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ISSUE DATE:
Oct. 14/99
DECISION/ORDER NO:
1898



PL990577

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Fairgrounds Shopping Centre Limited has appealed to the Ontario Municipal Board under subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the Town of Orangeville which dismissed an application numbered A-1/99 for variance from the provisions of Zoning By-law 22-90, as amended, respecting 95 First Street

OMB File No. V990273

CIRCULATED - COMMITTEE
OF ADJUSTMENT
DATE Oct 20/99
INITIAL CF

APPEARANCES :

<u>Parties</u>	<u>Counsel or Agents</u>
Fairgrounds Shopping Centre Limited	D. Wood
Town of Orangeville	J. Matera

DECISION DELIVERED BY S.D. ROGERS AND ORDER OF THE BOARD

Background

Fairgrounds Shopping Centre Limited, the applicant in this matter, applied to the Committee of Adjustment for the Town of Orangeville for a variance to establish a retail store of 800 square feet within one of it's buildings on the shopping centre grounds. The zoning by-law permits a minimum square foot retail store of 2,500 square feet. The application for variance was opposed by the Town of Orangeville and the Business Improvement Area of the Town of Orangeville (the BIA). The Committee of Adjustment refused the application and the applicant appealed to this Board.

The shopping centre site consists of 44 acres with frontage on First Street, Fifth Street, and Highway 10/24. The centre was the subject of a number of Board hearings in the past. When the applicant came forward with the first application, it triggered an in depth analysis of the policy framework for commercial development in the Town. Those studies translated into detailed policies in an Official Plan Amendment which established a commercial hierarchy and the means of protecting that hierarchy.

When the Official Plan Amendment and the Zoning By-law Amendment relating to the Fairgrounds site first came before the Board for hearing, the Board approved the OPA, but refused approval of the Zoning By-law, because of its concern that the by-law lacked

protection for the downtown area of the Town of Orangeville. The applicant then entered into detailed negotiations with the Town and BIA. After what all witnesses agreed were lengthy, ground-breaking and complicated discussions and negotiations, a Zoning By-law was drafted by the planners for the Town and for the applicant, and ultimately approved by the Board on or about February of 1997. It is a variance from the provisions of this by-law that the applicant seeks from this Board, by way of application filed in February of 1999.

The Proposed Use

The Board understands from one of the witnesses called by the applicant, Mr. Todd Lisso, a representative of the applicant, that it was his view, still strongly held, that the proposed use was a service commercial use, and not a retail use. This opinion was not shared by any other planning or market witness, however, the Board must examine the issue to satisfy itself that the application is properly framed.

The applicant is proposing to locate an 800 square foot General Nutrition Centre (GNC) in Building G. The proposed use was described this way by Mr. Winter, market consultant for the applicant, in a letter dated February 12, 1999:

GNC is the largest dietary supplement retailer in the world with more than 3,000 outlets.....A solid franchising concept that offers you an opportunity to take advantage of the self-care explosion by providing consumers with top-quality, affordable-priced vitamin and mineral supplements and sports nutrition and herbal products at convenient, easy-to-shop stores, operated by knowledgeable, customer-friendly managers.

It appeared that Mr. Lisso viewed this particular shop as a service establishment or personal service shop of some kind, because the store boasts persons who will consult with customers on their nutritional needs. However, it became clear from the evidence, that the primary activity on site is the sale of products, and that the shop consists of racks of products which are for sale to the consumer. It appears that the service provided by the "knowledgeable, customer-friendly managers" is an assistance to the customer in the selection and purchase of the retail product that is exhibited in the shop.

The Board therefore finds that the proposed use is a retail shop, and accepts the characterization of the shop by the two planners who appeared before the Board, as a specialty retail shop.

Applicant/Appellants Case

The essence of the applicant's case rested on the notion that this one 800 square foot store would create no impact on the function or vitality of the downtown Central Business District (CBD). Because there would be no impact on the CBD, the applicant claimed that the proposed variance thereby met the four tests set out in the *Planning Act*, and that the Board should authorize the variance.

