

ISSUE DATE:

Dec. 13, 2004

DECISION/ORDER NO:

1920



PL030382

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Philip Arber, Tina Hopson, Bruce Meness and others have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the United Counties of Prescott and Russell to approve Proposed Amendment No. 4 to the Official Plan for United Counties of Prescott and Russell
County File No. 020-OPA-02-002
OMB File No. O030069

Francosc nie Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 490 of the City of Clarence-Rockland (former Clarence Township) to rezone lands respecting Lots 26, 27 and 28, Concession 3 from Conservation (CON) to include an outdoor amphitheatre and accessory uses as permitted uses
OMB File No. Z030081

APPEARANCES:

Parties

Counsel*/Agent

City of Clarence-Rockland

M. Labrosse*
F. Loiselle

United Counties of Prescott and Russell

D. Shelly*

Francosc nie Inc.

P. Champagne*
K. Desmarais (Student-at-law)

Tina Hopson, Bruce Meness,
Ghislaine Rozon, Sylvian Prevost and
Dr. Erik Petersen

M. Swinwood*

Phil Arber

DECISION DELIVERED BY R. G. M. MAKUCH AND PARTIAL ORDER OF THE BOARD

The proponent Francosc nie Inc., a not-for-profit corporation, was created as a fundraising project for community groups within the United Counties of Prescott and Russell (United Counties) as well as the Montfort Hospital located in the City of Ottawa. In the spring/summer of 2002, it submitted an application for an amendment to the Official Plan of the United Counties in order to proceed with the development of a site

for the presentation of an outdoor theatrical pageant entitled "L'echo d'un peuple". This theatrical production is modeled after similar productions in France and in the Province of Quebec, all of which have met with great success and would be manned strictly by volunteers. A concurrent application was also made to the Council of the City of Clarence-Rockland for an amendment to Zoning By-law 490 to permit this development. It is noted that the Council of the United Counties has the authority to approve amendments to its own Official Plan pursuant to the provisions of the *Planning Act*.

The proposed site is located just south of the Village of Bourget on the eastern edge of what is known as the "Larose Forest". This forest has a total area of approximately 26,044 acres, is the second largest plantation forest in Southern Ontario and is currently under the care and control of the United Counties. The forest contains a network of approximately 160 kilometres of forest roads and trails. It also has a main forestry station as well as facilities and equipment for fire fighting, plantation tending and the selective harvest of lumber. A network of cross-country ski trails is popular during the winter months.

The proposal would involve construction of a stage, grandstands, bleachers, accessory buildings as well as a parking lot to accommodate 400 vehicles and 30 buses. The grandstands as well as some of the accessory buildings are proposed to be temporary structures and would be removed from the site at the end of each theatre season.

The theatre season would consist of 30 shows each of a two-hour duration over a 50-day period from approximately June 24 to mid-August each summer. The proponent expects crowds to be in the range of 1500 persons in the beginning, growing to 2500 persons per show within two to three years. The application initially requested the re-designation of an area composed of 142.99 hectares (353.32 acres) with actual development being restricted to an area of approximately 11 hectares (27 acres) and included land required for a first phase as well as additional land for a future phase of development, which would include an interpretation centre and related facilities. Particulars of the subsequent phases were not provided to the United Counties' Council as part of this official plan amendment application review. The area subject to the official plan amendment was reduced to 73 hectares (180 acres) with 11 hectares (27 acres) actually being developed to reflect what was actually required for the current

development proposal as identified by the proponent. This area represents approximately 1/1000th of the total forest (26,044 acres) according to the proponent. The proponent plans to construct a 2.44 m. (8 foot) berm around the stage and bleachers combined with a 1.83 m. (6 feet) high fence to minimize show and crowd noise. The main access to the site would be from County Rd. No. 8 to two existing forestry roads, which would require some improvements to meet the standards required for passenger and emergency vehicles.

