approved the amendment; as she called it, "rubber stamping" the amendment.

In arriving at its decision to approve the amendment, City Council considered the December 2011 staff report (Exhibit 1, Tab 1), which stated: "Staff has received complaints about noise and inquiries regarding the permitted uses for the property, prompting the rezoning application." The report also stated that noise impacts from the proposed use could be controlled in two ways: that the Applicants would be required to obtain a municipal business license to operate the cottage rental dwelling and to abide by all City by-laws, "most notably the Noise Control By-law."

It is also evident to the Board that the City took into account some of Ms. Veal's complaints about the non-permitted use and the noisy behaviour of the Applicants' frequent guests before approving the amendment. In response to those complaints, the Applicants accepted as conditions for municipal approval of their amendment the

planting of six-foot-tall cedar trees along the side yard shared with Ms. Veal's house (which is virtually atop the property line shared with the Applicants); the installation of a frosted glass insert on the window that faces Ms. Veal's property; the installation of a video (surveillance) camera in the backyard; the installation of a sun/shade gazebo on the rear deck; a rental contract and rules for guests; and the provision of the owners' contact numbers in case there are guest issues.

However, Ms. Veal told the Board that privacy was not her central concern. While the frosted window is effective, it was not asked for. As for the cedar trees, she said that one of the trees is dying and they do not deter noise, just as the presence of the surveillance camera at the back of the house does not deter guests' late-night and "bad" behaviour. It is the noise and associated behavior of the rotating presence of guests of the Applicants' rented house and lack of enforcement by the City that create the impacts on her and her property. She noted that the gazebo, which sits atop the rear yard deck of the subject property, is located very close to her property line and rear bedroom window. Its placement on the deck encourages people to sit outside on the deck; noise invariably follows, particularly late at night, which disturbs Ms. Veal. The Board determines that while imperfect solutions, it is evident that both the Applicants and the City considered Ms. Veal's concerns and the City took steps it felt would mitigate the perceived impacts created by the property being rented out as a cottage rental dwelling. That is, the City imposed what it considered to be appropriate conditions for Council's approval of the zoning amendment. With these in place, the approval was given. Ms. Veal contends that these conditions do not work, that the use should not have been permitted in the first place and the high turnover and noisy behavior of guests continue.

The issue for the Board to consider is whether the proposed amendment to permit the use creates cumulative adverse impacts on Ms. Veal sufficient for it to dismiss the appeal. Ms. Veal called Kenneth Westhues, an area resident, to speak in support of her appeal. Mr. Westhues' Powerpoint presentation (Exhibit 3) outlined his lay analysis of publicly available information (planning reports) on Council's previous site-specific approvals of cottage rental dwelling in neighbourhoods and the treatment of the use within the Niagara Falls Official Plan and Zoning By-law.

Mr. Westhues enumerated his findings to the Board in respect of the subject property and 11 other properties, noting that the City has approved every cottage rental application to date. Mr. Westhues presented the following information:

1. The City has no by-law or policy governing approval of cottage rental dwellings in residential neighbourhoods although it has a definition contained in the By-law No. 79-200: “a one family detached dwelling that is rented in its entirety to one group of travellers at a time for a period of less than 28 days at one time.”
2. All requests for rezoning for cottage rental dwellings have been approved by citing the following standard exceptions rule in the City’s Official Plan (Part 2, Paragraph 1.2): “A variety of ancillary uses may also be permitted where they are compatible with the residential environment. Ancillary uses shall include, but are not limited to schools, churches, nursing homes, open space, parks, recreational and community facilities, home occupations, public utilities and neighbourhood commercial uses.”
3. The planning reports for the subject property and other properties are founded on a flawed conception of what a cottage rental dwelling is: “a form of small scale, short term accommodation, similar to a bed and breakfast establishment...” Mr. Westhues offered that the fundamental distinction is overlooked between an ancillary use that is accessory to residence or home business (the bed and breakfast, where an owner customarily lives on site and tends to guests) and an ancillary use that is purely commercial, operated away and apart from the operator’s residence (the cottage rental).
4. Reasons given for recommending approval of cottage rental applications in Niagara Falls are shifting and inconsistent. He cited the example of a 2006 application that noted the owners live next door to the subject dwellings and are “able to supervise the use of the dwellings and better ensure the properties are properly maintained” whereas the subject property makes no mention of where the owners live. Mr. Westhues cited a 2005 application that noted five strong letters of support from neighbours, whereas Ms. Veal alone objects strongly to the amendment in this case.

