

ISSUE DATE:

Feb. 27, 2009



PL081433
PL081434

Ontario
Ontario Municipal Board

Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: F.J. Prentice
Subject: Proposed Official Plan Amendment No. 86
Municipality: City of Niagara Falls
OMB Case No.: PL081433
OMB File No.: PL081433

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

Appellant: F.J. Prentice
Subject: By-law No. 2008-174
Municipality: City of Niagara Falls
OMB Case No.: PL081433
OMB File No.: PL081434

IN THE MATTER OF subsection 17(45) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Motion Request By: Niagara Falls Pointe Limited Partnership (applicant)
Purpose of Motion: Request for an Order Dismissing the Appeal
Appellant: F.J. Prentice
Subject: Proposed Official Plan Amendment No. 86
Municipality: City of Niagara Falls
OMB Case No.: PL081433
OMB File No.: PL081433

IN THE MATTER OF subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Motion by: Niagara Falls Pointe Limited Partnership (applicant)
Purpose of Motion: Request for an Order Dismissing the Appeal
Appellant: F.J. Prentice
Subject: By-law No. 2008-174
Municipality: City of Niagara Falls
OMB Case No.: PL081433
OMB File No.: PL081434

APPEARANCES:

Parties

F.J. Prentice et al

Counsel*/Agent

Leila Cruikshank

Niagara Falls Pointe Limited Partnership Ian J. Lord*

The City of Niagara Falls Ken Beaman*

DECISION DELIVERED BY J. P. ATCHESON AND ORDER OF THE BOARD

The matter before the Board was a motion brought by Niagara Falls Pointe Limited Partnership (the “Applicant”) to dismiss the appeal of F.J. Prentice (the “Appellant”) to the passing of Official Plan Amendment No. 86 and Zoning By-law Amendment No. 2008-174 by the City of Niagara Falls which, if finally approved, would permit the development of a property known municipally as 5471, 5491 and 5507 River Road (the Main Parcel) together with a vacant parcel directly opposite the main parcel (the vacant parcel) located at the northwest corner of River Lane and Philips Street for a 119-unit residential condominium building together with a two level parking garage. The condominium building has a stepped-back height of 7 storeys at River Road and John Street reducing to a 5-storey height at River Road and Philip Street. The podium height of the project is a maximum of 2 storeys.

The Context

The subject properties are located on the west side of River Road between Phillip Street to the north and John Street to the south. The subject lands comprise approximately 0.500 hectares consisting of two parcels divided by River Lane. The larger parcel upon which the condominium building is proposed, has frontage on River Road to the east, Phillip Street to the north, and John Street to the south and consists of some 0.452 hectares of land. The second parcel is located across from the main parcel on the west side of River Lane and contains approximately 0.048 hectares of land and is to be used for surface parking for the project.

The majority of the lands are currently designated Tourist Commercial while the smaller parcel west of River Lane is designated Residential by the Official Plan for the City of Niagara Falls. The majority of the lands are currently zoned Tourist Commercial (TC-67) with site-specific provisions permitting the development of a motel having a height of up to four storeys and 112 units. The two properties on John Street are currently zoned Residential Single Family and Two Family (R2). This zoning has been in place since the early 1980's.

In 2006, Ore Development Corporation (ORE) a previous owner, made applications to amend the City's Official Plan and Zoning By-law to permit the development of a 29 storey, 250-unit residential development at 4399 and 4407 John Street. Niagara Falls City Council approved the (ORE) proposal and subsequently adopted Official Plan Amendment No. 68 which was forwarded to the Region of Niagara for approval. Regional staff recommended in a report dated October 11, 2006 that this Official Plan Amendment not be approved. Subsequent to the release of this staff report and prior to Regional Council's consideration of the matter, (ORE) abandoned its proposal.

The current Applicant, on or about November 1, 2007, acquired the subject property and on June 12, 2008 filed complete applications to amend the Official Plan and Zoning By-law of the municipality to permit the proposed development now before the Board.

At the commencement of the hearing, Mr. Lorenzo Siciliano of 4427 John Street Niagara Falls, L2E 1A4, sought participant status in the event the matter was to go to a full hearing.

The Board, with the consent of the parties, granted participant status to Mr. Siciliano.

The Appeal

The reasons for the appeals to the Official Plan Amendment and Zoning By-law Amendment, while individually and appropriately filed, are similar in their construct and are succinctly set out in the Appellant's response to the motion at Exhibit 4. These issues identified by the Appellant are summarized as follows

1. The increased height, the increased density, the building form and the reduction in building setbacks do not conform to the existing Official Plan and Zoning By-law.
2. The Project will result in overlook and privacy impacts on the existing residential neighbourhood.
3. Vehicle traffic has not been properly considered.
4. Geological impacts.
5. Municipal servicing and fire safety issues.
6. The proposed development is contrary to the recommendations contained in the 1983 River Road Study Area Neighbourhood Plan and the Community Improvement Plan (CIP).