Official Plan Amendment No. 4 was approved by United Counties Council on March 25, 2003 after a period of consultations with the general public, including a number of technical agencies which normally provide input into such matters as part of the planning process. The required statutory hearing under the provisions of the *Planning Act* was also held.

The Council of the City of Clarence-Rockland has refused and/or neglected to deal with the application.

The appellants who object to the enactment of Official Plan Amendment No. 4 raise a number of issues, which are summarized as follows:

- the negative impacts that this project could have on the environment and the Larose Forest
- the precedent that such a project could create
- the choice of the Larose Forest as opposed to an urban centre that has existing infrastructures and services
- increase in the potential for forest fires
- increase in traffic volumes on existing roads and within the Larose Forest
- chemical and biological products to be used to control the mosquitoes
- putting people at risk of the West Nile Virus
- tree cutting

- noise pollution
- groundwater impact potential on nearby wells
- impact on groundwater level of the Larose Forest
- negative impacts on the quality of life nearby residents
- the legitimacy of the data put forward by the organizers with regards to economic spin-offs
- inadequate public consultation leading up to the adoption of Official Plan Amendment No. 4

It was quite evident that the community was very much divided on this issue with United Counties receiving a petition containing approximately 300 in opposition to the proposal and the proponent claiming that the community was very much behind it as evidenced by the large number of individuals (in excess of 700) who have volunteered their time as well as others in the community.

The Board has carefully considered all of the evidence as well as the submissions of counsel for the parties including Mr. Arber himself and finds that the appeals against Official Plan Amendment No. 4 to the Official Plan of the United Counties should be dismissed and that the appeal by Francoscénie Inc. against the City of Clarence-Rockland's refusal/neglect to enact the proposed zoning by-law amendment should be allowed for the reasons that follow.

Although the appellants raise a number of significant issues in their appeal documents, they have failed to discharge the onus placed upon them as appellants to adduce satisfactory, credible, contrary and sustainable evidence to support the allegations raised in their appeals that Official Plan Amendment did not represent appropriate land use planning.

The site is designated "Rural Policy Area" under the United Counties Official Plan and part of it is considered to be "Significant Woodland" under Schedule B of the plan. It is currently zoned "Conservation" (CON) under Zoning By-law 490 of the City of Clarence-Rockland. The Rural Policy Area designation permits a fairly wide range of

residential uses including single, semi-detached and duplex dwellings, accessory apartments and mobile home parks. The non-residential uses permitted include, non-intensive agriculture, hobby farms, forestry uses, parks and open spaces and recreational trails. The commercial and industrial uses permitted include agriculture related commercial and industrial uses, nonagricultural industrial and commercial uses which meet the needs of the traveling public, or which relate to local resources, custom workshops, kennels and veterinary clinics, motor vehicle sales and service establishments, tourism commercial uses (motel, hotel, eating establishments, etc.) recreational commercial uses such as marinas, golf courses and campgrounds and communication towers. Institutional uses such as churches cemeteries and community halls are also permitted as well as waste disposal facilities subject to some specific policies in the plan.

Section 5.6.1.1 of the United Counties Official Plan states that amendments will only be considered when they are justified and when the required supportive information is provided. Proposed amendments are to be accompanied by sufficient information to allow Council to fully understand and consider the impact of the proposed change, the need for the proposed change and the effect of the proposed change on the need for public services and facilities.

The three professional land use planning witnesses who gave evidence in support of OPA No. 4, Marc Rivet for Francoscénie Inc., Francois Loiselle for the City of Clarence-Rockland and Pierre Mercier for the United Counties, demonstrated that they were knowledgeable individuals and had performed an in-depth analysis of the relevant planning documents prior to reaching their conclusions and opinions.

