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 refusal or neglect to enact a proposed amendment to Zoning By-law 87057 of the former Township of Ancaster, now the City of Hamilton to rezone lands legally known as Part of Lot 50, Concession 3, from Agriculture “A” Zone to Residential “R4” Zone, to permit a residential development

OMB File No: Z070011

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 composed Part of Lot 50, Concession 3, in the former geographic Township of Ancaster, now in the City of Hamilton

Approval Authority File No: 25T-200613
OMB File No: S070030

APPEARANCES:

Parties
Landmart Realty Corp.
City of Hamilton

Counsel
Russell Cheeseman
Art Zuidema

DEcision Delivered by R. Rossi and Order of the Board

Landmart Realty Corp. (the Applicant/Appellant, hereafter the Applicant) has proposed to change the zoning of its lands from Agricultural “A” Zone to the Residential “R4” Zone, Modified (Block 1) and the Open Space “O2” Zone (Block 2). The proposed modified Residential R4 Zone will permit a minimum lot area of 375 square metres; minimum front yards of three metres to a dwelling and six metres to an attached garage; minimum lot coverage of 45% for one-storey dwellings and 40% for two-storey dwellings; and an alcove may be permitted to encroach into a required yard to a maximum of 0.6 metres. The purpose of the application is to create 100 lots for single-detached dwellings; one lot for an existing single detached dwelling; one block for parkland; blocks for future development; a temporary turning circle; 0.3 metre reserves; and four public roads.
Both the Applicant and the City of Hamilton have reached agreement on the proposed changes to the Zoning By-law and on the plan of subdivision, but they remain apart on the appropriateness of Conditions 8, 17 and 22 proposed for the draft plan of subdivision.

Russell Cheeseman represented the Applicant and provided three witnesses (qualified) opposed to the City's proposed conditions: Planner John Ariens; Geotechnical Engineer Ian Shaw; and Traffic Consultant Norma Moores.

Art Zuidema represented the City of Hamilton and provided four witnesses (qualified) in support of the City's proposed conditions: Senior Project Manager, Development Planning, Raymond Lee; City Senior Planner Greg Macdonald; City Engineer Tony Sergi; and Transportation Engineer Brian Malone.

Planner John Ariens referred the Board to the Applicant's previous minutes of settlement and conditions with the City (Exhibit 1, Tab 2) for the Springbrook Meadows East development (Schedule A). He also cross-referenced from the same exhibit the "Partial List of Meadowlands Phase 10 Conditions of Draft Plan Approval as Settlement Agreement" (Schedule B) for the Meadowlands Phase 10 development, with the more recently-written, City-proposed draft plan conditions for Phase 10 (Tab 5) and the Applicant's own proposed draft plan conditions (Tab 6). The first 15 conditions of Schedule B from the previous minutes of settlement for the Springbrook Meadows East development were transferred into the proposed conditions for today's hearing with Condition 8 in contention.

Both Parties agree that as Condition 4 requires a groundwater study, Condition 16 – "The owner shall agree in writing that should a Hydro geological report be required as per Condition 8, the report shall also identify any significant recharge and discharge zones, to the satisfaction of the Director of Development Engineering" – should be deleted from the list of conditions and the Board accepted this recommendation.

Mr. Ariens then provided his expert planning opinion on the remaining three conditions in contention: Conditions 8, 17 and 22. He explained that Condition 8 works in tandem with Condition 4 and was agreed to in the minutes of settlement. The City now proposes, however, that existing Condition 8 is renumbered as 8b and that an
additional Condition 8a be added. Thus, instead of Condition 16, Condition 8a would read:

Prior to registration of the plan, the Owner will submit a Hydro geological report, for the subdivision, to the City, prepared by a qualified professional to assess the potential groundwater impacts, provide recommendations to mitigate any potential groundwater impacts, and to identify any works recommended including monitoring, to the satisfaction of the Director of Development Engineering.

