

ISSUE DATE:

December 1, 2011



PL110701

Ontario
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: 1671312 Ontario Ltd.
Applicant: 1578891 Ontario Ltd.
Subject: Minor Variance
Variance from By-law No.: 79-200
Property Address/Description: 3870 Stanley Avenue
Municipality: City of Niagara Falls
Municipal File No.: A-2011-011
OMB Case No.: PL110701
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APPEARANCES:

Parties

1578891 Ontario Ltd.

1671312 Ontario Ltd. (Niacon)

City of Niagara Falls

Counsel

Rocco Vacca

John Crossingham

Brian Duxbury

DECISION DELIVERED BY J. E. SNIEZEK AND THE ORDER OF THE BOARD

1578891 Ontario Ltd. (the Applicant) applied to the Committee of Adjustment for permission under Subsection 45(2)(b) of the *Planning Act* where the use is defined in general terms to permit a use that conforms to the uses permitted in the By-law. In the alternative, the Applicant applied for a minor variance under Subsection 45(1) to permit the use of property for "a construction material waste sorting and transfer depot". The application was approved and a neighbouring property owner 1671312 Ontario Ltd. (Niacon) (the Appellant) appealed the decision. The City of Niagara Falls appeared but took no position on the matter.

The Board heard from the Appellant's architect, Emilio Raimondo, the City's Director of Planning, Alex Herlovitch, subpoenaed by the Appellant, the Applicant's

consulting environmental engineer, Bridget Mills, and the Applicant's consulting planner, Richard Brady.

The Position of the Appellant

The Appellant asserts that the use as "a construction material waste sorting and transfer depot" requires a rezoning for two reasons – it is a prohibited use as a "junk yard" or "salvage yard" and is not in keeping with the policies of the Official Plan and Zoning By-law. The Appellant questions whether the proposed use is compatible with the use proposed for its property. The proposed use on the Appellant's lands is a multiple tenancy industrial building and a mini storage warehouse facility.

The Position of the Applicant

The Applicant asserts that the By-law defines uses in general terms and the use ("a construction material waste sorting and transfer depot") conforms to the uses permitted by the by-law and the proposed use is not "dangerous, obnoxious, or offensive by reason of the presence, emission, or production of odour, smoke, noise, gas fumes, cinders, vibration, radiation, refuse matter or water-carried waste". (Exhibit 1, Tab 1C, pg.4)

Law on By-law Interpretation

The Board requested the Parties to provide some law as to how By-laws are to be interpreted. The courts have ruled that principles of by-law interpretation have evolved from strict literal interpretation to a more liberal one depending upon the protections the zoning regulation is expected to provide (The City provided the Board with excerpts from Ontario Planning Legislation and Commentary by Robert G. Doumani and Patricia Foran, in the 2012 edition, pgs. 57 and 58, and The Law of Canadian Municipal Corporations by Ian Mac F. Rogers, Volume 2, pgs. 771 – 774. The City also provided The Bruce v. Toronto (City) 3 O. R. 62, 19 D.L.R. (3d) 386, Bayshore shopping Centre v. Nepean (Township), [1972] SCR 775, L.D.C.M.

Investments Ltd. et al and the Town of Newcastle et al, 8 O.R. pg. 504 – 511, Thomas Furniture Ltd. v Toronto (City) Chief Building Official [2002] O. J. No. 2297, 33 M.P.L.R. (3d) 208, and Sechelt (District) v. Cutlan, 2007 BCSC 1087 (CanLII).

Findings of the Board

The proposed use “a construction material waste sorting and transfer depot” is not a salvage yard or junk yard. The term yard is defined in the By-law as “YARD means a space, appurtenant to a building or structure, located on the same lot as the building or structure, and which space is open, uncovered and unoccupied from the ground to the sky subject to specific exceptions contained in this By-law” (Exhibit 1, Tab 1A, pg. 1). This term clearly does not apply to the term yard as applied to the term salvage or junk yard. The Oxford online dictionary defines salvage yard as follows: noun *North American* a place where disused machinery is broken up. The Online Dictionary defines junk yard as:

noun
a yard for the collection, storage, and resale of junk.

Noun

1. any old or discarded material, as metal, paper, or rags.
2. anything that is regarded as worthless, meaningless, or contemptible; trash.
3. old cable or cordage used when untwisted for making gaskets, swabs, oakum, etc.

Yard is defined in the Senior Dictionary of Canadian English as a piece of ground near or around a house, barn, school etc.

The proposed use is contained within a building and involves the sorting of construction waste into its various component parts – steel, drywall, lumber, and metals.

