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Dupuis v. Essex **Condominium Corp.** No. 28

In the Matter of subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant: Jerry Dupuis

Applicant: Essex **Condominium Corp.** No. 28

Subject: Minor Variance

Variance from By-law No.: 8600

Property Address/Description: 9099 Riverside Drive E

Municipality: City of Windsor

Municipal File No.: A-001/13

OMB Case No.: PL130248

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Ontario Municipal Board

M. Carter-Whitney Member

Judgment: October 11, 2013

Docket: PL130248

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Counsel: No one for Jerry Dupuis

A. Thielk, for Essex **Condominium Corp.** No. 28

W. Vendrasco, for City of Windsor

Subject: Public

Municipal law

M. Carter-Whitney Member:**Background**

1 Essex **Condominium Corp.** No. 28 ("Applicant") applied for a minor variance related to a property at 9099 Riverside Drive East ("subject property") in the City of Windsor ("City"). The condominium on the subject property includes an east tower and a west tower. The purpose of the application is to permit the construction of enclosures over two existing underground parking access ramps.

2 The Committee of Adjustment ("COA") approved the requested variance, subject to four conditions, to permit the construction of enclosures consisting of roof and walls on the two ramps to a maximum height of 14 feet, 8 inches.

3 Jerry Dupuis ("Appellant"), a resident of the condominium on the subject property, appealed the COA decision to the Ontario Municipal Board ("Board").

4 The following condominium owners and/or residents were granted participant status: Con Bach; Matthew Keelan; Louise Lauzon; Arleen Deschamps; Ted Broad; Paula Rumball; and Vicky Luxford.

Requested Variance

5 The requested variance is to permit the construction of the enclosures, whereas Zoning By-law 8600 ("ZBL") states that the development shall remain as existing.

Applicable Criteria

6 Section 45(1) of the *Planning Act* allows the Board to authorize variances to a zoning by-law where the variance: is minor; is desirable for the appropriate development or use of the land, building or structure; maintains the general intent and purpose of the official plan; and maintains the general intent and purpose of the zoning by-law.

Witnesses

7 Justina Nwaesei, a Planner with the City, was qualified as an expert land use planner on behalf of the City. The following witnesses provided opinion evidence on behalf of the Applicant: Troy Humber, Building Science Project Manager at AMEC Environment & Infrastructure ("AMEC"), who was qualified as a senior building science specialist with expertise in project management; and Karey Thatcher, also a Building Science Project Manager at AMEC, who was qualified as an expert in architectural design. The Board also heard evidence from Lise Allaire, property manager for the subject property, and from all of the participants.

Evidence and Findings

8 Ms. Allaire gave evidence as to the safety concerns that led to the Applicant's proposal to enclose the existing underground parking access ramps. She testified that she receives complaints whenever there is a snowfall or inclement weather, and that many people have experienced their vehicles sliding on the uphill exit ramp in those conditions. Ms. Allaire made specific reference to an incident in February 2013, in which a car slipped back down the ramp numerous times resulting in extensive damage to the vehicle. She noted that the parking garage door is now at the bottom of the ramp, and the proposal would move it to the top of the ramp.

9 Ms. Allaire stated that some of the other apartment buildings in the area have covered ramps. Mr. Humber also referred to other apartment buildings in Windsor that have enclosed ramps, and provided evidence concerning the design of the proposed enclosures.

10 Ms. Allaire provided extensive background on the process by which the Applicant's Board of Directors has determined how to address the safety concerns about the ramps. The Board of Directors reviewed various alternatives and chose the option they believe to be best suited for the subject property. Minutes of meetings of the Board of Directors held on September 27 and December 18, 2012, filed as Exhibit 1, Tab 3, indicate that the Appellant was on the Board of Directors, was present during the discussions concerning the enclosures, and seconded a motion to enclose the exit ramp prior to the entrance ramp.

11 The Appellant raised several grounds in his appeal of the COA's approval of the variance, including concerns that vehicles exiting the proposed enclosed exit ramp would have to make a blind left turn, and that garbage trucks might be parked at the exit ramp. The Appellant also raised issues in relation to the cost of the proposed enclosures, the bidding process for the proposed construction, and the negative impact on the appearance of the subject property. He further stated that there was not a serious safety issue in relation to the ramps in winter conditions.

12 At the hearing, the participants raised various concerns. Of the seven participants, five of them opposed the proposed enclosures and the other two supported the proposal.

13 Mr. Bach raised concerns that the *Condominium Act* had been violated by the Board of Directors. Ms. Allaire responded that the Board of Directors had discretion under the *Condominium Act* to make the decision to enclose the ramps without it putting it to a vote by the condominium owners.

14 The Board notes that this is an appeal of a minor variance under the *Planning Act*, and the Board has no jurisdiction under the *Condominium Act* in relation to this matter.

15 A number of the participants, including Mr. Bach, Mr. Keelan, Ms. Lauzon, Ms. Deschamps and Mr. Broad, echoed the types of concerns raised by the Appellant. In addition, Mr. Bach also raised issues relating to blocked views due to the proposed enclosures, noise from the proposed garage door opening and closing at the top of the ramp, and impacts on people using the Ganatchio Trail, which runs along the edge of the subject property. He suggested alternatives to the proposed enclosures, such as clearing the snow as it falls, or installing hot air blowers or de-icing pipes. Mr. Keelan expressed additional concerns that drivers exiting the enclosed ramp might panic and cause accidents. Ms. Lauzon, Mr. Keelan and Mr. Bach all stated concern that the enclosed ramps would have a negative effect on the value of their properties. Mr. Broad and Ms. Lauzon said that the majority of the condominium owners do not want the ramp to be covered. Ms. Deschamps testified that a mirror previously installed at the top of the ramp had blown away and not been replaced.

