

ISSUE DATE:

January 28, 2009



PL080723

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

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

Appellant: Millford Development Limited  
Subject: 2006 Official Plan for the Town of Newmarket  
Municipality: Town of Newmarket  
OMB Case No.: PL080723  
OMB File No.: PL080723

**APPEARANCES:**

**Parties**

Town of Newmarket  
Regional Municipality of York  
Millford Development Limited

**Counsel**

E. Armchuk-Ball  
R. Miller  
B. Montgomery (student-at-law)  
R. K. Webb  
K. Heyer

**MEMORANDUM OF ORAL DECISION DELIVERED BY C. HEFFERON ON  
A MOTION HEARD ON JANUARY 13, 2009 AND ORDER OF THE BOARD**

The subject application, by way of a Notice of Motion, was brought to the Ontario Municipal Board ("Board") pursuant to subsection 17 (45) of the *Planning Act* by Ms E. Armchuk-Ball, Municipal Solicitor for the Town of Newmarket and Mr. R. Miller, Solicitor for the Regional Municipality of York (together, as the "Moving Party").

The Moving Party requests that the Board dismiss the appeal under subsection 17 (36) of the *Planning Act* of Millford Development Limited ("Millford") against the Natural Heritage System provisions of Schedule A and the Woodlot provisions of Schedule B, in the 2006 Official Plan of the Town of Newmarket.

## **Background**

Millford owns an 11-acre development site on Eagle Drive, just east of Yonge Street in Newmarket. Approximately seven acres of the total 11-acre site is classified as environmental protection or hazard lands. These seven acres includes the required 10 metre top-of-bank setback. About four acres of the total 11 acres remain after the hazard lands are removed.

Lake Simcoe Conservation Authority has declared approximately 1.7 acres of the remaining four acres to be "woodlot" and, as such, protected from development. The woodlot classification was adopted as a Natural Heritage System ("NHS") designation in the 2006 Official Plan of the Town of Newmarket.

Millford has appealed to the Board to remove the NHS designation, from a 1.7-acre portion of the subject lands, on the grounds that it does not qualify as a "woodlot." A Board hearing into this matter has been tentatively scheduled for March 3, 2009.

The Moving Party led evidence that despite oral and written communication from Town of Newmarket officials, as well as the written and oral communications regarding the implications of the NHS designation on the development potential of the Millford site; and despite Millford's being in regular communication with the Mayor and other members of Council; and despite Millford's being an experienced developer in Newmarket, Millford did not make oral or written submissions as required under subsection 17(44.2)(1) of the *Planning Act* to have the NHS designation reviewed prior to approval of the 2006 Official Plan of the Town of Newmarket (Exhibit M1, Affidavit of Jason Unger, dated December 3, 2008).

In his submission to the Board, Mr. R. K. Webb, Counsel for Millford, acknowledged that Millford did not meet the provisions of subsection 17 (44.2)(1) of the *Planning Act* but argued that subsection 17(44.2)(2) allows the appeal to be heard if "the Municipal Board is of the opinion that there are reasonable grounds to add the person or public body as a party".

**Core Issue**

The matter before the Board at this Motion hearing is the reasonableness of continuing with the scheduled March 3, 2009 hearing of Millford's appeal against the NHS designation, on the subject property given, that Millford did not make either oral representation at the public meeting or written submissions to Council prior to the adoption of the new Official Plan as required under subsection 17 (44.2)(1) of the *Planning Act*.

**Position of the Moving Party**

Ms Enza Orsi is president and managing director of Millford, which is a successful development firm that has operated under her leadership in York Region for about 25 years, and was being advised during the time period in question by Larkin & Associates (Larkin), an experienced land use planning consulting firm. Evidence was presented that Larkin advised Ms Orsi both orally and in writing of the necessity of submitting an application to develop the subject site before the new Official Plan was enacted by the Town (on October 10, 2006).

By now claiming not to have been aware of the requirements of the *Planning Act*, at this late date, is not reasonable. If the motion was being heard under the Bill 51 regime, it would be summarily dismissed. The fact that prior to the enactment of Bill 51 on January 1, 2007, the *Planning Act* was less uncompromising regarding who is able to submit an appeal on a land use planning decision does not mitigate the unreasonableness of Millford's position.

