

ISSUE DATE:

Oct. 20, 2008



PL061186

BY-law No. 10-041

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Waterdown Bay Ltd. 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 90-145-Z (Flamborough) of the City of Hamilton to rezone lands respecting 392 Dundas Street East, Part of Lots 2, 3, 4 and 5, Concession 3, East Flamborough, to permit the development of a plan of subdivision.
OMB File No. Z060176

Waterdown Bay Ltd. 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 of Part of Lots 2, 3, 4, Concession 4 and 5, East Flamborough, 392 Dundas Street East, in the City of Hamilton.
(Approval Authority File No. 25T 200513)
OMB File No. S070002

APPEARANCES:

Parties

City of Hamilton

Waterdown Bay Ltd.

Halton Region Conservation Authority

City of Burlington

Betty & Roy James, and
Patricia & Marcus Casey

Counsel

A. Zuidema

S. Garrod

H. R. Watson

R.G. Doumani

M. Flynn-Guglietti

DECISION DELIVERED BY C. HEFFERON AND ORDER OF THE BOARD

The Appeal

Waterdown Bay Ltd. ("Appellant" or "Waterdown Bay") proposes to develop several thousand residential units on a large parcel of land known as Waterdown South, which is in the former Town of Flamborough, now the City of Hamilton. The first phase

(Phase 1A) is a 250 unit subdivision on lands municipally known as 392 Dundas Street East. Phase 1A is the proposal before the Board ("subject proposal").

Waterdown Bay has appealed the refusal or neglect of the City of Hamilton to approve the draft plan of subdivision for Phase 1A. It also seeks approval of a Zoning By-law amendment to implement the draft Plan of Subdivision for Phase 1A.

At the commencement of the hearing, the Appellant informed the Board that it had reached substantial agreement with the Halton Region Conservation Authority ("Halton Conservation") on the main issues separating them. While the City of Hamilton was not a signatory to those Minutes of Settlement, it indicated that it had participated in the discussions preceding their drafting and was in agreement with them. The Minutes of Settlement signed by the Appellant and Halton Conservation were accepted by the Board (Exhibit 4).

Midway through the proceedings, the Appellant and the City of Hamilton also reached a consensus on the content of a subdivision agreement covering the subject lands should the appeal before the Board be allowed (Exhibit 63). Being generally in agreement with each other's position on the key issues, the Appellant and the City of Hamilton cooperated with one another during the remainder of the hearing.

The City of Burlington did not participate in either of the above settlement discussions and indicated that it did not concur with either of them.

As a result of these two settlements, most of the issues listed in the Procedural Order were withdrawn on consent of the parties and the Board.

List of Expert Witnesses

For Waterdown Bay Ltd

Mr. Karl Gonnson was qualified to give opinion evidence on land use planning and municipal engineering

Mr. Dan Cherepacha was qualified to give opinion evidence on transportation and traffic engineering

Mr. Mark Conway was qualified to give opinion evidence on land use planning and (housing) market analysis

Dr. Cam Kitchen was qualified to give opinion evidence on environmental planning and on the South Waterdown Sub-Watershed Study

Mr. Chris Parent was qualified to give opinion evidence on biology and on the South Waterdown Sub-Watershed Study

Mr. James Webb was qualified to give opinion evidence on land use planning

Mr. Larry Lecce a principal of Upcountry Developments Ltd. was qualified to give opinion evidence on housing supply in Waterdown.

For the City of Hamilton

Mr. Stuart Anderson, a transportation planner was qualified to give opinion evidence on traffic engineering

Mr. Jason Thompson was qualified to give opinion evidence on land use planning.

For the City of Burlington

Mr. Paul Allen was qualified to give opinion evidence on transportation engineering

Mr. Douglas Annand was qualified to give opinion evidence on land economics

Mr. Philip Kelly was qualified to give opinion evidence on environmental and water resources engineering

Mr. Greg Simon was qualified to give opinion evidence on land use planning.

Participants

Two people were recognized as participants to the hearing – Ms M. Allan and Mr. H. Gerhardt.

Ms. Allan, representing the (unincorporated) Waterdown South Residents Association, did not ask to address the Board.

Mr. Gerhardt addressed the Board to clarify his concerns about possible storm water run-off onto his property, which is located below the Escarpment several hundred metres south of the subject property in the City of Burlington. He explained that he had withdrawn his objections to the proposed development after he had been assured by Waterdown Bay that Phase 1A will take place entirely within drainage area GS-1. Mr. Gerhardt's property is in drainage area GS-3, which is not impacted by Phase 1A.

Two Parties Withdraw from the Proceedings

Before the hearing commenced, three of the parties settled with the Appellant. Counsel for the Halton Conservation – Mr. Watson – and counsel for Betty & Roy James, and Patricia & Marcus Casey – Ms Flynn-Guglietti – asked to be excused from attending the daily hearing sessions as their clients had each settled with the Appellant, and the issues still in dispute no longer directly concerned their clients.

Although Betty & Roy James and Patricia & Marcus Casey, had settled with the Appellant before the hearing began, they each asked to be permitted to testify in order to relate their concerns about the subject proposal. These concerns included maintaining the character of the area; maintaining separation distances and an appropriate transition between the proposed Waterdown Bay homes and their own; maintaining existing views; minimizing overlook and noise levels; and preserving the existing natural heritage features of the area.

Background

A Joint Board was convened in 1996 pursuant to the *Consolidated Hearings Act, R.S.O. 1990, c. C-29* to consider the future urban boundaries of the community of Waterdown. The 1997 decision of the Joint Board was issued March 1997 just prior to the amalgamation of the Town of Flamborough (which includes Waterdown) with the City of Hamilton. This decision was immediately appealed to the Lieutenant Governor in Council.

