

ISSUE DATE:

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PL080455

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Sheldon Rosen, The Lodges at Blue Mountain Corporation
Subject: Proposed Official Plan Amendment No. 11
Municipality: Town of The Blue Mountains
OMB Case No.: PL080455
OMB File No.: PL090304

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

Appellant: Denis Martinek, Tyrolean Village Resorts Ltd.
Appellant: Sheldon Rosen, The Lodges at Blue Mountain Corporation
Subject: By-law No. 2009-03
Municipality: Town of The Blue Mountains
OMB Case No.: PL080455
OMB File No.: PL090152

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

Appellant: Sheldon Rosen, The Lodges at Blue Mountain Corporation
Subject: By-law No. 2009-04
Municipality: Town of The Blue Mountains
OMB Case No.: PL080455
OMB File No.: PL090153

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

Appellant: Sheldon Rosen, The Lodges at Blue Mountain Corporation
Subject: By-law No. 2009-05
Municipality: Town of The Blue Mountains
OMB Case No.: PL080455
OMB File No.: PL090154

IN THE MATTER OF subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Sheldon Rosen, The Lodges at Blue Mountain Corporation
Subject: Interim Control By-law No. 2008-12
Municipality: Town of The Blue Mountains
OMB Case No.: PL080455
OMB File No.: PL080455

IN THE MATTER OF subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Sheldon Rosen, The Lodges at Blue Mountain Corporation
 Subject: Interim Control By-law No. 2008-67
 Municipality: Town of The Blue Mountains
 OMB Case No.: PL080455
 OMB File No.: PL081124

APPEARANCES:

Parties

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Town of the Blue Mountains

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Sheldon Rosen and the Lodges at Blue Mountain Corporation

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DECISION DELIVERED BY K. J. HUSSEY AND ORDER OF THE BOARD

These appeals relate to permissions and prohibitions for short term rental of non-owner occupied residences in the Town of the Blue Mountains.

Sheldon Rosen and the Lodges at Blue Mountain Corporation (“Appellants”) have appealed Council’s decision to adopt Interim Control By-laws 2008-12 and 2008-67, Amendment No. 11 to the Town of the Blue Mountains (“Town”) Official Plan, and By-laws 2009-03, 2009-04 and 2009-05. Also before the Board is a site-specific appeal by Denis Martinek and Tyrolean Village Resorts Ltd. against By-law 2009-03.

Background:

The Town of the Blue Mountains is a four-season recreation and resort destination that attracts more than 730,000 visitors each year. The success of this area

as a tourist destination has created a growing demand for a range of accommodations. A housing needs study carried out in May 2010, provided information on the existing housing base. The residential housing units in the Town of the Blue Mountains can be split into two categories: those that are occupied by permanent residents and those that are occupied for seasonal recreational use. Of the 5,619 dwellings in the Town about 52% or 2,939 dwellings are permanently occupied. As one of the witnesses at this hearing observed, these numbers clearly reinforce the fundamental recreation resort base of the community as envisaged in the Official Plan, and speak to the significant role that seasonal residences play in the tourism sector. Many of these seasonal residences, originally purchased by individuals for their own use, are now being used by the vacationing public as short term accommodation (“STA”) rental units. While the majority of these units are in areas that are zoned for higher density, there are some that are in low density residential areas. It is the use of single detached dwellings in low density areas for STA that is at the heart of the dispute in these proceedings.

Over the years, the Town has increasingly received complaints from its permanent residents about noise, parking, garbage, nuisance, mischief, and vandalism to both private and public properties, which is believed to be perpetrated by some occupants of STA units. At this hearing the Board received evidence from 12 individuals who reiterated those concerns and spoke of their personal experiences regarding these matters. Municipal Council decided that it needed to take steps to lessen the conflicts between the permanent residents and the visitors. Council determined that all STA units would be regulated as a distinct land use, with the intention to reduce adverse impact on the surrounding low density residential areas. To that end, several meetings were held by the Town and the public was invited to provide input on policies and regulations.

