Nielson & Sidler Developments Inc. v. Oakville (Town) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983

AND IN THE MATTER OF an appeal by Nielsen & Sidler Developments Inc. from a decision of the Committee of Adjustment of the Town of Oakville whereby the Committee dismissed an application numbered A-36/90 for a variance from the provisions of By-law 1984-63, as amended, premises known municipally as 7 West Street

Ontario Municipal Board Decisions: [1990] O.M.B.D. No. 1299
File No. V 900271

Ontario Municipal Board
A.J.L. Chapman, R.B. Eisen
July 17, 1990

COUNSEL:
R.R. Arblaster, for Nielsen & Sidler Developments Inc.
D.L. Gates, for the Town of Oakville.

ORAL DECISION delivered by A.J.L. CHAPMAN and Order of the Board:--

The matter before the Board all day today has been the appeal by Nielsen & Sidler Developments Inc. against a decision of the Committee of Adjustment of the Town of Oakville. The Board is giving its decision on that appeal at a fairly late hour, so I don't propose to be very long, and also because in my view there is not really too much to be said.

I want to say at the outset that Mr. Gates, the Town Solicitor, in his usual fashion, and Mr. Leung, a planner with the Town of Oakville, have not only thought of everything that legitimately could be raised in support of the Town's position supporting the Committee of Adjustment decision, but have even gone above and beyond the call of duty and have dreamed up things that, with great respect to them, just don't hold water. Not a stone has been left unturned by the solicitor and by the Town planner to muddy the waters or to raise concerns of this, that and the other thing that would lead the Board to dismiss the appeal, and speaking personally, I think I know why, and speaking personally, I don't intend to comment on it - but they did their job.

The property in question is located on West Street, and I must say this, we are for the purpose of this hearing assuming that Lake Ontario lies to the south, that West Street lies to the west, and this property is located east of West Street and north of a road in the ownership of the Town known as Lakeview, but which is no longer open to vehicular traffic, but is still apparently a road allowance. Immediately to the east is a detached home and immediately to the north is a laneway, said to be about 15 feet in width, which gives access to the properties lying on the north shore of the lake, but to the east of the subject property. Immediately to the north of this laneway is the home of Dr. and Mrs. Moritz, who were the only two residents in the area to give evidence either in favour of or in opposition to what is proposed here and they were in opposition to the appeal in a manner in which I will describe in a moment.

The property is what is known as a substandard lot according to the R3 zoning. It is designated in the Official Plan for residential uses and it is zoned R3 by the Zoning By-law that is applicable. It has about 48 and 1/2 feet of frontage on the lake by a depth along West Street of 102.9, nearly 103 feet. It is substandard as far as the R3 regulations are concerned but that is not a concern at this hearing because variances have been granted recognizing it as a lot notwithstanding its deficiencies in lot area, lot frontage and slightly in lot depth as well.

There was located on this property a frame house, built perhaps in the area of 1924, so it is therefore approaching 70 years in age and again this has nothing to do with our decision, but I have always heard that frame houses that see 70 years are beginning to get a little long in the tooth. The single storey frame house predated the By-law and in its location it stood closer to West Street and closer to the lake than the R3 regulations permitted. Sometime after the By-law was passed, a foundation was put under the frame house. The foundation is of a much later vintage, probably from about 1986 than the house itself but, and this is the important point, the foundation was exactly under the existing walls of the old frame cottage and therefore the foundation as well was in conflict with the Zoning By-law in respect to its distance from the lake side and its distance from West Street. Why a variance was not asked for when that was done back in 1986, I don't know, but perhaps it was rectified at a later date by the then owner in 1989 because, in any event, an application was made back in 1989 for two variances. One was to permit a second storey that would be only 4.8 metres from the Lakeview Road, that's the lake side, when the By-law required a setback of 7.5 metres and the other to permit the second storey to be constructed 2.1 metres from West Street when the By-law said the setback had to be 3.5 metres.