During the course of the submission by Counsel for the Applicant and on questioning from the Board, Mr. Prentice and his agent Ms Cruikshank confirmed that the issues of:

- (a) overlook/loss of privacy
- (b) traffic
- (c) geological impacts

(d) servicing and fire safety

were no longer issues that they wished to pursue.

The Board confirmed that the remaining outstanding issues for the Appellant were:

- (a) increased height;
- (b) increased density; and
- (c) decreased setbacks that are not in conformity with the existing Official Plan and Zoning By-law and that further;
- (d) The proposed development is contrary to the recommendations contained in the 1983 River Road Study Area Neighbourhood Plan and the Community Improvement Plan (CIP).

The Motion

The grounds for the motion are as follows:

1. The reasons set out in the notice of appeal do not disclose any apparent land use planning grounds upon which the Board could allow the appeals in whole or in part ;
2. The appeal is not made in good faith or is frivolous or vexatious, and /or;
3. The appeal is made only for the purpose of delay.

Counsels for the Applicant and the City in their oral submissions also rely on subsections 1.1(f) and 2.1 of the *Planning Act* as amended by Bill 51 which are produced here for ease of reference.

Purposes

1.1 The purposes of this *Act* are,

- (f) to recognize the decision-making authority and accountability of municipal councils in planning. 1994, c. 23, s. 4.

Decisions of councils and approval authorities

2.1 When an approval authority or the Municipal Board makes a decision under this *Act* that relates to a planning matter, it shall have regard to,

- (a) any decision that is made under this *Act* by a municipal council or by an approval authority and relates to the same planning matter; and
- (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a). 2006, c. 23, s. 4.

Mr. Lord in his submissions and motion material found at Exhibit 3(a) and 3(b) noted the extensive and complete submissions made by his client in support of their application. These submissions, among other things, contained detailed engineering servicing studies, traffic impact studies, geological impacts studies together with shadow impact studies and a comprehensive planning appraisal as set out in the affidavit of Mr. Goldberg, a qualified land-use planner.

Mr. Lord, through the affidavit evidence of Mr. Goldberg, confirmed that the project had met all of the notice and public hearing requirements of the *Planning Act*, that his clients have addressed the concerns raised by City planning staff as set out in their staff report of July 21, 2008 Exhibit 3(a), Tab H, including entering into a Section 37 agreement with the Municipality as part of its Official Plans bonus policies prior to the City executing Official Plan Amendment No. 86. It was Mr. Lord's submission that based upon the planning process followed by the municipality and the changes made by his clients including the Section 37 agreement, that City planning staff were in full support of the revised application and supported the Official Plan and Zoning By-law Amendments as confirmed in their report of October 6, 2008 Exhibit 3(a), Tab K.

Mr. Lord proffered that the planning analysis conducted by Mr. Goldberg and City staff was complete bearing in mind the Provincial, Regional policy directions and the directions of the City's Official Plan currently in place and that these professionals are satisfied that there are no conformity issues with either Provincial or Regional policy directions and that the proposal before the Board meets the objectives and policies of the Official Plan for the City of Niagara Falls.

It was Mr. Lord's submission that this evidence should be preferred to the assertion found in the appeal and affidavit of Mr. Prentice and subsequently of Mr. Darbyson, a qualified land-use planner, retained by Mr. Prentice to assist him in replying to the motion to dismiss filed by the Applicant

Mr. Lord noted that his client had filed a site plan application in September of 2008 with the municipality and that this drawing formed part of the motion material. It was his submission that the appellants had failed to consider any of the changes that have resulted from the planning review and appear in his submission to merely wish to retain the status quo and have not considered, in any serious way, the merits of his client's application.

Mr. Lord acknowledges that the Official Plan set a base residential density standard of 125 units per hectare for high density development but that as planning staff points out in its report, the Official Plan

allows building heights greater than 6 storeys for residential land generally located in close proximity to the Central Business District, other major commercial districts, parks and open space areas. Minor increase in height and density may be allowed through bonus zoning provisions (Section 37 of the *Planning Act*).

It was Mr. Lord's contention that to go from an approved 112-unit 4-storey motel to a 119-unit, five to seven storey condominium project, is a minor change contemplated and encouraged by the Official Plan and represents good planning for this part of Niagara Falls. In this regard he relies on the planning appraisal of Mr. Goldberg and the assessments undertaken by City planning staff.

