

Ontario
Municipal
Board

Commission des
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de l'Ontario



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VIA E-MAIL

May 4, 2009

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Dear Sirs/Madame:

**Re: S. 43 Requests for Review
Decision Of Vice Chair Susan B. Campbell
Issued February 26, 2009
OMB Case No. PL060850**

The Board is in receipt of three Requests for Review, pursuant to s. 43 of the *Ontario Municipal Board Act*, of the above-noted Decision, OMB Case No. PL060850 (the "Decision") that was issued on February 26, 2009 and delivered by Vice-Chair Susan B. Campbell. The Order of the Board is set out on pages 66 and 67 of the Decision. The Board denied the appeals of Port Realizing Our Unique Distinction ("PROUD") of Official Plan Amendment 31 (OPA 31) and zoning By-law No. 2006-228. The Board also granted the appeals of the site plan and heritage permit applications filed by the Port Dalhousie Vitalization Corp. ("PDVC"). The Board Order was withheld, pending the finalization of the four items set out in paragraph (e) on page 67 of the Decision.

The Requests received by the Board are dated:

1. March 22, 2009, filed by Dr. Bacher, self-represented;
2. March 27, 2009, filed by Ms. Pepino, counsel for PROUD; and,
3. March 30, 2009, filed by Mr. Loucks, self-represented.

Rules 110 to 119, inclusive, of the Board's *Rules of Practice and Procedure* (the "Rules") set out the process whereby the Board may review a decision. A review request will not be successful if it is merely an attempt to re-argue an appeal. Pursuant to Rule 115, the Board will review a decision only if there is a "convincing and compelling" case that the Board acted outside its jurisdiction, violated the rules of natural justice, made an error of law or fact such that the Board would likely have

reached a different result, or heard false or misleading evidence from a party or witness that was discovered after the hearing and could have affected the result.

Disposition

I have carefully considered the content of each Request and I have concluded that the Decision will not be reviewed. All three Requests attempt to re-argue the issues that were raised over the course of the 71-day hearing, which considered the development applications filed by PDVC. These Requests fail to establish a "convincing and compelling case" that there is an error of law or fact, or a failure of natural justice or procedural fairness, or that new information or evidence is available that would have resulted in a different decision of this Board.

The Board strives to achieve finality in its decisions. In this particular case, the Board heard extensive evidence from all parties between February and November 2008. After the evidence was completed, the Board Member received detailed written submissions from each party. I am satisfied that the evidence and submissions of each party were given the appropriate weight by the Board Member in her lengthy Decision.

I must remind each Requester that the Board is not a court and does not operate under the principle of *stare decisis*. The Board is not bound by its decisions when considering new matters. Board decisions are not precedents, and a decision of one panel cannot bind or compel a future Board panel. Each proposal made before the Board is to be examined discretely and judged on its specific merits.

Background

The issues raised in the PDVC proposal involved the complex interrelationship between heritage conservation and land use planning. The Decision characterizes the central issue as one of determining whether the PDVC proposal achieves the policy imperatives of heritage conservation and long term economic prosperity for the community of Port Dalhousie. These policy objectives are clearly articulated in Provincial and Municipal (Regional and Local) planning instruments. It is my view that these policy objectives are compatible. The conservation of significant heritage features, pursuant to section 2.6.1 of the Provincial Policy Statement (the "PPS") and the goal to promote long-term economic prosperity need not be viewed as conflicting goals. Heritage Conservation District Plans, or guidelines that conserve significant heritage features, will serve to revitalize a District, by promoting activities such as renovation, rehabilitation, conversion, or new construction. Economic growth or revitalization in a Heritage Conservation District is certainly not limited to construction of new buildings. Heritage conservation also recognizes the importance of rehabilitation, renovation or conversion of existing uses. After reviewing this Decision, the supporters of heritage conservation have no reason to conclude that the activities of renovation or rehabilitation are of lesser importance to achieving the goal of economic development, than a proposal for new development. Each proposal is to be considered on its specific merits.

I make these comments by way of background, since this Decision did not find a conflict between the planning objectives of heritage conservation and long term economic prosperity. The Decision concludes, on page 66 that “the PDVC proposal complies with the *Ontario Heritage Act*, the *Planning Act*, the Regional Plan, the City’s OP, the Neighbourhood Plan and the District Guidelines; the proposal represents good planning and is in the public interest;...”