Then, Condition 8b would contain the same wording as the existing Condition 8:

The Owner agrees in writing that in the event groundwater is encountered during any construction within the subdivision, including but not limited to house construction, the Owner will submit a Hydro geological report to the City, prepared by a qualified professional, to assess the impacts, provide recommendations to mitigate the groundwater impacts and undertake the works as recommended including monitoring, to the satisfaction of the Director of Development Engineering.

Mr. Ariens opined that this condition is redundant in that Condition 8a requires the hydro geological report in any case, so the two reports would address the same things: groundwater impacts and provide recommendations to mitigate. The Applicant accepts Condition 8a, but does not wish to engage in a duplication of effort, as proposed by Condition 8b.

Mr. Ariens pointed out that there is a time dimension in respect of the hydro geological report. Both Conditions 8a and 8b require hydro reports in the case of Condition 8a, the timing of submission of that report is prior to the construction of homes and there will be no construction prior to registration (other than possibly a few model homes). Condition 8a requires the report to be delivered at the front end of housing construction. In comparison to the existing Condition 8, that condition is different in that it is more an optional report whereby the City is exercising an option to require that report. The need for a report is triggered by a finding of water, so the new Condition 8a
will require a hydro geological report, then in Condition 8 (which the City proposes is 8b), the City needs the Applicant to report the finding of any water. The report moves from a huge watershed study area covering hundreds of acres and moving along to the eventual building of houses to the specific subdivision and then to the more specific issue of where the Applicant might hit water on the subdivision. Mr. Ariens explained that the hydro geological report will be done well in advance of the registration and servicing of the subject lands and in fact, such a study (Exhibit 1, Tab 11) has already been completed and the Applicant's witnesses testified that they indeed expect to encounter groundwater on the subject lands. Mr. Ariens stated that where the Applicant encounters water during construction – whether putting in pipes or footing or a basement, the Applicant's hydro geological study will have determined the impact of groundwater. While Mr. Zuidema suggested that different results could arise, Mr. Ariens answered that this would be addressed through mitigation. Mr. Zuidema submitted that this additional provision (Condition 8a) provides the City with a trigger and a level of comfort where it can confidently issue building permits to ensure that what is built is sound and based on good engineering. It would provide the City with an additional degree of flexibility by enabling it to seek more study from the Applicant.

Geotechnical Engineer Ian Shaw provided both geotechnical and hydro geological evidence. He told the Board that Conditions 8a and 8b were essentially requesting the same scope of work and were redundant, in his opinion. The only difference is the timing when they need to be done. Condition 8a requires a report prior to the plan's registration and the existing Condition 8 states that if the Applicant finds water on its site during construction, a hydro geological report would be required. Mr. Shaw stated that as the report would be done prior to registration, it would essentially be the same report. By retaining both Conditions 8a and 8b, the Applicant would do a report prior to registration of the draft plan and then, when work starts on the site (and groundwater will be encountered), the condition reads that the Applicant needs to do another report which, in his expert opinion, would be the exact same report.

Mr. Shaw explained further that one does not stop at the report: one has to plan, mitigate any problems that are foreseen, monitor during the construction period to confirm what is required and react appropriately in order to mitigate anything unforeseen that arises. As he told the Board, the need for additional work is simply recognizing what the hydro geologists are already doing in their existing report –
identifying, mitigating and monitoring. He rejected Mr. Zuidema's suggestion that in the course of construction, "there might be new information", as the only thing one would obtain is more detailed information based on the existing comprehensive hydro geological report.

City engineer Tony Sergi told the Board that Condition 8a will ensure the whole project starts out properly while Condition 8b will address any specific situation or problem that arises. He said that Condition 8a will provide the evaluation and Condition 8b will provide the confirmation and the courses of action needed to address arising issues. Planner Greg Macdonald relied on Mr. Sergi's evidence on Condition 8 and he was satisfied that the extra wording (Condition 8b) was appropriate and that "it is better to be safe than sorry."

