

ISSUE DATE:

Oct. 03, 2006

DECISION/ORDER NO:

2794



PL060319

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Greenfield South Power Corporation has 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 0088-2006 of the City of Mississauga
OMB File No. R060076

Greenfield South Power Corporation and Greenfield North Power Corporation 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 Mississauga to approve Amendment No. 48 to the Official Plan for the City of Mississauga
Approval Authority File No.: L..A.19
OMB File No. O060063

Greenfield South Power Corporation has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of a site plan for lands composed of Part 1, Plan 43R-7398, parts of Lots 2 & 3, Concession 1, South of Dundas Street, in the City of Mississauga
OMB File No. M060069

Greenfield South Power Corporation has appealed to the Ontario Municipal Board under subsection 36(3) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to remove the holding symbol from By-law H-M1-2638
OMB File No. Z060088

Greenfield South Power Corporation has appealed to the Ontario Municipal Board under section 136(1)(b) of the *Municipal Act*, S.O. 2001, c. 25, from Council's failure or neglect to make a decision respecting an Application to Injure Private Trees for lands situated on 2315 Loreland Avenue
OMB File No. M060088

APPEARANCES:

Parties

Greenfield South Power Corporation and
Greenfield North Power Corporation

City of Mississauga

Counsel

S. D'Agostino

M. Minkowski

DECISION DELIVERED BY M.F.V. EGER AND ORDER OF THE BOARD

Introduction

September 5, 2006 was scheduled as a prehearing on Board Files O060063, R060076, Z060088 and M060069 and notice was properly served with respect to these matters.

In addition, Mr. D'Agostino requested consolidation of Board File M060088 with the above matters.

However, prior to the prehearing date, the City of Mississauga served a Notice of Motion seeking the dismissal of the appeals by Greenfield South Power Corporation (Greenfield South) and Greenfield North Power Corporation (Greenfield North) from the City's decision to approve Official Plan Amendment 48 (OPA 48) and against Zoning By-law 0088-2006 (Files O060063 and R060076). The Board used the prehearing day plus September 11th, to hear the motion, agreeing with counsel that it would be premature to consider other prehearing matters until the outcome of the motion was known.

Attachment 1 to this decision is the list of individuals in attendance at the commencement of the prehearing requesting party or participant status or just continued notice of the above noted matters. The Board did not make a final decision on the status of these persons. The Board also left Mr. D'Agostino's request to consolidate and all other prehearing matters, to be determined at a later date.

Mr. D'Agostino advised that Greenfield North was no longer the owner of the lands at 7260 Hurontario Street, located on the west side of Hurontario Street, north of Derry Road West and he withdrew Greenfield North's appeal from the City's decision to Approve Amendment No. 48 to the Official Plan for the City of Mississauga (part of O060063). Mr. Chan appearing for Cabot Trail Estates Ltd. then withdrew his client's request for party status.

The following is the Board's decision on the City's motion to dismiss Greenfield South's appeal of OPA 48 and Zoning By-law 0088-2006.

Planning Context

The City's proposed changes to their planning documents and Greenfield South's private applications all relate to the Province's recent initiatives to reduce reliance on coal-fired electrical generation and its identification of Mississauga as a preferred location for additional power generation facilities to provide power to the Greater Toronto Area. In May 2005, the Province also had announced the selection of Greenfield North and Greenfield South as potential sites for natural gas-fired power plants.

Mississauga Plan, the City's current Plan, came into effect in May 2003. Mississauga Plan resulted from the requirement of the *Planning Act* for municipalities to review their official plans every 5 years. Its approval replaced City Plan approved in 1997.

Mississauga Plan had incorporated new policies related to Electric Power, Telephone and Other Cable Services. Section 3.11.6.3 states-

Electric power facilities, except for a power generating station will be permitted in any land use designation. Power generating stations will be permitted only in lands designated Industrial.

With recent Provincial announcements in mind, in July 2005, City Council directed staff to undertake a review aimed at identifying where existing Zoning By-laws may need to be amended to implement Mississauga Plan; establish appropriate regulations and criteria for the location of power generating facilities; and effect changes to the draft Comprehensive Zoning By-law to implement Mississauga Plan, consistent with appropriate regulations and criteria for the location of power generating facilities.

In March 2006, City Council accepted staff recommendations and approved OPA 48 and proposed modifications to the relevant City Zoning By-laws. At the same time City Council directed staff to implement Revised Expanded Development Conditions contained in the report titled "Power Generating Facilities - Report on Comments", dated February 7, 2006 from the Commissioner of Planning and Building for consideration in all Requests for Proposals and in the evaluation of all applications for power generating facilities.

