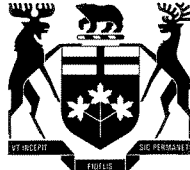


ISSUE DATE:

APRIL 10, 2008



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL070279

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Mart Kivistik
Appellant: Paul D.N. Temelini
Appellant: Loris Cecchetto Construction Limited
Appellant: Pentti Laakso
And others
Subject: Proposed Official Plan
Municipality: City of Greater Sudbury
OMB Case No.: PL070279
OMB File No.: O070039

APPEARANCES:

Parties

Counsel

City of Greater Sudbury

G.S. Watt

Ministry of Municipal Affairs and Housing

R. Boxma

Paul Temelini

L. Roslyn (agent for R.D. Cheesman)

Mart Kivistik

Loris Cecchetto Construction Limited

G.E. McAndrew

Pentti Laakso

G.E. McAndrew

**DECISION OF THE BOARD DELIVERED BY M.G. SOMERS AND ORDER OF
THE BOARD**

CONTEXT

The matters before the Board are the appeals from the Ministry of Municipal Affairs and Housing ("the Ministry") decision to modify and approve the City of Greater Sudbury ("the City") Official Plan ("new Plan").

Mark Simeoni, a senior planner with the City of Greater Sudbury (“the City”), was present at the hearing and provided evidence. Also present was one of the Appellants, Mart Kivistik.

This hearing involves three separate appeals, the Appellants are: Loris Cecchetto Construction Limited (“Cecchetto”), Paul Temelini (“Temelini”) and Mart Kivistik.

Counsel advised the Board at the beginning of the hearing that the parties had reached a settlement in the Cecchetto and Temelini appeals. Counsel filed Minutes of Settlements for each of there respective appeals (Exhibits 1 and 2).

THE CECCHETTO AND TEMELINI APPEALS

Mr. Simeoni provided evidence in support of the two settlements.

(i) Cecchetto Appeal

It was Mr. Simeoni’s evidence that the parties on consent requested that the Board modify the proposed Official Plan in the terms set out in accordance to the Settlement of Minutes, Attachment “1”, to this Order.

It was Mr. Simeoni’s opinion that the modifications were appropriate and represented good planning. The Board finds particularly noteworthy that the modifications represents the culmination of collaborative efforts on the part of the parties.

The Board finds that the above-mentioned modifications represents good planning and to be in the broader public interest pursuant to section 2 of the *Planning Act*.

The Board Orders that the Cecchetto appeal is allowed in part and the Official Plan for the City of Greater Sudbury is modified, as set out in Attachment “1” and as modified, is approved.

(ii) Temelini Appeal

It was Mr. Simeoni's evidence that the parties on consent requested that the Board modify the proposed Official Plan on the terms set out in accordance to the Settlement of Minutes, Attachment "2", to this Order.

It was Mr. Simeoni's opinion that the modifications were appropriate and represented good planning. It was particularly noteworthy that the modifications represented the culmination of collaborative efforts by the parties.

The Board finds that said modifications represents good planning and to be in the broader public interest pursuant to section 2 of the *Planning Act*.

The Board Orders that the Temelini appeal is allowed in part and the Official Plan for the City of Greater Sudbury is modified as set out in Attachment "2" and as modified, is approved.

KIVISTIK APPEAL

Mart Kivistik ("the Appellant") advised the Board that he is a retired Planner. He had been a planner with the former Regional Municipality of Sudbury for 26 years and 4 years with the former Borough of Etobicoke.

The Appellant testified that he opposed a number of sections of the proposed Official Plan. It was the Appellant's evidence that the new Plan replaces the "certainty" in the old Plan with "uncertainty and ambiguity". It was the Appellant's position that the new Plan did not comply with the direction and intent of the *Planning Act* and that certain policies in the new Plan was contrary to basic planning principles.

It was the Appellant's evidence that the new Plan replaces five distinct Residential Land Use designations with one Residential Designation, called "Living Areas 1". The Appellant maintained that what land use should be permitted in this

designation would to be determined at the discretion of Council. The Appellant testified that the new Plan and its policies over time would threaten the character and stability of existing single-family neighbourhoods, the cornerstone of the old Official Plan.

The Appellant maintained that having a single designation called "Living Area 1" would permit as a matter of right, all forms of housing, such as apartment buildings in existing single-family neighbourhoods. It was his view that policies that protected existing single-family neighbourhoods would be eliminated and replaced by policies that would facilitate the introduction of higher density developments into these areas.

