

ISSUE DATE:

Oct. 21, 2010



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL081128

By-law No.

10-295

Landmart Realty Corp. has appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the City of Hamilton to make a decision respecting a proposed plan of subdivision on lands located at 157 Parkside Drive to permit a large subdivision development

(Approval Authority File No. 25T-200802)

OMB Case No.: PL081128

OMB File No.: PL081129

Landmart Realty Corp. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's neglect to enact a proposed amendment to Zoning By-law ZAC-08-10 of the City of Hamilton to rezone lands respecting 157 Parkside Drive to permit a large subdivision development

OMB Case No.: PL081128

OMB File No.: PL081128

APPEARANCES:

Parties

Counsel/Agent*

Landmart Realty Corp.

R. D. Cheeseman

City of Hamilton

B. Duxbury & J. Wice

MC2 Homes Inc.

R. K. Webb

Amedeo DiMarco

A. Stewart

Silverwood Homes Limited & Parkside Hills
Inc.

K. Gonnens*

DECISION DELIVERED BY S. J. SUTHERLAND AND ORDER OF THE BOARD

This was a hearing under s. 34(11) of the *Planning Act* regarding the failure of the City of Hamilton (City) to make a decision on a rezoning application by Landmart Realty Corp. (Applicant or Landmart) to rezone lands at 157 Parkside Drive (Subject Property), Hamilton (City) from Agriculture "A" to Urban Residential "R-1-34", Medium Density

"RD-15" and Conservation Management "CM", to implement a draft plan of subdivision (City File No. 25T-200802).

The application by Landmart is for 104 blocks with 87 lots for single detached dwellings, seven blocks for townhouses, one block for a pedestrian walkway, three blocks for residential development and one block for a storm water management pond. The remaining blocks would be for revenue, widening and a turning circle.

At the commencement of the hearing, the Board was notified by counsel that the City of Burlington had withdrawn as a Party on a without costs basis. The Board was also told that, of the 51 Conditions to the draft plan, six remained in dispute, those being Conditions number:

- **2** The amended North Waterdown Master Drainage Plan (MDP) is approved and that the recommendations pertaining to lands of the draft plan including those for SWM facility No. 5 are implemented to the satisfaction of the Director of Development Engineering.

Landmart wishes this Condition to be removed.

- **13** The Owner shall provide and demonstrate on the draft plan of subdivision sufficient land to accommodate an 18.0 m wide temporary road access within Blocks 109 and 110 and Lots 1 and 35 as necessary. At such time when the road is no longer required by the City for the purpose of providing the second access, the City shall upon receiving a written request, stop up and close the lands as public highway and transfer title of the said lands back to the Owner for a nominal consideration. The Owner shall remove all temporary works at his own expense.

Landmart wishes the temporary road to be 15.0 m wide, rather than 18.0 m.

- **20** The Owner agrees that development shall not proceed prior to final approval from the Manager of Traffic Engineering of the Waterdown North Consolidated Traffic Impact Study.

Landmart believes this Condition to be unnecessary and wishes it deleted.

- **22** The Owner shall provide a financial contribution to the City toward temporary upgrades on Evans Road that are required to facilitate interim growth in Waterdown North in advance of permanent upgrades as identified in the Waterdown/Aldershot Transportation Master Plan (WATNP). Specifically, the i) installation of traffic signal controls at the intersection of Parkside Drive at Evans Road and ii) construction of an exclusive southbound left turn lane and signal modifications on Evans Road and Dundas Street.

The contribution shall be in the form of a single future value lump sum payment, calculated on a per unit basis, per the total unit count as presented in the Waterdown North Consolidated Traffic Impact Study.

Landmart wishes this Condition to be deleted.

- **28** That, prior to servicing, the Owner agrees that all lots that have less than 1.20 m side yard setbacks will be serviced with split drainage. Further, back to front drainage on such lots will not be permitted.

Landmart wishes the Condition to read: "That the Owner agrees that all lots that have less than 1.20 m side yard setbacks will in general be serviced with split drainage. Further, back to front drainage on such lots will be subject to the approval of the Director of Development Engineering."

- **33** The Owner shall construct a temporary hard surface walkway on the north side of Parkside Drive from the east side of Hollybush Drive to the west side of Braeheid Avenue to the satisfaction of the Director of Development Engineering and the Manager of Traffic Engineering.

