

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 20, 2017

CASE NO(S): PL170186

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:
Appellant (jointly): Albert Faccenda, Lloyd Ripani
Subject: By-law No. 2020.374
Municipality: City of Burlington
OMB Case No.: PL170186
OMB File No.: PL170186
OMB Case Name: Faccenda v. Burlington (City)

Heard: August 25, 2017 in Burlington, Ontario

APPEARANCES:

Parties

Counsel*/Representative

City of Burlington

B. Hurley*

Albert Faccenda and Lloyd Ripani

Self-represented

DECISION DELIVERED BY HUGH S. WILKINS AND ORDER OF THE BOARD

[1] On December 19, 2016, the City of Burlington (the “City”) Council passed By-law No. 2020.374 (the “By-law”). It amends the City’s Comprehensive Zoning By-law No. 2020 by setting out new requirements for specific low density residential zones and character areas in the City. Council also approved amendments to the City’s Official Plan regarding these character areas and low density residential areas.

[2] In January 2017, Albert Faccenda and Lloyd Ripani (the “Appellants”) appealed the By-law. In their Appellant Form, they allege that proper public notification of Council’s consideration of the By-law was not provided, members of Council were not fully informed of the impacts of the By-law, including economic impacts, and the By-law does not respect provisions in the Provincial Policy Statement, 2014 (the “PPS”). The Appellants’ appeal addresses solely the amendments to the By-law. The Official Plan amendment was not appealed to the Board.

[3] On July 25, 2017, the City filed a motion with the Board seeking an Order that the appeal be dismissed without a hearing under s. 34(25) of the *Planning Act*.

[4] The motion was heard in Burlington on August 25, 2017 in conjunction with the prehearing conference (“PHC”) for this proceeding.

The Motion to Dismiss

Evidence

[5] The City seeks to have the appeal dismissed without a hearing. In support of the motion, it filed an affidavit sworn by Jamie Tellier. Mr. Tellier is the City’s Manager of Urban Design. He is also a land-use planner. The Board qualifies him to provide opinion evidence in the area of land use planning.

[6] The Appellants neither challenged Mr. Tellier’s affidavit nor filed fact or opinion evidence.

[7] In his affidavit, Mr. Tellier states that between 2012 and 2015, Council gave directions to the City’s planning staff to conduct character studies of the Indian Point, Roseland, and Shoreacres neighbourhoods of the City and to study the possible elimination of the need for site plan review for low density residential zones. Mr. Tellier stated that the purposes of these directions were to:

- a. improve the compatibility of new development in specific established character neighbourhoods;
- b. apply lessons learned from the character studies to other low density residential areas outside of the specific character areas;
- c. eliminate the site plan process for low density residential zones by translating associated urban design guidelines, where possible, into zoning requirements;
- d. increase predictability for residents, landowners, designers and the development community with regard to new development and managing change in low density residential zones;
- e. improve overall customer service delivery; and
- f. update the regulatory framework for low density residential areas.

[8] Mr. Tellier states in his affidavit that the By-law is the outcome of the above-noted directions from Council. He states that the main purpose of the By-law is “to improve the compatibility of new development in areas that have not experienced much change or that have a specific neighbourhood character”. Mr. Tellier states in his affidavit that the By-law contains provisions on the height of dwellings, lot coverage, front yard setbacks, side yard setbacks and boundaries of the character areas in question and contains provisions regarding patios, decks and balconies, lot coverage, maximum floor area ratios, maximum dwelling depths, maximum height for columns, and maximum width and projection of attached garages for certain types of developments in low density residential zones. It also includes a definition for the term “Floor Area ratio – Low Density Residential”.

[9] Mr. Tellier states in his affidavit that numerous public engagement opportunities were provided during Council’s consideration of the By-law, including through email, mail, internet, City Councillor newsletters, workshops and formal presentations. He states that 18 public meetings were held to facilitate public engagement, including four

open houses and a statutory public meeting. Mr. Tellier states that public notices of the workshops and statutory public meeting met all statutory requirements.

[10] Regarding the economic impacts of the By-law on property values and the City's property tax revenues, Mr. Tellier states in his affidavit that the Appellants' allegations in these regards are speculative and are not genuine land use planning matters relating to the By-law.

[11] Mr. Tellier states in his affidavit that the PPS does not delineate how a planning authority is to accommodate intensification and redevelopment. He states that instead its broad policies provide planning authorities with flexibility in developing policies. At paragraph 13 of his affidavit, he states:

1. The PPS is not intended to provide detailed guidance on establishing appropriate built form policies for things such as height, lot coverage, floor area ratio, and setbacks; but rather to ensure that a Planning Authority does not conflict with the broader principles of the PPS such as allowing for growth, intensification and redevelopment and the establishment of healthy communities that enhance the quality of life for all Ontarians.
2. By-law 2020.374 does not change the densities, housing types, or lot sizes permitted currently in low density residential zones. It does not restrict growth or intensification. By-law 2020.374 simply regulates the built form of uses already permitted in such areas.
3. It is my opinion that By-law 2020.374 does not conflict with the PPS.

