NOTICE -- The last day for appealing this decision is November 5, 1996 File No. A-14/96

COMMITTEE OF ADJUSTMENT

DECISION OF COMMITTEE WITH REASONS
RE APPLICATION FOR MINOR VARIANCE

Planning Act, R.S.O. 1990, c. P.13, ss. 45(8)

| | |
|---|---|
| APPROVAL AUTHORITY: | THE CORPORATION OF THE TOWN OF ORANGEVILLE |
| RE AN APPLICATION BY: | Shannah Gail Davison |
| LOCATION OF PROPERTY: | Lots 3 and 4, Block 10, Registered Plan 201<br>35-37 First Street |
| PURPOSE OF APPLICATION: | The existing building on the subject property currently contains three residential dwelling units. The applicants are seeking a minor variance in order to add a commercial use to the existing multiple residential use on the subject property. The existing building which contains approximately 548 square metres (5,900 square feet) of gross floor area would be renovated to provide approximately 436.6 square metres (4,700 square feet) for three residential units, approximately 23.2 square metres (250 square feet) for a business or professional office, and approximately 88.2 square metres (950 square feet) for a retail use. |

WE, the undersigned, in making the decision upon this application have considered whether or not the variance requested was minor and desirable for the appropriate development and use of the land and that the general intent and purpose of the zoning by-law and the official plan will be maintained, or in the case of a change in a use of property which is lawfully non-conforming under the by-law as to whether or not this application has met the requirements of section 45 (2) of the Planning Act,

CONCUR in the following decisions and reasons for decisions made on the 16th day of October, 1996.

DECISION:

Denied.

CONDITIONS - This decision has been made subject to the following conditions:

n/a

REASONS FOR DECISION: In the opinion of the Committee, the variance is not a desirable use for the appropriate development on the subject lands. Concerns of the Committee relate to parking on the site, and access to the site for either normal or emergency purposes.

Signature of Member Signature of Member Signature of Member

Signature of Member Signature of Member

CERTIFICATION

Planning Act, 1990, R.S.O. c. P.13, ss. 45(10)

I, Marion Morris, Secretary-Treasurer of the Committee of Adjustment certify that the above is a true copy of the decision of the committee with respect to the application recorded therein.

DATED THIS 24th day of October 1996.

Marion Morris

Marion Morris, A.M.C.T.(A)
Secretary-Treasurer

File: Plan Reports OB.1

THE CORPORATION OF THE TOWN OF ORANGEVILLE

Circulated to members
of Council/Committee

AUG 09 1996

By:

**TO:** **Community Planning and Development Committee**

**FROM:** **Alan Young, R.P.P.**
**Director of Planning**

**DATE:** **August 8, 1996**

**SUBJECT:** **NOTICE OF APPLICATION FOR JUDICIAL REVIEW**
**Shannah Gail Davison v. the Corporation of the Town of Orangeville**
**35/37 First Street**

---

1.0 **Introduction**

On June 14, 1996, Mr. Justice R.E. Zelinski of the Ontario Court (General Division) heard the above application (see previous staff report attached as Appendix "A" for description). Submissions were made Mr. Stutz on behalf of the applicant, and the writer on behalf of the Town.

At the conclusion of the hearing on June 14, the judge gave a preliminary ruling that, on the evidence, site plan approval of the proposal was not required. On July 22, he denied the application on the grounds of non-compliance with the zoning by-law. The judge agreed with the position of the Town that the C5 zone does not permit the residential/commercial uses proposed by Mrs. Davison. Accordingly, if Mrs. Davison wishes to proceed with her proposal, she will have to proceed by way of application for rezoning or minor variance.

The reasoning and implications of the court decision with respect to the two items are discussed in the following paragraphs. A typewritten version of his conclusion with respect to the site plan approval matter is attached is Appendix "B", and his reasons for judgement with respect to the zoning are attached as Appendix "C".

2.0 **Site Plan Approval**

The judge found that the sufficient evidence had not been presented to allow him to construe the Davison proposal as "development" within the meaning of Section 41 of the Planning Act, and that therefore it did not require site plan approval by the Town.

Section 41 of the Planning Act defines "development" as:

*"the construction, erection or placing of one or more buildings or structures on land or the making of an addition or* ***alteration*** *to a building or structure that has the effect of* ***substantially*** *increasing the size or* ***usability*** *thereof, or the laying out and establishment of a* ***commercial parking lot*** *..."*

The writer had argued that the proposal constituted development on two counts:

- it would be an ***alteration*** increasing the ***usability*** of the building, since a commercial use would be added to the existing three-unit residential building and three residential units would remain; and

- it would contain a ***commercial parking lot*** since there would be parking spaces serving the proposed commercial use.