Council for the City, Mr. Beaman, questioned Mr. Westhues and submitted that the only distinction between a cottage rental dwelling and conventional leasing is the length of term of the rental; that is, it is a distinction based solely on the amount of time the tenant occupies the property. Mr. Westhues responded by saying that there is a difference between policies that govern cottage rental dwellings whose primary renter is a short-term tourist/traveller and those where someone rents a property for a year and the dwelling serves as the person's residence.

In the context of Ms. Veal's concerns and Mr. Westhues' presentation, the Board considered this application and the planning evidence proffered in support of it.

Mr. Bryce, the City Planner, explained that "cottage rental dwelling" is defined in the Official Plan (also referenced in Mr. Westhues' presentation). Counsel Mr. Beaman told the Board that the definition was added in 2008, meaning that City Council had approved earlier cottage rental dwellings through site-specific zoning amendments before there was even a definition in place. Mr. Bryce advised the Board that City staff was satisfied with the measures that the Applicants had put in place and the amendment was approved. He opined that there is no contradiction to the broad direction found in the Provincial Policy Statement and in the Growth Plan, which support the redevelopment of complete communities that incorporate employment and residential opportunities such as that proposed by the Applicants. He noted that communities are dynamic and land uses can change provided they do not impact adjacent land uses. The planner demonstrated persuasively through his evidence and analysis of the application that in planning terms, the proposed addition of this use through the amendment does not impact adjacent land uses and the Board determines that the broad policies of these provincial instruments are not offended.

Mr. Bryce reviewed the relevant policies of the Official Plan, which designate the lands as Residential. In partial response to Mr. Westhues' reading of the meaning "ancillary uses", Mr. Bryce advised that Policy 1.2 states that "A variety of ancillary uses may also be permitted where they are compatible with the residential environment." The City takes the view that a cottage rental dwelling is compatible with residential development. Accordingly, Council is able to consider other appropriate land uses. Such uses are not typically ancillary to a dwelling but instead they can be ancillary to a land use. Mr. Bryce explained that the City considers bed and breakfast operations similar to cottage

rental properties because they are small-scale, tourist-serving uses that cater to small groups. The difference between the two is that the bed and breakfast is often owner operated (on site) whereas a cottage rental property is not. As for the land use in this case, the planner opined that the subject property is an appropriate location for a small, tourist-serving operation, situated as it is on the periphery of a residential community, sited south and east of the public lands and with a major commercial tourist operation to the immediate north and nearby on River Road.

Mr. Bryce also explained that as for the intensity of the use, the City does not consider the use of a single detached dwelling as a cottage rental dwelling as a change in the intensity of the use. At best, it represents a single group of travellers occupying a single detached dwelling on a short-term basis. He explained that City Council was simply imposing site-specific zoning on this property to restrict the number of occupants and bedrooms to six occupants and three bedrooms.

Mr. Bryce opined that the proposed by-law amendment (No. 2012-143) is site-specific zoning that represents good planning and implements the above-cited controls on the occupancy of the dwelling. He added that the City recognized the legal non-conforming conditions of the subject property as it was built prior to passage of the parent by-law. Mr. Beaman noted that the operation of this cottage rental dwelling is regulated by the 2004 Noise Control By-law and by the 2001 Licensing By-law. In the case of the former, it has clauses that deal with persistent shouting, yelling and dog barking, of which the Appellant complains and provides the City Clerk with controls to act on the complaints. In the case of the latter, the City Clerk may revoke or suspend the Applicants' licence if the City receives nuisance complaints.

Mr. Bryce opined that the proposed zoning by-law represents good planning and should be approved. Counsel for the Applicants, Mr. Vacca, asked Mr. Bryce whether the Applicants' property could be considered to be a legal non-conforming cottage rental dwelling since it had been rented out for short-term rental accommodation since 2006. Mr. Bryce replied in the negative and stated that the cottage rental dwelling is not a listed use for the property in the by-law provision prior to 2011.

The Board determines that in respect of the Part 2 reference to "ancillary uses", the City's characterization of the cottage rental dwelling use as an ancillary use is a



reasonable one. The City used this section of the Official Plan to grant nearly a dozen of the same site-specific zoning amendments of other individual properties as cottage rental dwellings in Niagara Falls. Several of these are situated in proximity to the subject property. The Board considered whether because the City has spot-zoned 11 other properties by approving these site-specific zoning amendments, the subject site should automatically be so zoned. The Board says no and determines that each case must be decided on its own merits. In this case, the Board has considered the impacts created on the adjacent resident by the ongoing past and current use of the property as a short-term rental proposition for the Applicants.

