

ISSUE DATE:

Sept. 28, 2010

By-law No. 10-234



PL100258

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Malatesta Brothers Construction Company Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 6593 of the City of Hamilton to rezone lands respecting 1540 Upper Gage Avenue from "L-mr-2/S-401" (Multiple Residential Uses) District, Modified to the "RT-30/S-1614" (Street Townhouse) District, Modified to permit the development of 11 townhouse units
OMB File No. PL100258

APPEARANCES:

Parties

Counsel

Malatesta Brothers Construction Co. Ltd

N. Smith

City of Hamilton

J. Wise

DECISION DELIVERED BY JASON CHEE-HING AND ORDER OF THE BOARD

CONTEXT:

This matter concerns an application for a rezoning of the lands located at 1540 Upper Gage Avenue in the City of Hamilton (the "City") by Malatesta Brothers Construction Co. Ltd. (the "Applicant and Appellant"). The lands are currently zoned "L-mr-1/S-401". The purpose of the rezoning application is to permit the construction of an 11 unit, two-block townhouse complex to be accessed by a private road. The site is approximately 0.26ha in area with frontage on Upper Gage Avenue. The surrounding land use is single detached dwellings. The City's planning staff reviewed the application and in its planning report recommended to City Council approval of the change in zoning to permit the proposal. City Council failed to make a decision within the statutory period specified under the *Planning Act* (the "Act") and the Applicant appealed Council's failure to make a decision to this Board.

At the hearing, the Applicant summonsed the City's staff planner who authored the planning report and retained a professional land use planner. The City also retained a professional land use planner. There were a number of residents who provided lay evidence in opposition to the rezoning application.

THE EVIDENCE:

At the onset of the hearing, the Applicant's representatives advised the Board that while the proposal in terms of units and layout remained the same, the tenure had changed from a freehold townhouse complex with a private road to a standard condominium development.

The City planner (Mr. E. John) testified that the initial application was for 12 townhouse units. Following a review of the application staff had recommended a reduction to 11 units which the Applicant agreed to do by amending his application. Mr. John provided a planning history of the subject site and surrounding lands. The property is designated as residential in the former City of Hamilton Official Plan ("OP") and designated as attached housing in the Eleanor Neighbourhood Plan. While neighbourhood plans do not have the same status as an OP, it is nevertheless a planning document adopted by Council, which provides for the distribution and location of land uses within neighbourhoods in the City. When considering development proposals, Council refers to and is guided by adopted neighbourhood plans.

With respect to the planning history of the area, Mr. John noted that the lands immediately to the north and south of the subject site were developed as subdivisions consisting of single detached units. These lands had a previous designation as attached housing and as part of the justification to approve these subdivisions, planning staff wanted assurance that the remnant parcel – the subject lands – be developed as attached housing. This was in keeping with the mix of different housing forms and densities within the Eleanor Neighbourhood. It is his opinion that given the planned history of the site, the proposal for 11 townhouse units as shown in the detailed concept plan is not an over-intensification of the site. He testified that the intent of the current L-mr-1/S-401 zoning classification is to identify the principle of development which is for multiple dwellings and townhouses. It is his opinion that the 11 townhouse unit proposal implements the zoning subject to site-specific modifications which are contained in the Zoning By-law amendment that staff prepared. It is his opinion that this proposal represents an appropriate example of infill development that develops the lands as

intended in the Eleanor Neighbourhood Plan while ensuring that the existing character of the neighbourhood is maintained. It is his opinion that the proposed development conforms with the in-force Hamilton Official Plan and the Growth Plan, and is consistent with the intensification policies of the provincial Policy Statement.