Landmart wishes to construct the temporary hard surface walkway on the north side of Parkside Drive across only its entire frontage.

John S. Ariens gave expert land use evidence and opinion on behalf of Landmart. He testified that the Landmart subdivision has been designed generally in conformity with the North Waterdown Secondary Plan and complies with the density ranges and all policy objectives. The matter before the Board, therefore, does not involve the design of the subdivision nor its Land Use Schedule, but rather the outstanding Conditions listed above. Mr. Ariens told the Board that these conditions are generally related to matters external to Landmart's lands, and would result "in significant and unwarranted costs."

He described the lands as being immediately to the north of the Niagara Escarpment, bounded by Dundas Street, Parkside Drive, Highway 6 and Centre Road. The Waterdown community is identified as a settlement area and the Provincial Policies indicate that settlement area shall be the focus of growth; Mr. Ariens stated that Policy 1.1.3.4 of the Provincial Policy Statement (PPS) requires municipalities to have development standards facilitating intensification, redevelopment and compact form, while maintaining appropriate levels of public health and safety. Draft Plan Conditions are therefore required to facilitate this requirement of the PPS.

In relation to the s. 51(25) of the *Planning Act*, that a key requirement in the consideration of a Condition is that it be "*reasonable, having regard to the nature of the development proposed for the subdivision*". He said that the City has a standard list of Subdivision Conditions which are applied to all Draft Plans, and that these are not at issue, but that six of the 51 particular Conditions applying to this Plan of Subdivision are. He outlined his concerns, and opinion, on each of these Conditions.

- **Condition 2:** The North Waterdown Master Drainage Plan (MDP) is an ongoing initiative, commenced by the Municipality subsequent to the submission of the Draft Plan application, which included a detailed Stormwater Management Report prepared by Amec. This report identified the drainage boundaries and appropriately sized a stormwater management facility to be shared by Landmart and the adjacent developer. After examining the Witness Statement of Angelo Cutaia of Amec, Mr. Ariens accepted Mr. Cutaia's position that the final MDP will not affect the sizing or design of the proposed Stormwater Management Facility (SWM). He pointed out that the MDP is not

completed, does not yet contain recommendations, and has not yet been approved by Council. In his opinion, this condition is not appropriate and should be removed.

- **Condition 13:** Mr. Ariens believes this condition to be “generally satisfactory, but points out that an 18 m wide temporary road access would encumber Lots 1 and 35 because Blocks 109 and 110 are only 15 m wide. Based on Mr. Cutaita’s Witness Statement, Mr. Ariens is satisfied that a temporary road access can be accommodated within a 15 m wide parcel and recommends this Condition be revised to reduce the width of the temporary road access to 15 m.
- **Condition 20:** Having read the Witness Statement of Transportation Planning Engineer, William O’Brien. Mr. Ariens concurred that a Consolidated Traffic Impact Study has been completed, leaving a dispute (to be resolved as a result of this hearing) as to the road improvements necessary. Accordingly, he believed this Condition should be deleted.
- **Condition 22:** Again based on the Witness Statement of Mr. O’Brien, Mr. Ariens is of the opinion that these improvements are not warranted. He pointed out that they extend beyond the boundaries of the Draft Plan and apply to road improvements “far removed” from the subject development.

It was his opinion that this Condition is not appropriate and should be deleted.

- **Condition 28:** Mr. Ariens found the Condition “generally satisfactory”, but that it might not always be achievable. He recommended that the words “prior to servicing” be removed as redundant, and that some flexibility be allowed regarding back to front drainage be allowed subject to the approval of the Director of Development Engineering. He pointed out that this still afforded the City the final say regarding the appropriateness of such drainage.

- **Condition 33:** Mr. Ariens pointed out that Condition 5 requires Landmart to pay its proportionate share for the future urbanization of Parkside Drive, which will include sidewalks. The proposed Condition requires a temporary hard surface walkway extending well beyond the limits of the Draft Plan, and, as such, cannot be supported. It was his opinion that, in the interest of pedestrian safety, a temporary sidewalk is warranted, but only across the Parkside Drive frontage of the subject lands.

