

ISSUE DATE:

**Feb. 12, 2009**



PL061100  
PL070625

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

Appellant: Kraft Canada Inc.  
Subject: Proposed Official Plan  
Amendment No. 49  
Municipality: City of Mississauga  
OMB Case No.: PL061100  
OMB File No.: O060211

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Kraft Canada Inc.  
Subject: By-law No. 0225-2007  
Municipality: City of Mississauga  
OMB Case No.: PL070625  
OMB File No.: R070164

**APPEARANCES:**

**Parties**

City of Mississauga

Kraft Canada Inc.

**Counsel**

R. Swayze

M. Bull

C. Estrela

I. Banach (student-at-law)

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

This is a hearing of the appeals by Kraft Canada Inc. (Kraft) from a decision of the City of Mississauga (City) to approve an amendment to the City Official Plan (OPA 49) and against By-law 0225-2007 (By-law) as they relate to its property at 27 Reid Drive (subject property) that includes its existing wheat milling operation known as the Mississauga Mill (Mill) and is located within the Streetsville Planning District.

The subject property consists of approximately 15 hectares of land area. Approximately 3.5 hectares make up the tableland area located at the southeast corner of Reid Drive and Queen Street (an extension of Mississauga Road north through the village of Streetsville) and abutting a mainline railway corridor serving the Canadian Pacific Railway and GO Transit to the south. The tablelands make up the majority of the existing mill operation. To the east of the tablelands are between 11 and 11.5 hectares of valley lands associated with the Credit River. The valley land area is made up of approximately 7.7 hectares being unmanaged and in a natural state, approximately 2.8 hectares being the actual surface area of the Credit River and approximately 0.5 hectares made up of existing buildings, storage silos, roads, parking and manicured lawn area associated with the Mill operation.

The City is seeking to attain the future residential and green space use of the subject lands. The City acknowledges the right of the Mill to continue its operation but the City will require any expansion to be located on the tableland area and limited in size to a maximum of 5 percent of the existing gross floor area.

The appellant is seeking to protect its existing industrial operation including substantial expansion on the tableland area over the next ten years. The Mill constitutes the largest soft wheat flourmill in Canada and Kraft has no intention of ceasing its operation in the foreseeable future and not within the normal 20-year planning period associated with an Official Plan.

On behalf of the City, K. Crouse and J. Rouse were qualified and presented expert land use planning evidence and opinion in support of OPA 49 and the By-law respectively. J. Campbell, senior planner with the Credit Valley Conservation Authority (CVCA), was also qualified and presented evidence and opinion in support of OPA 49 and the By-law.

Area residents Robert and Verna Blackburn, Ms Moss, A. Idec, M. Pogany and P. Orphanos presented evidence in opposition to any expansion of the existing Mill operation. While acknowledging the Mill's right to continue its operation, they expressed their belief that any expansion would exacerbate existing concerns including, noise, dust, truck traffic, risks related to fire and explosion, valley land interference and vermin.

Wm. Papoutis, Vice Chair of the Sierra Club of Peel Region, and S. Rivers, a land use planner and volunteer with the Sierra Club of Canada, also expressed concerns related to allowing any additional expansion of the Mill.

All area residents, including those representing the Sierra Club, indicated their support of the re-designation of the subject property to High Density Residential for the tableland area and Greenbelt for the valley land area.

On behalf of Kraft, P. E. Johnston was qualified and presented expert land use planning evidence and opinion in support of the Mill operation continuing as a Business Employment use with all reasonable rights of expansion on the tableland and a right to replace structures within the existing operation area in the valley lands subject to CVCA approval. There was no objection to the valley lands being designated Greenbelt subject to an appropriate special provision for the Mill operation portion.

Also on behalf of Kraft, P. Norman provided expert economic evidence related to the Mill operation and the wheat farming and bakery sectors of the Ontario economy; J. Trought provided expert air quality evidence related to the Mill operation; A. D. Lightstone provided expert acoustical evidence related to the Mill operation; M. Duffin, Mill site manager, provided evidence related to the Mill operation; C. B. Middlebro' provided expert traffic engineering evidence related to the Mill operation and surrounding area; and, G. R. Nielsen provided expert ecological evidence related to the valley lands and its relationship with the Mill operation.