Mr. J. Webb provided planning evidence in support of the application. Mr. Webb adopts the evidence and planning opinions proffered by Mr. John. He noted that because the tenure is now changed to condominium from freehold that it is the RT-20 zone category that applies. But for that change in tenure, the proposal remains the same. Mr. Webb testified that the site specific modifications being sought are reduction in setbacks from the street line from 6.0m to 4.5m; for the northerly and southerly lot lines, a side yard of 3.0m whereas 6.0m is required where there are windows to a habitable room facing a yard; and a reduction on the parking space dimensions to be consistent with the city wide standard being implemented by the City as part of its new comprehensive ZBL (Ex. 4).

During the course of the hearing and in response to some of the concerns from the participants and evidence of the City's planning expert, the Applicant has proposed to delete the ground floor windows facing the side yard thus maintaining the existing setback performance standard. Additionally, the Applicant proposes to limit the proposed townhouses to two storeys and a maximum height of 11.0 metres to ensure compatibility with the surrounding housing forms. The RT-20 Zone permits a building to be a maximum of three storeys in height. Mr. Webb provided evidence of five block townhouse developments in the surrounding area. These townhouse developments have single detached dwellings and other townhouses as adjoining uses. The subject proposal at 43.4 units per ha is within the range of densities of the townhouse developments in the surrounding area (Ex. 4).

It is his opinion that the proposed use of the property for townhouses conforms to the established planning policy framework and the intensity of development at 11 units is compatible with the character of the area. It is his opinion that no unacceptable adverse impacts to the surrounding area will result from this proposal. Mr. Webb noted that the application before the Board is for a ZBLA to permit the proposed development and that site plan approval is still required from the City. The site plan application process is separate from the rezoning process and the City first requires that the lands are appropriately zoned for the proposed use.

The City's planning expert (Mr. G. Bender) maintains that the proposal represents an over intensification of the site. That the 11 townhouse units will result in a density and housing form that are not appropriate and will result in unacceptable adverse impacts to the immediate area. The area immediately surrounding the subject lands is a residential subdivision of single detached dwellings (Ex.3A).

It is Mr. Bender's opinion that the planning context for the area has changed considerably since the Eleanor Neighbourhood plan was put in place in the 1970s. The Farah Court and Erminia Court residential subdivisions immediately north and south of the subject lands have been developed as single detached residential. Notwithstanding that the designation for these subdivisions was initially attached housing under the neighbourhood plan, the reality on the ground is that the use surrounding the subject site is single detached housing. It is his opinion that to introduce a higher density housing form (townhouses) at the proposed density is not appropriate and nor is it keeping with the low density character of the immediate area. The density of the proposed development at 57.89 units/ha is more than twice the density of the Farah Court subdivision (21.43 units/ha) and the Erminia Court subdivision (19 units/ha). It is his opinion that this over-intensification will create unacceptable adverse impacts to the homes that abut the subject lands (Ex. 5A addendum).

It is his opinion that the proposal does not conform with the Hamilton OP which speaks to maintaining, preserving and enhancing the existing community character. Residential intensification must be compatible with and respect the built form and character of the existing residential neighbourhood. It is his opinion that the proposal will introduce a higher density housing form in an area that is predominantly single detached. Mr. Bender is of the opinion that the concept plan submitted by the applicant is not sufficiently detailed enough to properly assess the impacts of overlook and privacy on the abutting homes and that more detailed drawings from the applicant should have been submitted to the City. He submitted that even if the Board were to find that townhouses are an acceptable housing form that 11 units represent an over-intensification of the site. He referred to the concept plan for the subject lands submitted by the developer of the Farah Court subdivision to show that the subject lands could be developed as attached housing. That concept plan submitted in 1999 was for 8 townhouse units. It is his opinion that 8 units would be appropriate for the site.

Three participants – all residents of the neighbourhood – spoke in opposition to the proposal and on behalf of the residents that were in attendance at the hearing. Their primary concerns were that the scale of the development was too intense for the lands. They were concerned about overlook into their homes and the lack of privacy that would result if the proposal was approved. There were concerns about building townhouses in a neighbourhood that is predominantly single detached housing and the decrease in property values. There were also concerns expressed about the potential for increased traffic on Upper Gage Avenue.

