

ISSUE DATE:

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DECISION/ORDER NO:

0717



PL041198

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Flamborough Chamber of Commerce, Waterdown Business Improvement Area and Westdale Village Business Improvement Area have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Hamilton to approve Proposed Amendment No. 21 to the Official Plan for the Region of Hamilton-Wentworth now the City of Hamilton to redesignate land at Part of Lots 12 and 13, Concession 3 (East Flamborough) to add a Specific Policy Area to permit department stores
OMB File No. O050051
OMB Case No. PL041198

Trinity Development Group Inc., Rosart Properties, Waterdown Business Improvement Area and others have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Hamilton to approve Proposed Amendment No. 98 to the Official Plan for the Town of Flamborough now the City of Hamilton to redesignate land at Part of Lots 12 and 13, Concession 3 (East Flamborough) from General Industrial Commercial to Prestige Industrial Commercial to permit "big-box" retail development
OMB File No. O050052
OMB Case No. PL041198

Trinity Development Group Inc., Rosart Properties, Waterdown Business Improvement Area and others have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 05-021 of the City of Hamilton
OMB File No. R050063
OMB Case No. PL041198

Trinity Development Group Inc. has appealed to the Ontario Municipal Board under subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Hamilton to approve a proposed plan of subdivision on lands composed of Part of Lots 12 and 13, Concession 3 (East Flamborough), in the City of Hamilton
25T200404
OMB File No. S040107
OMB Case No. PL041198

APPEARANCES:

Parties

Flamborough Power Centre Inc.

Trinity-Rosner

Counsel

Dennis Wood

City of Hamilton	A. Zuidema
Rosart Properties	L. Townsend-Renaud
Flamborough Chamber of Commerce and Waterdown BIA	D. Bronskill
203490 Ontario Inc.	M. Van Lirope

**MEMORANDUM OF ORAL DECISION FROM A PREHEARING
CONFERENCE DELIVERED BY D. L. GATES ON NOVEMBER 14, 2005
AND ORDER OF THE BOARD**

On Monday November 14, 2005 a further prehearing conference on this matter took place in Hamilton. At the outset, the Board was advised that the remaining Parties had settled their differences. On consent they asked that the Board issue three Orders, Attachments #1, 2 and 3. The Orders build on one another and permit some development to proceed if only one or two of the Orders are the subject of a court review (which 203490 Ontario Inc. the "Company" has already commenced and withdrawn).

Mr. Van Lirope spoke on behalf of the Company, a former Appellant and Party to this matter. He requested an adjournment on the basis that his lawyer resigned from the file late Friday afternoon. Until late Friday afternoon Mr. Van Lirope thought that his lawyer would be making a Motion for Adjournment. At around 4:30 p.m. on Friday, November 11, his lawyer sent a facsimile of a letter to the Company advising that his firm was withdrawing from the file. Mr. Van Lirope indicated that he was President and part owner of the Company. Mr. Wood, Mr. Zuidema, and Mr. Bronskill opposed the adjournment on behalf of their respective clients.

The original basis for the Motion for Adjournment was so that the Company could pursue its appeal rights prior to the Board ultimately coming to its decision. The Company suggested that this would prevent duplication of effort and be in the public interest. It took the position that if it was successful in their appeal to the courts then another costly hearing would have to be held and the time spent by the Board on this

matter would be wasted. As of Monday, November 14 the Motion for Adjournment was for these reasons and to allow the Company to retain another solicitor. In essence the Board was being requested to adjourn the Motion for Adjournment for a Company that was no longer a Party or Appellant at the hearing.

It must be noted that the Company requested an adjournment in mid July and was fortunate to have the matter adjourned until mid September. In October the Board ruled that the Company had not pursued its appeal diligently and for this reason and others set out in the Board's decision dismissed the Company's appeal without a hearing. Also, because this matter involves large retail big box stores any delay can cause great prejudice to the parties. The Company and Flamborough Power Center Inc. are competitors for the same types of uses and the same tenants.

The proponents of the Orders take the position that the Company has not demonstrated even today that it is proceeding earnestly, that the Board is functus because it has already dismissed the Company's appeal and that to allow the adjournment would be to overrule the Board's previous decision and permit the Company to succeed in delaying now when such delay was not permitted previously by the Board.

