

ISSUE DATE:

**October 12, 2011**



PL110331  
PL090779  
PL101381

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

The Ontario Municipal Board has received appeals under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from the decision of the Minister of Municipal Affairs and Housing to approve the new City of Hamilton Urban Official Plan  
OMB File No. PL110331 (See Schedule "3")  
OMB Case No. PL110331

The Ontario Municipal Board has received appeals under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from a decision of the City of Hamilton to approve Official Plan Amendment No. 35 to the Region of Hamilton-Wentworth Official Plan  
OMB File No. PL090779 (See Schedule "1")  
OMB Case No. PL090779

The Ontario Municipal Board has received appeals under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from a decision of the City of Hamilton to approve Official Plan Amendment No. 128 to the Town of Ancaster Official Plan (PL090780); Official Plan Amendment No. 18 to the Town of Dundas Official Plan (PL090781); Official Plan Amendment No. 118 to the Town of Flamborough Official Plan (PL090782); Official Plan Amendment No. 75 to the Township of Glanbrook Official Plan (PL090783); Official Plan Amendment No. 220 to the City of Hamilton Official Plan (PL090784); Official Plan Amendment No. 149 to the City of Stoney Creek Official Plan (PL090785)  
OMB File Nos. PL090780-PL090785 (See Schedule "1")  
OMB Case No. PL090779

The Ontario Municipal Board has received appeals under subsection 17(40) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from the failure of the Minister of Municipal Affairs and Housing to announce a decision respecting the City of Hamilton Urban Official Plan  
OMB File No. PL101381 (See Schedule "2")  
OMB Case No. PL101381

**Schedule "1"**

Appellants to the amendments to the in-force Official Plans of the former Region of Hamilton-Wentworth, Towns of Ancaster, Dundas and Flamborough, Township of Glanbrook and Cities of Hamilton and Stoney Creek (OMB Case No. PL090779)

<b>OMB FILE NO.</b>	<b>APPELLANT NAME</b>
PL090779	TDL Group Corp.
	Upper Centennial Developments Ltd.
PL090780	TDL Group Corp.
PL090781	Lawrence Kaempffer
	TDL Group Corp.
PL090782	TDL Group Corp.
PL090783	TDL Group Corp.
PL090784	Harbour West Neighbours Inc.
	Shawcor Ltd.

	TDL Group Corp.
PL090785	TDL Group Corp.
	Upper Centennial Developments Ltd.

**Schedule “2”**

Appellants to the failure of the Minister of Municipal Affairs and Housing to announce a decision respecting the City of Hamilton Urban Official Plan (OMB Case No. PL101381)

<b><i>OMB FILE NO.</i></b>	<b><i>APPELLANT NAME</i></b>
PL101381	A. DeSantis Developments Ltd.
	LIUNA Group Corp.
	St. Joseph’s Villa

**Schedule “3”**

Appellants to the new City of Hamilton Urban Official Plan (OMB Case No. PL110331)

<b><i>OMB FILE NO.</i></b>	<b><i>APPELLANT NAME</i></b>
PL110331	1800615 Ontario Inc. and 1536708 Ontario Inc.
	2000963 Ontario Inc.
	2051206 Ontario Inc.
	2084696 Ontario Inc.
	2188410 Ontario Inc.
	456941 Ontario Ltd., 1263339 Ontario Ltd., and Lea Silvestri
	909940 Ontario Inc.
	Artstone Holdings Limited
	Carmen Chiaravelle, 1694408 Ontario Ltd., John Edward Demik, Peter Demik, Demik Brothers Hamilton Ltd., and Elaine Vyn
	City of Hamilton
	Confederation Park Shopping Centres Limited, Confederation Park Shopping Centres II Limited
	Corpveil Holdings Limited
	DiCenzo Construction Company Limited and DiCenzo (Golf Club Road) Holdings Inc.
	Flamborough Power Centre Inc., Flamborough South Centre Inc., Clappison Five Six Properties Inc.
	Freeland Developments Limited
	Gino and Olindo DalBello
	Hamilton Mountain Development Inc.
	Keith and Brenda Pickles

	Kraft Canada Inc.
	Landmart Homes and Landmart Realty Corp.
	Lynmount Developments Limited
	Mud and First Inc.
	Multi-Area Developments Inc.
	Norman Vartanian
	Paletta International Corporation
	Paletta International Corporation (re: Elfrida)
	Parkside Hills Inc.
	Sister Servants of Mary Immaculate
	Spallacci & Sons Limited
	Sullstar Twenty Limited
	Tom Nugent
	TDL Group Corp. Inc.
	Twenty Road Developments Inc.
	Upper Centennial Developments Ltd.
	Waterdown Bay Ltd.

