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LAW DEPARTMENT PL071062

08-050

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: Rose and Werner Arnold  
Subject: By-law No. 07-267  
Municipality: City of Hamilton  
OMB Case No.: PL071062  
OMB File No.: PL071062

**APPEARANCES:**

Parties

Counsel\*/Agent

Rose Arnold and Werner Arnold

A. Bagnell

City of Hamilton

N. Smith\*

Joseph Pecaric

**DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD**

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**Context**

Joseph Pecaric owns an irregularly shaped parcel in the former Town of Dundas, now the City of Hamilton. The municipal address is 81 Dundas Street, a major arterial. A six unit, 2.5-storey apartment building is on the site. The City has adopted a zoning by-law amendment that would permit the addition of two units within the loft attic area of the building, add the requisite two parking spaces, and adjust certain performance standards to rearrange the layout of the parking, the location of waste handling facilities, and allow smaller units. The Board adds Joseph Pecaric as a party to this proceeding. Rose and Werner Arnold, neighbours whose home abuts part of the subject site to the east, have appealed the by-law to this Board for hearing.

## Site and Area

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The subject site sits within the block bounded by Dundas Street on the south, Thorpe Street on the east, Court Street on the west and Cootes Drive on the north. Cootes Drive is also a major arterial. The area is mixed with older single-family housing, a large Canadian Tire store, a 24-hour car wash, a car rental agency, and other commercial uses. The subject site is approximately one kilometre from the downtown; a bus stop is directly in front of the site.

North of the subject site, within the block, are commercial uses and a car rental agency on Cootes Drive. To the west of the site are single-family homes that front on Court Street. The subject site is shaped like a thick L with the longest dimension along Dundas Street. This stretch reaches and turns the corner at Thorpe Street. Although the frontage on Thorpe Street is very small, and the flankage on Dundas is by far the longest dimension of the lands, the City deems the site to have its frontage on Thorpe Street. This technical definition of what constitutes the front yard is part of what has given rise to the by-law amendment now before this Board.

To the north of the subject site along Thorpe Street are single-family homes, some of which also abut the mid block L section of the subject lands at the rear of these houses. The home of Rose and Werner Arnold is one of these houses. Situated mid block on Thorpe Street, they are directly across the street from a large Canadian Tire store. Their rear yard straddles the property boundary between the subject site and that of the car rental agency. Mr. Pecaric also owns the lot that has the car rental agency.

The block in which the subject site sits, including the home of the Arnolds, is in the floodplain. When Mr. Pecaric built this very small apartment building he was required by the conservation authority to fill his site and raise the grade substantially. This grade change then required a retaining wall along that part of the eastern boundary that abuts the Arnold lands. A swale separates the Arnold lands from the subject site, although the property line is within the swale itself. The swale has a great deal of brush and naturalized under storey. To protect the swale, the retaining wall has been set back further on to the subject lands, rather than at the property line.

### **An Earlier Proceeding and Settlement**

At an earlier Board hearing, at which the Arnolds objected to a variance sought by Mr. Pecaric as part of the necessary permissions to build his apartment building, a settlement was reached between Mr. Pecaric and the Arnolds that called for a fence and landscaping at the northeast corner of the subject lands where they abut the Arnold lands. Specifically, the western edge of the landscaping and fence combination was to reach six metres from the property line in the swale. The evidence before the Board is that this buffer, as built, may be slightly shy of the requisite six metres. The Board makes no finding on whether the buffer, as built, has its western edge six metres from the eastern property line. The dimension is important in the matter now before the Board because it impacts one of the proposed new performance standards designed to accommodate the revised parking layout.

### **Locating the Requisite Parking**

The zoning by-law does not permit front yard parking. The apartment was built at the south-western corner of the site with a large area to the east. Because of the technical definition of frontage, this large area to the east that would most easily accommodate parking cannot be used for this purpose. All of the parking must be located to the north of the building. In addition, the front yard is defined as anything to the front of the front face of the building.

The existing parking layout, resulting in part from the earlier settlement with the Arnolds, includes a row of parking spaces running east/west along the northern edge of the site between the 6m east side buffer from the Arnolds and the 3m standard buffer on the west side. Some of these spaces extend into the "front yard" by virtue of being forward of the north/south line that delineates the front face of the building.

To accommodate the requisite parking and to better reflect current standards, the dimensions of the parking spaces is reduced. By reducing somewhat the dimensions of each parking space, and reducing somewhat the western set back buffer, additional parking can be located along this northern border. A shift to the location of the waste handling area frees up space for two reconfigured parking spaces abutting the north side of the building.