The Appellant testified that in considering applications to rezone lands in Living Area 1, Council will ensure that: (Section 3.2.1 Subsection 6 of the new Plan)

- a. the site is suitable in terms of size and shape to accommodate the proposed density and building form;
- b. the proposed development is compatible with the surrounding neighbourhood in terms of scale, massing, height, siting, setbacks, and the location of parking and amenity areas;
- b. adequate on-site parking, lighting, landscaping and amenity areas are provided; and,
- d. the impact of traffic on local streets is minimal.

It was the Appellant's view that such rezoning would be facilitated by Objective 3.1b of the new Plan, that would "encourage the redevelopment of a mix of residential uses," as oppose to the protective objective in the existing Official Plan.

The Appellant maintained that the new Plan and policies would overtime threaten the character and stability of established single-family neighbourhoods by the incremental introduction of higher density forms of buildings through the rezoning process. He testified that such rezoning would be much easier to obtain in the new Plan, since the higher density buildings, would be permitted in the new Plan and would not require an Official Plan Amendment, as they do now under the old Plan. It was the Appellant's view that the developers would only have to convince Council that their proposal, would meet the criteria of the Plan to obtain the rezoning.

It was the Appellant's evidence that there was no planning rationale underlining the elimination of the existing Low Density Residential designation. He maintained that

new policies should be instituted that would protect these areas and the homeowners from potential incompatible multiple-family residential uses. This protection existed under the old Plan, since other higher density residential development would not be permitted in the existing Low Density areas. Furthermore, this type of development would have to proceed through an Official Plan Amendment process and Rezoning, not just Rezoning.

The Appellant testified that Section 2.6.1 in the old Plan provided a clear and strong statement to protect low density areas: "...it is the intent of Regional Council to preserve the prevailing character of stable single-family and two-family areas." The Appellant maintained that no such policy statement can be found in the Living Area 1 Designation of the new Plan.

The Appellant noted that the new Plan, in Chapter 3 deals with "Living Areas" and Section 3.3 deals with "Intensification". It was the Appellant's view, that having Section 3.3 located in the "Living Chapter," implied that the focus of these policies would be within this designation. The Appellant provided the following examples to illustrate his concerns regarding the policies dealing with intensification:

- . "The City will encourage new growth to occur through intensification."
- . "Intensive forms of development can occur without dramatic change in the character and scale of existing neighbourhoods."
- . "Priority will be placed on meeting housing targets by means of intensification."
- . "It is an objective of this Plan that by 2015, the amount of growth occurring through intensification will double to 10%."

The Appellant maintained that the abovementioned policies would carry much weight in the consideration of any rezoning application, since the new Plan would permit, as a matter of right, all forms of housing, including high rise apartments.

Mr. Simeoni, the City's planner, fundamentally disagreed with the Appellant's premise, that having one residential designation would threaten the character and stability of an established single-family neighbourhood. Mr. Simeoni maintained that the

“The Living Areas” designated by new Plan was primarily intended for housing and related uses and in his opinion would be compatible with residential neighbourhoods.

In fact, Mr. Simeoni directed the Board to Section 3 of the new Plan, which states:

New residential development *must be compatible* with the existing physical character of established neighbourhoods, with consideration given to the size, and configuration of lots, predominant built form, building setbacks, building heights and other provisions applied to nearby properties under the Zoning By-law. [*Emphasis the Board's*]

It is Mr. Simeoni's opinion that the new Plan protects single-family neighbourhoods from high-density development, just as the old Plan did.

Mr. Simeoni testified that the objectives of the “Living Areas” designation is to achieve stability in the City's housing market by ensuring that a sufficient supply of designated and serviceable residential land is available to meet existing and future needs.

Mr. Simeoni disagreed with the Appellant's evidence that the new Plan was vague and required more residential designations and protection. Mr. Simeoni testified that the Plan is a detailed guide for land use planning in the City. He advised the Board that the Sault Ste Marie Official Plan was similar in approach and content to the City's new Plan. (Exhibit 6, Tab 7) In addition, Mr. Simeoni testified that the new Plan has had approximately 89 public meetings to ensure extensive public input. Mr. Simeoni filed a Public Participation Document dated April 2006 with the Board. (Exhibit 6, Tab 5)

The Board has carefully considered the evidence of the Appellant and Mr. Simeoni regarding whether “Part II Section 3.0 Living Area” represents good planning. The Board finds that the Appellant did not make his case that the “Living Area 1” designation would threaten the stability and character of a neighbourhood, particularly an existing single-family neighbourhood.

