

Issue Date:

July 24, 2009



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL081446

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

Appellant: Robert Gair
Subject: By-law No. 74-Z-2008
Municipality: Norfolk County
OMB Case No.: PL081446
OMB File No.: PL081446

APPEARANCES:

Parties

Robert Gair
Eadie Landco Limited
Norfolk County

Counsel

J. Davies
J. Hitchon
P. Tice

DECISION DELIVERED BY G. C. O' CONNOR AND ORDER OF THE BOARD

CONTEXT

Robert Gair has appealed Norfolk County's adoption of Zoning By-law 74-Z-2008 (the "ZBL") which amends ZBL NW-1-2000 of the former City of Nanticoke. The proposed amendment is to change the "Urban Residential Type 1 (R1-A)" zone on the subject lands known as 2 Sea Breeze Drive, Port Dover, to an "Urban Residential Type 4 (R4) zone to permit a four unit group townhouse. Relief from the required 30-metre lot frontage to permit a 28.1-metre lot frontage and an increase in the minimum side yard from 3.6 metres to 6 metres are also requested through this zoning amendment.

The subject lands are designated for "Residential" land uses in the City of Nanticoke Official Plan (the "NOP") and are part of a developed subdivision referred to as "Somerset". The proposal is to increase the density of the permitted residential development.

Case for the Appellant

Mr. Robert Gair resides at 4 Sea Breeze Drive that abuts the subject lands to the west. Mr. Gair submitted a number of reasons for his appeal which were further explained in his planner's testimony:

1. The subject property is the last remaining lot in a 27-lot subdivision replacing a plan that included townhouses and created a subdivision for single detached dwellings. Subsequently, 26 of the 27 lots have been developed as per the zoning in place. Nothing has changed to show that the existing planning is improper. There is no compelling reason to locate townhouses on the subject lot that cannot meet the 30-metre frontage requirement for townhouses.
2. The subject property is a corner lot and is poorly configured for the construction of four townhouses that will front on Somerset Drive because of insufficient frontage on Sea Breeze Drive. The Applicant has not been allowed multiple driveway exits to Somerset Drive and, as a result, a paved laneway has to be created forcing the project an additional 6 metres to the east (towards Mr. Gair's abutting property). Combined with the proposed driveways, this totals a 12-metre setback from Somerset Drive resulting in substandard rear yards. The proposed townhouses would severely encroach on his property causing serious privacy issues in violation of Zoning By-law NW-1-2000.
3. The lot frontage on Sea Breeze Drive requires a 1.9-metre relief. The functional rear yards are 1.5 metres short of the required 7.5-metre setback.
4. The Applicant relies on the existence of a six-building condominium cluster at 19 Somerset Drive to support this new proposal. The condominium development is vastly different from the proposal which is an over development of the lot.
5. The Appellant has twice attempted to purchase the subject lot from Eadie Landco Limited ("Eadie Landco") and also to negotiate a lesser development of the site. Eadie Landco refused on all counts.

6. There have been errors made on the By-law amendment by the Norfolk County planner. These errors illustrate confusion on behalf of the planner and the Applicant in the attempt to “squeeze” four townhouses onto this lot. This confusion could have influenced Councillors in their decision of October 14, 2008.
7. While it is understood that the 2005 Provincial Policy Statement encourages infill and intensification development as part of its “overall approach”, this should not be done at the expense of good planning. Intensification is not appropriate in this case.

Mr. William Pol, a qualified land use planner who testified in support of the Appellant, began his testimony with an overview of the Appellant’s issues and of the proposed ZBLA. He testified that the proposal would create several negative impacts on his client’s property. Mr. Pol submitted evidence on the following issues:

1. Shadow effect

The proposed building orientation is towards Somerset Drive with the four rear yards backing on to the Appellant’s single detached dwelling. The proposed four townhouses, in his opinion, would create a significant shadow effect by reducing afternoon and evening light from the west. The increased front yard increases the amount of building shadow effect which is out of keeping with the shadows expected from a single detached dwelling where the rear yard is an open unobstructed area.

