

**Ontario Municipal Board**  
Commission des affaires municipales  
de l'Ontario



**ISSUE DATE:** October 11, 2016

**CASE NO(S):** PL160493

**PROCEEDING COMMENCED UNDER** subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Nicola Clarizio
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	852 Upper Wentworth St
Municipality:	City of Hamilton
Municipal File No.:	A-56/16
OMB Case No.:	PL160493
OMB File No.:	PL160493
OMB Case Name:	Clarizio v. Hamilton (City)

**Board Rule 107 states:**

**107. Effective Date of Board Decision** A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

**Heard:** September 6, 2016 in Hamilton, Ontario

**APPEARANCES:**

**Parties**

**Counsel\*/Representative**

Nicola Clarizio

Teresa Clarizio

City of Hamilton

Patrick MacDonald\*

**DECISION OF THE BOARD DELIVERED BY STEFAN KRZECZUNOWICZ AND STEVEN STEFANKO**

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## **MATTER BEFORE THE BOARD**

[1] The matter before the Board is an appeal by Nicola Clarizio (the “Proponent”) of a decision by the Hamilton Committee of Adjustment (the “Committee”) to deny a variance allowing the second floor of a building at 852 Upper Wentworth Street (the “subject property”) to be converted from a commercial to a residential use (the “Requested Variance”).

## **BACKGROUND**

[2] The Proponent is a longstanding resident of Hamilton. He owns and operates Baresa Kitchens, a local cabinet making business. In 1972, he acquired land at 852 Upper Wentworth Street which was subsequently severed into two parcels: 852 Upper Wentworth Street, the subject property; and 129 Fieldway Drive, where in 2000, he built a single detached house and where he currently lives with his wife. The Fieldway property is situated immediately behind or west of the subject property.

[3] The subject property contains a 3,100 square foot, two-storey detached building with a basement. The property is designated as “Neighbourhoods” within a “Sub Regional Service Node” in the Urban Hamilton Official Plan (the “Official Plan” or the “UHOP”) and is zoned as “Urban Protected Residential District Modified” in Hamilton Zoning By-law No. 6593. In 1995, the subject property was rezoned to allow for a first floor commercial use and a second floor residential use. However, the Proponent felt more income could be generated from the property if a commercial use applied to the first and second floors; as a result, the property was rezoned in 1998, on a site specific basis, by By-law No. 98-261 (“ZBL”), to allow for that with the residential second floor use being removed as a permitted use.

[4] Following a complaint regarding a second floor residential use being maintained at the subject property, the City inspected the site and issued a notice on January 7, 2016, requiring the Proponent to ensure that the property did not have a residential unit on the second floor in violation of the ZBL (Exhibit 1, Tab 42).

[5] On February 18, 2016, the Proponent applied for a minor variance to permit a residential use on the second floor as had existed in the mid-90s (Exhibit 1, Tab 3). The variance was denied by the Committee on April 7, 2016 (Exhibit 1, Tab 6) and the Proponent subsequently appealed the Committee's decision to the Ontario Municipal Board (the "Board").

## **POSITION OF THE PARTIES**

[6] The City's position was that the Proponent, in order to obtain relief from the provisions of the zoning by-law, should apply for a zoning by-law amendment rather than a minor variance. Evidence in support of this position was provided by Michael Fiorino, a planner with the City, who was qualified as an expert in land use planning.

[7] Mr. Fiorino was of the opinion that the application is consistent with policies 1.1.3.1 and 1.1.3.2 of the Provincial Policy Statement, 2014 ("PPS") regarding growth in settlement areas and represents an efficient use of the subject lands and is appropriate for the available infrastructure (PPS policy 1.1.1).

[8] In relation to the four tests under s. 45 (1) of the *Planning Act* ("Act"), Mr. Fiorino was of the opinion that the application maintains the general intent and purpose of the Official Plan, specifically policies E.2.3.2.2, 2.3.2.14, and E.4.6 of Volume 1 that permit a broad mix of land uses, including a range of commercial and residential uses within buildings, but that it was not minor and did not maintain the general intent and purpose of the ZBL. He also indicated that he had no opinion as to whether the proposal was desirable for the appropriate development of the land.

[9] Mr. Fiorino took the view that the requested variance cannot meet the general intent and purpose of the ZBL as the by-law prohibits a residential use as a result of the change made in zoning in 1998. He also noted that the 1998 rezoning was approved through a zoning amendment and not a minor variance; it follows, according to him, that a similar process should be used if the rezoning is to be reversed.