16 Ms. Rumball and Ms. Luxford, however, testified that they support the proposed ramp enclosures. Both of these participants stated that they had experienced difficulty driving up the ramp and were concerned about safety given the existing situation. Ms. Luxford said that, on several occasions, her car had slid back down the slippery ramp in icy, rainy or snowy conditions. She testified that she believed the proposed enclosures would be an improvement to the building and its safety. With respect to noise, she said that she rarely hears the existing garage door, and is more likely to hear the sound of cars going over the metal grates on the ramps.

17 In her evidence, Ms. Allaire addressed many of the concerns raised by the Appellant and the participants

opposed to the enclosures. Regarding the blind left turn at the exit from the ramp, Ms. Allaire stated that this issue has been considered in the proposed design. She said that a red light system is proposed outside of the ramp exit to alert other cars and pedestrians that a car is exiting the ramp. She noted that a mirror used in the past had not been sturdy enough and a new mirror will be encased at the top of the ramp so that traffic and pedestrians will be visible to cars exiting the ramp. She also said that garbage trucks are briefly in the area of the exit ramp on two mornings each week for approximately ten minutes on each occasion, and do not create a serious obstacle for traffic exiting the ramp.

18 Regarding the suggestion that hot air blowers or de-icing pipes be used as alternatives to installing ramp enclosures, Mr. Humber testified that de-icing pipes would not address the problem adequately in heavy snow conditions, and that heating the ramps using hot air blowers or de-icing pipes would require significant energy consumption. With respect to the suggestion that snow be cleared as it falls, Ms. Allaire noted that the Board of Directors had already hired contractors for snow removal but this did not address the safety issues adequately. She said that problems may arise on the ramp with only one inch of snow on the ground and the contractors typically do not arrive to clear the snow until two or more inches of snow have fallen.

19 In response to concerns about the appearance of the proposed enclosures and whether they would block the view of some residents, Mr. Thatcher gave evidence concerning the design of the proposed enclosures. He testified that they would be aesthetically pleasing and would not detract from the existing buildings, and would not obstruct the view of anyone living on the second floor of the east tower. He noted that the proposed enclosure would be 14 feet high, 8 inches at its highest peak, and that the second floor balconies are 13 feet high, and 40 feet away from the exit ramp.

20 Ms. Nwaesei provided opinion evidence concerning the tests to be met for a minor variance, and concluded that all four tests are satisfied. She testified that the subject property is designated Residential in the City of Windsor Official Plan ("OP") and noted that policy 4.2.7.1 of the OP addresses fostering personal safety throughout the City. She provided her opinion that the requested variance is aimed at achieving safety on the subject property, and maintains the general intent and purpose of the OP.

21 Ms. Nwaesei stated that the subject property is zoned Residential District 3.4 (RD3.4) in Zoning By-law 8600 ("ZBL"), for which permitted uses include a multiple dwelling. The variance is sought from s. 12(4)(b)(i), which requires the development on the subject property to "be as existing". The ZBL defines "existing" to mean a use, building or other structure lawfully existing July 22, 2002, unless otherwise provided by the ZBL. She gave evidence that the intent of the ZBL is not to prohibit expansions of properties within this type of zoning, but to ensure that there are public discussions concerning any such proposals for expansion through an application to the COA or a rezoning process. She provided her opinion that the requested variance maintains the general intent and purpose of the ZBL.

22 Ms. Nwaesei also provided her opinion that the requested variance is minor in nature, and desirable for the appropriate development of the subject property, because it would involve enclosing the existing ramps in order to address safety concerns by improving safety for residents who use the ramps.

23 The Board has considered the evidence in light of the four tests for authorizing minor variances. Based on the evidence heard, and in particular the land use planning opinion evidence of Ms. Nwaesei, the Board finds that the variance requested does satisfy the four tests set out in s. 45(1) of the *Planning Act*.

24 The Board finds that the requested variance maintains the general intent and purpose of the OP and ZBL.

In particular, the variance maintains the general intent and purpose of the safety policies in the OP, and the ZBL provisions that ensure any expansion proposed for properties zoned RD3.4 is subject to public review.

25 The Board finds that the requested variance is desirable for the appropriate development of the subject property because the safety of residents is an important concern. The Board also finds that the variance is minor and will not cause adverse impacts. The Board has considered the various concerns expressed by the Appellant and the participants, and is satisfied that those concerns have been adequately addressed in the evidence put forward by the Applicant's witnesses.

Order

26 The Board orders that the appeal is dismissed and the requested variance is authorized, to permit the construction of enclosures consisting of roof and walls on two existing underground parking access ramps to a maximum height of 14 feet, 8 inches, subject to the following conditions:

1. The owner is to receive approval for the species and size of trees to be installed by the Landscape Architect prior to issuance of any permits.
2. To ensure that the trees are installed to the satisfaction of the City, the owner is to provide a Security in the form of a Certified Cheque, payable to the City, for the sum of \$1,000.00, to be returned upon satisfactory installation and three year maintenance of the planted trees.
3. The LED lighting to be provided generates a minimum continuous illumination level of at least 2.5 foot-candles to optimize natural surveillance for users, in a manner satisfactory to Windsor Police Services.
4. The time delay on the overhead door while in the open position does not exceed a maximum of 25 seconds, in a manner satisfactory to Windsor Police Services. This is necessary to maintain proper access control in favour of authorized users over those attempting to gain unauthorized access.

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