On October 13, 2007, a statutory public meeting was convened to provide notice of draft amendments to the Town’s Official Plan and its two zoning By-laws, the Township of Collingwood Zoning By-law 83-40, and the Town of Thornbury Zoning By-law 10-77. At that meeting the Town received additional comments from the public to which it would give consideration. While considering these comments, on February 4, 2008, the Town passed Interim Control By-law No. 2008-12 (“ICB”) to prohibit, for a period of six months, the use of any land, building or structure for the purpose of “*Short Term Accommodation*”, as defined by the ICB, on all lands zoned residential.

Subsequently, By-law 2008-32 deleted the prohibition of short term accommodation on lands zoned Residential Sixth Density (R6), Residential Seventh Density (R7) and Residential Eighth Density (R8).

On April 2, 2008, a staff report entitled "Short Term Accommodation Study" was presented to Council with recommended changes to the draft OPA and ZBL amendments that resulted from the October 13, meeting. On May 12, 2008, a second statutory public meeting was held to present the changes. On July 7, 2008, Council passed Interim Control By-law No. 2008-67, which extended the prohibition period to a total of two years. This was based on staff's recommendation that more time was needed to complete the study related to STA uses, before completing the official plan and the zoning by-law amendments.

On January 12, 2009, Council adopted Amendment No. 11 to the Official Plan of the Town of the Blue Mountains (Exhibit 47), which established policies for short term accommodation and bed and breakfast uses within the Town of the Blue Mountains Official Plan. Council passed the following by-laws containing standards for short term accommodation uses:

- I. By-law 2009-03 amending zoning by-law number 83-40 of the Township of Collingwood;
- II. By-law 2009-04 amending zoning by-law number 10-77 of the Town of Thornbury; and
- III. By-law 2009-05 to amend the Township of Collingwood zoning by-law 83-40 to rezone lands indicated on Schedule A-1 from Resort Residential RR zone to Residential third density R. 3-210 Zone

These were presented as Exhibits 54, 52, and 50, respectively.

On February 27, 2009, OPA 11 was approved by the Corporation of the County of Grey.

Definition of Short Term Accommodation:

For the purposes of OPA 11 and the proposed implementing by-law amendments, *Short Term Accommodation* is defined as follows:

Short term Accommodation means a dwelling or any part thereof that operates or offers three or more bedrooms as a place of temporary residence, lodging or occupancy by way of concession, permit, lease, license, rental agreement or similar commercial arrangement for any period of 30 consecutive calendar days or less throughout all or any part of the calendar year. Short term accommodation shall not mean or include a motel, hotel, bed and breakfast establishments, hospital, or similar commercial or institutional uses.

The Parties and the Issues

Blue Mountain Resorts Limited and Intrawest ULC, (“BMR”), a party to these proceedings but not an appellant, for the most part support the Town’s response to regulate STA units. Historically, BMR has played a significant role in policy development for the Town’s recreation and tourism industry, in which it has a large stake. BMR has developed 345 STA units of which 140 are within the BMR’s rental management program. All these units would qualify for STA rental under the new policy regime. All are located in residential areas prescribed by the new regulations. During the course of the hearing, BMR proposed certain modifications to OPA 11 (Exhibit “62”) and to Zoning By-laws 2009-03 (Exhibit “66”), 2009-04 (Exhibit “64”), and 2009-05 (Exhibit “51”). The Town agreed to the proposed modifications and requested the Board’s approval of those instruments.

The Appellants Denis Martinek and Tyrolean Village Resorts concurred with BMR’s proposal. These Appellants were satisfied that their concerns were resolved during the course of the hearing. The outstanding issues to be determined by these proceedings are, therefore, those of the Appellant Sheldon Rosen and the Lodges at Blue Mountain (“LBM”).

LBM's Appeals:

Mr. Rosen is the owner of LBM and manages 80 rental properties in the area. Of these 80 properties 15 are owned by LBM and 14 are STA units. The remaining 65 STA units are owned by people who have contracted rental management services from LBM. LBM argued that the new planning regime would have an adverse impact on its ability to expand its business. Of the 80 STA units, 20 are located in low density residential zones areas in which an STA unit is not a permitted use by the proposed zoning by-laws. However, LBM could continue to operate these units, if they qualify, as legal non-conforming.