Under Mississauga Plan, power generating stations were only permitted on lands designated Industrial (except the Lakeview Generating Plant had a special Utility designation). OPA 48 introduces definitions to Mississauga Plan for power generating facility, cogeneration, cogeneration facility, combined cycle and renewable energy. It changes all references to Power Generating Stations to Power Generating Facilities in the Industrial sections of the Plan for consistency. Cogeneration facilities are also added as a permitted use on certain Institutional lands.

Staff's review also identified that the City's Zoning By-law had not previously been brought into conformity with Mississauga Plan. This meant that under the City's Zoning By-law, power generating stations were permitted on lands in addition to lands zoned Industrial. Zoning By-law 0088-2006, together with Rezoning By-laws 0089-2006 (Port Credit) and 0090-2006 (Streetsville) that are not under appeal, are to implement the policies in Mississauga Plan, as amended by OPA 48.

History of Greenfield South Power Generating Corporation's Applications

Greenfield South owns lands at 2315 Loreland Avenue in the City of Mississauga. In May 2005, the Province of Ontario selected the two Greenfield sites, north and south, as locations for two natural gas fired electric generators, subject to required environmental assessment and local planning processes.

Greenfield South's proposal is for the development of a new 280 megawatt natural gas fuelled electrical generator which is expected to operate in shoulder and peak periods of electrical demand. The facility also includes the use of oil as a standby fuel during interruptions in natural gas supply.

The Greenfield South site is designated Business Employment in the Dixie District Policies of Mississauga Plan. The lands are zoned H-M1-2638 (Industrial) by By-law 5500 which would permit a power generating facility.

On August 4, 2005 Greenfield South applied to the City for site plan approval (Board File M060069) and to lift the "H" Holding symbol from its zoning (Board File Z060088). Greenfield South has also applied for a tree cutting permit (Board File

M060088). These matters are all before the Board on the basis that the City has not approved the applications.

In April 2006, Greenfield South appealed the City's decision to approve OPA 48 and Zoning By-law 0088-2006.

Greenfield South is also separately pursuing required Provincial environmental assessment approvals. The Province has enacted Ontario Regulation 116/01 under the *Environmental Assessment Act*, which devised an environmental screening process for electricity projects. The purpose of this regulation is to relate the level of review of such projects to their potential for impact. The first stage of review is the Environmental Screening Process. Greenfield South commenced this stage of review in December 2004 and published Notice of Completion in August 2005. The City requested that the Director of the Approvals Branch at the Ministry of the Environment elevate the subject project to an individual Environmental Assessment. The request was denied and the City has appealed that decision to the Minister of the Environment. To date there has not been a response from the Minister.

Board's Jurisdiction

The motion brought by the City of Mississauga is for an Order by the Board dismissing the appeal by Greenfield South Power Corporation in whole or in part to Official Plan Amendment No. 48 and Rezoning By-law 0088-2006.

The motion is brought under subsections 17(45) and 34(25) of the *Planning Act*. Pursuant to these subsections, the Board may dismiss all or part of an appeal without holding a hearing. While the Board's jurisdiction is broad, the City's motion relies primarily on the subsections 17(45)(a)(i) and 34(25)(a)(i) - reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal.

In *Toronto (City) v. East Beach Community Assn* (1996), 42 O.M.B.R. 505 at p.508 (O.M.B.), the Board made the following findings concerning the scope of its jurisdiction in the consideration of a motion to dismiss, which this panel adopts-

The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious

consideration of the circumstances of each case. This does not allow the Board to make a hasty conclusion as to the merit of an issue. Nor does it mean that every appellant should draft the appeal with punctilious care and arm itself with iron-clad reason for fear of being struck down. What these particular provisions allow the Board to do is seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudication process.

The Board heard two days of argument on the motion. The motion materials were extensive, including planning affidavits and cases in support of both sides.

