

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



**ISSUE DATE:** December 20, 2017

**CASE NO(S):** PL161293

**PROCEEDING COMMENCED UNDER** subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Marmora Freezing Corp.
Subject:	Minor Variance
Variance from By-law No.:	7625
Property Address/Description:	50-60 Marmora Street
Municipality:	City of Toronto
Municipal File No.:	A0648/16EYK
OMB Case No.:	PL161293
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OMB Case Name:	Marmora Freezing Corp v. Toronto (City)

**Heard:** November 7 to 9, 2017 in Toronto, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

Marmora Freezing Corp.

Dennis Wood

City of Toronto

Alexander Suriano

**DECISION DELIVERED BY PAULA BOUTIS AND ORDER OF THE BOARD**

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**INTRODUCTION**

[1] This is an appeal by Marmora Freezing Corporation (or “Fiera Foods” or “Applicant”) of a decision of the Committee of Adjustment (“Committee”) for the City of Toronto (“City”). The Committee refused to authorize variances to legalize a variance in Floor Space Index (“FSI”) for the existing industrial building and to legalize the location

of outside equipment, specifically garbage compactors located in the front yard of the facility.

[2] The facility is located at 50-60 Marmora Street (“Facility”). The property is 3.13 hectares in size. It is north of Highway 401 and west of Highway 400. To its south, north, east and immediate west are a wide range of industrial and commercial facilities. To the immediate west is Stetsco Global Packaging, Supreme Quilting, and Grand National Apparel. To the west of those facilities is a rail corridor, and to the west of that is a residential neighbourhood. The closest residential street to the Facility running north-south is Jodphur Avenue. Jodphur Avenue is at its closest point to the Facility about 110 metres (“m”) away, where 49 Jodphur Avenue is located.

[3] The Board understood that sometime towards the end of 2015 a major expansion at the Facility was concluded. Much of the building expansion that occurred was under a permit issued in 2007. The construction began in 2012. The expansion consisted of building large freezers and basement parking was converted to research and development uses. Between 2014 and 2016, condensers were installed to service the new freezers. Condensers have fans, circulate air and dissipate heat generated by the freezers to the outdoor environment.

[4] At the time the new condensers were installed, they were not authorized by the Ministry of Environment and Climate Change (“MOECC”), as required under the *Environmental Protection Act* (“EPA”). Following their commissioning, residents began to notice a significant increase in noise to their environment as full production ramped up. As a result, a provincial officer with the MOECC issued an order on February 17, 2016 and another on June 20, 2016 related to the noise. Suffice it to say, the MOECC is now significantly engaged with this Facility.

[5] As part of the Facility expansion, three additional structures were built without permits. One of these is a north equipment platform for the purpose of mechanical space, which added 955 square metres (“m<sup>2</sup>”). An open loading area on the east side of the building was converted to an enclosed space, adding 920 m<sup>2</sup>. Immediately adjacent to and to the south of that structure, also on the east side, an open loading area was

modified to add intermediate floors and to enclose it. The total new area for that is 1,864 m<sup>2</sup>. The conversion of the basement parking to production space results in an additional area of 6,946 m<sup>2</sup>.

[6] Robert Stevens is a licensed Professional Engineer and noise consultant with HGC Consulting. He testified on behalf of the Applicant regarding the noise environment at the facility and efforts made to address the noise issues. He also provided evidence regarding the extent to which the noise environment is affected by the uses giving rise to the minor variance applications. In so far as tests under the *Planning Act* ("Act") for minor variances related to noise, Mr. Stevens provided his opinion on these matters.

[7] The Board also heard evidence from Peter Norman, an economist with Altus Group. He provided his analysis and opinion from an economic and planning perspective with respect to the FSI variances before the Board.

[8] The third and final witness for the Applicant was David McKay, a land use planner, who provided his overall opinion on planning matters related to the minor variances.

[9] On the first day of the scheduled hearing, the Parties advised the Board that a settlement proposal was going to City council that day for a vote and requested the appeal be adjourned until tomorrow morning. Prior to standing the matter down for the day, the Board addressed whether any of the individuals present sought party or participant status.

[10] After some discussion, the Board granted participant status to several individuals who reside in the neighbourhood, all of whom opposed the authorization of the variances. Angelo and Rina Zamperin, residing at 49 Jodphur Avenue, were granted participant status. Their son, Paul Zamperin, acted as agent for them. Additionally, Fabio Ovettoni, residing at 34 Jodphur Avenue, and James Van Zuylen, residing at 41 Jodphur Avenue, were granted participant status. Prior the conclusion of the hearing on the second day, Joel Camelo, residing at 33 Jodphur Avenue, was also granted participant status.