It is here that the trouble begins because the owner then sold the house to the developer and the developer assumed he had a variance to permit a structure two storeys high which was, as I say, 4.8 metres more or less and 2.1 metres more or less from Lakeview and from West Street. The neighbours thought that this second storey was going to go on top of the existing first storey and I find that the neighbours really didn't appreciate that the plans called for extending the new two storey house to the north and slightly to the east in a building envelope that the regulations of the R3 zone permitted. The contractor, on the other hand, thought he had

got the two variances, and the only two variances he needed, and he knew that it was subject to the fact that the foundation had to be sound. Sometime after the variances had been granted and ownership of the house had been obtained, they started knocking out the wall board and found that the joists were too far apart, and I am advised and we accept it, that on that particular occasion they had a work crew there consisting of seven people, seven framing carpenters and a discussion took place, the result of which was, it was a heck of a lot cheaper and a heck of a lot safer to tear the thing down and to rebuild the first floor on the same foundation, rather than attempt to repair the old and inadequate framing for the first floor and so he went ahead.

I don't think there would have been anything said about it from that day to this except the neighbours to the north, Dr. and Mrs. Moritz, began to see additional footings being put in and they wondered what was happening here because they had one understanding and the contractor apparently was doing something else. Their original complaint to the Town was about these new footings going in, new foundations to the north and to the east. The Town said there was nothing you can do about that. They are doing it within the limits imposed by the R3 regulations.

One thing led to another and someone said, and I accept it, that the Town suggested that the best thing to do would be to apply for variances for the first floor as well as the second, and that was done, and I would think much to the contractor's surprise, the Committee of Adjustment said this time, no, we're not going to allow it. It must have come as quite a surprise because the planning report from the Town, a copy of which was filed as Exhibit 18, only suggests that if it is granted that the developer or the owner be requested to provide a fence marking the boundary between the Town Road, i.e. Lakeview and the property. Perhaps it says, I don't know, I can't find it now. Exhibit 18, here we are. Now that's all it suggested, just that a fence be put up to separate and mark the lands of the Town from the lands of the property owner, the fence being to the satisfaction of Parks and Recreation. There is nothing in Exhibit 18 that would suggest that there are other planning concerns.

The planner for the Town suggested that was because the Planning Department probably thought when they wrote that report, they were still dealing with the 1989 application. The Board doesn't accept that for one moment. The evidence is clear that staff were well aware concerns had been raised by neighbours, the politicians were also into the act, staff knew what was going on, and still their report to the Committee of Adjustment on that second application, only contained the planning concern about separating the private property from the public property.

We have the evidence of two land use planners on what the Board has to decide. The Board has to decide whether the By-law, by that I mean the By-law that zones these lands R3, ought to be bent again to allow two variances. The one from West Street and the one from Lakeview Street. The law is quite clear that you have to satisfy the Committee of Adjustment, here today, the Ontario Municipal Board, that four tests can be met. If you fail on just one of them, the application fails. If you satisfy on all four, probably you can grant the variances.

The four tests are, in no particular order, first of all the variances are minor. Secondly, whether they are appropriate for the use and development of the subject lands, not the neighbourhood, the subject lands. Thirdly, whether they maintain the general intent and purpose of the By-law and finally, whether they maintain the general intent and purpose of the Official Plan.

One planner said that in his considered professional opinion, all four tests were met. That was Mr. Gregoris, the planner called on behalf of the appellant. Mr. Leung, the planner called on behalf of the Town, said that in his considered professional opinion, three of the tests had not been met. He had no quarrel with the By-law so in that respect both planners have said the general intent and purpose of the By-law is being maintained and the Board agrees. I have nothing further to say about that, so that leaves a difference of opinion between the two planners on the three other tests. Whether it is minor, whether it is appropriate for the development of the land, for the use of the land, and whether it is in keeping with the general intent and purpose of the Official Plan.

Now it has been said so often, it is almost trite, that you can't determine whether it is minor mathematically. As Mr. Gates pointed out, you can have a complete obliteration of the requirement of the By-law or you can have just one per cent difference and if you look at the cases, you can find them going every which way because they depend upon the facts in every particular case.