The grounds on which LBM appeals Council's decision to regulate STA units are as follows:

- The proposal attempts to regulate the user, tenure or the operation of short term rental accommodation, rather than the use of land;
- There is no proper planning justification for the Interim Control By-laws, the Official Plan and the Zoning By-law amendments. No land use study has been undertaken pursuant to Section 38 of the *Planning Act*.
- There is no evidence that demonstrates any negative impact unique to accommodations of 30 days or less.
- The proposed regulation of short-term accommodation is not consistent with the PPS and does not conform with the Town of Blue Mountain Official Plan and Strategic Plan.

The Witnesses

LBM presented the following witnesses in support of their position:

1. Paul Johnston, Land Use Planner,
2. Michael Tedesco, Traffic Engineer and Transportation Planning ,
3. Gary Stamm, Economist,

4. Christopher De'Souza, a visitor to the Town who uses the Appellant's services and facilities.

The Town and BMR presented the following witnesses in response:

5. Gord Russell, Land Use Planner
6. Sergeant Charles Watt, OPP Officer.
7. Alvaro Almuina, Traffic Engineer and Transportation Planning
8. David Finbow, Director of Planning and Building services for the Town;
9. Colin Travis, Land Use Planner retained by BMR

Thirteen City residents provided testimony on their personal experiences with problems which they allege arose from STA rental units within their neighbourhood. There was one participant who spoke against the City's proposal but acknowledged the valid concerns of the residents.

Analysis

1. People Zoning

LBM's Position:

LBM asserts that the proposed zoning by-law amendments prohibiting STA units in certain residential areas are directed at the people who use those properties rather than the use itself. This constitutes "people zoning", and is inconsistent with the *Human Rights Code* (Ontario) and the *Canadian Charter of Rights and Freedom*. The proposed zoning discriminates on the basis of income as well as place of origin; its purpose is to keep people out of the restricted areas whose place of origin is outside of the Town; its purpose is also to deny the users the right to affordable housing. In essence, the Municipality's action amounts to "NIMBYism".

The Board's Findings:

The Board is unaware that the Applicant has filed with the Court any notice of constitutional question with respect to the by-laws under consideration at this hearing. Nonetheless, the Board must consider the issue raised by the Appellant as the Board's decisions must accord with the *Code* and the *Charter*.

The Board finds based on the evidence and submissions and on the judicial decisions presented that the Municipality has acted legitimately and within its authority to distinguish between STA units (accommodations intended for the traveling or vacationing public) and permanent dwellings units, and by allocating those uses to prescribed zones in order to achieve compatibility. The distinction between transient living and permanent accommodation is recognized in a number of decisions of the Court, and by the laws of the Province, such as in the *Assessment Act* and the *Residential Tenancies Act*. The *Residential Tenancies Act* clearly distinguishes between transient living and permanent accommodation: the *Act* does not apply to living accommodation intended for the traveling or vacationing public. The proposed by-laws, like the *Assessment Act*, use a 30 day period as the defining line for transient living accommodation. The Board finds that there is no basis to preclude the Municipality from also making the distinction and defining the period for transient living accommodation.

The Board rejects the Appellant's contention that STA units provide affordable housing for its users, which the Municipality's actions would frustrate. The Board finds that STA units are, by definition, not residential housing units. They provide optional accommodation for recreation purposes. The goal of the *Human Rights Code* is to prevent discriminatory practices and systemic barriers faced by members of the society from having access to adequate and affordable housing. The Board further rejects the Appellant's allegations that this is a case of NIMBYism. The policies espoused by *Human Rights Code* on NIMBYism are intended to address serious and real concerns that persons seeking affordable housing are not subjected to restrictions from which other types of housing in an area are exempt. By contrast, in this case, the Municipality assigns to different zones STA use that is thought to be incompatible in low density residential areas. The Board finds that this is a reasonable and legitimate response to the residents' concerns and is consistent with good planning practice.

The Board finds that the Appellant's assertion that the Municipality's action is aimed at the user and not the use, to be unfounded. The Board finds nothing in the definition of "*Short Term Accommodation*", as defined above, to suggest that any personal characteristic of a potential occupant of a STA unit is central to the restrictions imposed. The Board finds that the proposed by-laws would restrict STA use in certain areas and that restriction applies, regardless of who seeks occupancy in terms of identity, race, ancestry, origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or receipt of public assistance.