[11] On consent, through Paul Zamperin, the Board also accepted an additional 24 written statements representing 18 households. In addition to those written statements, four more letters came from residents at 41 Jodphur Avenue, which was otherwise represented at the hearing by Mr. Van Zuylen (Exhibit 19). The Board reviewed all these. The vast majority of these letters were form letters or variations thereof supporting Mr. Ovettoni's submissions opposing the variances.

[12] At the start of the second day of the hearing, the City and Applicant confirmed a settlement had been reached. The proposed variances remained unchanged, but were subject to one condition, described later in these reasons.

[13] Following the conclusion of the hearing, the Board reserved its decision. After careful consideration of all the evidence, the Board has concluded that it will allow the appeal, in part. The Board authorizes the requested variances, subject to two conditions, reflected in Attachment 1 to these reasons.

## **BOARD'S ROLE**

[14] Prior to addressing the specific tests under the Act, the Board wishes to address issues related to its role.

[15] The Participants, understandably, feel that if the Board approves the variances "after the fact", this amounts to allowing the Applicants to flout the rules. While the Board does not countenance undertaking construction or other activities without the needed approvals, the Board's judgment on planning permissions cannot be clouded by this. The Board must emphasize that its role is not to an enforcement role for breaches of City By-laws or provincial legislation. The Board's obligation is to determine whether the variances requested meet the statutory requirements under the Act and constitute good planning, in accordance with the evidence presented.

[16] The Board acknowledges the evidence of the Participants who indicated they have struggled greatly with the noise environment since the expansion. It was also their evidence that the noise attenuation measures since taken by the Applicant through the

construction and installation of noise walls among other measures, and for which an amended Environmental Compliance Approval (“ECA”) is expected to be issued, have not in their view addressed the noise issues.

[17] The issue for the Board is whether unacceptable impacts – including noise impacts - arise from the variances themselves, not whether the Facility’s operations otherwise create noise impacts.

[18] As noted by the Applicant, though likely not very comforting to affected community members, members of the community can seek leave to appeal of any approved ECA under the *Environmental Bill of Rights*. Community members can also continue to engage the MOECC on the noise issues. The MOECC can, as the enforcement body, issue orders and prosecute offences, for example should adverse effects arise from noise, even after abatement activities have occurred. But all of this is outside the purview of the Board.

## **EVIDENCE AND ANALYSIS**

### **Planning Act Tests**

[19] For the Board to authorize variances from applicable zoning by-laws, several tests must be met. The Board, in any planning decision it makes, must find that the proposal is consistent with the Provincial Policy Statement, 2014 (“PPS”) and conforms to the Growth Plan for the Greater Golden Horseshoe, 2017 (“2017 Growth Plan”). In addition, the Board must be satisfied that provincial interests referenced at s. 2 of the Act have sufficiently been regarded to.

[20] Specific to minor variance applications, the proposal must meet the following four-part test under s. 45(1) of the Act:

- a. maintain the general intent and purpose of the official plan (“OP”)
- b. maintain the general intent and purpose of the zoning by-law

- c. be desirable for the appropriate development and use of the land; and
- d. be minor.

[21] The Board comments that the City passed an amendment to its OP, known as Official Plan Amendment 231 (“OPA 231”), in December 2013. While it has been adopted by the City, and is therefore an indication of its intent, OPA 231 is under appeal. Mr. McKay testified that the employment designations themselves are in place, while a limited number of policies are also in force. He advised as well that the current employment District Structure is to be replaced with just employment area and land use designations split into General and Core. He indicated it is similar to the current OP regarding design and compatibility, but there is more emphasis on intensification of employment areas.

[22] While OPA 231 is indeed a statement of the City’s intentions, as it is under appeal, the Board does not consider the policies referenced in evidence as central. As a result, the Board refers to the in force policies for the purposes of its analysis.

[23] Mr. McKay testified that the Facility is in an area designated as Employment Area. The applicable zoning by-laws are City-wide By-law No. 569-2013 (“City ZBL”) and North York By-law No. 7625 (“NY ZBL”). The former is under appeal, and is not in force, however the City seeks approval to variances under both By-laws pending the resolution of the appeals.