Pierre Mercier, the Planning Director for the United Counties, is the author of the United Counties Official Plan, which was prepared after the coming into force of the Provincial Policy Statement (PPS) and was approved by the Minister of Municipal Affairs and Housing. Mr. Mercier was unequivocal that the United Counties Official Plan had regard for the PPS in that these policies had been incorporated into the official plan. He also concluded that the studies submitted by the proponent in support of the official plan amendment met the exigencies of section 5.6.1.1 and specifically that the environmental assessment prepared by Jean Roberge satisfied the requirements of paragraph 3.3.7.1 and that the proponent was not required to meet the requirements of

paragraph 3.3.7.2 at this stage. With respect to the “Strategic Plan for the Larose Forest”, relied on heavily by the appellants, Mr. Mercier indicated that this document has not been incorporated into the Official Plan of the United Counties as it has never been subjected to the scrutiny of a public consultation process as required under the *Planning Act*. The Board cannot therefore rely on this document as a statement of expression of the present and/or future intentions of the Council of the United Counties.

This witness reviewed a number of other policies set out in the official plan and concluded that the proposal met the strategic objectives of the United Counties as set out in the plan and made it quite evident that a number of the policies referred to by counsel for the appellants were not relevant to the considerations in this case. He concluded that the proposal met all of the requirements for development set out in the plan and that in fact, the proponent went beyond what would normally be required to submitted by an applicant for official plan amendment.

Francois Loiselle, the Planning Director for the City of Clarence-Rockland, who gave evidence under summons expressed his opinion that the proposed site was appropriate for the uses proposed and that the amendment represented appropriate land use planning in that it would be in conformity with the United Counties Official Plan as well as OPA No. 4. He was satisfied that the proposed use met the planning objectives of the City of Clarence-Rockland and that the proposal would be beneficial to the region.

The evidence of these three land use planners was not shaken under cross-examination nor was it contradicted by any evidence from witnesses for the appellants.

The land use planner for the appellants, Marcel Ernst, on the other hand, demonstrated very little knowledge respecting the planning process in the Province of Ontario and it was evident that he had not reviewed the relevant planning documents and that he had failed to obtain accurate and relevant information respecting the proposal and reached conclusions and opinions based on faulty and/or inaccurate information. Under cross-examination, he was unable to properly locate the subject property on Schedule “B” of the Official Plan after being given an inordinate amount of time to do so. Furthermore, he consistently attempted to substitute his opinions for those of the experts who submitted specific technical reports, without the proper

qualifications to make such comments. He made unfair attempts at denigrating the professionalism of the witnesses who gave evidence in support of the official plan amendment but retracted these allegations under cross-examination admitting that he had no basis upon which to criticize their professionalism and that he did not possess the necessary expertise to criticize the substance of these reports. The Board finds his conduct to be rather unprofessional and bizarre at best. He was particularly critical of the environmental assessment prepared by Jean Roberge and referred to it as insufficient, yet he admitted under cross-examination that he did not have the expertise to critique this report and also admitted that for the purposes of official plan amendment, the proponent needed only meet the requirements of paragraph 3.3.7.1 of the official plan and that it was not necessary in this stage for the proponent to meet the exigencies of paragraph 3.3.7.2. He was also very critical of the public consultation process carried out by the United Counties in his direct evidence but agreed under cross-examination that the United Counties had not only met the requirements of the *Planning Act* in this case but went beyond what was required under the legislation.

Furthermore, Mr. Ernst indicated that in carrying out his planning analysis, he considered the provisions of the *Crown Timber Act* to be relevant because the subject lands benefited from subsidies. This opinion was expressed notwithstanding that there were no subsidies ever paid on this parcel by the Crown and that this legislation had been repealed some ten years ago. It also became evident during the course of cross-examination that he allowed Mr. Swinwood, counsel for the appellants, to make revisions to his report.

In summary, Mr. Ernst's evidence consisted largely of contradictions and retractions. The Board does not find him to be a credible land use planner and cannot rely on any of this evidence.

