

EXPLANATION OF THE PURPOSE AND EFFECT OF BY-LAW NO. 2810 (2006)

The subject lands are located on the south side of Canboro Road, lying west of Church Street. The lands are legally described as part of Lot 17, Concession 10, former Township of Pelham, now Town of Pelham and known municipally as 850 Canboro Road.

Council approved By-law No. 1353 (1990) rezoning the lands to Agricultural A-94, restricting the permitted uses to: agricultural uses including greenhouses; one single detached dwelling on one lot; home occupations; kennels; uses, buildings and structures accessory to the foregoing permitted uses; and forestry and conservation uses. The By-law also reduced the lot frontage and area requirements of the Agricultural Zone to recognize the configuration of the lands.

This By-law amends special provision A-94 to permit the storage of fireworks in support of a home occupation and to allow for the use of sea containers as accessory structures. The By-law also restricts the storage of fireworks in accessory buildings to a maximum of 60 square metres.

File No: AM-11/05

Applicants: Micheal and Karen Biancaniello
Assessment Roll No.: 2732 010 015 07805
Planning Report No.: P-39/06

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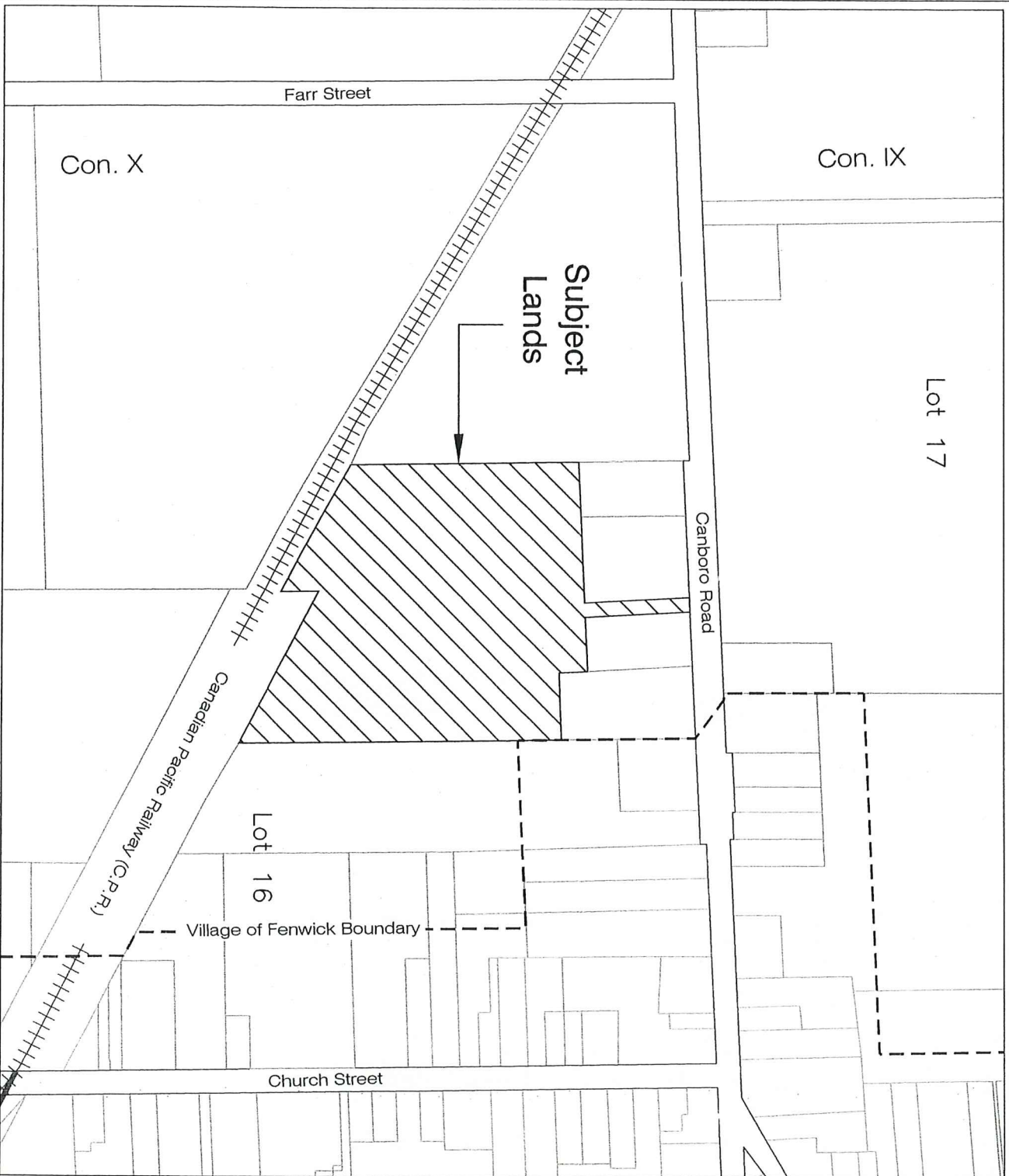
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SCHEDULE 'A' - KEY MAP TOWN OF PELHAM