As Mr. Cheeseman pointed out, all Parties agreed that Condition 8 represents an issue of timing – when water is encountered. Condition 8b requires a hydro geological study when one starts construction and one finds find water. Condition 8a requires a report at the outset in any case. Mr. Shaw has already confirmed that the Applicant will encounter groundwater on the site. While Mr. Sergi said that theoretically, the first report could show no water, Mr. Shaw already confirmed that extreme water conditions will be encountered. Further, Mr. Shaw has built in a monitoring process and if any changes occur, the Applicant's hydro geological experts will address them (Exhibit 1, Tab 11, p.99). As Mr. Cheeseman pointed out, it is in everybody's interest to ensure that these problems do not occur, but Mr. Shaw's report plans for any unforeseen problems.

The Board has considered the evidence regarding Condition 8 and determines the proposed Conditions 8a and 8b to be redundant. The City will require a hydro geological study and the Applicant has provided that report for the City's review. The Board preferred the expert evidence of Mr. Shaw in relation to the contents of his study and how it comprehensively plans for investigation, monitoring and mitigation of any problems that might arise, to Mr. Sergi's opinion that one report essentially sets the stage while the second report addresses any problems. Mr. Shaw's evidence is to be preferred as he is the author and has confirmed that any hydro geological issues that arise are covered off by the initial comprehensive report and that such issues are but an extension of what has already been proposed: to address any issues that arise. The
Board considers it unnecessary to require two conditions that require the same thing and determines that the single Condition 8 in both Tabs 5 and 6 is sufficient to address the City's concerns. Further, the same condition was previously accepted and agreed to by the City in the minutes of settlement for the Applicant's Springbrook Meadows East development. There is nothing unique to distinguish this development, which abuts the aforementioned development that requires dual conditions imposed for what would amount to essentially the same information – how to mitigate groundwater issues. Thus, the Board strikes out the proposed Condition 8a and leaves Condition 8 as it currently stands.

As for Condition 17 in Tab 5, requiring the Applicant to implement and construct the Garner Road East and Springbrook Avenue intersection improvements, as well as front-end the cost of the required works (with the City recovering the proportionate share from Springbrook Meadows East and West), Mr. Ariens took the Board to Condition 13 that flowed from the identical condition in the previous minutes of settlement for Springbrook Meadows East, where the Applicant was required to only pay 50% of the costs of the traffic study and will provide its proportionate share for the necessary improvements to the aforementioned intersection. Mr. Ariens noted that the Applicant agreed to Condition 13, but is contesting this new Condition 17, which essentially requires the Applicant to not only pay for its share of the traffic study, but to also front-end the costs of the intersection improvements and construct it as well. Mr. Ariens noted that no such condition was required in the Springbrook Meadows East development.

Mr. Ariens explained that the conditions for a draft plan of subdivision have to be within the Applicant's ability to satisfy. He cited the history of the problems with the Meadowlands Phase 8 development and its difficulties in obtaining secured road crossings over a hydro corridor and the farmer who refused to give up his lands. That requirement caused damages in the millions of dollars, all because the Applicant could not satisfy conditions that related to someone else's lands. With little or no room for lane widening or turning lanes and an increase needed, the Applicant would be forced by the proposed condition to attempt to obtain the lands of adjacent landowners and it could represent a condition that the Applicant cannot satisfy.
Mr. Zuidema asked Mr. Ariens whether the Applicant had investigated the current width of the City's road at this intersection to determine whether such an improvement could be required without affecting any additional lands. Mr. Ariens responded that he had not done any investigation although a traffic study has been submitted to the City, but has not yet been reviewed). Mr. Zuidema attempted to distinguish the Springbrook Meadows East development from the proposed Condition 17 for this case, as that subdivision was not going to have access to Springbrook Avenue. Mr. Ariens responded that the Springbrook Meadows East development might benefit from the intersection improvement although the cost sharing was worked out and that subdivision was not required to front end that intersection.

