

ISSUE DATE:

**Jan. 3, 2007**

DECISION/ORDER NO:

**0007**



Ontario

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

PL060646

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Wynberry Developments  
Subject: By-law No.  
Municipality: Town of Markham  
OMB Case No.: PL060464  
OMB File No.: R060149

**APPEARANCES:**

**Parties**

Wynberry Development Inc.  
Town of Markham

**Counsel**

T.R. Lederer  
J. R. Boxma

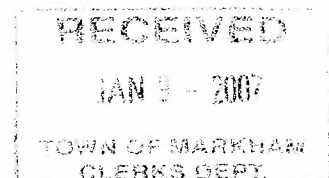
**DECISION DELIVERED E. PENDERGRAST AND ORDER OF THE BOARD**

**CONTEXT AND BOARD'S ORAL DECISION**

**The Appeal**

Wynberry Developments Inc. owns a .773 hectare (1.91 acre) site located on the south side of Monkhouse Road, immediately north of the development known as Markham Heritage Estates. It intends to develop the property for 12 single detached houses in accordance with an approved draft plan of subdivision, a site-specific by-law removing the site from the area covered by the Town's Rural Residential Zoning By-law (By-law 304-87) and a site-specific by-law amending the Town's Urban Expansion Area Zoning By-law (By-law 177-96) to include the site and establish site-specific standards and zoning provisions to govern the 12 lots.

The Town Council enacted amending by-laws on June 13, 2006, but Wynberry objected to the heights in the site-specific by-law amending the Urban Expansion



Zoning By-law (By-law 2006-148), and appealed the By-law to the Board. A two-day hearing of the appeal began on November 7, 2006.

By-law 2006-148 zones the site R1-F18\*308, and establishes a maximum height of 8 metres for the most westerly three lots (Lots 1, 2 and 3) and a maximum height of 9.14 metres for the remaining nine lots. In both cases, the heights are to be measured to the peak of the roof, rather than to the mid-point. At the commencement of the hearing, Mr. Lederer, counsel for Wynberry, indicated that his client would accept maximum heights of 10 metres, measured to the peak of the roof, for all lots, and noted that this maximum was measurably lower than the existing maximum height of 11 metres, measured to the mid-point of the roof, applicable in other parts of the Wismer Commons Community Plan Area in which the site is located.

### **Proposed Settlement**

On November 8, after the appellant had completed its case and the Town had called planning and urban design evidence, the parties requested an adjournment in order to allow them to work on a settlement proposal put to the Town by Wynberry. Shortly thereafter the Town and Wynberry reached agreement on a settlement by-law, which was endorsed by Town Council on November 28, 2006. With the consent of the parties, the hearing was reconvened on December 18, 2006, in order to hear evidence on the settlement by-law, which establishes heights of 9.15 metres for Lots 4, 5 and 6, and 10 metres for the remaining nine lots, measured to the peak of the roof.

### **Residents Opposed to the Settlement By-law**

Two residents of Markham Heritage Estates, Kara John and Stephen Kotyck of 8 and 10 David Gohn Circle, respectively, appeared at the hearing to give evidence in opposition to the proposed settlement by-law. Mr. Lederer objected to hearing from the residents on the grounds that doing so would be prejudicial to the hearing process. Mr. Boxma took no position on the matter. The Board's ruling was that the Board's duty was to hear the settlement by-law in terms of the public interest notwithstanding that the parties agreed to it, that the settlement by-law before the Board was different from the initial amending by-law that Wynberry had appealed, and that the Board would hear what the residents had to say about the by-law.

### **Evidence in Support of the Settlement By-law**

After hearing the evidence of Mr. Kotyck and Ms John, whose position was that the three most westerly units should be bungalows with a maximum height of 8 metres, as set out in By-law 2006-148, the Board heard evidence in support of the settlement by-law from Regan Hutcheson, the Town's Manager of Heritage Planning. The Board had previously qualified Mr. Hutcheson to give opinion evidence in land use planning with a heritage emphasis when he appeared before the Board on November 8.