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

City of Hamilton

M. Kovacevic\*, M. Minkowski\* and J. Wice\*

Ministry of Municipal Affairs and Housing

R. Boxma\* and C. Young\*

1507565 Ontario Inc.

D. C. K. Tang\*

1800615 Ontario Inc., 1536708 Ontario Inc., DiCenzo Construction Company Limited, DiCenzo (Golf Club Road) Holdings Inc. and Landmart Homes and Landmart Realty Corp.

R. D. Cheeseman\*

2000963 Ontario Inc., 2084696 Ontario Inc., 2188410 Ontario Inc., Mud and First Inc., Multi-Area Developments Inc. and Paletta International Corporation (re: Elfrida)

M. Noskiewicz\* and J. Drake\*

2051206 Ontario Inc., 909940 Ontario Inc.,

J. Hickey\*

Lynmount Developments Limited, Spallacci & Sons Limited, Sullstar Twenty Limited and Twenty Road Developments Inc.

456941 Ontario Ltd., 1263339 Ontario Ltd. and Lea Silvestri P. Pickfield\*

Artstone Holdings Limited, Corpveil Holdings Limited, Paletta International Corporation, Waterdown Bay Ltd., LIUNA Group Corp., St. Joseph's Villa, A. DeSantis Developments Ltd., Shawcor Ltd. and Harbour West Neighbours Inc. S. Snider\*

Carmen Chiaravelle, 1694408 Ontario Ltd., John Edward Demik, Peter Demik, Demik Brothers Hamilton Ltd. and Elaine Vyn S. Rosenthal\*

Confederation Park Shopping Centres Limited, Confederation Park Shopping Centres II Limited, Flamborough Power Centre Inc., Flamborough South Centre Inc., Clappison Five Six Properties Inc. Hamilton Mountain Developments Inc. and Kraft Canada Inc. C. Estrela\*

Tom Nugent

Freeland Developments Limited F. Sperduti\*

Gino and Olindo DalBello, Keith and Brenda Pickles and Norman Vartanian M. Rudolph\*

Parkside Hills Inc. T. Cymbaly for R. Smith\*

Sister Servants of Mary Immaculate J. Ariens

TDL Group Corp. Inc., A&W Food Services of Canada Inc., McDonald's Restaurants of Canada Limited and Wendy's Restaurants of Canada Inc. M. Polowin\*

Upper Centennial Developments Ltd. P. Harrington\*

Lawrence Kaempffer

J. Chapman

**Participants**

Niagara Escarpment Commission

J. Thompson\*

Environment Hamilton Inc.

D. McLean

Mary Kiss

**DECISION DELIVERED BY D. R. GRANGER AND ORDER OF THE BOARD**

This is the first Pre-hearing Conference and motion hearing regarding appeals related to the new City of Hamilton (City) Urban Hamilton Official Plan (UHOP) adopted by the City on July 9, 2009 and approved by the Minister of Municipal Affairs and Housing (MMAH) with modifications on March 16, 2011.

Consolidated with these appeals, on the consent of the Parties, are the appeals of the failure of the MMAH to make a decision regarding the UHOP, prior to March 16, 2011, and the appeals related to amendments to the in-force Official Plans of the former Region of Hamilton-Wentworth, Towns of Ancaster, Dundas and Flamborough, Township of Glanbrook and Cities of Hamilton and Stoney Creek.

The Board confirms the above listed Appellants, Parties and Participants as the Appellants, Parties and Participants to the hearing.

Alterra (Spencer Creek) Ltd. has indicated its intention to seek status to the hearing through the filing of materials. It is presently in discussions with the City. Any status will be confirmed on or before the next scheduled Pre-hearing Conference.

The following Appellants have withdrawn its appeals without objection:

- Bethel Gospel Tabernacle
- Hotz and Sons Limited
- Deanlee Management Inc.
- The Effort Trust Company

- Trinity Development Group Inc.
- Trinity Properties Investments Inc.
- New Country Investors Ltd.
- Sam's Auto Wrecking Ltd.
- North End Neighbours

Pursuant to the City's motion to dismiss certain appeals as set out in Exhibit No. 2, the following Appellants consent to the Board dismissing its appeals subject to there being no prejudice to its seeking Party status on a consent basis or by way of a motion on or before the next scheduled Pre-hearing Conference:

- A. DeSantis Developments Limited (re: the appeal of the UHOP decision by MMAH).
- Ecobuilding Inc.
- Giulio Trulli and Itala Silvestri-Trulli
- Leonard H. Lottridge
- Red Hill Creek Developments Inc.
- Yahezkel Zahavy

The Board so dismisses these appeals.