The applicant put forward this case by calling a market analyst and a planning witness. In response to presentations made by the BIA, the applicant also called Mr. Lisso.

The market evidence tendered by the applicant consisted almost entirely of attempting to show that there had been benefits to the CBD as a result of the development of the Fairgrounds Shopping Centre to date. This proposition was presented by way of analysis of vacancy rates, and gross leasable floor space increases in the CBD and at the Fairgrounds. The evidence was directed at showing that the previous predictions of the applicant's market expert had in fact been realized, and that there had been no undue negative impact on the CBD as a result of the development of the Fairgrounds. The Board did not find this evidence helpful for the case at hand.

However, the applicant's market analyst concluded from this evidence that the proposed 800 square foot store at the Fairgrounds site would not negatively impact on the vitality and planned function of the downtown CBD. The Board finds this conclusion unsupported by the evidence provided by this witness. It would seem to the Board that such a conclusion would necessitate a study of the activities of the two similar stores in the CBD which would be competing directly with the proposed GNC store at the Fairgrounds as well as stores selling similar merchandise in the CBD; the market served by these stores; the impact of a Fairgrounds store on these stores; and the resulting impact on the CBD as a whole. There was no such evidence before this Board.

However, each witness that came before the Board testified that it was clear to them that the establishment of the GNC at the Fairgrounds would not in itself, create a wholesale destabilisation of the downtown CBD. The Board finds this conclusion based in logic. The Board accepts, that in the absence of any concrete evidence, it was most likely that the establishment of *one* specialty retail shop at the Fairgrounds would not destabilise the downtown in terms of function or vitality. However, the Board is entitled to look at the entirety of the situation at the Fairgrounds in the context of the applicable planning policies, and will do so in its analysis.

The planning witness called for the applicant, Mr. Macaulay, gave his opinion that because the proposed store will not impact on the CBD as a whole, the proposal met all four tests it was required to meet under the legislation. In coming to this conclusion, Mr. Macaulay indicated that in his view there were only two general intentions expressed in the Official Plan and that the related Zoning By-law provisions were simply "mechanics" imposed to implement the two intentions of the Official Plan. He identified these two intentions as follows:

- to maintain the multifaceted nature and diverse functions of the CBD, including the retail function;
- to protect the planned function of the CBD for its continued viability.

Mr. Macaulay rejected suggestions by the Town's counsel that there was, in addition, an intent to ensure that certain priority uses, including smaller format retail stores be directed to locate in the CBD, and not in the Fairgrounds Shopping Centre area. As the Board understands it, this suggested intention was also, in Mr. Macaulay's opinion, simply a mechanic to achieve the fundamental intention. As a result of the fact that this single store would not impact on the vitality or planned function of the CBD, Mr. Macaulay concluded that the proposed variance met the general intent and purpose of the Official Plan and Zoning By-law.

Mr. Macaulay also concluded that the size of the variance was of no consequence, and that the issue as to whether any impact resulted, was the key issue in determining whether or not the variance was minor. Given that there would be no impact on the vitality of the downtown, he offered the opinion that the variance was minor. Mr. Macaulay also concluded that the proposed variance was desirable for the appropriate development of the property, as there would be no physical impact as a result of the location of this store, the general intent and purpose of the Official Plan and Zoning By-law would be maintained, and because the proposal was a response to the dynamic nature of the retail business.

The latter rationale was submitted to this Board by Mr. Lisso on behalf of the applicant in response to the submissions of representatives of the BIA. Mr. Lisso indicated that the GNC store was the type of national retail enterprise that his company anticipated would locate in their "Power Centres" He gave a cogent financial reason for this approach. He also indicated that because of the dynamic nature of the retail business at this time, it was necessary to apply to vary the original restrictions for these type of uses. He referred to recent significant changes in the retail industry, but the Board failed to understand how

these changes required the applicant to apply for the subject variance. He indicated that no written agreement had been reached with the BIA, and that he had always anticipated that any variance would require a process similar to what he was currently engaged in.