BOARD'S FINDINGS AND REASONS:

The Board had two issues to deal with at this hearing. Firstly, whether townhouses are an appropriate form of housing for this site and secondly, if it is appropriate, whether the proposal at 11 units is appropriate for the site.

Based on the evidence and submissions made at this hearing it is the Board's finding that townhouses are an appropriate form of housing for the subject site. It is clear in the Board's mind that the Eleanor Neighbourhood Plan adopted by Council anticipates "attached housing" for the subject lands. The site is zoned L-mr-1/S-401 and this zoning anticipates that the lands will be rezoned for multiple residential uses. The RT-20 zone category is included within the range of multiple residential zone categories that are identified within this zone. In this regard, the Board prefers the evidence of the City staff planner and the Applicant's planner that townhouses are permitted under the current zoning.

The Board finds that attached housing for the subject site was clearly anticipated and supported by the City's planning department in the planned development of this neighbourhood. The Eleanor Neighbourhood Plan clearly envisioned a mix of housing types for this neighbourhood and although the subdivisions immediately to the north and south of the subject site were developed as single detached, the City's planning department wanted assurances that the remnant parcel being the subject site be developed as attached housing. The Board finds that townhouses as a housing form is compatible with single detached housing and can co-exist within the same residential neighbourhood. To argue that these two housing forms cannot co-exist is a "stretch". It is the Board's view that the existing residential area extends beyond just the surrounding homes and should include the areas as shown in (Exhibit 3A). Within this

area there are examples of townhouse developments adjacent to single detached housing.

With respect to the second issue of density, the City submitted that the proposal for 11 townhouse units is an over-intensification of the site which would lead to unacceptable adverse impacts to the surrounding homes. To support this argument, the City's planning expert compared the proposed density to that of the surrounding single detached dwellings. On this comparative basis the density of the proposal is at least twice that of the single detached residential subdivisions that abut the subject lands. I cannot accept this argument as it is in my view inappropriate to compare density for a single detached subdivision with densities for a townhouse development. The City referred to the concept plan for 8 townhouse units done in late 1990's to demonstrate that attached housing can be developed on the subject lands. It is the Board's view that this was done for illustrative purposes to show to the City that attached housing can be developed on the subject lands. The Applicant's concept plan is more detailed and was accepted by the City's planning department as the basis for proposed ZBLA.

It is the Board's finding that the modifications to the City's planning staff draft ZBLA will result in a development that will be in keeping with the character of the area and would not create an unacceptable adverse impact to neighbourhood. The Applicant has proposed to delete the ground floor windows on the units facing the side yard thus maintaining the existing setback performance standard. Additionally, the Applicant proposes to limit the proposed townhouses to two storeys and a maximum height of 11.0 metres to ensure compatibility with the surrounding housing forms. The variances to the performance standards of the ZBL now being requested are a reduction in setback from the street line from 6.0m to 4.5m; and a reduction on the parking space dimensions to be consistent with the city wide standard being implemented by the City as part of its new comprehensive ZBL. The Board accepts the evidence of the Applicant's planner that the proposed density is within the range of densities for townhouse developments within the existing neighbourhood.

The Board finds that the proposed ZBLA conforms with the in-force Hamilton OP, that it is not premature and represents good planning. The Board notes that site plan approval from the City is required and that the Applicant must demonstrate how the proposal meets the site plan requirements of the City.

CONCLUSIONS:

Based on the Board's findings, the **BOARD ORDERS** that the appeal is allowed, and By-Law 6593 is hereby amended in the manner set out in Attachment "1" to this Order. The Board authorizes the municipal clerk to assign a number to this By-law for record keeping purposes.

So Orders the Board.

