Agenda Item #	Page #

File: Z-7949
Planner: M. Tomazincic

TO:	**CHAIR AND MEMBERS PLANNING & ENVIRONMENT COMMITTEE**
FROM:	**JOHN M. FLEMING DIRECTOR, LAND USE PLANNING AND CITY PLANNER**
SUBJECT:	**ONTARIO MUNICIPAL BOARD DECISION 1240 RICHMOND STREET MEETING ON JULY 23, 2012**

RECOMMENDATION

That, on the recommendation of the Director, Land Use Planning and City Planner, the following report on the decision by the Ontario Municipal Board relating to the appeal by Linda Anne Brand from a the decision of Municipal Council to refuse a Zoning By-law amendment relating to the property at 1240 Richmond Street **BE RECEIVED** for information.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

October 17, 2011 Report to Built and Natural Environment Committee – Linda Anne Brand. This report recommended the requested Zoning By-law amendments to permit the internal conversion of the existing single detached dwelling into 2 residential dwelling units be refused.

February 6, 2012 Report to Built and Natural Environment Committee – Linda Anne Brand. This report advised the Ontario Municipal Board that the Municipal Council has reviewed its decision made at its session held on October 24, 2011 relating to this matter and sees no reason to alter it.

BACKGROUND

The attached Ontario Municipal Board decision relates to an application by Linda Anne Brand initiated on 15 July 2011 to amend the Zoning By-law **FROM** a Residential R1 Special Provision (R1-5( )) **TO** a Residential R2 (R2-3) Zone to permit permit single detached dwellings; semi-detached dwellings; duplex dwellings; and converted dwellings (maximum 2 dwelling units). The purpose and effect of the requested amendment is to rezone the subject site to permit the internal conversion of the existing single detached dwelling into 2 residential dwelling units. The recommendation is to refuse the requested amendment.

On October 24, 2011, Municipal Council refused to amend the Zoning By-law. On November 24, 2011, an appeal was submitted by Barry Card, solicitor for Linda Brand, owner of 1240 Richmond Street, from Council's decision to refuse to adopt the requested Zoning By-law amendment. The Ontario Municipal Board Hearing was scheduled for May 16-18, 2012.

The City of London Legal Department and Planning Staff attended the Ontario Municipal Board hearing in support of Municipal Council's decision. The OMB dismissed the appeal and upheld the decision of Council. A copy of the OMB decision is attached as Appendix A.

Agenda Item #	Page #

File: Z-7949
Planner: M. Tomazincic

PREPARED BY:	**SUBMITTED BY:**
MICHAEL TOMAZINCIC, MCIP, RPP **PLANNER II, COMMUNITY PLANNING AND URBAN DESIGN SECTION**	**JIM YANCHULA, MCIP, RPP** **MANAGER OF COMMUNITY PLANNING AND URBAN DESIGN SECTION**

RECOMMENDED BY:
JOHN M. FLEMING, MCIP, RPP **DIRECTOR, LAND USE PLANNING AND CITY PLANNER**

July 9, 2012

Y:\Shared\implemen\DEVELOPMENT APPS\2011 Applications 7854 to\7949Z – 1240 Richmond Street (MT)\7949Z – OMB Decision Report

File: Z-7949
Planner: M. Tomazincic

Appendix A

ISSUE DATE:

June 29, 2012

PL111312

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

Linda Anne Brand 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 to enact a proposed amendment to Zoning By-law Z.-1 of the City of London to rezone lands respecting 1240 Richmond Street from Residential R1 Special Provision (R1-5(3)) to Residential R2 (R2-3) to permit the internal conversion of the existing single-detached dwelling into two residential dwelling units.
OMB Case No.: PL111312
OMB File No.: PL111312

APPEARANCES:

Parties	**Counsel**
Linda Brand	B. Card
City of London	J. Page

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

Introduction

This rezoning dispute involved an application and response that were not what they seemed.

It centered on an existing residential building, a few hundred metres from the gates of the University of Western Ontario, in the City of London (the "City"). The building is zoned single-detached. The owner, Linda Brand (the "applicant"), applied to rezone it for two dwellings (what her planner called a "duplex"); but City planning staff advised that the project was too "intense", and Council refused the application. She appealed to the Ontario Municipal Board (the "Board").

At the hearing, the applicant and the City were represented by counsel, each supported by planners (Mr. Knutson and Mr. Tomazincic respectively). There were also two participants opposing the application.