City's Motion to Dismiss

In this case, it is the City's position that while there are planning issues surrounding Greenfield South's proposal to establish a natural gas fuelled electrical generator at its Loreland Avenue property, they are distinct from OPA 48 and Zoning By-law 0088-2006. The grounds for the motion are:

1. OPA 48 did not effect any change to the land use permissions and restrictions contained in the City of Mississauga Official Plan as it applies to the appellant's lands.
2. The existing policies in the City of Mississauga Official Plan, without OPA 48, prohibit power generating stations on the appellant's lands, and have done so since 2003.
3. The only change effected by OPA 48 as it applies to the appellant's is a change in nomenclature to Mississauga Plan. If this change in nomenclature were to be withdrawn, there would be no impact upon the existing Official Plan policy framework as it applies to the appellant's lands.
4. Rezoning By-law 0088-2006 does not target the appellant's lands but applies on a City-wide basis. Rezoning By-law 0088-2006 implements Mississauga Plan, in conjunction with Rezoning By-laws 0089-2006 and 0090-2006 which have not been appealed.
5. The notices of appeal do not disclose any apparent land use planning ground upon which Official Plan Amendment No 48 (OPA 48) and

Rezoning By-law 0088-2006 could be refused by the Board.

6. The appellant's have not demonstrated any apparent land use planning ground that they have an interest in OPA and Rezoning By-law 0088-2006 beyond their possible impact only on their specific lands.
7. Such other grounds as counsel may advise.

Mr. Minkowski's submissions rely on the affidavit evidence of Mr. Calvert, the City's Director of Policy Planning, Planning and Building Department in support of the motion. It is Mr. Calvert's opinion that because Greenfield South's lands are not currently designated Industrial under Mississauga Plan, a power generating station is a prohibited land use. This has been the case since May of 2003 when Mississauga Plan came into effect.

It is Mr. Calvert's evidence that the only change to Section 3.11.6.3 of Mississauga Plan proposed by OPA 48, is the replacement of the "term power generating stations" with the term "power generating facilities". While OPA introduces a new land use within the Institutional land use designation that permits cogeneration facilities at the two local hospitals and the University at Mississauga, nothing under OPA 48 changes for the Greenfield South site.

It is Mr. Calvert's opinion that OPA 48 conforms to the Provincial Policy Statement, in that it creates more opportunity for power generating facilities in Mississauga. OPA 48 has the support of the Ontario Power Authority and the Region of Peel has indicated that it conforms to the Region of Peel Official Plan.

Greenfield North and Greenfield South are both affiliates of Eastern Power Limited. Mr. Calvert says that the Greenfield North lands are also designated Business Employment under Mississauga Plan and Greenfield North applied for an official plan amendment on those lands as well as a rezoning. He sees this as inconsistent with the position taken by Greenfield South as no application for an official plan amendment was ever made for the Greenfield South lands, notwithstanding they are also designated Business Employment.

In summary, it's the City's position that OPA 48, as it relates to Greenfield South, is really no more than a nomenclature change - power generating station to facility. That given power generation is not a permitted use in areas designated Business Employment by Mississauga Plan, OPA 48 leaves Greenfield South in no different position than it found itself prior to OPA 48. It is the City's position that Greenfield South does not conform to Mississauga Plan and is attempting to seek a site specific exemption through its appeal of OPA 48, but that should have been done through a private official plan amendment. That application process requires a planning justification report and other supporting studies and would trigger a fulsome public consultation process under the *Planning Act*.

Greenfield South's Response

Mr. D'Agostino relies on the affidavit planning evidence of Mr. Dragicevic.

That evidence indicates that representatives of Greenfield South first met with senior planning staff at the City in December 2004 to discuss municipal approvals required for the development of a natural gas electricity generator on the subject lands. Staff advised that the site was appropriately zoned for the development. There were a number of subsequent meetings, letters and reports that reflected that the site was zoned for the proposed use.

Greenfield South, relying on this information submitted its proposal to the Ministry of Energy, together with the required bid security; purchased the land; hired consultants; and began a process of securing other required approvals from the City and the Province.

Mr. Dragicevic says the Business Employment designation in Mississauga Plan permits industrial uses that operate within enclosed buildings. He also agrees with City staff's interpretation of the City's comprehensive Zoning By-law 5500 that the manufacture of power is a permitted use within M1 and M2 zones. But he says that By-law 0088-2006 would effectively remove power generating facility uses from the uses permitted in an M1 zone and if this by-law were in force and effect Greenfield South's proposal would not be permitted.

Concern was raised with the definition for power generating facility proposed to be included in OPA 48 and the limitation on the size of facility and type of fuel. Power generating facility is defined as “a building or structure used for the production of electrical power where the output is 10 megawatts or greater and the production of electricity is limited to natural gas fired, cogeneration and renewable energy”. He questions the justification for such a limitation in OPA 48 and says the amendment fails to recognize that natural gas generating facilities may be permitted in employment areas with less impact than permitted uses. He contrasts the proposed use with uses currently permitted on the subject lands. He points to the earlier Board decision that established the current zoning on the subject lands. Based on a settlement between the then owner of the lands, NSP Investments Limited, and the City, the Board endorsed an M1-Special Section Zone that permits all M1 uses plus an automobile and truck repair garage, a truck terminal and contractor yard or shop.