I often give as an example that it makes all the difference in the world if you've got a side yard variance from four feet down to two as to what lies on the other side of the property line. If you've got a solid brick wall of a man's garage, that's one thing, on the other hand if you've got his bedroom windows just two feet away, that's another thing. It depends upon circumstances. But one theme, I think, runs through all the cases and that is if there is unacceptable adverse impact, then probably you can't find that it's minor, no matter whether it is minor mathematically or not, and the same thing applies, I would think, perhaps, to some extent, to the other two as well. If you can find unacceptable adverse impact the variance ought not to be allowed. On the other hand, if you can't find unacceptable adverse impact on people, perhaps you can bend the By-law a little bit.

In this particular case, one variance has to do with the lake and that city owned road between the lake and the private

property. The other variance has to do with West Street and the evidence is that to the west of West Street is a cemetery, a very old and historic cemetery and west of that are more detached homes but they are too far away to be affected one way or the other.

The only neighbours who were concerned enough to come down here and give evidence were the two people who live to the north, and their main concern and they admitted it, was that proper process had not been followed. As a secondary concern they felt the place was a little massive because they are at a little lower level than this house, but they conceded that the building that could be built without any variances at all would, as the doctor put it, from a selfish point of view, be less attractive to him than what is proposed because he recognized the fact it was going to be a lot closer to him as of right. The doctor's windows on the south side that look at the lake, that would look at this building, are either very few in number or very insignificant as far as being overpowered by this particular house, and as Mr. Kerr, the architect, put it, when this house is finished, when it is allowed to be finished as planned, it will look a lot less imposing because of the way it is going to be finished than what it might at this stage of the construction. The architect, too, pointed out that by building with these variances, he could step down the house as it was extended to the north, whereas if they built within the building envelope, no variance is required and he would end up with a more unattractive building. This was admitted by several witnesses.

One thinks of the old adage, you cut off your nose to spite your face and that's the situation we are in. By flogging this thing we are going to produce as of right, not breaking any rules, not bending any by-laws, a worse looking building for the neighbourhood let alone for the property than what is proposed here, and all because of this obvious misunderstanding that developed, and we can see how it happened on both sides, and was allowed to grow without somebody getting together and knocking heads and saying this is not nearly as bad as one might have jumped to the conclusion it was going to be.

You know, it's very easy for anyone to say, in my considered professional opinion this does not conform. One has to think long and hard where is the harm, where is the hurt and the neighbours said our main hurt was that we feel that we were misled. I'm not going to get into the fact that she or he weren't misled one little bit. If they had taken the trouble to properly look at plans they could have seen what was there. If they had taken the trouble to find out where the house was going - they weren't misled. Everybody got off on the wrong foot and nobody stopped to talk to each other. Somehow the Town felt obliged to defend the neighbours and somehow we got into a hassle that should never have been. I know it is very bad form to say that in all my years at the bar, this is the worst case I've ever seen or something like that, but I'm going to say it anyway, that in all my years on the Board I've never seen, I can't recall ever having seen such a mountain made out of a molehill, out of two technical variances that have been there and if you do away with them, the result is worse than if you keep them, and allow the house to go.

Now there is only one thing that caused any concern at all and that was the Official Plan's emphasis on maintaining the character of the neighbourhood and I'm trying to paraphrase all this because of the hour and I'm rushing. There are motherhood statements in the Official Plan that can be taken to suggest all kinds of things and they have to do with, in essence, maintaining the character of the neighbourhood and it was demonstrated by using our old friend, Mr. Average, that this building sinned by being at the high end of the average in ever so many ways. It's there mainly because the lot is undersized compared to other lots in the area. But there is something that has got to be said, and it was not said, but it has got to be said and that is that waterfront property is extremely valuable and we are all putting our heads in the sand if we do not recognize the fact that a waterfront lot; even if it is undersized, is worth a staggering amount of money and the people who can afford those kind of lots are not going to be content with homes of 1,200 square feet or 1,900 square feet or whatever it might be. We have to understand the Housing Statement and where it is going, better use of land, more intense use of land, because one thing we have got to stop is the urban sprawl, that is going out into the rural areas, so that we are gradually paving over the north shore of Lake Ontario, from Oshawa to Grimsby. We have got to intensify the use of the land, that means smaller lots. We've got to understand that the people out there, and more and more of them, want smaller lots and not big gardens to maintain. These same people seem to have collected a lot of furniture because they also seem to want larger houses and there's nothing wrong with that as long as the adverse impact isn't there on the neighbourhood.