2. Noise and privacy

It was Mr. Pol’s testimony that all of proposed unit # 1 backs onto the interior 2.2-metre side yard of 4 Sea Breeze Drive with exposure to three sunroom windows, two bedroom windows and a bathroom window. Proposed units # 2, 3 and 4 also back onto the Appellant’s rear yard amenity space. The potential noise impacts would arise from the following activities: operation of kitchen and laundry room exhaust fans, people talking, television or music both from open windows and

persons on the proposed four decks. Mr. Pol opined that potential landscape and the existing privacy fence are not sufficient to mitigate the noise.

3. Odour

The planner stated that the proposal would create odour impacts associated with living activities emanating from kitchen exhaust fans and barbequing. The concentration and orientation of the four units each creating odours would be a significant impact.

4. Design elements

Mr. Pol further testified that the proposed driveway access abuts the existing public sidewalk and that there is no landscaped separation. In his opinion, this design creates conflicts between pedestrians, especially children attending a local school and people accessing the community mailbox.

5. Parking

The planner stated that the required townhouse parking, the parking aisles, the required visitor parking and the proximity of the parking aisle to the public sidewalk have not been appropriately addressed.

Mr. Pol reviewed all of the applicable planning documents and provided the following opinion synopsis that refusal of the requested amendment is consistent with the Provincial Policy Statement (2005) (the "PPS"); the refusal is also in conformity with the former City of Nanticoke Official Plan and with the Norfolk County Official Plan effective as of April 15, 2009. In his opinion, the concept plan is not in keeping with the intent and purpose of the interior side yard setbacks, parking provisions and special provisions in the Urban R4 Zone as adopted in the ZBLA.

The planner opined that the Applicant has not demonstrated a public need to develop a four unit group townhouse at this location, where lands are zoned for this use in the neighbourhood, the County is satisfied sufficient opportunities exist for townhouse development and the Applicant has been approved townhouse zoning in Port Dover.

He further opined that the proposal creates unacceptable impacts and that through the public planning process there has been strong public opposition to the proposal and it is appropriate to refuse the subject zoning as there has been no demonstrated public interest in approving the ZBLA.

Mr. Gair, the Appellant, testified that he had purchased his home in 2003 from the Somerset developer. It was his evidence that he undertook a review of the applicable zoning for the abutting lands which R1-4 were permitting a single detached dwelling. He also stated that he had met with the Applicant in January, 2008 to discuss his \$100,000.00 offer for the subject lot which was refused. He also testified that the developer had a trailer for advertising purposes on the lot which was removed in 2005.

Mr. Gair explained to the Board that in preparation for this hearing he had organized a meeting of residents at his home. He testified that over twenty persons attended and no one was in favour of the proposal. It was his testimony that he was provided with letters of authorization from sixty-four residents to speak on their behalf in opposition to the proposal. None of these residents were present at the hearing and there was no request that they be given status.

Case for the Applicant

Ms Barbara Eadie, the widow of Mr. Eadie, the former proprietor of Eadie Landco testified in her capacity as Vice President of Coastal Homes that the Appellant built his home and enclosed his rear yard with the highest fencing allowed. It was her testimony that Mr. Gair had approached Somerset Homes to purchase Lot 1-the subject lands. Somerset Homes never owned Lot 1. Somerset Homes and Eadie Landco were the builders and had purchased lots from Eadie Landco in Phases 1, 2, 3 and 4 of the development. Ms Eadie stated that had the Appellant approached Eadie Landco they would have been pleased to sell the lot to him.

Her evidence was that Lot 1, the subject lands had been vacant for six years and she was pressured by her financier to “get it off the books” but at the time no one expressed interest in purchasing an irregularly shaped and big lot. It became clear that the lot was cut off from the rest of Phase 4 because of Gair’s fence and the lot’s shape. In her opinion the high fence was preventing the sale of the lot. Eadie Landco then decided to attempt to have the lot rezoned R4 to build townhouse condos much like the Somerset Homes project directly across the street from the lot.

Ms Eadie further testified that a third meeting was held with the Somerset community and the Gairs. Many issues were raised with some residents in favour but the Gairs were not supportive, as they did not see a new plan. Colter Eadie, President of Coastal Homes, explained that things would change if Council supported the proposal and got it to site plan approval.

It was Ms Eadie’s evidence that she held a fourth meeting with the Gairs to arrive at a possible compromise to avoid an OMB hearing but no settlement was reached.

