

ISSUE DATE:

**Aug. 09, 2011**



PL101293

Ontario  
Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

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

Appellant: Jason & Leanne Roberts  
Subject: By-law No. 10-257  
Municipality: City of Hamilton  
OMB Case No.: PL101293  
OMB File No.: PL101293

**APPEARANCES:**

**Parties**

**Counsel**

Jason and Leanne Roberts

Clark Cerello

Manfred Rudolph

The City of Hamilton

Manfred Rudolph

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

This was a hearing in the matter of an appeal by Jason and Leanne Roberts from a decision of the Council of the City of Hamilton to pass Zoning By-law Amendment 10-257. This By-law amends Zoning By-law 6593 of the City of Hamilton and would permit a three storey multiple dwelling with a total of six units on a property known municipally as 366 Bay Street North in the City of Hamilton.

The Board was advised at the commencement of the hearing that Mr. Rudolph, Counsel for the applicant, had also been retained by the City of Hamilton to support the City's By-law Amendment now before the Board.

**CONTEXT AND THE EVIDENCE**

The subject property is a 616.9 sq m lot with 18.3 meters of frontage on Bay Street North. The lot is about 35 meters in depth and has an irregular shape in that a portion of the property loops behind the home to the north at 374 Bay Street, as shown on a survey plan prepared by B.J. Clarke an Ontario Land Surveyor dated July 19, 2011, Exhibit 4 Tab K. A row of Street Townhomes located on Simcoe Street West flanks the southern limit of the property. The block bounded by Bay Street, Ferrie Street West, MacNab Street West and Simcoe Street West in which the subject property is located has an average density of some 83 units/hectare and is made up of a wide range of housing types and styles consisting of single family dwellings, semi detached street townhouses ranging in height from 1 to 2½ storeys. The proposed density of the proposed development is 97 units/hectare. This is an older area of the City that existed before the municipal Zoning By-law and in many cases the form of development that has occurred bears little relationship to the current zoning regulations that govern the area. The form of existing development that makes up the area is clearly set out on an aerial photography Exhibit 4 Tab B, the photo books provided by the applicant Exhibit 5 and the photo book provided by the Appellants Exhibit 11. The neighbourhood by all account is an older residential neighbourhood characterizes by a range of housing types situated on a range of lot sizes. The neighbourhood is in close proximity to Downtown Hamilton and various open space recreational opportunities associated with the public open space facilities associated with the Hamilton harbour area. The subject property in the past consisted of a single family home with a greenhouse operation on the north side of the property. The greenhouses have been removed and the dwelling is currently vacant and in need of repair.

The subject lands are governed by the *Planning Act*, a number of both provincial and local planning policy regimes being:

1. The 2005 Provincial Policy Statement;
2. The Growth Plan for the Greater Golden Horseshoe Area;
3. The Region of Hamilton-Wentworth Official Plan which designates the City of Hamilton and this area as “Urban Area”;

4. The City of Hamilton Official Plan (old) designates the site “Residential” and is subject to the relevant policies of subsection A.2.1-Residential Uses; and
5. The new Urban Official Plan for The City of Hamilton designates the site “Neighbourhoods and Bay Street as a Collector Road”. This Official Plan is adopted by City Council but is under appeal in its entirety to the Ontario Municipal Board;
6. The North End West Neighbourhood Plan adopted by City Council as a policy guide but never formally approved; and
7. The Secondary Plan for the West Harbour (Setting Sail) adopted by City Council but under appeal in its entirety to the Ontario Municipal Board.

The planning witnesses all generally agreed that the Provincial Planning documents sanction the proposed development on this site and encourage that such urban sites be considered as candidate areas for redevelopment, infill and intensification. They also testified that the Region of Hamilton-Wentworth Official Plan sanctions the development and leaves the specific policy directions to the City of Hamilton Official Plan. The planners also agree that the form and extent of intensification is governed by the policy regime of the in force City of Hamilton Official Plan and Zoning By-law. It was their uncontradicted evidence that the new Urban Official Plan for The City of Hamilton did not provide for any significant policy direction shifts for this area but merely provides clarity to the form and concentration of intensification required by the Places to Grow legislation. In this case, while to Board should be aware of the new Official Plan and its directions there is nothing in the new planning policy documents that would lead the Board to conclude from the evidence that the appeal before it should not be governed by the Official Plan (old) policies and Zoning By-law currently in forces and effect for this area.

The Board, during the course of this one-day hearing, heard from four lay witnesses and the following qualified professionals:

1. Mr. Edward H. John, a qualified Land Use Planner employed by the City of Hamilton as a Senior Planner, testified regarding the City staff's planning report on the applications to the Municipality; and
2. Mr. Stephen Fraser, a qualified Land Use Planner, was retained by the Appellant in June of 2009 to assist them in the preliminary planning evaluation of the site and to assist his client in their applications to the Municipality and this Board.