File: Z-7949
Planner: M. Tomazincic

Appendix A

It was not until after the applicant's planning evidence that it became apparent that this case had nothing to do with whether the building would be occupied by one household or two. It had not functioned as a "single-detached" in years (at least as that term is understood in common parlance); nor was the intent of the application for it to function as a "duplex". In reality, the building was a student rooming house, and the application, if accepted, would double the permissible bedrooms from 5 to 10.

The Board has carefully considered all the evidence, as well as the able submissions of counsel. The Board concludes that if the applicant wanted ten bedrooms, she should have said so – and why. The Board was not satisfied that a proper case had been made to justify rezoning for up to ten bedrooms. The appeal fails accordingly. The Board adds, however, that this outcome is without prejudice to the applicant's right to resubmit, and to have the proposal fairly considered. The number of bedrooms should be assessed on planning merits, not on each side's euphemisms. The details and reasons are set out below.

Project and history

The application was submitted in mid-July, 2011 – for what the applicant's planner called "intensification". This century-old dwelling (2,433 square feet of liveable floor area) would go from "one dwelling" to "two dwellings", turning it into a "duplex". He said he never saw the interior.

Perhaps that explains why he did not say that it was used as a *de facto* student rooming house. The application and accompanying planning report (12-page application, 20-page report, 32 pages of appendices) did mention that there were students in the neighbourhood; but not once, in 64 pages, did it say that student accommodation represented either the existing use, or the intended use. On one hand, there is no distinct zoning category for the intended use; but the insistence on limiting descriptions to generalized terms (the property was "residential") made the assessment of actual planning consequences difficult. The focus of the hearing shifted to the actual (and presumably intended) use only after he concluded his examination-in-chief and cross-examination; but it was not thereafter challenged. In later evidence, equally uncontradicted, it became apparent that the previous owner, the Patry family (which

File: Z-7949
Planner: M. Tomazincic

Appendix A

operates student rooming houses in several cities) had been operating the building as a student rooming house for years; such was its use at the time of purchase.

There was no mention of this in the applicant's own examination-in-chief either. She testified that she had bought the building with the idea of eventually moving from her home in British Columbia to London – though she had no connection with the city. In the meantime, she referred only to wanting "tenants". She said she had not seen the interior, since before she bought it (she said she could not remember when she bought it, but the evidence indicated mid-2009); nor, she said, could she remember its interior configuration, or how many rooms might be used as bedrooms now.

She administers the property through an agent, but said she could not remember the name of the property management firm (though she eventually remembered the name of the agent). She said she knew of four tenants since the time of purchase. When finally asked about students, she said she had no idea how many occupied the building now; when asked on cross-examination how many rents she was collecting, she maintained that she still did not know.

The Board was never told when the property had last been used as a "single-detached", as that term is usually understood. It also appears the situation is not unusual: one participant owned a home similarly occupied by students, only two doors away; and the Board was shown neighbourhood photos with several "blue signs", in front of houses, advertising student rentals. The participant, Marie Blosh, president of the local community association, said the going rate was $500 per month per bedroom.

The application was to rezone from R1 to R2, with adjustments to the Floor Area Ratio. Though the applicant's planner called the objective a "duplex", the City preferred to call it a "converted dwelling". The Board was not told of any City opposition to students renting in the neighbourhood; on the contrary, a high-rise oriented to students was being considered right across the street. However, the existing dwelling was supposed to be licensed under the City's Rental Licensing By-law; this one was not.

The larger issue is that under the Zoning By-law Z-1-041300:

- a "dwelling" is allowed up to five bedrooms;

File: Z-7949
Planner: M. Tomazincic

Appendix A

- "two dwellings" would be allowed ten.
- Simply put, this proposal would double the number of potential bedrooms for students.

City staff prepared a 23-page report, recommending against the proposal. First, it said the proposal was contrary to the Provincial Policy Statement ("PPS"), on the general ground that it was not efficient development which sustained the financial well-being of the municipality. The report offered little rationale for that assertion.

Next, it said site-specific zoning was inconsistent with the City's Official Plan ("OP"), adding that there was nothing unique about the property to justify a site-specific amendment here. The report added that planning documents anticipated "conversions" elsewhere, but had not mentioned them here.

Not once in 23 pages did the report mention that the building was being used for student accommodation, or that this was presumably the expected future use.

There was one oblique exception. The report did mention that in 2008, Council adopted the *Great Near-Campus Neighbourhoods Strategy and Implementation Plan* (the "Strategy"). It was a statement of intent, adopted by two Council Resolutions, but not yet a "plan" or other binding instrument under the *Planning Act.* The report described the rationale for that Strategy:

> Applications for site-specific Zoning By-law amendments, consents to sever, and requests for minor variances are occurring incrementally on a site-specific basis in the absence of a comprehensive plan to direct intensification to appropriate areas. While individually an application may seem minor and insignificant, collectively these have resulted in a significant amount of intensity being added to these neighbourhoods creating impacts related to a loss of residential amenity, By-Law Enforcement concerns, loss of neighbourhood stability, and other issues.