It was his opinion that the application met the requirements of s. 51(24) of the *Planning Act*, is in conformity with the PPS and the Growth Plan, implemented the Official Plan (OP) and was in accordance with the general intent and purpose of the Zoning By-laws. He believed that it represents good planning.

William O'Brien gave expert traffic engineering evidence and opinion on behalf of Landmart. His testimony related to Conditions 20 and 22. So far as **Condition 20** is concerned, Mr. O'Brien stated that the City Traffic Engineering Office staff has reviewed at least two preliminary drafts of the study report and provided comments on technical details that were addressed in the final reports. He added that final City comments related to study recommendations are outlined in a City letter of September 17, 2010. Mr. O'Brien said he disagreed with several of the improvements proposed by the City and anticipates that these areas of disagreement will be resolved through the Board hearing. This condition should therefore be deleted.

Regarding Condition 22

Mr. O'Brien said the August 2009 coordinated traffic study considered the need for the proposed improvements at the intersections of Evans Road and Parkside Drive, and Dundas Street and Evans Road, and concluded that these improvements are not warranted since they would be temporary road changes and do not form part of the planned Waterdown Aldershot Transportation Master Plan (WATMP) improvements.

He said the EA process related to a new east-west corridor has not yet been completed, and that the plan did not look at how development would proceed or be

staged. He pointed out that Landmart is constructing 145 residential units, while additional traffic in the area will also come from an additional 499 residential units constructed by three developers. He also stated that Evans Road and Dundas Street is 5 km away from the Subject Property. He testified that there are no safety concerns, and that the intersection of Parkside Drive and Evans Road does not meet the warrants for traffic signals, which would cost in the order of \$100,000 to \$125,000, divided among three developers, only to be removed some time in the future.

Mr. O'Brien also testified that Landmart does not own the land possibly required for a southbound left turn lane at Evans Road and Dundas Street, that there are a service station and utility corridor to be dealt with at this location, that there is no indication of the possible impacts on Borer's Creek, and that any impact from increased traffic would be temporary. He maintained that it was within the purview of the City to take corrective action to relieve any temporary congestion at either Parkside Drive and Evans Road or Evans Road and Dundas Street.

He said primary focus should be the need for improvements on Parkside Drive, and that the key traffic issue to be addressed at this hearing is the extent of roadway improvements required to accommodate the additional 145 residential units in the initial phase of the Landmart lands, in the Waterdown North Secondary Plan area. He told the Board that a coordinated traffic study was carried out by Paradigm on behalf of the three landowners (Landmart, DiMarco and Silverwood) in consultation and cooperation with the City. The study recommended a number of roadway improvements that would allow the future traffic to be accommodated in a reasonable manner, pending the completion beyond year 2016 of transportation improvements that are planned for WAMPT. It is Mr. O'Brien's opinion that these study recommendations constitute an appropriate plan and will accommodate traffic related to the proposed Landmart Development.

Under cross examination, Mr. O'Brien opined that a level of service "E" in urban areas is not unusual. He disagreed that a peak hour warrant analysis would be justified, and that the Ontario Traffic Manual uses an eight hour warrant analysis, to justify the original capital expenditure and ongoing maintenance costs. He did agree that municipalities signalize intersections regardless of whether or not they meet the warrants, but suggested that this is invariably politically driven.

He did not agree that the development was premature until all the traffic issues had been resolved. Mr. O'Brien stated that the congestion resulting from the proposed development will not be at a level unseen in the area, and that "bottlenecks can be healthy", discouraging people living further away from the area. He said the lack of bottlenecks means the road system has been over designed.

It was Mr. O'Brien's conclusion that Condition 22 is not appropriate and should be deleted.

Alvaro L. Almuina gave expert transportation planning evidence and opinion on behalf of the City. It was Mr. Almuina's opinion that not one unit of development can be accommodated until road network improvements are made, or until an interim traffic allocation study is done, and without either of these taking place the application was premature. In an earlier hearing regarding the Silverwood lands, the decision on which was introduced by Counsel for Landmart (OMB File No. PL080167), Mr. Almuina held that any interim improvement to Evans Road and Parkside Drive would be "throw away costs", because of the recommendations of the TMP.