Mr. Roberts, the appellant, whose property abuts the subject lands, called four lay witnesses, all of whom live in the immediate neighbourhood. They testified in opposition to the proposed development raising a list of concerns. It is the Board's finding, the salient concerns expressed by these residents may be summarized as follows:

1. The proposed development is an over development of the site;
2. The style and form of the building is not in keeping with the character of the neighbourhood;
3. The parking provided is not sufficient;
4. The siting of the building will block the sunlight and views of neighbours to the north;
5. The building will result in increased noise; and
6. The encroachment issue needs to be resolved.

The Planning witnesses also generally agree that the Provincial Policy regimes encourage more compact built form within the built up area of the City of Hamilton and would encourage the intensification of this site. They also agree that the built form and the density of intensification for this site are to be left to the determination of the City through its planning policy documents.

Both planners testified that, in their opinion, the six units being proposed would meet the tests set out in the provincial policy regime and the City's planning documents,

and was an appropriate intensification of this site. They both advised the Board that the “Residential” designation in the City of Hamilton Official Plan would permit the redevelopment being proposed subject to the policies of subsection A.2.1 Residential Uses and in particular, the following sections which state:

2.1.1 The primary uses permitted in the areas designated on Schedule “A” as RESIDENTIAL will be for dwellings. Various types of dwellings are included within this designation, while preference will be given to the location of similar densities of development together.

2.1.13 Plans for redevelopment, will to the satisfaction of Council, ensure the Residential character of the area will be maintained or enhanced and that the redevelopment will not burden existing facilities and services.

2.1.14 in evaluating the merits of any proposal or multiple family RESIDENTIAL development Council will be satisfied that the following considerations are met:

- i) The height, bulk and arrangement of buildings and structures will achieve harmonious design and integrate with the surrounding areas; and,
- ii) Appropriate open space including landscaping and buffer will be provided to maximize the privacy of residents and minimize the impact on adjacent lower density uses.

The planners in formulating their opinions also rely upon and took the Board to Section C.7 **Residential Environment and Housing Policy** of the City of Hamilton’s Official Plan and, in particular, to the following subsections;

7.2 Varieties of RESIDENTIAL types will not be mixed indiscriminately, but will be arranged in a gradation so that higher density developments will complement those of the lower density, with sufficient space and to maintain privacy, amenity and value.

7.3 Council will encourage a RESIDENTIAL ENVIRONMENT of an adequate physical condition that contains a variety of housing forms that will meet the needs of present and future residents. Accordingly Council will;

- iii) Support RESIDENTIAL development such as infilling, redevelopment and the conversion of non-residential structures to make more efficient use of the existing building stock and/or physical infrastructure that recognize and enhance the scale and character of the existing residential areas by having regard to natural vegetation, lot frontages and areas, building height coverage, mass, setbacks, privacy and overviews.

- v) Encourage new RESIDENTIAL development that provides a range of dwelling types at densities and scales that recognize and enhance the scale and character of the existing residential areas by having regard to natural vegetation, lot frontages in areas, building height, coverage, mass, setbacks and privacy of overviews.

Both planners testified that, in their opinion, the tests set out in the Official Plan were met, that the form of development being proposed showed a gradation of density that was consistent with the area. It was their testimony that the revisions to the Zoning By-law standards, set out in the proposed Zoning By-law Amendment Exhibit 2 Tab 14 in this case, reflected more contemporary design standards not found in what they termed a dated Zoning By-law (By-law# 6593). They also agreed that there were no municipal servicing constraints that would prohibit the development.

## **FINDINGS AND CONCLUSIONS**

The Board, after carefully reviewing the evidence, the exhibits filed and the submissions made by the parties, makes the following findings.

It is clear that in recent years one of the major thrusts of Provincial Policy has been the more efficient use of our municipal infrastructure within urban areas and that intensification within urban areas is a significant tool in achieving this objective. There is no evidence that the City of Hamilton has not been or is not currently following this Provincial Policy direction. It is also equally clear that the subject site is an excellent candidate for redevelopment and that any form of residential redevelopment that increased the number of residential dwelling units on the site regardless of its density would qualify as intensification.

The Provincial mandate for intensification is not a licence to abandon sound planning principals, or to diminish appropriate land use planning standard in search of more density. Alternatively, intensification requires sensitive design as stated in the City of Hamilton's Official Plan at Section 7.3 iii) when it states that Council will:

Support RESIDENTIAL development such as infilling, redevelopment and the conversion of non-residential structures to make more efficient use of the existing building stock and/or physical infrastructure that recognize and enhance the scale and character of the existing residential areas by having regard to natural vegetation, lot frontages and areas, building height coverage, mass, setbacks, privacy and overviews.

The Board would note that the existing zoning standards of the City of Hamilton covering this area do not reflect the development that has occurred in this area in the past. It is clear to the Board from the site plan drawings found at Exhibit 4 Tab D that the existing zoning would permit a more intensive, greater higher, and a more massive built form on the subject property to that being proposed by the applicant. The Board finds that the proposed Zoning By-law Amendment provides for greater restriction on the form of development and imposes contemporary parking standard that are commonly accepted as being appropriate for older urban areas in proximity to urban transit. The Board would note from the proposed site plan Exhibit 4 Tab D and the proposed elevations Exhibit 4 Tab E that all parking will be located in the rear of the property accessed by a gated driveway that passes through the centre of the building. The Board is satisfied that the proposed parking at a ratio of 1.25 space/dwelling unit and its layout represents good planning and design contemplated by the City's Official Plan.