This is Schedule 'A' to By-law No. 2810 (2006) passed the 2nd day of
October, 2006.

Ronald W. Leavens
MAYOR: RONALD W. LEAVENS

Cheryl Milette
CLERK: CHERYL MILETTE

ISSUE DATE:
August 16, 2007
DECISION/ORDER NO.:
2291



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL060998

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

Appellant: Leah Guitard
Subject: By-law No. 2810 (2006)
Municipality: Town of Pelham
OMB Case No.: PL060998
OMB File No.: R060284

APPEARANCES:

Parties

Michael and Karen Biancaniello
Leah Guitard
Town of Pelham

Counsel

T. A. Richardson
J. A. Crossingham
T. A. Bielby

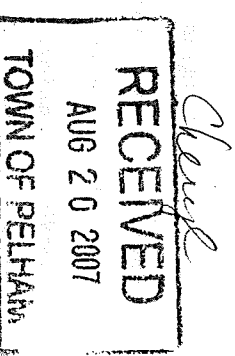
DECISION DELIVERED BY D. GATES AND ORDER OF THE BOARD

Physical Setting

850 Canboro Road is an irregularly shaped 15 acre parcel of land which has a 40 foot frontage and a depth of nearly 1300 feet in the Town of Pelham. Canboro Road runs in an east-west direction and is an 8 feet wide regional arterial road providing access to the charming old village of Fenwick. Appropriately it provides two lanes of pavement, one lane in each direction.

Approximately 300 feet back from the road allowance, the property widens approximately 315 feet to the east to lands occupied by St. Ann Catholic School and 370 feet to the west to lands being actively farmed with crops. The southeast portion of the property, about seven acres, is forested. A portion of the east boundary of the property abuts the urban area of Fenwick. Along the rear of this property running somewhat diagonally is a CPR mainline.

The two storey home of about 3000 square feet sits about 380 feet back from Canboro Road and looks out directly onto Canboro Road over a long paved and well



landscaped drive which occupies the 40 foot by nearly 300 foot front portion of the property that provides access to the main acreage. A 1500 square foot barn, built about the same time as the main house, 1979, is located about 300 feet to the south and west of the house.

At an earlier time four smaller residential parcels fronting on to Canboro Road appear to have been carved out of 850 Canboro Road and back on it, two lots to the east of the driveway and two to the west. Each of these lots have single family dwellings erected on them, and the lot immediately to the west of the driveway for 850 Canboro Road has been rezoned under a different regulatory regime so as to allow it to be used only for "a retail farm supply store, light manufacturing of wood products..." and the building has been expanded. A retail and manufacturing use relating to the fabrication, sale and supply of doors and windows occupies 854 Canboro Road today.

Ms Guitard, the Appellant, occupies 844 Canboro Road immediately to the east of the driveway so that her property borders 850 Canboro at its rear and side. Ms Guitard, her husband and four young sons occupy this property as their home. The other two lots that back onto 850 Canboro Road are also used for residential purposes.

The Application

On April 25, 2006 Mr. and Mrs. Biancaniello, the owners of 850 Canboro Road applied for the following rezoning:

An amendment to permit the use of three sea containers, each measuring 8 feet by 40 feet 2 of which are for the storage of fireworks, and the other provides a buffer between the two, in conjunction with the home occupation on the property (sic).