Greenfield South is also very concerned that the City is on record as opposing the subject proposal proceeding on the basis of an environmental screening report. They are also concerned with the timing of Council's approval of OPA 48 and Zoning By-law 0088-2006 one month after the Ministry of the Environment denied the City's request for an individual environmental assessment.

It is Mr. Dragicevic's opinion that all of Greenfield South's appeals should be heard together with its appeals of OPA 48 and Zoning By-law 0088. All the applications/appeals deal with the same development proposal on the same lands.

Board's Findings

Based on a review of the timelines of the City's review of its planning policies and zoning standards and Greenfield South's pre-consultation/applications to the City, the Board finds the two processes to be inextricable.

The Board finds the City's description of changes to the official plan as purely nomenclature changes, and of no consequence to the appellant, to be too narrow an argument in considering whether to dismiss Greenfield South's appeals.

Because OPA 48 and Zoning By-law 0088-2006 were developed together to regulate power generating facilities in the City, they need to be considered together.

For Greenfield South, together OPA 48 and Zoning By-law 0088-2006 would result in power generating facilities no longer being a permitted use on their property. In the future, this use would only be permitted through successful official plan and zoning by-law amendment applications. The Board finds that this change is an authentic planning issue for this property owner and a matter worthy of adjudication. The Board says this understanding that the owner, as evidenced by Greenfield South's other City planning and Provincial applications, has a genuine interest in establishing and operating a power generating on their lands.

As the motion hearing progressed it became clear that Greenfield South's issues with the City's proposed official plan and zoning changes are really specific to their own lands. The Board finds there is no reason to delay the implementation of the proposed changes beyond Greenfield South's lands to the rest of the City.

Board Decision on City's Motion to Dismiss

Based on the submissions and affidavit evidence, the Board orders that the City's motion to dismiss Greenfield South's appeal of Official Plan Amendment 48 and Zoning By-law 0088-2006 is granted, in part. The Board finds that the Greenfield South appeals should be permitted to proceed on a site-specific basis. In all other respects Greenfield South's appeals are dismissed. Therefore, with the exception of their application to the lands at 2315 Loreland Avenue, OPA 48 and Zoning By-law 0088-2006 come into effect.

A prehearing should be scheduled to address all four Greenfield South appeals and its site plan referral.

So orders the Board.

"M.F.V. Eger"

M.F.V. EGER
VICE CHAIR

ATTACHMENT 1

Appearances

Request for Party Status

Counsel*/Agent

Cabot Trail Estates Ltd.

A. Chan*

Six Points Plastics

Rita Stummer
1746 Mattawa Avenue
Mississauga, ON L4X 1K1

Peter S. Carlisi*

Request for Participant Status

Counsel*/Agent

City of Brampton

C. Grant*

CHIP (Concerned Homeowners
For Intelligent Power)
Unincorporated

S. Thompson
33 Maple Avenue North
Mississauga, ON L5H 2R9

Lawrence Mancini
2063 Proverbs Drive
Mississauga, ON L4X 1G3

Colin Tyler
1773 Mattawa Avenue
Mississauga, ON L4X 1K5

Vince Campaner
Staff Officer, Power Workers Union
6445 Caswell Street
Niagara Falls, ON L2J 1C1

Bruce Francisco
2244 Nida Court
Mississauga, ON L4X 1J8

Boyd Upper
Chair, Clean the Air Coalition Inc.
1519 Elite Road
Mississauga, ON L5J 3B3

Monica Schiegl
1654 Sherway Drive
Mississauga, ON L4X 1C7

Requests to be on Board's Mailing Listing

Elizabeth Francisco
Sherway Homeowners and
Recreation Association (Incorporated)
2244 Nida Court
Mississauga, ON L4X 1J8

Hans Gottschling
1655 Coram Crescent
Mississauga, ON L4X 1L1

D. Silk
1756 Mattawa Avenue
Mississauga, ON L4X 141

Max Tomlinson
3090 Treadwells Drive
Mississauga, ON L4X 2X5

Tom Clarkson
President Bramblewood/Albertson
Residents Association
1368 Bramblewood Lane
Mississauga, ON L5H 1M2