The Board prefers the evidence of Mr. Simeoni. The Board notes that Section 3 of the new Plan states that new residential development must be compatible with the existing physical character of an established neighbourhood. This section, among others, noted in Mr. Simeoni's thorough analysis, emphasizes that development has to reinforce and respect existing Neighbourhoods and their character. As such, the Board finds that "Section 3.0: Living Area" represents good planning and to be in the public interest.

In addition, the Appellant had secondary concerns over "Part II Section 5.2 Rural Area Designation Subsection 5.2.1". The Appellant maintained that the drafters of the new Plan, made a mistake with respect to severance policies, wherein a lake which does not have public water access and adequate off-street parking and boat docking facilities, could not be used for seasonal residential purposes; nor could severances be granted on such a lake. The Appellant maintained that much of the historic development of seasonal residential uses in the City takes driveway access either over Crown lands or over private lands with appropriate easement or rights-of way. The Appellant testified that he doubted whether the City's Planners wanted to eliminate their option for accessing seasonal residential properties.

Mr. Simeoni did not share the Appellant's concerns regarding the Rural Area Designation Subsection 5.2.1. According to the evidence of Mr. Simeoni, residential uses in Rural Areas, typically take the form of rural strip development along municipal roads, as well as permanent and seasonal waterfront residences located along the shorelines of non-urban lakes.

Mr. Simeoni testified that seasonal residential uses are permitted on water bodies that have public water access with adequate off-street parking and boat docking facilities. New lots for permanent waterfront residential use must front onto a public road that is maintained year-round. New lots for seasonal waterfront residential uses are permitted on lakes with public water access with adequate off-street parking and boat docking facilities. Mr. Simeoni has no concerns regarding severance, as noted by the Appellant in this section of the Plan.

Mr. Simeoni further testified that the policies mentioned in “Section 5.2. Rural Area Designation Subsection 5.2.1” represents good planning and is in the public interest.

The Board has carefully considered the evidence of the Appellant and Mr. Simeoni and finds that the Appellant did not make his case in respect to severance policies involving public water access in this section of the Plan. Based on the evidence of Mr. Simeoni, the Board finds that “Section 5.2. Rural Area Designation Subsection 5.2.1” represents good planning and is in the public interest.

The Appellant was concerned with “Subsection 20.5 Zoning”. It was his evidence that zoning has only two small paragraphs, they are:

Zoning is the regulation of land use and structures intended to promote the public health, safety, comfort, convenience and general welfare of the residents.

In order to implement the new Plan; a new Comprehensive Zoning By-law for the City will have to be prepared. Mr. Simeoni maintains that during the preparation of a new Comprehensive Zoning-law, previous zoning by-laws will be reviewed with respect density and building forms as they generally reflect the character of the City’s Communities and Non-Urban Settlements.

It was the Appellant’s evidence that the only guidance City staff has are the above-mentioned two paragraphs. The Appellant acknowledges that Section 20.5 of the new Plan states “that during the preparation of a new Comprehensive Zoning By-law, previous zoning by-laws will be reviewed with respect to density and building forms as they generally reflect the character of the City’s Communities and Non-Urban Settlements. ” However, the Appellant notes that existing zoning may not cover every area in the City. He maintains that there is no statement on what will happen if the old By-law does not fit the circumstances. In addition, the Appellant questioned what exactly “review” means. According to the Appellant the term and process is vague.

Mr. Simeoni testified that a new Comprehensive Zoning By-law for the City is going to be prepared. It was Mr. Simeoni’s evidence that the new Comprehensive Zoning By-law will be prepared by the professional planning staff of the City, along with public input. Mr. Simeoni notes that Section 20.5.1 of the Plan states the By-laws that are in effect at the time of adoption of the Plan, will be deemed to be in conformity with

the Plan, until amended or rescinded. Existing uses in compliance with the existing Zoning By-law will be permitted in the new Zoning By-law. Lands which are not rezoned in the existing Zoning By-law and which are not intended for immediate development pursuant to the policies of the new Plan shall be placed in a zone permitting only those uses that will not hinder the future sound development of lands in question.

It is Mr. Simeoni's opinion that given that the previous zoning by-laws will be reviewed and that the professional planning staff of the City and the public will have input into the new Comprehensive Zoning By-law; the new Zoning By-law should reflect the character of the City's Communities and the general interest of the public.

The Board prefers and relies upon the evidence of Mr. Simeoni that the Comprehensive Zoning By-law will reflect the character of the City's Communities and the general interest of the public. The Board notes that Section 20.5.1 states that the By-law that are in effect at the time of adoption of new Plan, will be deemed to be in conformity with the Plan, until amended or rescinded.