The rezoning was requested for the following reason:

The applicants conduct a business from their home, providing major fireworks displays. It is necessary to store the fireworks in an isolated location in accordance with federal licensing requirements....The storage location has been licensed by the federal government....

The location chosen for the sea containers was about 450 feet southwest of the house (152.4 metres) and about 175 feet (54.86 metres) southwest of the barn, and about 850 feet (274.32 metres) south of Canboro Road and 200 feet (86.87 metres) north of the CPR railway property.

While home occupations are permitted under the zoning by-law within single family dwellings on a property zoned A (Agricultural Zone), the use of accessory buildings in conjunction with the home occupation is not permitted, therefore an amendment to the zoning by-law was requested.

Subsection 5.83 of the Pelham Zoning By-law No.1136 (1987) defines a home occupation as:

an occupation conducted entirely within the dwelling or dwelling unit for gain or profit as an accessory use to the principle residential use by one or more persons residing therein.

Subsection 5.2 of the Zoning By-law defines accessory as:

a use, building or a structure that is incidental, subordinate and exclusively devoted to a main use, building or structure and located on the same lot therewith.

Subsection 6.7 of the By-law directs that no home occupation shall be permitted in any zone unless permitted in such zone and complies with the following provisions:

a) SIZE

Not more than 25% of the dwelling unit area shall be used for the purpose of home occupation uses, except this restriction shall not apply to "day nurseries" as defined herein.

b) ACCESSORY BUILDINGS

No accessory building shall be erected, altered or used for the purposes of a home occupation.

c) OCCUPANCY

The home occupation shall only be carried out by a resident of the dwelling unit in which the home occupation is located.

d) ADVERTISING

There shall be no external display or advertising to indicate to persons outside that any part of the dwelling, dwelling unit or lot is being used for a purpose other than residential.

e) SALES OR RENTALS

On any lot containing a home occupation shall be used as an open storage area accessory to that home occupation use.

On October 2, 2006 after a lengthy public process, Pelham Council unanimously passed the zoning amendment notwithstanding that their planning staff's recommendation did not support the amendment.

Evidence As To How The Home Occupation Operates

Mr. Biancaniello purchased 540 Canboro Road about seven years ago with the expectation that he could use the property as his home and operate his business from home. He has a very small office in his home and from there using his computer with very specialized software, designs fireworks displays. His forte, following in his father's footsteps, is European based, and he is renowned for spectacular visual displays building to unforgettable climatic endings. Using his telephone and computer he is able to enter into contracts for the provision of displays, and hire on a contractual basis, independent contractors to carry out the displays offsite, under his supervision.

His business is seasonal with the time of greatest activity being the 24th of May and July 1. During these busy periods he also wholesales consumer fireworks to large and small retailers. As time has passed wholesale sales to retailers have been declining while the more lucrative display business has been growing.

If the intensity of use were only as described above there would not be a concern about this use. Unfortunately shortly after Mr. Biancaniello moved in he put up a sign and offered to sell consumer fireworks from his house. Also, because the business is so competitive, he would test new display type fireworks at the rear of his property from time to time to ensure they measured up to their claims. This caused complaints and resulted in him removing his small advertising sign and ceasing selling consumer fireworks directly to his retail customers.

Occasionally during large fireworks displays a firework is a dud and proper disposal is an issue. An open fire pit has been constructed near the rear of the Biancaniello property and duds are brought back to the property and ignited in the fire pit. According to Mr. Biancaniello these dud shells do not noisily explode when ignited but would produce a contained flame. He also utilizes the test pit to assist fire authorities with fire training and with the safe disposal of duds from other less professional competitors. The Board inferred that because Mr. Biancaniello was so cooperative, if asked by the local police or fire department, more questionable material would also be disposed of here.

Mr. Biancanceillo is well liked by the local Fire Department and his charitable work such as assisting with training of fire personal respecting explosives and in particular fireworks is recognized and appreciated.

There is a distinction to be made between consumer fireworks which may be purchased by a person without a licence at different times throughout the year and professional fireworks used in large displays, which may only be purchased and set off under strict regulations by federally licensed professionals.