A majority of the parties to the Joint Board hearing subsequently executed a Memorandum of Agreement to resolve the matter at issue before the Joint Board. In June 2002, a decision and Order of the Lieutenant Governor in Council rescinded the 1997 decision of the Joint Board and substituted its own. The decision and Order of the Lieutenant Governor in Council re-designated the subject lands from rural to urban, and amended the Town of Flamborough Official Plan by a revised OPA 28 (Exhibit 6, Tab 4).

The Board was told that the City of Burlington did not oppose the adoption of the revised OPA 28 ("OPA 28") into the Town of Flamborough Official Plan in 2002. The Town of Flamborough Official Plan now forms part of the City of Hamilton Official Plan.

The Core Issue

Under the terms of OPA 28, urban development is allowed on all lands within Waterdown under certain conditions.

Subsection A.1.8 (iii) lists the criteria that have to be met before development can go forward on the subject lands. These criteria include completion of a Master Environmental Assessment Transportation study with implementation plan. If that transportation study determines that alterations to certain roads within the City of Burlington are necessary, the approval of Burlington City Council is required.

However, subsection A.1.11 of OPA 28 states that "no development shall place on (the subject lands) prior to the fulfillment of subsection A.1.8 except...that the (City of Hamilton) determines that a housing supply shortfall in Waterdown is imminent". In this case, subsection A.1.11 allows that "a limited amount of additional" urban development land may be released "solely to address the immediate shortfall" prior to fulfillment of subsection A.1.8, after certain criteria or tests had been met.

The Board finds that the "imminent housing supply shortfall" clause in subsection A.1.11 means that subsection A.1.11 has precedence over subsection A.1.8. The "imminent housing supply shortfall" clause functions as a "notwithstanding" clause for the purposes of determining whether the appeal is allowed and Phase 1A of the proposed development can go forward.

The Matter Before the Board

The Board was asked to determine whether certain criteria set down in subsections A.1.11 and A.1.12 of Official Plan Amendment 28 (OPA 28) have been met. Those criteria are:

1. Is there an imminent housing supply shortfall in Waterdown? (Section A.1.11)
2. Have the transportation impacts of the development been evaluated and addressed? (Subsection A.1.11 (ii))
3. Are the required environmental assessment for the Waterdown-Aldershot Master Transportation Plan ("WATMP" or "transportation study") and implementation plan proceeding expeditiously and have they (the transportation study and the implementation plan) advanced to the stage where "the alternatives have been identified and the potential routes identified for evaluation"? (Subsection A.1.11(iii))
4. Will the proposed development impact, prejudice, or compromise the planning process for the Waterdown South Secondary Plan (Secondary Plan)? (Subsection A.1.11 (iv))
5. Has a sub-watershed planning study (South Waterdown Sub-watershed Study or SWSS) been completed to the satisfaction of the Town of Flamborough (City of Hamilton), the City of Burlington and Halton Conservation? (Subsection A.1.12 (ii))

That the required documents – the SWSS, the WATMP, and the Secondary Plan – have been prepared is not itself in dispute. What is in dispute is whether in the preparation of them, the criteria in OPA 28 have been met.

The threshold issue, however, is whether there is an imminent housing supply shortfall in Waterdown.

Housing Supply

Mr. Annand, who was qualified by the Board to give opinion evidence on land economics, presented evidence indicating that based on lot sales of approximately 200 – 250 units per year, there is an ample supply of draft plan approved housing lots in Waterdown. It was pointed out in cross examination that In the supply calculations contained in his urbanMetrics report (Exhibit 23, Tab 3B, Appendix A) Mr. Annand included subdivisions that turned out to be some 20km from Waterdown as well as

subdivisions (such as Kennclyffe Heights, Upcountry Phase 2 as well as later phases of Waterdown Bay) that were "years away from" obtaining draft approval.

Mr. Annand's supply numbers were significantly reduced in cross-examination (from 3,449 registered, approved and anticipated lots to 807 registered and draft approved). The soundness of even this smaller number was put in doubt when the Board was reminded of the earlier testimony of Mr. Gonnsen, who was qualified to give opinion evidence on municipal engineering and land use planning. Mr. Gonnsen had pointed out that of the 510 lots Mr. Annand had shown as draft approved and "near shovel ready" (Exhibit 23, page 152) only the 100 lots in Upcountry Phase 1 had actually come to market. The others were precluded from doing so by engineering constraints, including the need for additional water supply. The Board learned later from Mr. Lecce, a partner in Upcountry Estates Ltd., that the lots in Upcountry Estates Phases 1 and 1a that he had offered for sale were sold within months of having been put on the market¹.

During cross-examination, Mr. Annand's absorption numbers of 200 – 250 units per year were also put into doubt when it was pointed out that housing lots have historically been in short supply in Waterdown owing both to the delay in approving the urban boundaries (caused in part by the appeal of the 1997 Joint Board decision) and to a shortage of serviced lots.

The fact that both the supply and the demand numbers on which he based his findings were put into doubt cast doubt on his conclusion that "there is a reasonably well balanced supply of un-built units that would reasonably satisfy the 3-year PPS requirement" (Exhibit 23, page 152).