According to Mr. Hutcheson, the evidence provided by Mark Hall, an architect and heritage planner who testified as an expert on November 7, had been persuasive, and Mr. Hutcheson now agreed that it was appropriate to develop the three most westerly lots as (Lots 1, 2 and 3) as two storey houses with a maximum height of 10 metres, measured to the peak of the roof, and that three other more centrally located lots (Lots 4, 5 and 6) should be developed as bungalows with lofts, with a maximum height of 9.15 metres measured to the peak of the roof. The remaining lots (Lots 7 through 12) would be permitted a maximum height of 10 metres, measured to the peak of the roof.

### **Board's Oral Decision**

Having considered the evidence it heard on November 7 and 8, as well as the evidence it heard from Mr. Kotyck, Ms John and Mr. Hutcheson on December 18, the Board gave an oral decision to allow the appeal in part, and to approve the settlement by-law submitted as part of Exhibit 40. While it acknowledged the concerns of Mr. Kotyck and Ms John in its oral decision, the Board found the evidence of the qualified professionals who appeared before it in support of the heights contained in the revised by-law to be more persuasive.

The purpose of this written decision is provide some additional background, a more complete statement of the Board's reasons for its decision and the Board's written Order.

## BACKGROUND

### Markham Heritage Estates

Markham Heritage Estates is a 38-lot subdivision developed by the Town of Markham in 1988 in order to receive buildings of architectural and/or historic value that would otherwise have been demolished. It includes two oval circular streets, oriented east-west and connected by a north-south spine road, Heritage Corners Lane, that provides access to the subdivision from 16<sup>th</sup> Avenue. David Gohn Circle is the more northerly of the two circular streets, and homes on the north side of David Gohn Circle back onto the rear yards of Wynberry's proposed development.

Buildings relocated to the heritage subdivision, most of which are from rural settings to the north and west of the site, are placed on landscaped lots and sold as single dwellings. Although the subdivision is not a heritage district under the *Ontario Heritage Act*, each house is individually designated. According to Mr. Hutcheon's testimony, Heritage Estates is a widely recognized innovative initiative and a showpiece for the Town. Those who buy the heritage buildings live in a unique, and, as indicated by the form of agreement of purchase and sale presented as Exhibit 38, very restrictive residential environment.

During the hearing on November 7 and 8, the Board heard opinion planning evidence from Gary Sellars, a Senior Planner with the Town, and from Mr. Hutcheson regarding the planning policies governing Heritage Estates. In terms of the proposed Wynberry development, Mr. Hutcheson stated that, in accordance with the policy context, his objective as the Town's Manager of Heritage Planning was to minimize the impact of the new development on the heritage subdivision.

Having heard the Town's evidence, as well as that of the two residents, it is clear to the Board that compatibility with Heritage Estates was an especially sensitive issue in reviewing the Wynberry proposal, not only because of the site's location and grade characteristics, but also because of a lack of complete success in minimizing the impact on Heritage Estates of new development adjacent and to the west of the heritage subdivision, on the east side of Spencer Avenue. In particular, the development to the west, as the result of what were described as grading miscalculations, had been developed with walk-out basements and rear garages

resulting in building massing considered inappropriate as a transition to Heritage Estates.

### **Measures to Ensure Compatibility with Markham Heritage Estates**

Because of the concern about the impact of new development on Heritage Estates, especially in the context of the issues related to the recent development on the east side of Spenser Avenue, Wynberry agreed, prior to the enactment of any amending by-law, to move proposed rear garages forward to be integral to the new homes, to re-grade the site, to provide landscaped screening along the rear of the lots and to upgrade the rear facades of the new houses to be more compatible with the heritage houses to the south. As noted, Wynberry also advised the board that it was willing to accept a lower maximum height than the prevailing 11-metre maximum for single detached dwellings in the Wismer Commons Community Plan area. Finally, Wynberry has taken some care to ensure that the 12 new houses on their property would have a compatible architectural character. This character was described by Vincent Santamaura, the project architect, who was qualified by the board to give opinion evidence on November 7, as having a Canadiana theme. (Mr. Hutcheson felt the theme was more accurately described as Neo-gothic, but agreed that, regardless of its name, the proposed style was appropriate.)

Notwithstanding Wynberry's actions in response to Town concerns, the By-law as enacted and supported by the Town's expert witnesses on November 7 and 8 limited the heights of the new houses 8 metres for the three westerly lots and 9.14 metres for the remaining house. A key reason for insisting on lower heights was the assumed negative impact of the new development on the heritage homes on the north side of David Gohn Circle, based on a drawing provided by Wynberry and presented to the Board as Exhibit 15.