LBM has raised the spectre of "people zoning" but has put before the Board no authority or any basis on which to support its assertion. Nor did LBM respond to the Municipality's argument and submissions, and the cases presented on this issue. The Municipality argued that it is lawful to distinguish between short term accommodation use and residential use for the purpose of zoning. The Municipality bolstered its argument with decisions of the Court on the question of whether a bylaw defining a "seasonal dwelling house" as a separate and distinct use of land, constitutes discriminatory people zoning. The Courts have held repeatedly that reference to continuous habitation and permanent residence relates to the use of the land and building and is not in contravention of the *Charter* or the *Code*. See, e.g., *Horseshoe the Valley LTD v. Township of Medonte* [1977] O.J. No. 2337 (Ont. H.C.); *Smith v. Township of Tiny (1980)*, 27 O.R. (2d) 690; aff'd. 29 O.R. (2d) 661 (C.A.); leave to Supreme Court of Canada refused 29 O.R. (2d) 66; *Neighbourhoods of Windfields Limited Partnership v. Death*, [2008] O.J. No. 3298 (Ont.S.C.J.); aff'd 2009 ONCA 227 *Canmore (Town of) v. Fosseheim* 2000 ABCA 71; *Canmore Property Management Inc. v. Canmore (Town)* 2000 ABQB 654; *Whistler (Resort Municipality) v. Miller* 2001 BCSC 100; aff'd 2002 BCCA 347; *Whistler (Resort Municipality) v. Wright* 2003 BCSC 1192; *Kamloops (City) v. Northland Properties Ltd.* 2000 BCCA 344.

Therefore, the Board finds no basis for LBM's assertions that the proposed zoning by-law amendments constitute "people zoning". The Board finds that the proposed By-laws are intended to regulate the use of lands and not the persons who use it. The Board finds that the actions of the Municipality are a legitimate exercise of its authority to zone for "differing levels of use intensity and differing needs for municipal services".

2. The Interim Control Bylaw

LBM's Position:

The LBM argued that there is no proper planning justification for the Municipality to adopt Interim Control By-law 2008-12 ("ICB") and it was unnecessary and inappropriate for the Town to have passed ICB By-law 2008-67 to extend the ICB for an additional six months because the purpose and intent of the ICB had been fulfilled. The intent of the ICB enacted on February 4, 2008, was to enable Town staff to undertake a study in respect of short term accommodation uses and to draft official plan and the zoning by-law amendments to implement measures to deal with the recommendations from the study. LBM submitted that the Report referred to as "The Short Term Accommodation Study" was completed on April 7, 2008, and provided the draft Official Plan and Zoning By-law amendments to address the areas of concern. LMB argued that the Town had sufficient time to implement the Official Plan and Zoning By-law Amendments within the time frame set out in the ICB but it failed to do so.

The Board's Findings:

On the basis of the evidence presented, the Board finds that the ICB was an appropriate response by the Municipality to the growing concerns with STA uses in the community. The Board disagrees with the Appellant that there was no proper planning rationale for an ICB in this situation. After years of various responses to the residents' concerns, which proved to be insufficient to abate the complaints, the Municipality made a decision to take a different approach to the problem.

According to Mr. Finbow's testimony, starting in December 2001, the Municipality responded to the residents' complaints on STA use by advising its staff to implement fines and to inform the Ontario Provincial Police (OPP) of its desire to enforce a zero tolerance policy for breach of the Town's noise and parking by-laws. This did not prove to be as effective as Council had anticipated. The complaints continued.

Sergeant Watts of the OPP confirmed that the problems that caused the residents' disgruntlement continued. He testified that in 2003 he attended at many disturbance calls and that his police detachment received "numerous complaints" about noise, garbage and parking problems related to STA rental units. The detachment

responded by assigning Police Officers to overtime duty on certain week-ends and holiday periods, to patrol the sensitive areas. Sergeant Watts testified that he participated in discussions with residents, Town officials and STA owners, including the Appellant, in an effort to reduce the number of calls that the Police were receiving.

