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PL070067
PL071132

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Ontario
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: Janice Laurin
Subject: By-law No. 07-304
Municipality: City of Hamilton
OMB Case No.: PL070067
OMB File No.: PL071132

IN THE MATTER OF subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Janice Laurin
Applicant: Angelika Plath
Subject: Consent
Property Address/Description: 8 McDonald Court
Municipality: City of Hamilton
OMB Case No.: PL070067
OMB File No.: C070025
Municipal File No.: B-176/06

APPEARANCES:

Parties

Janice Laurin
City of Hamilton

Counsel

A. Zuidema

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

This was a dispute over splitting a suburban lot of about 0.44 acre. Angelika Plath (Applicant) applied for consent to sever her significant corner lot, in an area of comparably large lots in the City of Hamilton (City). City planning staff (staff) was not supportive, but the Committee of Adjustment was, and issued approval conditional on rezoning. Neighbour Janice Laurin (Appellant) appealed that Decision to the Board.

The Applicant then applied for rezoning, which staff did not support either; but City Council did, and adopted site-specific Zoning By-law 07-304, with specifications for the split parcels. The Appellant appealed that Zoning By-law too.

At the hearing, the City was represented by Counsel defending its new By-law, but neither the Applicant nor Appellant were represented. The Board heard testimony from the Appellant and another neighbour, Ms Akimoto; it also heard the opinion of Mr. Fothergill (the City's consulting planner) and Mr. Wellings (the Applicant's planner). The Appellant asked the Board to follow the staff opinion and overturn the severance and By-law, while the City and planners asked the Board to sustain them, with modifications.

The Board has carefully considered all the evidence, and the eloquent submissions of both sides. The Board concludes, as the COA and City Council did, that the proposal meets the specific criteria of the Ontario *Planning Act* (Act), though under revised Conditions. The appeal against the severance is allowed in part, specifically to the extent that the Conditions are changed; the appeal against the severance is otherwise dismissed, as is the appeal against Zoning By-law 07-304. The details and reasons are set out below.

PROJECT AND HISTORY

The subject property, covering 1772.5 square metres (0.438 acre) at 8 McDonald Court, is on a circle in a 1961 subdivision, facing an east-west stretch of the street; but on the east side of the lot, McDonald Court turns north-south. The subdivision, originally on private services with lots measuring a third of an acre, extended north of Dundas Street (Highway 5), in the West Waterdown area of the former Town of Flamborough in the Region of Hamilton-Wentworth, now the City of Hamilton. In due course, the area obtained public water and sewer hook-ups, and was surrounded by urbanization of higher density, though the subdivision itself retained its original lot pattern. Zoning By-law 90-145-Z of the Town of Flamborough entrenched that situation, specifying minimum frontages of almost 100 feet and lot areas of over a third of an acre.

A 1990's application, to split a nearby lot in three, was turned down, and the then proponent appealed to the Board. That appeal was dismissed: the Board found that the Official Plan (OP) policies of the day specified that McDonald Court could not be

targeted for such intensification, without an OP Amendment. An OP Amendment was then duly adopted, and the nearby lot was split in two, with no appeal to the Board.

In 2006, the current Applicant sought consent to split her corner lot in two. The lot covered over 1772 square metres, with a frontage of 45 metres, and trees along the east side. The proposal called for a severed parcel along the east side ("Part 1"), and a retained parcel along the west side ("Part 2"). Although projections for a dwelling on the severed parcel were still conceptual, the expectation was that it would face the north-south stretch of McDonald Court, i.e. it would be at right angles to the existing home on the retained parcel.

Neighbours objected in writing, on five main grounds. First and foremost, they said the application was incompatible with the character of the area. The letters also argued that a new lot would

- Be vulnerable to noise,
- Harm trees,
- Create traffic risks at the corner, and
- Create problems for on-street parking.

The City's Planning Department (staff) produced a report (Exhibit 3, pp. 37-46) discounting the four latter grounds, but focusing of the initial question of compatibility. Staff concluded that "the proposed severance would not be compatible with the surrounding lot fabric and would not conform to the Official Plan policies regarding compatibility". This was considered by the Committee of Adjustment (COA); but by a majority vote, the COA instead issued consent for the severance, subject to eight conditions, including the following:

2. The applicant shall receive final approval of any variances from the requirements of the Zoning By-law as determined necessary by the Planning and Development Department....
3. The owner apply for and receive final rezoning approval....
4. That the consent agreement and all purchase of sale or lease agreements contain the following noise warning clause:

Purchasers/tenants are advised that sound levels due to increasing road and air traffic may occasionally interfere with some activities of the dwelling occupants as the sound levels may exceed the Municipality's and the Ministry of the Environment's noise criteria.

7. The driveway to the conveyed lands must be located along the north lot line, to the satisfaction the Public Works Department (Traffic Engineering and Operations).
8. The owner/applicant shall satisfy the requirements of the Public Works Department... Forestry & Horticulture Section

The Appellant appealed the COA's Decision to the Board.

Pursuant to Condition 3, the Applicant applied for rezoning. Some proposed measurements changed. Staff still recommended against the proposal, which went to the City's Planning & Economic Development Committee where, by a majority vote, staff's recommendation was again rejected. The Committee supported rezoning, and Council likewise, adopting Zoning By-law 07-304, with various performance standards for the new lots. The appellant appealed this Zoning By-law to the Board as well.

As mentioned, some proposed measurements changed. In summary, the applications before the Board were for approval of (a) a severance, and (b) a Zoning By-law, which would provide for the following updated figures at the subject property:

1. Whereas the previous By-law 90-145-Z called for a minimum lot area of 1390 square metres (0.3435 acre), under the new By-law 07-304,
 - The retained parcel would have 1055 square metres (0.26 acre),
 - And the severed parcel would have 646 square metres (0.16 acre).
2. Whereas old By-law 90-145-Z called for a minimum frontage of 30 metres (98.4 feet),
 - The retained parcel would have 28.5 metres (93.5 feet).

- The figure for the severed parcel was more confusing, because under the By-law, the frontage of the corner parcel was not measured along either the east-west or north-south stretches of McDonald Court, but *diagonally*. After some false starts, the Board was told that the frontage would be listed at 25.3 metres (83 feet), as specified in new By-law 07-304.

APPLICABLE CRITERIA

The applicable criteria for approving consents for severances are outlined in separate sections of the *Planning Act*. The relevant provision for consents, Section 53(12), refers to the criteria in Section 51(24):

...Regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and to,

- (a) The effect of development... on matters of provincial interest...;
- (b) Whether the (proposal) is premature or in the public interest;
- (c) Whether the plan conforms to the Official Plan...;
- (d) The suitability of the land for the purposes...;
- (e) (Highways)
- (f) The dimensions and shapes of the proposed lots;
- (g) The restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on the adjoining land....
- (h)-(l) (Natural resources, floods, services, schools, land dedications, energy)

Consent for the severance, however, is conditional on the new Zoning By-law, which was itself appealed under Section 34(19) of the *Planning Act*. A challenge to such a By-law may involve several factors, notably whether it complies with the *Planning Act*, the Provincial Policy Statement (PPS), the applicable Official Plan(s), and the fundamentals of good planning. That is because the *Planning Act* and related Provincial documents outline objectives and criteria, with which By-laws and other *Planning Act* instruments must comply. In this case, staff had argued that the By-law was problematic because of non-compliance with the Town of Flamborough Official

Plan (OP) concerning "compatibility". One could add that By-laws are also assessed in light of other important documents such as the *Places to Grow Act*; and the Provincial Policy Statement (PPS). In this location, there is also more than one OP: aside from the Town of Flamborough OP, there is the OP of the Region of Hamilton-Wentworth (still in effect), and the West Waterdown Secondary Plan, not to mention the Growth Plan for the Greater Golden Horseshoe.

OBSERVATIONS AND FINDINGS

Staff had identified five issues: compatibility, noise, trees, traffic and parking, of which the first was the most important. The Board attaches the same relative weight.

a) Core Issue

The staff reports emphasized the "compatibility" provisions of the Flamborough OP. In comparison, the repeated references to "intensification" in the other planning instruments, including the PPS, were hardly mentioned. Counsel for the City and the planners invited the Board to draw the inference that staff's analysis had perhaps been weighted in the wrong direction, or even that this was an "omission" displaying a "lack of regard" for Provincial policy. The Board, however, is cautious. Although intensification is a clear priority in current planning instruments, it does not have the effect of writing OP provisions about compatibility out of existence entirely.

But that begs the question of whether compatibility was as significant a concern as staff and the Appellant suggested. Their argument would have been more compelling, if instead of an overwhelmingly arithmetical focus, there had been significant evidence of a possible *visual* incongruity – something noticeably out of character. The "character of a neighborhood" depends more on what is visual, than on lines on a survey. Would a passerby, on the east-west stretch of McDonald Court, notice that the retained parcel to the west was any less spacious than its neighbours, particularly if it was visually unclear where the property line was? And how would a passerby view the severed parcel to the east, with its prospective dwelling facing the north-south stretch of McDonald Court, and with an *apparent* frontage (measuring from the north property line to the corner) of over 30 metres? The Board heard no significant

evidence of a prospective visual incongruity. In fact, there was no persuasive evidence that a viewer would notice any break in the "pattern" of the neighbourhood.

The only visual idiosyncrasy, that the Board heard evidence on, likely concerned the distance between the "back" of the proposed house on the severed parcel, and the side of the existing house of the retained parcel. That separation distance (perhaps slightly less than 3 metres at places) would be noticeably narrower than elsewhere on the street. However, that is a situation for which the standard response is concealment, via a green visual buffer, i.e. foliage. The Board will return to that point later.

In short, the Board heard no compelling reason why the goals of "intensification" and "compatibility" could not both be accommodated. The Appellant outlined her worst fear in Exhibit 14 (a collection of photos from another neighbourhood), displaying the juxtaposition of a new dwelling and an older one – and rendered all the more jarring, as the planners explained, by their positioning and massing on a relatively constrained site. However, as they also explained, the sight lines at this site were manifestly different. The Appellant also attempted, at Exhibit 24, to improvise how a similar juxtaposition might occur at the subject property; however, that attempt did not correspond to any of the expected sight lines. Assuming the proper attention to landscaping, the Board was not persuaded that the overall picture proposed by the Applicant would strike a viewer as being out of character.

b) Prospective Addenda

The planners nonetheless went to pains to suggest that, if necessary, compatibility could be improved even further concerning setback, massing and greenery. Mr. Fothergill agreed that if a dwelling on the severed parcel faced the north-South stretch of McDonald Court (in the sense that its "front" door and façade pointed east), the east side of the property would *look* like the front yard (*not* the south side, which is how the Zoning By-laws treat it, nor the diagonal across the corner, which is where frontage is measured). In that case, for the sake of visual consistency with other "front" yards, the appropriate setback might be more than the side yard setback currently foreseen: "One could incorporate a greater setback", said Mr. Fothergill, "than is provided in the By-law.... At the end of the day, the front of this house would not look far different from any other in the neighbourhood".

Mr. Wellings, for his part, focused on massing. Partly in response to the jarring photo at Exhibit 14, he suggested that any potential juxtaposition could be mitigated, notably by limiting the visual mass of the new house. He suggested that a height limit of 7 metres would be appropriate for that purpose.

As to trees, the COA had inserted Condition 8, specifying involvement by the City's Forestry & Horticulture Section. The Board was advised that in practice, this means the requirement of a "Tree Management Plan" (dealing with existing trees), though not necessarily a "Landscape Plan" (dealing with future plantings). Mr. Wellings advised that the severed parcel was expected to lose one tree in the driveway. Of equal importance, however, was the question of new plantings. Mr. Fothergill compared the green buffer on the north side of the property to what could occur elsewhere: "Some of that closeness is masked by vegetation along the north lot line. It could be enhanced.... There is an opportunity to have some landscaping to buffer the view of the building ". Mr. Wellings agreed with this "opportunity for landscape" and went further: he suggested that a possible Condition to the severance could include "a Landscape Plan, to be approved by the Planning Department", and/or that a Landscape Plan be incorporated into the eventual consent agreement covering drainage etc.

Finally, the Board was told that Condition 2, pertaining to variances, is now moot, and can be dispensed with.

The Board found no dispute with the above suggestions.

c) Other Arguments

There was no evidence at the hearing to support the stated concern about noise from Dundas Street a block away. In any event, that question was addressed in the COA's Decision which, out of an apparent abundance of caution, included Condition 4 requiring future contracts to include a clause warning about noise. The Board was advised of no necessity to change that arrangement, except that the obscure reference to noise from "air traffic" had no apparent rationale that anyone could discern.

The questions of traffic and parking had been reviewed by City transportation experts (Exhibit 1), and resulted in the COA's Condition 7 on positioning the future

driveway (for the severed parcel) away from the corner. The Board heard no evidence to suggest anything inappropriate with that arrangement.

CONCLUSION

As to the severance, the Board finds that it may proceed without a plan of subdivision, and that the relevant criteria of Section 51(24) of the *Planning Act* have been met. The Board does not discount the concerns of City staff and of the neighbours concerning compliance with the local OP: "compatibility" is an Official Plan objective, to be given weight. In this case, however, the Board heard many arguments about the *mathematics* of density and openness, but was not shown persuasive evidence that they translated into a tangible threat to the *visual* consistency of the area, particularly if the appropriate precautions are taken.

The Board also heard several suggestions from the expert witnesses, to improve the "fit". The Board finds no dispute on that account, and is prepared to incorporate those suggestions.

As to Zoning By-law 07-304, the Board was not persuaded of any inconsistency with the statutory criteria, notably the question of compliance with the Official Plan, for the same reason as above.

Accordingly, the Board disposes of this matter as follows.

1. THE BOARD ORDERS that the appeal of the Decision of the Committee of Adjustment, pertaining to the Applicant's Application for provisional consent to sever, is allowed in part, specifically to the extent that the terms of that Decision are amended at Paragraph 3 below. That appeal is otherwise dismissed.
2. THE BOARD ORDERS that the appeal of Zoning By-law 07-304 of the City of Hamilton is dismissed.

3. The terms of the Decision of the Committee of Adjustment are amended as follows:
- a) The measurements approved by the Committee of adjustment are hereby amended, to conform to the measurements specified in Zoning By-law 07-304.
 - b) Conditions 1, 3, 5, 6, and 7 of the Decision of the Committee of Adjustment are unchanged.
 - c) Condition 2, concerning variances, is deleted as moot.
 - d) In Condition 4, concerning warnings about traffic noise, the words "and air" are deleted.
 - e) Condition 8, concerning the Forestry & Horticulture Section, is replaced with the following:

In order to assist the retention and improvement of foliage to buffer a prospective dwelling on the severed parcel, the owner/applicant shall enter into a Tree Management Plan and a Landscape Plan satisfactory to the Public Works Department, Operations and Maintenance Division, Forestry & Horticulture Section, as a condition precedent to the approval of a building permit.

- f) A supplementary Condition 9 is added:

The side yard setback, on the east side of the severed parcel, shall conform to the front yard

setback required under Zoning By-law 90-145-Z.

g) A supplementary Condition 10 is added:

The maximum height of a dwelling on the severed parcel shall be 7 metres.

It is so Ordered.

"M.C. Denhez"

M. C. DENHEZ
MEMBER