The other witnesses (Ghislaine Rozon, Raymond Bouvier, Caroline Arcand, Tina Hopson and Sylvian Prevost), who gave evidence in opposition to OPA No. 4 did not provide the Board with any useful evidence. They simply reiterated the allegations made in the appeal documents and expressed their personal opinions on matters that they were not qualified to express opinions on.

The Board cannot rely on the evidence of Sylvian Prevost respecting noise as he is not properly qualified to express such opinions and even if he was so qualified, the Board could not accord much weight to that evidence by reason of his bias as a party who may be affected by the proposal.

Lindsay Penney, the biologist who gave evidence in support of the appellants, admitted on cross-examination that the environmental assessment prepared by Jean Roberge was satisfactory and adequate for the purposes of an official plan amendment.

Mr. Stan Rosenbaum who testified on behalf of the Ottawa Field Naturalist Club, whose goal it is to preserve the natural heritage in the region, could not provide the Board with reliable evidence, which would suggest that a particular species of bird made the site in question its habitat.

Dr. Jean-Luc Pilon, an expert in archeology and anthropology, referred to a mound located near the stream on the subject property as being an indication of potential archeological significance on the site, however he had not reviewed Jean Roberge's report, which concluded that the site had no archeological potential based on a review of the data base available. He agreed under cross-examination that reviewing the appropriate data base was the first step to be taken in making such an assessment on a site such as this one. He also concurred with the suggestion that in the event that, archeological features were found on site, measures could be taken to protect and preserve these without stopping development.

Dr. Robert Boudreau, of the Eastern Ontario Health Unit, expressed concern with the proposal insisting that the risk of forest fires and exposure to the West Nile Virus was too great if the project were to go ahead and that it was best for people to avoid situations where there are such risks. He admitted however under cross-examination that he did not have any expertise with respect forest fires and also that the risks associated with West Nile Virus were very low if proper precautions were taken as suggested by the Press Communiqué filed as Exhibit 73.

On the other hand, the proponent has produced a number of studies and reports in accordance with section 5.61.1 of the official plan to justify Official Plan Amendment No. 4 including, and environmental impact assessment, a hydrogeological study, a geotechnical study, a mosquito control study, a potable water supply study and a noise

impact study. Furthermore, a site plan, drainage plan, architectural plans, emergency plan, a mechanical engineering study and a traffic study were also prepared by the proponent to justify the proposed development.

Jean Roberge, the biologist for Francoscénie Inc. presented his environmental assessment report, which he considered to be a “screening” as contemplated by paragraph 3.3.7.1 of the official plan. Mr. Roberge explained the methodology he followed in carrying out his assessment and found no features of archaeological significance on the site after having used the appropriate manual for archaeological investigations and concluded that no “digs” were found to be necessary on the site. This evidence was unshaken under cross-examination and was not contradicted by the appellants and in fact the appellants’ biologist Lindsay Penney as well as their land use planner eventually agreed with Mr. Roberge’s conclusions. There is only a very small portion of the site, which is actually designated “Significant Woodlands” and the data base from the Ministry of Natural Resources indicates that the site is not a habitat for any wildlife.

Jacques Sauriol, an expert on groundwater assessment, reviewed the groundwater aquifer of the site and concluded that they would not be any negative impacts on the site or on adjacent lands as a result of the works proposed and proposed certain mitigation measures he followed by the proponent. This evidence was unshaken on cross-examination and was not contradicted by any cogent evidence presented by the appellants.

With respect to the issue of mosquito control and the potential for spread of the West Nile Virus, Dr. Simon Lachance, an expert on mosquito control and pesticides, concluded that “Bti”, a biological pesticide should be used to control this problem because it only affects the mosquito population and not other organisms or humans. This evidence was also not shaken under cross-examination and was not contradicted by any cogent evidence presented by the appellants.

Roland Drouin, a geotechnical engineer, described the site as consisting of sandy soils with good load-bearing capacity, which would be sufficient for the proposed infrastructure. He also concluded that the improvements to the forestry roads adjacent to the site would not pose any problems. He also established the groundwater level to

be at 1.4 m as of July 2002. This evidence was not shaken on cross-examination and was not contradicted by the appellants.