### **Evidence Regarding Heights Provided by Wynberry's Heritage Planning Witnesses and Related Settlement**

On November 7, the Board heard from Mark Hall, an architect and heritage planner qualified by the Board to give opinion evidence regarding architectural and heritage issues. Mr. Hall testified that the illustration of such concern to the Town and its staff was an orthographic drawing that did not take distances and perspective into

account. He then produced a series of exhibits he had prepared to illustrate the view north, across the north side of David Gohn Circle, as it exists today, as it would be with the new housing in place as proposed by Wynberry, both with young landscaping as proposed, and as it would be once the landscaping was more mature, in 7 to 10 years. According to the staff report on the proposed settlement (Exhibit 39), the Town's planners had asked Wynberry for such drawings on several occasions, but none had been forthcoming.

Based on Mr. Hall's perspective drawings and his evidence, planning staff was able to settle the appeal in a manner they felt would ensure an appropriate relationship between the new development and Heritage Estates. The settlement, which was the subject of the reconvened hearing on December 18, resulted in a revised amending by-law with maximum heights of 10 metres, measured to the peak of the roof, for all lots except the three most central ones (Lots 4, 5 and 6), where the height limit is 9.15 metres measured to the peak of the roof. In other respects the appealed and settlement by-laws are the same.

### **Reasons for Board's Decision Approving the Settlement By-law**

As delivered orally at the end of the settlement hearing on December 18, the Board's decision, based on the evidence and submissions it heard on November 7 and 8 and December 18, was to allow the appeal in part and enact the settlement by-law. Its reasons for this decision are as follows:

1. The perspective drawings prepared by Mr. Hall and submitted on November 7 were reviewed by Town planning staff and addressed in Mr. Hutcheson's testimony on December 18. The Board accepts Mr. Hutcheson's evidence confirming Mr. Hall's opinion that the additional height for the bungalow with loft dwellings (to a maximum of 9.15 metres) and two storey dwellings (to a maximum of 10 metres) will not visually dominate Heritage Estates when the new homes are viewed from the public realm.
2. The Board acknowledges that Mr. Kotyck and Ms John, whose homes are immediately south of the three most westerly lots, and who gave evidence

on December 18, are opposed to the heights established for these lots in the settlement by-law. However, neither Mr. Kotyck nor Ms John provided any evidence that would outweigh the professional opinions of Mr. Santamaura, Mr. Hall and Mr. Hutcheson that the heights established for these lots by the settlement by-law are appropriate in the context of the changes to the original application related to re-grading of the site, the provision of integral rather than rear garages and the landscaping required through the subdivision agreement, together with the rear setback imposed by the settlement by-law.

3. The Board agrees with Mr. Hutcheson's uncontradicted evidence on December 18 that the relocation of the bungalow with loft dwellings from the westerly portion of the lands to a more central location will provide a better backdrop to Heritage Estates opposite the James Thomas House (14 David Gohn Circle) at the north end of Heritage Corners Lane. As noted in the staff report on the proposed settlement (Exhibit 39), "this is the primary public view looking north on Heritage Corners Land and has more view corridors and open space offering views to the north."
4. The maximum heights set out in the settlement by-law are significantly lower than those established for residential dwellings in the parent by-law (By-law 177-96), both in terms of absolute numbers and in terms of the point to which the measurements are taken.
5. The Board accepts the evidence of Mr. Santamaura, as confirmed by Mr. Hutcheson, that the roof pitch for the style of architecture for the new dwellings backing onto Heritage Estates (referred to by Mr. Santamaura as Canadiana and by Mr. Hutcheson as Gothic Revival) will benefit from the additional height.

The Board congratulates the parties for achieving a settlement of the issues, and thanks all hearing participants for their contributions.

**Order**

The Board orders that the appeal is allowed in part, and that the Town of Markham Zoning By-law 177-96 is hereby amended in the manner set out in Exhibit 40 and attached hereto as Attachment "1". The Board authorizes the municipal clerk to assign a number to this by-law for record keeping purposes.

"E. Pendergrast"

E. PENDERGRAST  
MEMBER



ATTACHMENT "1"

EXPLANATORY NOTE

BY-LAW NO.

