

ISSUE DATE:

February 10, 2014



PL130995

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:	David Haist
Appellant:	Sandra Wendy Whillans
Subject:	By-law No. 2013-154
Municipality:	City of North Bay
OMB Case No.:	PL130995
OMB File No.:	PL130995

APPEARANCES:

Parties

City of North Bay (the "City")

Tambeau Construction Limited and
Melanie Ross

Dr. David Haist

Sandra Whillans

Counsel

P. Leckie

W. Brunton

DECISION DELIVERED BY BLAIR S. TAYLOR AND ORDER OF THE BOARD

INTRODUCTION

[1] Dr. David Haist and Sandra Whillans (the "Appellants") have appealed the decision of the City Council of North Bay to approve a re-zoning application for the property known municipally as 312 Greenwood Avenue (the "Subject Lands"), from a residential zoning of R1 and R3 to a Neighbourhood Commercial Special (C5 sp.) zone in order to allow a new day care facility.

DECISION

[2] For the reasons set out below, the Board will allow the appeal.

BACKGROUND AND CONTEXT

[3] The Subject Lands are designated “Residential” in the Official Plan and currently zoned mainly R1 with a very modest portion being zoned R3.

[4] The Subject Lands are located within a mature residential neighbourhood, have 64 m of frontage onto a local street with no sidewalks, have a depth of 27 m, an area of 0.19 ha, and are improved by an existing vacant building (namely the former Greenwood Baptist Church). The Subject Lands are one lot removed from the intersection of Greenwood Avenue and Beattie Street, are surrounded on three sides with existing residential uses, presently have a large paved parking lot, and an existing 7.47 m front yard setback.

[5] The photographs entered in Exhibit 1 and 3 show that the Subject Lands have asphalt laid down extensively in the front yard such that there is no longer a ditch in front of the church building. The result is that there is no obvious interface between the Subject Lands and the municipal right of way, apparently done to enable additional car parking either in the front yard or on or partially on the municipal right of way. To the east of the church is a driveway with a modest buffer strip at the property line. The driveway leads to an additional paved area at the rear of the property, and thence to the paved parking area at the westerly portion of the Subject Lands. This westerly paving would appear to extend from the face of the Church building to the westerly property line.

[6] The church occupied the Subject Lands for a number of years, but eventually outgrew the site and moved to a new location. Before moving, the church had its peak activity centered on two Sunday services with attendance at the early service being in the range of 140 attendees and 180 at the later morning service. Mid-week activity was quite modest in comparison.

[7] Melanie Ross, with the assistance of Tambeau Construction Limited proposes to re-use the existing vacant building for a day care facility. Ms. Ross currently has her

day care facility in operation at a temporary location (the new Greenwood Baptist Church site) and has at this time 40 children per day, some arriving via two buses and a van, and cared for by a staff of seven employees.

[8] Ms. Ross has had the Subject Lands inspected by the Ministry of Education and told the Board that the maximum number of children that the Subject Lands could be licensed for was: 10 children of 0-18 months, 30 children of 18-30 months, 22 preschool children, and 28 school aged children for a maximum of 90 children. She expects the usual hours of operation to be from 7:00 a.m. to 7:00 p.m., five days a week with the possibility of extended hours (if the need arises) commencing at 6:00 a.m. and ending at 8:00 p.m.

[9] To care for these children a staff of 16 full time and 10 part time employees will be required.

[10] To implement the proposed re-zoning, the Board was provided with a conceptual site plan.

PROCESSING

[11] The re-zoning application was filed with the City and duly circulated both internally and externally.

[12] There were no concerns expressed by the Engineering Department, Economic Development Department, the Fire Department, the Heritage Committee, and the Conservation Authority. The Building Department did not have any concerns with the proposal but would require additional information prior to the issuance of a building permit.

[13] The application duly proceeded to a staff report apparently based on the conceptual site plan provided to the City.

[14] That conceptual site plan was filed as Exhibit 4 to the hearing. It depicts the existing building with proposed exterior site changes including: three separately fenced outdoor play areas (for toddlers, preschoolers, and school aged children); one barrier free parking space in front of the building, four regular parking spaces in front of the building, a "car drop off area" in front of the building, 20 regular parking spaces on the

west side of the building, and a garbage location at the north west corner of the Subject Lands. Thus some 25 parking spaces in total were proposed, along with a “car drop off area”.

[15] A staff report for Council consideration was prepared by the Planning Staff of the City, and it attached a locational map and the existing site plan, (but not the proposed site plan as found in Exhibit 4).