Having considered all of the evidence and submissions presented over the course of 9 days, including the 43 exhibits filed, the Board finds that OPA 49 and the By-law, as they affect the subject tablelands are not consistent with the applicable Provincial Policy Statement (PPS), do not conform to the applicable Growth Plan for the Greater Golden Horseshoe (GP) and do not conform to applicable policies of the City of Mississauga Official Plan (OP). The Board finds that the tableland area of the subject property should remain in a Business Employment OP designation subject to site-specific policies and appropriate implementing zoning. The Board finds that the Greenbelt designations of the valley lands are appropriate subject to inclusion of provisions for the reconstruction of existing structures on their existing footprints, including minor alterations or additions to accommodate the replacement or upgrading

of equipment, buildings or structures and subject to receiving all necessary approvals of the CVCA.

The reasons follow.

Prior to the adoption of OPA 49 and enactment of the By-law, the subject lands were designated Business Employment and Greenbelt in the applicable OP and zoned M1 Light Industrial, M2 Heavy Industrial and F Flood Zone in the Streetsville Zoning By-law 65-30. The Business Employment designation permits a broad range of business activities including industrial uses. The M2 zone, the zone covering the majority of the tableland Mill operation area, permits manufacturing and warehousing uses and specific heavy industrial uses including a flourmill, grain elevator and lumber yard. There was no dispute with these facts.

The Mill has had a long history on the subject property beginning as early as 1835. It utilized the waterpower afforded by the Credit River until 1968 when it was converted to a modern pneumatic electrical powered mill. Over the years, the Mill capacity has continued to grow: 1865 – 2.3 metric tons per day; 1895 – 4.5 metric tons per day; 1968 – 227 metric tons per day; 1994 – 116,000 metric tons per year of finished flour product. During 2008, additional milling equipment was installed to increase the Mill capacity to 124,000 metric tons of finished product per year. The new equipment is expected to be operational in 2009 and it was the evidence of the site manager that no additional existing floor space exists to increase capacity beyond the 124,000 metric tons per year. The existing Certificate of Approval (CA) issued by the Ministry of the Environment (MOE) to Kraft in 2008 permits a maximum capacity of 130,000 metric tons per year. There was no dispute with these facts.

During this long history, the village area of Streetsville, eventually subsumed by the City, continued to grow and residential development occurred on the east side of the Credit River, opposite the subject property, along the north side of Reid Drive, opposite the subject property and to the south beyond the existing mainline railway corridor abutting the subject property. Evidence confirmed that newer subdivision developments included clauses warning purchasers of disturbances including those that may result from proximity to Pearson Airport and the Mill operation. There was no dispute with these facts.

Since conversion of the Mill to pneumatic electrical power, there has been a marked reduction in impact to the valley lands including the removal of the waterpower-related canal and the increasing natural regeneration of all valley lands not covered by water (approximately 7.7 hectares). The Mill operation area within the valley lands is now confined to approximately 0.5 hectares. This was clearly demonstrated in the air photo evidence series that spanned the last 50 years plus.

In 2005, the City embarked on a review of the Streetsville District planning policies and a first draft of OPA 49 was circulated to citizens on February 22, 2006. This was the first official notice to Kraft of a change in designation from Business Employment to High Density Residential. This circulation resulted from the City's adoption of staff recommendations set out in a report to the City Planning and Development Committee dated January 24, 2006. The only purpose or comment cited for the proposed change in use was "Permit the redevelopment of remnant Business Employment land located in walking distance of the GO Train Station and along public transit route to higher density residential lands" and "encourage development which is compatible with adjacent greenbelt uses." A public meeting was held March 14, 2006. The final staff report recommending the approval of OPA 49 was dated August 15, 2006 and comments included: "The land uses permitted in the Business Employment designation are not compatible with the existing and future residential uses of surrounding lands." This was the report put before the City Planning and Development Committee and Council to assist in the making of its decision to which this Board must now have regard.

At this hearing, the Board finds that the City has not substantiated any compatibility issue with the Mill operation on surrounding residential uses or valley land area. The City planner, Ms Crouse, submitted that the mere proximity of Reid Drive as a local road, residential existing on the north side of Reid Drive and the existence of surrounding greenbelt and residential lands results in her opinion that the existing use is incompatible. She did not raise the issue of compatibility in her witness statement and confirmed the City taking no position, and calling no evidence on issues related to noise, dust, traffic, odour, explosion risk or vermin. If the City is not alleging any adverse impacts resulting from the use, the Board finds itself at a loss as to how the City came to the conclusion that the use is incompatible. The evidence is just not there.

Interestingly in a case presented by Kraft, *Re City of Mississauga Restricted Area By-law 582-82*, 54 O.M.B.R. 190, related to the proposed down-zoning by creation of the non-conforming use of the Mill operation in the valley lands, the Board, otherwise constituted, noted: "The municipality has not made any offers to purchase the land and to relocate the industry at their expense for reasons of public interest. In fact no evidence was adduced to indicate that the municipality has any real concern with the existence of the industry" and "no other evidence was adduced by the City to indicate that the Reid Milling Company (as the Mill was known at the time) is either a nuisance or a threat to the public or the environment." A bit of history repeating itself it seems.

