Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: September 16, 2014 **CASE NO(S).:** PL140336

PROCEEDING COMMENCED UNDER subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Bonnie Chapeski
Subject:	Interim Control By-law No. 2014-10
Municipality:	Township of McNab-Braeside
OMB Case No.:	PL140336
OMB File No.:	PL140336

Heard: September 11, 2014 in Arnprior, Ontario

APPEARANCES:

Parties	**Counsel**
Bonnie Chapeski	Kenneth Cramer
Township of McNab/Braeside	Janet Bradley

MEMORANDUM OF ORAL DECISION DELIVERED BY M. C. DENHEZ ON SEPTEMBER 11, 2014 AND ORDER OF THE BOARD

1. INTRODUCTION

[1] In the Township of McNab Braeside ("the Township"), in the County of Renfrew ("the County"), Bonnie Chapeski ("the applicant") challenged an interim control by-law ("ICB") addressing residential uses in industrial zones.

[2] The impetus for the ICB had come from her 2013 Site Plan application, for an "accessory dwelling" in an industrial zone. It was the second time she had proposed such a project:

- The first time, she had obtained approval to build another "accessory dwelling" (2008) on her abutting industrial property,

- but she later sold that dwelling (2013),

- and that other industrially-zoned property was now occupied by a family with no ongoing connections with any industrial use.

[3] In 2013, she applied for a second "accessory dwelling." The Township felt that her first project underscored a flaw in its zoning by-law. The Township Official Plan ("TOP") designated this area for industry, not residences.

[4] Council then adopted the ICB, essentially freezing residential applications in the area, pending a study of accessory dwellings in industrial zones. The applicant appealed to the Ontario Municipal Board ("the Board").

[5] At the hearing on the merits, the applicant was represented by counsel, for whom she was the only witness. The Township was also represented by counsel, with the support of County planner Bruce Howarth (here, County planners provide planning services to local municipalities under contract).

[6] The Board has carefully considered all the evidence, the decision of Council, the supporting information/material thereto, and the submissions of both sides. Notwithstanding the eloquent arguments of counsel for the applicant, the Board finds that the ICB meets applicable criteria. The wording of the existing By-law did not achieve the stated objectives of the TOP, as graphically demonstrated by past experience. That is exactly the kind of context for which the legislature intended ICB’s. The appeal is dismissed. The details and reasons are outlined below.

2. BACKGROUND

[7] The subject property, at 430 Russett Drive (east-west), is near the boundary of the Town of Arnprior. The TOP designates this area for "Highway Commercial/Light Industrial" uses. The area is in fact used for those purposes:

- the lands west of the subject property have enterprises for concrete production and industrial boring,

- while east of the subject property, there are facilities for ministorage and other industrial uses.

[8] The area had once been zoned General Industrial (“GM"), but is now zoned Light Industrial ("LM"). The y-law lists various allowed industrial uses, though "office" is not one of them (offices are permitted only if they are accessory to an industrial use). The area is also subject to Site Plan control.

[9] In 2006, the applicant bought three contiguous lots in that zone, facing Russett Drive. The three had originally been a single property, but had been severed by a previous owner (1993). They were comprised of one large lot in the middle ("middle lot"), plus one smaller lot on each side to the east and west ("east lot" and "west lot").

[10] The applicant and her family operated two businesses there. One, under the name of Chapeski Contracting, cleared snow in the winter. The other, operating during the other seasons under the name of Mister Dirt, was in landscape supply, including topsoil, aggregates, and some excavation. Various materials and equipment were stored on site, on the west and middle lots.

[11] In 2007, the applicant proposed an "accessory dwelling" to be built on the east lot (414 Russett Drive). Township Zoning By-law No. 2010-49 foresees accessory dwellings – on condition that they are:

> naturally and normally incidental, subordinate and exclusively devoted to supporting the principal use… and located on the same lot therewith.

[12] At the time, there was apparently no dispute that the substantial house, proposed for the east lot, would nonetheless be "accessory" to the family businesses on their two other lots. However, there was another problem:

- The businesses were being operated from the west and middle lots,
- whereas the By-law insisted that an accessory dwelling had to be "on the *same* lot" as the industrial operation to which it was "accessory."