"J. Chee-Hing"

J. CHEE-HING
MEMBER

Attachment "1"

CITY OF HAMILTON

BY-LAW NO. 6593

To Amend Zoning By-law No. 6593 (Hamilton) Respecting Lands located at 1540 Upper Gage Avenue, Hamilton

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

AND WHEREAS the City of Hamilton is the successor to certain area municipalities, including the former municipality known as the "The Corporation of the City of Hamilton" 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 the Council of The Corporation of the City of Hamilton passed Zoning By-law No. 6593 (Hamilton) on the 25th day of July 1950, which by-law was approved by the Ontario Municipal Board by Order dated the 7th day of December 1951, (File No. P.F.C. 3821);

AND WHEREAS the Council of the City of Hamilton, in adopting Item 10- of Report 10- of the Economic Development and Planning Committee, at its meeting held on the day of 2010, recommended that Zoning By-law No. 6593 (Hamilton), be amended as hereinafter provided;

AND WHEREAS this by-law is in conformity with the Official Plan of the Hamilton Planning Area, approved by the Minister under the Planning Act on June 1, 1982.

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

1. That Sheet No. E-38d of the District maps, appended to and forming part of Zoning By-law No. 6593 (Hamilton), is amended by changing from the "L-mr-2/S-401" (Multiple Residential Uses) District, Modified, to the "RT-20/S-____ (Townhouse - Maisonette) District, Modified, on the lands, the extent and boundaries of which are shown on a plan hereto annexed as Schedule "A".
2. That the "RT-20" (Townhouse - Maisonette) District regulations, as contained in Section 10E of Zoning By-law No. 6593, are modified to include the following:
 - (a) That, notwithstanding Section 10 E (3), no building or structure, within the district shall exceed two storeys, ~~and no structure other than a building shall~~ ^{not} exceed 11.0 metres in height.
 - (b) That, notwithstanding Section 10E (4) (a), a minimum yard depth of not less than 4.5 metres from the street line shall be provided and maintained.
 - (c) That, notwithstanding Section 18A (25), every access driveway shall be located not less than 1.2m from the common boundary.
 - (d) A visual barrier, not less than 1.2m in height, and not greater than 2.0m in height, shall be provided and maintained along the boundary of the lot where it abuts a residential district.
 - (e) That, notwithstanding Section 18, an accessory building (enclosed garbage area) will be permitted to be located on a private road. The accessory building shall measure no more than 6 metres in width and 2 metres in height.
 - (f) That, notwithstanding Section 18A (11) and (12), no visual barrier or planting strip shall be required between the parking area and adjacent lot.
 - (g) That a maximum of eleven dwelling units shall be permitted.
 - (h) That notwithstanding Section 18A (7), no parking space shall be less than 2.6 metres in width by 5.5 metres in length.
3. That no building or structure shall be erected, altered, extended or enlarged, nor shall any building or structure or part thereof be used, nor shall any land be used, except in accordance with the "RT-20" (Townhouse - Maisonette) District provisions, subject to the special requirements referred to in Section 2 of this By-law.
4. That By-law 6593 (City of Hamilton) is amended by adding this By-law to Section 19 B as Schedule S-_____.