Pursuant to the City's motion to dismiss certain appeals as set out in Exhibit No. 2, the following Appellants consent to the Board dismissing its appeals subject to its being granted Party status to the appeals by TDL Group Corp. Inc.:

- A&W Food Services of Canada Inc.
- McDonald's Restaurants of Canada Limited
- Ontario Restaurant Hotel & Motel Association

- Wendy's Restaurants of Canada Inc.

The Board so dismisses these appeals.

The Board notes that in dismissing the appeals of A. DeSantis Developments Ltd. and Ecobuilding Inc. and recognizing the withdrawal of the appeal by Deanlee Management Inc., that the City has acknowledged related outstanding development applications and that these applications once fully resolved will result in a housekeeping amendment to the UHOP in that regard.

With respect to the appeal by Waterdown Bay Ltd., on consent of the Parties and at the request of the City, the Board consolidates this appeal with its appeal of Official Plan Amendment No. 122 related to the Waterdown South Secondary Plan (subject to consent of Parties to Board File PL101149) scheduled to commence on November 2, 2011. It is acknowledged by the Parties that any decision following from this appeal will be confined to the Waterdown South Secondary Plan area and will not prejudice UHOP policies for any other area of the City.

Prior to hearing the City's motion to dismiss the appeal by Mary Kiss, she agreed to revise her status to that of Participant, her intention being to come forward at the appropriate time during the hearing of the appeals to present her evidence pertaining to the Rifle Range Road/Ewen Road industrial zoned enclave, on behalf of the unincorporated Ainslie Wood Residents Neighbourhood Association.

Without objection, the Board recognizes Ms Kiss as a Participant to the hearing.

The remaining Appellant subject to the City's Motion to dismiss certain appeals is 1507565 Ontario Inc. (1507565). The City's Motion, including an affidavit and supplementary affidavit of City land use planner J. Hickey-Evans, was presented as Exhibit No. 2 and 2a respectively. Ms Hickey-Evans was also cross-examined by Counsel for 1507565.

The Response to the Motion including an affidavit of A. Frisina, a principal of 1507565, was presented as Exhibit No. 5.

Having considered the able submissions and evidence presented through the affidavits and cross-examination, the Board allows the City's Motion and dismisses the

appeal as not being valid pursuant to subsection 17(36) of the *Planning Act*. The Board does however, pursuant to subsections 17(44.1) and 17(44.2)2, find there to be reasonable grounds to recognize 1507565 as a Party to the hearing as it relates to the Elfrida area. The Board's reasons are set out in Attachment "1" to this Decision.

In conclusion, on consent of the Parties, the Board further directs the following:

1. The next Pre-hearing Conference will commence on Wednesday, February 15, 2012 at 10:30 a.m. at the Hamilton Convention Centre, Webster Room Section A & B, 1 Summers Lane, Hamilton, ON. Up to three (3) days have been scheduled. The agenda for this Pre-hearing Conference will include:
  - i. The final confirmation of Parties and Participants.
  - ii. The hearing of any settlements reached between the Parties.
  - iii. The hearing of any motions regarding Party status and dismissal of appeals. February 15, 2012, will be the returnable date for any motions. All motions will be made in accordance with the Board's Rules of Practice and Procedure.
  - iv. The final organization of all outstanding issues into categories including: site specific/stand alone; issue specific/stand alone; and, general to the entire UHOP. The City will take the initiative, in this regard, following consultation and circulation with and to the Parties and Participants.
  - v. The consideration of any further consolidations including appeals overlapping with the Hamilton Rural Official Plan such as the Elfrida and Airport Employment Growth District areas.
  - vi. The setting of appropriate hearing dates.
2. On or before November 16, 2011, the Board will require all Parties and Participants to provide the following to the City:



- i. The specific identification of those portions of the UHOP that are the subject of appeal and at issue, and whether or not the appeals and issues are site-specific or not.
- ii. A final issues list.
- iii. The detailed location of any properties of interest including PIN numbers. The appeal by TDL Group Corp. Inc. related to the general issue of drive-through facilities is exempt in that regard.

Failure to comply with these provisions may result in the Board removing Party and Participant status or dismissing the appeal pursuant to subsection 17(45)(e) of the *Planning Act*.

3. No further notice is required.

4. This Board Member is not seized.

The Board acknowledges that there has been a great deal of cooperation between the Parties in the settlement of the organization of these appeals. The Board strongly encourages the continuation of that cooperation leading to the further focusing and/or settlement of issues remaining in dispute.

The Board may undertake an assessment of the suitability of Mediation and provide for alternative dispute resolution in the form of Mediation at the formal request of the Parties.

The Board so Orders.

“D. R. Granger”

D. R. GRANGER  
VICE-CHAIR

**ATTACHMENT “1”**



Ontario

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**REASONS OF THE BOARD**

These are the reasons of the Board related to its dismissal of the appeal by 1507565 Ontario Inc. (1507565), the Board having found in favour of a Motion by the City of Hamilton (City) to dismiss its appeal of the Urban Hamilton Official Plan (Urban Plan).

