

ISSUE DATE:

FEB. 11, 2008



PL070779

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

1546867 Ontario Inc. and 1251483 Ontario Inc. (Anthony Vacca) has appealed to the Ontario Municipal Board under subsection 22(7) 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 the Official Plan for the City of Niagara Falls to redesignate lands known municipally as 4043 Kalar Road from "Good General Agricultural" to "Site Specific Good General Agricultural" and a "Special Policy Area" be added to the Official Plan

OMB File No. O070152

1546867 Ontario Inc. and 1251483 Ontario Inc. (Anthony Vacca) 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 79-200 of the City of Niagara Falls to permit the use of the dwelling on 4043 Kalar Road for office and storage purposes and the surrounding lands as a parking lot in conjunction with the neighbourhood plaza on lands known municipally as 8278 Thorold Stone Road

OMB File No. Z070106

APPEARANCES:

Parties

1456867 Ontario Inc.
1251483 Ontario Inc.

City of Niagara Falls

Counsel

R. Vacca

K. Beaman

Participants

C. & G. Scalding

M. Fleming

A. Stracuzzi

D. Ingram

DECISION DELIVERED BY D. GATES

This hearing concerned applications by 1456867 Ontario Inc. and 1251483 Ontario Inc. (the "Companies"), to obtain an Official Plan Amendment (OPA) and

rezoning so as to permit an existing restaurant and bar (Somebuddy's Restaurant), located in a neighbourhood plaza at 8278 Thorold Road, to expand its parking lot on to the property to the south, 4043 Kalar Road.

The neighbourhood plaza is located just south-east of the intersection of Thorold Stone Road, a four lane regional arterial road, and Kalar Road, an arterial road, but under the jurisdiction of the City. It contains two uses, the restaurant use occupying the westerly 333m² of the plaza, front to rear, and a 173m² convenience store. The plaza is located just within the limits of the urban area of Niagara Falls.

At the outset of the hearing, I ruled that a noise report could be introduced into evidence at this hearing even though it was not before City Council at the time Council refused to amend the City's Official Plan (OP) and Zoning By-law. The Board heard considerable evidence that included affidavits and a DVD of a portion of the Council meeting that all supported the conclusion that having the noise report would not have made any difference to the Council decision. No evidence whatsoever was produced by anyone that indicated that Council would have changed its position had it had the benefit of this report when it made its decision.

The Companies' explanation of their desire to expand the parking lot to the rear, as the Board understood it, is that they desire to provide better parking facilities for their customers and at the same time address some of the neighbourhood complaints centered on the business and their customers.

The Participants' primary concern, as the Board understood it, was that the proposal would move the parking lot nearer to them, which would cause more nuisance to them. Also, that any more parking might result in a further expansion of the business, and any further expansion may further exacerbate an already intolerable situation. The Board understands from the Participants' evidence that they believe that this successful restaurant business has outgrown this site and that it should look for expansion on to a new larger site elsewhere.

While it is impossible to attribute any particular reason as to why City Council did not pass the requisite OPA and Zoning By-law here, because in part, the City called no evidence at this hearing, the Board concludes that Council must have been sympathetic to the residents' arguments similar to those that the Board has heard.

The residents' concerns, as the Board understood them from the Participant's evidence, related to noise, garbage, nuisance from the behaviour of customers, site cleanliness and overall appearance, traffic, drainage, and expansion.

The Board heard that this restaurant and bar became quite successful and popular over the past few years and, in particular, since the restaurant installed and put into use a large outdoor patio (161m²) during the warmer months of the year between the westerly side of the building and the westerly lot line.

The patio is located at grade and each spring, gates are projected from the front and rear wall of the building to close off the lane that runs along the west side of the building from the front of the building to the existing rear parking area. During the warmer months that the patio is in use and the iron gates are closed, the rear parking area can be accessed only by Kalar Road. Late in the fall the gates area is opened, the patio operation is removed, and the lane provides access once again to the rear parking lot.

The restaurant itself is licensed by the LLBO for 120 people and the patio an additional 60 people. A restaurant use is permitted at 8278 Thorold Stone Road under the City's Zoning By-law. About four years ago when the patio was installed, the City historically treated patios as a use that was part of a restaurant and did not require any additional parking.