Traffic Engineer Norma Moores spoke to Condition 17. Ms Moores' traffic analyst report (Exhibit 1, Tab 8) was done for the Springbrook/Garner intersection and examined what immediate improvements would be required. The report also apportioned each subdivision's share to the cost of these improvements based on traffic generated by each subdivision. Her report concluded that based on existing volumes, no roadway improvements are required to support the construction of the first four subdivisions planned along Springbrook Avenue in the Ancaster Meadowlands Neighbourhood IV Secondary Plan (Tab 9, p.80). Ms Moores opined that the City should not require Condition 17 of the Applicant. She stated that Garner Road's current status is as a city road and is under the City's jurisdiction. While improvements will be contemplated in the future, these are adequately covered by the development charges by-law through which every developer pays.

Exhibit 7 contains traffic graphs (City's evidence) that reflect a different methodology from that used by Ms Moores in her work although they are based on her report's traffic counts. She told the Board that these graphs are typically used by the Ministry of Transportation for country roads where one does not expect a lot of traffic and where there are more free flow conditions on a rural highway. The graphs represent that under existing conditions, there would be a need for a left-turn lane now, before a single house is even built in the area.

Ms Moores used the highway capacity methodology in her January and June 2007 analyses and she said this is a more up-to-date methodology than what City Transportation Engineer Brian Malone provided via the graphs. She noted that at no
time did the City express concerns with her methodology and that she has applied the same methodology in her previous work in Ancaster and in fact, the City has told her to use the methodology she utilized in those examples. Mr. Zuidema noted that Ms Moores has never provided the City with copies of her January or June reports and had no discussion with the City of her recommendations.

Ms Moores advised the Board that Garner Road is an arterial road that continues to function like a rural two-lane highway. It has a rural cross section, but with improvements in the area, it is operating within the urban context.

City Transportation Engineer Brian Malone agreed with the findings in Ms Moores’ January report regarding recommendations for stop control and the construction of two turning lanes. In the June report, however, he opined that Ms Moores took a different approach and trip generation was revised to reflect a different quantity of land for trip generation (comparing the data from both reports - p.68 versus p.79). He added that there was no discussion of left turning lanes in Ms Moores’ June report, whereas in the January report, the base assumption was that it has already been widened to a four-lane with an existing left-turn situation. The June report looked at today’s existing situation. It assumed the existing Garner Road as a two-lane roadway not yet built to its full four-lane configuration and the report did not build in an operational assessment of a left turn lane. Mr. Malone noted that Garner road is still a rural road and is close to its existing MTO state, so he used that methodology to analyze the situation and concluded that a left-turn lane was warranted at Springbrook Avenue and Garner Road.

Mr. Malone reviewed Exhibit 7 and told the Board that there will be a process for widening Garner Road at some future point, but the question is when that municipally-led reconstruction would happen. He opined that it was appropriate for the Applicant to spend money to improve the intersection for the purposes of safety until such point as the City reconstructs Garner Road.

Mr. Malone also stated that his methodology from Exhibit 7 reveals that for the purposes of safety and operations, a left-turn lane is needed now. While there are two differing methodologies, Mr. Malone saw a symmetry for a left turning lane on Garner since he has used the same base traffic numbers from Ms Moores' report and there is a
correlation between existing outputs. Mr. Zuidema submitted that his witness had used a more conservative approach from a traffic safety standpoint and Mr. Malone opined that Garner Road has characteristics of a two-lane highway, as per MTO standards. He opined that if there is no left-turn lane and this development proceeds, there is a safety risk.