In the event the motion is allowed, the Moving Party contends that Millford can still apply for an Official Plan Amendment ("OPA") when it is ready to develop its land and therefore the development potential of its lands is not threatened.

**Position of Millford**

Ms Enza Orsi, who is the president and managing director of Millford, was not aware of the urgency of acting on the NHS designation, nor was she aware of the

implications of that designation on any future applications Millford might make to develop the subject property.

Mr. Webb argued that because of Ms Orsi's language difficulties and lack of formal education, the subtleties of the complex planning instruments that have become the norm in Ontario occasionally elude her. Nevertheless, Millford is a good corporate citizen and the language and/or formal educational shortcomings of its president and managing director, Ms Orsi, should not unreasonably burden it.

As to the contention that Millford can apply for an OPA when it is ready to develop the subject lands, it is Millford's position (according to Mr. Webb) that before it can apply for development permission it has to know exactly how much of its lands are actually developable. The fact that the NHS portion is in the middle of the parcel effectively precludes the intensity of development that both the Growth Plan and the policies of the new OP call for on sites like the subject property. Millford cannot see the wisdom of proceeding with the significant expense of preparing applications for an OPA and for development approval before it knows the real size of the developable portion of the site.

### **Precedents**

The Moving Party took the Board to a number of OMB and Divisional Court cases to support its contention that if the required oral and written submissions are not made prior to consideration of an appeal, the appeal is dismissed without a hearing.

In countering this argument, Mr. Webb pointed out that in every one of the cases cited in the Case Book (Exhibit M7) but one, the Appellant was not the owner of the subject lands. Millford is the owner of the lands that are the subject of the appeal to the Board.

The Board finds that of the cases cited (Exhibit M7), one has particular relevance to the present appeal. That case is Toronto (City) vs. East Beach Community Association, 42 OMBR 505, in which Vice Chair W. Lee found that "the Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons.... What these particular provisions (that is, subsections 17

(45) (a) and 34 (25) of the *Planning Act*) allow the Board to do is to seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing, and whether the issues are worthy of the adjudicative process.”

It is the view of this panel of the Board that there was authenticity in the reasons cited by Mr. Webb for his client's failure to satisfy the provisions of subsection 17 (44.2) (1) of the *Planning Act*, and that sufficient legitimate planning reasons were raised during this Motion hearing to convince this panel that the Board should examine the matter of the NHS designation on the Millford lands in a full hearing.

### **Disposition and Order of the Board**

Mr. Webb took the Board to Black's Law Dictionary (5<sup>th</sup> edition, pg. 1138). Black's defines "reasonable" as "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view...."

After consideration of the evidence and review of the transcript submitted (Exhibit M4), this panel finds that, while perhaps inept, Ms Orsi's response to the demands placed on her by the changing planning regime in Newmarket was in the circumstances, "suitable". It is reasonable for the managing director of a major land developer to want to know exactly what it owns for certain, in the way of developable land before committing to spend six figure sums on an application for development that might be completely inappropriate.

From the evidence before this panel, it does not appear that Larkin explicitly informed Ms Orsi that she only needed to make an oral presentation at the public information centre and/or the statutory public meeting, as well as a written submission to Council, in order to maintain Millford's position under subsection 17 (44.2) (1) of the *Planning Act*, with respect to the new Official Plan. Larkin seemed to focus on the necessity of her making an "application," which Ms Orsi, not unreasonably in this panel's view, given her non-native English speaking background and lack of formal education, apparently took to mean a several hundred thousand dollar development application.

This panel is of the view that a major landholder and developer such as Millford is more than the sum of its officers. The intensity at which the subject lands will be developed has considerable Growth Plan implications, and it is therefore this panel's view that the March 3, 2009 hearing into the NHS designation should go ahead as scheduled.

The Board therefore dismisses the motion and orders the March 3, 2009 hearing to proceed as scheduled.

So Orders the Board.

" C. Hefferon"

C. HEFFERON  
MEMBER

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