[16] The Planning Staff report considered the Provincial Policy Statement, 2005 (“PPS”), the Growth Plan for Northern Ontario, and the Official Plan, and recommended approval of the requested re-zoning to the Neighbourhood Commercial Special (C5 sp.) zone which would permit:

- Convenience stores
- Day nursery
- Dry cleaning depots
- Local retail stores
- Personal service establishments
- Professional offices and business offices, and
- Restaurants

[17] The “special” provision related to the exemptions from the zoning by-law: the existing front yard of 7.47 m whereas 9 m was required, and the proposed 25 parking spaces whereas 30 spaces were required.

[18] The staff comment with regard to these deficiencies was: “Planning Staff are of the opinion these deficiencies are minor and will not impact the overall use of the site.”

[19] Thus Planning Staff found that the by-law amendment request ... “maintains the general purpose and intent of the City of North Bay’s Official Plan”, and recommended approval to City Council. City Council adopted by-law 2013-154, which is the subject of this appeal.

THE HEARING

[20] During the course of the hearing, the Board heard evidence from six witnesses: the Appellants (Ms. Whillans, and Dr. Haist) both of whom reside on Greenwood Avenue, Yves Lemieux of 335 Elmwood Avenue (whose property backs onto the Subject Lands), the Manager of Planning Services, Melanie Ross, and Rev. Jim Holmes, pastor of Greenwood Baptist Church.

[21] Both Ms. Whillans and Dr. Haist gave evidence in a clear and forthright manner testifying that they had significant concerns with regard to the development proposal as bringing a commercial use into a residential neighbourhood, that the proposed on-site parking would be inadequate, and that the resulting traffic and parking issues on a daily basis would be incompatible with the neighbourhood.

[22] They noted that Greenwood Avenue is a local street, has no sidewalks, and has ditches on either side of the road. They provided photographs of the Subject Lands during summer and winter periods depicting the narrowing of the travelled portion of the local street due to street parking of parishioners of the church, and snow banks. They noted the steep incline of Greenwood Avenue as it approached the stop sign at Beattie Street. They testified that during winter months, the intersection can be the source of “close calls” and drivers have lost traction at the stop sign; being unable to proceed forward and having to back down Greenwood Avenue.

[23] The Appellants recognized that the neighbourhood had for many years co-existed with the Greenwood Church, but advised that the only real source of neighbourhood concern with the church had been one day a week and that being limited to a Sunday morning. At that time they said residents had to take special care when walking, cycling, or driving.

[24] However they pointed out that what was being proposed was substantially different from the operation of the church with its peak event on one Sunday morning per week.

[25] They had the understanding that the maximum number of children would be 94, that there would be 16 full time staff and 12 part time staff, with buses twice a day delivering children between the proposed day care and schools.

[26] They were strongly of the view that there was inadequate parking proposed, that there would be an overflow onto Greenwood Avenue, that Greenwood Avenue being a local street would not be able to accommodate that overflow, especially given the fact that there were no sidewalks, deep ditches, a narrow local street with a steep grade leading to Beattie Street.

[27] In view of these concerns, they were quite surprised that the City had not required that a traffic study be prepared as part of the development application.

[28] Also of concern, was the fact that the zoning by-law adopted by the City, provided other alternative permitted uses which, should the day care facility fail, would be available to other potential users for such uses as: convenience stores, dry cleaning depots, local retail stores, and restaurants, which they told the Board they felt were incompatible with a mature residential neighbourhood.

[29] The Board then heard from Mr. Lemieux, whose property backs onto the Subject Lands.

[30] Mr. Lemieux has an interest in property management and construction, as he owns several properties in North Bay. It is that interest that led him into direct contact with the Official Plan, Zoning By-law, and the Committee of Adjustment.

[31] He described the neighbourhood as a highly desirable residential area at the lowest residential density, well treed, and having a rural feel with a local road, no sidewalks, and deep ditches on either side of the streets. Such a location he said is not the appropriate place for a large commercial establishment. He said that if the by-law amendment were approved by the Board it would change the character of the neighbourhood and that if the day care were to cease, then the neighbourhood would be faced with a number of other potential commercial businesses that would also be out of character with the area.