Mr. Cheeseman noted that the January report of Ms Moores was the one used to approve the Springbrook Meadows West development, but Springbrook Meadows East and Meadowlands Phase 8 were not forced to pay as a condition. Ms Moores' January report sets out what the Garner/Springbrook intersection will look like at ultimate build-out and the date for examination is 2011. Condition 13 says that whatever the improvements will be, the Applicant will pay a proportionate share, but it will be divided up four ways among the developers. However, no matter who pays for it, the Applicant has its proportionate share to pay, but it must also provide sufficient securities for its proportionate share, which means that the Applicant must post a letter of credit for that share and the City will hold that until the work is completed. To that, the Applicant has agreed.

However, Mr. Cheeseman pointed out to Mr. Malone that the June traffic analysis concluded that “no roadway improvements are required”, so upon review of Condition 17, there are no required improvements. Mr. Malone agreed that the June report did not recommend any improvements at the present time. In that situation, Mr. Malone agreed with Mr. Cheeseman that the front-end costs must be zero since no improvements are required.

Mr. Cheeseman challenged Mr. Malone’s opinion that a left-turn lane is needed today where the Applicant does not even have draft plan approval yet and not a single lot has been built in phase 10. Mr. Cheeseman added that the Applicant has contributed no volume to the existing site and that the left-turn lane is based on existing conditions today. Thus, if the City wanted a left-turn lane tomorrow, it could begin the process to install one and the intersection is covered by the development charges by-law and the Applicant has agreed to pay for its portion of the intersection improvements as well as post the security. Mr. Cheeseman argued that it is unreasonable for the City to say that Garner Road needs a left-turn lane, so this Applicant must pay for it, front-end it and all the while the City will hold the Applicant’s money as security.
Mr. Malone noted that Springbrook Avenue does not provide access to Springbrook Meadows East. Planner Greg Macdonald said that the City is applying this condition because Phase 10 has two access points onto Springbrook Avenue, which will create impact. He added that Springbrook Meadows West will have the same condition applied and should they proceed with their development before Meadowlands Phase 10, Condition 17 would then not apply to the Applicant.

Mr. Cheeseman put it to Mr. Macdonald that Springbrook Meadows East must contribute its proportionate share of the traffic study and a proportionate share of the intersection improvements although it does not have direct access to Springbrook Avenue. However, now, the City is saying that as Springbrook Meadows East does not have direct access to Springbrook Avenue, it does not have to contribute to the cost of the intersection improvements. Mr. Cheeseman told Mr. Macdonald that it was unreasonable that conditions agreed to in a Board decision of April 4, 2007 could be changed by the City on May 31, 2007 that require the Applicant to now front-end the costs and construct the intersection improvements, yet Springbrook Meadows East does not have to pay.

Mr. Macdonald responded that the City conducted a thorough review and identified some ambiguity in Condition 9 of the negotiated settlement and it speaks to the Applicant actually having to build the infrastructure improvements. He said Condition 9 was not clear enough, so the City proposed Condition 17. Mr. Cheeseman countered that the previous minutes of settlement at Tab 2 had the identical Condition 9 and all parties signed off on that agreement. Mr. Cheeseman noted that Condition 9 does not require the Applicant to construct other parts of Springbrook Avenue or to construct the intersection.

Mr. Cheeseman noted there are no other traffic recommendations beyond what Ms Moores provided as to what is appropriate. Mr. Macdonald noted that the City has not yet approved her traffic analysis study, so if the City requires the traffic intersection improvements, it has to be built by whoever develops first. Mr. Cheeseman expressed concern that if his client agreed to the intersection improvements and the City did not approve the resulting format, how would the conflict be arbitrated and who would work it out? Mr. Macdonald said that the City is the approval authority and the issue could be taken to the Board.
Mr. Macdonald told Mr. Zuidema that the City will not be ready to proceed with road project improvements on its own initiative for some years yet. Thus, the Applicant can go today under Condition 17 or it can wait for the City to eventually redo the intersection in question or wait for another developer to proceed first to incur the responsibilities and costs afforded under the proposed Condition 17. Mr. Zuidema submitted that it is a matter of according this private developer's interests with the timing and whether the City's timing requirements coincide with this Applicant's interests and agenda.