### **The Variances**

[24] Under both the City ZBL and the NY ZBL, the required FSI is one times the area of the lot. The area of the lot is calculated differently under each of these zoning by-laws. Lot area under the City ZBL is calculated by reference to the gross floor area, minus a number of areas listed in the regulation, divided by the area of the lot. The City ZBL excludes a larger number of areas than are excluded under the NY ZBL, which only excludes parking areas within the building. As a result, the variance from the City ZBL is 1.18 while the variance under the under the NY ZBL is 1.46.

[25] In his evidence, Mr. McKay commented that the City-wide ZBL removes areas that are more ancillary to the facility compared to spaces used for operations. For example, the City ZBL removes storage rooms, washrooms, electrical, utility, mechanical and ventilation rooms in the basement.

[26] The other variance sought by the Applicant arises only under the NY ZBL. This variance will allow for accessory outside equipment in the front yard. The Facility currently has garbage compactors located in the front yard.

[27] Mr. McKay confirmed that the City's planning department had no concerns with these variances (Exhibit 2, Tab 15). The City's Economic Development and Culture Division wrote a letter supporting the application (Exhibit 2, Tab 12).

### **Noise**

[28] The Board gathers on the evidence heard from the Participants that prior to the expansion, the relationship between the neighbours and the Facility was one of peaceful co-existence. Since the expansion, the residents report they have been suffering adverse effects from noise.

[29] While Mr. Camelo acknowledged the Applicant had spent quite a bit of money on mitigation measures since the expansion, and thought it might even be beyond what was required (confirmed by Mr. Stevens during his reply evidence), it was his experience that the change in the noise was minimal, an experience echoed by other Participants. Mr. Camelo was also confident that the noise is as a result of the condensers as he is able to distinguish between that type of noise and other intermittent noises, like the trains.

[30] Mr. Camelo candidly testified that whether or not the noise issues he was concerned about related to the variances was of no importance to him. He simply stated he wanted to block anything that the Applicant was doing because of the adverse effects created by the Facility. In the circumstances of his experience, as he described it, this is not surprising.

[31] Mr. Van Zuylen, who has lived in the area for 50 years, echoed the view that the intolerable noise is from the Facility, not the pre-existing noise from the highways, the trains, or the airplanes. Mr. Van Zuylen commented that truck traffic also is a noise issue and that sometimes trucks were there with motors running for five or six hours. He indicated he cannot sleep with his windows open because of the noise and diesel fumes.

[32] As the Board noted in the introduction, the facility in 2007 obtained building permits related to the expansion and construction started in 2012. The basement area to be constructed was intended to be, and in fact was constructed as, a parking lot. The Board understands from Mr. McKay that while it still looks visibly like a parking lot in the basement at this time, it has since been converted to a research and development use. This portion therefore is now included in calculating the gross floor area (Exhibit 15). The top half of the permitted building expansion is where the freezers are located. The condensers were installed to service these freezers.

[33] The Board qualified Mr. Stevens as an expert in acoustic noise and vibration, with a particular expertise in environmental noise, i.e. noise to the outdoors.

[34] It was Mr. Steven's uncontradicted evidence that the noise issues at the Facility are unrelated to the variances before the Board and the noise would continue even if the variances were refused.

[35] Mr. Steven advised the Board that when he conducted his Acoustic Assessment from February to November 2016 to support the amended ECA application, he undertook a process to determine which sources of noise, if any, require control. These sources are evaluated against the applicable limits. If they are not meeting the limits, then work is done to determine what noise has off-site impacts and what mitigation measures can address that. Every non-negligible noise source on-site is measured and inputted into a computer model to determine which noise source is contributing to the total noise level off-site.



[36] Following the Acoustic Assessment, a number of mitigation measures were implemented as recommended, over the course of March 2016 to March 2017. The most significant sound sources were determined to be the condensers at the northwest quadrant of the building and at the southwest quadrant. Noise walls have since been installed as recommended.

[37] In addition, noise control measures were required to address the water pre-cooling system for the water that circulates through the coolers and the variable speed drives for all 24 condenser fans. They must be limited to 65% capacity from 7 a.m. to 11 p.m. and operate at 35% capacity for the balance of time. Lesser sources also required noise control measures and those were also installed.

[38] Mr. Stevens testified that the activities that are the subject of this hearing were ongoing as of late 2015, and as a result were included in his Acoustic Assessment. He testified that the overall sound levels were found to comply with the MOECC noise criteria, with the completion of the engineered noise control measures. He noted that the noise limit standard of acceptability is not inaudibility. The Facility can contribute to the acoustical environment, but cannot dominate it. Mr. Stevens testified that City noise criteria are essentially the same, therefore the Facility is in compliance with both the MOECC criteria and the City's criteria at this time.