Two former members of the executive of the Orangeville BIA, Mr. Hill and Mr. Child, appeared before this Board, and made articulate and forceful submissions with respect to the vast expenditures of time and energy involved in the negotiations preceding the final draft of the Zoning By-law.

Messrs Hill and Child indicated that they made a deliberate decision to negotiate with the applicant when the Fairgrounds proposal first came forward. They did so in an effort to establish safeguards in the Zoning By-law that would result in protection of the CBD for a period of time, while the CBD merchants adjusted to the market changes that would be the inevitable result of the establishment of the Fairgrounds Shopping Centre. It was their evidence that they were ultimately satisfied with the regulations included in the Zoning By-law which included the prohibition of certain specific types of uses such as liquor stores, floor space caps on different types of stores, and minimum floor space limits to ensure that the types of smaller stores typically found in the CBD would not locate at the Fairgrounds Shopping Centre and so compete directly with the CBD, and possibly undermine the vitality of the CBD.

As a result of what they considered an agreement with the owners of the Fairgrounds site, they refrained from objecting to the proposed development at the Fairgrounds site. Messrs Hill and Child indicated that it was their very clear understanding that the regulations should remain in place for a period of time that would be sufficient to allow the CBD to absorb the impact of the Fairgrounds development, and that an application at this time, to vary these standards, ran counter to what they understood was the purpose of the Zoning By-law regulations. It was their view that it was premature, at this time, and in the absence of a full market impact study, to vary the minimum floor space standards so drastically.

Counsel for the applicant made much of the fact that there had been no written agreement between the BIA and his client that required his client not to apply to vary the standards established in the Zoning By-law. Messrs Hill and Child indicated their doubt as to the legality of such an agreement. Counsel for the applicant also put to these gentlemen that his client had fulfilled its side of the bargain by including the agreed-to standards in the Zoning By-law, and that his client is under no obligation to live with these standards, given

the dynamic nature of the retail business and the lapse of time.

The Board does not accept counsel's proposition. The BIA had only one real concession that they could make, which was to not object to the approval of the Zoning By-law. That concession was made and once the Zoning By-law was passed, this bargaining tool no longer existed. Furthermore, the Zoning By-law supports the claim by Messrs. Hill and Child that there was a time element considered by the framers of the Zoning By-law. The Table of Floor Space Restrictions in the Zoning By-law indicates a phasing in of additional floor space, and some changes in those restrictions after January 1, 2001. There is no provision for a change in the total amount of floor space for this type of retail use, or for the minimum floor space restrictions for these type of retail uses. There is serious doubt that an agreement not to apply for a variance would be legitimate or legal, so it is understandable that such a written agreement was not demanded by the BIA. Furthermore, it may be that a truly minor variance to the minimum floor space standard might succeed without opposition from the BIA. In view of that possibility, it is even more understandable why the BIA would not insist on an agreement not to vary the standard.

It is clear from the evidence that most of the participants in the bargaining process, the applicant excluded, anticipated that the regulations would be in place for the short and medium term, to temper the impact on the CBD. There was candor on behalf of those opposing this application, that in the longer term, after some further study, there might be some change to these restrictions. While the applicant is entitled to make the proposed application, the opponents are entitled to oppose it, and to put forward as a basis for that opposition, their understanding of the history, intent and purpose of the Zoning By-law regulations. It is their evidence that the proposed store is precisely the type of store, which the Zoning By-law regulations were designed to prohibit at the Fairgrounds Shopping Centre, and the Board accepts that evidence.

Findings and Decision

The Board has not reviewed the evidence of the Town of Orangeville witnesses, for the simple reason that the Board has, in this decision, accepted the evidence and opinions of the witnesses for the Town of Orangeville and the BIA, in preference to the evidence of the applicant's witnesses. The evidence of the Town will become clear in this Board's reasons.

It is the Board's decision that the applicant's appeal should be dismissed. The Board finds that the applicant has failed to establish that the proposed variance satisfies

any of the four tests set out in the *Planning Act*.

It is the Board's view that the central thesis to the applicant's case has a fundamental flaw. The applicant's thesis seeks to reduce the four legislative tests to one simple test of impact. That is not how the legislation reads. And while it may be true that the focus of many variance applications which come before this Board is on the physical or functional impact of the proposed variance, it does not mean that all variance applications are to be tested by an assessment of impact alone.