I don't know how much redevelopment has taken place in this area recently. We were told that Bronte is redeveloping and it is redeveloping on smaller lots. But many of the houses throw up little lot coverage and things of that nature because they are still on the old lots that existed, very deep lots, I think the evidence was 200 - 300 feet deep, that have existed because of the day when we didn't have sewers and we didn't have public water. Those days are gone and there is no need to have these big lots and if you can redevelop them as some of them have been, then they can be redeveloped, and they can be redeveloped with larger houses as long as we are not having unacceptable adverse impacts.

And again, I say where is the evidence of unacceptable adverse impacts? You can do anything with averages. As Mr. Arblaster pointed out in his cross examination and got admissions to prove it, if you forget about the variances altogether and build the house that the By-law permits, you are still going to have a house that is at the top end of all these

averages in the area.

What it comes down to is two technical variances that were there when it was a one storey building, will be there if it's a one storey building or it's a two storey building. We heard the reasons for not being too close to West Street, not wanting to get people in the house too close to busy traffic. It really doesn't apply here for a lot of reasons. One, West Street itself is not a busy street. Two, it's a dead end street - the end of the line. There were reasons advanced about the park, the linear park, the Town hopes, and the Board hopes too, will some day be developed along the lakefront. That may not happen for some years, and in the meantime, is the planning process to sterilize the development of this property? I think not.

I have so much to say and I really don't want to say it because of the time. One of the witnesses, Mr. Thun, is the land use planner with the Halton Conservation Authority whose job it is to comment on variances and he said that if the foundation had not been used, if a new foundation had been there, they would have required a 30 metre setback from the high water mark of the lake. That theory is apparently based on a letter from a one time Minister of the Environment and on a study that was only received; nobody even knows where the high water mark of the lake is. To say a fellow can't do something because some day we might establish the high water mark and we think you will be within 30 metres of it, is no way to plan. But in any event that doesn't matter either because Mr. Thun clearly indicated that the bottom line of the Conservation Authority was that now that they were satisfied the foundation was the same that existed since 1986, they had no objection to this development, and I mention it because it is an example of how the Town has left no stone unturned to explore this thing to the ultimate.

The Board prefers the planning minion of the developer's planner, Mr. Gregoris, when it is in conflict with the Town's planner. We can't find that these two variances asked for do not meet all the four tests. I sometimes say with respect. I'm not going to. I'm going to say we disagree with the decision of the Committee of Adjustment. We set it aside and we allow the appeal. We impose only one condition and that condition is that the landowner and the Town enter into an agreement about a means of notifying subsequent purchasers of this property that at sometime in the future there may be a publicly owned park between them and the lake. That's the only condition we are going to impose.

If there is any difficulty about what the Board intends with that condition, the Board may be spoken to, but I think not. I think counsel understand where we are going. Again, if there is any concern about what the Board intends with its reasons, which I concede have been garbled and rushed and what have you, the Board is quite prepared to sit down at its leisure to tie this thing up so tight, it will never get moved.

I can't say how strongly I feel that this is almost a crime to have been allowed to proceed to this stage. The money that's been spent by all parties. The work the Town put in to try and defeat this thing is mind boggling. Two technical variances that wouldn't hurt a soul, haven't hurt a soul and aren't going to hurt a soul, but a hornet's nest is stirred up because some people got frightened about what was going on and didn't take the trouble to properly ascertain what was going on. What is going on is going to be an improvement over what is there now because it means better housing which increases the value of everybody's house in the neighbourhood; means a better house than what could have been if the By-law had been complied with. That's conceded, even by the main objector and yet we're here and it's nearly six o'clock at night because Gates is such an able lawyer and the planner - no that's the lawyer's job, not necessarily to believe in the matter at all, but to lead evidence to support his client's position and that's what Gates did. That's his job.

The appeal is allowed, the application as asked for is granted, subject to the condition that the owner enter into an agreement with the Town to provide for notice to subsequent purchasers of this property that at sometime in the future there may be a publicly owned park between them and the lake,

and the Board so orders.

A.J.L. CHAPMAN, Vice-Chairman
R.B. EISEN, Member