Eventually, in 2005 the Municipality sought legal advice on regulating and licensing STA use in residential zones, and on finding land use planning solutions that would be implemented by amending the Municipality's Official Plan and Zoning By-laws. The amendments were drafted and presented at a statutory public meeting on October 13, 2007. It was Mr. Finbow's evidence that subsequent to the October 13th public meeting the Municipality received complaints that new STA uses were being established. Staff recommended, in the February 4, 2008 report prepared for Council, enactment of a by-law to establish an area of interim control for STA use.

In view of this evidence, and the fact that the Municipality needed to consider the additional comments received at the October 13th meeting, the Board finds that the Municipality's actions were reasonable and necessary. The Board finds that the ICB and its extension afforded staff the time to carry out the study that Council directed, without the potential to compound the problem with more STA in the areas of concern. The Board finds that the study was expeditious and it followed proper planning principles.

The Study culminated in a meaningful recommendation to adopt OPA 11 and to pass Zoning by-law amendments 2009-03, 2009-04, and 2009-05, to regulate STA uses, while accommodating growth in that sector in more appropriate areas. The Board finds that this was a proper response by the Municipality to arrest the growing tension between its permanent citizens and its visitors, without eliminating the established STA units, which would become legal non-conforming uses. The Municipality concurrently developed a plan for expansion of these uses in more appropriate areas.

3. The Official Plan and the Zoning By-law Amendments

LBM's Position:

LBM argued that the proposed Official Plan and By-law amendments are inconsistent with the *Provincial Policy Statement* (PPS) and do not conform with the Town of the Blue Mountain Official Plan and Strategic Plan. LBM argued further that the decision to regulate STA units was a result of complaints from residents in the area surrounding the base of the Blue Mountain, which was developed as a resort area and not as a traditional single family area; the STA use is within the vision espoused by the current OP. LBM submits that by restricting and preventing the availability of short term accommodation, the proposed by-laws would have an adverse impact on the Town's tourist-based economy.

The PPS:

LBM argued that the proposed bylaws are contrary to sections 1.1.1, 1.4.3, and 1.7.1 of the PPS, which establishes the need for the Town to plan for an appropriate mix of residential, commercial and recreational uses, and to provide for sustainable tourism development. LBM further argued that STA is an integral component of tourism development. It is a form of accommodation that is an important and affordable component of the mix of available recreational accommodation choices, and it is an efficient use of land, resources, infrastructure and public service facilities, as those properties might otherwise be significantly underutilized.

The Town's response is that it shares these interests, as expressed in the PPS and its own Official Plan, and it is especially interested in preserving the residential-based recreational and tourism activities that are so essential to the Town's economic base. It must therefore plan land use patterns that support a strong, liveable and healthy community. The Town's position is that the Official Plan amendment and implementing Zoning By-law amendments provide policies and regulatory provisions aimed towards that purpose. The Town submitted that the proposal provides land uses where appropriate, to support and meet the long-term needs of the Town's residents and its visitors. The Town submits that through the use of cost-effective development standards, STA uses will be able to locate in areas that can accommodate their

buildings and their accessory support uses, while utilizing existing municipal services to meet the fluctuating servicing demands, and while protecting the environment and public health and safety of the users and adjacent residents.

BMR agreed and provided land use planning evidence to support the position that the proposal is consistent with the PPS and, as proposed, would continue to allow STA units to be established. BMR reiterated that STA units are an important aspect of the range of accommodation offered in the Town. However, BMR argued, there is a balance between the need to provide STA units to support the tourism economic base while at the same time, address the issues identified by residents. BMR submits that the proposed regulations do that.

The Board's Findings:

The Board agrees with the position espoused by the Town and BMR. The Board is unable to find any conflict with the Municipality's proposal and the policies of the Town's Official Plan and PPS. The purpose of the proposed official plan and zoning by-law amendments is not to eliminate or limit access to STA units but to regulate this type of accommodation to create a more compatible situation. The Town has directed STA to locations where servicing and appropriate levels of infrastructure are available, where the intensity of use can be better accommodated, and where future growth needs can be met. The Board finds that this course of action by the Municipality is in step with the policies established by the PPS for a strong, liveable and healthy community and will provide opportunities for sustainable tourism development.

