

ISSUE DATE:

AUG. 11, 2005

DECISION/ORDER NO:

2088



PL041198

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Flamborough Chamber of Commerce, Waterdown Business Improvement Area and Westdale Village Business Improvement Area 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 City of Hamilton to approve Proposed Amendment No. 21 to the Official Plan for the Region of Hamilton-Wentworth now the City of Hamilton to redesignate land at Part of Lots 12 and 13, Concession 3 (East Flamborough) to add a Specific Policy Area to permit department stores
OMB File No. O050051
OMB Case No. PL041198

Trinity Development Group Inc., Rosart Properties, Waterdown Business Improvement Area 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 City of Hamilton to approve Proposed Amendment No. 98 to the Official Plan for the Town of Flamborough now the City of Hamilton to redesignate land at Part of Lots 12 and 13, Concession 3 (East Flamborough) from General Industrial Commercial to Prestige Industrial Commercial to permit "big-box" retail development
OMB File No. O050052
OMB Case No. PL041198

Trinity Development Group Inc., Rosart Properties, Waterdown Business Improvement Area and others have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 05-021 of the City of Hamilton
OMB File No. R050063
OMB Case No. PL041198

Trinity Development Group Inc. has appealed to the Ontario Municipal Board under subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Hamilton to approve a proposed plan of subdivision on lands composed of Part of Lots 12 and 13, Concession 3 (East Flamborough), in the City of Hamilton
25T200404
OMB File No. S040107
OMB Case No. PL041198

Difelfam Realty Corp., Flamborough Power Centre Inc., Flamborough South Centre Inc. and 2062017 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the City of Hamilton which granted an application by Trinity Development Group Inc. numbered A277/04 for variance from the provisions of By-law 90-145-Z, as amended, respecting Part of Lot 12, Concession 3 (East Flamborough)
OMB File No. V050146
OMB Case No. PL050253

APPEARANCES:

<u>Parties</u>	<u>Counsel*/Agent</u>
Roitrin Properties (Flamborough) Inc. and Trinity Development Group Inc.	Joel D. Farber*
Flamborough Power Centre Inc., Flamborough South Centre Inc. and 2062017 Ontario Inc.	Dennis H. Wood* Sharmina Mahadevan*
Difelfam Realty Corp.	Gerald B. Aggus*
Flamborough Chamber of Commerce Waterdown Business Improvement Area	Roslyn Houser* David Bronskill*
Rosart Properties Inc.	Lynda Townsend-Renaud*
2034902 Ontario Inc.	Ariens Gaetner*
Westdale Village Business Improvement Area	David Simpson
City of Hamilton	Art Zuidema*

**DECISION DELIVERED BY D. L. GATES AND S. J. STEFANKO
FROM A PREHEARING CONFERENCE HELD JULY 19, 2005
AND ORDER OF THE BOARD**

This prehearing involved a number of appeals against planning approvals to permit over 500,000 ft² of commercial development at the Southeast corner and over 600,000 ft² at the Northeast corner of Highways #5 and #6 in the City of Hamilton.

At the outset of the hearing Mr. Farber brought a Motion for an order pursuant to Section 34(31) of the *Planning Act* that the part of the By-law 05-021 affecting his clients' lands located in the southeast quadrant was not in issue and that the By-law should be deemed to have come into force for his clients' holdings including the lands now owned by Loblaws on the day the By-law was passed. All the other persons and parties present at the prehearing had no objection to the order, provided it didn't apply to those provisions of the By-law known as "Warehouse Membership Club" like Sam's or Costco.

The Board found that based on the affidavit from Mr. Ariens, a qualified planner, none of the appeals related to the “Trinity and Loblaws lands”. This evidence was not challenged.

The Board orders that By-law 05-021 come into force on the date it was passed for the “Loblaws and Trinity lands” except any reference to big-box “Warehouse Membership Club” which will be struck from the By-law.

Mr. Farber’s appeal to By-law 05-021 will continue respecting “Warehouse Membership Club” for both its own lands and the lands of “FPCI”, at least until the next prehearing when the Board expects to hear from the parties as to whether “Warehouse Membership Club” remains an issue and which parties, if any, are contesting it.