The Board determines that Condition 17 is an unreasonable one. While the City's witness spoke of the traffic safety issues and risk of two lanes and no left-turn lane at the intersection that exist now, and Mr. Macdonald's evidence that the City will not be proceeding for some time to come, the Board accepts the Applicant's position that it should not bear the brunt of front-end costs and the responsibility of constructing the intersection improvements. Ms Moore's June report is clear and no improvements are required at the present time and indeed, Meadowlands Phase 10 has not been developed yet. Mr. Malone's suggestion of safety risks and dangers of rear-end collisions are undermined by the City's decision to assign this intersection a priority that may not see any City-initiated improvements "for some years yet" (Macdonald evidence). Whether one applies the City's or Ms Moores' methodology, and whether a turning lane is or is not needed, the City's unilateral change to the conditions previously agreed to for the earlier development to require the Applicant to now bear the responsibility and front-end costs for intersection improvements is wholly unreasonable in the Board's view. The City's witnesses have provided no sufficient planning grounds or persuasive reason why the Applicant should bear such an onerous burden as a condition of draft plan of subdivision approval. The Board strikes Condition 17.

Mr. Ariens told the Board that Condition 22 is a new one from the City and it is included herein:

That prior to Registration of the Final Plan, the Owner must demonstrate and submit an estimate or opinion of value supported by the presentation and analysis of relevant data to the satisfaction of the City's Manager of Real Estate that a bona fide effort has been made to sell Blocks 121, 122 and 123 to the abutting landowner at fair market value. If the abutting landowner declines on the Owner's offer, the Owner shall convey the lands to the City of Hamilton, as interim owner until such time the abutting landowner requires the lands for
development purposes. At that time, the City of Hamilton shall convey the lands to the abutting landowner at fair market value as determined by the City's Manager of Real Estate. Upon completion of the transfer, the City shall reimburse the Owner the proceeds of the sale less the City's administrative and legal costs. For the purposes of this provision, Council hereby declares these lands as "surplus" to the requirements of the City of Hamilton....

Mr. Ariens opined that this condition proposes that prior to registration, the Applicant must show it has offered to sell its land (several slivers fronting onto Springbrook Avenue) to the abutting homeowner at fair value and if they do not wish to purchase it, the City will hold onto the land until the adjacent landowner wants it, at which time the City will sell it to the homeowner and give the proceeds to the Applicant less its costs. Mr. Ariens told the Board that this scenario precludes his client from buying surplus residential land and incorporating it into its larger development. He noted that the abutting property owner is not a builder or a developer and the condition does not provide what is the definition of fair market value (Is the land raw? Unserviced? What of servicing costs? The road allowance and that area and infrastructure have also not been factored in).

Mr. Ariens explained that remnant blocks are often created in a normal development process and in this case, the City has failed to make reference to the other remnant blocks that can be found to the south of the subject remnant lots on Springbrook Avenue. He added that his client is a high-quality homebuilder and should one of these homeowners buy the block of land and sell it to another developer, this could completely undermine the character of the Phase 10 development, were they to build a completely different home. Mr. Ariens could not recommend Condition 22. He concluded that all applicable criteria of Section 51(24) of the Planning Act regarding the proposed draft plan of subdivision have been fulfilled.