The restaurant accesses on to the patio by two large garage type doors that roll up inside the restaurant.

Noise

At the hearing, the Participants complained about noise from the business consisting of amplified music including pounding base or live bands, both originating on the patio or projecting out from the restaurant on to the patio. Participants also complained about doors being left open at the rear of the building, when employees need cooler air on a hot summer night or to go out and smoke.

During the evening hours the City's noise by-law is enforced by the police. The City's By-law Enforcement Department did not identify any noise concerns during the circulation process. One Participant said she has given up complaining about noise.

The Companies' answer to these concerns was to call a qualified noise consultant who testified that noise could be reduced to achieve MOE guidelines by installing a solid wood acoustical 8' fence along the west and south lot lines. In general, the Board accepts his findings.

I am convinced that the 8' acoustical fence sufficiently surpasses MOE requirements so as to almost entirely overcome the 3 technical shortcomings in the studies or methodology or execution raised by the City. The Board finds that constructing the removable gates at the end of the plaza out of solid acoustical material similar to the acoustical fence, to a height of 4', and requiring the owner to place or direct any amplified speakers or other sound source below the height of 4' on or near the patio, should also assist with the booming base sounds that may be a nuisance even though they do not exceed MOE guidelines. The Board expects that the site plan and site plan agreement will incorporate these noise attenuation features. The residential area will be much quieter after the acoustical fence is erected than before.

Participants were concerned about the longevity of a solid board fence. Appearing under subpoena, Mr. A. Herlovitch, the Planning Director for the City, testified that the City will require the installation and maintenance of the acoustical barrier through a site plan agreement. The Board accepts this answer.

Drainage

Drainage was also another concern, especially with a gravel or asphalt parking lot extending further south nearer to the residential area. A Participant testified that drainage was already a problem without adding to it the additional water draining off the new parking lot. Mr. Herlovitch testified that the drainage issues could be accommodated through the site plan process. The Board accepts Mr. Herlovitch's opinion on this point.

Traffic

There was a general concern from the Participants that traffic would be aggravated by this proposal if the Board allowed it. With the reduction of parking along the east side of the building, as shown on the proposed site plan, if anything, the parking layout will be safer. Furthermore, the reduction of on street parking by having more spaces on site should also make for a safer neighbourhood if only by reducing the number of parking manoeuvres on nearby streets.

The proposed new parking layout is certainly safer than before because the layout of the new lot allows for flow-through traffic so that, in the future, cars will exit on to Kalar Road in a forward motion, not having to back on to Kalar Road like what frequently happens now.

Pedestrian Conflicts

There was a concern about pedestrian access to the convenience store. It was noted that the intersection at Kalar Road and Thorold Stone Road is signalized and there are two crossing guards at the intersection during school hours. There are many school children and handicapped children in the area. Both streets are quite busy.

In so far as the overall site will be reviewed during the site plan process, I am convinced that the City will make every effort to make pedestrian access to the convenience store as safe as possible. There would not be the opportunity to review the site plan as it applies to the convenience store but for this application. Also, the convenience store and restaurant are not expanding their size or operations in any way, so the subject applications will not likely cause much additional traffic.

Customer Behaviour

The Board heard that the restaurant customers are frequently noisy when they leave the site. According to Mr. Herlovitch, lengthy loud goodbyes will be less likely with the new parking lot that allows patrons to leave quickly and efficiently without difficult manoeuvring.

The prohibition of on street parking on Kalar Road pushed patrons further away from the restaurant in their search for parking. Mr. Mr. Herlovitch's opinion, this made it

harder for the restaurant to police their customers behaviour. The Board concurs. It is more likely that customers' garbage and noise will be controlled by the restaurant and be less irritating when there is a noise wall separating the noise source from the neighbouring residences and when garbage is confined to the restaurant parking area.

