

ISSUE DATE:

Feb. 01, 2011



PL101015

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

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Raffaella DiPaola
Applicant: 1729981 Ontario Ltd.
Subject: Minor Variance
Variance from By-law No.: 2009-141
Property Address/Description: 510 Bayfield Street
Municipality: City of Barrie
Municipal File No.: A-28/10
OMB Case No.: PL101015
OMB File No.: PL101015

APPEARANCES:

Parties

1729981 Ontario Ltd.

Raffaella DiPaola (North Barrie Plaza Limited)

Counsel

J. Alati

R. Minster

DECISION DELIVERED BY M. A. SILLS AND ORDER OF THE BOARD

The matter before the Board is an appeal by Raffaella DiPaola (Appellant) of the decision of the City of Barrie Committee of Adjustment (COA) to authorize variances for the property owned by 1729981 Ontario Ltd. (Applicant) and located at 510 Bayfield Street, in the City of Barrie. The City of Barrie did not appear at the hearing.

Background

The Applicant proposes to redevelop the subject 0.25 acre commercial site by demolishing the existing 63 square metre single storey vacant building and replacing it with a 300 square metre two storey commercial building. In order to accommodate the

construction of the new building, the Applicant requires authorization of the following variances:

1. to permit a side yard setback of 1.5 metres, whereas a minimum side yard setback of 3 metres is required;
2. to permit a rear yard setback of 1.5 metres, whereas a minimum rear yard setback of 7 metres is required.

An application for the exact same variances was before the COA in June 2009 at which time the variances were authorized, subject to the condition "*that the Ward Councillor facilitates a meeting with staff, applicant and parties present at the hearing to further discuss the site plan development*".

That decision was subsequently appealed to the Ontario Municipal Board (OMB) by two property neighbours; North Barrie Plaza Limited and Omilvine Holdings Limited. As a result, a nine day hearing was held which resulted in a decision in favour of the Appellants. The reason behind the decision related to the uncertainty of an easement in favour of North Barrie Plaza Limited over the subject site. The effect of this easement prohibited three parking spaces which were proposed to be located on the purported "easement lands" as part of the original site plan design. In his decision, the Board Member stated:

The Board is concerned that the Subject Property is subject to the right-of-way claimed by the Appellant, and is not satisfied that the Applicant has clear title to that part of the Subject Property designated as Part 55 on Plan 51R-30250. Accordingly, the Board is not satisfied that the Applicant will have the required minimum parking spaces.

Since the Applicant has not proved that it will have the required minimum parking spaces for the development, the Board finds that the proposed variances are not desirable for the appropriate development or use of the Subject Property.

The Board was told that rather than disputing the existence and validity of the easement, the Applicant decided to re-configure the site design. The current site plan meets the parking requirements of the zoning by-law and eliminates the need to provide parking on the lands in question (easement lands). On this basis, the Applicant re-submitted the application to the COA. In August 2010, the COA again authorized the variances, subject to the condition "*that the application be subject to the satisfaction of*

Site Plan Control approval". The appeal of that decision by North Barrie Plaza Limited is now before the Board.

Development Proposal

The subject property is located on the west side of Bayfield Street, which is a heavily travelled four lane highway carrying vehicular traffic north and south through the City of Barrie. Bayfield Street is a major commercial corridor consisting of a variety of establishments on both sides of the street, including several shopping centres. The subject property has a depth of 20.12 metres and a frontage of 50.62 metres on Bayfield Street.

The Appellant's property, known as North Barrie Plaza, is adjacent to the south and west (rear) limits of the subject property. This "L" shaped property is developed with three buildings which are currently occupied by restaurants and retail businesses. Adjacent to the west and south limits of the North Barrie Plaza is a large shopping centre with a Wal-Mart store and several other retail outlets. The main access to the Wal-Mart Plaza is over a common drive-way off Bayfield Street that runs through the North Barrie Plaza, and provides access for both properties. A signalized intersection on Bayfield Street controls access to this driveway.

The Applicant proposes to locate the new building at the south end of the site, with the north portion of the property being used primarily for parking. The site will be developed on full municipal services and will have extensive landscape treatment along the front of the property.

The site is designated General Commercial in the Official Plan and zoned General Commercial (C4) by both Zoning By-law 85-95 and Zoning By-law 2009-141.

