

ISSUE DATE:

Jul. 09, 2009



JUL 10 2009

TOWN OF MARKHAM
CLERKS DEPT.

TOWN OF MARKHAM
CLERKS DEPT.

Kegan
Lucy
Jim Baird
PL080870 Legal

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

1456924 Ontario Inc., has appealed to the Ontario Municipal Board under subsection 17(40) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the Town of Markham to announce a decision respecting a Proposed Amendment to the Official Plan for the Town of Markham

OMB File No. PL080870

1456924 Ontario Inc., 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 122-72 of the Town of Markham to rezone lands respecting 161 Main Street from Heritage Main Street (HMS) to a site specific exemption to permit business and professional offices on the ground floor of the subject building

OMB File No. PL080871

APPEARANCES:

Parties

1456924 Ontario Inc.

Town of Markham

Unionville Business Improvement Association,
Unionville Ratepayers Association, and
Unionville Villagers Association

Counsel

A. Robinson

J. Streisfield

T. Pochmurski

Participants

Sharon Taylor Wood

Richard Talbot

Guylaine Julien

DECISION DELIVERED BY J. G. WONG AND ORDER OF THE BOARD

Background

1456924 Ontario Inc. (Applicant) is appealing the Town of Markham's (Town) failure to make a decision respecting a proposed amendment to the Town's Official

Plan. The applicant is seeking an Official Plan Amendment (OPA) to the Unionville Core Area Secondary Plan PD 1-12 to permit business and professional office use on the ground floor of a commercial property located at 161 Main Street, Unionville (Subject Property).

The Applicant is also appealing the Town's refusal to enact a Zoning By-law Amendment (ZBLA) to Zoning By-law 122-72 for the Town of Markham to rezone lands respecting 161 Main Street from Heritage Main Street (HMS) with a site specific exemption to permit business and professional office use on the rear portion of the ground floor of the subject building. Both of these appeals have been consolidated for the purpose of this hearing.

The Subject Property is located in the central part of the Town of Markham, in a Heritage Conservation District known as Main Street Unionville (MSU). MSU is considered to be a historic commercial area containing local shops, restaurants and businesses. It is also regarded as a major tourist attraction for the region.

The Applicant purchased the Subject Property in 2000 and subsequently renovated in 2003, adding additional retail units on the ground floor.

Evidence

Mr. Robert Dragicevic, a qualified land use planner appeared on behalf of the Applicant. According to Mr. Dragicevic, the OPA is site specific and seeks to exempt the Subject Property from a general prohibition on MSU on ground floor office and professional use.

Mr. Dragicevic testified that other similar sized communities such as Port Hope, Bowmanville, Stratford and Kingston have the full array of retail and commercial uses and that there is no detriment in allowing other business uses on the ground floor of buildings located on their local "Main Street". The proposal here is to allow offices and professional uses on the ground floor on MSU. He testified that the recent renovations to the subject building included retrofitting the side entrances located on the right side of the building and as a result of the curvature of the road, they open indirectly onto Main Street. Currently, these side entrances are not being utilized.

Mr. Dragicevic asserts that the "planned function" of the street is for a traditional shopping area and this includes a variety of professional and office uses. Therefore, he

considers this proposal not as removing retail uses but as adding office uses. The proposed OPA and corresponding ZBLA does not permit access from the front of the building and that the expected use does not require altering the exterior and therefore the physical character of the building is protected. He asserts that the side door that the Applicant now proposes to utilize is located ten metres from the street and accessing the proposed ground floor office space from this door does not offend the retail streetscape.

It was Mr. Dragicevic's opinion that the proposal is consistent with the Provincial Policy Statement and Growth Plan as broadly applied, representing increased intensification through additional uses. Furthermore, he contends that this proposal makes better use of the existing infrastructure and maintains the commercial viability of a heritage area. Mr. Dragicevic also commented that there was no indication of opposition to the application from the Town's planning staff.

Ms Vivian Risi is the Applicant/owner of the Subject Property and is also the owner/operator of Royal LePage Your Community Realty which operates out of the subject premises. Ms Risi testified that the entire ground floor of the subject building was previously occupied by various retail tenants. Ms Risi testified that as tenants left she began occupying portions of the ground floor beginning in 2002 and took on additional ground floor space as it became vacant and failed to get re-lease for retail use. In 2003 she renovated and expanded the subject building that included adding two additional retail units on the ground floor. She testified that she was not made aware until 2006 of the prohibition on ground office use.