Site Cleanliness and Appearance

One Participant complained about garbage being dumped on the property and the condition of the garbage enclosure. Mr. Herlovitch told the Board that a new garbage enclosure would be required as shown on the proposed site plan. A new parking lot with generous and well landscaped southerly and south-westerly buffers should help considerably in the overall function of the lot, particularly with snow storage and the overall appearance of the lot.

In order to get materially more parking spaces with the addition of the parcel for the new parking lot, certain desirable site plan improvements have to be postponed or abandoned. For instance, there is no space on the property for the landscaping of the east side of the property after the City obtains a 3m road widening along Kalar Road.

The Board finds that the Appellants should pay for and landscape either the east side of its property or the west side of the Kalar Road allowance in the approximate locations identified by the Planning Director, once Kalar Road has been reconstructed to its ultimate width of 4 lanes. This could be provided for in the site plan agreement in the same manner as the Parties contemplate dealing with the storm sewers. If this results in the owner losing parking spaces at that time which cannot be provided elsewhere on it property, the owners may, rather than completing the work on their property, contribute an equal amount for the landscaping of Kalar Road in the same general location.

The Board finds that if the site plan is implemented as contemplated above, the property should be one that the community can take pride in.

Future Expansion Potential

Successful businesses, in my experience, wish to expand. The Board heard evidence that the restaurant business here was very successful. In my experience,

moreover, successful businesses become more responsible. The Board heard evidence that the Companies were not improving the parking as a precursor to expansion, but attempting to resolve ongoing site problems both for their customers and the community at large.

Obvious expansions here might be into the convenience store space, in the basement, or other area no longer required as an office or storage within the present space. I can understand why the City and the residents may be concerned about expansion based on past performance here. For instance, when the restaurant expanded on to the patio, parking and noise issues started.

If the restaurant is forced to leave these premises to expand because the Board denies these appeals, what is to prevent a succession of start up restaurants continuing to operate here, perhaps in a manner that aggravates neighbours much more? The community will have lost its opportunity to make the operation more compatible. This business will have lost its customers' good will it has created at this location. I do not see how these results are in the public interest, or further the greater common good or move anyone ahead in any progressive way.

The Board was advised that the City is considering a new Zoning By-law that currently provides that parking for restaurants in plazas is not based on the number of tables or seats, but on the floor area devoted to restaurant use. Furthermore, the new proposed by-law may also blend in some manner the overall parking standard for plazas. The new by-law is not before this Board nor was it entered into evidence.

The appeal is under the *Planning Act*, which pursuant to recent amendments, now requires the Board to have regard to City Council's decision. As mentioned above, I could not find how refusing this appeal is in the public interest or for the greater common good. While having carefully considered City Council's decision, the Board in the present circumstances must overturn it. Here the City called no evidence. I have heard planning evidence from two qualified planners, including the City's own Planning Director under subpoena, who recommended these applications for Council's approval. Both planners opined that the appeals had regard to and are consistent with all Provincial Policies, Regional and City Official Plans, and planning policies including the

City's Zoning By-law as it is customarily interpreted, and that the development resulting from these appeals, if allowed, represents good and sound planning.

The City's Official Plan and Zoning By-law are hereby amended as set out in Exhibit 10, Attachment 1, to this decision. As requested by the City and not objected to by Mr. Vacca, the Board will withhold its final Order until it has been advised that final site plan approval has been obtained and the site plan agreement signed and registered on title. If site plan approval is delayed for any reason, the Board may be spoken to.

"D. Gates"

D. GATES
MEMBER

Attachment 1

OFFICIAL PLAN AMENDMENT NO.

PART 1 - PREAMBLE

i) **Purpose of the Amendment**

The purpose of this amendment is to add a Special Policy Area designation to the Good General Agricultural designation of the subject land and special policies to recognize an existing neighbourhood commercial development and to permit a minor expansion thereto on to an adjoining lot, consisting of the conversion of a dwelling to an ancillary office and storage use and an expansion of a parking area.

ii) **Location of the Amendment**

The amendment consists of changes to the map and text.