Another reason Mr. Biancaniello purchased 540 Canboro Road was because the location where he stored his fireworks in Milton was soon to become unavailable to him. While initially using his barn, a short time after he moved into this property he erected an 8 foot X 40 foot steel locked sea container (like a railway box car but without wheels) to store fireworks in and about one to two years later another one was erected. As a further precaution a third steel container containing no fireworks was placed between the other two, there being about 10 to 20 feet of open space between each of the three containers.

There was evidence that Mr. Biancaniello and his wife might supervise 5 to 10 displays for the 24th of May and July 1. Trucks rented or stored elsewhere would enter the property via the only entrance off Canboro Road, drive past the house and barn to near the rear of the property and independent contractors would pick up the explosives from one of the two magazines and load the trucks. On their departure they frequently would park at the barn to socialize with Mr. Biancaniello.

There was disputed evidence over the number of trucks lined up on the driveway or adjacent to the barn at any one time which varied from Mr. Biancaniello's evidence of not more than two to Ms Guitard's evidence of five or more on some occasions. Ms Guitard also testified that frequently at this time of year the same vehicles arriving from offsite were parked all day on the property day after day.

It is somewhat difficult to distinguish between vehicles visiting the Biancaniello's property for business reasons or for family reasons. For instance Mr. Biancaniello testified that the looked after his sick mother and she resided with them in his home. Many days she required two caregivers.

Also in an area Ms Guitard thought was used for parking, the Board, having taken a view at the request of legal counsel for Mr. Guitard, found the area to be used as a large vegetable garden just as Mr. Biancaniello had testified to.

Clearly, Mr. Biancaniello has stepped into his father's shoes in more than just a professional way and this property provides a base for his large extended family (many of whom use portions of the vegetable garden) and his many friends. The Board found Mr. Biancaniello to be very professional in his explosives business, his premises were exceptionally neat and tidy, his demeanour totally friendly and likeable, and his evidence forthright, honest and in general, quite believable.

For instance, the Parties even took a second surprise view of the barn and could find little if anything to tie its use to the business as was asserted by the Appellant. The only evidence that the Board found at all difficult to believe was that Mr. Biancaniello fabricated all of his replacement wooden rocket stands in his small office within the house.

There was also evidence of Mr. Biancaniello using the rear of his property for skeet shooting. While Ms Guitard complained of noise from fireworks disturbing herself and her family it appeared that most of Mr. Biancaniello's neighbours were responsible for these home displays of consumer fireworks except for the disposal of duds and the testing of new products, which Mr. Biancaniello admitted to.

The Regulatory Framework

Explosives, including fireworks are regulated federally. The Board understands that the *Explosives Act* and its regulations provide regulated separation distances for storage magazines from other uses and that all federal separation distance criteria are met here. The Board also understands from Mr. Biancancello's evidence how difficult it is to find acceptable locations for such storage facilities and that most industrial locations are prohibited and prohibitively expensive because of the large setback requirements from other buildings and the expense related to large vacant industrial sites.

2005 Provincial Policy Statement

The subject lands are prime agricultural lands under the applicable Provincial Policy Statement (PPS). As such, agricultural uses, secondary use, and agricultural related uses are permitted. The PPS states that secondary uses shall be compatible with, and shall not hinder, surrounding agricultural operations. Also, these uses shall be limited in scale, and criteria for these uses shall be included in planning documents as recommended by the Province, or based on municipal approaches, which achieve the same objective. In prime agricultural areas normal farm practices shall be promoted and followed including the minimum separation distance formula for new uses.

Here there was conflicting evidence as to whether the use was consistent with the PPS however the PPS is not a statute which must be rigidly interpreted but a broad policy document to be considered under a statute that is to be interpreted in a broad and purposeful way. Clearly the intention of the PPS is to protect agriculture and discourage non-agricultural uses. From the description of the use above, the Board finds the use is too intensive to be considered a new secondary use under the PPS and is not compatible with surrounding agricultural operations.

Secondary use is defined as secondary to the principal use of the property, including but not limited to, home occupations, home industries, and uses that produce value-added agricultural products from the farm operation on the property.