Ms Sharon Taylor Wood testified that she previously operated a successful retail store on the ground floor of the subject building between 2004 and 2006. She opposes that application, does not want any office use on the main floor and would like retail stores kept on the ground floor "to keep the street alive". Ms Wood currently operates a retail store located across the street from the Subject Property in a building she subsequently purchased. She also testified that a former tenant, The Backyard Naturalist was successfully operating out of the rear ground floor space. However, Ms Wood did agree that a small portion of the rear ground floor space designated as "area E" in Exhibit 9, could be used for office if it is not required for retail use.

Ms Guylaine Julien, a former tenant who operated a chocolate store on the ground floor of the Subject Property from the Fall 2006 to June 2008, testified that it was

difficult to operate a business on Main Street and that businesses that operated at the rear of the property were not successful.

Ms Joanne Barnett, a qualified land use planner, appeared on behalf of the Unionville Business Improvement Association, the Unionville Ratepayers Association, and the Unionville Villagers Association. Ms Barnett confirmed that the Subject Property was located in the Heritage Main Street Area and that according to the Town's Official Plan 2005 (OP), Section 3.4.6.4, the Planned Function for the area, is "To provide a traditional shopping experience in the form of an historical commercial area where the at-grade uses are predominately retail ...". She testified that the Planned Function policies in the OP are further refined in the corresponding Secondary Plan and Implementing By-laws. The Board was directed to OPA 107 (Exhibit 8, Tab 9) adopted by the Town on May 27, 2003, Policy 5.1.3 which states: "... it shall be the policy of the Town to prohibit business and professional Offices on the ground floor of commercial properties facing Main Street Unionville." The Board was also directed to Section 14.1 of the Town's By-law 2003-167 for the Heritage Main Street Zone prohibiting business and professional offices from locating on the ground floor. It was Ms Barnett's opinion that the proposed amendments do not conform to the planned function in the OP, that it is the intent of the Town to implement the planned function, and there is no reason to deviate from that. She acknowledged that the OP provides for a review of plans/policies on a site-specific basis.

It was also Ms Barnett's opinion that allowing office use on the ground floor detracts from the planned function of the street and that the Subject Property is located in the middle of a designated zone and permitting ground floor office use would interrupt the flow of the street. In cross-examination, Ms Barnett did acknowledge that there were no specific concerns raised by the Town's Preliminary Planning Report to this application.

Mr. Richard Talbot, President of the Unionville Ratepayers Association, with an expertise in retail development, appeared in opposition to the application. Counsel for the Ratepayers advised the Board that Mr. Talbot had been previously qualified by the Board as an expert witness in retail planning and now sought to have him qualified as such. Counsel for the Applicant objected to Mr. Talbot's being qualified as an expert witness in this matter. In this instance, the Board qualified Mr. Talbot's testimony not as an independent expert witness but as a representative of a ratepayer group.

Mr. Talbot testified that Unionville Main Street was one of the most popular attractions in York Region. That the Subject Property occupied a prime location and Unionville Main Street in total was less than one kilometre long. It was his opinion that office uses do not offer enough to keep people interested in MSU as a destination and that retail and restaurant uses work well on main streets. Mr. Talbot confirmed that several retail tenants had previously occupied the subject space. Mr. Talbot stated that the new by-law in 2003 was also implemented to restrict new restaurant uses if retail on the street fell below 50%. In cross-examination, Mr. Talbot agreed that there are vacant properties on Main Street Unionville and there are also several buildings available for sale. Mr. Talbot acknowledged that there are professional offices that have operated for many years on the ground floor of buildings located on MSU in contravention of the by-law.

Mr. John Winter, a qualified retail analyst and consultant, appeared on behalf of the Town. Mr. Winter had participated in the preparation of a previous market study of the area. He opposes the conversion of ground floor retail to office use and maintains that retail be the predominate use along MSU. In his opinion, the Subject Property offers an excellent location in the core of a pedestrian orientated area. It was his opinion that the proposed office use is not representative of a traditional retail experience and does not preserve and enhance the distinctive character of the area. He asserts that MSU is a unique area, less than one kilometre in length, a small confined area for retail uses and restaurants as compared to other geographically larger main street type areas that include ground floor office with retail uses. Mr. Winter states that retail uses currently (based on February 2009 figures) occupy 49.35% of the ground floor space on MSU but that a minimum of 50% retail is needed to maintain the desired retail experience. He acknowledged that there are existing vacancies but this is not serious and that it may be difficult to get retail tenants.

Mr. Winter authored a study, "Market Analysis of Unionville Main Street, June 2002" for the Town that was later referenced as the basis for OPA 107. Mr. Winter agrees that ground floor space at the back of a building that is not usable for retail purposes could, in certain instances, be used for offices and not offend the retail streetscape. He did confirm that there should be no office use at the front of a building facing onto Main Street, as this would affect the functioning of Main Street.