1. **Map Change**

The land affected by this amendment is located on the southwest corner of Thorold Stone Road and Kalar Road, being Part of Township Lot 81 Stamford as in RO314335, except Part 2 on Plan 59R8527; Niagara Falls and Pt Twp Lt 81 Stamford; designated as Part 1 on 59R13263; Niagara Falls and municipally known as 8278 Thorold Stone Road and 4043 Kalar Road, respectively. The subject land is identified as Special Policy Area "XX" on Schedule "A" of the Official Plan and is shown on Map 1, included in Part 2 of this document.

2. **Text Change**

A Special Policy governing the land affected by the redesignation is to be added to PART 2, SECTION 14 - SPECIAL POLICY AREAS, as detailed in Part 2 of this document.

iii) **Basis of the Amendment**

The subject land is approximately 0.33 hectares in area. The City of Niagara Falls Official Plan designates the subject land Good General Agricultural. A neighbourhood commercial plaza owned by 1546867 Ontario Inc. exists on 8278 Thorold Stone Road and a single detached dwelling owned by 1521483 Ontario Inc. exists on 4043 Kalar Road. The neighbourhood commercial plaza on a portion of the land is recognized as a non-complying use under this designation.

The applicant wishes to convert the dwelling known as 4043 Kalar Road for office and storage purposes and the lands surrounding it into a parking lot for the plaza on the lands known as 8278 Thorold Stone Road.

The amendment is supported by a Planning Report, submitted by Urban and Environmental Management Inc. The study concludes the following:

- The proposal does not offend Provincial or Regional Policies for use of land outside of Urban Areas relating to significant Agricultural or Natural Heritage Resources.
- Containing the necessary parking for the development in a well screened parking lot on the land will address residents concerns about off-site parking and will improve compatibility with adjacent residences.
- The proposal does not involve a significant expansion to or intensification of an existing use. The proposal is consistent with the provisions of Regional Policy 12.6 and therefore does not require a Regional Policy Plan Amendment.

In its analysis of the requested amendment, the City of Niagara Falls Planning Department concluded the following:

- The proposal conforms with the general objectives of the Official Plan given that:
 - the proposed zoning change does not intensify the commercial use of the property,
 - the additional parking is needed and disturbances caused by off-site parking will be reduced. Traffic generation will not increase,
 - the proposed development does not interfere with permitted uses under the Good General Agricultural designation;
- The land known as 4043 Kalar Road allows for a logical parking lot expansion that can be integrated with existing facilities;
- Compatibility with adjacent land uses can be achieved by restricting the restaurant to its existing size and occupancy and restricting the former dwelling to ancillary office and storage uses, installing wood screen fencing along the adjacent properties, installing a 4.5 metre (15 foot) wide landscaping strip along the south property line and installing a 1.5 metre (5 foot) wide landscaping strip along the west property line of the lot formerly known as 4043 Kalar Road;
- There is a need to provide additional parking above zoning requirements to address concerns about off-site parking;
- The requested Zoning By-law amendment is appropriate. To ensure that the uses do not expand without further approval, the amending Zoning By-law will restrict the size of the plaza and restaurant occupancy and will restrict the use of the former dwelling to accessory office and storage uses;
- Through site plan control, issues such as location of garbage enclosures, fencing, tree planting, lighting and grading/drainage will be addressed; and,

- The proposal will improve the site conditions, including improvements to drainage, landscaping and traffic circulation.

Council considered the proposed Official Plan amendment and associated Zoning By-law amendment at a public meeting on July 23, 2007. Council refused the requested amendments after considering Staff's report (PD-2007-63), agency comments, public comments and a presentation from the applicant.

AB:mb

PART 2 - BODY OF THE AMENDMENT

All of this part of the document entitled PART 2 - BODY OF THE AMENDMENT, consisting of the following text and attached map, constitute Amendment No. ____ to the Official Plan of the City of Niagara Falls.

DETAILS OF THE AMENDMENT

The Official Plan of the City of Niagara Falls is hereby amended as follows:

1. MAP CHANGE

The "Area Affected by this Amendment" shown on the map attached hereto, entitled Map 1 to Official Plan Amendment No. ____ shall be identified as special Policy Area "XX" on Schedule "A" to the Official Plan.