In his reasoning, the judge indicated that he was was not satisfied, on the evidence, that the proposed alterations would **substantially** increase the usability of the building. No details or argument had been presented by the writer in this regard.

With respect to the commercial parking lot, the judge relied on a previous court case, supplied by Mr. Stutz, which stated that a commercial parking lot is a pay parking lot used by the general public.

## 3.0 Zoning

Mr. Stutz contended on behalf of his client that the proposal complied with the requirements of the C5 zone. One of Mr. Stutz's principal arguments was that the Zoning By-law should be interpreted to allow the residential/commercial combination because such a combination is allowed in the Official Plan.

Mr. Zelinski rejected Mr. Stutz's argument, and accepted the Town's position that the Official Plan is not applicable law for the purpose of a building permit. Mr. Zelinski also accepted the Town's position that it is open for the Zoning By-law to be more restrictive than the Official Plan, and still conform with the intent of the Official Plan. Mr. Zelinski concluded that the Chief Building Official was correct in not issuing the permit since the combination of residential and commercial uses is not allowed in the C5 zone. Where By-law 22-90 contemplates such a combination of uses, i.e. in the other commercial zones, there are express provisions to this effect.

Mr. Zelinski in effect recommends that the Town proceed with a program to amend the Zoning By-law to implement the Official Plan. While there is no onus on the Town to do so, it is appropriate for the Town to amend the zoning by-law to reflect the new Commercial policies. This is a project that has been contemplated by staff for some time, and it is expected that a report will be brought forward in the relatively near future.

There was no award of costs.

## 4.0 Conclusion

The Town was successful in its efforts to uphold the provisions of the Zoning By-law in relation to this matter. Accordingly, if the owners wish to add a commercial use to the existing building, a rezoning or minor variance will be requried.

For future applications, staff will accept the ruling of the court that a commercial parking lot, within the meaning of Section 41 of the Planning Act, is a pay parking lot. Accessory commercial parking lots, on their own, are not subject to site plan control.

The Town Solicitor has reviewed the decision, and has advised that the Town will continue to be able to control conversions through site plan control as long as there is evidence of a substantial increase in usability. Staff are of the opinion that this can be demonstrated.

## 5.0 Recommendation

**It is therefore recommended,**

THAT the report of Alan Young, R.P.P., Director of Planning, dated August 8, 1996, regarding an application for judicial review by Shannah Gail Davison,

BE RECEIVED.

Respectfully submitted,

Alan Young, R.P.P.
Director of Planning

THE CORPORATION OF THE TOWN OF ORANGEVILLE

**TO:** **Community Planning and Development Committee**

**FROM:** **Alan Young, R.P.P.**
**Director of Planning**

**DATE:** **May 7, 1996**

**SUBJECT:** **NOTICE OF APPLICATION FOR JUDICIAL REVIEW**
**Shannah Gail Davison v. the Corporation of the Town of Orangeville**
**35/37 First Street**

---

A legal proceeding has been commenced by Shannah Gail Davison, the owner of 35/37 First Street, against the Town of Orangeville, in order to compel the Town to issue a building permit that would permit the conversion of a portion of the ground floor of the existing building for commercial purposes. At present, the building contains three apartment units.

It is staff's interpretation of the By-law 22-90 is that the C5 zone allows triplexes and certain, specified commercial uses, but that it does not allow them in combination. Staff have suggested that Mrs. Davison apply for a minor variance to permit the commercial use in conjunction with the three apartment units, but no application has been filed. Staff have also requested that a site plan approval application be submitted, to permit the layout of a commercial parking lot, but Mrs. Davison is also contesting this requirement of the municipality.

Accompanying the application is an affidavit from a planner retained by Mrs. Davison, providing an interpretation of the Zoning By-law that would permit a triplex in combination with commercial uses. The planner's interpretation does not grapple with the structure of the by-law and the definitions of the permitted uses, and therefore has not given staff any new insights into the interpretation of the by-law.

The proposed combination of residential and commercial uses is in conformity with the official plan, but that alone does not allow one to interpret the by-law to permit the two uses. There may be many good reasons to allow the two uses, but

that does not allow your staff to waive zoning provisions. If a proposal is not in conformity with the by-law, relief must be sought either by way of rezoning or minor variance.

In conclusion, staff feel that the Town should respond to the application, indicating that a defence will be launched. Staff have received legal advice indicating that a judge would be prepared to accept evidence from Town staff, and that legal representation is not required. Staff would be prepared to proceed on this basis.

It should be noted that the application by Mrs. Davison does not include a motion for costs.

**It is therefore recommended,**

THAT the report of Alan Young, R.P.P., Director of Planning, dated May 7, 1996, regarding an application for judicial review by Shannah Gail Davison, BE RECEIVED,

AND THAT staff be directed to launch a defence against the application.

Respectfully submitted,

Alan Young, R.P.P.
Director of Planning

Transcript of Endorsement on Record

August 6, 1996

Proceeding date June 14, 1996

Stutz & Allan Young, Director of Planning

On consent, order to go to permit this matter to proceed on the basis of time. There are 2 real issues in this Application:

1) Is the Applicant - application governed by S41 of the Planning Act such that site plan approved is required?

2) Given that the site in question is zoned C5, and the proposal is to renovate the existing structure to convert certain of the space (which is now completely utilized as a 3 unit residential building) into residential and commericial uses consisting of office and retail space permissable in combination? It is conceded that each of the intended uses: residential, office, and retail are appropriate uses consistent with the zoning Bylaw not in combination.

S41 of the Planning Act defines "development" as including "alteration to a building ... that has the effect of substantially increasing the size or usability thereof or the laying out and establishment of a commercial parking lot."

Consistent with the principles addressed by Goodearle J. Ambler-Courtney Ltd. v Rucca Ltd. (1992) 34 A.C.U. 1024 (at p.3 of the unreported reasons at release), the proposed 6 space parking area proposed by the applicant will not constitute a "commercial parking lot". The size of the present structure is to be preserved, hence there is no increase in size. Mr. Young, for the Respondent could not provide me with any authority that supports that there is a "substantial increase in usibility" when it is the nature of the use, which is already 100% in use, albeit use of a different nature is a substantial increase in usability. There is no evidence that there will be any increase in usability, substantial or otherwise, by the changes in the nature of the use in terms of total occupancy.

I am of the view that since "substantial increase in the nature in size" is combined with "substantial increase in usability" there should be some relationship to or nexus between that combination of words. If so the prohibited construction would apply, for example, to prohibit storage space or similar, being usable by the development.

For these reasons I am of the view that S41 has no bearing upon the application on the evidence before me. I reserve on the No. 2 issue.

Zelinsky

Court File No. 404/96

**ONTARIO COURT (GENERAL DIVISION)**

**B E T W E E N:**

SHANNAH GAIL DAVISON

Applicant

- and -

THE CORPORATION OF THE TOWN OF ORANGEVILLE

Respondent

**REASONS FOR JUDGMENT**

of THE HONOURABLE MR. JUSTICE R.E. ZELINSKI

**APPEARANCES:**

Mr. William B. Stutz — Counsel for the Applicant

Mr. Allan Young, Director of Planning — Agent for the Respondent

THE ISSUES

On June 14th, 1996, I concluded that this application was not governed by s.41 of the Planning Act, R.S.O. 1990 c.P.13, (the "Planning Act"), with the result that site approval is not required irrespective of the result of the remaining issue on which I reserved.

That unresolved issue can be stated as follows:

> The site in question is zoned C5. The Applicant seeks to renovate an existing triplex to convert it into combined residential and commercial uses. If the application is successful, the present three unit residential use is to continue, however, certain of the former residential space will become retail, with the balance of the commercial space to be converted to an office.
>
> It is conceded that each of the intended uses is an appropriate use in a C5 zone, when not combined.

HISTORY OF THE OFFICIAL PLAN POLICY

Since 1994, when an amendment to its official plan was adopted by council, (the "O.P. Amendment") the relief sought conforms to Official Plan policy. That present policy is stated, in part, as follows:

E2.9 RESTRICTED COMMERCIAL/RESIDENTIAL

E2.9.2 Permitted uses include commercial and residential uses, alone or in combination....

The Respondent's By-law #22-90 is its Zoning By-law (the "Zoning By-law"). When that By-law was enacted in 1990, the Official Plan policy did not contemplate residential and commercial uses in combination in Restricted Commercial/Residential zones. Prior to the O.P. Amendment, such zones were classified, in the Official Plan, as areas in transition.