Mr. Lord directed the Board to the planning analysis conducted by City staff of the revised plans set backs as set out in the planning report found at Exhibit 3(a), Tab K, which concluded that there will be no negative impacts resulting from the proposed building on the immediate area.

It was Mr. Lord's submission that with respect to the 1983 River Road Study Area Neighbourhood Plan, that the document was never formally approved by City Council and never found its way into any approved planning document of the municipality and as such has limited value in reviewing the project at hand.

Mr. Lord in his submissions invited the Board to look beyond the Planning language employed by the Appellant and found in Mr. Darbyson's affidavit. It was his submission that the mere assertion or apprehension of planning impacts without a solid foundation for the allegation does not represent legitimate or authentic planning grounds to allow the appeal to proceed and that the comprehensive analysis conducted by Mr. Goldberg and City planning staff should be preferred to the mere assertions of the Appellants.

Mr. Beaman did not file any reply to the motions on behalf of the City but orally submitted that the Board should have regard for the decision of City Council as set out in Section 2.1 of the *Planning Act*. He confirmed that 1983 River Road Study Area Neighbourhood Plan was never formally approved by City Council and in his submission this document should be given little policy weight.

The Board then received submission from Mr. Prentice and Ms Cruikshank in reply to the motion. Mr. Prentice is concerned that City staff between their July 2008 and October 2008 planning reports changed their positions regarding the proposed project. He freely admitted that the Appellants are not opposed to the Official Plan redesignations of a major portion of the site from Tourist Commercial to Residential. Their concerns revolve around the size, density, height and setbacks of the proposed building.

The Appellants did not express any concerns or proffer any opinion evidence regarding negative impact resulting from the project. Nor in the Board's reading of Mr. Darbyson's affidavit is there any mention of negative impacts resulting from the proposal on the surrounding neighbourhood. The main contention set out in their submission is that the proposal does not comply with the existing Official Plan policies and the zoning by-law regulations of the municipality and would not comply with Regional housing guidelines. Mr. Darbyson in his affidavit asserts that in his opinion "the density, building mass, height and set backs of the proposed apartment building do not comply with the City's Official Plan policies". However he proffered no report or planning analysis of how he arrived at his planning opinion.

THE BOARD'S AUTHORITY AND FINDINGS

The Board, after carefully considering the submission and the evidence provided by the Parties, makes the following findings.

The Board's authority to consider the Motion to Dismiss in this case is found at Subsections 17(45) (Official Plans) and 34(25) (Zoning By-laws) of the *Planning Act*. Both subsections of the *Act* are similar in their construction in prescribing the grounds the Board may consider when determining whether to dismiss an appeal without a hearing. Subsection 17(45) is quoted in this decision for the purpose of clarity. The reader should note that the same criteria apply in subsection 34(25) with minor changes.

Dismissal without hearing

Subsection 17(45) Despite the *Statutory Powers Procedure Act* and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (b) Repealed: 2006, c. 23, s. 9 (10).

- (c) the appellant has not provided written reasons with respect to an appeal under subsection (24) or (36);
- (d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1996, c. 4, s. 9; 2006, c. 23, s. 9 (8-10).

Mr. Prentice has been an active participant in the public hearing process and has been diligent in bringing his concerns to City Council. The Board has no evidence before it that subsections 17(45), (c), (d) or (e) are applicable in this particular case nor is this being alleged by Mr. Lord in his submissions.

Subsections 17(45) (a) (ii) (iii) and (iv) speak to inappropriate actions or motives of the Appellants that are not based on good faith or that are solely employed for the purpose of delay. After reviewing the evidence and listening to the submissions, the Board is satisfied that Mr. Prentice's actions and his appeal are sincere and while they may seem frivolous and vexatious to the Applicant, they do not rise to the level contemplated by the *Planning Act* as grounds for dismissal of the appeal.

This leaves subsection 17(45) (a) (i) and its counterpart in subsection 34(25) namely, do the appeal letters and submission of Mr. Prentice disclose any apparent land use planning grounds upon which the Board could allow all or part of the appeal?

The grounds for the appeal were amended by the Appellant during the course of this hearing and are set out earlier in the decision.

The Board in considering the amended appeal outlined by Mr. Prentice and Ms Cruikshank is mindful of the significant body of case law that has developed in recent years in relation to subsection 17(45) and 34(25) and similar sections found in the

Planning Act. It is no longer sufficient for appellants to raise triable issues couched in planning language to survive a motion brought under these Subsections. The appeal must disclose planning grounds that warrant a hearing. It is not sufficient to simply raise apprehensions as Members McLoughlin and Lee state in *City of Toronto v East Beach Community Association*:

The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case.