Mr. Conway, who was qualified by the Board to give opinion evidence on land use planning and real estate market economics, presented the findings of a study² conducted by N. Barry Lyon Consultants (NBLC) on behalf of Waterdown Bay. Although

¹ Waterdown Bay also called to the stand Mr Lecce, who is a partner in Upcountry Estates Limited. Mr Lecce was asked to testify about his recent experience selling lots where he was able to provide a firm occupancy date. He testified that when he was able to offer a firm occupancy date, he was able to sell out his entire allotment of 250 homes within a few months of having offered them for sale to the public. He characterized demand in Waterdown as very strong.

² Exhibit 30 is a February 2007 draft of the NBCL report, and Exhibit 12, Tab 13, which is dated March, 2008 constitutes an addendum to the earlier draft.

Mr. Conway dealt with substantially the same numbers as Mr. Annand, the conclusions he drew from them often stood in stark contrast to the conclusions Mr. Annand drew.

In his evidence-in-chief, Mr. Conway demonstrated to the Board that his final number with respect to lot supply was not significantly different from that of the urbanMetrics study conducted for the City of Burlington by Mr. Annand, when the same parameters are applied. Each estimated that there are on the order of 396 lots draft plan approved and not yet sold in Waterdown North (189 in MC2 & 207 in Parkside Hills) and Upcountry Estates. Although the Waterdown North lots have received draft plan approval and can be sold to the public, they will not be available for building until a required water tower has been commissioned. The witnesses all agreed this will be "sometime after 2010".

Mr. Conway told the Board that the first measure of housing lot shortfall is based on local market supply and demand. This, he claims, is the measure used by the housing industry itself. The fact that new projects, such as those offered in Waterdown North, projects that are draft plan approved but not yet registered, are able to more than 50% sell out in a very few months, is regarded by developers as indicating an actual, here-and-now shortage of supply.

Mr. Conway indicated that the Provincial Policy Statement 2005 (PPS) constitutes another measure of housing lot supply. The PPS requires that:

Planning authorities maintain at all times where new development is to occur, land with servicing capacity sufficient to provide at least a 3-year supply of residential units available through... land in draft approved and registered plans (PPS, Section 1.4.1.b).

NBCL calculates the average demand for housing lots in Waterdown to be approximately 300 units per year. At this level, the PPS would require a supply of at least 900 lots in draft approved and registered plans. The Board took note of the fact that section 4.6 of the PPS indicates that "policies in this PPS set minimum standards" and that planning authorities are free to go beyond the minimum standards established in specific policies. It is the Board's view that a 3-year supply of housing lots is the minimum Hamilton needs to stay in compliance with the Provincial planning policy.

That a housing supply shortfall is "imminent" was also vigorously disputed by the City of Burlington on semantic grounds. Mr. Doumani argued that the Dictionary of

Modern Legal Usage (Oxford University Press, New York, 1995) defines "imminent" as "certain and very near, impending". It does not mean "merely probable". This, he argues, implies that it has already begun to make its impact felt right now.

The Board understands that a legal dictionary defines words by how the courts have interpreted them in particular contexts. Context is everything. "Imminent" used in the context of a policeman confronting a man brandishing a gun clearly has a different connotation than when it is affixed to the words "housing supply shortfall".

The Board also notes that OPA 28 is a policy document and not a statute. Accordingly, the Board prefers to use the definition in the Canadian Oxford Dictionary, which provides a real world meaning to words – that is, the meaning of a word as it is currently widely used in Canada and not just as it is used in a court of law. The Canadian Oxford Dictionary defines "imminent" as "impending, about to happen."

The Board's understanding of the word "imminent" or "impending" in the context of subsection A.1.11 of OPA 28 is coloured by the long lead time required to bring a serviced building lot to market. It was pointed out by experts testifying on behalf of Waterdown Bay that it regularly takes three or more years to secure draft plan of subdivision approval in Ontario. In certain circumstances, then, if there are just three years supply of draft plan approved building lots, a shortfall can indeed be considered to be "impending or about to happen." There is a strong possibility that the supply of building lots will be used up before more lots are approved.

In his cross-examination of Mr. Conway, Mr. Doumani drew the Board's attention to subsection A.1.10 of OPA 28, which provides that "phasing of development within (Waterdown South) will be controlled by subsequent planning requirements including the Provincial planning policies (respecting) housing...." He submitted that both the 1997 and 2005 Provincial Policy Statements take a broader, more regional perspective on lot supply. One should therefore conclude that a vacant lot anywhere in the Hamilton geographic area is, for the purposes of Provincial housing policy, equivalent to a vacant lot in any given market within the Waterdown geographic area.

Mr. Doumani then took Mr. Conway to CMHC's Preliminary Housing Market Study (Exhibit 31). Tables 1 and 2 of the CMHC report show that lot uptake in Hamilton lags well behind lot supply. Mr. Doumani submitted that it could be inferred from the figures in that even if there is a shortfall in Waterdown itself, there is no shortfall in the

Hamilton area as a whole, or for that matter in Burlington, which, he pointed out is part of the same regional area as Waterdown.

Mr. Conway agreed that the numbers in Tables 1 and 2 of the CMHC Report refer to the entire geographic area of the City of Hamilton, but that those numbers are not germane to the matter before the Board. He testified that the figures he (Mr. Conway) showed the Board speak to Waterdown only, which is the geographic area referred to in subsection A.1.11 of OPA 28.

In response to Mr. Doumani's probes, Mr. Conway said that it is, in any case, unrealistic to assume that the same buyer will consider both the still somewhat rural community of Waterdown to be on par with the older parts of Hamilton (or Burlington) when purchasing a home. This, he said, ignores local market preferences, which tend to be all-powerful in the homebuyer's decision making process.