The traffic analysis was presented by Jean Decoeur who concluded that traffic volumes near the site as a result of the proposal would be minimal the first three years of operation and that improvements could be made subsequently to minimize any impacts of such. He concluded that 50% of the spectators would arrive on site by bus while the other 50% would arrive in cars and that 50% of the spectators will access the site from Highway 417 to the south while the other 50% would access site from Highway 17 (also referred to as Regional Route 174) to the north. This evidence was not shaken on cross-examination or contradicted in any way by the appellants.

On the issue of noise and vibration, Neil Standen, an acoustical engineer retained by the proponent, concluded from his analysis that the sound, which would be heard by the closest neighbor almost one kilometer away, would not be noticeable and would be perceptible only in a very quiet background. He also concluded that the effect the sound produced during the shows on animals in the area would be minimal and that these animals would ignore such noise. The berm and fence proposed to be constructed around the theater area would act as an attenuation barrier for the sound. Mr. Standen took issue with the calculations used by Sylvian Prevost with respect to the sound system and that the system would only be used to 50% of its capacity and not 70% as described by Mr. Prevost. Mr. Standen's evidence was not shaken on cross-examination and was not contradicted by the appellants with any reliable evidence. The Board does not attach any weight to the evidence of Sylvian Prevost respecting noise as he is not properly qualified to express such opinions and furthermore, his bias as a party to this appeal taints his objectivity.

Jean-Francois Sabourin, an expert on environmental and water resources concluded that surface waters on the site would flow to a tributary of Black Creek and that the post development run-off would not exceed current runoff the site and that there would be no erosion resulting from the works. His evidence was not shaken on cross-examination or contradicted by the appellants.

The Board is satisfied that the emergency plan prepared by Francoscénie Inc. is adequate under the circumstances. It was prepared by Stephane Nadeau, an

experienced firefighter, and was reviewed by a number of individuals and United Counties officials including, emergency services, OPP, ambulance services and paramedics, fire chief, coordinator of fire services, forestry technician and planning department. Mr. Nadeau explained that this document is continuously evolving as new information becomes available and that it will continue to do so as time passes.

On the issue of forest fires, the Board is satisfied that the matter has been adequately addressed by the proponent. The emergency plan referred to above dictates the number of emergency personnel required on the site during performances and properly establishes the procedure to be followed for the prevention, detection and extinction of any fire that may occur on the site to sufficiently protect the public.

The initial concerns raised by the appellants were related to fires emanating from the Francoscénie site and the threat that this could pose to the forest. As it became evident during the course of the hearing that the emergency plan designed by Francoscénie Inc. was adequate to address this, the appellants turned their attention to the threat of fires emanating from outside the site. James Faught, the appellants' forest fire expert expressed the view that because the Francoscénie theatre project would attract more attention to the forest and that therefore more people would visit the forest thereby increasing the risk of forest fires.

The appellants and Mr. Faught would have everyone believe that if this project goes ahead, Eastern Ontario will be subjected to the same problems faced by the residents of British Columbia in the summer of 2002 when fire devastated its forests. While the Board recognizes that Mr. Faught has a great deal of practical experience fighting fires, the Board finds that the risks associated with the Francoscénie project were greatly exaggerated by him and the appellants. Mr. Faught, cannot not be considered to be a totally independent witness on this issue. He had no qualms in acknowledging that he did not believe any development should occur in the forest and that he was against any uses in the forest including those that are currently permitted by the Official Plan and the City's zoning by-law. He is the Executive Director of the Federation of Ontario Naturalists, an organization dedicated to protect and conserve the natural heritage of Ontario, and as such could hardly be expected to be unbiased in his opinions regarding this matter. The Board finds his evidence to be exaggerated and speculative at best as a consequence of his declared bias.