The Strategy had identified several tools for Council (e.g. changes to the OP and zoning by-laws); but they had not been adopted yet. They favoured larger-scale purpose-built student accommodation – "professionally managed" – as opposed to *ad hoc* conversions of existing buildings without "on-site management". Staff concluded:

> The request to adopt a site-specific Zoning By-law amendment in this low density residential area to facilitate the internal conversion of the subject site to permit two

File: Z-7949
Planner: M. Tomazincic

Appendix A

> residential dwelling units perpetuates the issues that triggered the need to undertake the Near-Campus Neighbourhoods Strategy in the first place. The proposed form of intensity is ad-hoc, is not conducive to on-site management, and is not consistent with the goals of the Great Near-Campus Neighbourhoods Strategy.

The report did not otherwise mention students. On another front, it made pointed comments about the absentee owner and the "management" of the property:

> In June 2010, the applicant was charged and convicted for permitting two separate self-contained units at this location. The conviction was handed down on June 28, 2010 and the owner was given a full year by the Justice of the Peace to bring the property into compliance with the Zoning By-law. The Prohibition Order was put forward to June 28, 2011. To date, municipal By-law Enforcement officers have not been able to gain entry to the building to confirm whether the applicant complied with the Prohibition Order and restored the building to a single dwelling....
> Conflicts arise due to increased demands for vehicular parking as well as an increase in noise and garbage that is inherent with an increase in occupancy. In fact, the history of By-law Enforcement issues related to increasing intensity at the subject site is indicative of the land use compatibility problems that arise when single detached dwellings are intensified....
> Concerns related to parking further exacerbate the potential for adverse impacts to the abutting properties.... The aforementioned By-Law Enforcement issues are indicative of the requested use being too intense for the subject site to accommodate. Since June 2009, when By-Law Enforcement staff first began investigating the subject site for its use as two residential dwelling units, the subject site has not been able to contain the level of intensity.

The report added photos (at more than one page) of "garbage accumulating at the rear of the subject site" (e.g. "during its illegal use as a converted dwelling"). Parenthetically, the application for rezoning was submitted to the City about three weeks after expiry of the time limit for compliance with the Prohibition Order.

Staff's next argument was based on OP section 3.2.3.2, which says: "Site specific amendments to the Zoning By-law to allow dwelling conversions within primarily single detached residential neighbourhoods shall be discouraged". Staff commented:

> The subject site is not unique within its context and does not have any special attributes which would warrant a site-specific amendment. Therefore, the requested amendment constitutes "spot" zoning and is not considered appropriate in isolation from the surrounding neighbourhood. This request for a site-specific "spot" zoning amendment is contrary to the residential intensification policies of the Official Plan.

On October 24, 2011, Council voted to refuse the application, citing the same grounds as staff, which led to this appeal. In February, 2012, staff produced another three-page report, this time on whether the City should alter its position in light of the appeal. It

Appendix A

suggested no change. Indeed, it added further information, indicating that the very day after Council voted to refuse the application,

> By-law Enforcement Staff executed a Search Warrant on October 25, 2011, to determine whether the subject site had been brought into compliance as required (by the Prohibition Order). By-law Enforcement Staff determined that, notwithstanding the Prohibition Order, the subject site still contained two dwelling units with two groups of tenants occupying the building.

There was no change in the City position. At the Board hearing on the appeal, the City took essentially the same position as in the staff report; the City's planner added that ten bedrooms would mean "too much intensity" for the site. However, the City pointed to nothing in the *Ontario Building Code*, or any planning document, demonstrating overcrowding or the like, according to accepted standards; nor was there any indication that the proposal had shortcomings in terms of the City's parking standards.

Analysis

The Board has three preliminary comments. First, it was agreed at the hearing that the term "converted dwelling" was more accurate than "duplex". This would involve certain nuances (the zoning would be "R2-1", not "R2-3"). Both sides were also agreed that if the proposal were to proceed, it would still be subject to a Site Plan process. In the Board's view, neither of these factors appreciably affects the outcome of this case.

The second preliminary comment is that the Board attaches little weight to the City's generic argument that the proposal did not represent efficient development which sustained the financial well-being of the municipality. That assertion had no specificity; and it was not supported by any clear rationale. The question of whether the proposal (such as it was) was overly "intense", however, deserves further analysis.