### **Objections Cited by the Arnolds**

The Board heard from both Rose and Werner Arnold. The Arnolds object to the addition of the two apartments as constituting inappropriate intensification. They object to the proposed reduction in the western buffer although their property is on the east side of the subject lands. They object to the additional parking and revised layout, feeling this increases traffic and vehicular movements on the site. They assert that the buffer at the northeast corner of the subject site was not built to specifications in the settlement from the earlier Board proceeding. Mrs. Arnold, in particular, asserts that Mr. Pecaric has not been a good neighbour, citing nuisance from vehicular fumes and the loss of a mature tree that had both shaded and provided privacy for a portion of their rear yard. She further asserts that she felt threatened by Mr. Pecaric.

The Arnolds called no other witnesses as part of their case.

### **The City's Case**

The Board heard from Mr. Cameron Thomas, a qualified land use planner who is a full member of the Canadian Institute of Planners and a Registered Professional Planner in Ontario.

The Provincial Policy Statement and the provincial Growth Plan for the Greater Golden Horseshoe both call for intensification, highlighting the efficient use of existing infrastructure. The Official Plan of the former Region of Hamilton-Wentworth places the site within the designation "Urban Area – Regional Centre". The existing small multi-unit building was evaluated against the requirements of the Official Plan of the former Town of Dundas. In particular, it was evaluated against section 2.5.5.1, Infill Intensification and Reurbanization Guidelines. It was also evaluated against the criteria set out in section 3.4.3.5 for multiple unit dwellings. The Plan also specifically acknowledges that the urban envelope of the former Town of Dundas is virtually built out and that accommodating the changing needs of its residents will be done primarily through infill and intensification.

The addition of two units in the loft attic of the structure will not change the visible Dundas Street exterior appearance of the building and meets the requirements for this modest intensification. In proceeding by way of a zoning by-law amendment, the City has also captured in this amendment certain changes to the performance standards that had

been approved by way of minor variance in the earlier Board hearing and are not, therefore, truly new.

Mr. Thomas also opined that the changes to the performance standards in the zoning by-law are reasonable and appropriate to accommodate this modest intensification. In particular, Mr. Thomas noted the reduction in the western buffer from 3m to 1.9m. Because the grade of the subject site had to be raised, this side of the site is also higher than the rear yards of the homes that abut the site on the west. Mr. Thomas testified that landscaping treatments, coupled with this grade differential, would make even a reduction to 0.9m appropriate. The exact dimension of the western buffer reduction is a function of the distance between the requisite 6m setback from the eastern boundary and the space necessary to accommodate the revised parking layout along the northern edge of the site.

#### **Mr. Pecaric's Case**

The Board heard from Mr. Reggie Walsh, a professional landscaper and neighbour whose home abuts the subject site to the west. Mr. Walsh installed most of the landscaping on the subject site. Although reconfiguration of the parking results in a reduction of the western buffer and the movement of waste handling facilities closer to the western boundary, Mr. Walsh is satisfied that there continues to be sufficient privacy and separation for enjoyment of his rear yard.

The Board also heard from Mr. Prem Tewari, a qualified professional engineer responsible for revised parking layout. In Mr. Tewari's professional opinion, the landscape buffer with the 6m setback from the Arnolds has been built just shy of the requisite 6m. Although he acknowledges that a small recalibration of the parking area along the northern boundary will be necessary if a professional survey shows this setback as being shy of the 6m, he is confident that the measurement will come well within one metre or less. Given Mr. Thomas's professional opinion that the western buffer could be further reduced by up to one additional metre, Mr. Tewari is satisfied that the northern edge of the property can continue to accommodate parking in an appropriate and satisfactory layout.

The Board also heard from Mr. Pecaric. Mr. Pecaric categorically denies ever threatening, raising his voice or otherwise acting in a threatening manner with Mrs. Arnold. He testified that he has sought mediation and/or settlement discussions with the Arnolds and that they have refused to engage in any such discussions with him.

He acknowledges that he owns the adjacent property that also abuts the Arnold lot and that has the car rental agency on it. He notes that this is a permitted use and that the area is filled with vehicular related businesses. He further notes the large Canadian Tire store across the street from the Arnold home and presented unchallenged evidence of car and truck traffic on Thorpe Street accessing the Canadian Tire site. Mr. Pecaric asserts that vehicular noise and fumes in the area are not being caused by cars entering and leaving his existing six-unit building.

Mr. Pecaric acknowledged that the large tree referred to by Mrs. Arnold did, indeed, come down. He was unchallenged in his testimony that while the tree might have been enjoyed by the Arnolds, it was both on his car rental property – not on the Arnolds' property and not on the subject site residential property -- and came down because it had rotted and was a danger.

Mr. Pecaric acknowledges that the Arnold rear yard is important to the enjoyment of their property, but notes he has put up both fencing and landscaping, with a considerable buffer between his residential property and that of the Arnolds.