Mr. Michael Higgins, who was qualified to provide professional land use planning evidence, provided an overview of the application and testified that the application was made to change the zoning from Urban Residential R1-A to R4. The amending By-law includes special provisions to reduce the required lot frontage from 30 metres to 28.1 metres, to increase the minimum interior side yard from 3 metres to 6 metres as per the revised Site Plan (Exhibit 16) and to prohibit any deck or unenclosed porch to be nearer than 3 metres from the interior side yard.

In support of his evidence that the proposal represented good land use planning without any negative impacts on the surrounding development, Mr. Higgins referenced section 1.0 “Building Strong Communities” of the PPS, in particular policy 1.1 “Managing and directing land use to achieve efficient development and land use patterns”. In his opinion, the proposal is consistent with this policy in providing additional housing type in the neighbourhood. The development makes use of existing infrastructure and increases density from one unit to four units. Mr. Higgins opined that the additional units ensure a cost effective development standard and minimizes the servicing costs.

His testimony was that Port Dover is a settlement area in Norfolk County and that the PPS directs growth to settlement areas. The PPS policies require efficient

development patterns and the efficient use of existing infrastructure and require that a mix of residential uses be provided and to take opportunity of infilling situations in a compact efficient form. The planner opined that the proposal is consistent with the PPS.

Mr. Higgins reviewed the applicable NOP policies and concluded that the development of the subject lands is consistent with the NOP policies, as it meets the need of mixed residential uses, infill and efficient compact development.

It was his testimony that the proposal is also consistent with the Norfolk County Official Plan (the "NCOP") Urban Residential Designation policies. Mr. Higgins explained to the Board that the NCOP has not received final approval, but its policies provide the current direction of the County, which are consistent with the PPS. In his opinion, the proposal is an infill development that meets the proposed residential density requirements by providing a different housing type compatible with the surrounding uses.

Mr. Higgins testified that the proposed ZBLA will, by special provisions, recognize the existing lot frontage, will provide an appropriate setback from the interior side lot line and will limit the size of decks in the interior side yards. In his opinion the passing of the ZBLA will be consistent with the NCOP policies and provides adequate privacy for the abutting lot. The planner further explained that the County passed By-law 12-SP-2008 under Section 41 of the *Planning Act*, placing the subject lands under Site Plan Control, ensuring that there is attention to such matters as lot grading, drainage, storm water management, servicing, fencing, landscaping, parking, building location, parking surface and access. In his opinion, the use of this control and the holding provision is considered good planning.

Mary Elder, Planner for the County, testified in support of the proposal. Ms Elder directed the Board to her Planning Report (Exhibit 2, Tab 4), which provides detailed reasons for supporting the proposal. Ms Elder's testimony is that the subject lands are close to an elementary school and parks. Somerset Drive and Highway #6 provide good access to the transportation network. The Ministry of Transportation (the "MTO") and the Public Works and Environmental Services Department comments did not indicate concern with the increased traffic or the proposed access to Somerset Drive. It was her testimony that there is adequate proposed parking on site.

Her evidence was that the proposal is consistent with PPS policies regarding infilling development. Ms Elder, in reference to the NOP, testified that the NOP policies requires the actual location, mix and density of residential development be determined through appropriate zoning, site plan agreements, servicing constraints, existing development patterns and compatibility with adjacent uses. In her opinion the proposal meets all of these requirements and conforms with the NOP.

BOARD'S FINDINGS AND CONCLUSION

The Appellant's Issues

Shadow Effect

A shadow study (Exhibits 18 & 19) was done on June 4, 2009, under the direction of Michael Higgins for the Applicant. Mr. Higgins explained that the results show morning shadowing of the proposed townhouses from the Gairs' fence, which also projects onto their rear yard in the afternoon. The proposed townhouses' shadow reach the fence and overtake it by late afternoon and project onto the Gairs' property in the early evening with a complete shadowing by sunset. In his opinion, the impact was minimal.

The Board finds that the shadowing as illustrated in the Shadow Study does not represent any negative impact on Mr. Gair's property. In fact, his own fence will create impact on the proposed development.

Noise and privacy

The Board finds that Mr. Gair's solid, wooden and high privacy fence will minimize noise and provide additional privacy. The Board heard evidence that the Applicant will move services away from the Gairs' property. The proposed rear decks are to be built at grade to ensure the privacy fence is effective. Based on the clarifications and concessions to the plans (revised Exhibit 16) which includes reduction in size of the townhouses from 1600 square feet to approximately 1200 square feet, this

modification would not permit large families to live here. The Board did not hear any evidence that four units will produce any measurable adverse impact from sound.