The Board finds that "Waterdown" as referred to in both OPA 28 and in the 2002 Order in Council (Exhibit 6, Tab 4) means the community of Waterdown only. It does not include the remainder of the geographic area of the City of Hamilton or any of the City of Burlington.

The Board was not impressed by Mr. Annand's testimony, which did not stand up well under Mr. Garrod's pointed cross-examination. His conclusions did not always reflect the data in his study. On the other hand, Mr. Conway knew the lands in question well having grown up in the area. His testimony was not shaken under Mr. Doumani's spirited questioning.

The Board finds the opinion evidence of Mr. Lecce and Mr. Conway to be the more persuasive in respect to the meaning of the term "imminent" in the context of the "housing supply shortfall in Waterdown" referred to in subsection A.1.11 of OPA 28. It therefore adopts and relies on their evidence and finds that for the purposes of subsection A.1.11 of OPA 28, the housing supply shortfall in Waterdown is imminent.

Having satisfied the Board that the housing supply shortfall in Waterdown is imminent, the Appellant was then required to demonstrate that the criteria listed in subsections A.1.11 (ii) (iii) and (iv) of OPA 28 have been met before it addresses the criterion in subsection A.1.12 (ii). These criteria in these subsections of A.1.11 are:

1. The transportation impacts of Phase 1A of the development have been evaluated and addressed (subsection A.1.11 (ii)).
2. The Environmental Assessment for the Transportation Master Plan is proceeding expeditiously and has advanced to the stage where the alternatives have been identified and the potential routes have been identified for evaluation (subsection A.1.11 (iii)).
3. The development will not impact, prejudice or compromise secondary planning processes, the Transportation Study process or any of the alternatives or alternative routes under consideration in the Environmental Assessment process for the Transportation Master Plan (subsection A.1.11 (iv)).

These criteria will be examined in the following sections.

Transportation Impacts

OPA 28 added two new plots of land to the existing urban area of Waterdown – Waterdown North, Upcountry Estates and Waterdown South. The total residential capacity within these three is estimated at 6,500 units. Because of lack of water, wastewater, and road services fewer than 500 units have been released, and these were in Waterdown South and Upcountry Estates. These 500 units were released in the order in which the developers submitted their applications for allocations. The Appellant, Waterdown Bay, made its application in March 2005, and managed to secure the 250 units that are intended to comprise Phase 1A of Waterdown South. The Board was told that the Appellant owns a large part of the lands within Waterdown South. The largest parcel not owned by the Appellant is referred to as the “Salem lands.” The other 250 units that were released were allocated to Upcountry Estates, which is on the north side of Dundas Street (Hwy 5) across from Waterdown South.

Mr. D. Cherepacha, a principal with Reed, Vourhees and Associates (RVA), was qualified to give expert opinion evidence on transportation and traffic. He testified on behalf of the Appellant. Mr. Cherepacha told the Board he had been involved with the Parkside Hills development and the Silverwood developments in Waterdown North

since 1995. He was retained by Waterdown Bay in 2006. Between 1995 and 2005, he was retained by the previous owner of the Waterdown Bay lands.

Subsection A.1.11 (ii) of OPA 28 requires only that the “transportation impacts of the (proposed) development have been evaluated and addressed” and subsection A.1.11 (iii) of OPA 28 requires only that the Environmental Assessment for the Transportation Master Plan is “proceeding expeditiously and has advanced to the stage where the alternatives have been identified and the potential routes have been identified for evaluation.” Subsection A.1.11 (iv) requires only that the development “not impact, prejudice or compromise secondary planning processes, the Transportation Study process, or any of the alternatives or alternate routes under consideration in the Environmental Assessment for the Transportation Master Plan or the evaluation and selection of the preferred alternatives or their implementation.”

The evaluation of the impact on the secondary planning process, which is also one of the criteria of subsection A.1.11 (iv) will be considered below.

The Board was told that after some years in preparation, Phase 2 of the Environmental Assessment for the Transportation Master Plan (also known as the Waterdown/Aldershot Transportation Master Plan or WATMP) has been finalized. It was the opinion evidence of Mr. J. Webb who was qualified to give opinion evidence on land use planning, that this work fully satisfies the criteria listed in subsection A.1.11 (iii).

The Transportation Master Plan also identifies the “preferred” route for the new road through Phase 1A. For the north-south road capacity, it recommends widening to 4 lanes both Waterdown Road and Mountain Brow Road, which runs east/west along the ridge of the escarpment on the south boundary of the Waterdown Bay site. It also recommends that, at some point, Mountain Brow Road turn 90 degrees north to run through the Waterdown South Secondary Planning area to join up with Hwy 5 (Dundas Street). The alignment of the extended Mountain Brow Road in the WATMP Phase 2 Report is identical to the alignment of Street A in the draft Plan of Subdivision application before the Board.

Mr. Webb testified that this work satisfies the transportation-related criteria listed in subsection A.1.11 (iv).

The May 2005 traffic impact study prepared for the Waterdown Bay lands concluded the existing road system could accommodate not only the proposed 250 units of Waterdown Bay Phase 1A but also 350 units in Upcountry Estates, and 200 units in MC2 (in Waterdown North) as well as the proposed commercial development west of the main town site at the intersection of Hwy 6 and Hwy 5.

Mr. Cherepacha testified that his research shows that only a small portion of the traffic from the developments in Waterdown North would use Dundas Street if they were going to Burlington and/or points east. Most would go east along Parkside Drive and then south on Brant Street. Very few vehicles would end up in the Dundas/Mill Street intersection, which is the principal intersection that traffic from Phase 1A of the Waterdown South development would be expected to use. He concluded that the traffic impact of Phase 1A is "negligible" and can be accommodated within the existing road system.

