

ISSUE DATE:

Jun. 28, 2011



PL090114

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellants: See below
Subject: Rural Hamilton Official Plan
Municipality: City of Hamilton
OMB Case No.: PL090114
OMB File No.: PL090114

List of Appellants

No. Appellant

1. Ontario Stone, Sand & Gravel Association (OSSGA)
2. Paletta International Corporation
3. P&L Livestock Limited
4. Copetown Lions Development Association
5. Bella Court Developments Limited
6. 557619 Ontario Inc.
7. 1175819 Ontario Ltd.
8. 1205953 Ontario Limited
9. St. Marys Cement (Canada) Inc.
10. Demik Developments
11. 1694408 Ontario Inc.
12. Blackheath Developments Inc. and Future Homes Construction Limited (c.o.b. Satellite Golf Centre)
13. Artstone Holdings Limited
14. Artstone Holdings Limited
15. Weizer Investments Limited
16. Corpveil Holdings Limited
18. Ancaster Christian Reform Church
19. 456941 Ontario Ltd., 1263339 Ontario Ltd. and Lea Silvestri ("Silvestri Investments")
20. Angelo Giacomelli and Mario Nesci
21. Earl Fransden and Kirsten Fransden
22. Keith Pickles and Brenda Pickles
23. John Paolini, Gino DalBello, Olindo DalBello, Luigi DeTina, Peter Djeneralovic, Jim Swick and Quinto Simone
24. New Country Investors Limited
25. 1507565 Ontario Inc.
27. Lafarge Canada Inc.
28. Peter Cartwright
29. City of Hamilton
30. Dr. Tom Nugent

- 31. 1800615 Ontario Inc. and 2157722 Ontario Inc.
- 32. DiCenzo (Golf Club Road) Holdings Inc.
- 33. Dufferin Aggregates
- 35. David E. Mercer
- 36. Multi-Area Developments Inc.
- 37. Paletta International Corporation
- 39. 2101510 Ontario Inc. (subsumed by Paletta International Corporation)
- 40. 2000963 Ontario Inc.
- 41. Mud & First Inc.
- 42. 2084696 Ontario Inc.
- 43. 2188410 Ontario Inc.

APPEARANCES:

Parties

Counsel

City of Hamilton

M. Kovacevic
J. Wice

Halton Region Conservation Authority

H. Watson

Ministry of Municipal Affairs and Housing

R. Boxma
S. Lockwood

Demik Developments & 1694408
Ontario Limited

S. D. Rogers

Ontario Stone, Sand & Gravel Association,
St. Marys Cement (Canada) Inc.,
LaFarge (Canada) Inc., and Dufferin
Aggregates

G. Swinkin

1507565 Ontario Inc.

D. Tang

Multi Area Developments Inc.,
Paletta International Development Corp.,
200963 Ontario Inc., Mudd & First Street
Inc.
2084696 Ontario Inc., & 2188410 Ontario
Inc.

M. Noskiewicz
J. Drake

Dicenzo (Golf Club Road) Holdings Inc.

R. Cheeseman

Niagara Escarpment Commission	J. Ginsburg
Art Stone Holdings Ltd., Corpveil Holdings Inc., Weizer Investments Ltd., P&L Livestock Ltd., & Paletta International Corporation	S. Snider
Ancaster Christian Reformed Church	P. Tice
FORCE (Friends of Rural Communities and the Environment)	T. Halinski
Dr. Tom Nugent	

DECISION DELIVERED BY C. HEFFERON AND ORDER OF THE BOARD

The subject application by way of a Motion for Direction was brought before the Ontario Municipal Board (“Board”) by legal counsel for the City of Hamilton, Mr. M. Kovacevic. In its Motion, the City requested the following relief:

1. An Order of the Board declaring the following portions of the City of Hamilton Rural Official Plan (“Rural OP”) are not or are no longer under appeal and are therefore in full force and effect:
 - a. The policies, schedules, maps, appendices and housekeeping amendments identified in Exhibit 1 to the Affidavit of Ms Hickey-Evans dated March 24, 2011 as not appealed (including withdrawn appeals). The Hickey-Evans Affidavit is found at Exhibit M5, Tab 2.
 - b. The housekeeping amendments, policies, schedules and appendices identified in Board decision dated June 7, 2010, in respect of the Rural OP.
 - c. The policies, schedules, maps and appendices that are identified in the Hickey-Evans Affidavit as being part of the settlement of the appeals made by the Ontario Stone, Sand & Gravel Association, St. Marys Cement (Canada) Inc., LaFarge (Canada) Inc., and Dufferin Aggregates (collectively, “Aggregates”).

2. An order declaring that the appeal filed by Demik Developments is a nullity, or in the alternative, an order dismissing the appeal of Demik Developments; and
3. Such further and other relief as counsel may advise and the Board may permit.

On April 5, 2011, Demik Developments and 1694408 Ontario Inc. (together, "Demik") responded to the City's Motion and requested certain relief.

1. That the Board approve the portions of the Rural OP (identified above) with the exception of:
 - a. Agricultural Designations in Schedule D – Rural Land Designations arising from modifications by the Minister of Municipal Affairs and Housing ("MMAH") and section D.2.0 – Agricultural Designation Policies, insofar as these apply to the Twenty Road Lands identified in Schedule B. The Twenty Road Lands comprise numbers 6244, 6492, 7015 and 7075 Twenty Road.
 - b. The Natural Heritage System Designations identified in Schedules B, B-1 to B-8, and Section C.2 – Natural Heritage System Policies insofar as these apply to the Twenty Road Lands identified in Schedule B.
 - c. Section D.2.2.1
 - d. Section A.1.3 – last bullet – related to the Growth Related Integrated Development Study ("GRIDS") as the basis of the Special Policy Area B designation.
 - e. Section A.1.5 – first bullet – related to GRIDS as the basis of the Special Policy Area B designation.
 - f. The statement contained in section A.2.1 just below the box identified as "Hamilton's Vision 2020".
 - g. Section F.3.0., the first paragraph, which references GRIDS

2. A declaration that Demik constitutes a “person” for the purposes of the *Planning Act* and that therefore its appeal is sufficient. In the alternative, a declaration that Demik remains a Party to this appeal.
3. The costs of this motion on a substantial indemnity basis.
4. Such further and other relief as Counsel shall advise and the Board shall permit.

Demik’s Notice of Response to the City’s Motion is found at Exhibit M5, Tab 1, pages 01-02.

Background

On September 27, 2006, Council of the City of Hamilton adopted the new Rural OP, which was then forwarded to MMAH for approval. The plan was approved with modifications in a decision dated December 24, 2008. Subsequent to the decision of MMAH approving the plan with modifications, some 43 Parties filed appeals of various policies and land use designations under the new plan.

In a letter to MMAH dated January 26, 2009 (Exhibit M2, Tab 2(O)), Demik Developments – at that precise time an unregistered partnership comprising several related companies – appealed parts of the Rural OP as modified and approved by MMAH.

On March 17, 2011, legal counsel for the City of Hamilton advised legal counsel for Demik that the properties previously identified as the “Twenty Road Lands” are not owned by either Demik Developments or 1694408 Ontario Inc. (Exhibit M5, Tab 8, page 47).

The lands in question were owned by eleven Demik family companies that on August 1, 2002, entered into a general partnership agreement and operated under the name “Demik Developments”. These companies are listed in Exhibit M5, Tab 9, pages

53 – 55). Demik Developments' registration expired on September 23, 2007 (Exhibit M5, Tab 9, page 71). It was not renewed until March 28, 2011.

On March 28, 2011, Demik Developments was registered as a General Partnership whose business activity is shown as "Land Development" (Exhibit M2, Tab 9, page 72).

Key Issues

The first issue to be resolved by this Board is whether Demik has made a valid appeal under subsection 17(36) of the *Planning Act*.

The second issue is whether Demik's petition to expand the relief requested to include references to GRIDS is allowed pursuant to subsections 17(36) and 17(37) of the *Planning Act*.

The Board was told that an Issues List had not been finalized when this Motion was heard.

The City's Position

The City contends that the January 26, 2009, Notice of (intent to) Appeal, which was filed by Demik Developments to appeal the MMAH decision should be dismissed because it fails on two counts:

In the first place, pursuant to subsection 17(36) of the *Planning Act*, only the Minister, a person or a public body may under certain specific conditions listed therein appeal all or part of a decision of an approval authority. Pursuant to subsection 8(7)(i) of Ontario Regulation ("O/Reg") 543/06, the decision is required to include, among others, the following statement:

Only individuals, corporations or public bodies may appeal a decision of the approval authority to the Ontario Municipal Board. A notice of appeal may not be filed by an unincorporated association or group. However, a notice of appeal may be filed in the name of an individual who is a member of the association or group on its behalf.

The City contends that since Demik Developments was not registered when it filed its original Notice of Appeal on January 26, 2009, it was not, as required pursuant to subsection 8(7)(i) of O/Reg 543/06, an “individual, corporation or public body” and therefore it could not lawfully have filed an appeal. The appeal should, it maintains, therefore be dismissed.

Secondly, pursuant to subsection 17(37) of the *Planning Act*, Demik’s January 26, 2009, Notice of Appeal did not specify that it had appealed the entire Rural OP, rather only specific sections of it, and that Demik has therefore no right to hold up approval of those parts of the Plan that it had not identified in its Notice of Appeal. The January 26, 2009 Demik Developments’ letter, which for the purposes of subsection 17(36) of the *Planning Act* is the Notice of Appeal, is found in Exhibit M2, Tab 2 (o)

For the two above noted reasons, the City argues, the Board should approve the Rural OP as modified and approved by MMAH except for certain policies appealed by others. These latter policies include Policy D.2.2.1, which Demik indicated it wishes to appeal and which others have also appealed.

Demik’s Position

Legal counsel for Demik, Ms. S. Rogers, submitted that her client supports the approval of the Rural OP as modified and approved by MMAH except insofar as it impacts the Twenty Road Lands.

She also contended that the Board can use its discretionary authority to declare that in the first place, Demik Developments is a “person” pursuant to subsection 17(36) of the *Planning Act*; second, that Demik’s January 26, 2009, Notice of Appeal satisfies the intent of subsection 17(37) of the *Planning Act*; and third, that Demik’s response to the City’s Notice of Motion (found at Exhibit M5, Tab 1) adequately expands or clarifies her client’s appeal.

Other Appellants' Positions

The other Appellants to these proceedings who responded to the City's Motion indicated in their Response documents that they generally support the City's position.

The Appellants from the aggregates industry requested that the Board accept the settlement that has been worked out with the City ("Aggregates Settlement").

The Aggregates Settlement was supported by the City in its submissions and not opposed by Demik in its submissions.

The Board's Findings

Both counsel cited numerous Divisional Court and Board cases in support of their respective positions

In support of its contention that Demik was not a qualified Appellant on January 26, 2009, when it submitted its Notice of Appeal (Exhibit M2, Tab 20), the City cited *Sunnyside Residents Assn. v. St. Joseph's Health Centre* (2002 CarswellOnt 5546, 45 OMBR 251), which was a Board decision rendered in December 2002.

In this case, Sunnyside Residents Association ("SRA"), an unincorporated association, appealed the decision of the (City of Toronto) Committee of Adjustment. By way of a Motion, a Mr. G. McCluskie sought to assign the appeal to himself as an individual. This Motion was dismissed by the Board with reasons.

In its decision in *Sunnyside Residents Association*, the Board cited *Homewood Residents Association v. Four Seasons Hotel Ltd.* (1981), 13 OMBR 92. In the *Homewood* decision, it was determined that the Board had no jurisdiction to hear this appeal since it was brought by an unincorporated body, and not by a "person" as is required by (what was then) subsection 42 (13) of the *Planning Act*. In this decision, the Board also found that "the law is clear on this question, the appellant association (was) a nonentity in law and (had) no status to institute an appeal".

The Board in this case also determined that it does not have the power under the *Ontario Municipal Board Act*, R.S.O., 1980, c. 347 and the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484 (Ont.) to create legal status in a party where none exists.

In its Notice of Response to the Motion, Demik cited the OMB Rules of Practice and Procedure, which defines a “person” to include:

A corporation and the entities included within the meaning of person in the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S22.

Demik contends that the *Statutory Powers Procedure Act* does not restrict “person” to an incorporated entity where there is “the exercise of a statutory power of decision” and cites examples of such unincorporated entities, including a trade union, and an association of employers. Demik also drew the Board’s attention to the broad definitions of “person” in both the *Canadian Business Corporations Act* (section 2.1) and the *Ontario Business Corporations Act* (section 1.1).

Subsection 17(36)(1) of the *Planning Act* says that “(an appeal may be filed by) a person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council”. The Board was told that the City was aware that Demik family companies have owned the Twenty Road Lands for years and that they have been developing property in Hamilton for over 50 years. These statements were not contradicted. The Board harbours no doubt that Demik family companies are very well-known to City officials.

The final sentence of subsection 8(7)(l) of O/Reg 543/06 states that “a notice of appeal may be filed in the name of an individual who is a member of the association or the group on its behalf”.

The Notice of Appeal was signed by Ms Rogers, on behalf of her client, variously identified as “a number of landowners ... in the Twenty Road area”; “Mr. John Demik”; and “Demik Developments”. After consideration of the evidence and the submissions of counsel, the Board finds that this satisfies the requirement of subsection 8(7)(i) of O/Reg 543 the *Planning Act*.

The Board finds moreover that there is no prejudice to the City and the other parties respecting subsection 17(36) of the *Planning Act* because uncontested evidence

exists that officers and representatives of Demik were in regular contact with the City during the time period in question regarding their lands and land use planning matters that might affect them, as required under the *Planning Act*. The City had, in the Board's view, ample time to come to grips with and react to the Demik Notice of Appeal letter prior to appearing before this Tribunal with its Motion to Dismiss.

In sum, the Board finds that Demik was a qualified Appellant when it filed its January 26, 2009, Notice of Appeal.

The second key matter that this Tribunal has been asked to determine is exactly which parts of the Rural OP that Demik has appealed.

In its submissions, the City maintained that subsection 17(37) of the *Planning Act* mandates that Demik Developments has only appealed those sections of the Rural OP it identified in its January 26, 2009, Notice of Appeal, and that pursuant to subsection 17(38) those parts of the plan, not under appeal, are therefore in full force and effect.

In its Notice of Response to (the City's) Motion to Dismiss filed April 5, 2011, Demik requested that the Board approve the Rural OP with the exception of six policies which it had determined relate specifically to its (Demik's) Twenty Road Lands. On page 1 of this document under the heading, "Relief Requested", Demik lists several items (paragraphs, d, e, f and g) that refer to GRIDS.

The City contends first, that GRIDS is not a policy of the Rural OP. Rather it is a background to that plan and, as such, integral to all of the policies in the plan. And second, that if references to GRIDS were removed, in the City's view the structure of the plan itself would be compromised, perhaps fatally. (Email from M. Kovacevic to S. Rogers dated March 23, 2011 (Exhibit M5, Tab 8))

In addition, the City contends that Demik has no standing to expand the scope of its appeal beyond what was referenced in its January 26, 2009, Notice of Appeal, and cited *Still's Bay v. Muskoka Lakes (Township)* 2003, O.M.B.D. No. 772. In this 2003 decision, the Board found that the "right of appeal crystallized on the last day for appeal".

The City also cited the March 1999 Board decision *Owen Sound (City) v. Grey (County)*. In this 1999 decision (Exhibit M3, Tab 25), the City of Owen Sound had

determined the existence of potential or actual conflicts between the County's official plan, which had previously been approved by the Minister and the City's adopted, but not yet approved official plan. The Owen Sound official plan was referred to the Board by MMAH.

The City of Owen Sound (which is referred to in the decision as the "Town") appealed the entire County official plan. In paragraph 14 of its 1999 decision, the Board noted that:

Having appealed the entire Plan, there is nothing to prevent a party from narrowing its appeal.

In paragraph 15, the Board noted that:

The Town further asks that the entire County plan be kept open until the appeal of the Town's plan has been heard. The Town argues that there may be further areas of conflict between the two plans which the Town has not yet identified, but which may become apparent when (the other appellants) file their respective issues preparatory to the hearing.

In paragraph 16, the Board wrote:

Section 17(37)(b) of the *Planning Act* requires that notice of appeal to the Board must '... set out the reasons for the appeal....' The Board in *Owen Sound (City)* found that the intent of this section is to place the responsibility for setting out the reasons for the appeal on the shoulders of the appellant, and not on the shoulders of some unknown third party.

In this decision, the Board found that the Town's request to hold open the entire County official plan pending possible identification of further conflicts with the (Town's proposed) official plan to be both unfair and unreasonable. The Board further found that the Town had disclosed no apparent land use planning ground to support its appeal of the remainder of the plan where no section has been specified as being the subject of issue for adjudication. Accordingly, the Board dismissed the appeal to the extent that the appeal related to those sections of the Plan that were not included in the Town's issue list.

In support of its contention that this Panel has the authority to allow it to modify its appeal letter, Demik cited the Divisional Court case, *Luigi Stornelli and. Centre City Capital Ltd. 50 O.R. (2nd) 417 {Ontario}*. In *Stornelli*, the court held that,

... Statutory requirements of the ground for appeal must be construed as directory only, any defects to be remedied either before or at the hearing of the appeal, as long as an opportunity can be afforded of dealing with them.

Demik argued that even though it dealt with the *Planning Act* as it was prior to both Bills 163 and 51, the principle enunciated in *Stornelli* still holds. Demik cited the March 1999 Board decision in *Owen Sound (City)*, which is referred to above to support this claim. Using the argument advanced in *Stornelli*, Demik contends that the current Motion hearing has provided it (Demik) with “an opportunity to elaborate on the Notice of Appeal and identify the apparent land use planning ground – the triable issue – that warrants a hearing”.