The qualified planner called by the Biancaniello's, Mr. Smart argued that the use proposed is permitted within precise reading of the PPS broad policy provisions. He argued that these provisions do not require that a secondary use be related to agriculture. While I disagree with his conclusions here, if he is correct, I fail to see how the definition of secondary use can be read so broadly so as to include what is applied for here. For instance a secondary use to farming might include the canning and selling of preserves. A domestic art might be considered a secondary use to a residential use. I am not able to expand the definition here so as to include the proposed sea containers.

The Greenbelt Plan

The subject lands lie within the specialty crop portion of the Protected Countryside. Section 3.1.2 of the plan provides the following policies:

1. Within the specialty crop areas, normal farm practices and a full range of agricultural, agricultural-related and secondary uses are supported and permitted.
2. Lands within specialty crop areas shall not be re-designated in municipal official plans for non-agricultural uses, with the exception of those uses permitted in the general policies of sections 4.2 to 4.6.
3. Towns/Villages and Hamlets are not permitted to expand into specialty crop areas.
4. New land uses, including the creation of lots, as permitted by the policies of this Plan, and new or expanding livestock facilities shall comply with the minimum distance separation formulae.

Section 4.5 provides the following policies for existing uses:

1. All existing uses lawfully used for such purpose on the day before the Greenbelt Plan comes into force are permitted.
2. Single dwellings are permitted on existing lots of record, provided they were zoned for such as of the date the Greenbelt Plan came into force, or where an application for an amendment to a zoning by-law is required as a condition of

a severance granted prior to December 14, 2003 but which application did not proceed.

3. Outside of settlement areas, expansions to existing buildings and structures, accessory structures and uses, and/or conversions of legally existing uses which bring the use more into conformity with this Plan, are permitted subject to a demonstration of the following:

- a) Notwithstanding section 4.2.2.6, new municipal services are not required; and
- b) The use does not expand into key natural heritage features and key hydrologic features, unless there is no other alternative in which case any expansion shall be limited in scope and kept within close geographical proximity to the existing structure.

4. Expansions to existing agricultural buildings and structures, residential dwellings, and accessory uses to both, may be considered within key natural heritage features and key hydrologic features if it is demonstrated that:

- a) There is no alternative and the expansion, alteration or establishment is directed away from the feature to the maximum extent possible; and
- b) The impact of the expansion or alteration on the feature and its functions is minimized to the maximum extent possible.

5. Expansion, maintenance and/or replacement of existing infrastructure is permitted, subject to the infrastructure policies of section 4.2.

This particular property is just outside of a settlement area. Secondary uses are defined in this plan identically to their definition in the 2005 PPS.

The Board's comments about the 2005 PPS being a policy document intended to be applied not necessarily literally but purposely apply equally here. For the reasons mentioned above, I concur with the municipal planners position that he expressed in his August 21, 2006 staff report that the proposal does not comply with the purpose and intent of the Greenbelt Plan and should not be permitted. Just because the plan states that secondary uses "are supported" does not convince me that this use is secondary

or permitted by the Greenbelt Plan. Just because Section 4.1 of the Greenbelt Plan permits some other non-agricultural uses in rural areas does not change my view that when read as a whole the intention of the Greenbelt Plan was to prohibit uses such as proposed here. It is not what was intended, too intensive, and not secondary.

Regional and Local Official Plans

The Board understands that neither plan has been updated to reflect the Greenbelt Plan or the 2005 PPS. In both plans the subject land is designated Good General Farmland.

In the Regional OP the land is not designated good tender fruit or good grape land that have the highest priority for preservation. Policy 6.A.8 provides generally that non-agricultural uses should not be located in Agricultural Areas. Such uses may be applied for and approved if they meet a number of Regional criteria such as utilizing lower quality soil, necessity of use, availability of other sites, degree of conflict, distance and natural buffering from existing agricultural uses, and impact on the environment.

Mr. Smart suggests that while it is not necessary to apply this policy because the Biancancello's are applying for a secondary use, he suggests that this proposal meets a number of the criteria.

For instance he suggested that because Mr. Biancancello assisted the community with fire training and shell disposal this use is necessary and desirable for the community. The Board is not convinced this desirability and need could not be met by other means and that this use was really that necessary or desirable. Similarly, Mr. Biancancello stated that he could not find another location elsewhere. From his answers to questions on cross-examination, the Board was not convinced that he had done a really thorough search of all other properties in Niagara and Halton Regions.

As regards conflicts, the planner reminded the Board that the application was not to set off fireworks, but merely to store them in sea containers and by utilizing the existing environment such as distance separation, landscaping, forested area, obstructions and elevations, the proposal will have little impact. Here the planner seemed to overlook the fact that the locating of the containers on the property will, (together with the access and parking therefore), undermine the capacity of this property of being farmed.

Of more relevance, was his analysis of the secondary use provisions in the Niagara OP which provide as follows:

Policy 6.A.18

Home industries such as welding ships, small engine repair, carpentry, electrical; home occupations within residences such as bed and breakfast facilities with up to six guestrooms and personal services; and uses that produce and market value-added agricultural products are permitted as secondary uses to the principle use of a property in an agricultural area provided that:

- i) the use is small in scale and remains ancillary to the principal use of the property, and
- ii) any value-added agricultural products are from the farm operation on the property; and
- iii) all of the property remains designated and zoned agricultural, and
- iv) new secondary uses are compatible with and do not hinder surrounding agricultural uses, and
- v) home industries are permitted by zoning by-law amendment, and
- vi) the use complies with the other policies in the Regional Policy Plan, and

No future severance of these secondary uses is permitted.

The local municipalities are expected to incorporate more detailed policies in their Official Plans and Zoning By-laws to regulate secondary uses (i.e. lot size, lot coverage, setbacks, and the need for site plan control) so that any negative effects on agriculture are minimized.

Here he noted that the home industries listed would normally have outside storage associated with them and could not see the difference between what was permitted there and proposed here. Furthermore he suggested the proposed use here is small scale like the others mentioned in 6.A.18 because it occupies less than 1% of the entire property.

To the Board this is like suggesting a variance is minor because it is a variance of less than 1%. As the Board has often stated, it is not merely the percentage change that is to be considered. The containers themselves may have little adverse impact, but the adverse impact of the containers themselves is not the only concern here; as stated above, it is the intensity or scale of the use in total that most concerns the Board.

The Board finds that the listed uses at the beginning of 6.A.18 could easily be considered secondary uses to a farm operation as is specified in the later part of the sentence pertaining to agricultural products. As Mr. Smart pointed out, what is contemplated in 6.A.18 are small-scale uses. Fireworks storage has nothing to do with a farm operation.

The warehousing of fireworks cannot have been contemplated as permissible by the Region under this section when it adopted this Official Plan. As specified, the uses set out in 6.A.18 are clearly secondary, and ancillary (6.a.18(1)). Furthermore, a more detailed explanation of what is intended is expected to be included in local official plans and zoning by-laws.

It could be argued that personal service secondary uses are stand-alone and the title "secondary use" is to be given no meaning in this planning document. The Board does not agree with this interpretation and finds that personal services would still support the agricultural community, particularly where the property might not have easy access to such necessary services. It could also be argued that Bed and Breakfast facilities are essentially tourism uses which compliment agricultural uses and not a good example of stand alone non-agricultural uses in general.

Again the Board finds a too literal approach unhelpful and believes that the purpose and intent of the Region's OP is to encourage agricultural production and those subordinate uses which assist the viability of existing agricultural production, not uses totally unrelated to agriculture. The Board does not agree with Mr. Smart's narrow description of this use as simply storage.

Even if it could be argued that this use meets the tests set out in the Regional Official Plan, a conclusion the Board does not come to here, the Board cannot look to it to overcome the application's failure to comply with provincial policy, especially when the OP has not been updated to reflect this policy.

As mentioned above, the subject lands are designated Good General Agricultural under the Pelham Official Plan. There the predominant use of land in the Agricultural Area shall be all forms of agriculture. Within this designation limited home occupational and professional uses are permitted provided they don't alter the rural character of the area and can be justified as a convenience to the nearby inhabitants.