Mr. Zuidema challenged Mr. Ariens that there is nothing prohibiting the Applicant at any time from purchasing the lands adjacent to these three slivers for future development. Mr. Ariens said that the lands are of an insufficient size on which to build a house, so the Applicant would need to consolidate the adjacent lands in order to build on them. Further, Mr. Ariens said that contracting with the owners of the properties abutting the remnants would require an amendment to this condition and the lands would still have to be transferred to the City in order to clear Condition 22.
Planner Raymond Lee advised the Board that this is the first time the City of Hamilton is seeking to utilize this type of condition. It arises from developer/homeowner situations where the neighbour feels at a distinct disadvantage in negotiations with the developer. Often, a developer holds these remnant parcels and another developer can feel disadvantaged. Mr. Lee said that the intent of the proposed Condition 22 is that these remnant parcels be developed in conjunction with the abutting lands. He added that there is diminishing cooperation today and the City receives developer's requests to acquire small parcels of land where the private landowner is unwilling to sell their lands for the developer to proceed with its development. Such lands can be a fragment piece or triangle and are often located in strategic locations and frequently hold up development. Mr. Lee said this is in not in the City's interest and the industry has brought this concern to the City. He noted that the City cannot expropriate these lands and it is the developer's responsibility to acquire the lands to facilitate their development. He added that the City cannot force a homeowner to acquire a remnant parcel if he does not want it, and the City cannot force a developer to acquire those lands and merge it with the abutting lands. Mr. Lee said that through this condition, the City is simply trying to find some middle ground, acquiring interim ownership of the lands until such time as they are needed for development. The intent is that the City take ownership in order to facilitate the sale of that property based on fair value and to return the proceeds to the developer. Mr. Lee offered that the City is open to other solutions but its goal is not to give advantage of one entity over another. He added that the City wants this development to happen, to proceed to registration and for the Applicant to be successful.

Mr. Lee told the Board that there is nothing in this condition to prevent the Applicant from approaching the homeowners to acquire the property and if it did obtain the properties, the City would be reasonable with such acquisition and simply sign off on it. Mr. Lee noted the right of a municipality to impose conditions on a draft plan approval. As Section 51(25) of the Planning Act reads: “The approval authority may impose such conditions to the approval of a plan of subdivision as in the opinion of the approval authority are reasonable, having regard to the nature of the development proposed for the subdivision...” with four requirements listed.

Mr. Cheeseman asked Mr. Lee how the Applicant is to obtain an appraisal for the value of these three parcels of land. Mr. Lee said this would be done in consultation
with an accredited property appraiser. As for the value someone will pay for the lands, Mr. Cheeseman again asked how the City intends to ascertain the value of the lands when the Applicant comes to the City with the selling price. Mr. Lee responded that the City wishes to ensure an attempt has been made to offer the parcel to the abutting landowner. The City does not want the developer to go to the homeowner and say that the property is of no value unless the homeowner has this front sliver of land. Mr. Cheeseman was concerned that there is no definition of fair market value and how the land is to be sold (whether raw or developed and serviced), but he told Mr. Lee that the sale of lands between developers is indeed their business and they are the best ones to know exactly the value of the lands being sold.

Mr. Lee told Mr. Cheeseman that the City will not expropriate the subject lands for the Applicant, as the City is not in a position to expropriate lands to benefit a single developer, as there needs to be an overriding public interest. Mr. Cheeseman argued that there is no public interest since the City would only have interim ownership and there is no public benefit to that. Mr. Lee said the City has no attempt to obtain financial benefit by profiting from these small parcels of land. Mr. Cheeseman challenged him on this point and said the City could theoretically take the land and hold it for six years and when it came time to sell it to the developer next door and its value has increased, the benefit of the increased value would go to the City and not to his client. Mr. Lee said that the City would determine the value at the time the lands would be conveyed as established by a property appraiser. He added that whether the land increases or decreases in value, there is no issue since the City is simply holding the lands.