[39] In preparation for this hearing, Mr. Stevens was again retained to consider if there was any material contribution to the off-site sound levels from the areas that were built without permits and which resulted in the need for variances to the FSI. He testified that he compared the off-site sound levels of the Facility with and without the operation of the condenser fans in the four makeup air units serving the basement below the warehouse and the 11 air-conditioning units on the east addition. He indicated that the difference was less than one dBA, and referred to it as "immaterial", noting that a change in sound level of less than three dBA is generally accepted as imperceptible.

[40] With respect to the garbage compactor, Mr. Stevens testified that the observations on-site determined that this equipment was acoustically insignificant, to the point that it was not included in the model. Nonetheless, on October 27, 2017, this

input was added to the model. Mr. Stevens testified the computed difference with and without the compactors operating was less than 0.1 dBA, and therefore was an immaterial source.

[41] Even though not recommended by Mr. Stevens, additional noise walls are shown on the site plan. These are to be built in the future, or are currently under construction. The Board understood from Mr. McKay that as the Facility continues to operate and innovate it wants to be “ahead of the game” in future. These anticipated noise walls will encompass almost the entire perimeter of the Facility, including providing a secondary noise wall where the southwest condensers are located. This noise wall is currently under construction (Exhibit 2, Tab 10).

[42] The Board was provided with various exhibits regarding the noise complaints: a log record (Exhibit 9), how many in total (Exhibit 16), broken down by month (Exhibit 17) and also by location (Exhibits 8, 10, and 16).

[43] Unfortunately, it is difficult to draw conclusions from these Exhibits. While complaints may have gone down to some degree post installation of the noise walls, this could be for any number of reasons, including reporting fatigue. In some cases, the pre- and post-mitigation complaint numbers are the same, e.g. April 2016 there were 40 complaints, and in June of 2017 there were also 40 complaints.

[44] The aggregate data by location shows that 971 of the 1011 complaints – or 96% of complaints - are coming from six households. This may reflect something as simple as people are home all day at those six households, while others are away at work. In any event, the Board is really unable to draw any conclusions from the information and so draws none other than there are 1011 complaints, of which the vast majority come from six households, over the period of March 2016 to October 2017.

[45] The Applicant also provided the Board with an Exhibit showing complaints about fan noise or just “noise”, or in one instance, a complaint noted as “refrigerated trailer”, when the fans were off or operating at reduced levels. The Board understood that the fans are off when the Facility is not in operation. In two instances, fans were on, but

they were operating at the required level of at or below 35% (Exhibit 8). These were 28 of the 1011 complaints.

[46] The Board is unable to draw any firm conclusions from Exhibit 8 other than for a small number of complaints, it is unclear what the source of the noise actually was, and may well not have been from the Facility at all.

[47] Mr. Ovettoni entered into evidence the two provincial officer orders issued against Fiera Foods related to the Facility, dated February 17, 2016 and June 10, 2016. The Board understood it is these orders, in particular the first, that resulted in the work conducted by HGC Consulting and what led to the mitigation measures being in place. In them, the MOECC Officer makes findings that residents are suffering from adverse effects and orders various actions be taken to address the noise issues.

[48] On reply evidence, Mr. Stevens commented that regarding the noise generated from trucks as referenced in the June 2016 order, he was not sure that the MOECC correctly captured his comments that he “calculated that the sound levels from five refrigerated trucks would theoretically emit the levels of sound heard in the video”. The Provincial Officer noted that only two trucks were visible in the video.

[49] At the hearing, Mr. Stevens commented that this noise level was what one would have expected. He noted that in any event, the location from which it was measured was on the sidewalk from the front of the building, where no limit applied. In his opinion, there were no noise exceedances related to the trucks in the residential community.

[50] Ultimately, the Board concludes, based on the evidence of Mr. Stevens, that the portions of the expansion that result in the need for the FSI variances and the garbage compactor are not contributing materially to the noise environment of the Facility and that without the variances, the existing noise environment would continue.

[51] As a result of his work, it was Mr. Steven’s opinion that the variances can be considered minor, which is one part of the four-part test regarding variances under the Act.

[52] Similarly, it was Mr. Steven's opinion that the general intent and purpose of the OP is maintained. Policy 4.6.6 of the OP requires that outside storage and processing is not detrimental to neighbouring land uses in terms of noise. More specifically, Policies at 4.6.6 g) and i) require that development contribute to the creation of competitive, attractive, and highly functional Employment Areas, and refers to providing landscaping on the front and any flanking yards and by ensuring that outside storage or processing is limited.