Because this material is sorted within a wholly enclosed building it is not a junk or salvage yard.

Here, the prohibited uses must be clearly defined if it is to be prohibited as a use.

The general use provision in the industrial zone is, as follows:

11.2.1 PERMITTED USES: No person shall within any LI Zone **use** any land or **erect** or **use** any **building** or **structure** for any purpose except one or more of the following **uses**, provided that each such **use**, except the **uses** described in clauses b, p, q, v and w, is conducted within a completely enclosed **building** and is not prohibited under section 4.8:

- (a) Manufacturing, compounding, processing, packaging, crating, bottling, assembling of raw or semi-processed or fully processed materials, and further provided that no such use is dangerous, obnoxious or offensive by reason of the presence, emission or production of odour, smoke, noise, gas fumes, cinders, vibration, radiation, refuse matter or water-carried waste.

This provision is the bolded section, which appears in the subject property zone – light industrial and the prestige industrial zone, and the general industrial zone (it does not include the nuisance clause), the heavy industrial zone and the transportation – distribution industrial zone with the caveat “stored or transported in connection with any of the following permitted uses.” This general provision can be applied to the proposed use because it processes and assembles construction materials within an enclosed building. It could be located in any of the industrial zones because the clause is contained within all of the industrial zone categories. The exclusionary principle is not applicable because the use is not specifically listed as a prohibited use because it is not a “yard” and it would be permitted in all of the industrial zones within a building in the prestige and light industrial zones and in the general, heavy and transportation – distribution zones.

The uncontested evidence of Ms Mills was that the use is not obnoxious or dangerous and would probably require a certificate of approval – noise and air and the certificate would require a “best practices operational statement”.

The test that the Board must apply is where the uses of land are defined in general terms. The Board, acting in the shoes of the Committee of Adjustment, may permit the use for any purpose that, in the opinion of the committee, conforms to the uses permitted in the By-law. The Board finds that the use is defined in general terms.

On review of the complete list of uses in the by-law for the light industrial zone, the Board finds that the following uses would involve similar activities – a carpenter shop – assembling construction materials into their final use and may involve the reuse and recycling of construction materials and a contractor’s or tradesman’s shop might involve similar activities. The Board finds that the use of a grain and feed mill and

storage, laundry plant, silver plating and cutlery would involve processes that would be more intrusive and potentially more disturbing.

By-law 2004-191 added site specific uses.

The Board finds the contractor, tradesman material office and shop would contain similar materials and could involve similar activities. The cement manufacture and dry cleaning establishment might provide for uses with greater impacts. The Board notes that cement manufacture is a fundamentally different use from concrete batching and concrete forming businesses.

Ms Mills made the following recommendations in her report:

1. The proposed operations must meet the minimum D-6 setback from the southern property line by 70 m;
2. The operator of the recycling depot should obtain all necessary environmental approvals prior to operating the facility; and
3. Upon start up of operations, the operator should prepare and implement best management plans/procedures to minimize the potential for wind-blown litter and fugitive dust from on-site traffic movement (Exhibit 3, pg. 9).

Mr. Brady recommended that the Board's approval should be subject to a site plan agreement, certificate of approval air and noise and a building permit. Mr. Brady recommended that the Board's final order should be withheld pending a site plan agreement and a certificate of approval air and noise.

The Board finds that the Appellant's concerns about compatibility are not supported by the existing mix of uses that are permitted in the By-law. The Appellant has chosen to build a prestige industrial development in a light industrial zone. His choice should not impede development that generally complies with the permitted uses contained within the By-law.

The Board finds that the use - “a construction material waste sorting and transfer depot” – conforms to the uses found in the By-laws 79-200 and 2004-191 subject to a site plan agreement and certificate of approval with a best practices and procedures plan and conformance with the D-6 Guideline.

Accordingly, the Board Orders that the appeal is allowed and the variance to By-law 79-200 is subject to the following conditions:

1. The proposed operations must meet the minimum D-6 setback from the southern property line by 70 m;
2. The operator of the recycling depot should obtain all necessary environmental approvals prior to operating the facility;
3. Upon start up of operations, the operator should prepare and implement best management plans/procedures to minimize the potential for wind-blown litter and fugitive dust from on-site traffic movement; and (Exhibit 3, pg. 9)
4. A site plan agreement with the Applicant and the City and obtain the necessary certificates from the Ministry of the Environment and compliance with by-law performance standards.

The Board’s final Order will be withheld pending fulfillment of the conditions. If difficulties arise with the fulfillment of the conditions, the Board may be spoken to.

“J. E. Sniezek”

J. E. SNIEZEK
MEMBER