The proposed site design changes have been accepted by the City and the Applicant is prepared to enter into a site plan agreement. In order to achieve final site plan approval, the Applicant must obtain authorization for the relief requested.

Preliminary Matters

Counsel for the Appellant raised two issues for the Board's consideration prior to proceeding to hear evidence on the matter of the minor variances.

Mr. Minster contended that the Notice of Hearing, Key Map and the Notice of Decision contain inaccuracies; specifically, the “Notice of Hearing” and the “Provisional Decision with Reasons” contains erroneous information as follows:

1. COA has granted a variance of By-law 2009-141, which is not in effect.
2. Key Map attached to the application is incorrect as the “existing commercial building is not a diagram of the building as it exists”.

Mr. Minster submitted that as the Notice of Hearing and Decision is defective, the decision by the COA is a nullity.

During the course of his arguments, Mr. Minster referenced several sections of the *Planning Act* and related Board decisions with respect to the enactment of zoning by-laws and the statutory requirements related to providing Public Notice. However, he later conceded that the matter of the stated by-law number was no longer an issue and accordingly, abandoned his objections with regard to Issue 1.

However, Mr. Minster argued that the inaccuracy of the key map drawing effectively amounts to a failure to provide adequate public notice. It was his contention that other members of the public may have come forward to oppose the application had they known the actual location of the building on the property.

Counsel for the Applicant submitted that Zoning By-law 2009-141 is the City's new comprehensive zoning by-law which has been passed, but is being appealed in its entirety. However, Mr. Alati contended that the Secretary Treasurer of the COA City has confirmed that the City is measuring minor variance applications against the performance standards of the new by-law. In any event, the variances are of the same numerical magnitude under both by-laws. Mr. Alati submitted that the location of the building on the key map is irrelevant. The key map, which was produced by the municipality, was meant to show where the building could be located should the required zoning standards be adhered to. The application submitted by his client clearly depicts the intended deployment of the proposed building, and the Notice of Hearing and Decision describe the precise details of the variances and the nature of the application.

The Board finds that the statutory requirement to provide public notice has been met, and accordingly, it is appropriate to proceed with this matter. The Board does not accept Mr. Minster's argument that the public might have relied on the key map drawing alone to make an assessment of their opposition to this application. I am satisfied that any misstatements/errors in the Notice of Hearing are minor and are not of a nature that could be considered to have misled the public with respect to the subject application. The Notice of Hearing clearly sets out the appropriate numeric content of the relief being requested and is sufficient to inform the public of the exact nature of the application. The Appellant, who was involved with this matter previously, was fully aware of the exact details with respect to the development proposal. The reasons for appeal did not list concerns with respect to these matters and, despite having ample time to do so, the Appellant did not bring a proper Motion forward to the Board.

Although counsel for the Appellant ultimately abandoned his objections with respect to the appropriate by-law to be applied to this application, I will address that matter for the record. The *Planning Act* provides the Board with the authority to make any decision that the committee could have made on the original application (subsection 45(18)), or to make a decision on an application which has been amended from the original application (subsection 45(18.1)) if in the Board's opinion, the amendment to the original application is minor (subsection 45(18.1.1)). I find that if a revision were to be necessary, which in my view is not the case in this instance, that revision would be considered minor as the relevant performance standards set by By-law No. 2009-141 are exact to those of By-law No. 85-95.

Applicant's Position

Mr. Dan Amadio was qualified by the Board to provide expert planning opinion evidence. It was his opinion that the proposed development is consistent with Provincial Policy Statement (PPS) and Growth Plan (GP) policies which promote an efficient use of land and encourage intensification within areas with existing infrastructure. The requested variances are critical to the effective redevelopment of the property, and are appropriate based on sound planning principles. The requested variances are minor in nature and comply with subsection 45(1) of the *Planning Act*.

Mr. Amadio asserted that the proposed development conforms to the goals and objectives of the City of Barrie OP which intended “*to maintain, enhance and support the City’s role as the primary commercial/service centre of the region*” (subsection 4.3.1). It is a goal of the OP to encourage the maintenance and expansion of the commercial service sector by developing policies “*which will complement and enhance the efforts of the private sector in the provision of goods, services and employment opportunities*”. The proposed development provides an opportunity to implement these goals and objectives.