Mr. Michael Manett, a qualified land use planner, appeared on behalf of the Town. Mr. Manett testified that the prohibition on ground floor office use on MSU dates back to 1990 and since then it has maintained a pedestrian orientation. The Board was advised that the prohibition on office use was carried forward from OPA No. 99 adopted in 1990 and later replaced by OPA No. 107. It is his opinion that the proposed changes are contrary to the intentions of Markham's Council and counter to the prohibitions in the OP and ZBL. The removal of the ground level retail does not maintain the planned function of the area. The Town has sought to maintain the prohibition on ground floor office use through their Secondary Plan (OPA No. 107) and ZBL. In Mr. Manett's opinion, the proposed OPA seeks an exemption from the Secondary Plan, taking away retail uses and changing it to predominately an office use.

It was Mr. Manett's position that office use erodes the sense of identity for Main Street; it does not provide the animation of retail uses which involves displaying goods and having customers come into a store. He proffers that the Applicant did not object to the earlier OPA No. 107 when she had an opportunity to do so. It was his position that the proposed OPA and ZBLA are contrary to a clear prohibition, that there was no supporting study indicating a need for change, and that the existing policy was based on extensive public consultation and study.

Disposition

In this instance, having heard all of the qualified experts and their opinions together with all of the other evidence that was presented, the Board prefers the planning evidence and opinions of Joanne Barnett and Michael Manett, that the proposed OPA and corresponding ZBLA do not represent good planning. The evidence of Planners Barnett and Manett was also supported by the market analysis and the evidence and testimony of Mr. Winter. The Board notes that the proposed OPA and corresponding ZBL would permit 70% of the total ground floor space of the subject building for office/professional use, along with utilizing the street level side entrance, and this represents a substantial departure from the existing by-law and the strict prohibition on ground floor office use on MSU.

The prohibition on ground floor office use on MSU is part of a long-standing policy that dates from 1990 with OPA 99 and ZBL 267-90; which were subsequently reconfirmed in 2003 with OPA No. 107 and ZBL 2003-167 but only after public consultation along with corresponding market studies and analysis (Exhibit 8, Tab 7 &

8). OPA 107 Policy 5.1.3 states: "... it shall be the policy of the Town to prohibit business and professional Offices on the ground floor of commercial properties facing Main Street Unionville." This prohibition reinforces the stated Planned Function for the area as stated in OP Section 3.4.6.4(a)(i): "To provide a traditional shopping experience in the form of an historical commercial area where the at-grade uses are predominately retail ...". The Board finds, in this instance, that the existing prohibition is part of a reasoned approach with policies designed to support a "traditional shopping experience" in a relatively small, well-defined, tourist orientated area. The Board notes that the Applicant acquired the property in 2000 but did not object to the passing of OPA No. 107 in 2003, which re-confirmed the prohibition of ground floor office use on MSU.

The testimony of the former tenants of the ground floor space was mixed; Sharon Taylor Wood testified that she experienced great success while Guylaine Julien spoke of the difficulties of operating a business there. The Applicant testified that she tried to lease the space through her own agents without success. There was no independent expert evidence confirming that there was no demand or that this space was not suitable for retail uses. The only evidence on the leasing of the subject space was the Applicant's and the experience of her own agents. Mr. Winter testified that retail vacancies go up and down and confirmed that there are existing vacancies on the street. On the basis of the evidence presented, the Board is not satisfied that retail use is not feasible in the subject space and therefore additional uses should be permitted.

The planning rationale is that retail uses generate more animation and consequently increase the pedestrian traffic on the street to create a retail experience for visitors to the street. The prohibition is to not have professional and office uses located on the ground floor of buildings facing Main Street in order to promote and maintain the animation along a defined relatively short stretch (approximately one kilometre) on a specific street and the Board finds that this is reasonable. In this case, office and professional uses are only prohibited on the ground floor but are permitted on the second and subsequent floors and also in the basement area of properties facing Main Street. This policy was confirmed in studies completed in 1990 and again in 2003 that Council subsequently adopted. The Board notes that the Applicant currently occupies portions of the second floor and the basement area and utilizes the basement level entrance at the rear of the subject building and this is unaffected by the prohibition on ground floor office use.

THE BOARD ORDERS that the appeals are dismissed and the proposed Official Plan Amendment and corresponding Zoning By-law Amendment are not approved.

This is the Order of the Board.

"J. G. Wong"

J. G. WONG
MEMBER