2. TEXT CHANGE

PART 2, SECTION 14 - SPECIAL POLICY AREAS is hereby amended by adding the following new subsection:

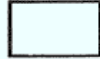
14.XX SPECIAL POLICY AREA "XX"

Special Policy Area "XX" applies to approximately 0.33 hectares of land located southwest of the Thorold Stone Road and Kalar Road intersection. The land is designated Good General Agricultural on Schedule "A" of the Official Plan. Notwithstanding the policies contained in PART 2, Section 7.1, the land may only be developed with a 137 square metre neighbourhood commercial plaza including a seasonal patio and 70 square metre storage and office building and an associated parking area subject to the following policies:

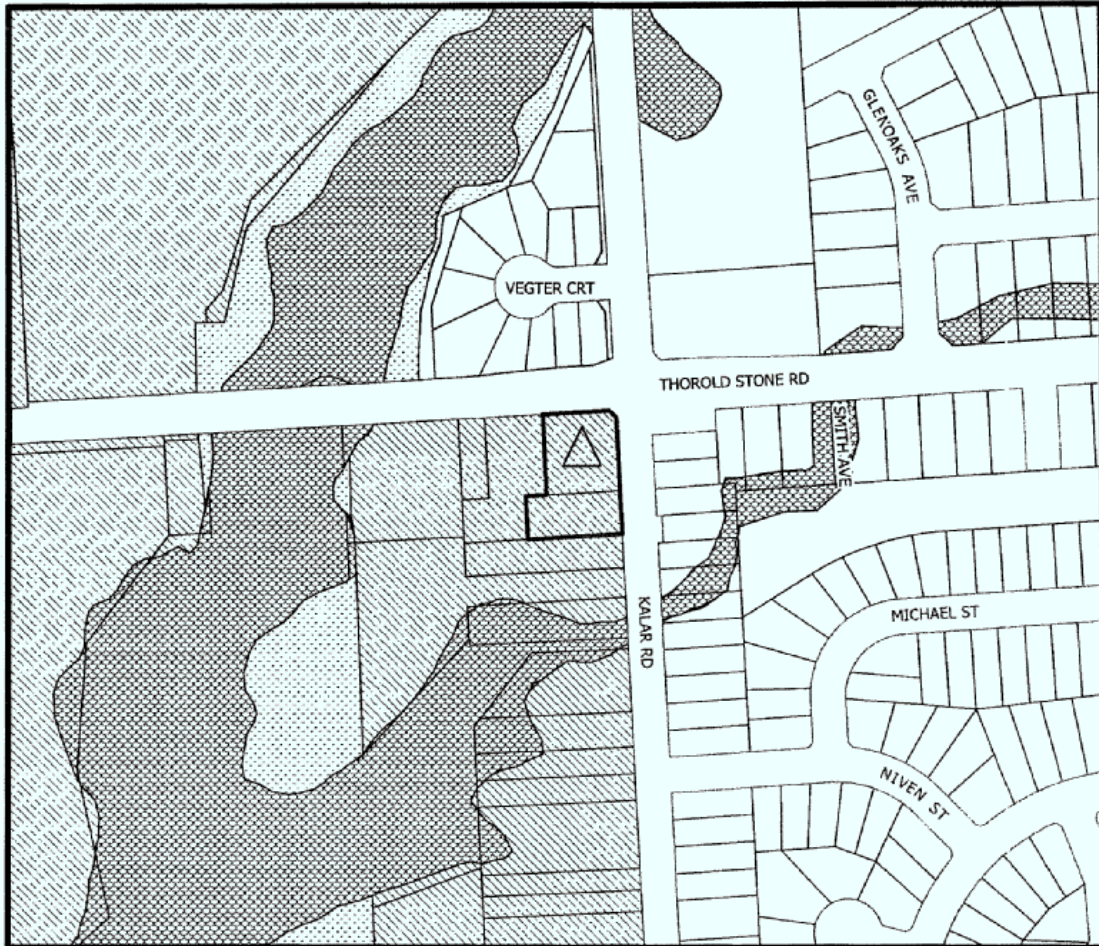
- 14.XX.1 To ensure the parking area does not impact on abutting land uses, provisions shall be included in the amending by-law to require the parking lot to be developed with generous buffering and landscaping along adjacent land uses.
- 14.XX.2 Development will be subject to site plan control and a site plan agreement shall be registered on title.