On the day before Counsel made their final submissions, Mr. Cherepacha was brought back to the stand by Mr. Garrod to explain some discrepancies between the traffic counts he used in his report and the traffic counts cited by Mr. Allen in his testimony. Mr. Allen, who is employed by the City of Burlington, was qualified to give opinion evidence on transportation. Mr. Cherepacha claimed that Mr. Allen's traffic counts were "either far out of date or simply erroneous".

The Board finds that Mr. Cherepacha's testimony to be comprehensive with strong notes of both authority and veracity. His conclusion that the existing road system is able to accommodate the traffic from both Upcountry Estates and Waterdown Bay was not shaken under rigorous cross-examination by Mr. Doumani.

The Board had earlier found that because of the "notwithstanding" provision of subsection A.1.11 of OPA 28, subsection A.1.8 (iii) does not apply to the present appeal. Nevertheless, Mr. Cherepacha's evidence and conclusion regarding the capacity of the existing road system to handle all of the traffic from Phase 1A (as well as the 250 residential units approved in Upcountry Estates) would satisfy the transportation criteria therein listed if it did.

Paragraph 2 of subsection A.1.8 (iii) stipulates that "any recommended solution and implementation thereof that requires alterations (to roads within the City of Burlington) will be at the sole discretion of Burlington City Council" (Exhibit 6, Tab 4,

page 97). The evidence before the Board is that two studies have shown that no change whatsoever to the existing road system in either Hamilton or Burlington is required to accommodate the 500 residential units proposed and in development (250 in Upcountry Estates proposed and 250 in Waterdown Bay Phase 1A in development). The Board therefore finds that the transportation criterion in subsection A.1.8 (iii) regarding the impact on the existing road system could be met if required.

Mr. Webb testified that Mr. Cherepacha's evidence satisfies all the transportation-related criteria in subsections A.1.11 of OPA 28. His opinion evidence was not shaken by Mr. Doumani's intense cross-examination.

The Board finds Mr. Webb's planning evidence to be comprehensive and credible and therefore adopts and relies on that evidence. The Board finds that all the transportation-related criteria listed in subsection A.1.11 of OPA 28 have been met.

Having met the transportation-related criteria in subsection A.1.11 (ii), (iii) and (iv) of OPA 28, the Appellant was then required to demonstrate to the Board that the criterion in subsection A.1.12 (ii), pertaining to the Waterdown South Secondary Plan Study has been met.

The Waterdown South Secondary Plan Study

One of the relevant criteria for development in subsection A.1.11 (iv) of OPA 28 holds that the development will not impact, prejudice or comprise the secondary planning process.

Mr. C. Parent, team leader for Ecoplans Ltd., which prepared the South Waterdown Sub-Watershed Study (SWSS) told the Board that the SWSS team cooperated fully with the Waterdown South Secondary Plan Study team (led by Sorensen, Gravely, Lowes) and provided ecological and hydro-geological information to the Secondary Plan team as it came available for inclusion in the Secondary Plan. Mr. Parent stated that it is his opinion that the Secondary Plan includes the latest and best information from the SWSS and, in fact, "the latest and best information of its kind available anywhere". His opinion was supported during cross-examination by Dr. C. Kitchen, chief scientist for the SWSS.

But it was the transportation-related criteria in subsection A.1.11 (iv) that caused the most heated debate regarding the Secondary Plan. A special bone of contention was the location and function of proposed "Street A". The position of Mr. Gonnens is that as Phase 1A has been designed, Street A can function either as an interior collector road or a main arterial road depending on the design of subsequent phases of the Waterdown South development and on the final decision of Hamilton City Council regarding the various options listed in the Waterdown South Secondary Plan.

Testifying on behalf of the City of Burlington, Mr. P. Allen, who was qualified to give opinion evidence on transportation engineering, stated that it was his professional opinion that the location of Street A in the draft plan of subdivision precluded any changes to its function. He listed a number of reasons why with its present layout and location, Street A could only function as an arterial road and could not be used as an internal collector road.

Also testifying on behalf of the City of Burlington, Mr. Simon, who was qualified to give opinion evidence on land use planning, told the Board that fixing the function of Street A before the completion of the Secondary Plan is contrary to basic planning principles and would, in any case, limit the options within the Secondary Plan planning process. Limiting these options, he maintained, is contrary to the provisions of subsection A.1.11 (iv) of OPA 28, which states that "the development will not impact, prejudice or compromise the secondary planning processes...."

Disputing the conclusions of Mr. Simon, Mr. Webb told the Board that it was his professional opinion that the Secondary Plan was "substantially complete" since only the statutory public meeting to be held in the early fall 2008, remained to be held. He testified that the proposed Phase 1A had been developed in conjunction with the provisions of the Secondary Plan, and wholly complied with it. In any event, Phase 1A was developed along with and in conjunction with the Secondary Plan, and both it and Street A reflect the "preferred concept plan" in the Secondary Plan (Exhibit 6, Tab 5, page 109).

Under Mr. Doumani's cross-examination, Mr. Webb stated that even if during the upcoming public meeting someone suggested that they preferred one of the other options under consideration during the development of the Secondary Plan, Hamilton City Council would not, at this late date, make more than minor changes to the

“Preferred Concept Plan” (Exhibit 6, page 109) simply because of all of the decisions it has already taken in the process of developing the Waterdown South Secondary Plan (Exhibit 6, Tab 5).

