

ISSUE DATE:

July 5, 2010



PL100221

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Mark Milne
Applicant	Willowpond Enterprises Inc.
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	252-254 Locke Street South, Hamilton
Municipality:	City of Hamilton
OMB Case No.:	PL100221
OMB File No.:	PL100221
Municipal No.	A-295/09

APPEARANCES:

Parties

Counsel*/Agent

Mark Milne

K. Dickson

Willowpond Enterprises Inc.

S. Bernstein*

DECISION DELIVERED BY A. CHRISTOU AND ORDER OF THE BOARD

This was an interesting case involving an existing and sympathetic family-type restaurant, The Courtyard, occupying the ground floor of two former semi-detached dwellings on Locke Street, which is a commercial thoroughfare within a low density residential area. Two smaller restaurants were approved, enlarged and combined into The Courtyard, through a series of successive variances to the Zoning By-law over the past few years. Required parking for the restaurant use was also eliminated by the previous variances.

The essence of this hearing was whether or not the Board should approve the two variances requested and legalize the existing (unlicensed) rear yard patio, to permit an *outdoor patio* (licensed under the LLBO) with seating capacity of 42, as an accessory to the existing 30 seat restaurant. The variances are as follows:

1. To permit an *outdoor patio* within the “D” (Urban Protected Residential) District; whereas the By-law does not permit *outdoor patios*; and
2. To permit an *outdoor patio* in a rear yard and north-east side yard, notwithstanding that an *outdoor patio* is only permitted within the front yard where only the rear lot line adjoins a residential district.

By-law 6593 prohibits *outdoor patios* in the rear yard. An *outdoor patio* is permitted only within the front yard when the rear lot line abuts a residential district. Part of the property where the restaurant and rear patio exist, is zoned commercial, and the rear one third is zoned residential and contains a five-car garage used for storage, which is to remain. The evidence was that when you have split zoning, the (primary) use must be permitted in both zones. The residential zone does not permit restaurants. Oddly enough, the By-law does not regulate or even define unlicensed “patios” such as the one at the rear of this restaurant, which operates without known problems.

Mark Milne, who lives south of the laneway separating the restaurant from his property, has appealed the decision of the City of Hamilton Committee of Adjustment (Committee) that approved a variance to permit an *outdoor patio* in the rear yard of this existing restaurant. The appellant alleges that the variance does not meet the criteria set out in s. 45 of the *Planning Act*; it is not minor; and it will set a precedent in the area. The proposal represents a change of use and should be subject to Official Plan and Zoning amendments, as the City has no policy for *outdoor patios* in the rear yards of restaurants abutting residential. Also, no parking is proposed to be provided for the patrons of the restaurant and the patio; there will be noise nuisance; and garbage from the restaurant is not being managed properly at the present. He is amenable to the liquor licence for the restaurant, but not for the patio.

The Evidence

The Board heard expert planning evidence from the Appellants' planner, Allan Ramsey and from David Barnet, planner of the Committee, who appeared under subpoena by the Applicant. Also, two residents, Norman Reintamm and Donald Cameron, appeared in support of the variance. The City did not appear.

Mr. Ramsey testified that the front portion of the property is designated Commercial, while the rear portion is designated Residential in the Hamilton Official Plan (OP). Although restaurants and *outdoor patios* are permitted in the commercial areas, the proponent should demonstrate that adverse impacts on adjacent residential uses are minimized. He opined that the proposed *outdoor patio* is incompatible with the adjoining residential uses and does not address the potential adverse impacts of noise to nearby residents.