The most noticeable impacts of the amendment are those created on the Appellant, Ms. Veal. Where one other similar application elsewhere in the City involved the provision of letters of support, in this case, there were no letters of support – only the presence of Ms. Veal and a handful of attending residents, all of whom oppose the proposed amendment. While Mr. Vacca put to Ms. Veal a photocopy of a petition signed by a number of neighbourhood residents who allegedly support the Applicants' proposed rezoning, the Board pointed out to this counsel that none of the signatories to the petition were in attendance. The Board advised him that it places very limited weight if any on such documents as they have little or no probative value where the persons who have signed cannot be questioned or the reasons for their support can be explored. The only sentiment expressed by residents at this hearing was opposition to the proposal, buoyed by the impacts created by the illegal operation of the subject property as a rental property for short-term guests.

An important issue for the Board was to understand the City's historical approach to site-specific zoning individual residences throughout the City to permit cottage rental dwellings. The Board is not entirely certain that the optimal way to respond to the trend of residents creating cottage rental dwellings of their homes is to engage in site-specific zoning amendments and justifying their use as an "ancillary use" (as City Council has done). This "spot zoning" of residential neighbourhoods is tantamount to piecemeal planning and does not present itself as an entirely seamless or efficient means of permitting the use let alone regulating it. And, as the Board has seen in the circumstances of this particular case, this approach has raised voices of opposition by virtue of the impacts this practice can have on adjacent residential properties. While not

impacting the character of a neighbourhood *per se*, spot zoning of this type is shown in this case to create unacceptable impacts on adjacent properties.

The Board determines that the City of Niagara Falls Official Plan is a flexible and generous document as far as extending opportunities for the City to permit ancillary uses that are compatible with residential neighbourhoods. It is within its right to consider the bed and breakfast use and cottage rental dwelling uses as similar uses that do not necessarily change the character of a neighbourhood or impact adjacent uses (in this case, residential) and do not affect the intensity of use. However, Ms. Veal has shown how the impacts in this case have been substantial and how the remedies available to her have been ineffective. She made a persuasive distinction between the bed and breakfast use and that of a cottage rental dwelling as it impacts her property. Where the bed and breakfast operation is owner-occupied and its guests are chaperoned on the premises, there is no such on-site presence of the Applicants/owners of the subject property. Guests have free rein of the property and are unsupervised. Ms. Veal has established through her uncontradicted testimony that the illegal short-term cottage rental use frequently includes nuisance behaviour from the Applicants' renters that adversely impacts her peaceful enjoyment of her property. Noise disturbances are frequent during guests' stays. The noise is to be expected as people arrive for their vacations and settle into a temporary stay. This is a very different scenario from established "consistent" residents who live in their dwellings over the long term or even from long-term renters, who, the Board heard, are more inclined to treat the property as their residence.

Therein lays the problem for Ms. Veal. With the ongoing seasonal arrival of renters, she is being impacted by frequent, loud, noisy and boisterous behaviour from short-term renters. The problem remains an ongoing one despite the measures put in place by the Applicants. As Ms. Veal has shown persuasively, there is a history of ongoing bad guest behaviour on the subject property and she has not had responsive action from the City to control the non-permitted use. The Board is not satisfied that this ancillary use is compatible with the residential use to the immediate south. In the site-specific context, the impacts that the use creates are significant and the ancillary use becomes, in the Board's determination, an inappropriate site for the proposed use.

In the Board's determination, Ms. Veal has demonstrated persuasively her individual incidents and resulting frustration with the cumulative impacts she continues to experience from the non-permitted cottage rental use. Her recitation of specific examples of impacts on her personal enjoyment of her home and property through the inconsiderate behaviour of short-term guests was neither shaken nor adequately addressed by either the Applicants or the City. What was also persuasive to the Board were Ms. Veal's statements that showed how, despite the City's argument that there is a Noise Control By-law and Licensing By-law to regulate the use of the property or revocation of the Applicants' license, she has repeatedly complained to the City and the Niagara Region Police and the situation has not improved for her. The Board was also mindful of her stated concern that once the zoning is approved for the subject property, it stays zoned for the use and the subject property could continue to be a cottage rental property no matter who owns it. Further, despite the condition that Council imposed on the Applicants to use a rental agreement that stipulates no noise after 10 p.m., there is uncontradicted evidence from Ms. Veal that the tourists/travellers who rent the Applicants' property are frequently violating this clause. Despite measures put in place and as recently as May 18, 2012 (six weeks before the date of this hearing), Ms. Veal documented problems with a group outside well after 10 p.m. making noise that disturbed her.