A further motion was brought by Mr. Farber on behalf of his clients to dismiss a number of appeals to a number of variances sought by his clients to permit the commercial project to proceed in the Southeast quadrant. At the outset of the hearing all of the appeals to the variances except one were withdrawn. The sole remaining appeal was by Mr. Aggus on behalf of Difelfam Realty Corp., and it related to a reduction of side yard to 1.1 m when the original Zoning Bylaw required a minimum of 5 m side yard and By-law 05-021 required a 3 m side yard.

As mentioned above, a lengthy affidavit was provided by Mr. Ariens showing the variances met the four tests set out in Section 45(1) of the *Planning Act*. For the reasons provided by Mr. Ariens the Board finds that all the variances except the one appeal by Mr. Aggus meet the four tests and all of those appeals are dismissed. The dismissal of these appeals was effectively on consent.

Finally, Mr. Farber asked the Board to dismiss the appeal of Mr. Aggus because it did not disclose any land use planning ground pursuant to Section 45(25) of the *Planning Act* and in particular a(i) and (ii).

Mr. Ariens affidavit supported Mr. Farber's position. Paragraph 62 states:

“62. The Difelfam appeal letter does not identify any adverse impact or planning issue whatsoever arising from the reduced side yard variance. Accordingly, the Difelfam appeal should be dismissed without a hearing pursuant to subparagraph 45(17)(a)(i) of the *Planning Act*.”

In support of Mr. Aggus' position, he filed an affidavit of James Webb, also a professional land use planner.

Paragraphs 9 and 10 of his affidavit states:

9. As proposed, the Variance permits buildings to locate within 1.1 metres of the entire length of the rear lot line of properties at 50 and 56 Dundas Street. Based on the current zoning regulations, a building with a maximum height of 15 metres (approximately 4 storeys) can be built within 1.1 metres of the lot line. Directly associated with the reduction in the side yard, there is significant reduction in the area of the site that is available for Landscaped Open Space. Based on my analysis of the proposed variance, I have identified a number of adverse impacts which will have a cumulative negative impact on the character of the area as well as an adverse impact on the property at 56 Dundas Street East as follows:
 - (i) the reduced set back and separation of the building mass from the property line does not provide appropriate buffering between land uses;
 - (ii) the associated reduction in the opportunities for Landscaped Open Space is not consistent with the Official Plan objectives for enhanced landscaping;
 - (iii) the proposal for a building within 1.1 metres of the property creates urban design and building appearance concerns;
 - (iv) the proposal to reduce the building separation from the property line causes a conflict between the matters of good urban design and Building Code considerations, as follows:
 - the Building Code regulates openings, ie windows, in a building face having regard for separation distance to an opposing building fact;
 - the reduced set back may require an easement over the adjoining property to establish as "limited distance separation" as per the Building Code, restricting the use of the adjoining property;

- the resulting building form with a blank wall or minimal openings is inappropriate in an urban design context at a location that is intended to achieve a heightened standard of design according to the applicable official plan policies;
 - with regard to the building mass that can be implemented in keeping with the proposed variance, the applicants have not provided any information to demonstrate and absence of sun and shadow impacts.
- (v) the proposed Variance creates an unacceptable precedent for building form when applied to adjoining properties, the resulting built form could see adjoining buildings with a total separation distance of 2.2 metres and significant reductions in the area of a lot that can be maintained for landscaping.
10. It is my opinion that the City's review of the proposed variance has not considered the possible impacts of the variance in the proper context. The Staff comments state that the requested variance is to "accommodate a building which will likely face back onto a second public access to the shopping center. The proposed building is oriented away from the properties along Dundas Street and should not result in incompatibilities." Staff have inappropriately based their comments on a site plan that has very possibility to be revised with very different building form and resulting impact. The comments do not properly address the implications of the variance which is applicable to the entire length of the lot line abutting 56 Dundas Street East.

