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PL080200

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

Appellant: Elicor Developments Inc.
Subject: By-law No. 106-2007
Municipality: The Nation
OMB Case No.: PL080200
OMB File No.: PL080200

APPEARANCES:

Parties

Elicor Developments Inc.

Charles Martel

Counsel

D. Kelly

M. Polowin

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

INTRODUCTION

Charles Martel (the Owner), carrying on business under the name Carnage Paintball, owns a vacant lot of 23.65 hectares (58.44 acres) in the Nation Municipality (the Municipality), in the United Counties of Prescott and Russell (the County). He applied for rezoning, to use the premises for the game of paintball.

Municipal Council agreed, but the adjacent Owner, Elicor Developments Inc. (the Appellant) appealed to the Board. The Appellant had recently obtained its own rezoning, to develop a complex for recreational vehicles (RVs) and related uses. It objected that a paintball facility next to its RV resort would be too noisy.

The Municipal planner testified in support of the By-law, but the Municipality did not otherwise participate in the hearing.

The Board has carefully considered all the evidence, as well as the able submissions of counsel. There was also a demonstration of equipment. Notwithstanding eloquent argument for the Appellant, the Board finds, as planning staff did, that the paintball rezoning meets the requirements of the *Planning Act*. The Board nonetheless recommends that the site plan process consider deploying certain paintball equipment on the east side of the property. The details and reasons are set out below.

GEOGRAPHIC CONTEXT

The subject property is mostly bush, though the centre is relatively open. It faces Route 500, some 800 metres east of Limoges Road. Route 500 and Limoges Road are both "major collectors" under the County Official Plan. Route 500 has some 4155 vehicles per day, Limoges Road about 6700. Highway 417, about 1090 metres northeast of the property, has between 20,000 and 28,000.

Across Route 500 to the south is a school for the neighbouring "rural subdivision" of Forest Park, comprising some 200 single-family houses. On the east side of the subject property is a church.

The site's west and north sides are bounded by the T-shaped property of the Appellant, rezoned in June 2007 for an RV park to be called Atlantis Resort (Atlantis). A site plan application for part of that complex (called Phase 1, immediately west of the subject property) proposed 223 lots for RVs, while other preliminary illustrations showed a proposed driving range along the north side of the subject property. The Appellant had applied to rezone the Atlantis site from "Agricultural" and "Rural" to "Recreational Commercial", with a list of proposed uses (Exhibit 1, Tab 29). Municipal Council agreed, and that Zoning By-law was not appealed.

PROPOSED USE OF THE SUBJECT PROPERTY

The Owner has been in the paintball business for several years, renting outdoor premises a few kilometres away. The game comprises "structured" mock battles under referee supervision, with league rules. Each mock battle is on a "court": the Owner's

tentative site plan proposed an eventual twelve courts, though only two at the outset. There would also be an accessory building for a shop, snack bar for game participants, meeting space, and possible accessory dwelling. Courts would usually measure 8124 square metres (though two of twelve would have minor variations), with clear boundaries. The distance, from the centre of the nearest proposed paintball court to the RV sites, is 130 metres (426 feet); the distance to the Atlantis "outdoor living area" is 92 metres (301 feet).

In the proposal, games could have two formats: "speedball" (a mock battle in a field with obstacles, for 5 minutes), or "bushball" (in bush, for 15 minutes). All players must wear protective equipment. The obstacles in speedball are usually plastic drums or inflated objects. All games use gun-shaped devices, called "markers", using compressed air or carbon dioxide to propel balls of coloured gelatine at speeds up to 300 feet per second, with a range of about 40 metres (125 feet). Players who have been hit with colouring withdraw from the game. The Owner's expert estimated that in the faster-paced speedball games, 6000 capsules can be released over an hour, though not at a steady rate: highest intensity as at the beginning of the game, and the lowest during rest periods.

The existing Agricultural zoning did not permit a game facility like paintball, so in the Fall of 2007, the Owner applied for "Recreational Commercial" zoning (the same as Atlantis). However, it elicited concerns from neighbours, including the Appellant, about noise and safety.

On October 27, 2007, the Owner arranged a demonstration for neighbours and Councillors. The Appellant did not attend. Subsequently, on the advice of planning staff, Council adopted By-law 106-2007, rezoning the site as "Rural Exception": the By-law authorized the requested uses, subject to a front setback of 120 metres, a west setback of 55 metres, and setbacks at the north and east of 45 metres. The Appellant appealed.

NOISE

a) Introduction

In the words of the Appellant's counsel, "noise is the sole reason why we're here". That issue raised two questions, both of which were in dispute:

- Objectively, what *noise level* could be anticipated (typically measured in average decibels, or "dBA")? And
- Would this level exceed accepted *standards*?

