

ISSUE DATE:

Nov. 10, 2010



PL100513

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

2188353 Ontario Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 79-200 of the City of Niagara Falls to rezone lands respecting 6226 Giovina Drive from Residential Single Family 1C (R1C) to Residential Single Family and Two Family (R2) to permit a proposed semi-detached dwelling

City's File No. AM-2009-029

OMB Case No. PL100513

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APPEARANCES:

Parties

Counsel

Mario Chan

City of Niagara Falls

K. Beaman

DECISION DELIVERED BY C. HEFFERON AND ORDER OF THE BOARD

Background

On December 23, 2009, Mario Chan ("appellant") applied for an amendment to Zoning By-law 79-200 to permit development of two semi-detached dwelling units at 6226 Giovina Drive in Niagara Falls ('subject property').

On April 26, 2010, Council for the City of Niagara Falls ("Council") denied the application.

On May 31, 2010, Mr. Chan appealed Council's decision to the Ontario Municipal Board ("Board").

The appeal was opposed at the Board hearing by the City of Niagara Falls ("City"). Also present at the hearing to express their opposition were Mr. G. Figliomena and Mr. A. Merante who, the Board was told, occupy single family homes beside and opposite the subject property on Giovina Drive.

Matter before the Board

The matter before the Board is the Chan application to change the zoning on the subject property from R1C (single family detached) to R2, which permits single, semi-detached and apartment residences.

Motion for Adjournment

At the commencement of the hearing, Mr. Beaman brought a motion requesting that the hearing be adjourned until the incoming Council had an opportunity to consider what he submitted was “new evidence”.

In support of his argument, Mr. Beaman relied upon Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170 and [1990] S.C.J. No. 137. After reviewing this case, I am of the view that the facts of the Chan case and the matter heard by the Supreme Court of Canada are not similar. I found that the materials at issue did not constitute new evidence. I found them to be closely similar to the materials that Council had before it when it made its decision on April 26, 2010.

And after consideration of Mr. Beaman’s submission and mindful of the Board’s Rules and its practice of granting adjournments only in the face of compelling reasons, I denied the adjournment, dismissed the motion and ordered that the hearing recommence forthwith.

Evidence and Analysis

Mr. Chan’s appeal was opposed by two participants, Mr. G. Figliomena and Mr. A. Merante. Mr. Figliomena lives in a 2-storey single family detached home on Giovina Drive beside the subject property. Mr. Merante lives in a single family detached home opposite the subject property.

Mr. Merante testified that the proposed development would not be compatible with the other single family detached homes in the area. In cross-examination, Mr. Beaman pointed out that there was a town house development on the opposite side of St. Paul Avenue to the Chan property as well as mixed commercial/industrial/residential development directly opposite the Chan property. Mr. Merante stated in effect that he did not consider them to part of (his) neighbourhood. He also told the Board that

approximately seven years ago he had received an opinion from the City's "Development Department" (sic) that "the current zoning would only allow construction of a single family dwelling...." (Exhibit 1, Tab 4, page 1, para 2.) At that time, he told the Board that he was himself considering purchasing the subject property to develop.

With respect to the possible adverse impact to the surrounding properties, Mr. Merante offered no evidence beyond asserting that the proposed development would not fit into their single family neighbourhood. The Board was told that the subject property has been vacant for at least 20 years.

Mr. Figliomena followed Mr. Merante to the stand. His opinion paralleled that of Mr. Merante. He offered no land use planning evidence. Nor, despite questions from Mr. Beaman in cross-examination and direct queries from the Board, could he tell the Board how the proposed development would adversely impact his property beyond a vague suggestion that "property values in the entire neighbourhood" would suffer.

In support of his appeal, Mr. Chan retained Mr. R. Brady, who was qualified to offer opinion evidence on land use planning. Mr. Brady testified that Mr. Chan had gone to some lengths to make the design of his proposed building compatible with the design of the neighbouring homes. Using architect's drawings (Exhibit 1, Tab 8) he pointed out that the structure will appear from the street to be two individual homes. One of these homes, the smaller, will have a formal entrance and a 1-car garage on Giovina Drive; the other will have a formal entrance and a 2-car garage on the main or collector road, St. Paul Avenue. As no contradictory evidence was offered up, I found that there was no issue of compatibility with the surrounding properties.