A By-law to amend By-law 177-96, as amended

**Wynberry Developments Inc.**  
**Part of Lot 17, Concession 7**

The proposed by-law amendment applies to a 0.773 ha. (1.91 acre) parcel of land located on the south side of Monkhouse Road, east of Spencer Avenue, within the Wismer Commons community.

The lands are presently zoned Rural Residential (RR4) by By-law 304-87, as amended.

The purpose of the by-law amendment is to incorporate the lands into the designated area of By-law 177-96, and zone them Single detached Residential (R1-F18\*308) Zone.

The effect of the by-law amendment will be to permit the lands to be developed for single detached residential purposes.

A by-law to amend Urban Expansion Area  
Zoning By-law 177-96, as amended  
(To incorporate lands into the designated area of this By-law)

THE COUNCIL OF THE CORPORATION OF THE TOWN OF MARKHAM  
HEREBY ENACTS AS FOLLOWS:

1. THAT By-law 177-96, as amended, is hereby further amended as follows:
  - 1.1 By expanding the designated area of By-law 177-96 to include the lands in Lot 17, Concession 7, as shown on Schedule 'A' attached hereto.
  - 1.2 By zoning the lands  
  
Single detached Residential (R1-F18\*308) Zone  
  
as shown on Schedule 'A' attached hereto.
  - 1.3 By adding the following Subsection 7.308 to Section 7 – EXCEPTIONS:

**"7.308 WYNBERRY DEVELOPMENTS INC., WISMER COMMONS**

Notwithstanding any other provision of this By-law, the provisions in this Section shall apply to those lands denoted by the symbol \*308 on the Schedule to this By-law. All other provisions of this Bylaw, unless specifically modified/amended by this Section, continue to apply to the lands subject to this Section.

**7.308.1 Zone Standards**

The following specific Zone Standards apply:

- a) Minimum required *front yard* - 4.3 metres
- b) Minimum required *rear yard* - 15 metres
- c) Minimum required *interior side yard* - 1.8 metres on one side,  
1.2 metres on the other side
- d) Maximum *height* for Lots 4, 5 and 6, as shown on Schedule 'A'  
attached hereto - 9.15 metres
- e) Maximum *height* for Lots 1, 2, 3 and 7 to 12, inclusive, as shown on  
Schedule 'A' attached hereto - 10 metres
- f) Minimum width of *landscaping* adjacent to the rear lot line - 3.0  
metres

**7.308.2 Special Site Provisions**

The following additional provisions apply:

- a) The *main wall* of a *dwelling* shall be setback no further than 4.5 metres from the front lot line.
- b) The *main wall* of an attached *private garage* that contains the opening for motor vehicle access shall be setback no further than 5.8 metres from the *front lot line*.
- c) Detached *private garages* are not permitted.
- d) The height of the dwellings on all lots shall be measured from the *established grade* at the front *main wall* to the highest point of the ridge of a gabled, hip, gambrel roof or other type of pitched roof.
- e) No part of the grade at the rear wall shall be lower than 0.8 metres than the average grade along the front wall.

2. All other provisions of By-law 177-96, as amended, not inconsistent with the provisions of this by-law shall continue to apply."

FROM RR4 (BL 304-87)  
TO R1-F18\*308(BL 177-96)

EDWARD JEFFREYS AVENUE

MONKHOUSE ROAD

DAVID GOHN CIRCLE

WISMER PLACE

ALEXANDER HUNTER PL

SPENCER AVENUE

EVERETT STREET

KENTLAND STREET

1 2 3 4 5 6 7 8 9 10 11 12

**MARKHAM**  
DEVELOPMENT SERVICES COMMISSION

**A BY-LAW TO AMEND BY-LAW 177-96**

--- BOUNDARY OF AREA COVERED BY THIS BY-LAW

[H] SINGLE DETACHED RESIDENTIAL

[RR4] RURAL RESIDENTIAL FOUR

THIS IS SCHEDULE 'A' TO BY-LAW  
PASSED THIS ..... DAY .....

..... MAYOR

..... CLERK

\*No. / EXCEPTION SECTION NUMBER

NOTE: 1) DIMENSIONS ARE IN METRES  
2) REFERENCE SHOULD BE MADE TO  
THE ORIGINAL BY-LAW LODGED IN  
THE OFFICE OF THE CLERK

SCALE 1: 2000

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