[12] Mr. Tellier states in his affidavit that the By-law is consistent and conforms with the PPS, the Growth Plan for the Greater Golden Horseshoe, 2017 (the "Growth Plan") and the City's Official Plan, is in the public interest, and represents good planning.

Submissions of the City

[13] The City argues that the Appellants' reasons for appeal do not disclose any land use planning grounds. It submits that the appeal was not made in good faith and that it is frivolous. Relying on s. 34(25)(a)(i) and (ii) of the *Planning Act*, the City requests that the appeal be dismissed. Section 34(25)(a)(i) and (ii) states:

34(25) Despite the *Statutory Powers Procedure Act* and subsections (11.0.2) and (24), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal, [or]

(ii) the appeal is not made in good faith or is frivolous or vexatious

[14] The City submits that the Appellants' reasons for appeal can be placed in three categories: failure to provide proper public notice of City Council's consideration of the By-law; economic impacts; and consistency with the PPS.

[15] Regarding the Appellant's public notification concerns, the City submits that the evidence before the Board is that the statutory requirements for notice of the public meeting and open houses were complied with and notes that the Appellants themselves and other members of the public made interventions to Council and its committees regarding the By-law.

[16] Regarding the Appellants' economic impacts argument, the City submits that this ground for appeal is speculative and does not constitute a land use planning ground.

[17] Regarding consistency with the PPS, the City argues that s. 34(19.0.1) of the *Planning Act* requires appellants to explain in their appeal documents why the by-law in question is not consistent with the PPS. Section 34(19.0.1) states:

34(19.0.1) If the appellant intends to argue that the by-law is inconsistent with a policy statement issued under subsection 3(1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan, the notice of appeal must also explain how the by-law is inconsistent with, fails to conform with or conflicts with the other document.

[18] The City submits that in their Appellant Form, the Appellants refer to PPS concepts, but do not explain how the By-law is inconsistent with the PPS. The City

argues that the PPS aims to manage growth on a large scale and it cannot be applied as suggested by the Appellants.

[19] The City argues that the Appellants are developers whose primary motivation for bringing the appeal is to prevent the By-law from restricting what they can build and from reducing their earnings from properties that they develop. The City argues that in this regard the Appellants have not brought the appeal in good faith.

Submissions of the Appellants

[20] The Appellants did not provide fact or opinion evidence in response to the City's motion. They stated that they do not plan to retain a land use planner to provide evidence at the main hearing of the appeal.

[21] The Appellants submit that proper notification was not given to the public of Council's consideration of the By-law and the process before Council when the By-law was passed was rushed. They submit that requests to have the decision deferred were ignored. The Appellants submit that public involvement in Council's decision-making process was minimal and public comments were not properly addressed.

[22] The Appellants argue that the economic impacts of the By-law on homeowners in the affected areas will be significant. They argue that the By-law will result in smaller homes that will reduce the ability of homeowners to earn rental incomes and reduce the range of housing options in these areas. They submit that the proposed floor area ratios will impact the value of smaller lots as developers will see no value in re-developing them. They argue that this will result in lower property values for property owners and reduced property tax revenues for the City.

[23] The Appellants submit that the By-law will result in the under-utilization of land, will reduce the range of housing options, and will decrease the size of homes, resulting in inconsistencies and non-conformity with the PPS, the Growth Plan, and the City's

Official Plan. The Appellants argue that by not intensifying the areas in question, the By-law will push development away from settlement areas and produce low density urban sprawl elsewhere. The Appellants submit that the By-law's restrictive height requirements will result in larger basements that are prone to flooding, which may cause adverse health impacts. They argue that the By-law does not prioritize intensification, use of transit or efficient development, does not foster resiliency to climate change, and does not promote water efficiency and conservation.

[24] The Appellants argue that the PPS encourages the promotion of efficient development, the optimization of the use of land, use of existing infrastructure, integration of an appropriate and wide range of housing types, promotion of sustainable compatible design, development that is compatible with the existing character of neighborhoods, promotion of green building techniques, creation of compact housing, and encouragement of complete communities of various types, character and sizes. They argue that the By-law does none of this. They state that it will result in small houses on big lots and will hinder the creation of houses that fit in and meet the City's urban design guidelines. They note that other nearby municipalities do not have similar restrictions to those in the By-law.