The Board has carefully considered the evidence of the Appellant and Mr. Simeoni and finds that "Subsection 20.5 Zoning" represents good planning and to be in the public interest.

The Appellant was concerned with "Subsection 20.3 Detailed Development Plans" ("DDP"). The Appellant advised the Board that according to the new Plan, DPPs undertaken on small areas and adopted as a By-law does not require the approval of the Minister and as such would not have the status of an Official Plan Amendments. The Appellant maintained that there would be no appeal process or public participation.

Mr. Simeoni disagreed with the Appellant. It was Mr. Simeoni's evidence that the public would be involved in the Plan. Furthermore, Mr. Simeoni noted that since the DDPs are to be adopted as a By-law, if the public disapproved of the DDP, they could appeal it through the By-law process.

The Board prefers the evidence of Mr. Simeoni regarding “Subsection 20.3 Detailed Development Plans” and finds that this section represents good planning and to be in the public interest.

In addition, the Appellant is concerned with “Sub-section 20.7 Comprehensive Planned Unit Development (“CPUD”)”. Section 20.7 of the new Plan states:

In order to take advantage of the development potential of difficult sites, encourage infilling, and promote innovative development that might not be otherwise permitted under the Zoning By-law, a Comprehensive Planned Unit Development (CPUD) provision is established by this Plan. CPUD not only allow flexibility in the development of lands with physical constraints, but may also be extended to conventional sites in order to enhance the economic viability of development, particularly major projects to be phased in over time. CPUD is not intended as a separate land use category, but may be applied in all *Living Area I* designations (Section 3.2.1) and to those privately owed lands designated Parks and Open Space and identified with a CPUD symbol on *Schedule 2c, Site Specific Policies*.

The Appellant submits that the provisions regarding CPUDs are more detailed in the old Plan. He is concerned that the policies for CPUDs in the new Plan are more flexible and not as defined. The Appellant maintains that due to the new Plan’s flexibility a high rise in a CPUD could be introduced into a single detached dwelling area.

The Appellant further submits that the new Plan leaves the City’s staff and the public in the dark regarding the criteria for CPUD. It is the Appellant’s position that the Plan should be more informative regarding CPUDs.

The Appellant directed the Board to “section 20.7.1.d Policies (for CPUD)” in the new Plan. The provision states that a CPUD may be applied to any parcel of vacant land having a minimum area of three hectares. However, the Appellant notes that in section “2.13.2 d. Policies (for CPUD) in the old Plan, would allow a CPUD provided that the parcel of land had a minimum area of five hectares and met the criteria established in this Section. It was the Appellant’s position that section 2.13.2.d of the old Plan had a higher standard and better protects the public.

Mr. Simeoni disagreed with the Appellant. It was Mr. Simeoni’s evidence that pursuant to the new Plan, the CPUD provision applies to lands under unified control that

are generally intended for mixed use and/or mixed density development. It may form part of a larger proposal that includes traditional development by subdivision. Mr. Simeoni maintains the policies found at 20.7.1 for a CPUD is detailed and informative and protects the public. Mr. Simeoni notes that a CPUD shall be permitted only through an amendment to the Zoning By-law. The layout and design of streets, services, landscaping, open space and individual buildings are presented in the form of a detailed Concept Plan that is submitted prior to rezoning approval. Once final approval is obtained, a site plan in conformity with the initial Concept Plan must be submitted and approved. Mr. Simeoni notes that prior to the approval of any CPUD proposal, the proponent must demonstrate to Council how the proposal meets the intent and criteria established in this section.

The Board prefers the evidence of Mr. Simeoni regarding "Subsection 20.7 CPUD'S" and finds that this section represents good planning and to be in the public interest.

It was the Appellant's testimony that any appeal from the Council regarding a rezoning to the Board, in particular rezoning for higher density uses, would prejudice citizens. He maintained that the appeal to the Board would be based on interpretations of criteria and policy and not whether the proposed use was permitted. He further maintained that the Board would place greater weight on expert witnesses, as oppose to that of a layperson's opinion and that in most circumstances, such an expert witness would represent the municipality.

However, the Appellant's argued that if the rezoning was accompanied by an application for Official Plan Amendment, a different story would emerge. It was his position that since the proposed intensified use would not be permitted in the Official Plan; the burden of proof would fall on the proponent, to show how the new use represented good planning, and why the plan should be amended. The Appellant submitted that this would be based on planning arguments and not on interpretations of criteria and policies.