In response to a query from the Board, counsel for the City of Hamilton, Mr. Zuidema, agreed with Mr. Webb that the Secondary Plan is “substantially complete”, and stated that it would be presented to Council of the City of Hamilton in Fall 2008 substantially in its present form. In any case, the Board notes that there is no stipulation in subsection A.1.11 (iv) that the Secondary Plan be complete, only that the proposed Phase 1A development not “impact, prejudice or compromise the secondary planning process”.

After consideration of all the testimony from these experts, the Board finds it is in agreement with Mr. Gonnens and Mr. Cherepacha regarding the location of Street A as found in the “Preferred Concept Plan” in the Secondary Plan. The Board finds that the draft plan of subdivision before the Board in no way limits Hamilton Council’s options respecting the location and function of Street A within the Secondary Plan, and that the location and function of Street A in the draft plan of subdivision does not therefore contravene the provisions of subsection A.1.11 (iv) of OPA 28.

Having met the transportation-related and secondary plan study criteria listed in subsection A.1.11 (ii), (iii) and (iv) of OPA 28, the Appellant was then required to demonstrate to the Board that the criterion in subsection A.1.12 (ii), pertaining to the South Waterdown Sub-watershed Study has been met.

South Waterdown Sub-Watershed Study

Ecoplans is the lead consultant on the massive South Waterdown Sub-watershed Study (SWSS), which was commissioned by the Appellant, Waterdown Bay, in order to comply with Policy A.1.12 (ii) of the Town of Flamborough Official Plan (OPA 28). The SWSS has been in progress since December 2002, and was, at the time of this Board hearing (July 2008) “substantially complete in all respects” according to Dr. C. Kitchen, who was lead scientist on the study team.

Subsection A.1.12 (ii) reads that in the area south of Highway No. 5 (i.e., the subject lands):

Prior to any development, a sub-watershed planning study shall be completed to the satisfaction of the City of Burlington and the Halton Region Conservation Authority. The sub-watershed planning study will identify ways and means to limit future flows to pre-development levels which will have the effect of causing no increase on downstream erosion or downstream flood risk.

Subsection A.1.12 (ii) requires that before any development can take place on the subject lands, a sub-watershed planning study must be completed to the satisfaction of the City of Burlington.

Mr. P. Kelly, who holds the position of Manager of Development, Environmental, and Transportation Engineering at the City of Burlington acknowledged that while the City has “received” the required South Waterdown Sub-Watershed Study (SWSS), it has not “adopted” it primarily because it is not satisfied with the study. Mr. Doumani submitted that this is a strong indication that the SWSS is not “complete” for the purposes of OPA 28 and that the proposed draft plan of subdivision approval for Phase 1A is premature.

As Halton Region Conservation Authority had signed off on the subject proposal before the start of the hearing and the City of Hamilton had also concluded a Subdivision Agreement during the hearing, Burlington’s entire subsection A.1.12 (ii) case hinged on whether the required sub-watershed study has been completed “to its (the City of Burlington’s) satisfaction”.

The Board understood that the issue it had to determine was whether the SWSS can be considered to be “complete” if it has not met with Burlington’s “satisfaction.”

Mr. Doumani submitted that the only way the SWSS can be considered to be complete without Burlington’s being satisfied is if subsection A.1.12 (ii) of OPA 28 were amended. He submitted that no application to amend this subsection has ever been put before the Board.

Mr. Kelly pointed to a number of shortcomings in the study – shortcomings that were of such significance that he could not as a professional engineer sign off on (the SWSS) as it stood. Unequivocal as that statement is, the Board finds that Mr. Kelly’s testimony did not stand up well to the energetic cross-examination of Mr. Garrod.

Dr. Kitchen and Mr. Parent, who is a biologist with Ecoplans Ltd. and project manager of the SWSS team, described the process whereby the Technical Steering Committee (TSC) was selected and the terms of reference drawn up. The TSC comprised a total of eight participants including Waterdown Bay, the City of Hamilton and the City of Burlington. They indicated that the TSC had reached an "impasse" with respect to the SWSS. Mr. Parent said that one TSC member in particular - the City of Burlington – regularly refused to accept specific findings of the SWSS or the opinions of its technical experts.

In his cross-examination of Mr. Parent, Mr. Doumani examined the term "impasse" which Mr. Parent had used and attempted to get Mr. Parent to agree that the fact that there was an impasse (or deadlock) indicated the SWSS project was not "complete" as required in subsection A.1.12 (ii) or was even "proceeding expeditiously" and was therefore somehow inherently flawed. Mr. Parent refused to be taken there and, through a number of examples attempted to demonstrate the unreasonableness of some of the later requests and claims of (Burlington's engineering staff).

The Board listened closely to this exchange and concluded that the testimony of neither Dr. Kitchen nor Mr. Parent had been in any way shaken. Dr. Kitchen stated that in his professional opinion the SWSS is (to paraphrase) as complete as it is likely ever to be, and complies fully with the intent and purpose of subsection A.1.12 (ii) of OPA 28.

Cognizant of Dr. Kitchen's reputation for thorough and high quality work, the Board finds that the SWSS is complete for the purposes of subsection A.1.12 (ii) of OPA 28.

The Board also finds itself in agreement with counsel for Waterdown Bay and Hamilton (Mr. Garrod and Mr. Zuidema) that, after studying the 2002 Order in Council no reasonable person would conclude that the use of the words "to the satisfaction of" in subsection A.1.12 (ii) of OPA 28 is intended to give the City of Burlington an absolute veto over development in the City of Hamilton. After all, as previously noted, OPA 28 is not a statute, it is a planning policy. It does not therefore follow that it should be interpreted in the harsh light of contract law.