THE LAW

This Application is framed in s.25 of the Building Code Act S.O. 1992, c.23 ("BCA"). Its success is dependent upon the present Official Plan policy, as stated in the O.P. Amendment, being incorporated into the "applicable law" which the Chief Building Official ("CBO") must consider when determining whether a building permit will issue.

Counsel for the Applicant relies upon s.24(1) of the Planning Act to assist him to advance this interpretation.

For convenience those statutory provisions which are relevant, are set out as follows:

PLANNING ACT

24.(1) Despite any other general or special Act, where an official plan is in

effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith. 1983, c.1, s.24(1).

27.(1) When the Minister has approved an official plan adopted by a county or by a regional, metropolitan or district municipality,
(a) every official plan; and
(b) every zoning by-law passed under section 34 of this Act or a predecessor thereof,
that is then in effect in the area affected ... shall be amended to conform therewith.

BCA

8.(1) No person shall construct or demolish a building or cause a building to be constructed or demolished in a municipality unless a permit has been issued therefor by the chief building official.

(2) The chief building official shall issue a permit under subsection (1) unless,
(a) the proposed building, construction or demolition will contravene this Act or the building code of any other applicable law ... (emphasis added)

> 25.(1) Any person who considers themself aggrieved by an order or decision made by an inspector or chief building official under this Act or the regulations, except a decision not to issue a conditional permit under subsection 8(3), may, within twenty days after the order or decision is made, appeal the order or decision to a judge of the Ontario Court (General Division).
>
> (4) If an appeal is made under this section, the judge shall hold a hearing and may rescind or affirm the order or decision of the inspector or chief building official or take such action as the judge considers the inspector or chief building official ought to take in accordance with this Act and the regulations and, for such purpose, may substitute his or her opinion for that of the inspector or chief building official.

Section 24(1) of the Planning Act is clearly prospective in its application. The Respondent's Zoning By-law was passed on a basis which was consistent and in conformity with the Official Plan then in effect. While, pursuant to s.24(1) of the Planning Act, no amendments to the Zoning By-law can now be passed without regard to the policy set out in the O.P. Amendment, the fact that the existing Zoning By-law is more restrictive than present policy does not in any way offend s.24(1) of the Planning Act. The Zoning By-law continues to be valid.

Under s.8(1) BCA, the CBO must issue a building permit if the present Official Plan, which includes the O.P. Amendment, is "applicable law". His failure to do so would otherwise be in contravention of "applicable law".

In Re Woodglen & Co. Ltd. and City of North York (1984) 43 O.R. (2d) 289, Haley, J. concluded that an Official Plan does not constitute "applicable law" with reference to s.8(1) BCA determinations. In an appeal to the Divisional Court ((1984) 47 O.R. (2d) 614) Southey, J. confirmed the findings of Judge Haley, as she then was, stating at p.617:

> Counsel for the appellants argued that the official plan was part of the "applicable law" within the meaning of s.6(1)(a) of the *Building Code Act*, and that the chief building officer was not obliged to issue a permit to cover construction that would not be in conformance with the official plan. In my judgment, the learned county court judge was right in rejecting that submission, on the ground that an official plan and amendments thereto are not effective in themselves to regulate land use and are not part of the applicable law which the chief official is to obey. As appears from the authorities to which the learned judge referred, an official plan is recommendation, or statement of intention only, which may or may not be implemented by the municipality by the enactment of

> appropriate zoning by-laws: see *Re Steven Polon Ltd. and Metropolitan Licensing Com'n*, [1961] O.R. 810, 29 D.L.R. (2d) 620; *Re Township of Southwold and Caplice et al.* (1978), 22 O.R. (2d) 804, 94 D.L.R. (3d) 134, 8 M.P.L.R. 1; *Cadillac Development Corp. Ltd. et al. and City of Toronto* (1973), 1 O.R. (2d) 20, 39 D.L.R. (3d) 188.

In her analysis, Madam Justice Haley, as she now is, went on to consider, at p.297, those authorities which were distinguishable on the basis that "there was a specific statutory duty placed upon the municipality to bring its Zoning By-laws into conformity within the Official Plan of the Region". There was no such statutory duty in her case. Similarly, in this case, the parties have not referred to any "specific statutory duty on the [Respondent] to effect such compliance", as would be the case if s.27(1) of the Planning Act had application. (See J. & R. Rite Holdings (Oshawa) Inc. and City of Oshawa (1988) 64 O.R. (2d) 471).