The applicant seeks also to limit the intent and purpose of both the Official Plan and the Zoning By-law to the most generalised intent expressed by the policies, while ignoring the "mechanics" of how this intent is to be achieved. It is the Board's view that while there is a goal of a most general nature that can be described as the foundation of the resulting Official Plan policies and Zoning By-law standards, this does not preclude examination of the general intent and purpose of specific policies and specific Zoning By-law standards in the context of the over-arching goal. It seems antithetical to suggest to the Board that it test the general purpose and intent of both the Official Plan and Zoning By-law, by considering only the most basic goal of the Official Plan and ignoring the general intent of the corollary policies set in place to achieve that general goal. Nor does the Board accept that this is the intent of the legislation. The Board does not accept that zoning standards are simply "mechanics", the purpose and intent of which are to remain unexamined.

The Board uses Mr. Macaulay's example of a zoning setback. He postulated to the Board that in considering the merits of a variance to a setback, one looks not just at the size of the variance, but at the intent of the set back which is to establish space around a house, to permit light and air to penetrate to the house. Mr. Macaulay equates that exercise, which is undeniably appropriate in assessing a minor variance, to the one presently before the Board. However, the Board characterises the concept of space around a house and its purpose, as being a description of the general intent and purpose of the specific zoning standard of setbacks. To make that analysis equivalent to what the applicant now poses to the Board, is to say that the overarching, most general goal is to create liveable housing. It cannot be denied that a house without any setback from the property line can be quite liveable. But to test a variance by that standard alone is to ignore the general intent and purpose of a specific zoning standard, which is established primarily to create liveable housing, but within the context of that general principle, is established generally to create space around a house. It has been the tradition of planners before this Board on these matters, to examine the general purpose of the zoning

standards themselves. Furthermore, if one only looks only at the most fundamental, most basic, most general, intent of the Official Plan as the only test for assessing variances, it renders moot the need for such zoning standards.

The commercial policies in the Official Plan for the Town of Orangeville establish a commercial hierarchy, with the CBD functioning at the top of the hierarchy as the preferred location of diverse, multi-functional, small-format, retail stores; the Fairgrounds as the preferred location for large-format, retail stores with a more Regional market draw; and the remainder of the commercial nodes to accommodate a mix of these types of uses. The means for ensuring and maintaining the specific planned functions of these areas is to ensure that small-format retailers locate primarily in the CBD, while the larger format retailers locate at the Fairgrounds Shopping Centre, with a mix of such uses in the secondary commercial nodes. This goal is achieved by imposing limitations, such as minimum floor space limits in areas where the Town does not wish to see the smaller format retail stores, such as the Fairgrounds.

Confirmation of this construct is found in the following Official Plan policies:

E2.1 GOAL

To promote Orangeville's function as a service centre providing a broad range of activities, goods and services...by means of a strong commercial structure which focusses on the Central Business District and includes other appropriately located major commercial facilities and areas.

E2.2 OBJECTIVES

E2.2.1 To support the further strengthening of Orangeville's major commercial structure, the components of which are the Central Business District and nearby commercial sections of the east-west Broadway corridor, the major commercial node in the vicinity of First Street, and Hansen Boulevard and the interconnecting north-south corridor of First Street.

E2.3.5 In order to maintain healthy interaction and balance within this major commercial structure, the Plan provides for the promotion and encouragement of certain activities in the Central Business District and for improvements in supporting services and facilities serving the Central Business District, as well as selective limitations on retail developments to be permitted elsewhere.

E2.4.5 Among the diverse activities which contribute to the economic vitality and community value of the Central Business District, the following types of activities are regarded as priority uses to be provided with particular encouragement and support: non-department store DSTM outlets, other specialty shopping facilities including liquor and specialty food stores, business and personal services of all kinds.....

The intent of these policies is concisely summarized by a statement repeated in a number of planning reports dealing with the Zoning By-law now sought to be varied. This statement was referred to several times by counsel for the applicant.

