

ISSUE DATE:

Aug. 13, 2012



PL111331

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: A & W Food Services of Canada Inc.
Appellant: McDonald's Restaurants of Canada Limited
Appellant: Ontario Restaurant Hotel & Motel Association
Appellant: The TDL Group Corp.; and other
Subject: By-law No. 2011-137
Municipality: City of Niagara Falls
OMB Case No.: PL111331
OMB File No.: PL111331

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Appellant: A & W Food Services of Canada Inc.
Appellant: McDonald's Restaurants of Canada Limited
Appellant: Ontario Restaurant Hotel & Motel Association
Appellant: The TDL Group Corp.; and other
Subject: By-law No. 2011-136
Municipality: City of Niagara Falls
OMB Case No.: PL111331
OMB File No.: PL111332

APPEARANCES:

Parties

A & W Food Services of Canada Inc.
McDonald's Restaurants of Canada Limited
Ontario Restaurant Hotel & Motel
Association
The TDL Group Corp.
Wendy's Restaurants of Canada Inc.

City of Niagara Falls

Counsel

D. Baker

K. Beaman

**MEMORANDUM OF ORAL DECISION DELIVERED BY J. V. ZUIDEMA
ON JULY 12, 2012 AND ORDER OF THE BOARD**

At an initial pre-hearing conference (PHC), the Board was told that the parties were working towards a settlement. A disposition outlining the circumstances of the appeals launched and the progress being made by the parties was issued on June 14, 2012 flowing from that first PHC and the reader is directed to that disposition for background leading to this settlement telephone conference call (TCC).

Mr. Beaman, counsel to the City of Niagara Falls (City) provided a summary overview of what had transpired since the last appearance before the Board, and true to his word, a settlement had been achieved which he recommended to the Board. In that respect, he called upon Kenneth Mech, in-house land use planner with the City to provide opinion evidence in support of the settlement. Mr. Mech was qualified and accepted as an expert in land use planning and he provided an Affidavit (filed as Exhibit 2) which set out his opinions on the proposed zoning by-laws.

Specifically Mr. Mech explained that the language of section 4.6 of By-law 2011-136 had been revised to clarify that no rights were being taken away and the following language was included to provide such certainty: “ .. nothing in section 4.6 shall be interpreted or applied such as to restrict the rights attached to any land or buildings pursuant to subsection 34(9) of the *Planning Act*, R.S.O. 1990, c. 13 or any successor thereto.” The section deals with the ability to reconstruct when there has been a fire or other such significant damage. He also pointed out that a typographical error had been noticed in section 13 dealing with road widenings. The proposed revisions addressed both of these concerns.

Mr. Mech then addressed By-law 2011-137 and specifically section 4.3.4 dealing with drive through facilities. He explained that drive through facilities had been permitted in the Neighbourhood Commercial (NC) zone in the past and the NC zone has been included but that the language has been clarified so that the measurement for separation distances is to be taken from the speaker-box located at the drive through. By addressing this issue, Ms. Baker indicated that her clients' concerns had been

adequately addressed. As such, she did not cross examine or otherwise object to the evidence presented.

Mr. Mech opined that the proposed by-laws were consistent with the Provincial Policy Statement, conformed to the Regional and City Official Plans, represented good planning and were in the public interest. He recommended their approval to the Board.

The Board provided an oral decision allowing the appeal in order to amend the zoning by-laws as requested. The Board's decision was based on the uncontested evidence of Mr. Mech, who provided testimony jointly on behalf of the parties. For ease of reference, the amended zoning by-laws are attached to this decision.

THEREFORE THE BOARD ORDERS that the appeals are allowed and By-laws 2011-136 and 2011-137 are hereby amended in the manner set in Attachments #1 and #2 to this Order.

This is the Board's Order.

"J. V. Zuidema"

J. V. ZUIDEMA
VICE-CHAIR

ATTACHMENT # 1

CITY OF NIAGARA FALLS

By-law No. 2011-136

A by-law to amend By-law No. 79-200, to introduce new definitions and regulatory provisions.