[53] Mr. Stevens also commented on PPS policies 1.1.3.4 and 1.2.6.1. These policies address the following: avoidance of development and land use patterns which may cause environmental or public health and safety concerns; promoting development standards to facilitate intensification, redevelopment and compact form, while avoiding or mitigating risks to public health and safety; and indicating that major facilities and sensitive uses (e.g. residential) should be planned so as to ensure they are appropriately designed, buffered and/or separated to mitigate adverse effects from noise, amongst other things, and to ensure the long-term viability of those facilities.

[54] It was his opinion that the requested variances were consistent with the PPS since the activities that would be permitted by the variances do not materially contribute to the sound emissions and because necessary mitigation measures are in place, ensuring that sound emissions of the Facility meet the applicable limits.

[55] Mr. McKay adopted Mr. Steven's evidence on these matters, and further elaborated. His evidence is addressed later in these reasons.

### **Economic Matters**

[56] The Board also heard evidence from Mr. Norman, who the Board qualified as an expert in economic development, and in particular an expert in industrial economic development. His evidence addressed only the FSI variances.

[57] Mr. Norman testified that Fiera Foods has been operating for a little over 30 years, and had been at 50-60 Marmora Street since the late 1990s. He indicated that

this company stands out against recent trends in terms of increasing its production and creating new jobs and in innovation. For example, among other innovations related to manufacturing techniques, in 2017, Fiera Foods had introduced 100 new products between January and September 2017, while also having 25 patents on technologies.

[58] It was his evidence that with this employer in particular, given its investment, new space, new productivity and job growth on the site, that it has both upstream and downstream impacts. It purchases about \$150 million worth of raw ingredients annually and services major food service chains and national retailers. Mr. Norman advised that it spends about \$90 million on payroll total, with \$72 million at the Facility, supporting about 1,500 jobs, a large portion of which are manufacturing jobs. To provide context, Mr. Norman indicated that Statistics Canada data shows that only 15 firms of 1,999 classified as having employees in the food manufacturing industry in Ontario had 500 or more employees as of June 2017.

[59] It was Mr. Norman's opinion that the increased FSI that the Applicant seeks will directly increase the Facility's productivity, resulting in a direct contribution to the economic health of the City through a higher assessed value and higher property taxes to the City, and by providing a strong contribution to the local economy.

[60] Mr. Norman understands that most of the employment comes from people in the City. He indicated that in addition to the nearby highway connections to enable the movement of product, it has good transit, making it accessible to employees.

[61] Mr. Norman indicated that in addition to a number of domestic channels, Fiera Foods has a very high export quotient to the United States.

[62] Mr. Norman reviewed OP policies relevant to economic matters and whether the variances requested were desirable for the appropriate use of the land, building or structure, addressing two parts of the four-part test for minor variances under the Act.

[63] It was Mr. Norman's opinion that the FSI variances maintained the general intent and purpose of the following OP policies.

[64] The City's OP Policy 2.2.2(c) indicates that growth is to be directed to Centres, Avenues, Employment Areas, and Downtown to create assessment growth and contribute to the City's fiscal health. Policy 2.2.4.1 is similar, seeking to protect Employment District for economic activity to maintain the tax base and nurture a diverse tax base. Policy 3.5.1 preamble directs growth to key locations with high transit accessibility. Policy 3.5.1.1 a) directs the maintenance of a strong and diverse economic base; c), a healthy tax base; and d), promoting export-oriented employment.

[65] Regarding whether the FSI variances are desirable for the appropriate development or use of the land, building or structure, it was his opinion that the variances support the City's economic development strategies. The City's employment growth plan, for example, identifies the food and beverage industry as a high-value sector by bringing new money into the City either by exporting goods or services or by attracting new investors. It was his opinion that it also strengthened and reinforced the particular employment area in which it is situated. Ultimately, he concluded that the FSI variances were therefore desirable.

[66] Mr. Norman also concluded that the requested FSI variances are consistent with the PPS and conform to the 2017 Growth Plan.

[67] Regarding the PPS, Mr. Norman commented on the following. PPS Policy 1.1.3.2 requires that land use patterns be based on densities and a mix of land uses which efficiently use land and resources and are appropriate for and efficiently use the infrastructure and public service facilities that are planned or available. He commented that this is a very transit connected site compared to many others in the province, having several high frequency buses and is not far from Wilson subway station. It is also freight supportive and therefore was an appropriate location for intensification.