Odour

The Board has not heard any evidence to support the assertion of adverse impact from odour, except for domestic smells in an urban area, and therefore the Board determines that cooking odours emanating from the four units will not be any different from those in the immediate neighbourhood and will not have a negative impact.

Design elements

The Board has heard compelling evidence that the Applicant has taken steps to minimize possible impacts from the proposal (Exhibit 16) and the revised proposed By-law (Exhibit 23). These include Site Plan Control, a reduction to single garages rather than the proposed double garage, the revised location of the parking spaces and the townhouse height restriction to 24 feet.

The Board also heard evidence that efforts will be made to move the community mailbox from its present location to a more user-friendly area. This would reduce traffic and pedestrian congestion in the area.

The Board finds that the imposition of site plan control and the revised by-law represent good planning. As revised, the design elements will not have a negative impact on the neighbourhood.

Compatibility

Throughout the hearing there was often reference to the opinion that the proposal was out of character with the neighbourhood. Based on the expert evidence of

planners Higgins and Elder, the Board is satisfied that the proposal is in keeping with the neighbourhood, creating a “gateway” to the Somerset subdivision.

The Board finds that compatible means being mutually tolerant and capable of existing together in the same area. The proposal is similar to what already exists on the opposite side of the proposal. Mr. Gair’s high wooden fence provides a clear separation from what exists on the other side of it and the proposed townhouses, which in the Board’s view will be in harmony with the neighbourhood.

The Board does not agree, therefore, that this modest four unit townhouse proposal is not compatible. The Board is satisfied that the planning documents and the revised plans and the amended proposed by-law permit and encourage this type of intensification development in the area.

Secondly, it is significant that a development of similar density and design has been located immediately to the west of the subject property for many years. The Appellants attempted at some length to distinguish the design of this project from the design of the proposed development. While there are admittedly some differences, which are to be expected, the Board is satisfied that from a streetscape perspective, even a discerning eye would be hard-pressed to notice any significant distinction. The Board also accepts the opinion evidence of Mr. Higgins and Ms Elder that the development is a “good fit” for the neighbourhood.

Finally, the Board is of the view that the opinions of the Applicant’s and the County’s planning witnesses were largely uncontraverted. Each of them have significant planning experience in the urban setting, and the Board notes that this proposal underwent significant scrutiny, and modification, before finding its way to council, and ultimately, to the Board. The Board also notes that many modifications were made during the course of these proceedings as evidenced in the revised site plan (Exhibit 14), the site plan modifications (Exhibit 16) and the proposed revised By-law No. 00Z-2009 (Exhibit 23).

Counsel for the Applicant referred the Board to numerous Board decisions on the meaning of “compatibility” and particularly in (1999) 37 OMBR 389 Re: Scarborough Official Plan Amendment No. 101 (at 405) S. D. Rogers (December 7, 1998):

Finally, there was much evidence and much legal argument before this Board as to the appropriate tests to apply in determining whether a proposed development can be determined to be “compatible” with adjacent development. This Board has long adopted the axiom that for development proposal to be compatible in a planning sense, it need not be the same as, or even similar to but exist in harmony with, existing development.

In this Board’s view that while assessing the magnitude of difference between that proposed and that existing can assist in assessing compatibility, the truly objective test of compatibility is whether the proposal will have a physical or functional undue adverse impact on the existing development. This is not a test which requires a determination as the existing residents’ “likes” or “don’t likes” in respect to a proposal. Rather it is a gathering of evidence of the real and tangible negative impact that the proposal will have on the existing residents’ enjoyment of their property and/or community; assuming that change is inevitable. In this context the magnitude of difference may serve as an indicator of impact.

In saying this, the Board recognizes that the very fact that some change will occur will signify an impact to what is currently enjoyed by existing residents. However, assuming that some change must occur (and this need not be assumed in some circumstances), the task is to determine what kind of change will satisfy the planning policies applicable to the site, and yet minimize the impacts on the functional and physical characteristics of the neighbourhood.

On all of the evidence presented, the Board prefers and relies on the evidence of Ms Elder and Mr. Higgins.