While the concerns of area residents raise the spectre of incompatibility, there has been no evidence presented to substantiate that any problem raised by area residents continues as a direct result of Kraft not meeting its CA obligations, in fact, the evidence is not contradicted that there have been no successful complaint prosecutions and that Kraft has been fully cooperative with all complaint officials when contacted. By-law Enforcement for the City advised the Commissioner of the Planning and Building Department in a report dated February 23, 2005 "when investigating noise complaints, they have found Kraft Mill to be diligent and responsive to any of their requests. They have no record of vermin infestations stemming from the mill operation, and are not investigating any violation of municipal by-laws." The acoustical expert for Kraft did acknowledge noise excess impacting the abutting townhouses on Reid Drive that is presently being addressed in accordance with the CA. He confirmed that new equipment had been ordered and, as required by the CA, the MOE noise guidelines NPC-205, applicable in the circumstance of an industrial use in proximity to a sensitive use, in this case residential, will have to be met.

Kraft on the other hand presented a multitude of well-qualified and recognized experts all who remained unshaken that the Mill operation can exist and expand without adverse impact in full compliance with all agency requirements. This included the evidence and opinions of an air quality engineering expert, an acoustical engineering expert, a traffic engineering expert and an ecological expert. No other experts contradicted their expertise at this hearing.

The land use planner for Kraft, Mr. Johnston, had the advantage of relying on this expert advice and reports in confirming his opinion that there is no logical reason to

change the land use designation of the subject lands at this time. There is no empirical evidence justifying any incompatibility of use. There is insufficient rationale or reason and it is unprecedented, in his opinion, for the City to force an existing major business employment owner to limit its operation against its will contrary to established Provincial and City policy.

The City had no such advantage because it did not undertake any expert or comprehensive study leading to the justification of the change in use from Business Employment to High Density Residential, as it certainly should have knowing the circumstances of this case.

The evidence of the economist for Kraft confirmed the subject property to be an ideal site for its operation. It is located central to Ontario's soft wheat growing farmers who supply it and to the bakeries it serves. The existing facility constitutes the largest soft wheat flourmill in Canada and second largest in North America. The abutting mainline railway is strategic to the Mill should local wheat supply be disrupted. Wheat is the third largest seeded crop in Ontario and Ontario farmers depend on the Mill as a local market for their crops, exporting being more expensive to local farmers. There are presently 14,000 farmers in Ontario growing wheat in rotation. Ontario wheat production averaged 2.1 million metric tons between 2004 and 2008. It was his opinion that the restrictions proposed by the new OP designation constitute legislative damage and that to survive, the Mill and its resource providers and product users demand certainty of operation and ability for growth. Any upset could result in a domino effect adversely affecting both farmers and bakeries and it was his opinion that the added restrictions are severe and would have a deleterious effect on Ontario's economy.

The Board finds the study undertaken by the economist retained by Kraft to be credible, educational and compelling. There is no dispute of the significance of this Mill to the agricultural community and baking industry, both important to the economy of the Province. He was forthright in stating his opinion that if the Mill operation came into question and became less competitive in its ability to respond to market demands, Kraft would most likely consolidate its milling operation in Toledo, Ohio, where it presently operates the largest soft wheat flour mill in the world. This, of course, would dramatically affect the cost to Ontario farmers and bakeries not to mention the loss of 43 jobs at the Mill. Counsel for the City, in final submissions stated that Kraft "could put

any added production in the Toledo plant, which would be perfect.” When considering the larger picture, namely the continued health of the economy of the Province of Ontario, the Board is not so sure.

The adequate provision of employment opportunities and the protection of the financial and economic well-being of the Province and its municipalities are provincial interests to which this Board must have regard as set out in Section 2 of the *Planning Act*.

It was the opinion of the land use planner for the City, Ms Crouse, that the subject site tableland represents an isolated remnant industrial site in the context of a residential area and would not meet the definition of Employment Area in the PPS set out as “those areas designated in an official plan for clusters of business and economic activities, but not limited to, manufacturing, warehousing, offices, and associated retail and ancillary facilities.” It was her reading of PPS policy 1.3.1 c) that if not an Employment Area, then the subject site would not have to be planned for the protecting and preserving of the current and future uses.