The County of Grey Official Plan

LBM's Position:

LBM argued that the major focus of the County's Official Plan is to promote the economic well-being of the County and the proposed amendments especially do not conform to Sections 1.1, 1.5.4, 1.4.5, 1.4.6, and 2.5.2 of the County's Official Plan. LBM argued that proposed prohibition of STA units in certain areas is contrary to the

County's objectives to promote recreation based economic activity within the Town, the provision of adequate housing, and the efficient use of land.

The lands which are affected are located within the "Escarpment Recreation Area" designation of the Official Plan. This area is identified as the focus of growth in the County, and its importance to the tourism sector of Ontario, Grey County and the Town of the Blue Mountains is recognized in Policy 2.5.2. LBM argued that the proposed regulation of short term accommodation is contrary to those policies which seek to promote recreation based economic activity.

Similarly, for those reasons, LBM argues that the proposal does not conform to the Town of the Blue Mountains Official Plan including sections 1.3.3, 2.3, 2.5, 2.5 (i) and 3.2.1 and are in conflict with the *Places to Grow Act* and *Growth Plan*.

The Board's Findings:

The Board finds that regulation and control of STA uses within the Urban, Hamlet and Escarpment Recreation areas conform to the County of Grey's Official Plan.

The County of Grey reviewed the proposed amendments and concluded that there were no conflicts with the *PPS* or with the County's Official Plan. The County determined that the lands that would be affected by the amendments fall within the Urban, Hamlet or Escarpment recreation designations of the County's Official Plan. Within those designations, the County encourages a wide range of commercial and residential housing accommodation types suited to the level of services available. Within those designations, the County generally defers to the more detailed land use policies and development standards of the local Official Plan and Zoning By-laws.

Section 1.2 (1) of the Town's Official Plan states the purpose of the plan is to guide and manage the pattern of development and to maximize the efficient use of land, to deal with the location of specific land uses with an intent to restrict land use conflicts that would inhibit the orderly development and efficient utilization of resources within the Town. The Board finds that the proposed planning instruments are in keeping with that purpose.

The Town's Official Plan provides that all new infilling development shall be in accordance with section 3.15(1). Such infill lands shall be regulated to ensure the physical condition of the site is considered appropriate and the character of the form of development conforms to the surrounding development. Section 3.15 (6) states that redevelopment of residential lands shall generally be restricted to similar use unless the change of use, such as increased density or commercial use, is specifically provided under the Plan or the implementing zoning by-law. Most importantly, where infilling development is commercial use and permitted through the Official Plan or amendment thereto and the implementing zoning by-law, the Plan states that the character and stability of existing neighbourhoods shall generally be maintained.

In this context the Board has considered LBM's argument that STA units are dwellings and that they are compatible in any residential area. The Board, however, disagrees. The Board finds that STA units are distinct commercial entities with the goal of making a profit. They are often managed by a professional manager who uses a system of reservation, collects taxes and accepts credit cards from paying guests whose permanent residences are elsewhere and who have no right of renewal. Those premises are occupied by paying guests for a short span of time and for the purpose of allowing enjoyment of the recreational and tourist facilities in the area. This commercial entity has the potential to conflict with the character and stability of existing neighbourhoods because of the constant turnover of people and the difficulty that turnover brings in controlling noise and other nuisances. In the Town of the Blue Mountains, "the proof of the pudding is in the eating"; the evidence of conflict is categorical. The Board finds that the Town must ensure that compatibility is achieved between the commercial STA use and existing residential neighbourhoods in order to be in conformity with its Official Plan.

Section 3.17 provides for buffering to be used to enhance compatibility when introducing commercial uses into predominantly residential areas. It states:

(1) Where different land uses abut, every effort shall be made to avoid potential conflicts between such different uses. Where deemed appropriate, buffering shall be required for the purpose of reducing or eliminating the adverse effects of one land use upon the other. The buffer may consist of open space, a berm, wall, fence, plantings or any combination of the aforesaid sufficient to accomplish the intended purpose. The use of site plan control shall be exercised where appropriate to ensure adequate buffering is provided and maintained.

