

ISSUE DATE:

July 31, 2009



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL031147

Joe Fortino, Anthony Valeri, and Canadian Niagara Hotels Inc. have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 2003-180 of the City of Niagara Falls
O.M.B. File No. R030246
O.M.B. Case No. PL031147

APPEARANCES:

Parties

City of Niagara Falls

Canadian Niagara Hotels Inc.

J. Fortino

A. Valeri

Counsel/Agent*

K. Beaman

T. Halinski

S. Fortino*

DECISION DELIVERED BY C. CONTI AND ORDER OF THE BOARD

Background

This is a hearing regarding three appeals against the approval of a Zoning By-law Amendment, by the City of Niagara Falls, to rezone lands for open space uses in order to provide a gateway entrance feature into the City. The By-law Amendment rezones lands on the north and south sides of Roberts Street, east of Stanley Avenue from part Tourist Commercial, part deferred Tourist Commercial and part Residential to a site-specific Open Space Zone. Appeals were filed by Canadian Niagara Hotels Inc., Joe Fortino and Anthony Valeri (the Appellants) regarding properties at 5348 Roberts Street, 5168 Roberts Street, and 5201 and 5209 Roberts Street, which are owned respectively by each of the Appellants.

The properties are currently used for commercial and residential purposes. The proposed By-law would permit continuation of existing uses, but limit new uses to

sightseeing tour establishments and tourist information centres, with a number of other operations such as retail stores, currency exchanges, restaurants, etc. permitted as accessory uses.

The Board heard that in 1999, the property owners in the vicinity of Hwy. 420 and Roberts Street petitioned the City to make improvements to roads in the area. The location is one of the main exits from Hwy. 420 into Niagara Falls and it receives very high traffic volumes.

Policies in the Niagara Falls Official Plan identified the intersection as one of the main gateways into the City. The City and Niagara Region worked together to turn the area into a Gateway Corridor entrance into the City of Niagara Falls and began a program of property acquisition. Some lands had already been acquired by the Ministry of Transportation for Highway widening. When these plans were abandoned, the lands were turned over to the City. The Region acquired additional properties for the purpose of establishing the corridor.

The Board heard that the lands have been designated as Open Space in the Official Plan and that the City passed a By-law Amendment to rezone the lands on Roberts Street, extending from Stanley Avenue past Second Avenue to Open Space. Initially, the By-law made no provision to allow continuation of existing uses, but this was changed after area residents objected.

Since the passing of the By-law amendment, the Region has abandoned their property acquisition program. While there is no longer intent to establish a publicly owned gateway corridor, the City still intends to provide the gateway through land use controls and zoning. The By-law Amendment to enact these zoning controls is the subject of the appeals.

Evidence

The Board heard that the concerns of the Appellants had initially been to maintain the Tourist Commercial Zoning. However, after further consideration of the matter the Board learned that two of the Appellants, Canadian Niagara Hotels Inc. and

Anthony Valeri, would be satisfied if some uses which are allowed under the Tourist Commercial Zoning are still permitted.

The City submitted a revised By-law (Exhibit 7) which has resolved the concerns of Canadian Niagara Hotels Inc. and Anthony Valeri, but not those of Mr. Fortino. Mr. Fortino wants the Tourist Commercial Zoning to remain on his property.

The Board heard testimony from Alex Herlovitch, Director of Planning and Development for the City of Niagara Falls. Mr. Herlovitch is a Registered Professional Planner with more than 25 years of experience. He was qualified by the Board as an expert in land use planning.

Mr. Herlovitch submitted excerpts from the Niagara Falls Official Plan including the gateway policies and the locations of proposed gateways in the City (Exhibit 2, 3 and 4). He noted that since the Region abandoned their land acquisition program, the City had been in discussion with Canadian Niagara Hotels Inc. in an attempt to settle their appeal. This has resulted in the revised By-law (Exhibit 7), which provides for some tourist commercial use on the lands owned by the three Appellants.

The revised By-law provides for continuation of existing uses on the Appellants' lands and permits some limited tourist commercial uses. In particular, sightseeing tour establishments and sightseeing tourist information centres can be established on the properties with accessory uses including a retail store, currency exchange, a beer, wine or liquor store, fruit stands, a restaurant, a drive-in restaurant, a tobacco store, and a souvenir store. Mr. Herlovitch noted that the By-law will not permit uses such as the establishment of hotels or tourist attractions.

While Canadian Niagara Hotels Inc. had requested that the Tourist Commercial Zoning be restored to their property, Mr. Herlovitch stated that the zoning must conform to the designation in the Official Plan. A Tourist Commercial Zoning would not conform to the Open Space designation and therefore is not allowed. The zoning provided in the By-law is a modified Open Space zoning that provides for some tourist commercial use.

Mr. Herlovitch testified that the zoning provided in the revised By-law complies with the Official Plan. It is consistent with the gateway indication in the Official Plan and with the Plan's open space policies.

Mr. Herlovitch indicated that provincial policies are not affected by the By-law. His opinion is that the By-law represents good planning. The land uses permitted in the By-law will be compatible with the gateway function. In Mr. Herlovitch's expert opinion, the By-law should be approved.

Mr. Halinski noted that in addition to the above, the By-law is also proposing a zero side yard setback. Mr. Herlovitch indicated that in this case the City has adopted the side yard setback of zero, which is the standard for Tourist Commercial Zones. He stated that the setback is appropriate in this situation because the adjacent lands are small open space areas where the City is not expecting a great deal of active use.

On the basis of the revised By-law including the provision for reduced side yard setback, Mr. Halinski confirmed the agreement of Canadian Niagara Hotels Inc. Mr. Valeri confirmed his agreement with the revised By-law.

Ms Fortino submitted that Mr. Fortino simply wants to protect the value of his property by maintaining the Tourist Commercial Zoning. Based upon correspondence received from the City in 2008, Mr. Fortino had been under the impression that now that the property acquisition program has been abandoned, the zoning on his property would be returned to Tourist Commercial. Furthermore, at the pre-hearing conference held for this appeal in March of 2009, the City had agreed to present alternative concepts to the other Parties for their consideration by the end of April 2009. Ms Fortino indicated that no alternative concepts had been provided and they only received the revised By-law three days before the hearing.

Ms Fortino also questioned the viability of operating a tourist information centre or sightseeing tours establishment on each of the three properties in such close proximity.

On the basis of these concerns, Mr. Fortino still opposes the By-law.

In response, the City indicated that they had not presented alternative concepts because they were in settlement discussions with Canadian Niagara Hotels Inc. until a few days prior to the hearing. They indicated that the zoning requested by Mr. Fortino is not in conformity with the Official Plan. The Tourist Commercial zoning cannot be allowed on the lands while the properties are designated as Open Space.

With regard to the feasibility of three tourist information centres in close proximity, the City contends that to fall under this category it is only necessary for an operation to function as a contact point in conjunction with a tourist operator. There is no intent that each property necessarily contain a full tourist information centre.

Findings

Mr. Fortino provided little evidence to support his desire to maintain the Tourist Commercial Zoning on his lands. The Board has no planning evidence that this would be an appropriate zoning for the lands, that it would conform to provincial policy and the Official Plan, or that it represents good planning.

The planning evidence in this matter is to the contrary. The City has stated that a Tourist Commercial Zoning on the property would not conform to the Official Plan, and that is one of the reasons for providing a special Open Space zoning through the proposed By-law. The opinion evidence provided by Mr. Herlovitch is that the proposed By-law conforms to the Official Plan, does not offend any Provincial policies and represents good planning. This evidence is uncontested.

This hearing was established through a pre-hearing conference. All Appellants should have been aware of the need to bring forward appropriate evidence to substantiate their appeals at the hearing. Mr. Fortino chose to simply provide argument, rather than bring forward planning evidence. As a result, the Board has no planning basis upon which to allow the Fortino appeal in full.

The Board is concerned that alternative concepts were not presented to the Appellants as part of the settlement discussions. However, the Board accepts the City's submissions that they were involved in attempting to settle the appeal with Canadian Niagara Hotels Inc., and that to make further revisions to resolve the Fortino appeal would make the zoning of those lands conflict with the Official Plan.

In view of the above, the Board accepts the expert evidence provided by the City of Niagara Falls. The revised By-law (Exhibit 7) conforms to the Niagara Falls Official Plan, does not offend provincial policy and it represents good planning.

Based upon the evidence, the concurrence of Canadian Niagara Hotels Inc. and Anthony Valeri with the revised By-law (Exhibit 7), and the lack of planning evidence to fully support the Fortino appeal, the Board allows the appeals in part based upon the provisions of the revised By-law.

Order

THE BOARD ORDERS that the appeals against By-law 2003-180 of the City of Niagara Falls are allowed in part and the provisions of the By-law are revised in accordance with Attachment "1" to this Decision. In all other respects, the appeals are dismissed.

So Orders the Board.

"C. Conti"

C. CONTI
MEMBER

By-law No. 2003-

A by-law to amend By-law No. 79-200, to restrict the use of the land on both sides of Roberts Street, east of Stanley Avenue, to passive landscaped open space, save and except for existing lawful uses and a limited range of tourist commercial uses.

THE COUNCIL OF THE CORPORATION OF THE CITY OF NIAGARA FALLS ENACTS AS FOLLOWS:

1. Sheet D4 of Schedule "A" to By-law No. 79-200 is amended by redesignating from TC in part, DTC in part, R2 in part, R2 and numbered 336 in part, DTC and numbered 168 in part, and DTC and numbered 187 in part, to OS and numbered 632, the land on the north and south sides of Roberts Street, east of Stanley Avenue, as described in Appendix 1, attached to and forming part of this by-law, and shown hatched and designated OS and numbered 632 on the plans Schedule 1, Schedule 2 and Schedule 3, attached to and forming part of this by-law.

2. Notwithstanding the provisions of section 14.1 of By-law No. 79-200, no person shall use the land described in section 1 of this by-law and shown hatched and designated OS and numbered 632 on the plans Schedule 1, Schedule 2 and Schedule 3 attached hereto, or erect or use any buildings or structures thereon for any purpose, except:

- (a) Passive landscaped open space; and
 - (b) A use which is lawfully being carried on the date of the passing of this by-law upon the land or in an existing building or structure erected thereon, so long as such land, building or structure continues to be used for that purpose.
3. Notwithstanding section 2 above, the following land:
- (a) Lot 638, Plan 2628, now known as Plan No. 9; Niagara Falls; Lots 645 and 646, Plan 746, now known as Plan No. 9; Niagara Falls; and Part of Lot 630, Plan 746, now known as Plan No. 9; Niagara Falls;
 - (b) Part Lot 630 Plan 9 Town of Niagara Falls now in the City of Niagara Falls and Regional Municipality of Niagara; and
 - (c) Lot 645 and Lot 646 Plan 9 Town of Niagara Falls now in the City of Niagara Falls and Regional Municipality of Niagara;

may be used to erect and use a new building or structure thereon for the purpose of a sightseeing tours establishment, sightseeing tourist information centre and accessory uses including a retail store; currency exchange; beer, wine or liquor store; fruit stand; a restaurant; a drive-in restaurant; tobacco store; and a souvenir store in accordance with the regulations specified in section 8.6.2 of By-law No. 79-200, except that notwithstanding section 8.6.2(d), the minimum interior side yard width shall be 0.0 metres.

4. For the purposes of this by-law: "Passive landscaped open space" means an area of land which is used for the growth and maintenance of grass, flowers, shrubbery, trees and other landscaping and may include a surfaced walk and decorative pools and fountains, but does not include any access driveway or ramp, parking area and bus parking area.

5. Section 19 of By-law No.79-200 is amended by adding thereto the following:

19.1.632 Notwithstanding the provisions of section 14.1 of By-law No. 79-200, no person shall use the land on the north and south sides of Roberts Street, east of Stanley Avenue, designated OS and numbered 632 on Sheet D4 of Schedule "A", or erect or use any buildings or structures thereon for any purpose, except in compliance with By-law No. 2003-_____.

Passed this 6th day of October, 2003.

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DEAN IORFIDA, CITY CLERK

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WAYNE THOMSON, MAYOR

First Reading: October 6, 2003
Second Reading: October 6, 2003
Third Reading: October 6, 2003

APPENDIX 1
TO BY-LAW NO. 2003-_____

Part of Lots 675 to 681 inclusive, 687 to 693 inclusive, 702, 707 and 715, Plan No. 2628, now known as Plan No. 9

Lots 637 to 641 inclusive, 649 to 653 inclusive, 674, 684, 686, 703, 708, 710 to 712 inclusive and 719, Plan No. 2628, now known as Plan No. 9

City of Niagara Falls

Regional Municipality of Niagara

Part of Lots 525, 544, 545, 554, 586 and 630, Plan No. 746, now known as Plan No. 9

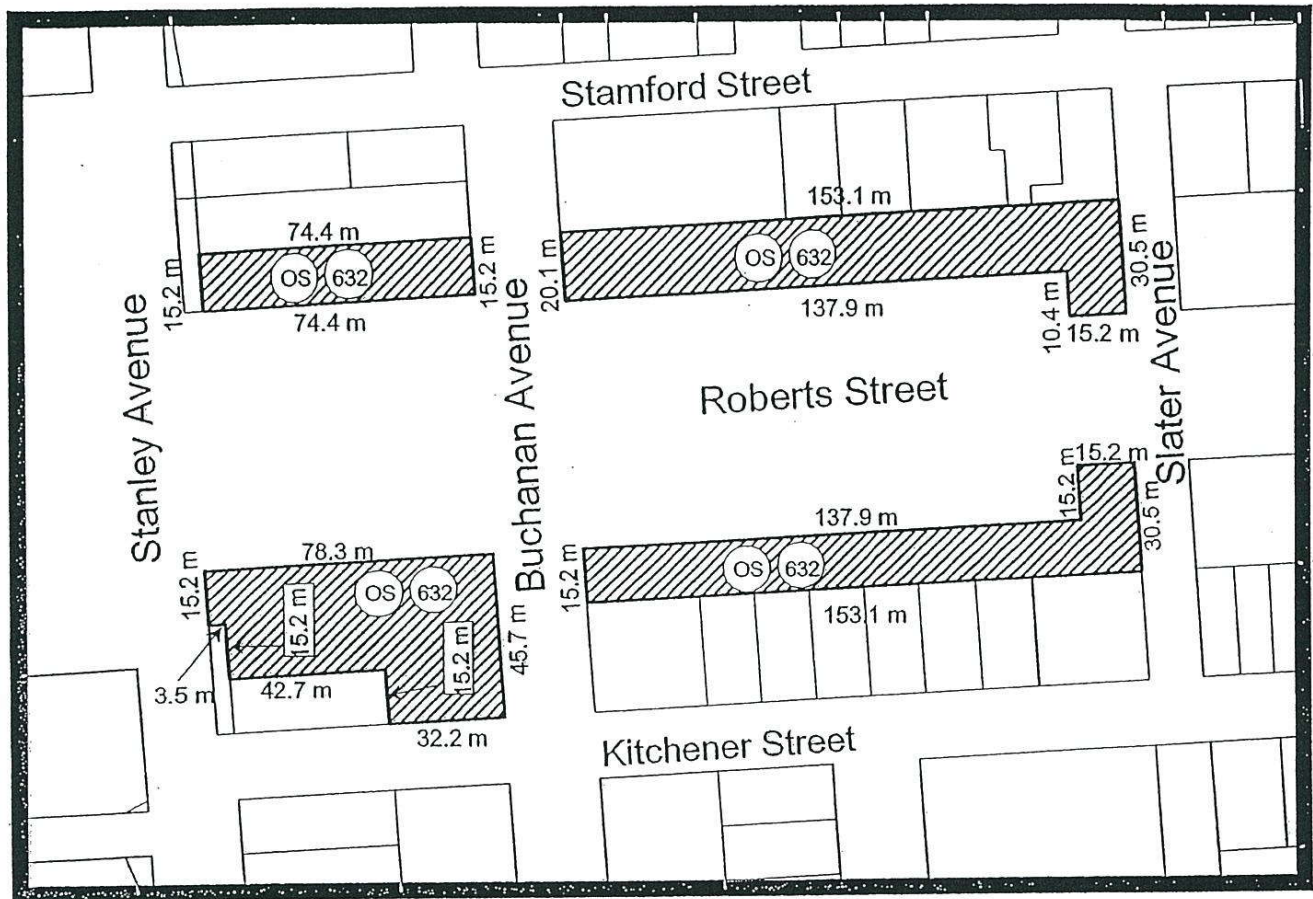
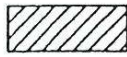
Lots 521 to 524 inclusive, 546 to 553 inclusive, 555 to 563 inclusive, 585 and 587 to 606 inclusive, 631 to 636 inclusive and 642 to 648 inclusive, Plan No. 746, now known as Plan No. 9

City of Niagara Falls

Regional Municipality of Niagara

SCHEDULE 1 TO BY-LAW No. 2003-180

Subject Land



Amending Zoning By-law No. 79-200

Description:

See Appendix #1



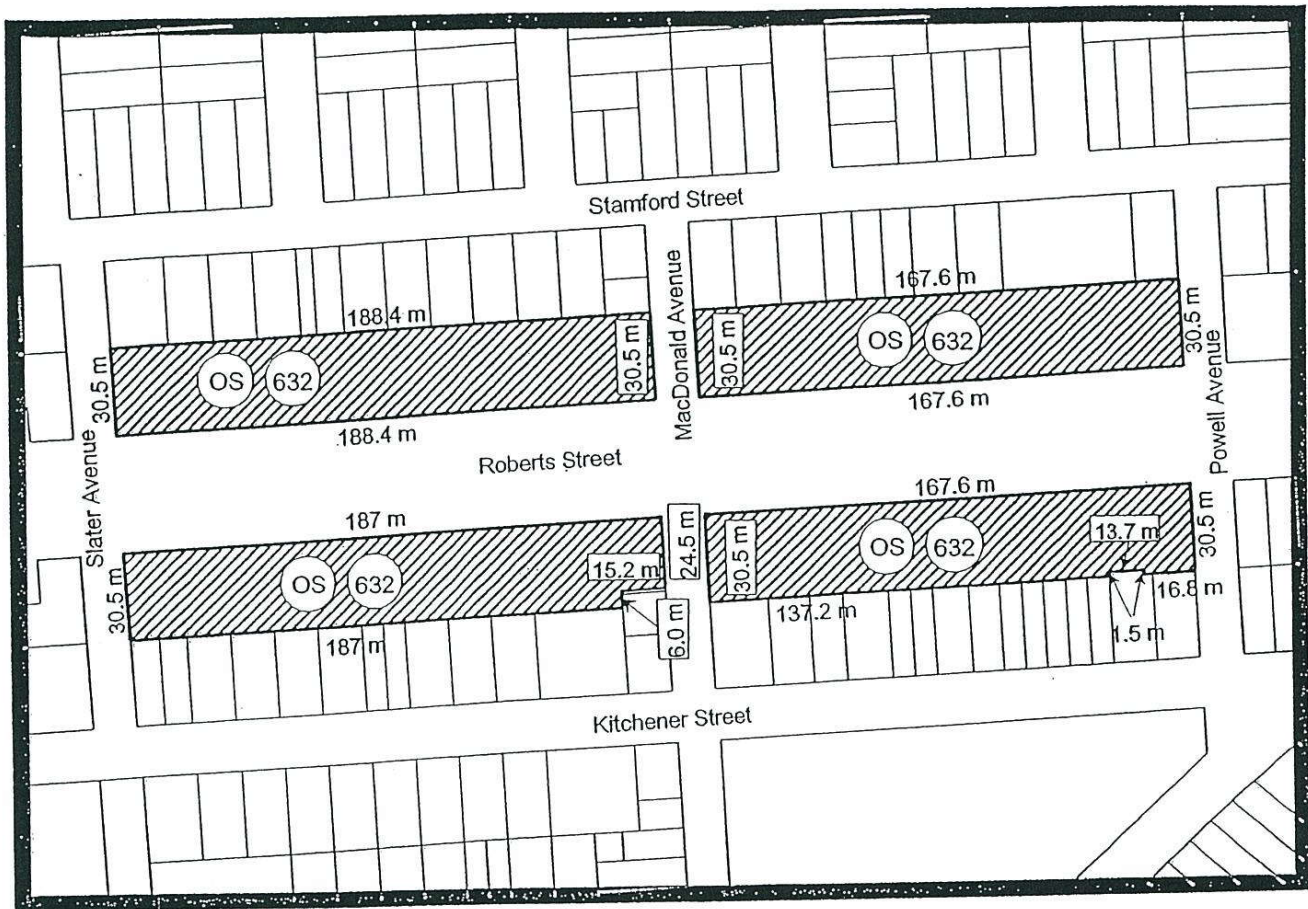
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SCHEDULE 2 TO BY-LAW No. 2003-1 80