The land use planner for Kraft disagreed. It was his opinion that the subject site, with its previous permissions, was quite capable of accommodating a cluster of business and economic activities. He also pointed out PPS policy 1.3.1 as requiring planning authorities to “promote economic development and competitiveness” and 1.3.1 b) to “take into account the needs of existing and future businesses.” PPS policy 1.3.2 does set out that “planning authorities may permit conversion of lands within employment areas to non-employment uses through a comprehensive review, only where it has been demonstrated that the land is not required for employment purposes over the long term and that there is a need for the conversion.”

It is clear in the evidence before this Board that no such comprehensive review has occurred. The Board finds that in the circumstances of this case, involving an industry of provincial significance with a desire to remain competitive and a need to expand, the subject site tableland does constitute an Employment Area as defined in the PPS and any change opening the door to a conversion from employment use to residential use should be subject to the comprehensive review provisions of the PPS.



In that respect regarding the subject property, as it stands, OPA 49 is not consistent with the PPS.

The policies set out in the GP 2.2.6 Employment Lands include policies similar to those in the PPS and for all of the reasons previously stated, the Board finds that OPA 49 does not conform to the GP as it affects the subject property.

Prior to the use proposed by OPA 49, the subject property tableland was designated as Business Employment in the City OP. OP policy 2.3.2.5 sets the objective of the City “to facilitate the operation and expansion of existing businesses permitted by this Plan.” It is the opinion of the land use planner for Kraft that the City’s unsolicited proposal to change the land use designation and restrict the operation of a significant existing industry conflicts with this objective. The Board agrees.

In addition, the land use planner for Kraft pointed out that if the subject property that abuts a mainline railway corridor were to be designated for residential use, “a noise impact study will be submitted” prior to approval-in-principle as set out in OP policy 3.17.9.2. The City has undertaken no study in that regard.

The land use planner for Kraft also raised the inappropriateness of designating a significant area for high-density residential development absent any feasibility analysis regarding increased traffic and existing industrial site remediation. The proposed designation and zoning to high density residential could accommodate upwards of 600 to 700 residential units with impacts on the surrounding area unknown at this time.

The Board finds that OPA 49, as it affects the subject property tableland, does not conform to the policies and objectives of the applicable City OP. Just because the City is taking the initiative, in this case to change the land use designation on the subject property from Business Employment to High Density Residential, does not absolve it of its responsibility to properly and comprehensively justify the change in light of the PPS, GP and its own OP and especially in the circumstance of an existing, unwilling and significant industry presently operating an expanding business in compliance with a recent Ministry of the Environment issued Certificate of Approval that takes into consideration the proximity of the Mill to other sensitive land uses and is abutting an existing mainline rail corridor important to its business.

With respect to the issue of existing facility replacement, including minor alteration or addition, on that portion of the valley lands presently occupied by the existing Mill operation, the Board is satisfied that the CVCA is in the best position, with the most experience and appropriate mandate related to natural heritage and natural hazard protection, to address future changes at the time they might arise.

PPS Natural Heritage policy 2.14 permits development and site alteration if it has been demonstrated that there will be no negative impacts on the natural features or their ecological function. PPS Natural Hazard policy 3.1.2 permits development and site alteration where it is demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard. The ecologist for Kraft expressed his opinion that the CVCA could be satisfied in that regard. He did acknowledge OP policy 3.9.2.6 setting out that development would not be permitted if there are lands suitable for development on the property beyond the hazard lands. He agreed that if replacement facilities could reasonably be located outside of the valley lands area, they should be. He also confirmed the necessity of properly protecting a rare healthy butternut tree identified adjacent to the valley lands portion of the Mill operation.

While the planner for CVCA expressed a preference for a less permissive policy within all of the valley lands area, he did confirm the CVCA's authority, the subject area being within its "Fill and Construction" regulation area, to require appropriate expert studies prior to the granting of any permits. He confirmed the CVCA's important role to assist landowners in protecting and enhancing natural heritage and natural hazard areas. The Board would expect nothing less than a fully consultative and cooperative process between the Parties in that regard.

Overall, the Board prefers the expert evidence that has been presented by Kraft over that of the City. To some degree, Kraft has been forced to retain independent expertise to defend and confirm its long-standing existing operation that has continued in conformity with Official Plans and in compliance with Zoning By-laws for many decades. The Board is somewhat surprised by the suddenness of the change and minimal dialogue between the City and what has clearly been confirmed as a very important industry with far reaching economic spin-off in Ontario. Neither the City nor the area residents have presented evidence to substantiate a need for the significant

change proposed or proven any non-compliances resulting in any unaddressed ongoing adverse impacts.