This affidavit expanded the appeal letter filed by Mr. Aggus which repeated the four tests and simply stated the variance did not meet them.

The Board finds that there is a valid land use planning ground of appeal in this instance. While the letter of appeal provided little detail, the Board finds that the appeal letter together with the affidavit filed in support discloses a valid planning issue. In this instance the appellant ought not to have its appeal dismissed without a hearing. The Board is satisfied on the evidence filed that the appeal is not frivolous or vexatious and was made in good faith.

Notwithstanding the foregoing, the Board does not believe the variance issue should be tied to the proposal in the Northeast quadrant and will grant a separate hearing for this variance at the earliest possible date. The Board's planner should be spoken to to assist with the date. This panel is not seized.

Among the many other Motions brought, Mr. Wood on behalf of a Flamborough Power Center Inc. ("FPCI") brought a motion to dismiss the appeals of the Flamborough Chamber of Commerce ("Chamber") and the Watertown BIA ("BIA"). FPCI, whose lands are located in the northeast quadrant requires a Regional Official Plan Amendment, a local Official Plan amendment and the rezoning to proceed with their over 600,000 ft² of commercial space. Mr. Wood, on Friday, July 8, 10 days before the prehearing and in accordance with the Board rules, served his voluminous motion materials on the Chamber and BIA in support of his application to dismiss.

A further motion was brought by Ms Hauser on behalf of her clients the Chamber and the BIA to adjourn the power centers motion to dismiss her clients' appeals.

The substance of Ms Hauser's motion was that notwithstanding that Mr. Wood complied with the Board's rules, this hearing was exceptional and the Board ought to allow her request for adjournment. The reason why this matter was exceptional resulted from the overall magnitude of the combined applications for 1,100,000 ft² of commercial space in two quadrants, the number of parties, the number of positions, and the type of evidence including a number of extremely complex market studies and reports.

Mr. Wood's position was that FPCI would be greatly prejudiced financially by delay, that Ms Hauser's clients as appellants have a responsibility to prepare their case and a number of months have passed since they had filed their appeals.

Mr. Wood stated that there was no reason why Ms Hauser's clients shouldn't be expected to comply with the Board's rules like everybody else. He did not think it was fair for his client to be prejudiced for Ms Hauser's clients' lack of diligence. He believed her clients were the authors of their own misfortune.

Mr. Wood relied on the Board's rules, commentary and a number of previous decisions. This is not a case where the BIA and the Chamber failed to hire a lawyer or planner prior to the first prehearing nor was Mr. Wood alleging that these two appellants

were purposely delaying this hearing, but whether purposeful or not, Mr. Wood went on to say that the result was the same because his clients were prejudiced.

The Board regards the dismissal of an appeal without a hearing as an extremely serious step. The Board in this exceptional case will grant the adjournment. The Board finds that it should not so rigorously apply its rules so as to deny an adjournment in virtually every case. Due to the extreme complexity of the case, the number of parties and positions and the quality and quantity of materials, the specialized type of evidence, the Board finds that 10 days just isn't enough in the particular circumstances here. To dismiss Ms Hauser's request for an adjournment would result in the ultimate prejudice to her clients while a short delay of about one month would not seem to unduly prejudice Mr. Wood's clients particularly when negotiations with Ministry of Transportation for a major intersection necessary to service the site at Highways #5 and #6 have not yet been completed.

For these reasons the Board will allow the adjournment pursuant to Section 65 of its rules and, fix a date for the second prehearing conference; -- September 14 and 15, 2005, and fix the hearing date for January 3, 2006 for 9 days and recommencing February 6, 2006 for 10 more days.

At the prehearing on September 15 the Board expects that the parties will have agreed on a procedural order, that Mr. Simpson's and Mr. Gaertner's positions will be known and that no further prehearing will be required. Mr. Gaertner and Mr. Simpson both agree to advise the Board and the parties of their respective positions within 10 date days of the conclusion of this prehearing.

The Board so orders.

"D. L. Gates"

D. L. GATES
MEMBER

"S. J. Stefanko"

S. J. STEFANKO
MEMBER