The PROUD Request

This Request asserts that Vice-Chair Campbell erred in her interpretation and application of the Ontario Heritage Act, (the “OHA”) and in particular her application of s. 41.2 (1) (b). The Request quotes from a recent decision of Member Denhez, which interpreted and applied the same provision of the OHA when considering a pre-2005 Heritage Conservation District Plan in the City of Vaughan. That decision is attached to the Request, along with my disposition affirming Member Denhez’s analysis, as being the correct interpretation of s. 41.2 (1) (b) of the OHA. In support of this ground, the Request asserts that the Vice-Chair misunderstood that the OHA is to be given a purposive and liberal interpretation.

I agree with the comments in the Request that it is necessary for the Board to undertake a purposive and liberal interpretation to achieve the objectives of the OHA. The court decisions found at tab 3 and 4 of the Request support this proposition. I agree with the ground raised in the Request that the correct interpretation of s 41.2 (1) (b) of the OHA is set out in the Decision of Member Denhez.

However, the Request fails to acknowledge an important finding in the Decision, which is that the Board determined that the PDVC development proposal complies with the Port Dalhousie Heritage Conservation District Plan and guidelines. The Vice-Chair concluded that these guidelines were incorporated into the Local Official Plan. As such, the Member did assess whether the PDVC proposal, including the heritage permit and site plan, complied with the guidelines. The Vice-Chair concluded, on page 66 of the Decision, that the proposal “complies with the *Ontario Heritage Act* and ...the District Guidelines;...” In my view, any error in the interpretation or application of s. 41.2 (1) (b) is moot, given the proper analysis undertaken by the Board to find that the PDVC proposal complied with the Heritage Conservation District Plan and guidelines. The interpretation placed by Member Denhez on s. 41.2 (1) (b) of the OHA does not lead to the conclusion that the Decision contains an error of law such that the Board would have likely reached a different decision.

The Request also asserts that the Decision contains a restrictive analysis of the heritage attributes of the Port Dalhousie Conservation District. As policy documents, Heritage Conservation District Plans are not meant to offer determinative checklists of heritage features, such that items that are not mentioned are assumed to be excluded from the list of heritage attributes or reasons for designation. I agree with the notion that Heritage Conservation District Plans are policy documents and the absence of view lines or a specific reference to a particular building, from the list of heritage attributes is not determinative of the significance of these features. Heritage Conservation Districts

are to be considered as a unit and study documents or guidelines need not include a specific reference to each heritage attribute. The Request asserts that the Vice-Chair discounted the sight lines, as heritage attributes, since views from the lake were not specifically referenced in the background study or Heritage Conservation District guidelines.

I have concluded that the Vice-Chair considered the opinion evidence from the various witnesses who testified at this hearing on sight lines and the visual impact of the proposal. On page 56 of the Decision, the Board makes an important finding in respect of the opinion evidence she received in this hearing on heritage planning and architectural analysis. The Board found that the opinion evidence of Messrs. Chapman and McClelland, whom she described as witnesses "working in the public interest and not for a proponent or opponent is convincing in this matter". The Decision found "after reviewing in detail almost 300 exhibits and days of testimony the most persuasive evidence is found in Exhibit # 5... and the testimony of Messrs. McClelland and Chapman". Amongst other matters, Mr. McClelland considered the visual impact of the proposed development on the Port Dalhousie Heritage Conservation District. The Decision summarizes his conclusions on page 57. I have no reason to interfere with the findings of the Vice Chair, given that she had the benefit of hearing and assessing the evidence of these witnesses, who were subject to cross-examination.

The Vice-Chair accepted the opinion evidence of Mr. McClelland and Mr. Chapman in respect of the heritage attributes of the features within the Port Dalhousie Heritage Conservation District and did not unduly restrict her analysis. The evidence which she considered on views and sight lines is an example of her broad consideration of the heritage attributes of the District.

This Request also asserts that the Vice-Chair misapplied the 2005 PPS by creating a distinction between significant heritage resources and not significant heritage resources. This is referred to in the Request as a punitive interpretation of the PPS.