The Appellant's expert, Dr. Williamson, and the Owner's expert, Mr. Ferraro, both relied on guidelines from the Ministry of the Environment (MOE), entitled *Noise Assessment Criteria in Land Use Planning*, or "LU-131" for short. MOE divides sound environments into three "Classes": and for each Class, MOE recommends a limit on the level of sound reaching "noise sensitive land uses", like residences:

	MOE recommended daytime limit for "noise sensitive land uses"	Description of Environment
Class 1 Urban:	Variable , depending on initial level of background noise	Area, according to MOE, "dominated by an urban hum, primarily road traffic noise" (MOE). Mr. Ferraro testified that in a suburban setting, noise levels may be around 55 dBA. That was not disputed.
Class 2 Mixed:	50 dBA	"A low-level hum may be audible in a Class 2 area during the shortened daytime, but would be absent during the evening and night"
Class 3 Rural:	45 dBA	Area "dominated by natural sounds having little or no road traffic".

b) Decibel Readings and Background Noise

Several kinds of measurements were relevant:

1. What is the one-hour average level of ambient background noise *now*?

2. What level of noise could be expected from the *proposed use*? This is in two categories:
 - One-hour averages, and
 - Short bursts, called "impulsive sounds" (often measured in dBAI).

For comparison, Dr. Williamson said that quiet nature may be at 30 dBA (perhaps as low as 25, on an exceptionally still night). Further information (notably at Exhibit 11) indicated that a suburban street may be at 50 – 60 dBA; normal conversation is at 60; a vacuum cleaner or a ringing telephone are at 75; 85 is the point at which occupational health and safety rules come into play – about the same noise level as a lawn mower; and a pistol shot, at a distance of 75 metres, is at 106. A difference of 3 dBA is said to be almost imperceptible.

For ambient background noise, the sound experts for the Appellant and for the Owner produced similar measurements, but differed on their interpretation:

- Dr. Williamson, for the Appellant, installed his receptor on the Atlantis site, as far as possible from Highway 417, Limoges Road and Route 500, on the lowest traffic day of the week. He recorded background noise of 42 dBA.
- Mr. Ferraro's measurement, on site, was similar – 40 dBA – i.e., only a 2 dBA difference, which would be almost imperceptible.
- In interpreting that data, however, Dr. Williamson concluded that the area should be treated as a *Class 3* noise environment ("rural", "dominated by natural sounds"). By that reasoning, eventual sound readings should not exceed MOE's *Class 3* recommended limit of 45 dBA.
- In contrast, Mr. Ferraro interpreted his background reading of 40 dBA as reflecting "distant traffic coming from Highway 417 to the north and Route 500 to the south". He argued that the correct classification would be *Class 2* ("mixed"), subject to a higher MOE limit of 50 dBA.

c) Paintball Noise

Both sound experts agreed that gelatine balls made less noise when shot, than on impact with the movable speedball obstacles. Other opinions, however, were in dispute, pertaining to both “impulsive sounds” (non-continuous), and hourly averages:

- Dr. Williamson did his game readings near the premises of a *different* paintball operator, called Hopperz. He installed his receptor on the afternoon of October 18, and again in the evening of November 1; on the earlier date, he reported ambient background noise of 46.1 dBA, and average game noise of 47.6 dBA, subject to various technical adjustments. On the evening of November 1, which was colder, the readings were higher, with an average of 50.2 dBA after technical adjustments, and impulsive sounds reaching 65 dBAI (adjusted technically to 58.3 dBAI). He called the outcome “significantly higher” than MOE recommended limits.
- Mr. Ferraro, on the other hand, used the Owner’s own equipment, at the subject property itself. He measured impact noise, on empty barrels, at between 58 and 63 dBAI. Other impacts, by his readings, were at 51 to 54 dBAI. He measured *average* sound during the paintball game at 43 to 45 dBA, depending on technical adjustments. This would all be within MOE limits. His report concluded that “the level of impulsive sounds is so low as to have little impact on the enjoyment of adjacent outdoor properties”. He testified that the result would be “the same kind of noise” as a game of hockey or basketball.

The Owner added that the inflated plastic obstacles are less soft at low temperatures, with higher impact noise accordingly. Although that was not an expert opinion, it appeared consistent with the data, and was not contradicted. He also testified that he did not intend to use those inflated obstacles in cold weather anyway.

d) Standards

Normally, MOE Guidelines would be just that: guidelines (non-binding). However, the County Official Plan specifies, at Section 6.9.3, that to prevent "incompatible land uses", "relevant or future MOE guideline documents shall be applied when preparing and adopting local Zoning By-laws".

OBSERVATIONS AND FINDINGS

The question before the Board is whether expected sound levels, from the proposed use, run afoul of applicable standards.

a) Noise

On the first aspect (expected level of noise), Dr. Williamson reported that a different site (Hopperz) produced game noise averaging 47.6 dBA – but that on a colder evening, it reached 50.2 dBA, with intermittent bursts adjusted to 58.3 dBA. Mr. Ferraro, using the Owner's own premises and equipment, reported much lower noise at 43 dBA; the Owner added that the items producing the loudest noise – in cold – would be withdrawn at those temperatures.

Which data is more reliable? There were obvious methodological challenges, particularly for Dr. Williamson, who could not base his experimentation on the actual materials or site, but had to rely on a reasonable facsimile (Hopperz). He handled that challenge as best he could. However, the Board had no way of ascertaining whether Hopperz was necessarily identical to what was proposed at the subject site.

For that matter, there was no data on whether or how the subject property would generate noise – compared to noise from the Appellant's own property. How many decibels would be generated by the RVs? Or the proposed driving range?

In short, there were methodological difficulties in demonstrating that the decibel level from the subject property would be relatively noticeable at the Appellant's property.

There were also other difficulties. What about other noise sources? Dr. Williamson's report described "the area surrounding the Atlantis Resort (as) not urbanized, well away from busy roads". That characterization omits the school and subdivision across the road; more importantly, it is not clear how that description fits a property located between two major collectors and a 400 Series highway.

Furthermore, if the site matched Dr. Williamson's bucolic description, then why was its ambient background noise level already at 42 dBA, near the maximum recommended by MOE for a rural context? According to Dr. Williamson's own testimony, readings in a "natural" setting should normally have been closer to 30 dBA.

b) Standards

There were two even more fundamental difficulties, pertaining to the standards to apply to this matter, The first was

- whether this was a Class 2 (mixed) environment with a recommended daytime maximum of 50 dBA,
- or a Class 3 (rural) environment with a recommended maximum of 45 dBA.

The Board was not shown how or why MOE would have intended Class 3 designations to apply to areas whose ambient background noise was *already* only 3 dBA below the recommended maximum. If that were the applicable standard, then almost *any* marginal decibels from human activity would put it above the limit.

If "natural" areas are closer to 30 dBA, then a Class 3 designation (an area "dominated by natural sounds having little or no road traffic") appears less appropriate than Class 2 (equated with a "low-level hum"). The Board therefore finds that the Class 2 recommended daytime maximum of 50 dBA would be the more likely standard. Furthermore, even if the environment were not considered suburban *now*, it soon would be, said the Owner's planner, once Phase 1 created its lots for 223 RVs. The environment to be created by the Appellant itself, he argued, would certainly be more consistent with a "suburban" setting than with a "rural" or natural one.

But that begs the more fundamental question: do any of these standards even apply to an RV resort anyway? MOE Guidelines apply specifically to noise affecting “noise sensitive land use”, like residences or hospitals, but not other kinds of non-institutional development. Were they even relevant to the Appellant and its property?

Yes, said the Appellant, because the Atlantis RV resort would be essentially residential in character. Dr. Williamson's report (Exhibit 4) referred to the Appellant's concern over "a significant adverse effect on their residential development". The Board was told that the Appellant intended to target “snowbirds” – May to October – with a negligible focus on “transients”.

That “residential” characterization was disputed by the planners for the Municipality and the Owner:

- The Atlantis property is not designated “Residential” under the County OP;
- nor is it zoned “Residential”.
- An RV does not meet any of the Zoning By-law definitions of a residence;
- nor is a "residential" use even allowed there under the County OP.

The Owner's planner and lawyer therefore argued that since the Atlantis property was not “residential” in a planning sense, it failed to meet the MOE definition of a “noise sensitive land uses”. By that reasoning, the MOE Guidelines above did not apply to this situation in the first place. “The commercial character of the (Atlantis) By-law”, he said, “makes LU-131 inapplicable.” The Board is compelled to agree that the relevant planning documents do not equate the Atlantis project with a residential “noise sensitive land use” to which the MOE limitations specifically apply.

c) Caveat

For the reasons above, the Board was not persuaded that the expected noise levels from the proposed use would exceed applicable Provincial standards, both

because of difficulties in the underlying data, and because those standards were apparently not drafted with RV resorts in mind.

In reaching that evidentiary conclusion, however, the Board is mindful of not overstating the case. The fact that a given standard is inapplicable does not mean that noise is to be taken lightly; and whether RV resorts are considered “residential” under planning documents does not change the fact that many Ontarians live in such communities, with an expectation of some quiet enjoyment.

The Board also remains mindful that the Provincial Policy Statement (PPS), at its Definition Section, adopts the same meaning for “adverse effects” as the *Environmental Protection Act* which, at Section 1.1, treats noise as a “contaminant”. For good measure, after twice equating “noise” with “contaminants”, the PPS adds the following objective:

- 1.1.1 (c) Avoiding development and land use patterns which may cause environmental or public health and safety concerns....

Adverse effects: as defined in the *Environmental Protection Act*, means one or more of... impairment of the quality of the natural environment for any use that can be made of it...; harm or material discomfort to any person; an adverse effect on the health of any person; impairment of the safety of any person; rendering any property... unfit for human use; (or) loss of enjoyment of normal use of property....

The PPS is the backdrop for planning decisions – including not only zoning questions, but also site plan questions. Even if the Board finds no fault with the Municipality’s Zoning By-law 106-2007 under appeal, the Board nevertheless expresses its expectation that at the next stage (site plan), the Municipality and the Owner will use their best efforts to avoid configurations which would needlessly create noise. In that light, the Board would expect them both not only to heed the Owner’s undertaking to avoid inflated speedball obstacles in cold weather, but also to consider confining speedball obstacles to the east side of the property.

CONCLUSION

THE BOARD ORDERS that the appeal against By-law 106-2007 of the Nation Municipality is dismissed.

It is so Ordered.

“M.C. Denhez”

M. C. DENHEZ
MEMBER