Mr. Simeoni disagreed with the Appellant's premise that an appeal from Council to the Board would create a bias in favour of the Municipality. In his submissions, Mr.

Watt argued that if a citizen disagreed with a decision from Council, a duly elected public body, a citizen would have the right to appeal that decision to the Board. The citizen has the right to retain counsel and/or to represent themselves at the appeal. At a hearing at the Board, the citizen's evidence would be carefully considered by the member. In addition, a citizen has the right to retain an expert witness, if the citizen believes it would be helpful. The Board agrees with Mr. Watt and does not see how the new Plan could possibly prejudice a citizen and/or his rights in the appeal process to the Board.

The Appellant directed the panel to a decision of the Board in *Re Official Plan of Town of Richmond Hill Planning Area ("Richmond Hill")* (June 26, 1980) 11 O.M.B.R. 2. In this particular case, the Town of Richmond Hill presented its case over a 25-day period. The Board had expressed its dissatisfaction with many of the provisions in the proposed Official Plan. At the conclusion of the Town's evidence-in chief, the Town's Solicitor asked the Board for an adjournment for the purpose of allowing Council to consider proposing modifications, although no detail as to the content or thrust of the modifications were given. The objectors claimed that the changes required to remedy the defects in the Plan and render it workable and fair would be of such magnitude, as to constitute a complete rewriting of the entire text. In a cross-motion for nonsuit, the objectors sought an outright rejection of the entire plan.

The Board granted the motion for non-suit. It was held that the proposed Official Plan, did nothing more, than declare what existed in the Town and left future development to the subjective discretion of Council to plan as it wished, when it wished and if it wished. Because the Plan was not a guide for future development and because its procedures were cumbersome, expensive, lengthy and open to delay and designed to circumvent the safeguards contained in both the *Planning Act* and the rule of natural justice, the Plan was rejected.

The Appellant argued that the case at hand was similar to *Richmond Hill*. The Appellant stated that the City's new Plan was vague, with no detail and very little content, like that of the Richmond Hill's Plan. The Appellant further argued that the new Plan left future development to the subjective discretion of Council to plan as it wished.

It was the Appellant's position that the panel should follow *Richmond Hill* and repeal the sections of the new Plan that he had problems with.

Mr. Watt in his submissions distinguished *Richmond Hill*, from the case at hand. He argued that the problems with Richmond Hill's Plan had to do with the entire Plan. In the case at hand, the Appellant only appealed a few provisions of the new Plan.

Mr. Watt notes, that the Richmond Hill Plan was vague and unworkable. However, Mr. Watt argued that the evidence of Mr. Simeoni clearly showed that the City's Official Plan has detail, content and would act as a guide for future development for the City. It is Mr. Watt's position that *Richmond Hill* should not be followed for the above-mentioned reasons.

The Board agrees with Mr. Watt, that the *Richmond Hill* is distinguishable from the case at hand. *Richmond Hill* has to do with the Town's entire Plan; the case at hand has to do with only a few provisions. In the *Richmond Hill*, the Plan had no detail and did not act as a guide for future development for the area. In the *Richmond Hill*, the lack of detail in the Official Plan circumvented the safeguards contained in the *Planning Act* and the rule of natural justice. This is not the case here, the Board finds that the City's Official Plan has content, policies, rationale that protects its citizens, and acts as a guide for future development for the City.

Having considered the land use planning evidence as well as the submissions of Counsel and the testimony and submission of the Appellant, the Board finds that the particular sections of the new Plan represents good planning and to be in the broader public interest.

Therefore, pursuant to Section 17(27) of the *Planning Act*, the Board hereby dismisses the appeals and approves those portions of the Official Plan for the City of Greater Sudbury and related Modification Nos. 2,3,5 and 40 to the Official Plan for the City of Greater Sudbury made by the Minister of Municipal Affairs and Housing pursuant to subsection 17(34) of the Official Plan as identified in the previous Orders of the Board in this matter dated: October 15, 2007; December 17, 2007 and January 22, 2008 with the only exceptions now being:

1. The Agricultural Reserve land use designation shown on Schedules 1a, 1c and 2c, as they apply to the lands south of the railway tracks between the communities of Chelmsford and Azilida. This remaining appeal to the Official Plan for the City of Greater Sudbury by Pentii Laasko is to be heard by another panel of the Board at a later date, and
2. The lands forming the subject matter of a second site-specific appeal. [being OMB Case No. PL061127]

In all other respects, the appeals contained within PL0700279 are dismissed.

The Board so Orders.

"M.G. Somers"

M.G. SOMERS
MEMBER