[32] In reviewing the City staff report, he noted that s. 2.2.1.6 of the Official Plan discusses Neighbourhood Commercial development and provides the following:

[33] Retail and personal service uses to serve the convenience needs of the local population in residential areas such as "corner" stores, variety stores, personal services,

dry cleaning pick-up stores may be permitted in a residentially designated area by an amendment to the Comprehensive Zoning By-law, which shall be approved by the municipality only when it has been demonstrated that:

- a) The proposed store (or stores) is warranted in the particular location on the basis of the location and type of other retail and personal services establishments in the vicinity of the proposed store.
- b) The proposed location would minimize any adverse effects upon adjacent residential areas by way of landscaping, fencing and appropriate lighting.
- c) Wherever possible, such uses should be located on the corner of two streets.
- d) The proposed commercial site is not great than four tenths (0.4) of a hectare.
- e) Adequate parking can be provided.

[34] Mr. Lemieux pointed out that the Subject Lands were not located on a corner lot, that the conceptual site plan had not, in his view, minimized any adverse effects on adjacent neighbours as the proposed site plan failed to implement the Zoning By-law as it did not provide the required three metre landscape buffer strip around the Subject Lands or provide appropriate fencing on the proposed site plan, that the 25 parking spaces shown on the proposed site plan included parking spaces in the front yard, (not allowed by the Zoning By-law), included the “car drop off area” which was actually on the municipal right of way, and that the Zoning By-law did not allow parking in the side yard setback, whereas on the proposed site plan there were 10 parking spaces up to the property line to the adjoining residential property to the west.

[35] Also looking at the Official Plan, Mr. Lemieux referenced s. 2.1.5 which he advised stated: “The broad purpose of the neighbourhood is to provide for the day-to-day needs and lifestyle requirements of the residential environment, and to protect that environment from conflicting land uses and through traffic.” Because of the traffic and parking issues, and non-compliance with the provisions of the Zoning By-law, he felt this policy of the Official Plan was not being met.

[36] Turning to the specifics of the Zoning By-law, Mr. Lemieux first referenced the amenity provisions found in s. 6.1 General Provisions:

6.1.1.2 : A strip of land not less than three metres in width along the lot line within the commercial zone and adjacent to the residential zone shall be adequately landscaped.

[37] Addressing the proposed site plan in Exhibit 4, he noted the absence of the required landscape strip on a portion of the northerly boundary abutting residential dwellings, and along the entire westerly boundary abutting a residential dwelling.

[38] From the Commercial (C5) Zone, Mr. Lemieux referenced s. 6.6.2.4 with regard to the front yard setback, and noted that it was required to be a minimum of 9 m whereas only 7.47 m is being provided to the existing building.

[39] In addition to not meeting the minimum requirement for a front yard setback he advised the Board that s. 3.33 of the Zoning By-Law read as follows:

a. Where a lot in any Commercial, Industrial or Institutional zone fronts on a street opposite a Residential or Rural zone, or abuts a Residential or Rural zone, the following amenities are required:

- i. The front yard and a strip of land, not less than three (3) metres in width along the side and rear lots lines within a Commercial zone ...shall be adequately landscaped except where used for entrances and exits;
- ii. No employee or visitor parking spaces, loading spaces or outside storage is permitted in the front yard or side yard adjacent to the Residential or Rural zone.

[40] With regard to these provisions, he demonstrated that Exhibit 4 failed to provide the required full three metre landscape strip at the north and west property lines abutting the residential uses, and in fact on the west side, 10 parking spaces were to be located up to the property line with only a chain link fence proposed to separate the parking lot from the abutting residential side and back yard.

[41] With regard to the front yard, he noted that Exhibit 4 showed a barrier free (handicapped) parking space in the front yard contrary to the zoning by-law. He also pointed to four other "parking" spaces that appear to be wholly located on the municipal right of way, and could not count as "parking" spaces without special permission and an encroachment agreement with the City. Similarly he noted the "car drop off area" was

not located on the Subject Lands but rather wholly on the municipal right of way, which to be lawful, would require an encroachment agreement with the City.

[42] Again with regard to the front yard, he pointed to the westerly portion of the Subject Lands where the proposed site plan in Exhibit 4 laid out six parking spaces that were either wholly or partially within the front yard setback, again in his opinion contrary to the Zoning By-law.

[43] Thus in his opinion there were a number of fundamental areas of non-compliance between the Zoning By-law requirements and the proposed site plan that had not been identified by City staff in their review, and consequently the staff report that City Council had before it never raised those issues.

[44] Thus he recommended that the Board allow the residents' appeals and overturn the decision of City Council, which, in his opinion did not follow the Official Plan nor comply with the City's own Zoning By-law.

[45] The Board then heard from the City's Manager of Planning Services, Beverley Hillier. The staff report to Council had been prepared by one of her staff, but reviewed and signed off by her.

