

SECTION ON “REASONS FOR APPEAL”

Appeal to the Ontario Land Tribunal of the by-laws passed by Niagara Falls City Council in August and September 2021, to legalize the use of 5411 River Road as a vacation rental

Appeal made by Kenneth Westhues, 5419 River Road

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Preface to reasons for appeal

Section 2.1 of the *Planning Act* requires that OLT have regard for Niagara Falls City Council’s decision in this matter, and for the information Council considered in reaching its decision.

At its meetings on 10 August and 14 September 2021, City Council did approve the by-laws under appeal, and it did so on the recommendation of Alex Herlovitch, Director of Planning and Development.

The by-laws were approved by the smallest possible margin, 5 to 4, the Mayor breaking a tie between the 4 Councillors in favour and the 4 Councillors opposed.

The four Members of Council opposed to the by-laws each gave detailed reasons for their opposition. Only one of the five who voted in favour gave reasons. This was Councillor Dabrowski, who seemed to imply that vacation rentals should generally be approved in this residential neighbourhood.

Mr. Herlovitch’s recommendation on 10 August 2021 to approve the subject property, 5411 River Road, for commercial use as tourist accommodation, contradicted his recommendation on 9 February 2021, against allowing 5411 River Road to be used for tourist accommodation.

These by-laws are Council’s decision on an OPA/ZBA application submitted in October 2020. This original application was not for any vacation rental. That term was not used. The application was for a “hybrid inn” composed of six properties. After objections from City Staff, the applicant eventually dropped five of the six properties. By the time Council voted on 10 August 2021, only one property remained, 5411 River Road.

This appeal is therefore not of a decision at the municipal level on which there is consensus or clarity. On the contrary, the by-laws passed by a split vote, after intense community conflict, hours and hours of debate at meetings of City Council, repeated changes of the application, submission of false information by the applicant and its subsequent correction, sale of the main property involved, and changes in the recommendation of Planning Staff.

Reasons for appeal

[1] By-laws Nos. 2021-95 and 2021-96 are not consistent with the *Provincial Policy Statement* (2020), in particular the priority of the PPS on “provision of sufficient housing to meet changing needs, including affordable housing.” These by-laws provide for the conversion of housing to tourist accommodation, without adequate justification.

- [2] These by-laws do not conform with *A Place to Grow: Growth Plan for the Greater Golden Horseshoe* (2020), in particular its objective to “Support a range and mix of housing options, including additional residential units and affordable housing, to serve all sizes, incomes, and ages of households.” These by-laws set a precedent for conversion of additional residential units in the River Road area, including many units of affordable housing, into tourist accommodation.
- [3] These by-laws do not meet the stated priorities of the *Niagara Region Official Plan* on “the quality of life for the Niagara community,” on “safety within the public realm,” and on “affordable housing supply,” and the *Plan’s* discouragement of “conversion of existing affordable rental housing.” Highlighting the value on safety in the Region’s Official Plan was the invasion of our home just after midnight on 31 July 2021 by a barefoot drunken reveller lodging at 5411 River Road.
- [4] 5411 River Road lies in the River Road Satellite District, a residential area in which the City’s Official Plan states that “no commercial uses shall be permitted” (Para. 4.2.38). The OPA here under appeal makes an exception to this rule, designating this one home a “Special Policy Area.” The reasons set forth in the Applicant’s Planning Justification Reports (PJR) and the City’s Planning Reports are not sufficient to justify this exception. In particular:
- (a) The PJR claims that short-term tourist accommodation in a house where nobody lives is a residential, not a commercial use of property. This contention has been discredited by multiple OLT decisions. The City’s own Official Plan (OPA No. 127) defines a vacation rental unit as a commercial use.
 - (b) Both the PJR and the City’s Planning Reports describe 5411 River Road as an “independent” or “stand alone” vacation rental unit. This is not true. Since 2017, it has been named “Niagara Riverview Inn” and operated illegally as part of a larger tourist establishment, “Niagara Historic Inns,” owned by John Pinter. Mr. Pinter is the Applicant for the OPA/ZBA. By available evidence, if OLT upholds the OPA/ZBA, this property will continue to be operated as part of a multi-building tourist establishment, which Mr. Herlovitch has described as “akin to a hotel.”
- [5] The City’s Official Plan limits vacation rental units to major and minor commercial districts (OPA No. 127). It holds out the possibility of exceptions to this rule: OPAs allowing spot-zoning for vacation rental of properties in a residential district. OPA No. 127 says these exceptions are not to be made indiscriminately. This means that for any such exception, there must be some good planning reason in support of it, something distinctive about the particular property that recommends it for vacation rental. No such planning reason can be found for 5411 River Road in the PJR, the City’s Planning Reports, or the by-laws themselves. There is nothing distinctive about this property that makes it more suitable for spot-zoning as vacation rental than any of thousands of other homes in the City’s residential districts.
- (a) As a single detached dwelling, 5411 meets the first of the seven criteria listed in OPA No. 127 for reviewing applications for vacation rentals. This does not make it distinctive, however, since according to the 2016 federal census, more than 25,000 properties in Niagara Falls meet this criterion.
 - (b) The second criterion in OPA No. 127 limits the vacation rental to 3 bedrooms. The house at 5411 River Road has 4 bedrooms, space that facilitates its use as a party house. The City’s Planning Report says one bedroom would have to be closed off – a requirement nearly impossible to enforce.

