

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 17, 2015

CASE NO(S):

PL150532

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Y & Z Zahavy Holdings Inc.
Subject:	Request to amend the Official Plan – Refusal of request by City of Niagara Falls
Existing Designation:	Residential
Proposed Designated:	Special Policy Area
Purpose:	To permit a residential development with a density of 109 units per hectare
Property Address/Description:	5971 Dorchester Rd
Municipality:	City of Niagara Falls
Approval Authority File No.:	AM-2014-004
OMB Case No.:	PL150532
OMB File No.:	PL150532
OMB Case Name:	Y & Z Zahavy Holdings Inc. v. Niagara Falls (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Y & Z Zahavy Holdings Inc.
Subject:	Application to amend Zoning By-law No. 79-200 – Refusal of Application by City of Niagara Falls
Existing Zoning:	Institutional (I) Zone
Proposed Zoning:	Residential Apartment 5C Density (R5C) Zone
Purpose:	To permit the development of a four storey and five storey apartment building with a maximum of 154 dwelling units
Property Address/Description:	5971 Dorchester Rd
Municipality:	City of Niagara Falls
Municipality File No.:	AM-2014-004
OMB Case No.:	PL150532
OMB File No.:	PL150533

Heard: October 19 , 2015 in Niagara Falls, Ontario

APPEARANCES:

Parties

Counsel

Y & Z Zahavy Holdings Inc.
("Proponent")

Patrick Bakos

City of Niagara Falls ("City")

Ken Beaman

DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD

INTRODUCTION

[1] The Proponent is the owner of a 1.41 hectare ("ha") parcel of land municipally known as 5971 Dorchester Road in the City of Niagara Falls. These lands were formerly occupied by the Diamond Jubilee public school. However, when this school was rendered surplus by the local School Board it was conveyed a number of times and is currently used for a day care and a Montesorri School.

[2] The lands to the south, west and east are developed with single detached dwellings and, to the north, a 6 story apartment building exists along with a number of commercial uses fronting on nearby Lundy's lane.

[3] The Proponent is seeking amendments to the City's Official Plan ("City OP") and Zoning By-law to develop the site with a 4 story and a 5 story apartment building having a total of 154 units.

[4] The Official Plan Amendment ("OPA") and the Zoning By-law ("ZBA") which I am being asked to approve are set out at Tabs 24 and 25 respectively of Exhibit 1 filed in this proceeding.

[5] The land in question is designated Residential in the City OP. Apartment buildings, up to 6 storeys in height, and with densities up to 100 units per ha, can be considered on residentially designated lands which front onto an arterial road, are located on a transit route and are in proximity to commercial areas. The Proponent is requesting a Special Policy Area designation to permit the apartment development with a density of up to 109 units per ha.

[6] The parcel is zoned Institutional (I) which permits a number of uses including a Community Building, a Private Club and a Funeral Home. The request is to change to a Residential Apartment 5C Density (R5C) Zone with site specific regulations for front and rear yard depths, side yard width, landscaped open space, number of buildings, parking and balcony projections.

[7] Notwithstanding a City Planning report ("Staff Report") dated May 12, 2015 which recommended the proposal, City Council did not approve it. No reasons were given at the time the decision was made but, in the Notice of Refusal sent following Council's decision, the justification was that the proposal was an overdevelopment of the site, was not appropriate for the neighbourhood and would have a negative impact on traffic.

[8] Council's decision was then appealed by the Proponent to the Ontario Municipal Board ("Board").

THE EVIDENCE

[8] In support of the changes requested, Jeffrey Kenny, of Strategy 4 Inc. and Alex Herlovitch, Director of Planning for the City, provided expert land use testimony, Chirag Patel, an engineer with Flora Designs Inc. provided expert engineering evidence relating to functional servicing and storm-water management and Jeff Munk, an engineer with J. M. Munk Engineering provided expert traffic engineering testimony.

[9] From a planning perspective, Messieurs Kenny and Herlovitch testified, *inter alia*, that the OPA and ZBA were consistent with the Provincial Policy Statement, 2014

(“PPS”), conformed to the Growth Plan for the Greater Golden Horseshoe (“Growth Plan”) and the Regional and City Official Plans and represented good planning.

[10] From a servicing perspective, Mr. Patel testified that the City’s infrastructure is adequate to accommodate the development; that the City Engineer is satisfied with the servicing being proposed; and that such servicing complies with all City and Provincial requirements.