The Board prefers the evidence of Dr. Albert Simard who gave evidence on behalf of Francoscénie Inc., in reply to the evidence of James Faught. Dr. Simard has a great deal of professional analytical experience with respect to the behavior of forest fires and has reviewed the emergency plan and has opined that it is satisfactory and may in fact be overkill under the circumstances. He believes that the site could be considered to be fire resistant as designed and given the nature of the vegetation and trees present. He also believes that in any event the risk of a forest fire starting in the Larose Forest during the summer months are extremely low given the conditions present on the site. Furthermore, one cannot compare the conditions present in the Larose Forest with those present in the Province of British Columbia, topography being an important element. Dr. Simard also possesses valuable experience in the training of fire fighters for forest fires and asserts that one could be trained in a very short time period. He stood up well under cross-examination and was able to effectively and convincingly rebut propositions put to him by counsel for the appellants respecting humidity and likely atmospheric conditions to be found in the forest at different times of the day during the summer months.

With respect to the allegations that there was inadequate public consultation carried out by the Council of the United Counties, the Board is satisfied that the Council followed the exigencies of the legislation and in fact went well beyond these legislative requirements in carrying out its duties respecting this matter. The following is a summary of the public process followed by the Council of the United Counties in its review and consideration of this matter.

A Notice of Public Meeting was sent to every registered owner or tenant of properties located within 120 m of the site as prescribed under the Planning Act as well as to every property owner within three km of the site. Notice of the public meeting was also published in the "Tribune Express" and "Vision Prescott and Russell", both community newspapers having general circulation in Prescott-Russell. A Notice of Public Meeting was also posted in proximity of the site as prescribed under the. The notice was also circulated to the usual technical agencies that are normally expected to comment on such applications.

A joint public meeting was held on November 27, 2002 in front of the Council of the United Counties of Prescott and Russell as well as the Council of the City of

Clarence-Rockland at the Bourget Community Centre located within a few kilometers of the site. This public meeting was attended by more than 500 people of which more than 40 people made oral and written presentations concerning the project. Subsequent to this public meeting the United Counties received more than 30 written comments from the public in favor and/or against the project. A number of individuals and organizations made formal requests for official notification of Council's decision.

With respect to the issue of the precedent to be set by this approval, each application is reviewed on its own merits and any future phases of development on the site that may be proposed, would be evaluated by the United Counties and City of Clarence-Rockland as against the planning policies in effect at that time.

The concerns raised by the appellants were simply not supported by any cogent evidence upon which the Board could rely to allow their appeals.

The Board therefore finds that OPA No. 4 has regard for the Provincial Policy Statement (PPS), was properly considered in accordance with and is consistent with the relevant policies in the United Counties Official Plan and represents appropriate land-use planning under the circumstances.

It must also be noted that the lands in question would be subject to a lease agreement between Francoscénie Inc. and the United Counties. The United Counties is a public authority charged with protecting the public interest and any additional public concerns that are not normally covered by a Site Plan Agreement under Section 41 of the Planning Act could be addressed in this lease agreement and would afford more protection to the public.

Accordingly, the Board orders as follows:

1. The appeals against Official Plan Amendment No. 4 to the Official Plan of the United Counties of Prescott and Russell are hereby dismissed; and
2. The appeal against the refusal/neglect of the Council of the City of Clarence-Rockland is allowed and By-law No. 490 is hereby amended in accordance with Attachment 1 (please note that Attachment 1 is Ex. 24) hereto.

The Board shall withhold issuance of its order until such time as it is advised that a Site Plan has been approved by the City and a Site Plan Agreement has been entered into pursuant to Section 41 of the *Planning Act*.

The Board will remain seized of this matter to resolve any issues that may arise during the site plan review process.

Counsel at the conclusion of the hearing advised the Board that they wish to reserve the right to make representations as to costs, these must be made in accordance with the Board's Rules.

It is so Ordered.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER