

ISSUE DATE:

**July 19, 2011**



PL110034

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

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: 883929 Ontario Limited  
Subject: Minor Variance  
Variance from By-law No.: 0225-2007  
Property Address/Description: 6730 Davand Drive  
Municipality: City of Mississauga  
Municipal File No.: A-449/10  
OMB Case No.: PL110034  
OMB File No.: PL110034

**APPEARANCES:**

**Parties**

**Counsel**

883929 Ontario Limited & PetsAbove Limited

G. S. Swinkin

City of Mississauga

A. Wilson-Peebles  
R. Kehar (student-at-law)

Peel Condominium Corporation 456

E. Lidakis

**DECISION DELIVERED BY C. HEFFERON AND ORDER OF THE BOARD**

**Background**

883929 Ontario Limited has purchased units 21 and 22 in a multi-tenanted industrial condominium building located at 6730 Darand Drive, Mississauga that it proposes to let to PetsAbove Limited. The latter company proposes to develop a pet crematorium in the two units. The latter company proposes to develop offices and visitation rooms in a portion of the two units.

When the proposed pet crematorium is fully developed, a total of three Matthews Power-Pak II incineration units will be installed. Each of these units is capable of cremating approximately 750 lbs of corpses per hour in what the Board was told by the

Canadian distributor of the Matthews units is a clean, odourless process that will meet or exceed the applicable Ministry of Environment (“MOE”) emissions standards.

The Board was told that an MOE Certificate of Approval has been applied for but the process is currently in abeyance pending the outcome of the current Board proceedings.

### **Matter Before the Board**

883929 Ontario Limited appealed the December 9, 2010 decision of the City of Mississauga Committee of Adjustment (“Committee”) refusing its application for a minor variance from the parking provisions of Zoning By-law 0225-2007 (“By-law”) to permit Units 21 and 22 of 6730 Davand Drive to be used as a pet crematorium with associated services.

In its decision, the Committee stated that based on the opinion of both the Planning and Development land use planner and the Zoning Examiner, a minor variance from the parking requirements would not be required if pet crematoria were found to be a form of “manufacturing” as defined in the By-law. In refusing the application, the Committee also noted that while the proposed use might be appropriate in a stand alone structure in an E3 zone, in its view this use is not suitable in a multi-tenanted industrial condominium building and is not permitted under the provisions of the By-law as the Committee understands them.

The matter before the Board in the subject hearing centred then on whether the By-law contemplates the proposed use conforming to the uses permitted in the By-law. If the Board were to find that it does, the Municipality has indicated that a parking variance would not be required since the proposed use would thereby satisfy the parking standards for the E3 zone. The applicant/appellant commenced its case by taking the Board to subsection 45(2)(b) of the *Planning Act*.

### **The Statutory Regime**

Subsection 45(2)(b) of the *Planning Act* reads:

In addition to its powers under subsection 45(1), the committee, upon any such application where the uses of land, buildings or structures permitted in the By-law are defined in general terms,

may permit the use of any land, building or structure for any purpose that, in the opinion of the committee, conforms with the uses permitted in the By-law.

The Board has to consider whether this proposal satisfies the statutory requirements in subsection 45(2)(b) of the *Planning Act* that is whether the proposed use is defined in general terms in the By-law and whether the proposal conforms with the uses permitted in the By-law.

### **The Participants' Position**

Several owners and/or tenants of Peel Condominium Corporation 456 who attended the hearing asked for and were granted Participant status. Peel Condominium Corporation 456 comprises two buildings, 6720 and 6730 Davand Drive.

Except for Mr. Tucci, who owns units 1 and 2 of 6720 Davand Drive, the Participants were all from 6730 Davand Drive, which is the building where the two subject units are located.

- Mr. P. Von Richter                      Units 12, 14, 15, 16 of 6730 Davand Drive
- Mr. D. Cossarin                        Units 12, 14, 15, 16 of 6730 Davand Drive
- Mr. E. McLaren                        Units 17, 18, 19 of 6730 Davand Drive
- Mr. M. Brajovic                        Unit 7 of 6730 Davand Drive
- Mr. P. DiPrincipe                      Unit 13 of 6730 Davand Drive
- Mr. C. Tucci                            Units 1 and 2 of 6720 Davand Drive

In their testimony, the Participants indicated that they believed the proposed use was not appropriate in a building such as 6730 Davand Drive. They felt such use demanded at a minimum a separate structure. They were especially concerned with the potential for noxious odours, lack of sufficient parking for visitors, increased risk of fire and the general incompatibility of the proposed use with food wholesaling and restaurant uses within the building.

## **Land Use Planning Evidence & Analysis**

### The Applicant/Appellant's Position

Mr. M. Rogers, who was qualified by the Board to give opinion evidence on land use planning matters, stated that he had been retained by the applicant/appellant in August 2010. He told the Board that he discussed the proposed use with a number of City officials, and gleaned three points from these discussions. The first was that because the proposed use is not defined in the By-law, planning approval would be required; the second was if the proposed use were located anywhere, it should be in an E3 zone ie., the subject zone; and the third was that an application to the City of Mississauga Committee of Adjustment would be the "appropriate" course of action. This testimony was not contradicted.

Mr. Rogers' evidence respecting subsection 45(2)(b) of the *Planning Act* focussed on the exact meaning of the word "manufacturing" as a permitted use in an E3 zone in the By-law. He said that in the definitions in the By-law, the term "manufacturing" contemplates the processing of materials using intense heat. Cremation, he opined, could be considered to be a manufacturing process, except in this case, the material processed would be pet remains and the end product would be the "cremains". "Cremains", he said, are not ash but rather bone fragments, which may be placed in an urn and sold to the pet owner. Alternatively, the cremains may be held for dispersal or disposal in an approved location. Essentially, he maintained, the subject application simply extends the meaning of manufacturing to include the proposed use.

Mr. Rogers testified that the subject lands are designated "Industrial" in the Official Plan (section 3.4). This designation permits a wide range of business activity including "manufacturing" and "processing" and may involve processes or operations that are "obnoxious due to ... noise, odour and visual aesthetics" (section 3.4.1.1). He testified that although "obnoxious" processes that might also be visually or aesthetically-offensive are permitted outdoors in the E3 zone, the proposed use takes place entirely indoors and involves no odour or noise emissions. Because the entire process including transfer of the corpse to the crematorium for incineration takes place indoors, there is, in his opinion, no possibility of any obnoxious or disturbing visual displays.

This latter view was corroborated in the subsequent testimony of Mr. R. Steele, the Canadian distributor of the Matthews Power-Pak II pet incinerator (Exhibit 5). Mr. Steele is a licensed funeral director with extensive experience in the operation of crematoria. He told the Board that the Power-Pak II is similar in both size and operation to one of Matthews' crematoria devices designed for the incineration of human remains. Mr. Steele's testimony was not contradicted.

Mr. K. Crawford, whose firm, PetsAbove Inc, has entered into a business relationship with 883929 Ontario Limited, the owner of units 21 and 22 of 6730 Davand Drive to lease the premises for the proposed use explained under oath exactly how he envisions his pet crematorium business operating. His testimony explaining the technical details of his business plan supported Mr. Steele's testimony.

Mr. Rogers also testified that the proposed use conforms to the general intent and purpose of the By-law. He explained that what is proposed is a type of processing which is included in the definition of manufacturing. The pet remains, he said, are processed under high heat into cremains, which become a "product", one that when packaged in an urn has memorial value to the owner of the deceased pet.

He acknowledged that the By-law permits crematoria only in connection with cemeteries and only in OS3 (open space category 3) zones. However, the proposed use cannot be equated with a crematorium, he said, because the By-law restricts that use to human remains. The proposed use – the incineration of pet remains - must therefore be characterized as "processing", which, in his opinion, conforms to the general intent and purpose of the By-law respecting an E3 zone.

He also testified that the change in the list of permitted uses requested is minor in nature because the By-law permits manufacturing and processing. The difference is that the proposed use will process materials that are, in his words, "slightly unconventional".

He testified that the proposed use is also appropriate or suitable on the subject property since it is not obnoxious. He contrasted it with a waste transfer station, which he said is a permitted use in the building and is, in his opinion, obnoxious. The proposed use, he said, is not permitted in other zones, and this prohibition is, in his opinion, entirely appropriate. He stated that in any event, since the proposed operations

are designed to take place entirely indoors with no air or noise emissions and the equipment is designed to operate safely and cleanly, there would be no adverse impact on the surrounding properties. Besides which, he testified, there are a number of other safeguards and minimum performance standards that will be imposed by other levels of government before the proposed operations could commence. Land use permission is, he said, only the first of several permissions required.

#### The Opposing Parties' Position

The proposed use was opposed by both the City of Mississauga and by Peel Condominium Corporation 456. Mr. E. Davidson and Ms B. Leckie testified on behalf of the former and Mr. D. Vella on behalf of the latter. Messrs. Davidson and Vella were qualified by the Board to give opinion evidence on land use planning. Ms B. Leckie, who is the long serving Zoning Examiner for the City of Mississauga, was qualified to give opinion evidence on the By-law.

Ms Leckie explained that By-law was designed to be, what she termed "exclusionary". She explained that this means that if a use is not listed, it is not permitted. Any use that is not listed in the By-law requires, in her opinion, a zoning by-law amendment. Because the proposed use is not listed, it requires a zoning by-law amendment. Ms Leckie testified that she was one of the designers of the By-law and knows how it is intended to be applied. Her testimony was not shaken under vigorous cross-examination by legal counsel for the applicant/appellant.

Mr. Davidson testified that other pet cemeteries and crematoria in the GTA and environs were introduced by way of either or both official plan ("OPA") and zoning by-law amendment ("ZBLA"). He stated that both an OPA and a ZBLA would be required in the present instance because the City of Mississauga Official Plan does not have a land use category that permits pet cemeteries. Crematoria are only permitted in this municipality as part of a cemetery operation. Cemeteries, he said, are only allowed in lands designated "private open space" and zoned OS3 (See Exhibit 1, tab 5, pg. 24 and tab 6, pg. 52). Because pet crematoria are not an explicitly permitted use in the By-law, in his opinion they are prohibited. His testimony on this point supported the testimony of Ms Leckie.

While crematoria are defined in the OP, Mr. Davidson pointed out that the definition restricts crematoria to human remains only. He said there is no provision in either the OP or the By-law for pet crematoria. They are therefore simply not permitted. The proposed use cannot therefore be included in the general permitted manufacturing use. For this reason, he stated that it is his opinion that the proposed use fails to satisfy the provisions of subsection 45(2)(b) of the *Planning Act*.

Because the proposed use does not in his opinion consider the surrounding uses, particularly those food processing uses in other units of the mixed use, multi-tenanted condominium, it is, he testified, neither desirable nor appropriate on the subject property. The testimony and regular attendance of several of the other tenants in the complex during the subject hearing confirmed for him, he said, that the proposed use would have a definite destabilizing effect on the condominium complex. The proposed use is, in his opinion, more appropriate in a stand alone building in the E3 zone.

He testified that for all the above reasons the requested addition to the list of permitted uses, which would allow PetsAbove Limited to operate its proposed pet crematorium in units 21 and 22 of 6730 Davand Drive does not conform to the intent of the By-law and fails to satisfy the criteria for subsection 45(2)(b) of the *Planning Act*.

Mr. Vella's testimony added support to that of Mr. Davidson and Ms Leckie.

### **The Board's Findings**

Ms Leckie had testified that in Mississauga crematoria are restricted to cemeteries. The fact that neither Mississauga's OP nor its By-law contemplates their handling pet remains within an area designated and zoned for (possibly obnoxious) industrial uses is, in the Board's view, not an oversight. There is a long-established pet crematorium operated by the Municipality in connection with its animal shelter. This use, the Board was told, had been established under a provision of the previous City of Mississauga Zoning By-law. This provision in the previous By-law, Ms Leckie explained, allowed the municipality essentially to ignore its own zoning and to establish whatever use it wanted wherever it wanted provided only that it was in the public interest to do so. When the present By-law was enacted, the existing animal shelter/pet crematorium was given "legal non-conforming status" with all that that status implies.

Ms Leckie testified that the City of Mississauga did not seem fit to permit pet crematoria or pet cemeteries within any of the categories in its in-force By-law. This is, the Board finds, the City's prerogative.

After consideration of the evidence and the submission of counsel, the Board finds that the proposed use does not comply with the planned function of the E3 zone. This Panel struggled long and hard with the notion that the handling of pet remains is a kind of manufacturing process but failed to make the connection. The Board might have been able to better see pet cremation as a (waste) disposal process. The Board was told that a "waste processing station" is a permitted use within the E3 category. It was suggested by one of the witnesses for the appellant that incineration was implied by the term "waste processing".

Under the Declaration of the Peel Condominium Corporation 456, however, incineration is not permitted in this complex. It was Mr. Steele himself who in response to a question from the Board described the Power Pak II as an "incinerator". In fact, the Matthews' literature also describes it as such. In any event, incineration of pet remains is not, in the Board's view, an appropriate (that is, a suitable) use on the subject property, which is a relatively compact, multi-tenanted industrial commercial condominium complex with shared interior walls.

For all the above reasons, the Board finds that the proposed use does not conform to the uses permitted in the By-law and fails to meet the criteria in subsection 45(2)(b) of the *Planning Act*.

### **Disposition & Order of the Board**

The Board Orders the appeal is dismissed. The requested variance is not authorized.

So Orders the Board.

"C. Hefferon"

C. HEFFERON  
MEMBER