Analysis and Findings

[25] In a motion of this nature, the Board must consider whether the reasons for appeal are authentic, legitimate and genuine. In *East Beach Community Association v. Toronto (City)*, [1996] O.M.B.D. No. 1890 ("*East Beach*"), the Board stated at para. 9:

With respect to the tests specifically stated in ... [s.] 35(25)(i), it is our view that these provisions allow the Board to examine whether there has been disclosure of planning grounds that warrant a hearing.... The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons.... What these particular provisions allow the Board to do is to seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudicative process.

[26] The test in *East Beach* requires that an appeal be based on more than apprehensions set out in the language of land use planning or references to land use planning concepts or terms in the grounds for appeal. The test requires the Board to consider whether such references and the appellant's evidence and submissions provide a meaningful, logical and permissible basis for the Board to allow all or part of an appeal. If a land use planning ground is not supported or is incapable of support by reference to adequate evidence, then the Board must dismiss the appeal. As noted in *Guelph (City) Official Plan Amendment No. 30 (re)*, [2006] O.M.B.D. No. 924 ("*Guelph*"), at para. 8, it is not sufficient for an appellant to raise a triable issue or to cite land use planning concerns. "Speculation, conjecture and apprehension are not sufficient to sustain an appeal" (see *Guelph*, at para. 17).

[27] These issues were addressed by the Divisional Court in *Zellers Inc. v. Royal Cobourg Centres Ltd.*, 2001 CarswellOnt 3362, at para 32 (as quoted in *Free v. Norfolk (County)*, [2016] O.M.B.D. No. 283, at para. 37). The Court stated:

The legislation and related jurisprudence make it clear that it is not sufficient that appellants raise land use issues in the Notice of Appeal. Such issues have to be worthy of adjudication and the responsibility falls on the shoulders of the appellants to demonstrate through their conduct in pursuing the appeal, including their gathering of evidence to make their case, that the issues raised in their Notice of Appeal justifies a hearing.

[28] The Appellants' concerns focus on three main issues. These are (i) public notice and engagement concerns; (ii) economic concerns; and (iii) consistency with the PPS. They have not produced evidence on which to base their arguments.

[29] Regarding the public notice and engagement concerns, the City produced evidence that the statutory requirements for notice of Council's consideration and passage of the By-law were met and that various residents and residents' associations participated at the meetings and open houses held by the City. In response, the Appellants have provided no evidence to show that the City did not comply with these statutory requirements, that the public was not adequately notified or that the public did not participate in the decision-making process. Based on the evidence before it, the

Board agrees with the City that this reason for appeal is not authentic, legitimate or genuine.

[30] Regarding the Appellants' economic concerns, the City has produced opinion evidence that this is not a proper land use planning issue. In response, the Appellants neither provided evidence of the likelihood of these impacts nor evidence or submissions explaining how these concerns are in any way proper land use planning issues. The Board finds that without persuasive evidence or submissions linking these concerns to planning issues, this reason for appeal is not authentic, legitimate or genuine.

[31] Regarding the issue of consistency with the PPS, the City provided opinion evidence that the By-law is consistent and conforms with the PPS, the Growth Plan and the City's Official Plan. In response, the Appellants described various provisions in the PPS, Growth Plan and the Official Plan, but did not explain how they apply to the facts in this case. They did not articulate basic facts to sustain their arguments of inconsistency and non-conformity. As noted by the City, Section 34(19.0.1) states that an appellant intending to argue that a by-law is inconsistent with a policy statement or fails to conform with a provincial plan or an official plan, the notice of appeal must explain "how the by-law is inconsistent with, fails to conform with or conflicts with the other document". Although the Appellants allege, among other things, that the By-law will result in the under-utilization of land, reduce the range of housing options, and decrease the size of homes, they have not adduced evidence explaining how the By-law would do these things or why, taking into account the character and qualities of the neighbourhoods in question, these alleged outcomes would be inconsistent with the PPS. Moreover, the Appellants stated to the Board that they do not intend to produce opinion evidence in the area of land-use planning at the hearing. In *Millar v. St Catharines (City)*, [2017] O.M.B.D. No. 164 ("*Millar*"), at para. 24, the Board found that an appellant should demonstrate "an intent to call probative evidence on the issue at the ultimate hearing and steps taken to that end". The Board finds that the Appellants have not done this. It finds that this reason for appeal is not authentic, legitimate or genuine.

[32] The Board finds that the City has demonstrated that there are no legitimate land use planning grounds under appeal. It finds that the reasons set out in the notice of appeal are not authentic, legitimate or genuine and do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal.

[33] The Board dismisses the appeal. Given this outcome, there is no need for the Board to address procedural issues, including requests for participant status that were made at the PHC.

ORDER

[34] The City's motion is granted. The appeal is dismissed.

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

If there is an attachment referred to in this document
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Ontario Municipal Board

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