Summing up on this point, the Official Plan and its amendment are not "applicable law" which the CBO was required to consider.

In Re Woodglen, Haley, J. was proceeding under s.15(1) of the BCA which is the predecessor of the present s.25(1) BCA. She went on to consider at p.298 "... whether I have any broader powers under the appeal provisions in [s.25] of the Building Code Act to review the decision of the chief officer by applying the principles in the Boyd case." (City of Ottawa et a. v. Boyd Builders Ltd. [1965] S.C.R. 408)

She concluded that she had such powers as an appellate court. Those powers included the granting of an order of *mandamus*.

At p.300, Haley, J. summarized the principles upon which equitable relief should be granted, on the basis of the Boyd case as follows:

> *Application of equitable principles*
> Before, the passing of the *Building Code Act* appeals were taken from decisions of building inspectors on building permits by way of *mandamus* applications to the High Court. *Mandamus* being an equitable remedy, the court was able to develop building permits on grounds not open to the building inspector. Such principles are reflected in the three tests in the *Boyd Builders* case referred to above.
>
> As I have said, the onus is on the municipality in persuading the court to exercise its equitable discretion to show it has fulfilled three prerequisites:
>
> (a) a clear intent to restrict or zone existing before the application by the owner for a building permit;
> (b) that council has proceeded in good faith;
> (c) that council has proceeded with dispatch.

In this application the clear intent of the O.P. Amendment is to permit multiple uses in combination. Bad faith as a result of the failure of council to amend the Zoning By-law to assure consistency with the amendment was not argued. In Re Woodglen, the "delay in proceeding" between the approval of the district plan and the application before Madam Justice Haley was some ten years. In the case before me the delay between the O.P. Amendment and this application is approximately two years.

I questioned Mr. Young, representing the Respondent, whether the Zoning By-law and the "combination of uses" policy stated in the O.P. Amendment were not mutually exclusive. He agreed that they were. He then conceded that, until the Zoning By-law is itself amended, the O.P. Amendment and the Zoning By-law will not conform to each other. His response to my concerns about the failure to amend the Zoning By-law to incorporate present policy was, essentially, to "trust us", citing problems inherent in procedures necessary to amend a Zoning By-law as the basis of delay.

While I am not completely satisfied with that response I am satisfied that Mr. Young has a legitimate concern about the problems he contemplates.

Thus, while it has not been satisfactorily established that council will, shortly, proceed in good faith to pass amendments to the Zoning By-law so as to conform to the O.P. Amendment, there has not been undue delay at this time.

I am certain that these reasons will be treated as notice to the Respondent's council of the priority of getting

on with the task of amending its Zoning By-law. Failure to do so may, on another occasion, cause a different result.

The language of the Zoning By-law is inconsistent with combinations of uses, at present, in C5 zones. If it were, the O.P. Amendment would not have been necessary. In other commercial zones where combinations of uses are permitted in the Zoning By-law, that by-law specifically includes language which permits such combinations. In relation to the subject site, the Zoning By-law is silent in that respect.

The Respondent relies on the reasons of Fraser, J. in S.R.V. Developments Ltd. v. Courtenay (City) (1992) 12 M.P.L.R. (2d) p.154, wherein at p.155, the learned justice defined a similar issue as follows:

> In the separate zones designated in the zoning by-law as "Commercial One" (C-1), the "Central Commercial" zones, "Liquor store" is a specifically permitted use. The city concedes that a liquor store could come within the expression "retail or wholesale outlet" but says that, by specifically designating "liquor store" as a permitted use in C-1, it has winkled out and excluded the use from the more general one in C-2.

Fraser, J. accepted this argument, following, in part, the reasons of MacGillivray, J.A. in Cambridge Leaseholds Ltd. v. Hewitson (O.C.A.) [Unreported]. I adopt his conclusion. When there are references, as here, to

combinations of uses in certain zones, but silence on that point in the subject zone, that silence has the result of excluding combinations of uses in the subject zone.

**CONCLUSION**

The decision of the CBO not to issue a Building Permit was correct.

The exercise of my jurisdiction to make an order in the nature of mandamus is premature at this stage.

The Application is denied.

Mr. Young is a planner and not counsel. He was permitted to argue before me on the basis of an authorization from the Town, and the consent of Mr. Stutz. This procedure should not be encouraged in my view.

No order as to costs.

July 22, 1996
Mr. Justice R.E. Zelinski