The Board, during the course of Mr. Prentice and Ms Cruikshank's presentation, sought amplification from them to determine what evidence they might lead at a hearing which could establish legitimate and authentic planning grounds which might lead the Board to allow the appeal in whole or in part based upon the remaining matters contained in their appeal. The Board recognizes and has made allowance that the Appellant is not a learned counsel or planning professional but a concerned citizen and as such may not be as conversant with planning matters. That being said, the onus to protect the public interest and carry forward the planning policies of the municipality, vest with City Council and not individuals. There is no compelling evidence that City Council has failed in this regard. The density height and built form they have approved is in the Board's findings in conformity with the policy directions set out in the Official Plan.

Official Plans and Zoning By-laws are not static documents but are guides to direct orderly change. The Board accepts the position of the Applicant and the Municipality that to change the Official Plan designation on the subject property from Tourist Commercial to Residential is appropriate and good planning for this part of the City of Niagara Falls.

The Appellants alleged in their submissions that the proposed development would not meet Region of Niagara guidelines. However, the uncontradicted affidavit

evidence is that the Region of Niagara was notified of the project and offered no objections to it.

The Board has carefully reviewed the affidavit of Mr. Darbyson and understands that he would be available to testify at any upcoming hearing in this matter. However, as the courts have said in *Zellers Inc. et. al. v. Royal Cobourg Centres Limited et.al.*

Decisions to participate in this process and particularly to launch an appeal are serious and must be pursued diligently. The legislation and related jurisprudence make it clear that it is not sufficient that the appellants raise land use issue in the Notice of Appeal. Such issues have to be worthy of adjudication and the responsibility falls on the shoulders of the appellants to demonstrate through their conduct in pursuing the appeal, including their gathering of evidence to make their case, that the issues raised in their Notice of Appeal justify a hearing.

There is nothing in the affidavit of Mr. Darbyson to support the assertions he makes with respect to the issues of conformity with the Official Plan. There are no references to sections or text of the Official Plan that he intends to rely upon, nor is there any assessment of the project or the zoning standards under appeal that he opines are not appropriate. This is in stark contrast to the affidavit evidence of Mr. Goldberg and the City Staff who have comprehensively reviewed the project within the planning policy regime of the municipality.

Mr. Darbyson in his affidavit indicated that he will rely in part on the 1983 River Road Study Area Neighbourhood Plan. However, again he never explicitly outlines, in his affidavit, the applicability of the study. This study is over twenty-five years old and was never formally adopted as an Amendment to the City's Official Plan. The Board finds that this document should be given limited weight.

Similarly, the Appellants in their material referenced the Community Improvement Plan (CIP) but make no reference nor provide any insight in their material as to its applicability in the support of their appeals. The mere mention of the CIP without some

specific reference to its importance is of little value in determining the authenticity of the appeals before the Board

The Board finds that the Appellants in their appeal and motion materials have not met the onus of substantiating the authenticity of their appeal nor have they disclosed to this panel of the Board any apparent land use planning ground upon which the Board could conclude that another panel of the Board could allow the appeals in whole or in part.

In reviewing the material and submission made, the Board is satisfied that nothing presented in this hearing was not before City Council when it arrived at its decision on the Official Plan and Zoning By-law and that there are no new issues that might require that the matters be referred back to City Council. The Board is fully aware and has had regard for the decision of City Council as set out in Section 2.1 of the *Planning Act*.

The Board, after considering all of the evidence filed and the submission made, finds for the reasons contained in this decision that the appeals filed by Mr. F. J. Prentice et. al. against Official Plan Amendment No. 86 and Zoning By-law Amendment No. 2008-174 of the City of Niagara Falls do not, pursuant to Subsections 17 (24) and 34(25) of the *Planning Act*, disclose any apparent land use planning grounds upon which the Board could allow all or part of these appeals.

The motion to dismiss the appeals of Mr. F. J. Prentice et. al. against Official Plan Amendment No. 86 and Zoning By-law Amendment No. 2008-174 of the City of Niagara Falls brought by Niagara Falls Pointe Limited Partnership, is granted, and further;

The Board Orders that the appeal is dismissed and Official Plan Amendment No. 86 to the Official Plan of the City of Niagara Falls is approved; and

The Board Orders that the appeal against Zoning By-law Amendment No. 2008-174 of the City of Niagara Falls is dismissed.

This is the Order of the Board.

“J. P. Atcheson”

J. P. ATCHESON
MEMBER