The City submitted that, pursuant to subsection 17(36) of the *Planning Act*, 1507565 had not made oral submissions at a public meeting or written submissions to City Council before the Urban Plan was adopted. It is therefore not entitled to appeal the Urban Plan.

The first public draft of the Urban Plan was available at a public open house on April 8, 2009. The statutory public meeting occurred over three days being June 10, 11 and 16, 2009. City Council adopted the Urban Plan on July 9, 2009.

While conceding that it did not make oral submissions at any of the public meetings, 1507565 submitted that it did make a written submission in the form of correspondence dated March 7, 2007 (Exhibit No. 5, Tab 2c).

The March 7, 2007, correspondence is clearly set out as being “Re: New Official Plan for Rural Hamilton.”

The March 7, 2007, correspondence references Special Policy “B” in the New Rural Official Plan (Rural Plan) and the Elfrida Node in Hamilton, as identified in the GRIDS report.

The correspondence notes that the New Official Plan for Rural Hamilton was submitted to the Province for approval and urges its support. The New Official Plan for

Rural Hamilton included the Special Policy Area “B” Elfrida Node area, an area of interest to 1507565, as an owner of land within Special Policy “B.”

In the simple reading of the correspondence dated March 7, 2007, the Board finds nothing to link it to the Urban Hamilton Official Plan. It is a letter addressing the Rural Plan long before any public presentation of an Urban Plan.

The Rural Plan was subsequently adopted by City Council and approved by the Minister of Municipal Affairs and Housing (MMAH) but modified by MMAH to exclude the Elfrida Node area.

1507565 appealed the decision of MMAH regarding the Rural Plan. Its appeal in that regard remains valid.

It is reasonable to expect that 1507565, an acknowledged sophisticated land owner and developer represented by competent Counsel, knowing the position of MMAH with respect to the Elfrida Node area, would have taken every necessary step to assert its interest in maintaining the Elfrida Node once the Urban Plan became known. It did not.

It is clear on the face that 1507565 did not make written submissions to Council specifically related to the Urban Plan prior to its adoption in July 2009, as it should have.

There is a novel element to these submissions.

1507565 submits that it did not file any new written submissions and made no oral submissions as it was, in support of the City’s position, to include the Elfrida Node area in the Urban Plan.

It submits that it is now the victim of a set of circumstances leaving it in an unfair and prejudiced state.

It relied on its support of the City Urban Plan that included the Elfrida Node area.

The Approval Authority, MMAH, modified the plan and removed the Elfrida Node area.

Even given Party status, if all other appellants on the same issue were to withdraw their appeals, 1507565 would be left with no appeals to make representations on as a party.

This could point to a flaw in the legislation. Upon extensive modification from an adopted plan by an Approval Authority, a person's right to appeal those modifications could be statutorily barred potentially causing great prejudice.

Is it reasonable to expect that all persons in support of a plan as might be adopted should make oral or written submissions in order to protect a future right to appeal if not satisfied with later modifications by an Approval Authority?

This could be a serious matter for an unsuspecting ratepayer if, as a result of a modification, some prejudice in the form of a land use incompatibility or adverse impact resulted with no right to appeal.

This is less of a concern in the circumstances in this case.

1507565 is an appellant to the Rural Plan due to its exclusion of the Elfrida Node area.

It was aware of the Approval Authority's position with respect to the exclusion of the Elfrida Node area.

Proper notice was given for the open houses and public meetings regarding the Urban Plan that included language explaining the necessity of making oral or written submissions in order to protect any right of appeal.

Others have appealed the Urban Plan as it relates to the Elfrida Node area.

It is reasonable that 1507565 be a Party to those appeals against the exclusion of the Elfrida Node area from the Urban Plan.

As an appellant to the Rural Plan and a Party to the Urban Plan related to the Elfrida Node issue, it could seek the consolidation of all appeals so related into one hearing.

In the preliminary stages of the Board's procedures leading up to a hearing, there has been an expressed high likelihood that all appeals related to the Elfrida Node area will be consolidated and heard together at one hearing.

Considering all of these circumstances, the able submissions of Counsel and all of the evidence presented, the Board finds that 1507565 has not met the letter of the law by not making written submissions to City Council regarding the Urban Plan prior to its adoption by City Council.

The Motion by the City of Hamilton is granted and the appeal by 1507565 Ontario Inc. against the Hamilton Urban Official Plan is dismissed.

1507565 Ontario Inc. is, however, now recognized by the Board as being a Party to the hearing of the appeals against the Hamilton Urban Official Plan as they relate to the Elfrida Node area.

The Board so Orders.

"D. R. Granger"

D. R. GRANGER  
VICE-CHAIR