

ISSUE DATE:

Dec. 15, 2005

DECISION/ORDER NO:

3281



PL050589

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

Betty Reid and Micheal Evans 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 4669-05.D of the Town of Aurora
OMB File No: R050140

Whitwell Developments Ltd. has brought a motion before the Ontario Municipal Board under subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, to dismiss the appeals without holding a full hearing
OMB File No: R050140

APPEARANCES:

Parties

Counsel

Whitwell Developments Limited

M. Bull

Michael Evans

Betty Reid

MEMORANDUM OF ORAL DECISION ON A MOTION TO DISMISS AN APPEAL DELIVERED BY J. E. SNIEZEK ON NOVEMBER 17, 2005 AND ORDER OF THE BOARD

This is a hearing concerning a motion to dismiss the appeals without the benefit of a hearing of Betty Reid and Michael Evans by the applicants Whitwell Developments Limited.

At the outset, it can be stated that the Board is cognizant of the motives of the two appellants that they are well intentioned but those motives are not under review. What is under review is the content of their appeals and the necessity of carrying them forward to a full hearing.

The provision of permitting the Board or a party to an application to dismiss the appeals without a hearing is relatively new. Section 34(25) of the *Planning Act* was approved by the legislature in 1994 and further refined in 1996. The test goes beyond

the triable issues that had previously been the established principle (Re: Town of Leamington, Zoning By-law 4407-98, OMB Case No. PL980797).

The exact section of the *Planning Act* is provided as follows:

Section 34 (25)

Despite the *Statutory Powers of Procedure Act* and subsections (11) and (24), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own motion or on the motion of any party, if,

- (a) it is the opinion that,
 - (i) the reasons set out in the appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious, or
 - (iii) the appeal is made only for the purposes of delay.
- (a.1) the appellant did not make oral submissions at a public meeting or did not make written submissions to the council before the by-law was passed and in the opinion of the Board, the appellant does not provide a reasonable explanation for having failed to make a submission. **(not alleged here)**
- (b) the appellant has not provided written reason for the appeal. **(not alleged here)**
- (c) the appellant has not paid the fee has prescribed under the *Ontario Municipal Board Act*. **(not alleged here)**
- (d) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. **(not alleged here)**

Section 34(25.1)

Before dismissing all or part of an appeal, the Municipal Board shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause 25(d). (***not alleged here***)

Section 34(25.2)

The Board may dismiss all or part of the appeal after holding a hearing or without holding a hearing on the motion under subsection (25), as it considers appropriate.

The East Beach Community Association v. Toronto (City) summarized the three tests:

- i) authenticity of the reasons stated;
- ii) are there issues that would affect a decision on a hearing;
and
- iii) are the issues worthy of the adjudicative process.

Ms Reid's reason for appeal can be summarized as follows:

1. The impact the proposed development will decimate main street Aurora (Yonge Street).
2. Traffic problems will occur at peak hours and State Farm (the development to the north of the proposed retail development now under construction) has not granted access through their site.
3. The lands should be used for prestigious office space similar to the Magna development.
4. The jobs created at the proposed development will be low wage jobs and the threat at the time of the approval that

the development would relocate to Stouffville is not true because it could not be developed there.

5. Wal-Mart was never mentioned as the prime tenant in the development.

Note: the Board used Ms Reid's letter of objection and her oral submissions to formulate this list.

Mr. Evans stated two reasons for his appeal:

1. The lack of a proper market study for historic downtown Aurora.
2. Lack of electrical power.

The appellants have only appealed Zoning By-law 4669-05. Ms Reid indicated in her letter that she wishes to appeal Official Plan Amendment No. 58 (OPA 58) but that matter was not appealed. As a result, the Board's power to consider some of the matters raised in the letters of appeal is extremely limited. The appeal of a Zoning By-law that implements an approved Official Plan Amendment is limited to the technical content of the By-law and not the primary matter of land use.

MS REID ISSUE 1 - MARKET IMPACT

The Town of Aurora (Town), the Region of York (Region) and the proponent all assessed the market impact of the proposal. The proponent's study by Malone Given Parsons (MGP) was peer reviewed by the Town (Scott Morgan dated September 03, 2004) and the Region (J. Winter, Exhibit 2B, Tab E). The MPG study states that the proposed development "will not have a significant adverse impact on the existing and approved future retail facilities of the neighbouring municipalities in the York region". The Town comments in OPA 58 "The Town's market study/feasibility impact requirements have been appropriately met".

MS REID ISSUE 2 - TRAFFIC PROBLEMS

The Town and the Region are satisfied that the traffic concerns are adequately addressed.

MS REID ISSUE 3 - OTHER USE OF THE LANDS - PRESTIGE OFFICE SPACE

OPA 58 redesignates the lands from Business Park to Business Park Commercial Centre. OPA 58 states "the development of these lands shall be subject to a site plan agreement that shall be reviewed in accordance with the Urban Design Guidelines to ensure pre-eminent site, building and landscape design".

MS REID ISSUE 4 - LOW WAGE NATURE OF THE JOBS

The low wage nature of the employment is not usually considered a land use planning ground. It is a factor, in terms of the development's impact upon the Town; however, it is not a valid ground for making an appeal.

MS REID ISSUE 5 - WAL-MART WAS NOT MENTIONED AS THE PRIME TENANT

Ms Bull, correctly, pointed out that Wal-Mart was mentioned in the market research and impact materials.

If Wal-Mart was not mentioned there might be a potential question as to the validity of market impact assessments but that was clearly not the case.

MR. EVANS ISSUE 1 - IMPACT UPON HISTORIC DOWNTOWN AURORA

One of the conditions for the approval of the Zoning By-law and the Official Plan Amendment include "a market study acceptable to the Town". The study was accepted by the Town and by the Region. It was noted by the Town's peer reviewer that:

As in other markets, I would recommend protecting smaller scale retail uses in Aurora's historic core area and in the Bayview-Wellington Node. In this regard council might consider imposing a size restriction on the "baby box" new format retail units in the First Professional development such as 5000 sq. ft. minimum for First Professional specialty DSTM stores....

Clause (e) of 27.D.8.2.4.2 maximizes total other retail at 12,913 square metres with a minimum store size of 370 square metres and a maximum number of stores at 10. A liquor store, beer store and cinemas are not permitted.

The municipality considered the historic downtown area and placed controls on development to protect it.

MR. EVANS - ISSUE 2 POWER AVAILABILITY

It is Mr. Evan's assertion that the power supply to the site is deficient. The lack of power must be assessed at the time a building permit is issued by the Town. It is not a land use planning ground on its own.

BOARD FINDINGS

As stated previously, the Board requires that appellants must be prepared to do more than "talk the talk" they must be prepared to "walk the walk".

The issues raised must be clear and create the potential for an adjudicative process. A hearing is not held for the sake of a hearing. Hearings must present issues that are decidable and this is not the case here.

The issues are not defined and not supported by a body of evidence sufficient to bear the weight of a hearing.

Therefore, the Board grants the motion and dismisses the appeals.

The Board so Orders.

"J. E. Sniezek"

J. E. SNIEZEK
MEMBER