While Mr. Cheeseman stated that the City has no statutory authority to take these lands, Mr. Lee said the City would only hold the lands in interim ownership. As Mr. Lee said, there is no express authority in the Act to take these lands on a permanent basis, Mr. Cheeseman put it to him that there is no authority to even do so on a temporary basis and even Section 51(25) does not provide for such conditions on a “temporary” basis. As Mr. Cheeseman stated, there is no express authority for the City’s ‘scheme.’ City Planner Greg Macdonald wrapped up the hearing’s evidence and provided his expert opinion that Conditions 8a and 8b, 17 and 22 meet the criteria of Section 51(24) as well and should be applied to the draft plan of subdivision.
The Board determines Condition 22 to be an unreasonable one. While the Board appreciates the City's honest efforts to find a way to deal with the problem of unfair advantage explored by Mr. Lee in his evidence, the Board cannot support a condition that places a restriction on one party's ability to do with its land what it pleases. This condition effectively tells the party who it can sell its land to, as well as limiting the market-place and in fact, in the Board's view, represents an unacceptable intrusion into the market-place. Such a condition involves the City in the private transaction of sellers, which would also empower the municipality to determine whether a fair offer had been made. If the City determined that the offer was unfair, it could simply not clear the condition. Further, if the offer is deemed to be unfair to the other party, the seller must convey the lands to the City. Additionally, it does not appear to be a condition that has been well thought out and as Mr. Lee said, the City is open to alternate solutions. The Board appreciates that the City is attempting to address the reality of unfair advantage between some parties in the course of development initiatives in the greater municipality, but by inserting itself into the market-place, it assumes for itself a role that the Board can only characterize as intrusive.

After a full review of the proposed condition, the Board can logically determine that it does nothing to satisfy the needs of two parties to a sale in an equitable fashion, for where one party might derive unjustifiable enrichment through the sale of a remnant parcel without the condition, it would appear that that same disadvantage is still experienced by a party where it is restricted to who it can buy land from and where a party must convey its own lands to the City to hold. The Board rejects the suggestion the attachment of Condition 22 to the list of conditions for Meadowlands Phase 10. What is more, the application of this condition to one set of remnant blocks and the lack of such a condition on the southerly blocks represents inequitable treatment of the development overall.

It is hoped that the City will continue to explore other more reasonable options in subsequent cases than the one proffered in these proceedings, which are unfair to the Applicant.

The Board also determines that a public interest has not been demonstrated by the City in the imposition of these conditions. The Board determines that no public interest is served by allowing the contentious conditions for the reasons elicited above.
Having considered all of the evidence, the Board approves the amendment to Zoning By-law 05-200 contained in Exhibit 4 (Attachment 1) and the amendment to Zoning By-law No. 87-57 (Ancaster) contained in Exhibit 5 (Attachment 2) and determines these Zoning By-law Amendments to represent good planning based on the evidence of all Parties.

The Board also approves the slightly revised draft plan of subdivision that was faxed to the Board on June 27, 2007 (Attachment 3) and determines the draft plan of subdivision to represent good planning and to meet all of the applicable conditions contained in Section 51(24) of the Planning Act.

The Board has stricken Conditions 8a, 17 and 22 for the reasons stated and approves, therefore, the draft plan conditions as set out in Exhibit 1, Tab 6 (Attachment 4).

So Orders the Board.

"R. Rossi"

R. ROSSI
MEMBER
CITY OF HAMILTON

BY-LAW No. ______

To Amend Zoning By-law 05-200,
Respecting Lands Located at 425 Springbrook Avenue

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, S.O. 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 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 Ontario Municipal Board recommended that Zoning By-law No. 05-200, be amended as hereinafter provided;

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 Ancaster) in accordance with the provisions of the Planning Act;

NOW THEREFORE the Ontario Municipal Board Orders as follows:

1. That Map 1285 of Schedule “A” to Zoning By-law 05-200, is amended by incorporating the Neighbourhood Park (P1) Zone boundaries for the applicable lands, the extent and boundaries of which are shown on a plan hereto annexed as Schedule “A”;
This is Schedule "A" to By-Law No. 07-

Passed the .......... day of ....................., 2007

Schedule "A"

Map Forming Part of By-Law No. 07-

to Amend By-law No. 05-200 (1285 of Schedule "A")

Subject Property
Lot 50, Concession 3, Ancaster, Meadowlands Phase 10

"Land to be zoned Neighbourhood Park (P1) Zone"