MAP 1 TO AMENDMENT NO. SCHEDULE - A - TO THE OFFICIAL PLAN





Area Affected by this Amendment

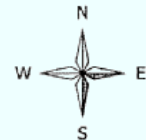


Proposed Change To Add: SPECIAL POLICY AREA XX



**CITY OF NIAGARA FALLS OFFICIAL PLAN
EXCERPT FROM SCHEDULE - A - FUTURE LAND USE PLAN**

-  ENVIRONMENTAL PROTECTION AREA
-  GOOD GENERAL AGRICULTURE
-  OPEN SPACE
-  RESIDENTIAL



1:NTS

AM-12/2007

NOTE: This schedule forms part of Amendment No. __ to the Official Plan for the City of Niagara Falls and it must be read in conjunction with the written text.

November 2007

CITY OF NIAGARA FALLS

By-law No. 2008 -

A by-law to amend By-law No. 79-200, to recognize the commercial use of a portion of the land and permit a limited expansion of the use on the balance of the land.

THE COUNCIL OF THE CORPORATION OF THE CITY OF NIAGARA FALLS ENACTS AS FOLLOWS:

1. Sheet B3 of Schedule "A" to By-law No. 79-200 is amended by redesignating from NC, in part, and A, in part, to NC and numbered 811, the land on the southwest corner of Thorold Stone Road and Kalar Road, being Pt Twp Lt 81, Stamford as in RO314335, except Part 2 on Plan 59R8527; Niagara Falls and Pt Twp Lt 81 Stamford; designated as Part 1 on 59R13263; Niagara Falls and shown hatched and designated NC and numbered 811 on the plan Schedule 1, attached to and forming part of this by-law.

2. Notwithstanding the provisions of sections 2.31 and 4.27.1, Table 1 of clause (a) of section 4.19.1, section 8.1.1 and clauses (a), (b), (c), (e), (f), (h) and (i) of section 8.1.2 of By-law No. 79-200, no person shall use the land described in section 1 of this by-law and shown hatched and designated NC and numbered 811 on the plan Schedule 1 attached hereto, or erect or use any building or structure thereon, except for the purpose of a restaurant and an accessory office and storage building and a retail store, and except in compliance with the following regulations:

- | | | |
|-----|----------------------------------|--|
| (a) | Regulations | for the purpose of determining compliance with clauses (b) through to and including (l) of this section of this by-law and all other provisions of Zoning By-law No. 79-200, all the land described in section 1 of this by-law and shown hatched and designated NC and numbered 811 on the plan Schedule 1 attached hereto, shall be considered one lot |
| (b) | Minimum lot area | the whole of the land shown hatched and designated NC and numbered 811 on the plan Schedule 1 attached hereto, save and except for any part that may be required to be dedicated for the purpose of road widenings |
| (c) | Minimum front yard depth | 9 metres |
| (d) | Minimum rear yard depth | 2.5 metres |
| (e) | Minimum exterior side yard width | 3 metres |
| (f) | Maximum floor area | 737 square metres |

(g)	Maximum floor area of the restaurant, not including office and storage uses	333 square metres
(h)	Maximum floor area of the seasonal patio, accessory to the restaurant	161 square metres
(i)	Maximum floor area of the convenience store	173 square metres
(j)	Maximum floor area of an accessory building containing office and storage uses for the restaurant	70 square metres
(i)	Maximum occupancy of the restaurant	120 seats, plus 60 seats on an outdoor patio
(j)	Minimum number of parking spaces for the restaurant and accessory office and storage building	46
(k)	Minimum number of parking spaces for a retail store	1 parking space for each 25 square metres of gross less able floor area
(l)	Minimum landscaped open space	9% of the lot area, which shall include landscape strips having the prescribed widths in the following locations:
	(i) along and adjacent to the rear lot line, save and except for any existing building	4.5 metres
	(ii) along and adjacent to the interior side lot line, between points "a" and "b" as shown on the plan Schedule attached hereto	1.5 metres