[68] Mr. Norman also referenced PPS Policy 1.3.2.3 which seeks to protect employment areas, and commented on s. 1.7.1 a) of the PPS, which seeks to support long-term prosperity by promoting opportunities for economic development and community investment-readiness. In that context, he noted the 2014 Ontario Government press release that commented on Fiera Foods providing "good jobs for

families here in Toronto and sources \$80 million worth of ingredients from our local farming communities.”

[69] Regarding the 2017 Growth Plan, Mr. Norman referenced Policy 2.2.5, which seeks to promote economic development and competitiveness in the Greater Golden Horseshoe by making more efficient use of existing employment areas and increasing employment densities.

[70] Mr. McKay adopted Mr. Norman’s opinions in this regard.

[71] Mr. Ovettoni noted that the jobs spoken of were from temp agencies and are low-paying. In his view, this was not a good type of employment.

[72] Mr. Zamperin was of the view that “nowhere in provincial policy do we promote low paying precarious employment”.

[73] Mr. Van Zuylen also echoed these concerns that these jobs were not good jobs. He commented that of course, jobs are essential and diversification and innovation is great. While he felt that it was great that Fiera Foods had become significant to the economy of Toronto and Ontario, Fiera Foods was not an exemplary corporate citizen.

[74] Mr. Norman’s evidence did not contradict that these jobs may be of a precarious or temporary basis. His evidence on reply was that it is not relevant to the issues. He testified that job refers to “any form of employment”. He indicated that the job growth data comes from the Growth Plan for the Greater Golden Horseshoe, 2005. He indicated a job is counted if a person worked sometime between January of the year before the census and census day. So, any day with work counts as a job. He explained that “a job is a job” in regards to these policies.

## Overall Planning Opinion

[75] Following the evidence of Mr. Norman and Mr. Stevens, Mr. McKay reviewed the planning framework as a whole, incorporating in his opinion the evidence previously given.

[76] Beginning with the provincial framework, Mr. McKay concluded that the requested variances were consistent with the PPS and conformed to the 2017 Growth Plan, which has provisions addressing as desirable intensification and redevelopment, a range of mix of employment uses and densities, and efficient land use.

[77] Regarding economic policies, in addition to the policies referenced by Mr. Norman, he referenced Policies 1.1.1 a), b), and e) and 1.3.1 of the PPS, which are directed at financial well-being, a range of uses, including employment, cost-effective development, and the promotion of economic development and competitiveness.

[78] Regarding land use compatibility, he also referenced PPS Policy 1.2.6.1, regarding land use compatibility, he concluded in accordance with the evidence of Mr. Stevens, that this had been addressed. It was therefore his opinion that the proposal was consistent with the PPS.

[79] Similar to his evidence regarding the PPS, for the purposes of the 2017 Growth Plan, it was his opinion that the requested variances conform to the 2017 Growth Plan, which also promotes compact urban form, intensification, efficient use of existing services, and the achievement of complete communities.

[80] Mr. McKay then turned to the four-part tests for variances under the Act, first related to the FSI variance, and then regarding the management of the garbage compactor equipment. He concluded that the requested variances maintain the general intent and purpose of the OP and the two zoning by-laws, are desirable for the appropriate development or use of the land, and are minor.



## Floor Space Index

### *Official Plan*

[81] In reference to the current OP, in addition to adopting the opinions of Mr. Norman and Mr. Stevens, Mr. McKay also referred to OP Policy 3.4.21 which is a compatibility policy. It was his opinion that the variances were consistent with this policy and the other policies previously addressed.

[82] OP Policy 4.6.6 outlines the development criteria for employment areas specifically. The policy seeks overall to ensure that development will contribute to the creation of “competitive, attractive, highly functional *Employment Areas*”, in a number of ways.

[83] He noted that these variances will support an economic function; do not create excessive car and truck traffic on the road system within the area and adjacent areas, i.e. the road network functions; the site has sufficient parking and loading on the site; and noise issues have been studied and appropriately addressed.

[84] At this junction, the Board notes that the settlement reached between the Parties requires a condition that the Applicant will enter into an agreement with the City under the Act such that it will pay the City \$200,000 towards the installation of traffic signals near the Facility, at Matthews Gate and Walsh Avenue (Exhibit 22).