The most reasonable inference, the Board finds, is that the intent and purpose of subsection A.1.12 (ii) of OPA 28 and, indeed of the 2002 Order in Council implementing it, is to encourage cooperation between and among the parties in order to arrive at

optimum planning and engineering solutions in the furtherance of the greater public good. It is the Board's view that a legalistic interpretation of subsection A.1.12 (ii) does not take the place of rational planning and informed decision making.

The Board finds that with respect to the subject proposal, the criteria set down in subsection A.1.12 (ii) of OPA 28 with respect to the SWSS have been met.

The Board also finds that there is no need to amend subsection A.1.12 (ii) of OPA 28 (as implied by Mr. Doumani in his summation) in order to comply with the intent and purpose of the 2002 Order in Council.

The Per-Lot Payment Question

In his Summation, Mr. Doumani submitted that if the Board were to find for the Appellant, Condition (xxviii) from the Subdivision Agreement between MC2 and the City of Hamilton should be inserted into the final Subdivision Agreement between Waterdown Bay and the City of Hamilton (Exhibit 63) as "Condition 28". Condition (xxviii) of the Subdivision Agreement between MC2 and Hamilton requires that a unit charge payment of \$1,980.00 for each townhouse unit and \$2,500 for each single family detached dwelling unit be paid to the City of Hamilton for transmittal to the City of Burlington for use in road construction in the City of Burlington (Exhibit 52).

In his May 26, 2008 letter to Mr. Doumani (Exhibit 52), Mr. Garrod suggested on behalf of Waterdown Bay that his client might support a similar arrangement in favour of the City of Burlington in order to settle the issues raised by the City of Burlington without the necessity of a hearing and determination by the Board. No evidence was put forward that Burlington ever seriously entertained the Waterdown Bay proposal, let alone accepted it. In fact, the issues that were of concern to Mr Doumani's client were litigated at the hearing.

The Board notes that subsection A.1.9 of OPA 28 states that "no development shall proceed in Stage 3 (which includes the subject lands) until a charge of \$800.00 per unit is paid to (the City of Hamilton) at the time of issuance of building permits". Subsection A.1.9 also authorizes (the City of Hamilton) to use an "alternative method to collect said unit charge" and stipulates that this unit charge is in addition to the (City of

Hamilton's) regular development charges and that this \$800.00 shall be indexed to the Consumer Price Index (CPI).

In the absence of settlement between the City of Burlington and Waterdown Bay, the Board finds no reason to order the increased unit payment requested by Mr Doumani. The Board therefore finds that the criteria of subsection A.1.9 of OPA 28 should apply. Approval of the draft plan of subdivision will therefore be conditional on Waterdown Bay agreeing to pay the sum provided for in subsection A.1.9 of OPA 28 to the City of Hamilton for transmittal forthwith to the City of Burlington.

The Board may be spoken to if difficulties arise in calculating the final sum.

Summary of the Board's Findings

Having considered all of the evidence presented and having regard for matters of Provincial interest as well as the decision of the City of Hamilton Council, the Board finds the draft plan of subdivision and proposed amending zoning by-law to be consistent with the Provincial Policy Statement 2005; to conform to the Region of Hamilton-Wentworth Official Plan and to conform to the Official Plan of the City of Hamilton especially as concerns the applicable policies in subsections A.1.11, and A.1.12 of OPA 28. These policies set out the criteria that are to be met with respect to the proposed plan of subdivision approval and implementing zoning by-law. The Board finds that the Phase 1A of the Waterdown South development represents good planning, and is in the overall interest of both the local community and the Province.

Conclusion

The Board Orders that the appeal is allowed and the draft plan prepared by Walker, Nott, Dragicevic Associates Limited dated September 18, 2007 comprising the 250 units of Phase 1A respecting lands at 392 Dundas Street East, Part of Lots 2, 3, 4 and 5, Concession 3, East Flamborough (Exhibit 2) is approved subject to the fulfillment of the conditions set out in Attachments 1 and 2 of Exhibit 63.

The Board orders that the appeal under subsection 34(11) of the *Planning Act* is allowed, and Zoning By-law 05-200 is hereby amended in the manner set out in Attachment 3 to Exhibit 63.

The Board orders that the appeal under subsection 34(11) of the *Planning Act* is allowed, and Zoning By-law 90-145-Z (Flamborough) is hereby amended in the manner set out in Attachment 4 to Exhibit 63.

The Board orders that the appeal under subsection 51(34) of the *Planning Act* is allowed.

And the Board Orders that pursuant to subsection 51 (56.1) of the *Planning Act*, the City of Hamilton shall have the authority to clear the conditions of draft plan approval and to administer final approval of the plan of subdivision for the purposes of subsection 51 (58) of the *Act*. In the event there are any difficulties implementing the conditions of draft plan approval, or if any changes are required to be made to the draft plan, the Board may be spoken to.

So Orders the Board.

"C. Hefferon"

C. HEFFERON
MEMBER

ATTACHMENT 3

OMB File No. ZO600176

Authority:

Bill No.