(2) In some cases abutting uses which are considered incompatible may be prohibited under the zoning by-law where buffering is considered inadequate to properly mitigate land-use conflict. Incompatible mix uses on the same lot such as the residents above the commercial garage may also be prohibited.

The Board finds that in this case, Section 3.17.2 is applicable.

The Board has considered the Appellant's argument that buffering and mitigating measures can be employed to achieve compatibility in areas that the proposed amendments seek to exempt, that is, in low density residential areas.

The Board agrees with the Residents, the Town and BMR that unlike the areas zoned for medium density residential development, the expectation is that low density residential neighbourhoods are reserved for permanent dwellings. Preservation and protection of the integrity and character of these established neighbourhoods must therefore be the paramount objective when considering whether commercial uses should be established within those residential areas.

BMR's evidence is that it has developed 345 STA units within medium density residential zones where the expectations by residents are different. This approach has proven to be successful. BMR's STA units were developed within a set of comprehensive planning tools such as site plan controls for proper buffering and other mitigation measures to achieve greater compatibility. These are the same standards that the Town seeks to impose by the proposal before the Board.

The Board has considered LBM's argument that there has been no evaluation of the veracity of the complaints and no objective evaluation of the quality and quantity of the complaints. LBM argued that complaints come from a very small group in the Municipality and there is no evidence that the complaints are unique to STA uses; they can equally be related to any residential accommodation including long term rentals in the resort area.

The Board finds no reason to doubt the veracity of the residents' testimony, which was extensive, and their accounts of the problems that they have encountered over many years. The photographs that were presented in evidence clearly document the conditions of which they spoke. Sergeant Watt's evidence also left no doubt of the

protracted and difficult situation which the OPP found challenging to manage effectively because of the transient nature of the occupancy of STA units.

In light of all this, the Board finds that the Town has acted prudently in its decision to prohibit STA uses in low density residential areas.

In reaching this decision the Board considered and adopted the reasoning of Owen-Flood J. in Whistler (Resort Municipality) v. Wright supra in which he states at paragraph 52:

The defendants further contend that the prohibition on tourist accommodation in residential zones serves no legitimate municipal planning purposes. Susan Goodall, whose property abuts on the Palmer property, deposed in her affidavit that the weekly rental of the property to tourists creates excessive noise and constant turnover of large groups of people. Whether or not these complaints are well-founded, they demonstrate, in my view, a rational relationship between the prohibition on temporary accommodation in residential zones and legitimate municipal concerns. It is self evident that renting a house on a weekly basis to large groups of persons in the resort municipality has the potential for creating noise and volume concerns.

The Board finds, however, that in this case the complaints are well founded. There is convincing evidence of incompatibility and convincing evidence that the integrity and character of the low density residential neighbourhoods are being undermined by the presence of STA units in those areas. These are legitimate concerns to which the Municipality has turned its attention appropriately. The Board finds that the proposal is a reasonable response to the situation and represents good planning.

The Motions:

The Board heard several motions during the course of the hearing on which the Board made oral rulings. Below are the Board's reasons for denying these motions, for which the Parties provided motion material.

1. Motion Requesting Change of Venue:

At the start of the hearing, the Appellant LBM requested a change of venue because of an incident it characterized as a hate crime that occurred in the vicinity of

one of its properties. LBM expressed concern for the safety of its principal, Sheldon Rosen, during the course of this hearing. A police occurrence summary was filed on August 20, 2010, that noted the incident.

The request was denied. There was no evidence that the incident was in any way connected to the hearing. Further, if, as requested, the hearing had been re-located to Toronto, there would have been significant prejudice to the members of the community who demonstrated a high level of interest in this hearing, as was apparent from the significant numbers in attendance. These members of the community would be denied the opportunity to attend the hearing.

The Municipality undertook to provide an OPP Officer on site, which in the Board's view, was entirely satisfactory.

2. Motion for an Order that proposed changes to OPA 11 and ZBLA 2009-03, 2009-04 and 2009-05, are *ultra vires* and any determination on those instruments by the Board would be beyond its jurisdiction.