At this hearing, Mr. Almuina supported temporary measures at Evans Road and Parkside Drive, and Dundas Street and Evans Road despite these improvements representing "throw away costs" as "reasonable measures" since the "East/West Link" is not yet in place. He did not quantify what the limit of these costs should be. He said the City could do with the dollars what they wished, putting in lights or not, providing a turn lane or not. Under cross examination, he concurred that it was a time delay of 14 seconds per car that he was looking at, stating "we rarely get into safety concerns."

It was Mr. Almuina's position that since Landmart "was going first" it should pay the costs of doing so, stating that traffic impacts are cumulative and should not be looked at on a piecemeal basis. He stated that it was his opinion that the piecemeal approach to addressing the traffic impact of development in Waterdown North is not appropriate and is inconsistent with good planning practice. He believed the argument that "only" 100 or 150 residential units are proposed and in themselves do not have a significant traffic impact is misleading, stating the impact must be looked at in the context of the "big picture."

Mr. Almuina also felt that an eight hour warrant at Evans Road and Parkside Drive may be insufficient in determining whether lights are justified. He said a four hour warrant, such as what is used in school districts might be more reasonable.

It was Mr. Almuina's position that it was important to maintain a level of service commensurate with the character of the community, and to not design a system that will fail.

In addressing **Condition 20**, Mr. Almuina stated that it was not uncommon to have such conditions in place given the importance of transportation capacity for the successful implementation of a development project. He does not believe the Condition should be deleted.

The Board's Disposition of Conditions 20 and 22

Condition 20:

The Board prefers the evidence of Mr. Ariens and Mr. O'Brien. At least two preliminary drafts of the study report have been reviewed by the City's Traffic Engineering Office. Comments on technical details were addressed in the final report. This hearing will resolve any remaining areas of disagreement. The Condition is unnecessary and potentially time consuming. The Board Orders it deleted.

Condition 22:

The Board prefers the evidence of Mr. Ariens and Mr. O'Brien. It finds the position of Mr. Almuina rigid and unreasonable. The reasons are as follows:

- These improvements will be temporary, and will involve considerable "throw away costs". They do not form part of the planned WATMP improvements.
- This phase of the Landmart development will account for 145 of the 500 new residential units to be built by three developers considered by the August 2009 study.

- Landmart does not own the land that may be necessary for left turn lane and signal modifications at Evans Road and Dundas Street. The City maintains that it will not expropriate land and that any exchange must involve a willing seller.
- No safety concerns have been presented to the Board.
- Not doing the improvements will potentially result in a relatively inconsequential delay of 14 seconds per car.
- The intersection of Parkside Drive and Evans Road does not meet the usual warrant for traffic signals in such a location. It is not near a school.
- Intensification will inevitably lead to more traffic and some delays. As the character of the community changes, so will the level of service. Communities do not remain frozen in time. Levels of service are modified to meet changing conditions. In this instance, the modification will be slight, and will be temporary.
- If temporary congestion problems arise, it is within the ability of the City to mitigate them if it feels it is important to do so.
- Mr. Almuina's position that any development at all is premature until the east-west corridor is complete would stall development to potentially 2016 or beyond. The Board fails to see how an allocation study would change that reality, and finds the cessation of development for that length of time unreasonable and not in the interests of a growing community.

The Board Orders this Condition to be deleted.

Angelo Cutaia gave expert engineering advice and opinion on behalf of Landmart, primarily addressing Conditions 13 and 28. Gavin Norman, the City's Manager of Engineering Design and Construction, did the same on behalf of the City.

Regarding Condition 13

It was Mr. Cutaia's position that temporary road access to the planned subdivision can be accommodated within a 15 m right-of-way, which would accommodate both the roadway and the grading. This would eliminate the need to include Lots 1 and 35 as part of the right-of-way. He testified that the only services necessary at this location – a storm sewer and street lighting – could be accommodated within the 15 m. He also told the Board that the appearance of the temporary roadway would be no different at 15 m than it would be at 18 m. The travelled portion is 8 m whether the width is 15 m or 18 m. He pointed out that the roadway would be temporary and would be signed as such. He said that there would be no engineering consequences or safety issues as the result of a 15 m rather than an 18 m right-of-way, which would eventually be stopped up and closed.