Mr. Brady then took the Board to the Provincial Policy Statement ("PPS"). Policy 1.1.3.4 of the PPS requires that:

Appropriate development standards should be promoted which facilitate intensification, redevelopment and compact form, while maintaining appropriate levels of public health and safety.

Mr. Brady testified that the proposed rezoning and development is consistent with this policy and, indeed, all relevant policies in the PPS. No evidence was offered in opposition to this opinion.

He also stated under oath that the proposed rezoning and development conform to the City of Niagara Falls Official Plan. The subject area is designated "Residential", which allows for all forms of residential development subject to the provisions of the Zoning By-law 79-200. Higher density forms are encouraged at the peripheries of neighbourhoods. The proposed development is located at the corner of a collector road. This, in Mr. Brady's opinion, qualifies as a "periphery location". No contradictory evidence was presented.

Mr. Brady also testified that the proposed development satisfies all the provisions of the R2 zoning and that no minor variances would be required to accommodate the proposed semi-detached dwellings.

Mr. Brady's opinion evidence was adopted in whole by Mr. A. Herlovitch, who was also qualified by the Board to give opinion evidence on land use planning matters. Mr. Herlovitch is Director of Planning and Development for the City of Niagara Falls. He appeared under subpoena. He testified that his Department supported the Chan application and that none of the other City Departments or the Regional Municipality of Niagara objected to the rezoning (Exhibit 1, Tab 13, page 69).

In his testimony, he also referenced his planning report to Council regarding the Chan application. The planning report is dated April 26, 2010. In the Executive Summary, he clearly sets down the Planning Department's support of the Chan application and its reasons for this support (Exhibit 1, Tab 8). And in Exhibit 1, Tab 12, in a memo under City of Niagara Falls letterhead, Mr. Herlovitch, as Director of Planning and Development, states in a refreshingly forthright and unequivocal manner his opinion that Council's (April 26, 2010) refusal to approve the requested site specific zoning by-law amendment was not consistent with the PPS and out of conformity with the City of Niagara Falls Official Plan.

In response to a query from Mr. Beaman, Mr. Herlovitch stated that a draft site specific zoning by-law amendment has not yet been prepared for the Board's consideration.

General Finding

The decision of Council to deny the requested zoning by-law amendment was taken after the enactment of Bill 51 in January 2007 and so is subject to the provisions of subsection 2.1 of the *Planning Act*. Subsection 2.1 reads:

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 matter,
- (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a)

Subsection 2.1, then, requires the Board to carefully consider and have regard to the decision of Council as well as the information and materials before Council at that time of the decision. The Board is required to weigh those materials and that information considered by Council against the evidence heard by the Board.

Ontario Municipal Board Member S. Stefanko in his decision issued July 24, 2009 read subsection 2.1 in the following way:

In reaching my decision, I have been particularly mindful of the provisions of s.2.1 of the *Planning Act* ("Act") which states that I shall have regard to any decision made under the Act by a municipal council. This section, in my view, requires the Ontario Municipal Board to consider the decisions of council and to weigh those decisions against the evidence heard by the Board. To read this section as creating some kind of obligation on the Board to be bound by and to implement such decisions would be placing too narrow an interpretation on the section. Other provisions of the Act such as ss. 17(36), 17(50), 34(19) and 34(26) clearly allow for, and contemplate the possibility of parties appealing a decision of a municipal council and the Board overturning it. Therefore, notwithstanding a level of inherent deference contained in s.2.1, the Board does, and should, for obvious reasons, retain its independent decision-making authority. When considering the decision made by Town Council and Regional Council, it is incumbent upon me to scrutinize those decisions to the extent possible....

This Panel concurs with Member Stefanko's interpretation of subsection 2.1.

After considering the supporting information Council had considered in making its original decision, I find that the April 26, 2010 decision of Council denying the application of Mr. Chan is not supportable. Based on the planning evidence before me, the zoning amendment constitutes good planning. In arriving at this decision, I have had regard to the decision of Council.

Disposition and Order of the Board

The Board Orders that the appeal is allowed and Orders that an appropriate site specific amendment to Zoning By-law 70-200 to accommodate the proposed revised architectural sketches shown in Exhibit 1, Tab 2, pages 20 - 22 be drawn up forthwith.

The Board may be spoken to if difficulties arise in processing this Order.

So Orders the Board.

"C. Hefferon"

C. HEFFERON
MEMBER