The Board finds that the proposed By-law amendment is appropriate, represents good land use planning, conforms to both official plans and the PPS, and is in the overall interest of the community.

The Board directs the Municipality of Norfolk County to enact By-law No. 00-Z-2009 as set out in Attachment “1” to this decision.

The appeal is therefore dismissed.

So Orders the Board

“G. C. O’ Connor”

G. C. O’ CONNOR
MEMBER

ATTACHMENT "1"



BY-LAW NO. 00-Z-2009

OF

The Corporation of Norfolk County

BEING A BY-LAW TO AMEND ZONING BY-LAW NW 1-2000, AS AMENDED, OF THE FORMER CITY OF NANTICOKE FOR PROPERTY DESCRIBED AS LOT 1 REGISTERED PLAN 37M-19 GEOGRAPHIC TOWNSHIP OF WOODHOUSE URBAN AREA OF PORT DOVER, NORFOLK COUNTY IN THE NAME OF EADIE LANDCO LIMITED.

WHEREAS Norfolk Council is empowered to enact this By-Law, by virtue of the provisions of Section 34 of the Planning Act, R.S.O. 1990, c.P.13, as amended;

AND WHEREAS this By-Law conforms to the Official Plan for the former City of Nanticoke.

NOW THEREFORE THE COUNCIL OF THE CORPORATION OF NORFOLK COUNTY HEREBY ENACTS AS FOLLOWS:

1. That Schedule "A6" of the City of Nanticoke Zoning By-Law NW 1-2000, as amended, is hereby further amended by changing the zoning of the subject lands identified on Map "A" (attached to and forming part of this By-Law) from "Urban Residential Type 1 (R1-A)" to "Urban Residential Type 4 (R4.18) (H);
2. That subsection 5.4.8, Special Provisions for Permitted uses is hereby further amended by adding the following:

#	By-Law #	Address	Additional Uses Permitted	Sole Permitted Uses	Excluded Uses
R4.18 a	00-Z- 2008	Port Dover, New Lake Shore Road			Duplex, double duplex, triplex and fourplex

3. That subsection 5.4.9, Special Provisions for Lot and Building Requirements is hereby further amended by adding the following:

#	By-Law	Address	Description of Special Provision
R4. 18 b	00-Z-2008	2 Sea Breeze	Maximum number of <i>dwelling units</i> : 4 Minimum <i>lot frontage</i> : 28.1 metres

			Maximum <i>building height</i> : 7.3 metres and 1 storey Minimum <i>interior side yard</i> : 6.0 metres A <i>deck or unenclosed porch</i> shall not be permitted in the <i>interior side yard</i> . Any patio (meaning not built up and fully supported by grade) in the interior side yard shall not be nearer than 3.0 metres of the interior lot line.
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4. That the Holding "(H)" provision of this By-Law shall be removed upon a site plan agreement being entered into with the municipality and registered on title in accordance with the standard site plan policies of Norfolk County.
5. That this By-Law shall apply to the subject lands identified on Map "A" (attached to and forming part of this By-Law);
6. That the effective date of this By-Law shall be the date of final passage thereof.

ENACTED AND PASSED THIS 14TH DAY OF OCTOBER, 2008.

First Reading: October 14, 2008

Mayor

Second Reading: October 14, 2008

Third Reading: October 14, 2008

Clerk/Manager of Council Services

**EXPLANATION OF THE PURPOSE AND EFFECT OF
BY-LAW NO. 00-Z-2008**

This By-Law affects a parcel of land described as Lot 1 Registered Plan 37M-19 in the Geographic Township of Woodhouse in the Urban Area of Port Dover, Norfolk County, located at 2 Sea Breeze, Port Dover.

The purpose of this By-Law is to change the zoning on the subject lands from "Urban Residential Type 1 (R1-A)" to "Urban Residential Type 4 (R4.18) (H)" to permit development of a semi-detached dwelling and a four unit group townhouse.

A 'Holding (H)' provision is applied to the subject lands and is not to be removed until an approved site plan and registered agreement is in place addressing grading and drainage and site development details.

The lands are being placed under site plan control through a separate By-Law, which will ensure that staff has an opportunity to review such matters as access, parking, grading and drainage, location of any buildings and structures, landscaping and buffering etc.