He recommended the temporary road access be 15 m.

Mr. Norman disagreed. He said past experience has shown that roads in Hamilton originally deemed to be temporary can end up as permanent because of such things as changes in land use policy and resident expectations. It is for that reason that the City ordinarily requires temporary roads to be constructed to urban standards within a standard right-of-way, in this case 18 m.

Mr. Norman went on to state that the issue is not whether a road can fit into a 15 m or 18 m right-of-way, but the ability to grade to abutting lots with minimal side yard set backs and homeowner safety. He said the City had no standards for 15 m rights-of-way, although he did concede under cross-examination that private roads could be built on 13 m rights-of-way.

The Board's Disposition of Condition 13

The right-of-way is to be temporary, and it is within the City's purview to see that it remains that way. There will be no difference in appearance be it a 15 m or an 18 m right-of-way. No safety or grading issues were identified by Mr. Norman. Mr. Cutaia, on the other hand, testified there would be none. While the City may have no standard for a 15 m right-of-way, standards can and do change, and the need to accommodate

reasonable changes is always there. If it was not so, we would still be measuring road widths in chains. For these reasons, the Board Orders that Condition 13 read as follows:

- The Owner shall provide, and demonstrate on the draft Plan of Subdivision, sufficient land to accommodate a 15.0 m wide temporary road access within Blocks 109 and 110 as necessary and to the satisfaction of the Director of Development Engineering. At such time as the road is no longer required by the City for the purpose of providing the second access, the City shall, upon receiving a written request, stop up and close the lands as public highway and transfer title of the said lands back to the Owner for a nominal consideration. The Owner shall remove all temporary works at his own expense.

Regarding Condition 28

Mr. Cutaia found this Condition generally satisfactory, but maintained that the words "prior to servicing" should be removed as they are redundant and identified earlier. He also urged some flexibility regarding this Condition, and that grading should be subject to the approval of the Director of Development Engineering. He told the Board that it might be necessary or desirable to service some of the townhouse lots with back-to-front drainage, and that by leaving the final approval for this with the Director of Development Engineering; the City would still maintain the final control as to the suitability of this happening on individual lots.

Mr. Norman did not support a change in this condition, saying that drainage and grading issues in new developments have become an increasing challenge due to narrow lot development. He said one-way drainage on narrow lots is difficult to implement successfully because of the limited space between homes, the long distance, the water must be conveyed, and because homeowners invariably construct sidewalks and other amenities in the side yard, blocking the swale needed to convey flows from storm events. He acknowledged that the City does not have an outright ban on back-to-front, or one-way, drainage.

The Board's Disposition of Condition 28

If the final decision of the suitability of any decision regarding one-way or back-to-front drainage on any lot with a side yard setback of less than 1.20 m ultimately rests with the Director of Development Engineering, the Board can see no reason to have a blanket prohibition on such drainage. The Board also finds the words "prior to servicing" redundant. The Board Orders Condition 28 to read as follows:

- The Owner agrees that all lots that have less than 1.20 m side yard setback will in general be serviced with split drainage. Further, back-to-front drainage on such lots will be subject to the approval of the Director of Development Engineering.

The Board granted the Motion of Counsel for Landmart.

Regarding Condition 33

There is a cluster of community facilities on the north side of Parkside Drive, namely an elementary school, a secondary school and a YMCA. There is therefore a recognized need for safe pedestrian access to these facilities. Landmart's lands do not abut these facilities, but their development will contribute to both pedestrian and vehicular traffic to the facilities. After some discussion, the following condition was agreed upon by the Parties:

- The Owner shall construct a temporary hard surface walkway on the north side of Parkside Drive from the west limits of the Owner's lands to Braeheid Avenue.

It was also agreed that the following footnote will accompany the Condition:

- The City will undertake best efforts to recover design and construction costs for the temporary hard surface walkway fronting MC2 lands from the east limit of the Landmart lands to Braeheid Avenue at the registration of Draft Plan 25T-200904.

The Board is satisfied with this resolution to the issue and orders the Condition and footnote to read as above.