[85] It was Mr. McKay’s evidence that the rationale for a signal at that location is that this is a major thoroughfare which connects the employment lands to adjacent areas and it is intended to assist with controlling the traffic and speed, which he had understood have been of some concern. On examination by the City’s counsel, he also agreed that the Facility’s employees and trucks contribute to this traffic and that trucks use the route to connect to the highways.

[86] The Participants were generally of the view that the site was over-intensified already and an “eye-sore”. As part of this discussion, the Participants addressed issues

regarding parking. Originally, the Applicant intended to seek a variance for parking, but ultimately concluded it would not do so. The Participants suggested that the site plan, which includes all required parking, must be false or simply unworkable, as looking over the plan, it was impossible to have the parking noted and planned without conflicts regarding fire routes or truck unloading.<sup>1</sup>

[87] Mr. McKay testified in reply evidence that parking needs had been reviewed by a consultant, LEA Consulting Ltd. They concluded that peak demand was 269, but to meet the by-law requirements, a total of 310 spots are required. Despite the lesser need, the Applicant concluded it can and will meet the zoning by-law requirements, and it prepared a site plan in accordance with the requirement. He confirmed that not all the work required to be done to reconfigure parking at the site had yet been done, however.

[88] Mr. McKay advised the route around the Facility was not a fire route, nor was one required around the entire site. It was there to facilitate car and truck traffic. He also indicated that unloading could be accomplished without interfering with parking. Trucks would stop in the drive isle, unload and leave, and there are no by-law requirements that would preclude that from occurring.

[89] On the basis of the evidence, the Board concludes that the site can be functional for its purposes and maintains the intent and purpose of the OP.

### ***Zoning By-laws***

[90] With regard to maintaining the intent and purpose of the zoning by-laws, Mr. McKay indicated FSI is intended to determine what is an appropriate massing or space for the site it is on, and to address any impacts.

[91] In his view, FSI was more meaningful in the context of residential development than for development of employment lands. It was his view that the goal was to set a

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<sup>1</sup> Mr. Ovettoni also alleged that there was an "illegal road" into the site from Clayson Road. However, this was indicated to be inaccurate by Mr. McKay on reply evidence, who confirmed that the driveway was owned by Fiera Foods and no permit or permission was required from the City to use it. He also noted the curb cut was approved by the City, including for use by trucks.

benchmark against which development is to be measured. Anything beyond the standard should be subject to a public process. While he questioned the value of FSI in an employment area, he agreed upon examination by the City's lawyer that a larger development footprint could potentially increase impacts, a proposition with which the Board agrees.

[92] He noted that from a numerical standpoint "the [NY ZBL] number is big (1.46) because we are dealing with a big property and a big building." Under the City-wide ZBL, he suggested this was a better approach as it was more about the useability of the space, i.e. what creates the use in the building versus ancillary components. Numerically, the FSI is not as large under the City-wide ZBL (1.18).

[93] In his opinion, the FSI variance did not result in any further impacts over what would otherwise be in place and the converted parking space did not change the footprint, though it does allow for a more efficient use of the Facility. Therefore, it was his opinion that it maintained the general intent and purpose of the zoning by-laws. In addition, given the Board's finding that the site will be functional for its intended purpose, the Board also concludes that the general intent and purpose of the ZBL is maintained.

### ***Desirability of Development***

[94] On the question of desirability of the development for the appropriate use or development of the land, it was his view that this variance is appropriate in reflecting intensification and reinvestment in an employment use, without any further impacts, and as a result, the development was desirable.

### ***Minor***

[95] Regarding impacts as it relates to the FSI variance, the changes were largely internal to the building and those that were not created no additional undue impacts to the neighbouring area, in accordance with the evidence given by Mr. Stevens. As a result, Mr. McKay concluded that the requested FSI variance was minor.

## Outdoor Equipment

[96] Regarding the garbage compactor, Mr. McKay explained that the Applicant's plan is to keep the equipment in the front yard, but move it outside of the 9 m front yard setback. The equipment consists of a yellow dumpster and the blue compactors (Exhibit 13, photos 17 and 18). The Applicant will also improve landscaping and also seeks a permit to build decorative screening.

[97] Mr. McKay advised a building permit application had been submitted for the purposes of building a decorative screen, which approval is dependent on approval of the minor variance related to this equipment.

[98] There is a difference of opinion between Mr. McKay and the City's zoning examiner about whether the zoning by-law standard at s. 31(11)(a) of the NY ZBL actually applies. In the view of Mr. McKay, this standard relates to the storage of equipment, not the active use of it. However, the Applicant seeks the variance given the City's position.

