

ISSUE DATE:

September 12, 2012



PL110883

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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

Appellant: Snelgrove Plaza Inc.
Appellant: Valleywood Resident Association
Subject: By-law No. 2011-095
Municipality: Town of Caledon
OMB Case No.: PL110883
OMB File No.: PL110883

IN THE MATTER OF subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Motion by: Valleywood West Developments Limited
Purpose of Motion: Request for an Order Dismissing the Appeal
Appellants: Snelgrove Plaza Inc.
Valleywood Resident Association
Subject: By-law No. 2011-095
Municipality: Town of Caledon
OMB Case No.: PL110883
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APPEARANCES:

Parties

Valleywood West Developments Limited

Snelgrove Plaza Inc.

Valleywood Resident Association

Town of Caledon

Counsel

M. Bull
S. Mahadevan

J. Alati

P. Gross

DECISION DELIVERED BY JASON CHEE-HING ON A MOTION TO DISMISS WITHOUT A HEARING AND ORDER OF THE BOARD

Context:

Valleywood West Developments Limited (“SmartCentres”), has brought a motion seeking an order of the Board to dismiss without holding a hearing, the appeals filed by Snelgrove Plaza Inc. (“Snelgrove”) and the Valleywood Resident Association (“VRA”) of the Town of Caledon (“Town”) Zoning By-law No. 2011-095 (“ZBL”).

By way of background, SmartCentres proposes to develop a shopping centre of approximately 135,000 sq. ft. including a supermarket on its site located at the northeast corner of Hurontario Street and Valleywood Boulevard in the Town. SmartCentres filed a rezoning application (“SmartCentres ZBL”) to amend the Town’s ZBL 2006-50 in order to permit its proposal. Town Council passed the SmartCentres ZBL on July 12, 2011. Snelgrove and the VRA have appealed the SmartCentres ZBL to this Board.

Motion filings:

In its motion filings, SmartCentres grounds for the motion can be summarized as follows:

Snelgrove appeal:

1. The market considerations raised in the Snelgrove appeal relate to commercial competition and are not a valid land use planning ground.
2. Snelgrove has not alleged in its appeal that any supermarket and in particular, the Sobeys supermarket in the Snelgrove Plaza will close as a result of the SmartCentres proposal.
3. Snelgrove has provided no evidence to substantiate any of the allegations raised in its appeal.
4. The appeal does not raise any apparent land use planning ground which the Board could allow part or all of the appeal.
5. It is not made in good faith or is frivolous or vexatious.
6. It is made for the purpose of delay.

VRA appeal:

1. The VRA has provided no evidence to substantiate any of the allegations raised in its appeal.
2. The reasons raised in its appeal, for the most part, do not relate to the requirements of the Caledon Official Plan (OP) or to substantive issues regarding the SmartCentres proposal.
3. The appeal does not raise any apparent land use planning ground upon which the Board could allow all or part of the appeal.

Snelgrove's response to the motion can be summarized as follows:

1. Its appeal was motivated by genuine land use planning concerns and potential impacts on planned function.
2. It retained qualified experts to ensure that the concerns raised in its initial appeal were supportable and defensible.
3. An appellant is not obliged to retain experts prior to filing its appeal, nor is an appellant required to cite all of its reasons or the evidence behind each of its reasons in its notice of appeal.
4. The Town's planned function of the Village Centre in Mayfield West, Phase 1, and the provision of specialty food facilities or a small grocery store within the Village Centre are jeopardized by the SmartCentres proposal. The Village Centre is intended to be the focus of the Mayfield West community, Phase 1 and its intended function should not be undermined.
5. Compliance with the policies in the Town's OP and in the Mayfield West Secondary Plan ("SP") is not being achieved should the SmartCentres proposal be approved.

The VRA's response to the motion can be summarized as follows:

1. The SmartCentres proposal will adversely impact the residents of the Valleywood community due to the site's proximity to the Valleywood residential community. These impacts relate to traffic, safety and emergency response times.

2. Its appeal is in response to actions taken and not taken by Town. The Town is the only party being challenged. Its appeal relates to the Town's questionable planning practices, questionable staff report and existing unresolved traffic issues.

Board findings and reasons:

Snelgrove appeal:

At the hearing, Ms. Bull, counsel for SmartCentres submitted that Snelgrove's notice of appeal does not disclose any apparent land use planning grounds. SmartCentres allege that the Snelgrove appeal is motivated by purely competitive reasons. The Snelgrove Plaza is located approximately 1.2 km from the SmartCentre site and a Sobeys supermarket is located in that plaza. Although Snelgrove does not allege that any existing supermarket will close as a result of the SmartCentre proposal, SmartCentre submits that the issues raised in Snelgrove's appeal relate to commercial competition and are not a valid land use planning ground. Additionally, SmartCentres assert that the appeal is made for the purposes of delay and to further Snelgrove's private, commercial interest and as such the appeal is not made in good faith.

SmartCentres argued that two new issues were raised in Snelgrove's response to motion filings that were not in its notice of appeal. These issues related to trip distribution/generation and that the opportunity to develop a supermarket or specialty food store in the Village Centre in the Mayfield West community would be adversely impacted and undermined by the proposed development. SmartCentres argued that the planned function of the Village Centre as set out in the Town's OP does not require it to have a supermarket or specialty food store and that Snelgrove's alleged concern of the Village Centre is disingenuous and goes to the *bona fides* of its appeal.