The Moving Party and Appellant LBM argued that changes to the as adopted planning instruments (OPA 11 and Zoning By-laws 2009-03, 2009-04 and 2009-05) that the Town intended to introduce at this hearing are fundamental. They would change the essence, the purpose and the effect of the proposed regulatory scheme [that Council intended] for STA uses in the Town. LBM argued that the Board's power was limited to modification and the proposed changes were not modifications; they went beyond simply correcting defects or reducing the impact of the performance standards in the zoning by-laws and should be declared invalid or repealed for the following reasons:

- a) No proper notice of the changes was provided to the public. The request that the changes be made by the OMB resulted from an *in camera* meeting for which proper notice was not given and for which no proper report was made.
- b) No constructive notice could be inferred regarding the proposed changes as there was no suggestion at any point in the public process regarding these amendments or the hearing of these appeals, that such changes were contemplated until just weeks prior to the

commencement of the hearing. There were significantly more properties and lands affected by these changes than by the original bylaws and therefore there was the real potential of more interested persons that are not party to this hearing.

- c) The apparent request by Council that the OMB modify OPA 11 and amend the zoning by-laws is *ultra vires* as proper notice was not given and the meeting should have been held in public; there was no resolution or bylaw respecting this in the public record.

In response, the Town argued that the Appellant's motion was premature and should only be considered after all evidence had been tendered, and only at the conclusion of the hearing. The Town argued that no request was made to the Board to revise the as-adopted planning instruments. As a courtesy to the Parties, the Town distributed revised language of what it intended to place before the Board for its consideration. The Town argued that any requested revisions or modifications to the planning instruments must be tendered as evidence by any party and only then would the Board be in an informed position to assess such requested revisions or modifications and make a ruling on the questions raised by the Appellant.

In the meantime, the Town continued to support the planning instruments that had been appealed to the Board. The Town further argued that it was not bound to pursue the distributed revisions nor was any party including the Town, prevented from requesting additional or alternative revisions based upon the evidence ultimately tendered at the hearing. Further, the Town argued that the distributed revisions were not of a fundamental nature and did not change the areas in which Town Council determined new STA uses ought not to be permitted.

The Town also argued that the Board's power to modify and amend is broad and goes beyond simply correcting defects or reducing the impact of performance standards. The Board is not required to provide any notice as a precondition of exercising its powers pursuant to subsections 17(50) and 34(26)(b) of the *Planning Act*. There are also no notice provisions in the *Planning Act* that are a precondition to any party requesting that the Board exercises its powers pursuant to those sections.

Nevertheless, the Town posted notice of the distributed revisions on its website and published these revisions in the newspapers in August 2010.

The Board denied the motion. The modifications to which LBM referred were not before the Board. It was therefore premature to make a ruling on the motion to exclude those documents. Modifications were eventually presented by BMR and were accepted by the Town. The Town also presented an amendment to By-law 2009-05 by eliminating paragraph 4. These modifications were not challenged by LBM. In any event, the Board finds that the changes proposed are not fundamental and do not change the essence, purpose or effect of the proposed regulatory scheme for STA uses in the Town. The Board finds that the changes provide clarification and eliminate ambiguities.

3. Motion for the production of notes from an in camera meeting held by Council with its Planner and Legal Counsel

LBM alleges that a request by Council that the OMB modify OPA 11 and amend the zoning by-laws was improperly done in a closed session and requested production of the notes from that meeting. The Board denied the request. The Board agreed with the Town's position that Council's instructions to its legal counsel are properly given and received in a closed session meeting of Council.

The Board's Order:

Accordingly, the Appeal is allowed in part:

1. Amendment No. 11 to the Official Plan for the Town of the Blue Mountains is modified as presented in Exhibits "62" and "68", and as modified is approved.
2. Zoning By-law 2009-03 is amended as set out in Exhibit "66", and as amended is approved.
3. Zoning By-law 2009-04 is amended as set out in Exhibit "64" and as amended is approved.

4. Zoning By-law 2009-05 is amended as set out in Exhibit "51" and as amended is approved.
5. The Appeal against Interim Control By-law No. 2008-12 is dismissed.
6. The Appeal against Interim Control By-law No. 2008-67 is dismissed.

In all other respects the Appeal is dismissed.

So Orders the Board.

"K. J. Hussey"

K. J. HUSSEY
VICE-CHAIR