Rejecting this interpretation, the City pointed out that after Bill 51, the appeal process and exactly who could appeal has become much more closely defined than it had been in 1999 when *Stornelli* was argued.

Demik also cited *Galventure Developments Inc. v. Halton (Region)*, which was a 2005 appeal to the Ontario Municipal Board pursuant to section 17(24) of the *Planning Act*. Demik argued that the circumstances in *Galventure* parallel the circumstances in the present matter before the Board. The City argued that they do not. After a careful reading of *Galventure*, the Board finds that the circumstances in the current case are different enough from those in *Galventure* as to render *Galventure* unhelpful in the present deliberations. Among other important differences between the two is the fact that in *Galventure* an Issues List had already been settled by the Board, whereas in the present instance an Issues List has not yet been settled.

The City contends that GRIDS forms the basis of the growth-related policies found in the Rural OP as adopted by the City, including designation of the so-called Elfrida lands as “Special Policy Area B”. Special Policy Area B refers to lands that have been set aside for future urban growth. When it approved the Rural OP MMAH removed the Special Policy Area B designation from the Elfrida lands but left in all references to GRIDS. The City submitted that the Board should infer from this that GRIDS is fundamental to the integrity of the Rural OP.

In its January 26, 2009, Notice of Appeal, Demik made no specific reference to GRIDS. However, in its modified letter of appeal found in its April 5, 2011 Response, four references to GRIDS are made (paragraphs d, e, f, and g). Demik contends that the

references to GRIDS in its April 5, 2011 list of policies it is appealing are critical to its appeal precisely because GRIDS underpins all the policies that it has appealed. Demik's Response to the (City's) Notice of Motion is found in Exhibit M5, Tab A, page 01.

The City argued that according to the provisions of the (post-Bill 51) *Planning Act*, subsection 17(37), Demik's appeal is restricted to what it specified in its January 26, 2009 Notice of Appeal.

After consideration of the positions of both sides, the Board finds no prejudice to Demik's appeal if subsections *d*, *e*, *f* and *g* in its April 5, 2011 list are not admitted. Demik's rights respecting its Twenty Road Lands are not compromised by restricting its appeal to those policies of the Rural OP identified in the January 26, 2009 Notice of Appeal.

Conclusions

The Board has reviewed the Affidavit of Ms. Hickey-Evans, a qualified land use planner (Exhibit M2, Tab 2) and is satisfied from the evidence that those sections and policies of the Rural OP identified in the Aggregates Settlement represent good planning. The Board accepts the Aggregates Settlement, which modifies the Rural OP as indicated below in subparagraph c.

The Board Orders that the City's Motion is allowed in part, but that the City's Motion to dismiss the Demik appeal is itself dismissed. The Board Orders that Demik (identified above as comprising Demik Developments and 1694408 Ontario Inc.) is allowed as an Appellant to these proceedings.

The Board also Orders that the January 26, 2009 Notice of Appeal letter adequately identifies the policies in the Rural OP that Demik takes issue with. The Board will not amend the Demik appeal to include other issues not identified in the January 26, 2009 Notice of Appeal.

In accordance with the provisions of subsections 17(38) and 17(39) of the *Planning Act*, the following portions of the City of Hamilton Rural Official Plan are not or are no longer under appeal and are therefore in full force and effect.

- a) The policies, schedules, maps and appendices and housekeeping amendments identified in Exhibit 1 to the Hickey-Evans Affidavit dated March 24, 2011, identified as not appealed (including withdrawn appeals).
- b) The housekeeping amendments, policies, schedules and appendices identified in the Board decision dated June 7, 2010, in respect of the Rural OP.
- c) The policies, schedules, maps and appendices in the "Chart" that is identified in the Hickey-Evans Affidavit (Exhibit M2, Tab 2.I, Exhibit "I") as being part of the settlement of the appeals made by Ontario Stone, Sand & Gravel Association, St. Marys Cement (Canada) Inc., LaFarge (Canada) Inc., and Dufferin Aggregates.

The Board was told by the contending Parties that Policy D.2.2.1 of the Rural OP as modified, which Demik indicated in its April 5, 2011 list in the Response to the (City's) Notice of Motion, has also been appealed by other Parties. It is therefore excluded from this Order.

The Board Orders that Demik Developments request for costs is dismissed.

So Orders the Board.

"C. Hefferon"

C. HEFFERON
MEMBER