- (c) The third criterion in OPA No. 127 is, “Parking and landscaping shall be consistent with the residential environment.” The entire backyard of 5411 River Road has been turned into a parking lot for four cars, as shown in the survey submitted with the OPA/ZBA application. With the two parking spots in the front driveway, this makes a total of six parking spots – more than a stand-alone vacation rental would require, and more than is normal for homes in this residential neighbourhood.
- (d) The fourth criterion in OPA No. 127 identifies lot size, parking, street, and proximity to tourist areas. 5411 River Road satisfies this criterion. “Proximity to tourist areas” is an elastic term, possibly meaning proximity to areas zoned Tourist Commercial in the City’s Official Plan. An estimated 3000 dwellings are closer to TC zones than is the property at issue here.
- (e) The fifth criterion in OPA No. 127 is especially pertinent: “An undue concentration of Vacation Rental Units is to be avoided in order to reduce the impact on the character of the residential nature of the area and residential enjoyment of permanent residents.” The City’s Planning Reports claim the vacation rental closest to 5411 River Road is 300 metres away. This is not true. On 10 August 2021, Mr. Herlovitch himself circulated to all Members of Council the Airbnb listings for the three vacation rentals John Pinter was then operating: 5411 River Road, the immediately adjacent 5401 River Road, and about 80 metres away, 4465 Eastwood Crescent. That same day, 10 August 2021, Mr. Pinter was advertising 5411 and 5401 River Road together on Airbnb under the heading, “Two Adjacent 4 Bedroom Vacation Rentals Sleeps 20.” In addition to Mr. Pinter’s vacation rentals, four more lie within 50 metres of 5411 River Road. All these properties have been steadily hosting tourists throughout September 2021. Granted that the word *undue* is somewhat imprecise, this constitutes “undue concentration” in any sense of the word.
- (f) The sixth criterion in OPA No. 127 requires consideration of “the current vacancy rate(s) and supply of available housing for tenants.” Vacancy rates fluctuate in Niagara Falls. A comment of Mr. Tousaw in his OLT Decision on Toronto’s vacation-rental by-law is apt: “Whatever the number, one fact is indisputable: each dedicated STR unit displaces one permanent household. That household must find another place to live.” Use of 5411 River Road as a vacation rental since 2017 has displaced one permanent household. Legalization of this use would approve this displacement and invite further displacement of tenants in the River Road Neighbourhood.
- (g) The seventh criterion in OPA No. 127 is that the vacation rental would be subject to the City’s new Licensing By-law, passed in May 2021. Under its current ownership and control, 5411 River Road fails to meet this criterion. The owners, Alfred and Collette D’Souza, disqualified themselves from holding a license to operate a vacation rental by operating it illegally since 2017, ignoring at least two cease-and-desist orders from the City. Similarly, the leaseholder of 5411 River Road, John Pinter, disqualified himself by submitting to the City false information in a sworn statement (the OPA/ZBA application of 22 April 2021), also by ignoring at least one cease-and-desist order from the City. At the Council meeting of 10 August 2021, Councillor Carolynn Ioannoni correctly pointed out that approving 5411 River Road for vacation rental would mean rewarding nonresidents of this residential neighbourhood for illegally operating a purely commercial enterprise in it for the past four years.