Mr. Alati, counsel for Snelgrove cross-examined SmartCentres' two expert witnesses (Mr. D. Argue – planner, and Mr. D. Annand – Market Analyst) who had provided affidavit planning and market evidence in support of the motion to dismiss. Snelgrove, in its oral submissions argued that firstly, it did not have to disclose all of its grounds in its notice of appeal. Mr. Alati argued that an appellant is not obliged to retain experts prior to filing its appeal, nor is an appellant required to cite all of its reasons or the evidence behind each of its reasons in its notice of appeal. Snelgrove retained qualified

consultants (a market analyst, a land use planner, and a transportation planner) after it filed its appeal to ensure that its concerns raised were supportable and defensible. Responding affidavit evidence of these experts was filed with the Board.

Mr. Alati argued that the Town's planned function of the Village Centre in Mayfield West, Phase 1, and the provision of specialty food facilities or a small grocery store within the Village Centre are jeopardized by the SmartCentres proposal. The Village Centre is intended to be the focus of the Mayfield West community, Phase 1 and its intended function should not be undermined.

He argued that compliance with the policies in the Town's OP and in the Mayfield West SP is not being achieved should the SmartCentres proposal be approved. He argued that on this planning ground alone, there is contrary sustainable evidence that would be brought at a hearing upon which the Board could allow all or part of the appeal.

The Board's statutory authority to consider a motion to dismiss without holding a hearing for zoning matters is found in subsection 34(25) of the *Planning Act* as follows:

"...the Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

(a) it is of the opinion that,

i) the reasons set out in the notice of 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,

iii) the appeal is made only for the purposes of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process."

It the Board's finding that Snelgrove's representatives have demonstrated to this Board through both its motion filings and in its oral submissions that the grounds for appeal hold the promise of contrary sustainable evidence to be brought at a full hearing upon which the Board could allow part or all of the appeal. In particular, it is the finding of this Board that Snelgrove has demonstrated that the issue of the SmartCentres proposal threatening to undermine the planned function of the Mayfield West (Phase 1) Village Centre is a triable issue worthy of the adjudicative process at a full hearing.

The Board finds that the assertions made by SmartCentres that the Snelgrove's appeal is motivated is by purely competitive reasons, and to further Snelgrove's private, commercial interest remains to be proved at a full hearing into Snelgrove's appeal.

The Board does not agree with the assertions made by SmartCentres that Snelgrove's appeal is not made in good faith or made for the purpose of delay.

The Board notes the very fulsome motion filings and oral submissions of SmartCentres including a very comprehensive list of Board jurisprudence on motions to dismiss relating to commercial competition. However, it is the view of this Board, that in this appeal, the principles which the Board has apparently accepted in commercial competition cases, as referred to by Ms. Bull, would have to be argued and supporting evidence brought at a full hearing into this appeal (SmartCentres Outline of Argument, p.15).

VRA appeal:

SmartCentres argue that VRA has not provided any expert evidence or opinions to support the issues raised in its appeal nor did the VRA file affidavit evidence in response to the motion to dismiss. SmartCentres argue that while VRA may be frustrated with the actions of the Town's council and that planning staff did not share its concerns that this cannot form the basis for an appeal before this Board. It is SmartCentres position, that the Town followed a very comprehensive planning process and met the statutory requirements under the *Planning Act*.

VRA's response to the motion to dismiss is four pages in length. The response puts their concerns into three categories: questionable planning practices; questionable staff report; and existing, unresolved traffic issues. No affidavit planning evidence was filed by the VRA. At the hearing, Mr. Harrison spoke on behalf of the VRA. He submitted that the VRA is concerned about the inadequate provision of fire services, increased traffic from the proposal which will generate an overflow of traffic into the existing residential neighbourhood. He asserted that the Town has not done a proper analysis of the traffic impacts the proposal would have on the surrounding residential communities.

The Board finds that while VRA may have legitimate concerns with respect to traffic impacts, it has not demonstrated either in its response to the motion or in its oral submissions that it is capable of bringing contrary sustainable evidence at a full hearing

which would allow this Board to allow part or all of its appeal. The Board finds that much of the VRA submission, relate to their frustrations both with Town council and the planning approval process.

The Board in its jurisprudence on dismissal motions, has consistently held that the appellant must not only demonstrate authentic planning grounds in its notice of appeal but must be able to demonstrate that it can bring contrary sustainable evidence to support its appeal at a hearing and upon which the Board can act accordingly. It is the Board's finding that the VRA has not demonstrated this either in its response to motion filings or in its oral submissions.

With respect to the VRA appeal, the Board will grant the motion to dismiss and dismiss the appeal without holding a hearing.

In their motion filings, SmartCentres and Snelgrove sought costs respectively, in preparing the motion and in responding to the motion. Under the circumstances, no costs to either party will be awarded by the Board.

Board's Order:

With respect to the motion to dismiss the Snelgrove appeal, the **BOARD ORDERS** that the motion be denied.

With respect to the motion to dismiss the VRA appeal, the **BOARD ORDERS** that the motion is granted and the appeal is dismissed.

So Orders the Board.

"Jason Chee-Hing"

JASON CHEE-HING
MEMBER