Mr. Amadio submitted several photos portraying the development along Bayfield Street and within the immediate area. The OP sets out that “*that the design, appearance and scale of new commercial development shall be in harmony with adjacent land uses*” (subsection 4.3.2.1 (b)). Mr. Amadio submitted that the proposed built form is in keeping with the character of the General Commercial Area and the proposal will result in a higher and better use of a commercial site. The reduced setbacks will not negatively affect the design or function of the site and the new building is compatible in appearance and scale with adjacent buildings. The proposal is consistent with subsection 4.3.2.5 (e) of the OP which intended for this area to be developed in a nodal fashion; “*General Commercial areas will be permitted in suitable locations primarily at the intersection of arterial and collector roads and will be encouraged to establish in nodal fashion*”.

Mr. Amadio submitted that the proposal meets all the standards of the zoning by-law applicable to the General Commercial designation, with the exception of the two variances being requested. He contended that the setbacks established in the zoning by-law intended to address issues related to safety, privacy, access for property maintenance, light and air movement, shadowing and buffering. He opined that the reduced setbacks will not compromise or adversely affect the intent of the zoning by-law. The site has been designed to maintain the front and northern side yard setbacks by positioning the building closer to the rear and south side of the property. And although the required reduced rear and side yard setbacks will result in the proposed building being closer to adjacent properties, these are compatible commercial uses and the variances will still allow for a sufficient buffer between properties. The portions of the adjacent properties abutting the subject site are used for vehicle parking and as such, these properties will not be negatively affected by the proposed building being

closer to the property line. The proposed site design allows for extensive landscaping along the portion of the property fronting onto Bayfield Street, and provides for functional parking, routine building maintenance and snow removal. Emergency vehicle access to the site and/or adjacent properties will not be affected, and the safe movement of pedestrian and vehicular traffic will not be compromised. There is no evidence to indicate that the reduced setbacks will affect light and air movement between the buildings, or result in adverse shadowing impacts.

With respect to the Appellant's concerns related to the loss of visibility of buildings on his property, Mr. Amadio submitted that he is not aware of any law or planning principles which specifically protect the visibility of commercial properties. However, it was his opinion that there are different fields of sight and visual obstructions at any given vantage point along Bayfield Street, and the proposed variances will not result in any unappreciable degree of obstruction to the commercial establishments on the Appellant's, or any other surrounding properties.

In summary, it was Mr. Amadio's professional opinion that the variances comply with the intent of the OP, and both the existing and new zoning by-laws. The development proposal represents a desirable outcome and will not result in the creation of unacceptable adverse impacts. The subject site is currently underutilized and the proposal will result in the property being redeveloped in an effective and efficient manner. The variances are minor in nature and the proposal represents good planning.

Appellant's Position

Mr. James Kirk is a registered professional planner and Member of the Canadian Institute of Planners. It was his professional opinion that the requested variances do not meet any of the four tests and therefore, should be refused.

Mr. Kirk submitted that the proposed variances do not maintain the intent of the OP with respect to being in harmony with adjacent properties and/or minimizing the impact on adjacent land uses. He contended that when the separation between buildings is reduced, the harmony is altered. The proposed variances would create an unacceptable impact on the North Barrie Plaza property in that visibility, "which is key to retail and commercial business", would be adversely affected. He further contended

that “the size of the project would create a potential parking and traffic burden on the surrounding properties”.

Mr. Kirk opined that the proposed variances do not maintain the general intent and purpose of the zoning by-law. He submitted that setbacks are intended to ensure that there is adequate distance between buildings on abutting properties. It was his contention that the reduced setbacks do not allow sufficient space for yard and building maintenance, and could present problems with respect to emergency vehicle access.

In summary, Mr. Kirk opined that the reduced setbacks will have a significant effect on the visibility of nearby commercial establishments and therefore, the variances cannot be considered to be minor in nature. The Applicant has not established a need for the reduced setbacks and the proposed variances are not desirable for the appropriate development of the property.

Mr. Carmen DiPaola purchased the North Barrie Plaza property, now owned by his spouse, 35 years prior. He told the Board that he is currently the manager of the plaza property, and has past experience as a real estate broker and developer.