Regarding Condition 2

At the end of the first day of the hearing, Counsel for Landmart indicated that he was bringing a motion, seeking:

1. An Order of the Board striking out the proposed Condition 2 of the Special Conditions of Draft Plan Approval 25T-2000802, 157 Parkside Drive, Waterdown.
2. An Order of the Board striking out the words "in accordance with the recommendations of the amended MDP" where they appear in condition 27a) of the Special Conditions of Draft Plan Approval for 25T-2000802, 157 Parkside Drive, Waterdown.
3. Such further and other relief as Counsel may advise and the Board may permit.

Counsel for the City brought a cross-motion for the following:

1. An order abridging the time for serving and filing this Motion;
2. An order adjourning the within hearing until final approval of the Waterdown North Master Drainage Plan Addendum and Borer's Creek Capacity Assessment Report.
3. In the alternative, an order adjourning the within hearing and consolidating the within hearing with the hearing of MC2 Homes Inc. (PL081087) scheduled to commence before the Ontario Municipal Board on September 27, 2010.

4. In the further alternative, an order granting leave to the City of Hamilton to submit alternative wording for Condition number 2 of the draft plan conditions presently before the Board (and related conditions thereto) which alternative Condition Number 2 would read as follows:

No 2. That, prior to the final Plan of Subdivision, the Owner shall implement such works as are required to fully mitigate the increase in flood risk downstream on the Borer's Creek imposed by development of the subject subdivision phase to the satisfaction of the Director of Development Engineering.

5. Such further and other relief as may be requested and this Board may permit.

The Board heard the motions and concluded the following on the basis of the grounds presented:

The North Waterdown Master Drainage Plan was completed in February, 2007, a year before Landmart applied for the Zoning By-law Amendment and Draft Plan of Subdivision. There is no "amended North Waterdown Master Drainage Plan" in existence. There is a draft document which did not, at the time of this hearing, contain neither recommendations nor an executive summary. This document has not been seen by Council. Landmart argued that it is entitled to have its application for ZBLA and Draft Plan approval adjudicated on the basis of the planning documents and policies that were in place at the time it made its application to the City, and that, in fact, the policy environment for this application has not changed.

Counsel for the City argued that there is a risk of downstream flooding from Borer's Creek, to which Landmart could contribute, and that the amended drainage plan suggests mitigating measures such as a dam or weir in the east-west corridor, likely on MC2 lands. Counsel argued that the *Clergy* principle, dictating that the policies in place at the time of application, is not always applicable and that this is one such occasion when it should not be applicable. He took the Board to a decision by then Member Krushelnicki involving *James Dick Construction Ltd.*, in which the Member states, "While the Board may seek to be consistent in its application of *Clergy*, at the same time it must not bind or fetter its discretion to act in an appropriate manner in the face of new

circumstances..... It must also be acknowledged that the *Clergy* principle is not law or an inviolate rule. It is a practice to promote fairness in the planning process...

In short, the Board is authorized when it is fair to apply the *Clergy* principle and should undoubtedly do so in the vast majority of cases. And equally, it has the authority to conclude when the circumstances of a case warrant the application of another principle. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest.

Counsel for the City also took the Board to Member Hussey's 2007 decision regarding *Bearsfield & Triple-R-Ranch Co.* in which Member Hussey applies Member Krushelnicki's reasoning in *James Dick* to set aside *Clergy*. In this instant, Member Hussey found that would best serve the public interest.

Generally, this panel prefers the position of Member Campbell stated in a decision regarding *Sun Life Assurance Company of Canada*, in which she writes, "This panel does not accept the proposition that the choice of policy regime to be applied to an application is merely a matter of Board procedure. The application of the relevant policy regime goes to the heart of procedural fairness in matters heard by this Board. The logical corollary of the reasoning in *Dumart* and *James Dick* is that an applicant, at the time it files an application with a municipality, can not know what policies against which its application will be tested. Such a situation would be patently unfair."

It would also be like the proverbial pinning of jelly to the wall.

In any event, the Board cannot find any compelling public interest that would dictate the setting aside of *Clergy*. To begin with, there is no more recent policy in place. There is simply a draft report, without recommendation, as yet even to be seen by Council. There is no "new science" contained in this report, as suggested by Council for the City. Its main feature appears to be the construction of a weir on property belonging to a developer other than Landmart. Landmart cannot be expected to comply with a policy that does not exist involving land that is not theirs.

As for the cross-motion by the City, the Ontario Municipal Board has already ruled that this hearing is peremptory for the City and that there will be no motions to adjourn. The Board also accepts the argument of Counsel for Landmart that the relief sought in paragraph 4 of the cross-motion is an unreasonable condition, not capable of

being fulfilled by Landmart. As such, it is not within the power of the Board to impose it pursuant to s. 51(25) of the *Planning Act*.

The Board's Disposition of Condition 2

The Board grants the Motion of the Counsel for Landmart, and Orders Condition 2 deleted.

Regarding Condition 16

On consent, the third line of the second paragraph of Condition 16 was amended to read "such a road conveyance shall occur within 30 days....." The Board so Orders.

For the reasons outlined in the body of this Decision, the Board agrees with the expert planning opinion of Mr. Ariens that the revisions to the Draft Plan Conditions outlined in this Decision fully comply with the City of Hamilton Official Plan, Provincial Policies in effect and the provisions of the *Planning Act*, and that the conditions are reasonable and relate to the development proposed.

The Board accepts Mr. Ariens uncontested statement that the Landmart subdivision has generally been designed in conformity with the North Waterdown Secondary Plan, and that the plan generally reflects the road pattern and land use schedule of the Secondary Plan, and complies with the density ranges and all policy objectives. The Board was not asked to declare on the design of the subdivision nor its Land Use Schedule. The only issues before the Board related to the Conditions in dispute.

The Board Orders the following:

- That the appeal is allowed and that conditions 2, 13, 16, 20, 22, and 28 are amended in accordance with the *Orders* outlined in this Decision.
- That the revised Draft Plan of Subdivision, 157 Parkside Drive, prepared by IBI Group as Drawing D and certified by A. T. McLaren

Ltd. O.L.S., dated August 9, 2010, is approved subject to the conditions set out in Attachment "1" to this Order as amended by the Board in this Decision.

- That the appeal against By-law 05-200 of the City of Hamilton is allowed, and By-law 05-200 is amended as set out in Attachment "2" to this Order.
- That the appeal against By-law 90-145-Z (Flamborough), as amended, of the City of Hamilton, is allowed, and By-law 90-145-Z (Flamborough) is amended as set out in Attachment "3" to this Order.

So Orders the Board.

"Sylvia J. Sutherland"

SYLVIA J. SUTHERLAND
MEMBER

ATTACHMENT "2"

Authority:

Bill No. [REDACTED]

CITY OF HAMILTON

BY-LAW NO. [REDACTED]

To Amend Zoning By-law No. 05-200 Respecting Lands located at 157 Parkside Drive, Concession 4, Part of Lots 10; (Flamborough)

WHEREAS the City of Hamilton has in force several Zoning By-laws which apply to the different areas incorporated into the City by virtue of the City of Hamilton Act, 1999, Statutes of Ontario, 1999, Chap. 14;

AND WHEREAS the City of Hamilton is the lawful successor to the former Municipalities identified in Section 1.7 of By-law No. 05-200;

AND WHEREAS it is desirable to enact a new Zoning By-law to comprehensively deal with zoning throughout the City;

AND WHEREAS the first stage of the Zoning By-law, being By-law No. 05-200, came into force on May 25, 2005;

AND WHEREAS this By-law is in conformity with the Official Plan of the City of Hamilton (the Official Plan of the former Town of Flamborough), in accordance with the provisions of the Planning Act.