CITY OF HAMILTON

BY-LAW NO. 08 -

**To Amend Zoning By-law No. 05-200
Respecting Lands Located at 392 Dundas Street East (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, 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 first stage of the new Zoning By-law, being By-law 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, approved by the Minister under the Planning Act on September 27th, 1988) in accordance with the provisions of the Planning Act;

NOW THEREFORE the Ontario Municipal Board Orders as follows:

1. That Maps 414, 447 and 448, of Schedule "A" of By-law 05-200 are amended by incorporating the Conservation/Hazard Lands (P5) Zone (Block "1"), Open Space and Parks (P4) Zone (Blocks "2", "4" and "6") and Open Space and Parks (P4) Zone, modified (Blocks "3" and "5") boundaries for the applicable lands, the extent and boundaries of which are shown on a plan hereto annexed as Schedule "A" to this By-law;
2. That Schedule "C" of By-law 05-200 is amended by adding an additional special exception as follows:
 - "13. Within the lands zoned Open Space and Parks (P4) Zone, identified on Map 447 of Schedule "A" and described as part of 392 Dundas Street East, being Block 3 on Schedule "A" of this By-law, the following special provisions shall apply:

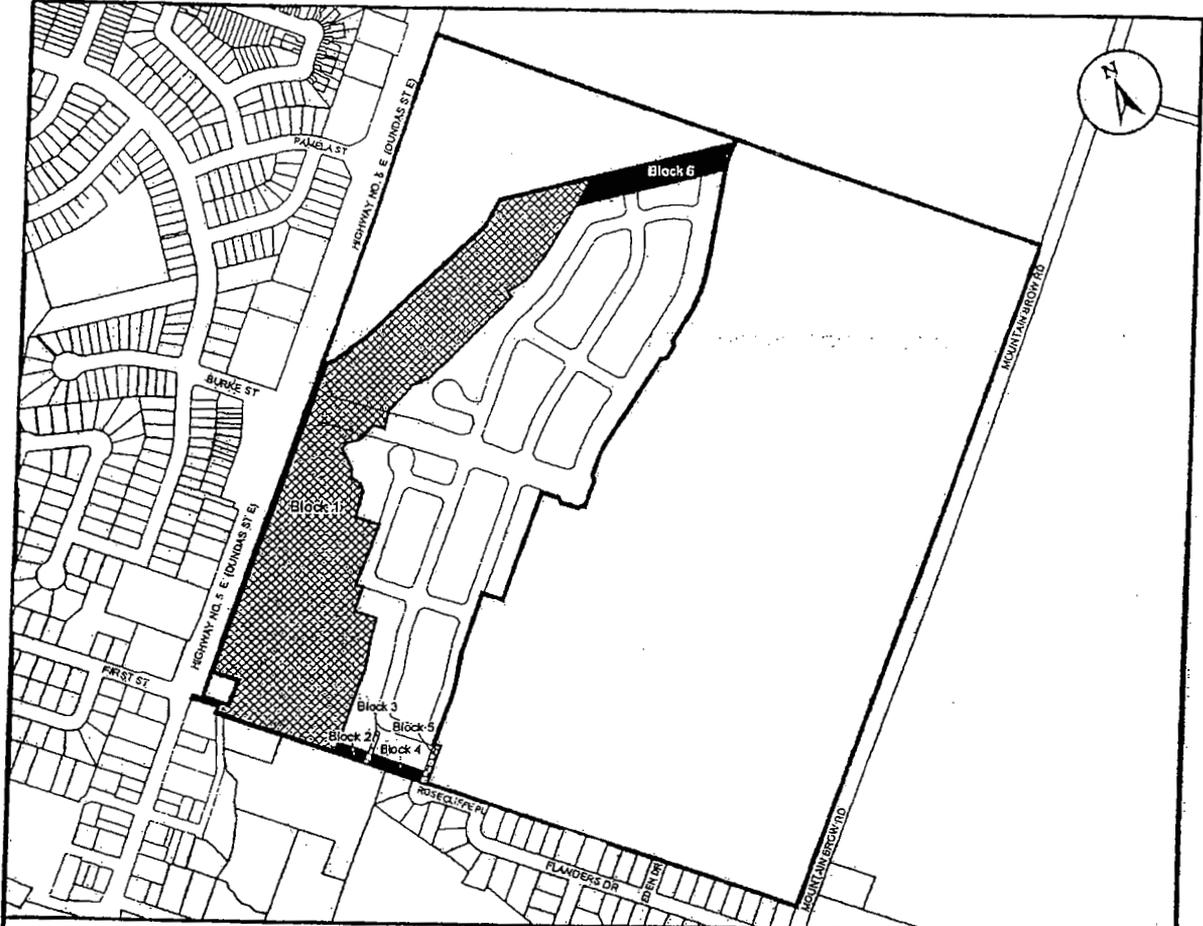
ry. a r o " "

- a) In addition to the uses permitted within Section 7.4, of By-law 05-200, the subject property shall also be permitted to be used as an access driveway for properties municipally known as 50, 52, 53 and 56 George Street."

"14. Within the lands zoned Open Space and Parks (P4) Zone, identified on Map 447 of Schedule "A" and described as part of 392 Dundas Street East, being Block 5 on Schedule "A" of this By-law, the following special provisions shall apply:

- a) In addition to the uses permitted within Section 7.4, of By-law 05-200, the subject property shall also be permitted to be used as an emergency access."

3. 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.



This is Schedule "A" to By-Law No. 08-
 Passed the day of, 2008

 Clerk

 Mayor

Schedule "A"
 Map Forming Part of
 By-Law No. 08-_____
 to Amend By-law No.05-200

- Subject Property**
 392 Dundas Street East
-  Block 1 - Lands to be zoned Conservation/Hazard Land (P5) zone
 -  Blocks 2, 4, 6 - Lands to be zoned Open Space and Park (P4) zone
 -  Block 3 - Lands to be zoned Open Space and Park (P4-13) zone
 -  Block 5 - Lands to be zoned Open Space and Park (P4-14) zone

Scale: N.T.S.	File Name/Number: ZAC-05-066/25T200513
Date: July 10, 2008	Planner/Technician: AF/DG
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT	