[11] In relation to traffic and parking, Mr. Munk pointed out that City staff has no difficulty with the proposal, that any increase in vehicular queuing along Dorchester Road is not significant, and, based on the proxy surveys conducted, it is expected that the parking demand for the proposed development would be lower than zoning by-law requirements. He also commented that the City typically accepts parking proposals within 10% of by-law requirements.

[12] Although opposed to the relief sought, the City did not call any witnesses to support its position.

[13] Four area residents spoke, very briefly as participants; two raised questions which were answered by Mr. Patel and two reiterated their concerns with traffic congestion.

ANALYSIS AND DISCUSSION

(i) PPS and Growth Plan

[14] The contemplated development, in my view, is entirely consistent with the PPS. It provides intensification in a settlement area, is transit supportive, provides a range of unit types, can be serviced with existing infrastructure and does not cause any environmental or public health and safety concerns.

[15] As for the Growth Plan, the Staff Report pointed out that since the City has not yet met its residential development target, the development of multiple-unit housing within established areas of the City, like the one proposed in this case, is necessary.

[16] I am satisfied that what is before me is consistent with and conforms to Provincial policy.

(ii) City OP

[17] In my view, the focal point of the City OP for purposes of the contemplated development is s. 1.15.5(iii). This provision outlines various criteria to be considered when assessing proposed apartment buildings. Matters such as arterial road frontage, public transit routes, proximity to commercial areas, setbacks and parking are all factors which come into play.

[18] The expert planning evidence I heard in this case confirmed that the requisite compliance in relation to s. 1.15.5(iii) exists.

[19] Furthermore, the gradation of building heights between the 6 story building north of the site and the single detached homes south of the site, the extensive landscaping around the site's perimeter and the efficient use of infrastructure all contribute to the proposal's conformity with the City OP and justify the modest increase of 14 dwelling units.

(iii) Resident Concerns

[20] During the extensive consultative process leading up to this hearing, concerns were expressed by area residents and City staff. Those concerns were squarely addressed by the Proponent and changes were made to the original proposal submitted.

[21] For example, density went from 124 units per ha to 109; actual unit numbers decreased from 174 to 154; a 6 story building was reduced to 5 and a 5 story building was reduced to 4; and setbacks were increased. In fact, the ZBA contains four regulations (front yard depth, rear yard depth, northerly interior side yard and southerly interior side yard) which are greater than what is required.

[22] The larger setbacks to the west and south lot lines are particularly noteworthy. They will reduce the overlook of the proposed buildings over nearby dwellings and will allow for the preservation of mature trees in these yards.

[23] The Proponent also reconfigured the site's ingress and egress as requested by City staff. Instead of two points of access/exit only one will exist and it will be, as required by the City, across from Spence Street.

[24] Although there will be a modest increase in traffic delays as a result of the development, I am not satisfied that such delays should override the other planning merits of the proposed development which, in my estimation, are persuasive.

(iv) Council's Decision

[25] Section 2.1 of the *Planning Act* ("Act") stipulates that I am to have regard to the decisions of Council. The Divisional Court, in *City of Ottawa v. Minto Communities Inc.* [2009] O.J. No. 4913 has provided the requisite guidance as to the meaning of this phrase.

[26] In paragraph 33 of that decision Aston J. pointed out that the words "have regard to" do not, by themselves, suggest more than minimal deference to Council's decision. However, he then went on to say that in the context of the Act and balancing the public interest mandates of the Board and the municipality, I should scrutinize and carefully consider the Council decision. When I do so in this case, I would note that there was no planning evidence before Council upon which it could rely to support the decision made. Moreover, the expert evidence I have heard in this hearing in support of the relief

sought was un-contradicted by any other expert evidence. As Aston J. also stated in paragraph 33 of *Minto, supra*, "...the Board does not have to find that the decision of Council is demonstrably unreasonable to arrive at an opposite conclusion."

DISPOSITION

[27] Based on all of the foregoing therefore, I do not agree that Council's decision should be sustained. Accordingly, it is ordered that:

- (a) The OPA is approved;
- (b) City By-law No. 79-200 is amended in accordance with the ZBA; and
- (c) The appeal by the Proponent is allowed.

"Steven Stefanko"

STEVEN STEFANKO
VICE CHAIR

If there is an attachment referred to in this document,
please visit www.elfto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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