Subject Land 



Amending Zoning By-law No. 79-200

Description:

See Appendix #1

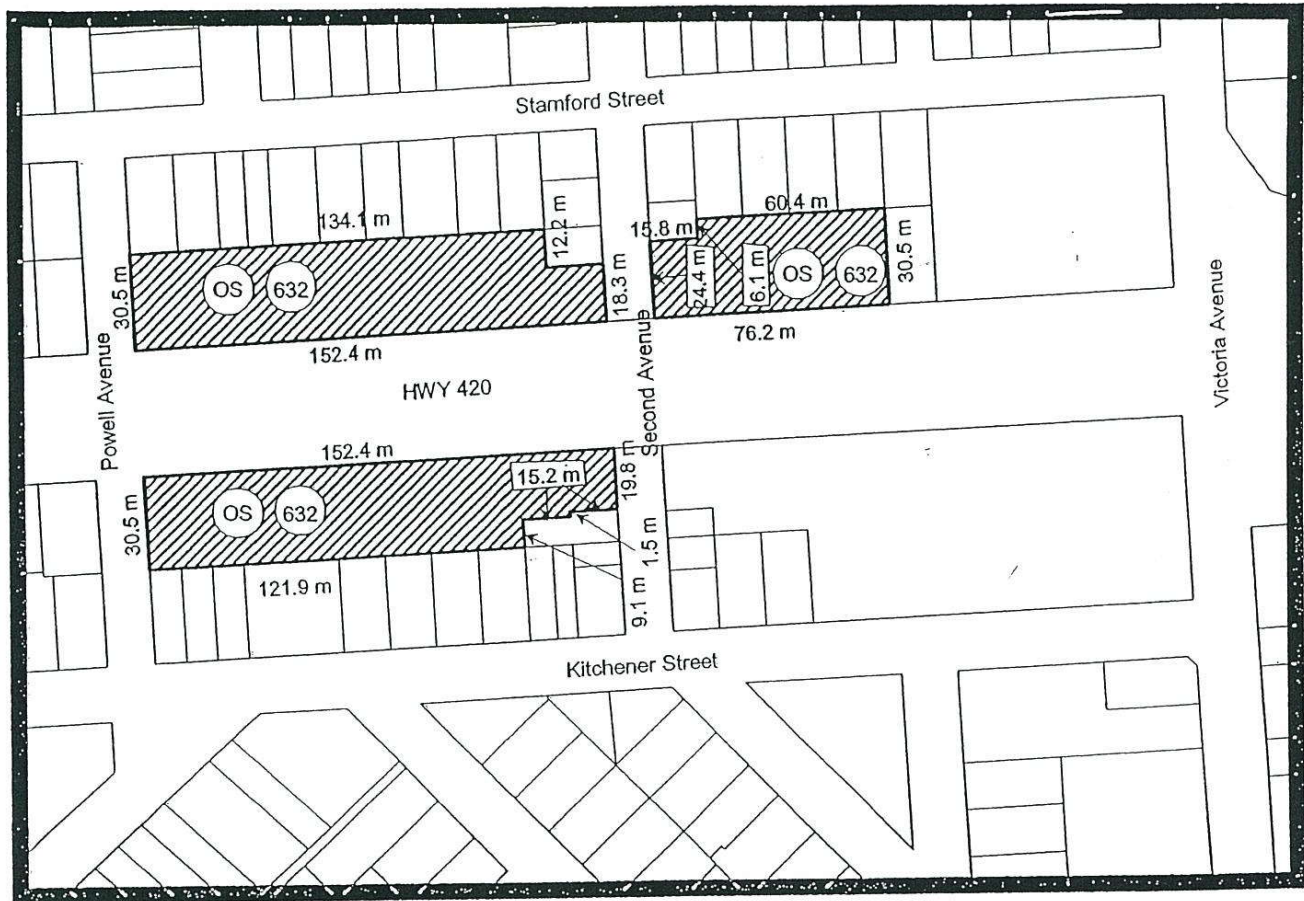
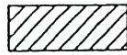


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AM-07/2003

SCHEDULE 3 TO BY-LAW No. 2003-180

Subject Land



Amending Zoning By-law No. 79-200

Description:

See Appendix #1



1:NTS

July 2003

AM-07/2003