[13] Instead of applying for a straightforward minor variance, the applicant and the Township agreed on a different approach, purportedly meeting that requirement. Although the applicant's house would have an integral garage, a further detached one-car garage would also be built (barely 10 feet by 21 feet) – to be labeled an "automotive-commercial garage" for the business's vehicles/equipment. The parties agreed to characterize the house as "accessory" to this "automotive-commercial garage."

[14] The Board has little hesitation in finding that characterization fictional. The dwelling was dramatically larger and more important than this little structure (not much larger than a garden shed) to which it was ostensibly "incidental" and "subordinate." Furthermore, after the property changed hands (as described later), the new owners told the Township that in fact, "an automotive-commercial garage does not exist, nor has ever existed" (March 2014). However, there appeared to be consensus at the time that this arrangement was desirable for the appropriate development and use of the property, that it maintained the intent of the TOP and the By-law, and was minor in nature.

[15] The corresponding Site Plan was approved accordingly. The house was built in 2008. However, the applicant did not build the detached garage. The Township felt

compelled to launch suit on that account, for enforcement of the Zoning By-law and Site Plan Agreement. The garage was eventually built (2009).

[16] The applicant testified that family members later encountered medical difficulties, leading them to conclude that they needed to dispose of some of their real estate.

[17] In 2013, they sold the house (including its garages and its lot at 414 Russett Drive) to the Bondarchuk family, which now uses it as the family home, with no apparent connection to any industrial uses.

[18] In early September, 2013, the applicant discussed a new project with municipal planning staff, in a pre-consultation. This new proposal was for another "accessory dwelling", this time on the middle lot. The plans for the 2344 square foot house illustrated a “living room”, “family room”, bedrooms, “master bath” etc.; there was also a small “office”. The two-car garage was labeled "implement storage", but there was nothing else to distinguish these plans from those of a family home.

[19] Revised plans were submitted in late September 2013, along with a formal application for Site Plan approval. On the plans, the “living room” was relabeled "office", and the former "office" was now called "file storage", but the appearance was identical.

[20] Various discussions ensued with municipal planning staff, with yet further plan adjustments being drafted in early January, 2014, then again later that month. There were also separate (and apparently independent) discussions with the Township's Chief Building Official. The applicant testified that by late January, 2014, she believed the project had reached prospective compliance with all physical requirements of the existing By-law. She added that, although no revised Site Plan application had been formally resubmitted (since the application of late September), she was ready to do so. However, events intervened.

[21] The Township learned about the sale of 414 Russett Drive to the Bondarchuks. The planner said the Township became aware around early October, 2013. The County planner summarized the municipal reaction:

> The way the Zoning Bylaw was worded was vague enough that it still wasn't enough to prevent a young family with children from moving into an industrial area…. We took every precaution we could, but it happened anyway.

[22] The planner told the Board that among other concerns, the existing By-law did not address the maximum size of an accessory dwelling, nor any parameters to indicate whether it would be disproportionate to the industrial use itself.

[23] On February 4, 2014, Township Council adopted Interim Control By-law No. 2014-10. It froze applications for any dwelling in an industrial zone:

> No person shall use or cause or permit the use of any lands, building or structure within lands zoned LM or GM in the Township's Zoning By-law for any residential purpose, except such residential purpose for which the land, building or structure is being used on the day this By-law is passed.

[24] Under s. 38 of the *Planning Act* ("the Act"), an ICB can be enacted for a maximum of one year, with a potential one-year renewal. The Act also calls for a study. In this case, Council directed planning staff:

> to review and/or study land-use planning policies relating to residential areas in the LM and GM Zones… and to consider whether such residential uses are compatible with industrial uses and/or whether performance standards are required to ensure compatibility;
>
> the purpose of the review and/or study shall be to determine the appropriateness of the existing policies in terms of goals and directives of the Provincial Policy Statements, the Township's Official Plan and the intended development of land within the (industrial) zones and make recommendations to Council as to whether amendments to the Zoning By-law are required….

[25] The applicant appealed to the Board.

3. CRITERIA

[26] The Act offers only limited guidance to the Board, concerning the criteria on which to assess an appeal of an ICB. Section 38 opens with a reference to the only statutory precondition listed, namely that there be “a review or study”:

> 38(1) Where the council (has)… directed that a review or study be undertaken in respect of land use planning policies…, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.
>
> 38(2) The council of the municipality may amend an interim control by-law to extend the period of time during which it will be in effect, provided the total period of time does not exceed two years from the date of the passing of the interim control by-law.
>
> 38(4) Any person or public body… may, within sixty days from the date of the passing of the by-law, appeal to the Municipal Board by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection.