[46] With regard to the testimony of Mr. Lemieux, the Manager of Planning Services did agree that the proposed site plan did show a parking space in the front yard, which was contrary to the Zoning By-law. She confirmed that the four parking spaces in front of the building were actually on the municipal right of way and could not be counted toward the parking requirement of the Zoning By-law for the Subject Lands. She confirmed that the "car drop off area" was within the municipal right of way. With regard to the landscaping strip of three metres, she noted that it was not fully shown on the proposed site plan, particularly the proposed westerly parking which parking was right to the property line. She also confirmed that the site plan did show six parking spaces at the westerly portion of the Subject Lands that were either wholly or partially within the required front yard setback.

[47] Thus, while the Council adopted Zoning By-law 2013-154 required a minimum of 25 parking spaces, she agreed that based on the proposed site plan in Exhibit 4, it

would appear that perhaps only 14 parking spaces could be provided that would meet all the City's Zoning By-law standards.

[48] Notwithstanding this, she had done an inventory of other child care locations in North Bay, and was of the view that the number of parking spaces was appropriate and that the application represented good planning.

DECISION

[49] With regard to the facts outlined above, the Board has considered the PPS, the Growth Plan for Northern Ontario, the Official Plan and the Zoning By-law for the City of North Bay. Also as required by the *Planning Act*, the Board has had regard for the decision of City Council and the supporting information and materials before Council.

[50] The Board finds that it prefers the evidence of Dr. Haist, Ms. Whillans and Mr. Lemieux.

[51] The Board finds that this is a mature, residential neighbourhood that has co-existed with the former Greenwood Baptist Church. It would appear to the Board that the essence of that co-existence has been the recognition that one day of the week (and really only one morning) required special care and attention by the neighbours with regard to traffic, parking, and pedestrians on the local street.

[52] The Board finds that the rezoning by-law enables a broad range of commercial uses such as restaurants, convenience stores, local retail stores, etc. and not just a day nursery. Some of those uses at this location would not generally be compatible with the established residential character of the neighbourhood, on a local street, and this ought to have been addressed by City staff at a much earlier stage.

[53] The Board finds that this proposal will allow a maximum of 90 children to be cared for on-site with approximately 16 full time staff and 10 part time staff. While those numbers pale in comparison to the usual Sunday congregational attendance, the Board notes that such care will be provided five days per week and not just on a Sunday morning.

[54] The City's Zoning By-law (which implements the City's Official Plan) provides mandatory parking provisions. Section 3.26 stipulates the minimum number of

automobile parking spaces on the same lot as the building is located. In this case the evidence is the usual by-law standard of 30 parking spaces.

[55] The Board finds that the proposal will generate significant weekday traffic in the morning and afternoon peak periods, on a local street, with no sidewalks, with ditches on either side of the paved surface, and to a destination that, based on the proposed site plan in Exhibit 4, would appear to be able to provide only 14 car parking spaces on the Subject Lands, (being 11 less than the Council adopted by-law requiring 25 parking spaces) and less than 50% of the usual zoning by-law requirement of 30 parking spaces.

[56] It would appear to the Board that at the maximum potential of the Subject Lands as a day nursery, if all of the anticipated 16 full time employees drove to work, the proposed site plan for the Subject Lands with 14 parking spaces could not accommodate the staff parking needs, ignoring in total, any parents, guardians, and buses dropping off up to 90 children for care.

[57] The Board disagrees with the staff planning report that stated that the zoning amendment request “maintained the general intent and purpose of the Official Plan”. That is one of the four tests of s. 45(1) test for a minor variance. It is not the test for an amendment to a zoning by-law. Section 34 requires a proposed zoning by-law to conform to the Official Plan, not just meet its general intent and purpose.

[58] The Board finds that the rezoning application based on the proposed site plan does not conform to the Official Plan with regard to s. 2.1.5 which requires the residential areas to be protected from conflicting land uses and through traffic.

[59] The Board finds the proposed site plan to implement the rezoning does not comply with a number of fundamental City zoning requirements and if implemented as proposed would only ultimately lead to conflict with abutting residences and the neighbourhood. Thus the Board finds that rezoning does not conform to s. 2.2.1.6 of the Official Plan as adequate parking is not provided, and that adverse impacts are not minimized for adjacent residential areas.

[60] The Board finds that in these circumstances, the development proposal does not constitute good planning.

ORDER

[61] Thus the Board allows the appeal in whole and hereby repeals by-law 2013-154.

[62] This is the Order of the Board.

“Blair S. Taylor”

BLAIR S. TAYLOR
MEMBER