According to Mr. Ramsey, the front portion of the property is zoned "H" Community Shopping and Commercial District, which permits a wide range of retail and commercial uses, including restaurants and *outdoor patios*. The rear portion of the site is zoned "D" Urban Protected Residential. Restaurants and *outdoor patios* are not permitted in this zone, nor are they permitted where a lot line adjoins a residential district. Both the rear lot line and the north side lot line adjoin a residential district. In lots with dual zoning, the (restaurant) use must be permitted in each of the Districts. In his opinion, the variances do not maintain the general intent and purpose of the Zoning By-law. The variances are not minor, because the patio would add 42 seats to the 30 seats permitted by variance within the restaurant, for a total of 72 seats. The *outdoor patio* in the rear yard, if licensed under the LLBO, will increase the potential for nuisance, loss of privacy and will create land use incompatibilities with abutting residential uses; it is not desirable for the development of the area as there are no other rear yard *outdoor patios* in the immediate area or anywhere else in the City; and it does not represent good planning. He concluded that the proposal should be considered in the context of OP and Zoning Amendment applications, where the potential impacts to allow a prohibited use can be comprehensively evaluated.

Daniel Barnet testified that planning staff support the variances because there is a board fence and buffering is provided between the outdoor patio and the abutting residential by the garage and by the lane. The Applicant has revised the Site Plan to the City's satisfaction, by removing some of the proposed seating and reducing the seats from 46 to 42; no outdoor bar and no music or sound system is to be permitted on the patio. He is not concerned that parking is not provided for the restaurant and the proposed outdoor patio, because it is located in a commercial area. He recommends approval of the variances.

Discussion

This was a change in use by variance, to introduce a licensed *outdoor patio* use in the rear yard as an accessory to an existing restaurant. A patio not licensed under the LLBO seems to be permitted, although such use is not defined in the By-law. An *outdoor patio* on the other hand is defined in the By-law and it can be licensed if it is accessory to a restaurant. An *outdoor patio* is limited to the front of a restaurant where the more noisy activity is tolerated. It is not, however, permitted in the rear, and particularly where the restaurant property abuts residential. The reason in the Appellant's uncontradicted planning evidence appears to suggest that loud conversations and noise from restaurant patrons could interfere with the quiet enjoyment of the abutting residential occupants, which represents nuisance. The City has no policy on rear *outdoor patios* and no evidence was adduced that any such patios exist elsewhere. The City therefore needs to review, as a public policy, on how to deal with rear yard licensed patios and to clarify in its By-law the difference between "patio" and "*outdoor patio*" which is tied in with LLBO. I find that a Zoning By-law Amendment is the proper way to approach this matter.

It would appear that the City accepted an incomplete variance application, without a legal survey and it approved a Site Plan that does not include all of the property. There was also some confusion as to whether the variances shown in the Notice and in the Decision were consistent. Not having complete and accurate information can lead to confusion and misunderstanding by the public and may lead to questioning the accuracy of the Committee's decisions.

The Board does not disagree with this owner that this particular *outdoor patio* may be appropriate for this location, given the existing five car garage at the rear may provide sufficient separation and buffer between the patio activity and the residential dwellings. However, the issue is conformity with the By-law which dictates that the use (restaurant) must also be permitted in the residential zone when the site has dual zoning. Restaurant is not a permitted use in the residential zone. The applicant did not advance any compelling planning evidence to support his variances. Need or desire for a rear yard licensed patio is not one of the tests in the Planning Act. Therefore, the variances for an *outdoor patio* in the rear yard fail the Zoning conformity criteria in the Planning Act. When one or more criteria are not met, the Board can not authorise the variance. However, the Board will authorize the variance to permit an outdoor patio in the north-east side yard, as it would have no impact on the residential uses at the rear.

THE BOARD ORDERS that the appeal is allowed in part and the variances to By-law 6593 of the City of Hamilton are authorised as follows:

1. Variances 1 and 2 are not authorized.
2. The following variance is authorized:

To permit an outdoor patio in the north-east side yard, notwithstanding that an outdoor patio is only permitted within the front yard where only the rear lot line adjoins a residential district.

This is the Order of the Board.

“A. Christou”

A. CHRISTOU
MEMBER