His concerns relate to the marketability, parking and sightline impacts to the plaza property. He contended that the proposed siting of the Applicant’s building will result in altering sightlines and diminish the visibility of plaza buildings from the driveway intersection on Bayfield Street. He said from a marketing perspective, it was his experience that if potential customers “can’t see the property, they won’t drive into the property”. He asserted “I bought my property 35 years ago, they just bought their property 1 1/2 years ago; why should someone out of the blue be allowed to increase the economic viability of their property at the expense of the Appellant?” He told the Board that one of his tenants has already told him that they will relocate their business if the proposed building is permitted to proceed as planned.

Mr. DiPaola was further concerned that as a result of the proposed right-in, right-out entrance to the subject site, patrons of the future tenants of the proposed building will use the plaza parking lot as a turn-around.

Mr. Ted Manouris is the owner of the Mr. Sub business which is located on the plaza property. He told the Board he is concerned about parking issues and the loss of business resulting from the pending loss of visibility of the signage on his building.

Analysis and Disposition

The Board has considered the concerns of the Appellant and carefully examined the professional planning evidence. In this regard, I found that the submissions of Mr. Amadio to be more comprehensive and more convincing. In consideration of all the evidence before me, I am satisfied that the subject application meets the criteria set out in subsection 45(1) of the *Planning Act*, and represents good planning.

I find that the proposed development is consistent with the direction set out in Provincial planning policies, and the variances maintain the general intent and purpose of the City of Barrie Official Plan. The Board can appreciate that the existing building is limited with respect to the types of commercial uses which can be accommodated due to its size and configuration. It would then follow that a larger building, which is more suited to providing a broader array of commercial uses, would facilitate a more efficient and viable use of the property. The proposed development is in keeping with the direction set out in the Provincial Policy Statement with respect to intensification and more efficient use of land and existing infrastructure. Likewise, the development proposal promotes the goals of the OP with respect to encouraging the maintaining and expansion of the commercial service sector; effectively enhancing the provision of goods, services and employment opportunities.

In my view, the proposed variances are consistent with the intent and purpose of both, the existing by-law and the new comprehensive zoning by-law. The proposal is a permitted use and the building design is in keeping with the overall character of development in the immediate area and along this commercial corridor. There was no evidence before the Board which would indicate that the reduced setbacks will impede pedestrian/vehicular access to surrounding properties, or otherwise compromise the public safety. The subject site will not require a loading zone or outdoor garbage storage facility, and there was no evidence to substantiate Mr. Kirk's concerns with respect to property maintenance. As the portion of the plaza property abutting the subject site is used as a parking lot, it is unlikely that the reduced building setback will

result in the creation of adverse shading or shadowing impacts. The Board is further satisfied that the proposed siting of the new building allows for an appropriate buffer between buildings on adjacent and surrounding properties. It is worthy of note that the portion of the plaza property abutting the rear yard of the subject site is deemed by the zoning by-law to be a side yard. Consequently, the owner of the plaza would be permitted to construct a building having a setback of only three metres from the rear property line of the Applicant's property.

The Appellants concerns with respect to this proposal relate to parking and visibility of existing business establishments. I find the concerns related to parking amount to little more than an apprehension of impact; the requisite number of parking spaces is being provided on site, and there are enforcement options available to control parking on the plaza property.

The Board does not concur with the Appellant's position that visibility of North Barrie Plaza business establishments is a matter which is to be considered in the determination of this minor variance application. While I have no reason to doubt that Mr. Paola has extensive expertise in the marketing of commercial properties, planning principles neither guarantee a "view" nor require established sightlines to be maintained. Moreover, any particular view and/or sightline is lost within a fleeting moment as a vehicle travels along Bayfield Street.

In conclusion, the Board finds there is no evidence to indicate that the proposed variances will result in the creation of any appreciable degree of adverse impact to the North Barrie Plaza or the surrounding area. The proposed development represents good land use planning and the variances are minor in nature.

THE BOARD ORDERS that the appeal is dismissed and the variances to Zoning By-law No. 85-95 and Zoning By-law No. 2009-141 are authorized subject to the condition set by the Committee of Adjustment.

The Board so Orders.

"M. A. Sills"

M. A. SILLS
MEMBER