Even the Flamborough Chamber of Commerce and the Waterdown BIA believed that they were being prejudiced and requested costs of this morning. They stated that nothing has been produced to suggest the Company will proceed diligently. It was noted that the Company includes principals who are experienced in land development. It was also noted that the Company has a history of engaging counsel at the last minute. The return date for this prehearing conference was originally scheduled for five days earlier.

It was suggested that everyone is prejudiced by the delay except the Company, which has nothing to lose by delay. All the other parties accepted the risk of proceeding and are requesting the Board to proceed.

In the circumstances the Board hereby dismisses the companies request to adjourn its Motion for Adjournment and dismisses the Motion for Adjournment for the reasons set out by the proponents above. The Board will consider costs on the request of any Party. It is so Ordered.

Planning Issues

At the outset of this matter the Trinity lands and the Loblaws lands comprise lands owned by Riotrin. Riotrin, and the Company, both owners of land on the South side of Highway #5, and FPCI a landowner on the North side of Highway #5 are competitors. All sites are somewhat constrained by the necessity of completing the Highway #5 and #6 interchange, particularly the lands of the Company which also has access challenges. Each company appealed each other's planning instruments which would give the other company a competitive advantage. Some of the planning instruments were appealed by the Waterdown Business Improvement Area and the Flamborough Chamber of Commerce ostensibly to protect existing businesses so as to prevent blight in older retail areas.

On November 14, the Board heard oral evidence from Mr. Fothergill, an experienced planner retained by FPCI in 2003 respecting these applications. He was qualified by the Board to give opinion evidence. He indicated that FPCI and Trinity lands are designated in the Official Plan for the former Town of Flamborough as Prestige Industrial-Commercial and General Industrial-Commercial and that these designations permit a wide range of industrial and commercial uses including wholesale and/or retail warehouse use and home improvement, furniture or appliance outlet.

In June 2004, FPCI applied to amend the Official Plan for the Region of Hamilton-Wentworth, and Flamborough OP, and the Zoning By-law to permit an expanded range of retail and commercial uses and in particular department stores. A public meeting was held on February 1, 2005 and Amendments 21 and 98 were adopted amending the Regional and City's OP's respectively so as to permit the development of a big box retail including department stores on the FPCI property. Staff recommended in favour of these planning instruments including Zoning By-law Amendment 05-021 subject to the phasing of development pending traffic studies, traffic improvements, and a satisfactory market study for the final phase. Each planning instrument attracted a number of appeals.

Regional Official Plan Amendment Number 17, adopted on October 29, 2003 and now in force, permits department stores and grocery stores on the Trinity lands (Riotrin Power Center lands at that time). Trinity's lands are also subject to Flamborough's

Official Plan Amendment #96 which permitted department store, grocery store and retail establishments subject to size limitations. Development on the Trinity lands is to be phased in in conjunction with road improvements. Initially Trinity appealed this O. P. Amendment but withdrew its appeal by letter dated February 2, 2005.

The FPCI property is currently zoned Prestige Industrial-M1-1 and General Industrial M2-1 which permits a wide range of industrial and commercial uses implementing the OP (but not department stores). The zoning on the Trinity lands is Prestige Industrial Holding, which additionally permits wholesale and retail warehouse facilities, retail establishments and video rental establishment. Zoning holding provisions which tie development to road improvements, also exist on the Trinity lands in particular relating to the Highway #5 and #6 interchange. Trinity initially appealed this zoning (By-law 03-332) but withdrew its appeal by letter dated February 2, 2005.

FPCI's applications were filed to permit retail and commercial uses including department stores similar to the uses permitted on the Trinity lands (Riotin lands at that time) with the exception of a supermarket. In support of the FPCI applications Mr. Fothergill authored a planning report, submitted a MPG market report, a MPG response to peer review, traffic impact study, a revised traffic impact study and an addendum to the traffic study.

Both the sites on the North and South side of Highway #5 were thoroughly examined through an exhaustive public process prior to the Municipality passing the various planning instruments. Exhaustive planning studies were completed which concluded these applications were in the public interest, conform and implement the regional and local official plans and represent good planning.

Since that time all the parties have agreed to settle with similar holding provisions for each except that the Company has not agreed to settle but wishes to press on with its appeal based on market issues. The revisions to implement the settlement only make the planning instruments stronger by providing more access to FPCI's land, more detail in the holding provisions and greater support for existing businesses.

Mr. Fothergill recommended the Plan of Subdivision with the proposed conditions to the Board. He testified that the plan meets all the tests set out in Section 51(24) of the *Planning Act* and that it is in the public interest because it provides for a widening of

Highway #5 and a significant road widening (Block 6) of Highway #6 in order to facilitate the proposed intersection. All landowners in the vicinity would benefit from these dedications.

Through the subdivision process, the Municipality will be provided with a water tower site, and a storm water detention and quality pond. Additionally the City has the ability to link the lands south of Block 12 (Block 12 contains a watercourse) to the lands to the North if it chooses to link them in the future. Development on Blocks 2 and 15 can be sited so as to front on and have access onto Street A and not Highway #5. Mr. Fothergill opined, the subdivision conditions (which help accomplish the foregoing) are reasonable in the circumstances.

Attachment #1, as a result of the settlement, permits the subdivision plan to proceed and adds an additional condition for a further road connection through FPCI's lands to Highway #5 should the Ministry of Transportation or the Municipality require it.

The Board heard no reason why this subdivision plan should not proceed, heard extensive evidence as to its advantages as noted above and will dismiss any outstanding appeals as provided for in Attachment #1. Attachment #1 is so Ordered.

Attachment #2 is the Order which dismisses the Rosart, Trinity and all the other appeals to the extent set out in the Order. The Board notes that the Flamborough Chamber of Commerce and Waterdown BIA withdrew their appeals by letter dated October 24, 2005 to the extent set out in Attachments #2 & 3.

A good explanation as to these planning instruments is set out in the Staff Report attached as Exhibit "C" to Mr. Fothergill's Affidavit wherein the Staff supported these amendments. Relevant portions of the Executive Summary of the Staff Report as well as the Recommendations are attached as Attachment #4. Clearly the Staff and City Council believed these applications were in the public interest and good planning. Their reasoning is set out in the Attachment. Mr. Fothergill came to the same conclusions. The Board specifically adopts paragraphs 127 & 129 of Mr. Fothergill's affidavit which states as follows:

"127. For the reasons outlined above, it is my opinion that the FPCI applications have been thoroughly reviewed by the City, its staff and consultants, and have been the subject of a

thorough public consultation process. The proposed development is appropriate for the FPCI property, is supported by planning, market and traffic studies and meets the official plan tests...

129. It is my opinion, the FPCI proposed development represents good planning." .

The Board heard no reason why the OP amendments and Zoning Amendment should not proceed, heard extensive evidence as to their advantages and that they represented good planning and will dismiss any outstanding appeals as provided for in Attachment #2. These proposals will give local residents a full range of shopping alternatives in their local community. They will compliment and support the nearby industrial uses, without causing blight in older commercial areas or unforeseen traffic problems which cannot be managed by the planned traffic improvements. Attachment #2 is so Ordered.

Mr. Fothergill then went on to review Attachment #3. With respect to the OP, the changes would strengthen the position of the Waterdown BIA and the Flamborough Chamber of Commerce by increasing the minimum size of retail stores, eliminating restaurants from some of FPCI's lands and limiting exceptions from these rules. An automobile service station and gas bar was added as a permitted use to be ancillary to the proposed Canadian Tire store. On some of the lands accessory convenience retail uses were deleted as a permitted use (Site-Specific Area 14). On a portion of a Site-Specific Area 14 lands restaurants were deleted and market study rules enhanced.

On the same lands amendments to the Zoning By-law deleted Accessory Convenience Retail Store but added Automobile Convenience Center and strictly defined it. The amendments decreased the required rear yard setback so as to permit the buildings more easily to face Street A and not front on Highway #5. They also clarify the calculation of gross floor area of all retail establishments and identify precisely the exceptions to the minimum size restrictions for certain retail uses. Also as in Attachment #1 & 2 the amendments set out the new access requirements of the Ministry of Transportation through FPCI's land. They also reduce the number of square foot floor space permissible for each phase for the FPCI development.

In all cases Mr. Fothergill recommended the original planning instruments (OP's and Zoning By-law) and the amendments as good planning. All these amendments seem to the Board to be in the interests of the Flamborough Chamber of Commerce and the Waterdown BIA in preventing blight in existing commercial areas.

The Board heard no reason why the proposed development should not proceed. The Board heard extensive evidence as to its advantages and that the OPs and Zoning Amendment as amended represented good planning and will dismiss any outstanding appeals as provided for in Attachment #3. Attachment #3 is so Ordered.

"D. L. Gates"

D. L. GATES
MEMBER