Case Law, Ontario Land Tribunal

Among numerous precedents in courts and tribunals, in Ontario and elsewhere, three decisions of the provincial tribunal (OMB, LPAT, now OLT) can be cited in direct support of this appeal.

First and most recent is the 2021 Decision by Susan de Avellar Schiller, upholding the Niagara Falls by-law on vacation rentals (PL 180774). This Decision notes that “the City does contemplate the possibility that a particular proposal for a VRU may be appropriate in a particular Residential zone” through “careful and prudent analysis” (Para. 13). By the evidence I will call at the hearing of this appeal, the analysis in the present case has been neither careful nor prudent. The Decision states further that “case-by-case consideration of a VRU application in a Residential zone enables the City to fine tune the fit of that particular application to the character and needs of a Residential neighbourhood” (Para. 23). No fine tuning will be found in the Municipal Record for this appeal. The Record will show no evidence of how this vacation rental would fit with the character of the River Road Neighbourhood, or how it would satisfy the needs of this neighbourhood.

The second Decision of particular relevance here is from 2012, that of Reid Rossi in the case of Veronica Veal v. City of Niagara Falls (PL 120425). The City had rezoned the home next to Ms. Veal’s for vacation rental (at that time called “cottage rental”). Ms. Veal appealed, citing reasons similar to those listed above. The Tribunal permitted me to present evidence at the hearing in support of her appeal. The Decision went wholly in Ms. Veal’s favour: “This ‘spot zoning’ of residential neighbourhoods is tantamount to piecemeal planning and does not present itself as an entirely seamless or efficient means of permitting the use let alone regulating it. And, as the Board has seen in the circumstances of this particular case, this approach has raised voices of opposition by virtue of the impacts this practice can have on adjacent residential properties” (p. 9). Since the Decision in the Veal case, the City has not approved any residential properties for use as vacation rentals – none until the approval of 5411 River Road, next door to my wife’s and my home, that is here being appealed.

The third Decision of particular relevance here is from 2019, that of Scott Tousaw in the appeal of the City of Toronto’s zoning by-laws governing short-term rentals (PL 180082). That Decision included a trenchant explanation for why owner-absent short-term rentals are a commercial, as opposed to residential, use of property, and for how such rentals can conflict with the interests of long-term residents. Two especially pertinent quotations from this Decision are as follows. (1) “The Tribunal finds that the intensity of use arising from a successful, dedicated STR [short-term rental], with its business intention of regular turnover of STR customers, even if just one dwelling, operates as and exhibits a commercial use of land that changes the character of a neighbourhood” (Para. 125). And (2) “Whatever the number, one fact is indisputable: each dedicated STR unit displaces one permanent household. That household must find another place to live. This phenomenon is occurring in increasing numbers in Toronto’s residential areas, the very places that are planned, designed and built to provide housing for residents.”

Conclusion

I will present documentary and visual evidence in support of the arguments above at the hearing of this appeal, or earlier if the Tribunal so directs. With the Tribunal’s permission, I may also wish to present additional arguments.