The Board is of the view that the City should review carefully the approach it continues to take in respect of granting approval throughout the City to all applications for site-specific zoning amendments to permit cottage rental dwellings, particularly when residents are expressing opposition to the regularization of the use within established neighbourhoods. As Mr. Beaman told the Board, Council does not know how many residences throughout the City are currently operating in this illegal fashion, although he suggested that "there may be many" but since there have not been complaints, they must be operating quietly and/or "under the radar." There have been nearly a dozen applications to date and all were approved, particularly referencing the Part 2 clause permitting a range of ancillary uses. In the Board's view, universal approval of site-specific zoning amendments for this type of use throughout the City on a site-by-site basis within stable neighbourhoods constitutes piecemeal planning and does not represent good land use planning, particularly where (in this case) there is a demonstrated history of negative impacts created by the Applicants' illegal use on at

least one residential property to the south. These impacts are sufficient for the Board to determine that City Council's approval of similar site-specific zoning amendments for cottage rental dwellings should be considered carefully, cautiously and comprehensively, taking into account the circumstances and context of the individual application in the future and the impacts that such "ancillary uses" might create, particularly where there already exists evidence of ongoing and sustained negative impacts on surrounding properties. Council's reliance upon the standard exceptions rule in its Official Plan that permits "a variety of ancillary uses" is, in the Board's determination, a most generous interpretation by Council, equating cottage rental dwellings to bed and breakfasts where Ms. Veal showed persuasively how the absent owners – the Applicants – do not live on site and as such they do not control their guests' behavior and the City has been unresponsive to Ms. Veal's attempts to avail herself of the municipal remedies. Again, the City planner offered no opposing evidence on this matter and neither the City nor the Applicants presented any information to the contrary. This "ancillary use" clause in the Official Plan as justification for permitting the use on the subject site does not represent good planning in this case as Ms. Veal's and Mr. Westhues' evidence and testimony have shown.

While the intensity of land use does not change in the planning context, the impacts created by the illegal/proposed use in the case at hand have been well established by Ms. Veal, such that Board determines that approval of the site-specific amendment for the subject property should not have been given. In the Board's determination, there is persuasive evidence before it from Ms. Veal that the approval has not improved her situation and the conditions imposed by Council have not mitigated the continuing impacts from the frequent and high turnover of short-term guests.

The Board finds Mr. Bryce's planning evidence to be sound as far as the policies of the Official Plan are concerned but the Board was required to weigh that evidence in the context of Ms. Veal's evidence of uncontested, on-the-ground impacts that the subject property's rental use currently creates on her and her property. Given her experiences, the Board assigned little weight to Mr. Beaman's submission that Ms. Veal has "remedy mechanisms" available to her and two by-laws that will enforce noise disturbances and establish licensing requirements. As stated, Ms. Veal has shown persuasively that such remedies require lengthy documenting processes involving among other things keeping noise records and finding two witnesses to any disturbance. And, they have not worked

for her even after the City approved the zoning. It is noteworthy that Ms. Veal has complained to the City for a long time about the use, all to no effect. And, once the Applicants had submitted their application in response to her complaints, the City Council approved the amendment with the inclusion of measures to mitigate impacts that she has shown at this hearing do not adequately address the impacts of noise and disturbances caused by the high turnover of guests of the dwelling.

In the Board's view, these cumulative experiences constitute a nuisance and create a negative impact on Ms. Veal's quality of life and represent a negative impact that the proposed amendment itself creates – permitting a use that impacts adversely an adjacent property in the form of diminishing Ms. Veal's personal enjoyment of her property and quality of life. Such impacts are significant, in the Board's determination and are directly attributable to the Applicants' operation of the property as a cottage rental dwelling. The Board finds that the cottage rental dwelling use is not compatible with the surrounding neighbourhood as set out in these reasons. The Board will not approve the site-specific zoning amendment for the subject property as it would permit a use that Ms. Veal has demonstrated through her evidence impacts her adversely and where she has shown legal remedies to be ineffective. The Board also determines that this amendment does not represent good land use planning and is not in the public interest. The Board prefers the evidence of Ms. Veal to that of Mr. Bryce for the reasons given.

Having considered all of the evidence, **THE BOARD ORDERS** that the appeal is allowed and the site-specific amendment of the Zoning By-law is repealed.

So Orders the Board.

"R. Rossi"

R. ROSSI  
MEMBER