Once again, the Board disagrees with Mr. Smart's opinion and does not characterize this use as narrowly as a small scale storage use. Considering this use as a whole, the Board does not find that this use is a "convenience to local inhabitants" or small scale. Ms Guitard and a few of the other residents certainly did not find the fireworks testing a convenience in any way. Similarly, the shipping activity on the property associated with the storage use, especially before the 24th of May and July 1, could not be considered small scale in this quiet somewhat idyllic agricultural community.

Again the Board finds a too literal approach unhelpful and believes that the purpose and intent of the Town's OP is to encourage agricultural production and those subordinate uses which assist the viability of existing agricultural production, not uses totally unrelated to agriculture. The Board does not agree with Mr. Smart's interpretation of Sections 1.10.2 and 1.10.4 and finds these subsections support the Board's view that ancillary uses and small-scale industrial and commercial uses are permitted in the Agricultural Area when they are related to and serve agricultural uses.

Pelham's Zoning By-law

850 Canboro Road is zoned A-94 under the Town's Zoning By-law No.1136 (1987) as amended (the "By-law"). Generally, agricultural uses, one single-family dwelling, home occupations, kennels and accessory uses, buildings and structures are permitted under this zoning. The minimum lot area for agricultural uses is approximately 13.96 acres. For agricultural uses and accessory uses a maximum lot coverage of 10% is permitted. Here Mr. Smart testified the coverage is less than 1% even when you include the sea containers.

Under the definition section of the By-law "Accessory" means:

- A use, a building or a structure that is incidental, subordinate and exclusively devoted to a main use, building or structure and located on the same lot therewith;

Under the definition section of the By-law "Home Occupation" means:

- An occupation conducted entirely within the dwelling or dwelling unit for gain or profit as an accessory use to the principle residential use by one or more persons residing therein.

6.1 Accessory Uses

A) GENERAL

Where this By-law provides that a lot may be used or a building or structure may be erected or used for a purpose, that purpose shall include any accessory building or structure or accessory use, but shall not include (1) any occupation for gain or profit conducted within or accessory to a dwelling house or unit except as in this By-law is specifically permitted.

B) LOCATION

Except as otherwise provided herein, in a Residential zone any accessory building or structure which is not part of the main building shall be erected to the rear of the required front yard and shall not be located closer to any lot line than 1.2 metres (3.94 feet) or closer to any street than the required yard for the main building or structure.

In all other zones any accessory building or structure which is not part of the main structure shall be erected to the rear of the front yard and shall not be located closer to any lot line than the required yard of the main building or structure.

C) MAXIMUM HEIGHT

Except as otherwise provided herein, no accessory residential building or structure shall exceed 3.7 metres (12.14 feet) in height.

d) LOT COVERAGE

The total lot coverage of all accessory buildings on a lot shall not exceed 10% of the lot area.

e) UNDERGROUND PARKING

The yard requirements of this By-law shall not apply to underground parking structures.

Mr. Richardson argued that the Board should ignore these sections or give them little weight insofar as these sections are being amended by his client's request. In the Board's opinion these sections are important in considering what the Town's intention was, especially when the County's OP defers somewhat to the local zoning by-law. When taken together the Board finds that these provisions clearly do not anticipate such an intense use which includes storage outside a building, non-resident workers coming to work on the property loading fireworks into trucks, significant portions of the business occurring outside of the main house and advertising and sales taking place on the property (now discontinued).

Other Matters

Mr. Smart suggested that the proposed use implements government policy, by encouraging work at home and less commuting. The Board does not find that Places To Grow supports the intensity of use described here where what is proposed is what the Town planner has (correctly in the Board's opinion) characterized as a second use on this agricultural property.

Finally, one of Mr Richardson's arguments was that the Board should approach this matter more creatively like Municipal Council did. Essentially any other home occupation could store its inventory in the basement. Here that is prohibited by government regulations because of the type of product stored. The size of the storage area here is approximately the same as the basement, which is not being used for business purposes. The coverage is essentially the same. The Board finds that the use is of such an intensity as described that it should be considered a second use on the property and therefore it is not good planning to approve the use of the sea containers on the property. If the product stored was not explosives but something else, the Board

would still find the use as described as too intensive to be considered a home occupation. Therefore the appeal is allowed and Zoning By-law 2810 (2006) is repealed.

It is so Ordered.

"D. Gates"

D. GATES
MEMBER