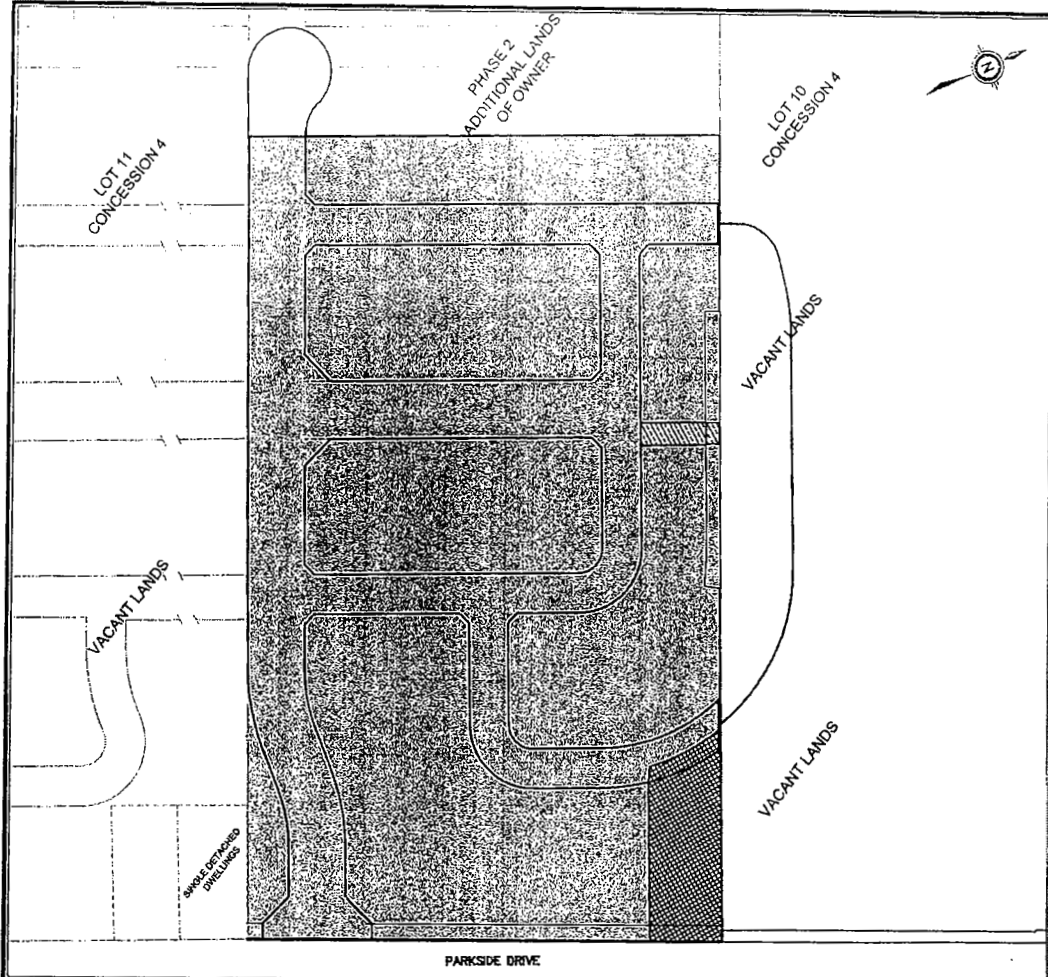
NOW THEREFORE the Council of the City of Hamilton enacts as follows:

1. That Schedule "A", Maps No. 479, 480 and 515 of By-law 05-200, is amended by zoning the lands Conservation/Hazard Lands "P5", the extent and boundaries of which are shown as "Block 1" on a plan hereto annexed as Schedule "A".
 2. That Schedule "A", Maps No. 479, 480 and 515 of By-law 05-200, is amended by zoning the lands Open Space "P4", the extent and boundaries of which are shown as "Block 2" on a plan hereto annexed as Schedule "A".
 3. That the Clerk is hereby authorized and directed to proceed with the giving of notice of the passing of this by-law, in accordance with the Planning Act.
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PASSED and ENACTED this [REDACTED] day of [REDACTED], 2010.

Fred Eisenberger
Mayor

Rose Caterini
Clerk



This is Schedule "A" to By-Law No.10 - Passed theday of, 2010		----- Clerk ----- ----- Mayor
<h3>Schedule "A"</h3> <p>Map Forming Part of By-Law No. 10-_____</p> <p>to Amend By-Law No. 05-200</p>		Subject Property BLOCK 1 - Lands to be zoned Conservation Management "P5" Zone. BLOCK 2 - Lands to be zoned Open Space "P4" Zone. Refer to By-Law No.90-145-Z
Scale: N.T.S Date: August 2010	File Name/Number: ZAC-08-10 157 Parkside Drive Former Town of Flamborough	<p style="font-size: 8px;"> 225 Eastway Suite 1000 Hamilton, ON L8N 1Y9 Tel: 905.544.1811 Fax: 905.544.1812 www.ibigroup.com </p>
Zoning By-law Amendment		