[99] It was Mr. McKay's opinion that with the screen wall and landscaping proposed, this would sufficiently maintain the intent and purpose of the OP and zoning by-laws. He also opined that it was desirable for the development or use of the property, i.e. it is appropriate to relocate, screen and landscape the area to reduce the visual impact in the public realm. With these efforts, it was his opinion that any impacts would then be minor.

[100] Mr. Ovettoni suggested in his evidence that the Applicant would not comply with the 9 m setback, given the history of noncompliance. But in any event, he suggested if they obtain a variance under the NY ZBL for outside equipment in the front yard, then the same restrictions should apply as would otherwise apply in another yard where it is permitted.

[101] These restrictions require a fenced compound where equipment, material, product or goods are stored; a setback equal to the minimum yard setback where goods

are kept; and the outside storage would not exceed 30% of the area of the yard in which the storage is located. Mr. Ovettoni noted that he expected achieving the latter would not be an issue.

[102] The Board notes that there are no goods being kept, and this variance relates to the garbage compactor, i.e. equipment only. In addition, the Applicant has already proposed screening and will have to move the compactors outside of the 9 m front yard setback to comply with the NY ZBL.

[103] The Board suggested to Mr. McKay that if it approved the variance for outdoor equipment, it would be appropriate to require as a condition that the plans he described for the garbage compactor equipment be a condition of approval related to it. Flowing from this suggestion, Mr. McKay provided wording to relate to this condition (Exhibit 23). As a result, for this variance, the Board imposes a condition that the proposed screen wall for the garbage compactor is to be constructed substantially in accordance with plans at Drawing S-01.1 dated October 13, 2017 as filed in Exhibit 2, Tab 11, as reflected in Attachment 1.

## **CONCLUSION**

[104] It was Mr. McKay's overall opinion that the variances, cumulatively and individually, are minor, they are consistent with the PPS, conform with the 2017 Growth Plan, are in accordance with good land use planning principles and are in the public interest. The Board notes that s. 2 requirements are adequately addressed, given the consistency with the PPS and conformity with the 2017 Growth Plan.

[105] In light of the overall evidence, the Board concludes that the requested variances represent good planning, and meet the necessary tests under the Act, as articulated in these reasons.

**ORDER**

[106] For the foregoing reasons, the Board will allow the appeal in part. The variances are authorized, subject to two conditions, all in accordance with Attachment 1.

[107] The Board withholds its final order until it has been advised by the City Solicitor that the agreement contemplated between the City and owner has been executed and registered on title to the satisfaction of the City Solicitor.

*“Paula Boutis”*

PAULA BOUTIS  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Ontario Municipal Board**

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## Attachment 1

### Authorized Variances

**1. Section 60.20.1.10.(3), By-law 569-2013 and Section 31(5), Bylaw 7625**

The maximum permitted floor space index is 1 times the area of the lot.

**Section 60.20.1.10.(3), By-law 569-2013**

The existing building has a floor space index equal to 1.18 times the area of the lot.

**Section 31(5), By-law 7625**

The existing building has a floor space index equal to 1.46 times the area of the lot.

**2. Section 31(11)(a), By-law 7625**

Accessory outside equipment, material or products are not permitted in the front yard.

Garbage compactors are located in the front yard.

### Conditions of Approval

1. For variances 1 and 2 above, the variances are authorized subject to the condition that the owner shall enter into an agreement with the City pursuant to sections 45(9) and 45(9.1) of the Planning Act securing the following (the "Agreement") to the satisfaction of the City Solicitor:
  - a. The Owner shall pay to the City the amount of \$200,000 to be used towards the installation of traffic signals at the intersection of Matthews Gate and Walsh Avenue;
  - b. The moneys shall be paid to the City in trust upon the issuance of a building permit for the development permitted by the minor variances sought in this application;
  - c. The Agreement shall provide that to the extent that the total of all associated costs of construction of the traffic signals is less than \$200,000, the residual amount will be returned to the Owner;
  - d. In the event that the traffic signals are not authorized by the City for construction within 2 years of the date of the issuance of the building permit referenced in subsection (b), then the full amount of the moneys will be returned by the City to the Owner; and
  - e. The Agreement shall be registered on title to the properties at 50-60 Marmora Street pursuant to section 45(9.2) of the Planning Act at the sole cost of the Owner.

2. Regarding variance 2 only, the proposed screen wall shall be constructed substantially in accordance with Drawing S-01.1 dated October 13, 2017 as filed in Exhibit 2, Tab 11.