THE COUNCIL OF THE CORPORATION OF THE CITY OF NIAGARA FALLS ENACTS AS FOLLOWS:

1. Section 2 - Definitions of By-law No. 79-200 is amended as follows:
 - (a) by adding the following sections and By-law No. 79-200 is renumbered accordingly:
 - “2.5.1 ANIMAL CLINIC means a building or structure or part thereof under the control and supervision of a qualified veterinarian who is a member of the Ontario Veterinarian Association, where animals or birds are given treatment but has no outdoor kennels;
 - 2.15.1 CONSERVATION USE means the use of land and/or water for the purpose of planned management of natural resources;
 - 2.15.2 CONVENIENCE STORE means an establishment where prepared food, groceries, household items, tobacco, patent medicines, periodicals and other similar items are kept for retail sale to the public and may include automated banking machines, depots for laundry and dry cleaning and media rental;
 - 2.64.1 WORKS OF A CONSERVATION AUTHORITY means projects undertaken by a Conservation Authority to protect or enhance areas under their control;”
 - (b) by deleting section 2.44 and replacing it with the following:
 - “2.44 PRIVATE GARAGE means a detached accessory building or part of a main building designed or used for parking or storage of vehicles of the occupants of the dwelling and in which no repair or service is rendered for profit or gain;” and
 - (c) by deleting section 2.62.
2. Clause (b) of section 3.1 of By-law No. 79-200 is amended by adding the following:

“Residential Single Family 1F Density Zone	R1F
Environmental Protection Area Zone	EPA”
3. Sections 3.3.1, 5.2, 5.5 and 5.10 and clause (g) of section 4.13 of By-law No. 79-200 are amended by adding “R1F” after “R1E”.
4. Section 4.6 of By-law No. 79-200 is deleted and replaced by the following:

“4.6 RESTORATION OF NON-CONFORMING BUILDING: Nothing in this By-law shall apply to prevent the strengthening, restoration to a safe condition or rebuilding of any building or structure or part thereof which at the day of the passing of this By-law was lawfully used for a purpose prohibited by this By-law, provided that such strengthening, restoration or rebuilding will not increase the exterior dimensions or floor area of the original building or structure.

Notwithstanding the foregoing, nothing in section 4.6 shall be interpreted or applied such as to restrict the rights attached to any land or buildings pursuant to section 34(9) of the *Planning Act*, R.S.O. 1990, c.13 or any successor thereto.”

5. Section 4.10 and clause (h) of sections 4.14, 4.17.1 and 4.18 of By-law No. 79-200 are deleted.

6. Section 4.16 of By-law No. 79-200 is deleted and replaced by the following:

“4.16 SCREENING DEVICE: No person shall use, for any non-residential purpose, any lot which has any side lot line of an interior lot or any rear lot line that abuts land in a residential zone unless they erect and maintain a close-board type fence or decorative wall with a minimum height of 1.8 metres abutting the side lot line and the rear lot line, save and except where the lot line abuts the front yard of a residentially zoned lot.”

7. Clause (a) of section 4.19.1 of By-law No. 79-200 is amended by deleting the following:

“Plant, factory, warehouse and transportation terminal	1 parking space for each 90 square metres of floor area and for each 4 employees, whichever is greater
Retail establishment, adult store tattoo studio, dancing studio, laundromat and personal service shop up to and including a gross leasable floor area of 450 square metres	1 parking space for each 25 square metres of gross leasable floor area
Retail establishment, adult store, tattoo studio, dancing studio, exceeding gross leasable floor area of 450 square metres	1 parking space for each 18 square metres of gross leasable floor area on the main sales floor plus 1 parking space for each 45 square metres of gross leasable floor area on every other floor”

And adding the following:

“Plant, factory, warehouse and transportation terminal	1 parking space for each 90 square metres of floor area
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Retail store, adult store, tattoo studio, dancing studio, laundromat and personal service shop up to and including a gross leasable floor area of 450 square metres	1 parking space for each 25 square metres of gross leasable floor area plus 1 parking space for each 90 square metres of floor area devoted to storage
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Retail store, adult store tattoo studio and dancing studio, exceeding a gross leasable floor area of 450 square metres	1 parking space for each 25 square metres of gross leasable floor area on the main sales floor plus 1 parking space for each 45 square metres of gross leasable floor area on every other floor and 1 parking space for each 90 square metres of floor area devoted to storage”
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8. Section 4.19.3 of By-law No. 79-200 is amended by adding the following clause and By-law No. 79-200 is renumbered accordingly:

“(b) Within the RIF Zone the following shall apply:

- (i) Maximum lot area which can be used as a surface parking area 25%
- (ii) Maximum width of driveway or parking area in the front yard of a lot 55% of the lot frontage
- (iii) Maximum area of a rear yard which can be used as a parking area 40 square metres
- (iv) Maximum area of an exterior side yard which can be used as a parking area 67% of the yard up to a maximum of 50 square metres
- (v) Notwithstanding section 2.61.1 of this By-law, no person shall park or store a motor home, a snowmobile, a boat, a personal watercraft, a recreational vehicle or a trailer in the front yard, side yard or exterior yard of a lot.”

9. Clause (c) of section 4.19.3 of By-law No. 79-200 is deleted and replaced by the following:

“(c) Within the I Zone, no person shall use more than 33% of the area of the front yard of any lot for parking areas and driveways.”

10. Section 5.9 of By-law No. 79-200 is deleted and replaced by the following:

“5.9 SPECIAL PROVISIONS FOR A GROUP HOME TYPE 1: Any building used for the purpose of a group home type 1 shall comply with all the regulations which apply to the zone in which such group home type 1 is located.”

11. Clause (e) of sections 7.1.2, 7.2.2, 7.3.2, 7.4.2, 7.5.2 and 7.7.2 of By-law No. 79-200 is deleted and replaced by the following:

“(e) Minimum interior side yard width, 1.2 metres”
subject to the provisions of clause a of section 5.1

12. Clause (i) of sections 7.1.2, 7.2.2, 7.3.2, 7.4.2, 7.5.2, 7.7.2, 7.8.2 and 7.9.2 of By-law No. 79-200 is deleted.

13. The following sections are added after section 7.5.2 of By-law No. 79-200 and By-law No. 79-200 is renumbered accordingly:

“7.6 RESIDENTIAL SINGLE FAMILY IF DENSITY ZONE (R1F ZONE).

7.6.1 PERMITTED USES: No person shall within any R1F Zone use any land or erect or use any building or structure for any purpose except one or more of the following uses:

- (a) A one family detached dwelling
- (b) A home occupation in a one family detached dwelling, subject to the provisions of section 5.5
- (c) Accessory buildings and accessory structures, subject to the provisions of sections 4.13 and 4.14
- (d) A group home type 1

7.6.2 REGULATIONS: No person shall within any R1F Zone use any land or use any building or structure except in accordance with the provisions of sections 4 and 5 and the following regulations:

- (a) Minimum lot area 320 square metres.
- (b) Minimum lot frontage
 - (i) for an interior lot 10 metres
 - (ii) for a corner lot 12 metres
- (c) Minimum front yard depth
 - (i) for a one family detached dwelling 3 metres plus any applicable distance specified in section 4.27
 - (ii) for a private garage with driveway access from the front yard 6 metres plus any applicable distance specified in section 4.27

(d)	Minimum rear yard depth	7.5 metres plus any applicable distance specified in section 4.27
(e)	Minimum interior side yard width, subject to the provisions of clause a of section 5.1	0.9 metres
(f)	Minimum exterior side yard width	
	(i) for a one family detached dwelling	3 metres plus any applicable distance specified in section 4.27
	(ii) for a private garage with driveway access from the exterior side yard	6 metres plus any applicable distance specified in section 4.27
(g)	Maximum lot coverage	45%
(h)	Maximum height of building or structure	10 metres subject to section 4.7
(i)	Maximum number of one family detached dwellings on one lot	1 only
(j)	Parking and access requirements	in accordance with section 4.19.1
(k)	Accessory buildings and accessory structures	in accordance with sections 4.13 and 4.14
(l)	Minimum landscaped open space	30% of the lot area"

14. Clause (e) of section 7.8.2 of By-law No. 79-200 is deleted and replaced by the following:

- "(i) for a one family detached dwelling, a semi-detached dwelling or a duplex dwelling, subject to the provisions of clauses a and b of section 5.1 1.2 metres
- (ii) for an on street townhouse dwelling, a triplex dwelling or a quadruplex dwelling 3 metres"