The Parties to this hearing both acknowledged the Board's role to balance the public and private interests in this case. The Board finds that the pre-OPA 49 circumstance represents a more reasonable equilibrium in that regard, save Kraft's willingness to limit the permitted uses to those now existing on the subject property and to be further restricted by the implementation of a new construction envelope. Without evidence of non compliance with agency requirements or actual adverse impacts being caused by Kraft, the Board finds OPA 49 to be inherently unfair to the existing industry and a threat to the overall economic well-being of the associated agricultural and bakery employment sectors. Kraft and its predecessor companies have carried on business without prosecution of complaint for many years, long before the arrival of residential subdivisions to the area. It has enhanced the valley land area and has cooperated with all initiatives of the Federal Department of Oceans and Fisheries, Provincial Ministry of Natural Resources, Credit Valley Conservation Authority and Credit River Anglers Association. This is all in addition to it operating its business in compliance with a recent Certificate of Approval issued and regulated by the Provincial Ministry of the Environment. The evidence clearly confirms a business committed to its own improvement and the improvement of the community at large, including being a recognized sponsor of special events in the local community.

The acoustical engineering expert for Kraft astutely observed when asked about noise complaints from residents, none of which have resulted in a successful prosecution, that "poisoned relations between parties sometimes make all observances, even compliant ones, seem more irritating." Perhaps the Parties and Participants to this hearing can look to finding an antidote. In similar past circumstances, the Board has encouraged the creation of special liaison committees to meet and better understand each other's concerns and to constructively share ideas on a regular basis. In this case the Board would encourage the formation of such a group that should include a senior Kraft representative, the local Councillor or representative, a conservation authority representative, a representative of the Reid Drive homeowners and a representative of the south and west facing Credit River valley subdivision homeowners.

In conclusion, the Board **Orders** that the appeals by Kraft Canada Inc. are allowed, in part, and OPA 49 is modified to designate Area 11A as Business Employment and Area 11B as Greenbelt with the following Site 11 special policies 4.32.8.12 to apply:

4.32.8.12.1 Area 11A

- a. The lands identified as Area A, may be used for grain processing, grain milling, and related accessory uses, including accessory offices, outdoor storage located to limit its visibility to Queen Street, Reid Drive and the Credit River valley, and the temporary storage of motor vehicles related to the primary use of the property. Any new construction will be limited to a construction envelope identified in the applicable implementing zoning by-law.
- b. Amendments to the Official Plan and Zoning By-law will be required prior to the development of Area A for any purpose other than grain processing, grain milling, and related accessory uses.

4.32.8.12.2 Area 11B

- a. On the lands identified as Area B, the existing buildings may be used for grain processing, grain milling and related accessory uses. Repairs that do not enlarge or extend the existing buildings or structures and which are for the purpose of maintenance or restoration of the buildings or structures to a safe condition will be permitted. Subject to the approval of the Credit Valley Conservation Authority, minor alterations or additions to existing buildings and structures to accommodate the replacement or upgrading of equipment, buildings or structures will be permitted. Subject to the approval of the Credit Valley Conservation Authority, existing buildings and structures may be replaced with new buildings and structures, provided that any new building or structure is not larger or higher than the building or structure it replaces and is in the same location as the building it replaces.

As modified, OPA 49 is approved. In all other respects the appeal by Kraft Canada Inc. of OPA 49 is dismissed.

With respect to the appeal against By-law 0225-2007, the Board allows the appeal, in part, and the Board withholds its Order for 60 days from the issuing of this decision pending receipt of a By-law amendment in a form satisfactory to the City that conforms to OPA 49 and incorporates the following:

1. A new construction envelope on that portion of the subject property identified as OPA 49 Area 11A no greater than as illustrated in Exhibit No 9, page 24, which incorporates an appropriate new building setback from top of bank satisfactory to the CVCA and the appropriate E2 Employment Zone new building setback for buffering purposes along the frontage of Reid Avenue.
2. The application of all E2 Employment Zone regulations on that portion of the subject property identified as OPA 49 Area 11A restricted to the uses permitted in OPA 49 and subject to no new building construction occurring outside of the new construction envelope.
3. Special provisions conforming to OPA 49 for that portion of the subject property identified as OPA 49 Area 11B.

The land use planners for the City, CVCA and Kraft confirmed their ability to meet to resolve the final form of a By-law amendment in conformity to the Order of the Board regarding OPA 49. The Board may be spoken to should difficulties arise. This Board Member is seized in that regard.

“D. R. Granger”

D. R. GRANGER  
VICE CHAIR