



Ontario

Ontario Municipal Board

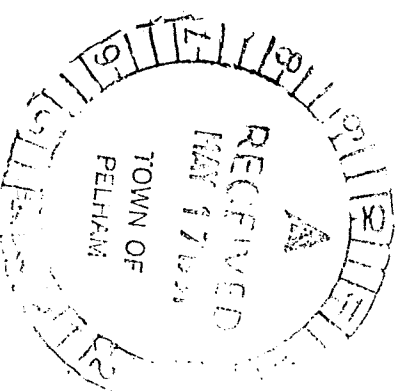
Commission des affaires municipales de l'Ontario

DB87
F284

R 890530
R 870525

IN THE MATTER OF Section 34(18) of
the Planning Act, 1983

AND IN THE MATTER OF appeals by
Canadian National Railway, Bryland
Developments Limited and others
against Zoning By-law 1261 (1989) of
the Corporation of the Town of
Pelham
O.M.B. File No. R 8900530



AND IN THE MATTER OF appeals by
Stephen Kaiser, the Preservation of
Agricultural Lands Society, the
Landcorp Group and others against
Zoning By-law 1136(1987) of the
Corporation of the Town of Pelham
O.M.B. File No. R 870525

C O U N S E L :

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|-------------------|-------|-----------------------|
| G. F. Brooks Q.C. | - for | The Town of Pelham |
| G. R. Green Q.C. | - for | Stephen Kaiser et al. |

DECISION OF THE BOARD delivered by S.R. COLE

By-law 1261 rezones certain lands situate on either side of Highway No. 20, east of Station Road from Light Industrial, General Industrial & Residential R1 and R2 to Highway Commercial and Highway Commercial Exception. The aim is to permit a broader range of commercial uses at the easterly entrance to the Town of Pelham.

At the outset of the hearing, the Board had filed with it as Exhibits 37 and 38, communications from Canadian National Railway and Bryland Developments Ltd, (which operates under the name The Landcorp Group) respectively indicating the unqualified withdrawal of C.N.'s appeal and the withdrawal of Bryland's appeal subject to By-law 1261

being amended to reflect Town council's resolution of July 16, 1990.

The Board hereby directs the Town to amend By-law 1261 to reflect the terms of its resolution of July, 16, 1990.

Three individuals appeared on their own behalf to object to the rezoning. Two of them, Mrs. Carla Hines and Mr. Wayne King have residential properties which front on Rice Road, north of Highway No. 20 and which back onto a property currently owned by Mr. Stephen Kaiser. Mrs. Hine's and Mr. King's concerns are shared, although in the Board's view any impact of rezoning would affect the former more than the latter.

The other objector to the By-law is Mr. Klaus Bargeron who lives on the east side of Station Street, south of Highway No. 20. His concerns are different from the other two objectors and will be dealt with separately.

Turning first to Mrs. Hine's and Mr. King's concerns. They occupy the only two houses presently on Rice Road north of the highway. Both acquired their properties in the mid-1980's and constructed homes on them in the late-1980's. When their properties were purchased the lands to the rear, that is to the east, were zoned Residential R1. It was then a strip of land with 140 feet of frontage on Highway No. 20 and a depth of 712 feet. The Board accepts that both of them acquired and built upon their properties with full knowledge of and reliance upon the existing zoning. It was their intention to live in a country-like setting.

In furtherance of this aim, Mr. King purchased the rear 282 feet of the land to the east from Mr. Kaiser who acquired his property after both Mrs. Hines and Mr. King had purchased theirs. Mrs. Hines, who resides in her home with her husband and two children, aged 4 and 6 years, was unable for financial reasons to acquire the 236 feet of

Mr. Kaiser's land that abuts her property although she wanted to and it was offered to her.

Mr. Kaiser was unable to state how he proposed to develop the land or whether someone else would develop it. He has already sold a part interest in the property which now, after the sale of the rear lands to Mr. King, extends back 430 feet from the highway.

The Board had the benefit of testimony from only one planner, she being called by the Town in support of its by-law. In the main the Board agrees with her comments as to the overall planning merits of the by-law and the need for the insertion of a general height limitation of 10.5 metres in the by-law to reflect what previously existed but it parts company with her in relation to the safeguards that she feels are built into this by-law and the pending comprehensive by-law so as to minimize any impact upon Mrs. Hines in particular.

The Board shares her opinion that the Kaiser site should be of one uniform zoning throughout, be it Highway Commercial, as proposed, or Residential-R1 as it now is. She, of course, favours the Highway Commercial zoning. The objectors recognize, as does the Board, the validity of such zoning in this situation. They however wish to limit the depth of such rezoning so as to minimize the impact upon their enjoyment of their properties.

If, as the objectors want, the Board were to direct a split zoning, i.e. Highway Commercial over the front 194 feet, to correspond with the depth of the property to the west, and Residential R1 over the remaining 236 feet then effectively the rear lands would be potentially land-locked and sterile. The Board, while recognizing a latent efficacy in such zoning concept, does not consider such solution to be good planning.

Having come to this conclusion and on the premise that Highway

Commercial is an appropriate zoning, the Board must have regard for the protective elements the by-law. The permitted uses ranging as they do from auto body shops to light manufacturing to warehouse sales outlets and to drive-in restaurants provides no assurances per se as to the quality of continued enjoyment of their amenities by the abutting residential property-owners. The question then becomes whether the by-law's regulatory standards can minimize, if not eliminate, the adverse impacts that the wide range of permitted uses inherently encompasses?

The planner states that no outside storage is permitted. The Board can find no such proscription in By-law 1261 or in the new comprehensive By-law 1136 which is still before the Board.

The planner contends that the 30 foot side and rear yard setbacks from residential zones together with the requirement of a 10-foot planting strip within the setback will provide an adequate buffer from the residential properties. At present there are mature trees within the thirty-foot westerly side yard setback and even though it would be desirable to retain them, Mr. Kaiser candidly admitted that some or all of them may need to be uprooted given the nature of the yet unknown development that will ultimately occur on the site. Given that the 30 foot rear yard setback could result in any of the uses being on the same parallel as the Hines' home and that there may well be no mature vegetation screening such uses, the Board does not accept that the By-law's standards are sufficient to offset the impact of the introduction of the non-residential uses into what heretofore has been a residentially zoned area.

Although site plan control is in effect in the Town and provides a measure of comfort to the objectors, they do not participate in the process. They are fearful that the problems which have occurred in the recent development of the property at the north-east corner of Rice Road and Highway 20 notwithstanding site plan control will recur on the

Kaiser site.

A property owner is entitled to place reliance upon existing planning controls. Nothing is immutable and to that extent such reliance cannot be absolute. However unless there is a valid reason to change planning controls which is accompanied by adequate protection of in-place users of adjacent properties, no such change should occur lightly.

The Board understands and accepts the reasoning behind the rezoning to Highway Commercial but it is not persuaded that adequate safeguards for the protection of others are to be found within the planning controls. This is particularly so as it relates to Mrs. Hines. Accordingly, having taken into account the siting of the Hines' home, and, to a lesser extent, that of Mr. King, the Board is of the opinion that the minimum rear yard setback in the case of Kaiser property alone should be 46 metres from the rear lot line. The Board therefore allows the appeals of Mrs. Hines and Mr. King in part and directs the Town to amend By-law 1261 to reflect a minimum rear yard setback of 46 metres in the case of the Kaiser property.

Such setback would still provide a development envelope with a depth of 271 feet. With such amendment development could occur on up to 29,810 square feet of the lot which translates into a coverage of 50 percent.

It may well be that once a concrete development proposal is put forward Mrs. Hines and Mr. King's basic objections could be resolved. If such were to occur the Board can foresee the possibility of Mr. Kaiser or whoever the developer is obtaining relief from rear yard set back provision. Until such proposal is forthcoming part of the regulations of By-law 1261 pertaining to the Kaiser property can be considered to be premature.

Turning next to Mr. Barger on who along with his wife have lived at 1443 Station Road since 1962. His property is one removed to the south from two lots which front on Highway 20 at the south-east quadrant of its intersection with Station Road. That lot between his property and the lots fronting on Highway 20 is improved with a dwelling and is known municipally as No. 1445 Station Road. It does not abut Highway 20. It is zoned Residential as are Mr. Barger on's property and the two lots fronting on Highway 20.

He has no objection to and indeed sees merit in Highway Commercial zoning along the Highway 20 corridor. His concern relates to the rezoning of a property which does not abut such corridor and the prospect of its development in conjunction with the two Highway 20 properties to any of the permitted Highway Commercial uses and the effect it will have on his enjoyment of his property.

The three properties to the north of his are currently being offered for sale. He has already experienced a rezoning application for these properties which was discontinued possibly in face of his opposition. That proposal was to construct a combination gas bar, car wash and convenience store. To do so meant regrading the overall site from between 1.5 to 4.8 feet to bring it up to the level of Highway 20. In addition to the noise, litter and drainage problems he attributed to such use he was faced with the prospect of having a 6-foot fence erected at the southerly lot line of 1445 Station Road within 10 feet of his home's northerly wall.

Although the Town's planner stated that in her opinion the development of the south-east quadrant without the property at 1445 Station Road would be difficult given the by-law's regulatory standards she acknowledged that development on the combined site could have an adverse impact on Mr. Barger on owing to the narrow 40 foot width of his property.

Although no measurement of the two Highway 20 lots were provided, the Board using Exhibit 47, Schedule "A" to By-law 1261, was able to scale off the approximate measurements. The combined frontage on Highway 20 is 200 feet and the depth ranges from 150-200 feet. Using the bylaw's standards these lots are capable of being developed without the inclusion of 1445 Station Road as part of the site. Reference to Exhibit 42, a map of existing land uses disclosed a property zoned Industrial, but used commercially which measures 100 x 150 feet. It is located about 1000 feet east of Station Road on the north side of Highway 20.

With this information in mind the Board cannot accept the planner's sweeping contention that development of the two lots alone is difficult. It might well be for a use as intensive as the abandoned proposal that Mr. Bargeron has already faced. However the by-law permits in excess of 35 uses in the Highway Commercial zone. The Board has no doubt that some of these myriad of uses could develop without serious problems on the two lots. There is no danger of sterilizing the two Highway 20 lots if 1445 Station Road is not similarly rezoned.

Once again as with the Kaiser property it may well be that given a concrete development proposal and the existence of site plan control, albeit a process in which he is not entitled to participate, Mr. Bargeron might have no qualms about the inclusion of 1445 Station Road in any redevelopment scheme. Until such occurs its inclusion in By-law 1261 is premature.

The Board therefore allows the appeal of Mr. Bargeron and directs the Town to amend By-law 1261 to exclude 1445 Station Road therefrom.

In summary, the Board in allowing the appeals from By-law 1261 in whole or in part hereby directs the Town to amend the By-law as follows:

1. By the addition of the terms of its resolution dated July 16, 1990, with respect to the land of Bryland Developments Ltd.;
2. By the insertion of a maximum height restriction of 10.5 metres throughout the Highway Commercial zone;
3. By the modification of the regulatory standards as they relate to the Kaiser property on the north side of Highway 20 east of Rice Road so that the minimum rear yard setback is 46 metres; and
4. By the removal of the property known as 1445 Station Road from the by-law;
5. By the insertion of a provision prohibiting outside storage;

The Board's Order will so issue.

Concurrent with the hearing as to By-law 1261 the Board heard the balance of the case relating to comprehensive zoning By-law 1136 (1987). Most of the appeals relative to By-law 1136 were dealt with by this panel of the Board in its decision dated September 20, 1990. Schedule "B" to that decision identified five matters found in specified sections of or schedules to the by-law which were not dealt with then at the request of the Town. To all intents and purposes these matters with the possible exception of the fourth one, pertaining to certain lands west of both Rice Road and Hurricane Road in which Mr. Stephen Kaiser has an interest, were to be "tidied-up" at this time.

Mr. Kaiser's testimony confirmed his counsel's opening remarks wherein it was stated that if the lands on the north side of Highway 20

covered by By-law 1261 were rezoned to Highway Commercial following the hearing on that by-law then Mr. Kaiser's appeals against the comprehensive by-law both for himself and on behalf of John Hajcman (o/a Olympic Plumbing) and Star Tile and Decorating would be withdrawn.

As a result of the Board's decision in the matter of By-law 1261 which has the effect of rezoning the lands west of Hurricane Road to Highway Commercial instead of Light Industrial-M1, as By-law 1136 originally contemplated, then the Board considers the appeals of Mr. Kaiser et al against By-law 113⁶ to have been withdrawn and hereby dismisses said appeals.

As to the other four matters referred to in Schedule B of the Board's earlier decision, counsel for the Town has addressed all but the first one. Broadly speaking, these matters relate to certain lands zoned open Space (OS) and Airport (AR) and certain lands situate within the Niagara Escarpment Plan area. Both the Town and the Niagara Escarpment Commission have suggested that these three matters be deferred. The problem with proceeding thusly is that no part of the comprehensive zoning by-law will come into effect since all matters under appeal must be disposed of before the by-law takes effect.

The Board does not believe that this is what the Town intends. From the Board's perspective it seems that what is requested of us is to delete those sections of and schedules to the by-law dealing with the three categories described previously. The lands in question will remain zoned as they are under By-law 279. Accordingly the Board hereby directs the Town to amend By-law 1136 by deleting therefrom the following:

1. Section 29 entitled "Airport AR Zone", and
2. The Airport AR Zone of the lands illustrated on Schedule "A-6" to By-law 1136.

3. The Hazard H Zone, Open Space OS Zone, Agricultural A Zone, Institutional I Zone, A-41 Zone, I-42 Zone, and A-67 Zone of lands as illustrated on Schedule "A" to By-law 1136.
4. The Agricultural A Zone and Institutional I Zone of lands illustrated on Schedule "A-1" to By-law 1136.
5. The Open Space OS Zone, Hazard H Zone A-15 Zone and A-16 Zone of lands as illustrated on Schedule "A-4" to By-law 1136.
6. The Agricultural A Zone, Hazard H Zone, Open Space OS Zone, and Residential 1 R1 Zone as illustrated on Schedule A-5" to By-law 1136.

The Board has been requested by the Town to delay the issuance of our final order with respect to By-law 1136 until a development agreement has been entered into pursuant to Minutes of Settlement filed with the Board in its File No. C890341, a related matter. The Board will accede to this request. In so doing it will afford the Town an opportunity to make written representations to the Board, if such are necessary with respect to the Board's interpretation of the request made concerning the Open Space, Airport and Niagara Escarpment Plan lands.

The final matter of concern found in Schedule "B" to the earlier decision relates to those lands to be zoned M3-Extractive Industrial marked in green on Schedule "A" to By-law 1136. The Board received no further representations in this regard at the resumption of the hearing. As stated, in order for By-law 1136 to come into effect the Board must address this issue and hereby directs the Town to amend the By-law by deleting the coloration associated with the M3-Extractive Industrial Zone from Schedule "A" to the by-law. Once again, as the Board's final order is not to issue until the Town confirms the

execution of the development agreement in File C 890341, the Town will have the opportunity to make written representations to the Board if it so chooses, regarding the Board's decision with respect to the M3-Extraction Industrial zoning.

The Board's Order on By-law 1136 (1987) will not issue until the directions in this decision are completed and a revised copy of the by-law has been forwarded to and accepted by this Board as being in compliance with this decision.

In summary, subject to the changes made by the Board in its earlier decision or those directed to be made by the Town in both that decision and this decision, the appeals against By-law 1136 (1987) are otherwise dismissed.

DATED at TORONTO this 14th day of May, 1991.



S.R. COLE
MEMBER

"W.R.F. Watly"

W.R.F. WATLY
MEMBER