15. Clause (j) of Section 8.1.1, clause (ll) of section 8.2.1, clause (u) of section 8.4.1, clause (hh) of section 8.5.1 and clause (kk) of section 11.3.1, all of By-law No. 79-200, are amended by deleting "Veterinarian office" and replacing it with "Animal clinic".
16. The following section is added after section 8.6.4 of By-law No. 79-200 and By-law No. 79-200 is renumbered accordingly:

"8.6.5 REGULATIONS FOR GASOLINE BARS: The regulations in section 8.6.2 shall not apply to gasoline bars but all of the regulations in section 8.9.3 for gasoline bars in AS Zones shall also apply to gasoline bars in TC Zones."
17. Section 8.9.1 of By-law No. 79-200 is amended by adding the following clause:

"(a) Convenience store accessory to an automobile service station or gas bar"
18. Section 8.9.2 of By-law No. 79-200 is amended by adding the following clause:

"(m) Maximum floor area of a convenience store 200 square metres"
19. Section 8.9.3 of By-law No. 79-200 is amended by adding the following clause:

"(m) Maximum floor area of a convenience store 200 square metres"
20. Clause (j) of sections 11.1.2 and 11.2.2 of By-law No. 79-200 is deleted and replaced by the following:

"(j) Minimum landscaped open space

(i) for an interior lot	67% of the required front yard
(ii) for a corner lot	67% of the required front yard and 67% of the required exterior side yard"
21. Section 12.2 of By-law No. 79-200 is amended by adding the following clauses:

"(j) Maximum height of a one family detached dwelling 10 metres

(k) Accessory buildings and accessory structures to a one family detached dwelling in accordance with sections 4.13 and 4.14"
22. The following section is added after section 18.2 of By-law No. 79-200 and By-law No. 79-200 is renumbered accordingly:

"19 ENVIRONMENTAL PROTECTION AREA ZONE (EPA ZONE).

19.1 PERMITTED USES: No person shall within any EPA Zone use any land or erect or use any building or structure for any purpose except one or more of the following uses:

- (a) conservation use
- (b) existing agricultural use
- (c) wildlife management
- (d) works of a Conservation Authority

19.2 REGULATIONS: No person shall within any EPA Zone use any land or erect or use any building or structure except in accordance with the following regulation:

- (a) Buildings and structures No buildings or structures are permitted unless for flood control purposes in accordance with the regulations of the Conservation Authority having jurisdiction or appropriate government agency. Docks and boat ramps will be allowed subject to the approval of the Conservation Authority and/or appropriate government agencies."

ATTACHMENT #2

CITY OF NIAGARA FALLS

By-law No. 2011-137

A by-law to amend By-law No. 79-200, to introduce regulatory provisions for drive-through facilities.

**THE COUNCIL OF THE CORPORATION OF THE CITY OF NIAGARA FALLS
ENACTS AS FOLLOWS:**

1. Section 2 - Definitions of By-law No. 79-200 is amended by adding the following thereto:
“2.16.1 DRIVE-THROUGH FACILITY means an establishment that is accessory to a restaurant, retail store or financial institution where products or services are dispensed by an attendant or an automated machine, to persons who remaining vehicles that are in a designated queuing lane.”

2. Clause (a) of section 4.19.1 of By-law No. 79-200 is amended by adding the following thereto:

“A drive-through facility accessory to a restaurant or retail store 12 spaces in a queuing lane, measured from where products are dispensed, each with a minimum length of 6 metres and a minimum width of 2.75 metres, a drive-through facility accessory to a financial institution 3 spaces in a queuing lane, measured from where services are dispensed, each with a minimum length of 6 metres and a minimum width of 2.75 metres”

3. Section 4 - General Provisions of By-law No. 79-200 is amended by adding the following thereto:

“4.34 DRIVE-THROUGH FACILITIES: A drive-through facility is permitted in a NC Zone, a GC Zone, a SC Zone, a TC Zone and an AS Zone and shall be separated from the boundary of a residential zone by a minimum perpendicular distance of 10 metres, measured from the speaker box.”