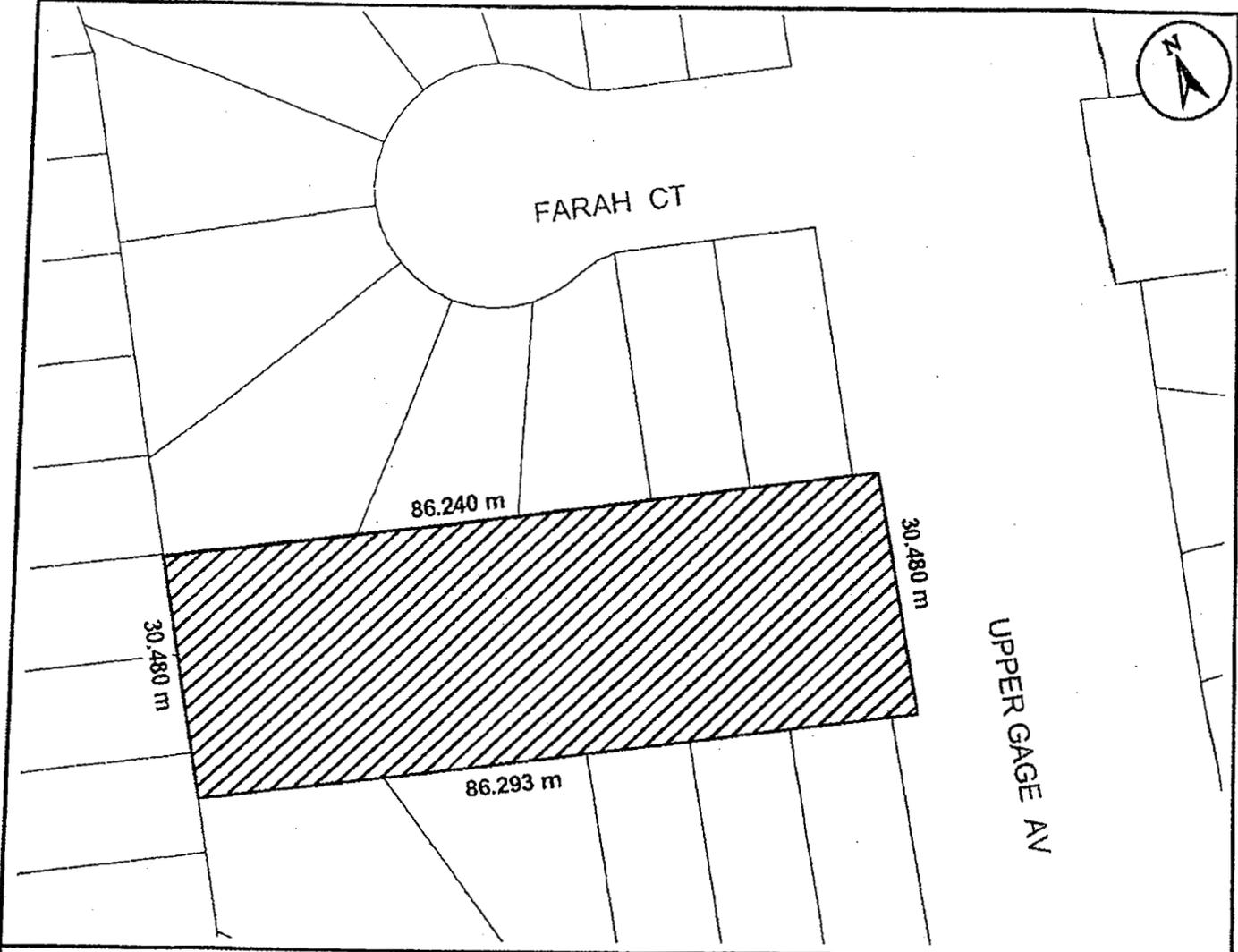
5. That the Clerk is hereby authorized and directed to proceed with the giving of notice of the passing of this By-law, in accordance with the Planning Act.

PASSED and ENACTED this day of , 2010.

Fred Eisenberger
Mayor

Kevin C. Christenson
Clerk

ZAC-08-087



This is Schedule "A" to By-Law No. 10-
 Passed the day of, 2010

 Clerk

 Mayor

Schedule "A"

Map Forming Part of
 By-Law No. 10-____

to Amend By-law No. 6593

Subject Property
 1540 Upper Gage Avenue

 Change in Zoning from "L-mr-2/S-401" (Multiple Residential Uses) District, Modified to the "RT-20/S - ____" (Townhouse Maisonette) District, Modified.

Scale: N.T.S.	File Name/Number: ZAR-08-087
Date:/../..	Planner/Technician: MB/NB
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT	