The intent behind the... restrictions is to entrench the role of the Fairgrounds shopping centre as a centre for larger format retailing and other uses which are unlikely to locate in the Downtown. **The limitations on the non-anchor uses are intended to prevent the Fairgrounds centre from evolving into a completely diversified commercial centre, thereby usurping the role of the Downtown.** (emphasis added)

Thus it is clear that the larger format retail stores were to be encouraged to locate at the Fairgrounds site, while the smaller format retail stores similar to those typically found in the CBD were to be prevented from locating at the Fairgrounds to *prevent the Fairgrounds from evolving into a completely diversified commercial centre.*

The Board heard evidence that, through inadvertence, there exists at the Fairgrounds Shopping Centre specified personal service floor space in excess of that permitted in the Zoning By-law. Specified personal services establishments are smaller format commercial uses and the amount of such uses is severely restricted in the Zoning By-law. The Board also heard that Fairgrounds was in the process of obtaining site plan approval for two retail stores which would meet the minimum floor space standard of 2500 square feet, but which would require, should the Board approve the application before it, a variance to the cap on floor space for small format retail stores.

The Board therefore finds that should it approve this variance, it would be part of an evolution of the Fairgrounds centre into a diversified commercial centre - a result which the policies in the Official Plan are specifically designed to prevent. The Board further finds that the general intent and purpose of the Official Plan is to identify small format retail stores of the size proposed in this application, as priority uses to be located in the Central Business District, away from the Fairgrounds Shopping Centre.

The Board therefore finds that the proposed variance does not meet the general intent and purpose of the Official Plan.

With the exception of Mr. Macaulay, all witnesses before the Board agreed that the purpose of the minimum floor space standard for other retail stores was to direct small format retail floors away from the Fairgrounds Centre and to the Central Business District. Such stores are still permitted to locate in any of the other commercial nodes identified in the Official Plan. However, it is clear that this zoning standard was directed at preventing

the location of such stores at the Fairgrounds site. The Board accepts the evidence of witnesses for the BIA and the Town that the purpose of the zoning standard was directed specifically at stores of the size typically found in the downtown, which is in the order of 800 to 1200 square feet. Clearly this proposal is on the smaller end of the stores found in the CBD, and falls well within the category of stores the zoning by-law is directed at.

The Board therefore finds that the proposed variance does not meet the intent or purpose of the Zoning By-law.

While it is clear Board jurisprudence that the size of a variance is not determinative of whether a variance is minor or not, the size of a variance becomes significant where size is the essence of the problem the zoning standard seeks to address. This is the case before the Board. This is not a case where the applicant is requesting a variance of an inch, or of 50 to 100 square feet. This is a case where the applicant is seeking a variance to permit the type of use which is specifically not to be permitted at the Fairgrounds.

And while there was no evidence that a negative impact would result in the CBD as a direct result of this one store only, there was no evidence that satisfied the Board that the effect of the location of a series of smaller stores and personal service shops, such as those existing and now proposed at the Fairgrounds site, might not, together, usurp the planned function of the CBD as a centre of diverse, small scale commercial retail and service establishments. As a result the Board finds that the variance is not minor.

And for all of the foregoing reasons the Board finds that the proposed variance is not desirable for the appropriate development of the property. It represents the establishment of the type of store, which the regulatory framework set out specifically to prevent. It is not an establishment that is suitable for a centre designed within the commercial planning framework to accommodate large format retail stores.

There was much discussion about the loss of public confidence in the planning process should this variance be approved. The Board knows that all parties to a matter before the Board can lose confidence in the planning process when they are not successful in their position before the Board and that such a possibility should not be a reason for refusing approval of a variance. However, the Board has always had as part of its mandate the protection of the public interest when making planning decisions. The Board finds that it is not in the public interest to amend a zoning standard by the variance process, when the variance will produce a result which the zoning standard is specifically directed at preventing.

As a result the Board dismisses the appeal and the variance applied for is not authorized. So orders the Board.

"S. D. Rogers"

S. D. ROGERS
MEMBER