

ISSUE DATE:

April 26, 2012



PL111231

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: 1143341 Ontario Inc.
Subject: Minor Variance
Variance from By-law No.: 2006-50
Property Address/Description: 6 Nixon Road
Municipality: Town of Caledon
Municipal File No.: A-065/11
OMB Case No.: PL111231
OMB File No.: PL111231

IN THE MATTER OF subsection 69(3) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: 1143341 Ontario Inc.
Subject: Protest the levying of fees in relation to an application for 45(12)
Property Address/Description: 6 Nixon Road
Municipality: Town of Caledon
OMB Case No.: PL111231
OMB File No.: MM110050

APPEARANCES:

Parties

Counsel

1143341 Ontario Inc.

L. Pandy

Town of Caledon

P. Gross

DECISION DELIVERED BY JASON CHEE-HING AND ORDER OF THE BOARD

Background and context

1143341 Ontario Inc. ("Applicant/Appellant") has appealed the decision of the Town of Caledon's ("Town") Committee of Adjustment ("COA") to deny the minor variance to permit the height of an existing tower crane of 120 feet. The variance is required as the

height of the tower crane exceeds the zoning by-law (“ZBL”) maximum height requirements. The subject property is located at 6 Nixon Road in the municipality of Bolton. The Applicant/Appellant has also appealed the levying of fees by the municipality in relation to its appeal of the minor variance application to the Ontario Municipal Board (“Board”).

At the hearing, the Applicant/Appellant was represented by counsel and he retained a planner. The Town was also represented by counsel and retained a planner in objection to the appeal. Three abutting landowners provided lay testimony as participants who were in objection to the minor variance application.

Requested variance:

To permit the height of the existing tower crane of 120 feet, whereas the maximum building height permitted is 12.2 metres (40 feet).

Evidence:

Mr. M. Brancaleoni testified that his business involves the manufacture of pre-cast concrete slabs and that the crane tower is essential to the operation of his business as it lifts and moves the heavy slabs to designated areas in the site. He testified that the height of the crane is proportional to the length of the boom and that the length of the boom cannot be shortened as it is designed to lift and move a certain amount of weight. If the crane is reduced in height, and consequently the boom is reduced in length, then the carrying capacity is significantly reduced. It was his testimony that the business cannot function with a smaller crane.

There is no disagreement by the parties that the radius of the boom encroaches above the abutting properties. The parties have also agreed that it is the height of the crane and the impacts on the abutting landowners that are at issue here.

Planner C. Brawley proffered opinion evidence in support of the application. The subject property is zoned Service Industrial (MS) and designated as Industrial. It was his opinion that the tower crane complies with the Official Plan (“OP”) as an accessory

structure. It was also his opinion that the crane performs an essential function to the operation of the business and it is unusual to have a height restriction on buildings in an industrial zone. It is his opinion that the crane maintains the general intent of both the OP and the ZBL. Planner Brawley further opined that the impacts to the neighbours are minor and that the encroachment of the boom over the abutting properties is not caused by the height of the crane but by the extension of the boom.

Planner W. Lauder is the staff planner for the Town. He authored the staff report which recommended against the height variance. He testified that the Applicant/Appellant did not show the tower crane in his site plan application at the time of submission and review by the Town. The height of the crane tower at 120 feet is well in excess of the permitted height of 40 feet. It was his opinion that the length of the boom encroaches overhead on the properties of several landowners and creates unacceptable, adverse impacts in terms of safety and encroachments on eight abutting properties. He testified that the abutting landowners cannot use their lands to the fullest extent because of the encroachment of the boom. The abutting landowners cannot locate any structures on their lands where the crane encroaches. It was his planning opinion that the impacts caused by the crane are not minor, nor is it desirable for the appropriate development of the land.

Three participants (Grant Pickess, Mike Guglietti, and Vince Vigliatore), all abutting landowners, gave lay evidence in objection to the application. It was their testimony that the crane creates unacceptable safety and liability issues on their respective properties as it encroaches overhead on their lands. Mr. Guglietti is concerned about the safety of his employees from falling materials when the crane swings over his property. Mr. Pickess testified that he has observed the radial movement of the crane transporting a concrete slab over his property. He testified that he has been unable to attract tenants to his building because of the safety and liability issues associated with the crane. It was their testimony that the tower crane adversely impacts on their property rights as they are unable to fully utilize all of their lands. The participants testified that they are not interested in any easement agreement with the Applicant/Appellant.

Board findings and reasons:

It is the Board's finding that the height of the crane creates unacceptable adverse impacts to the abutting landowners. The Board finds that lowering the height of the crane will reduce the length of the boom, thus decreasing the effectiveness of the crane in lifting and moving materials within the site – an alternative which Mr. Brancaleoni testified was unacceptable. The height of the crane tower cannot be considered in isolation as it is directly related to the length of the boom and the functionality of the crane tower. The crane tower must be considered within the context of both its height and length.

The Board does not agree with the argument advanced by the Applicant/Appellant that the encroachments and impacts are caused by the boom of the crane, are not due to its height, that the variance being sought is for height and that the encroachments are not due to the height of the crane. The Board finds that the crane must be viewed in terms of its function; the height and the extension of the boom are critical elements to the crane's function. A reduction in the height would mean a shorter boom and consequently, a reduced load carrying capacity. The boom is an integral part of the crane. As such, the Board finds that the adverse impacts can be attributed to the height of the crane. Additionally, the encroachment of the crane on the abutting properties gives rise to safety and liability concerns that are, in the Board's view, unacceptable.

It is the Board's finding that the application of the statutory test of "...is desirable for the appropriate development or use of the land, building or structure" has to consider the impact the development would have on the abutting neighbours. The Board does not agree with argument advanced by counsel for the Applicant/Appellant that the desirability test relates only to the subject lands and that impacts on the abutting properties should not be a consideration for this test.

For these reasons, and with respect to the statutory tests found in subsection 45(1) of the *Planning Act* ("Act"), the Board finds that the variance does not maintain the general intent of the ZBL, it is not desirable for the appropriate development or use of the lands, the variance is not minor and will create unacceptable adverse impacts to the abutting landowners.

The Applicant/Appellant also appealed the levying of fees by the municipality for its application under subsection 45(12) of the *Act*. Counsel for the Applicant/Appellant submitted that the municipality does not have the authority to charge a fee for an appeal made to this Board. It is the Board's finding that there was no evidence to suggest any irregularity in the levying of fees by the municipality. The Board is therefore satisfied that the levying of fees by the Town pursuant to its By-law 2011-019 meets the requirements of subsection 69(1) of the *Act*. Therefore, the **BOARD ORDERS** that:

1. The minor variance appeal is dismissed and the variance is not authorized; and,
2. The appeal of an additional fee charged by the Town in respect of this appeal is dismissed.

So Orders the Board.

"Jason Chee-Hing"

JASON CHEE-HING
MEMBER