### **Board Findings**

The Board finds that the Arnolds have failed to call a case that demonstrates any impact, let alone any adverse impact, on them as a result of this proposed zoning by-law amendment. Setbacks and buffers to their property remain in full force and effect and have not been modified by this proposed zoning by-law amendment. The revised parking layout does not bring any parking closer to their property. The waste handling facilities are to be relocated even further away from the Arnolds than is the case now. The reduction in the buffer width is proposed on the west side of the site and the Arnolds abut the site to the east. And finally, the simple assertion that there is too much intensification does not persuade the Board that this modest addition of two residential units within the building envelope of the existing structure is either inappropriate or impacts the Arnolds' ability to enjoy their home.

On the evidence of Mr. Thomas, the Board finds this addition of two rental units reasonable, appropriate, consistent with the Provincial Policy Statement and requirements for intensification, conforms to the in force Official Plans, and represents the principles of good community planning. The Board further finds that the proposed amendments to

performance standards in part reflect existing approved conditions and in part reflect reasonable and appropriate adjustments to accommodate the addition of the two residential units.

With regard to the western buffer, the Board finds that a reduction from 3m to not less than 0.9m is reasonable and appropriate. The Board has now been advised that a surveyor's report has found that the western boundary of the buffer at the northeastern corner adjacent to the Arnold land exceeds the 6m setback requirement. The western buffer is now reduced to 0.9m. The City has filed an amended form of by-law that reflects this reduction; the by-law is found at Attachment 1 to this Decision.

The appeal is allowed in part.

The proposed zoning by-law amendment, found at Attachment 1, is approved.

The Board so Orders.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER  
MEMBER

**ATTACHMENT 1**

**CITY OF HAMILTON**

**BY-LAW NO.**

**To Amend Zoning By-law No. 3581-86 (Dundas), as amended,  
Respecting Lands located at 81 Dundas Street (Dundas)**

**WHEREAS** the City of Hamilton Act, 1999, Statutes of Ontario, 1999 Chap.14, Sch. C. did incorporate, as of January 1st, 2001, the municipality "City of Hamilton";

**AND WHEREAS** the City of Hamilton is the successor to certain area municipalities, including the former area municipality known as "The Corporation of the Town of Dundas" and is the successor to the former regional municipality, namely, "The Regional Municipality of Hamilton-Wentworth";

**AND WHEREAS** the City of Hamilton Act, 1999 provides that the Zoning By-laws and Official Plans of the former area municipalities and the Official Plan of the former regional municipality continue in force in the City of Hamilton until subsequently amended or repealed by the Council of the City of Hamilton;

**AND WHEREAS** Zoning By-law No. 3581-86 (Dundas) was enacted on the 22nd day of May 1986, and approved by the Ontario Municipal Board on the 10th day of May, 1988;

**AND WHEREAS** this By-law is in conformity with the Official Plan of the City of Hamilton (former Town of Dundas) in accordance with the provisions of the Planning Act;

**NOW THEREFORE** the Council of the City of Hamilton enacts as follows:

1. Exception S-103 of Section 32: Exceptions of Zoning By-law No. 3581-86 (Dundas), is hereby amended as follows:
  - (a) That the current wording of Permitted Uses be deleted and replaced by the following:



Permitted Uses

A maximum of 8 units within the apartment building existing on the date of the passing of this By-law, being the 26th day of September, 2007, and buildings, structures and uses accessory to the apartment building, shall be the only permitted uses.

(b) That the following Regulations are added:

7. Notwithstanding the provisions of clause 7.14.1 of subsection 7.14 DIMENSIONS FOR THE DESIGN OF PARKING AREAS of SECTION 7: OFF-STREET PARKING AND LOADING, the minimum length of a parking space with a 90 degree angle shall be 5.7 m.
8. Notwithstanding subclause 13.2.7.2 BUFFER STRIP of subsection 13.2 REGULATIONS FOR APARTMENT BUILDINGS of SECTION 13: MEDIUM DENSITY MULTIPLE DWELLING ZONE (RM2), a buffer strip along the westerly lot line that abuts any R1, R2, R3, R3A, R4 or R6 Zone shall be a minimum width of 1.0 metres between the lot line and an outdoor waste enclosure and a minimum width of 0.9 metres between the lot line and a driving aisle or a required parking space.
9. Notwithstanding Clause 7.1.2 of subsection 7.1 LOCATION of SECTION 7: OFF-STREET PARKING AND LOADING, two of the required parking spaces may be located in the front yard.
10. Notwithstanding subclause (ii) of Clause 13.2.5 FLOOR AREA of subsection 13.2 REGULATIONS FOR APARTMENT BUILDINGS of SECTION 13: MEDIUM DENSITY MULTIPLE DWELLING ZONE (RM2), the minimum floor area of four one-bedroom second floor units shall be 46.7 square metres.