The original application and resulting Zoning By-law Amendment were based upon the belief that the existing building on the property may have encroached upon the property at 46 Simcoe Street West, being the property owned by the Appellant, Mr. Roberts. This resulted in the proposed by-law sanctioning a zero meter setback along the south limit of the property. However the most recent survey (prepared by B.J. Clarke an Ontario Land Surveyor dated July 19 2011 (Exhibit 4 Tab K.), shows no encroachment and in fact show a right of way on the Roberts property in favour of a neighbour to the east. Both planners in response to a question from the Board agreed that contemporary side yard standards would be 1.2 meters on one side and 0.6 meters on the other. It was their uncontradicted opinion that this would ensure access around the building for maintenance purposes and was consistent with current City development standards for new development. The Board finds that there is no compelling reason for a zero meter setback along the south side yard and will direct that the side yard in this area be 0.6 meters and that the Zoning By-law Amendment be amended accordingly.

The Board understands the concerns of the residents as expressed by the witnesses called by Mr. Roberts and that change is sometimes difficult and that a somewhat different form of housing can be disconcerting. The test set out in the City's Official Plan is to "provide a range of dwelling types at densities and scales that

recognize and enhance the scale and character of the existing residential areas by having regard to natural vegetation, lot frontages in areas, building height, coverage, mass, setbacks and privacy of overviews.”

The Board finds that after considering the proposed elevations of the new building and the street simulation found at Exhibit 4 Tab J that the proposed structure is in keeping with the height and massing of other buildings in the immediate area and would result in a smaller massing of the built form than is currently permitted as a matter of right by the current zoning regulations. Albeit that the type of ownership proposed (condominium) for the new units is somewhat different to the surrounding development this does not, in the Board’s finding, affect the urban design issues the Official Plan requires one to consider. The Board understands that the height limits of the current zone can vary and be as high as 14 meters and that the proposed zone in the parent by-law upon which this site specific amendment is based would limit the height on the site to 11 meters. However, in the Board’s finding it would be appropriate to specify a height limit of 11 meters for the proposed building in the Zoning By-law Amendment to make it clear to the neighbourhood that this is the maximum height being permitted by this site specific amendment. The Board was advised that the south facing wall of the proposed building would be without windows and as such the Board is satisfied that there would be no overview issues with respect to the Roberts’ property. Some issues were also raised by the Appellants that a proposed roof garden might cause oversight issues. This matter has not been finalized. The Board would note that this proposal is subject to site plan control and that the issue of the roof garden it designs and appropriate screening, if required, can be dealt at that time.

The Board has considered the testimony of Mr. Moniz that his parent’s view from their home at 374 Bay Street will be impacted from the siting of the proposed building. Clearly the dominant view from 374 Bay Street is to the west of the open park space on the west side of Bay Street. The Board has considered the site plans Exhibit 4 Tab D, the photographic evidence provided by both the applicant and the appellant and the relationship of the two properties and their buildings and is hard pressed to find that the proposed building will obstruct any views to the west or southwest from the Moniz property. Similarly, it is the Board’s finding that the views from 46 Simcoe Street owned by the Roberts will not be obstructed by the proposed development. Nor was any compelling evidence presented to the Board that the proposed building would create



any significant shadow effects beyond what might be expected if the property was developed under the current zoning regulations.

The Board would note that this is a compact residential neighbourhood. The Board heard no compelling evidence that the proposed building would create any noise conditions beyond what one would normally expect in a residential neighbourhood. The fact that the parking area is within the rear yard and is totally screened by the building will mitigate noise from this area to surrounding areas.

Both planners in their testimony noted that new The Secondary Plan for the West Harbour (Setting Sail) designated the site as "Low Density Residential" on Schedule M-2 General Land Use and that this designation abutted a Medium Density Residential 1 designation on the same schedule covering the lands to the immediate south. It was their opinions that if the Board were to approve this Zoning By-law Amendment that the City would undertake a housekeeping amendment to the Secondary Plan once it was finally approved by the Board. This Board would note that The Secondary Plan for the West Harbour is not in force and does not in the Board's finding constitute a new direction that should be followed in this case. It is clear that the current Official Plan of the City of Hamilton is the policy document that must govern this application and that the City should undertake its housekeeping amendment once the transition from the old to the new planning policy regime is in place.

Accordingly and for the reasons contained in this decision:

**THE BOARD ORDERS** that the appeal against Zoning By-law Amendment 10-257 of the City of Hamilton is dismissed and the municipality is directed to amend Zoning By-law Amendment 10-257 as follows:

1. that the maximum height of the building be 11 meters;
2. that the south side yard be 0.6 meters; and
3. that no window opening be permitted on the south facing wall of the building.

The Board will withhold its final Order pending receipt from the City of Hamilton of a revised Zoning By-law Amendment in accordance with the Board's decision.

The Board may be spoken to if any problems should arise.

This is the Order of the Board.

“J.P. Atcheson”

J.P. ATCHESON  
MEMBER