I recognize that Board decisions are required to be consistent with the PPS, pursuant to s. 3 (5) of the *Planning Act*. I am satisfied that the Decision properly interpreted the PPS and, in particular, policy 2.6.1. This policy requires that "significant" built heritage resources and cultural heritage landscapes shall be conserved. The Board is required to determine the significant heritage attributes of the conservation district when assessing whether a proposal is consistent with the PPS. Part 5 of the OHA specifically authorizes the Board to hear appeals of municipal decisions and determine whether to permit alterations and demolitions within a Heritage Conservation District Plan. For these reasons, I do not share the view that the Vice-Chair misapplied the PPS. Such an interpretation would be contrary to the OHA.

The final ground raised in this Request is in respect of the application of the Provincial Growth Plan. The Request asserts that the Vice-Chair erred in considering the Growth Plan in the determination of the appeals. The PDVC applications for official plan and zoning by-law amendments were filed prior to June 16, 2006. The applicable provisions

of Reg. 311/06 direct that the applications filed prior to June 16, 2006 be disposed of as if the Growth Plan had not come into effect. I recognize that the Vice Chair did not interpret this regulation in this manner, but I am also mindful that the PDVC proposal considered the applications for the site plan and heritage permits, which were filed after the official plan and zoning by-law amendments. However, in my view, this interpretation of Reg. 311/06 is not an error of law that would have resulted in a different decision. The Board carefully considered all applicable planning instruments in the Decision. The interpretation and application of the Growth Plan was only a small component of the overall analysis. The Growth Plan is not referred to in the summary of the issues quoted above, found on page 66 of the Decision. Further, the policies of the Growth Plan that were considered are not materially different from the objectives in the PPS, respecting intensification of land uses or the promotion of long term economic prosperity and economic vitality.

For all of these reasons, I dismiss the Request of PROUD pursuant to Rule 115.01.

The Bacher and Loucks Requests

Both Requests are, in my view, an attempt to re-argue evidence that was available at the time of the hearing. In particular, these Requests refer to staff reports or correspondence from the Region of Niagara or the Ministry of Culture that was presented in evidence and debated over the course of the 71-day hearing. The attachments to the Dr. Bacher Request were presented at the hearing. The Vice Chair provided sufficient analysis of the evidence to explain how the Provincial and Municipal planning objectives are satisfied by the Decision. The Request filed by Mr. Loucks refers to photos and a compilation of materials that was also available at the time of the hearing. I am satisfied that the Board received this evidence and gave it the appropriate weight after considering the opinion evidence and lay testimony. Board Members are required to perform this independent analysis after hearing the evidence presented, in order to arrive at a Decision. The matters addressed in these submissions, such as Provincial policy objectives for heritage conservation and the importance of conserving heritage attributes of the district, were all addressed in the Decision.

Many of the points raised in these Requests in relation to the Provincial Policy Statement are also presented in the PROUD Request. I will not repeat my comments and trust that the two parties will consider my disposition on the PROUD Request. I have exercised my discretion to dismiss the Requests of Dr. Bacher and Mr. Loucks pursuant to Rule 115.01.

Final Comments

I recognize that this development proposal has been controversial within the community. The various positions taken by the Council of the City of St. Catharines in respect of these PDVC applications are summarized in the Decision. The Board was faced with a difficult choice. It heard evidence from witnesses, whom the Board preferred, that were not testifying for a proponent or opponent. The Board determined that this proposal will provide an economic stimulus to this community that will serve to protect the Port Dalhousie Heritage Conservation District in the long term. The previous

Ms. N. Jane Pepino
Dr. John Bacher
Mr. Jeff Loucks
May 4, 2009
Page 6

municipal council at the City arrived at the same conclusion. The current municipal council does not share this view, although this Council took no steps to repeal the official plan amendment and zoning by-law adopted by the previous Council.

I am satisfied that the Board carefully considered all of the evidence presented and I am in agreement with the Decision. I acknowledge that the PROUD Request correctly points out that two errors are found in the Decision (the interpretation of s 41.2 (1) (b) of the OHA and the transitional provisions to the Growth Plan). However, I do not find that these errors, for the reasons I have described in this disposition, would have affected the final result. As such I have dismissed the Request. It is my expectation that the parties will now work together to ensure that the economic stimulus promised by the PDVC proposal will come to fruition. This approval will serve the long-term interests of heritage conservation in the community of Port Dalhousie.

For all of these reasons, Decision PL060850 remains in full force and effect.

Yours truly,

A handwritten signature in black ink that reads "Marie Hubbard". The signature is written in a cursive, flowing style with a large initial "M" and a decorative flourish at the end.

Marie Hubbard
Chair