[27] The Board has usually considered six main factors:

- strict interpretation,
- planning rationale,
- compliance with official plans,
- a fair and expeditious study,
- urgency,
- and the availability of alternatives.

4. ANALYSIS

[28] Counsel for the applicant characterized this matter as comprising two questions:

- "Does the Interim Control By-law stand?" and
- "Is the Chapeski application frozen?"

[29] Counsel for the applicant argued that, as of January, 2014, the applicant's application was complete, and that the applicant was entitled to approval. He acknowledged that "the By-law clearly needs attention", but called the Township's response – namely this ICB – an overreaction. "It's overreaching."

[30] The Board offers two preliminary observations. First, one could quibble with the contention that an acceptable Site Plan had crystallized. Technically, although there were allusions to potential Board consideration of a draft Site Plan *other* than the one filed in September 2013, the Board has no such formal document before it. No revised Site Plan application was filed before the ICB was adopted, nor after.

[31] Second, as to whether the ICB was an overreaction, s. 38 of the Act has often been described as a blunt instrument; but it is the instrument which the legislature has provided. Although counsel for the applicant argued eloquently that the Township should have pursued alternatives to an ICB, he offered only one example, namely a Township announcement that it would enforce its Site Plan Agreements more vigorously. The Board was not persuaded that this would satisfy the policy requirements at hand, or that it was an alternative that should pre-empt an ICB.

[32] However, this decision does not rest on the above parenthetical observations, but on the ICB itself. It has often been said that the purpose of ICB's is to stop a problem from getting out of hand, and to provide breathing space during which a study can be done to determine the appropriate planning policy and controls for dealing with the situation. Although ICB's are to be given a strict interpretation, there was no

compelling evidence here that the Township's measure stepped outside those parameters; nor was there any evidence that the study would be biased or slow, or that the question was not immediate.

[33] Instead, the focus of debate was on the planning rationale, in light of the TOP. The TOP expresses one "objective" – and only one objective – for areas designated Highway Commercial/ Light Industrial:

> To reserve sufficient lands for future commercial and light industrial development in order to diversify and strengthen the economic base of the Municipality.

[34] The TOP's only reference to residential use within that designation is to "an accessory dwelling unit for a caretaker, owner or employee." The Board has no difficulty in finding that within this TOP designation, any residential use is specifically exceptional, and conditional on being "accessory."

[35] In short, new stand-alone dwellings in an industrial zone plainly offend the TOP.

[36] Yet that is exactly what the applicant produced the last time – and under the existing By-law wording, the Township had an understandable concern that there was nothing to stop events from repeating themselves.

[37] That is not to suggest any bad faith on the part of the applicant and her family. What happened on the east lot, at 414 Russett Drive, was said to be the result of a family emergency (which started with a medical problem), and the Board has no reason to believe otherwise.

[38] Nonetheless, the Board finds that the Township's circumstances were exactly the kind for which ICB's were intended. If ICB's cannot be used to address potential loopholes in the zoning framework – loopholes which clearly compromise the Official Plan – then it is difficult to conceive what else ICB's might have been intended for.

[39] The Board adds that, in accordance with the Act, the task of developing an appropriate planning response requires study and consideration. The question in this case is whether that rationale also extends to the applicant's property, and “whether the Chapeski application is frozen.”

[40] As a general rule, s. 38 ICB's apply to all properties in a described class. This ICB would therefore apply to the applicant's property, unless there was some exceptional reason to find otherwise. For example, an argument might be made if the cause for concern, underlying the ICB, failed to apply to a given property. Another argument might arise if the subject property had been through a Board decision that had already studied it in depth. The Board finds no such exceptional circumstances here. The ICB applies to the applicant's property.

[41] In finding that there are sufficient grounds for a study and an ICB, the Board is not making a determination on the long-term merits of any new Township zoning initiative here. Furthermore, although the applicant’s plans are currently delayed, the Board is not making a determination on whether some future reconfigured Site Plan might be appropriate in due course.

ORDER

[42] The appeal is dismissed.

“M. C. Denhez”

M. C. DENHEZ
MEMBER