- (ii) along and adjacent to the exterior side lot line, save and except for any driveways, between points "c" and "d" as shown on the plan attached hereto 3.0 metres

3. Section 19 of By-law No. 79-200 is amended by adding thereto to the following:

19.1.811 Notwithstanding the provisions of sections 2.31 and 4.27.1, Table 1 of clause (a) of section 4.19.1, section 8.1.1 and clauses (a), (b), (c), (e), (f), (h) and (i) of section 8.1.2. of By-law No. 79-200, no person shall use the land on the southwest corner of Thorold Stone Road and Kalar Road, designated NC and numbered 811 on Sheet B3 of Schedule "A", or erect or use any building or structure thereon, except for the purpose of a restaurant and an accessory office and storage building and a retail store, and except in compliance with By-law No. 2008-_____.


Passed this day of , 2008.

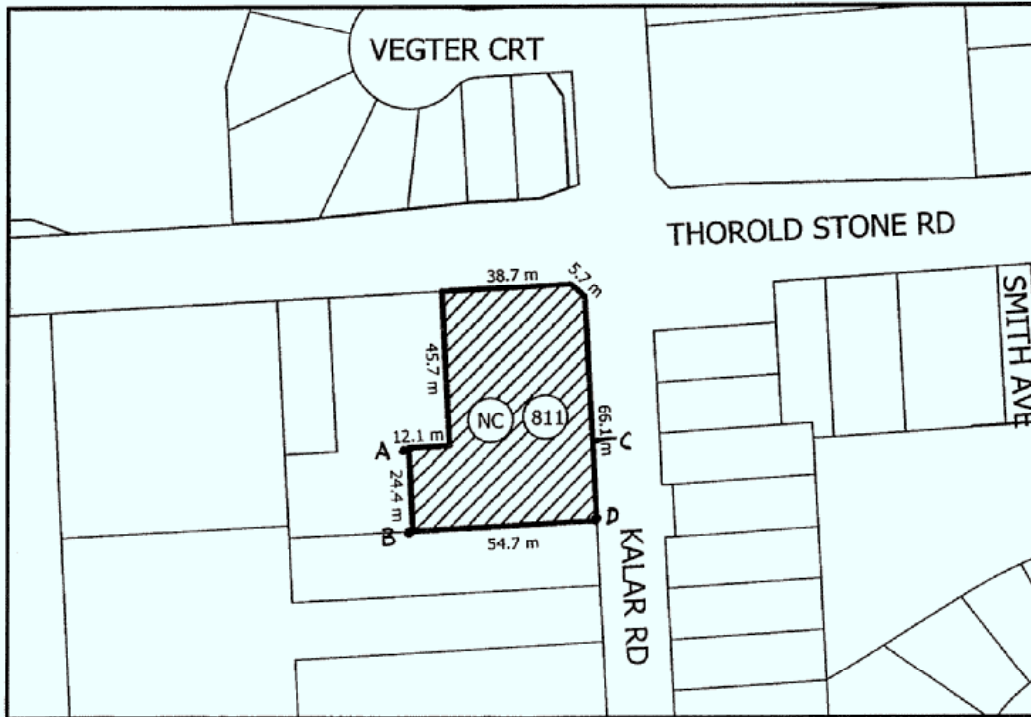
.....
DEAN IORFIDA, CITY CLERK

.....
R.T.(TED) SALCI, MAYOR

First Reading: , 2008
Second Reading: , 2008
Third Reading: , 2008

SCHEDULE 1 TO BY-LAW No. 2008

Subject Land 



Amending Zoning By-law No. 79-200

Description: Pt Twp Lt 81, Stamford as in RO314335,
 except Part 2 on Plan 59R8527;
 Niagara Falls
 Pt of Twp Lt 81 Stamford; designated as Part 1 on 59R13263;
 Niagara Falls

Applicant: 1546867 Ontario Inc. and 1251483 Ontario Inc.

Assessment #s: 272510000411600, 272510000406800



1:NTS

AM-12/2007