The third preliminary comment is about context. As a backdrop, the PPS calls Ontario's planning system "policy-led". Decision-makers are under a statutory duty not only to "have regard" to stated "Provincial interests" but also to issue Decisions "consistent" with the PPS, and which "conform" to Provincial plans. The process is not discretionary. In a "policy-led" system, the expectation is that there is a clear and coherent planning rationale for land-use proposals and decisions.

File: Z-7949
Planner: M. Tomazincic

Appendix A

In such a system, it is essential that applications reflect the true nature of the proposal, and that responses be based on objective criteria. Both municipalities and property-owners have a right to transparency on that account. Without it, there is no way for a policy-led system to function on a methodical basis.

That is not what happened here.

Contrary to labeling, this application was not about a "duplex" in the conventional sense. Although the paper trail was couched in broad generic language (the property was simply "residential"), and it was said that this phraseology merely reflected the language of the By-law, the circumstances suggested a more specific objective. The application was submitted after a conviction by a Justice of the Peace, pertaining to how the building was occupied. The core issue at the current hearing, pertaining to that occupation, was the number of bedrooms that the student accommodation could have, i.e. a maximum of five or ten. The City's response – that there were "By-law Enforcement issues" (which, after some effort, were ascertained to mean noise and garbage), resulting from "too much intensity" – was a euphemism for saying it thought there were too many students in the building. That is the question at the core of this proceeding.

To be clear, the Board's determination is not based on the history of litigation before Justices of the Peace, nor is the Board swayed by considerations of *who* the occupants of the building are. The Board is mindful of the admonition, by the Supreme Court of Canada, against "people zoning" in *Bell v. The Queen*, [1978] 98 D.L.R. (3d) 255, and zoning on the basis of "personal characteristics or qualities". At the risk of conjecture, the reluctance of both sides to mention "students" may have been due, in part, to an apprehension about running afoul of that decision.

In the current case, however, the issue is not *who* the occupants are, or their qualities, but specifically the number of bedrooms for them, and the appropriateness of this building to sustain that number. The applicable OP provision, section 3.5.9, says that in this area, "residential intensification may be permitted through conservation and rehabilitation of the existing housing stock, provided… that intensification is of a scale which is compatible with surrounding land uses". The "scale" of this intensification was, therefore, pivotal; and in this particular context, the relevance of the number of

File: Z-7949
Planner: M. Tomazincic

Appendix A

bedrooms was specifically acknowledged by the Board in *Patry v. London (City),* [2006] O.M.B.D. 0780. It is a germane consideration.

The next aspect of context is the structure of land-use controls under the City's planning instruments:

- The OP establishes a general rule about site specific amendments to the Zoning By-law being "discouraged".
- The Board has no doubt that there are exceptions: municipalities in Ontario adopt site-specific by-laws routinely, and the Board was not shown that the City of London had totally abandoned the practice.
- However, as with any exception to a general rule, there would have to be some compelling reason to do so.

In addition, the Board is mindful of the admonition, at section 2.1 of the *Planning Act*, to "have regard" to the decision of Council.

The next question is whether, on its substantive merits, this proposal would warrant departing from the general OP rule "discouraging" site-specific amendments. Hypothetically, it is arguable that if the applicant were to produce a straightforward plan, demonstrating how the premises could be configured to accommodate the real proposed use (according to sound objective principles, including prospective compliance with the *Ontario Building Code*, the Property Standards By-Law, and the Rental Licensing By-Law), then the applicant would deserve a fair hearing from the City. If the City turned down an accurately-described and well-substantiated proposal, the rationale should be based on accepted criteria, objectively ascertainable. Euphemisms are not enough.

On review, the Board's first conclusion is that the Board cannot agree with the application as filed or as presented in this appeal.

- It is incumbent on an applicant to demonstrate that the requested rezoning complies with all relevant planning principles;

File: Z-7949
Planner: M. Tomazincic

Appendix A

– and it is incumbent on an appellant to establish the grounds of the appeal.

– In this case, the applicant's side did not set out what the applicant was actually seeking (namely up to ten bedrooms) – let alone the objective planning merits of configuring this accommodation in that way.

On that basis, this appeal cannot succeed.

However, it should be further noted that the above finding is without prejudice to the right of the applicant to resubmit – with a transparent proposal this time. If she wants ten bedrooms, she should say so – and *why*. For its part, if the City considers that number excessive, it should point to objective standards to corroborate its position. If the parties wish the undersigned Member to be seized, in the hypothetical event that the matter does eventually reappear at the Board, the Board may be spoken to.

Conclusion

The appeal is dismissed. It is so Ordered.

"M. C. Denhez"

M. C. DENHEZ
MEMBER