[10] Mr. Fiorino was also of the opinion that the application is not minor. His analysis in this regard focused primarily on the effect an approval would have on parking. He testified that there are four parking spaces on the subject property. Under existing parking requirements, one space would be required to accommodate a residential unit on the second storey but no additional spaces would be required for the first floor commercial use.

[11] The Proponent's position on the matter was that the relief he is seeking is minor because he is simply asking the City to reintroduce a use that existed on the subject property between 1995 and 1997 (when the upper floor was zoned residential and the main floor zoned commercial). He did not know why the 1998 rezoning was done through a zoning amendment rather than a minor variance as his actions at the time were guided by the advice of his representative. Moreover, according to the Proponent, times have changed since the mid-1990s; it has become increasingly difficult to secure a commercial lease for the upper floor and he needs the space to house his extended family. Finally, the City requires a fee of \$10,900 to apply for a zoning amendment that the Proponent feels is both onerous and unnecessary particularly when, in his opinion, the relief sought can be accommodated through a minor variance application.

## **DISPOSITION OF THE BOARD**

[12] The Board finds in favour of the Proponent and will authorize the Requested Variance. The reasons supporting the decision follow.

## **ANALYSIS**

[13] It is, in the Board's opinion, noteworthy that Mr. Fiorino views the Requested Variance as meeting the intent and purpose of the Official Plan and that he could not opine as to the desirability test set out in s. 45(1) of the Act. His main concern, from a s. 45(1) perspective, was that the proposal, because of parking and the need for a thorough rezoning review, is not minor and, because the residential second floor use is

not currently permitted, the intent and purpose of the by-law is not being met. The Board is not persuaded.

[14] In the Board's view, the appropriate planning consideration to be applied when assessing whether a variance is minor in cases of this type, is whether it creates an unacceptable adverse impact.

[15] No evidence was presented to show that any type of adverse impact would be created by the second floor residential use, let alone one that was unacceptable. Furthermore, the residential use sought by the Proponent was countenanced by the City in the late 1990s when the Proponent also owned the property. The only significant planning policy change since the late 90s which affects the site, has been the adoption of the UHOP. As Mr. Fiorino candidly acknowledged, the proposal maintains the general intent and purpose of this Plan. In short, nothing materially has happened from a planning or policy point of view which would prevent the proposal from being approved.

[16] As for maintaining the general intent and purpose of the ZBL, the Board has four observations.

[17] First, the evidence disclosed that other properties on Upper Wentworth Street have mixed commercial and residential uses. In fact, immediately adjacent the site, to the north and south, is a dental office with a second floor residential use and a beauty salon with a basement residential use.

[18] Second, while concern was expressed by the City in relation to parking, Mr. Fiorino testified that the parking requirement for the proposal, including the continuation of a main floor commercial use, is only one space. The photographs filed in evidence clearly show there is ample parking available.

[19] Third, the City suggested that a rezoning application should be pursued by the Proponent in relation to the use sought because he has historically 'flouted' City land

use permissions and requirements and a thorough planning review of the site is necessary at this time. The historical dealings between the Proponent and the City, is not, in the Board's estimation, an appropriate planning consideration nor is it one which should prevent the requested relief from being approved. To the extent the Proponent maintains a basement use at the site which is contrary to the existing by-law, he does so at his peril knowing that the City has enforcement rights and remedies. This proceeding is confined to the issue of whether the second floor residential use should be allowed from a planning perspective.

[20] And finally, at the risk of repetition, the Board is of the view that since the proposal conforms to the UHOP, based on Mr. Fiorino's evidence, the re-establishment of the residential use is appropriate and justified from a planning perspective.

[21] In the final analysis, the Board is satisfied that the Requested Variance meets the four tests set out in s. 45(1) of the Act and that the use proposed is as appropriate today as it was when it was permitted by the City in the late 1990s.

## **ORDER**

[22] For the reasons expressed above, the Board orders that the Requested Variance is authorized and that the appeal is allowed.

*"Stefan Krzeczunowicz"*

STEFAN KRZECZUNOWICZ  
MEMBER

*"Steven Stefanko"*

STEVEN STEFANKO  
VICE-CHAIR

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**Ontario Municipal Board**

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