

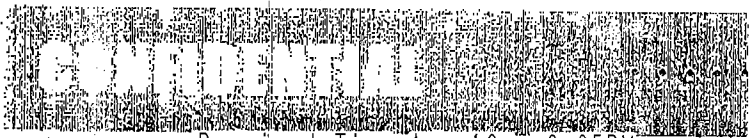


**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

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Court File No. 80/05
Released: 20050812

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Re: Residents for Sustainable Development in Guelph v. 6 & 7 Developments Limited
and The Corporation of the City of Guelph

Before: Farley, Swinton and Croll JJ.

Counsel: Eric K. Gillespie and T. J. Law for the Appellant
Benjamin Zarnett and Tom Friedland for the Respondent 6 & Developments
Josephine Matera for the Respondent City of Guelph

Heard at Toronto: August 8 and 9, 2005

ENDORSEMENT

[1] Residents for Sustainable Development in Guelph ("RSD") appeals from a decision of the Ontario Municipal Board ("the Board") dated December 29, 2004. The Board allowed the appeal of the respondent 6 & 7 Developments Limited ("6 & 7") and approved amendments to the City of Guelph's Official Plan and Zoning By-law to permit a commercial development on lands controlled by 6 & 7 comprised of a 135,000 square foot junior department store (intended to be a Wal-Mart) and 20,000 square feet of other commercial space.

[2] Pursuant to s. 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law. Leave to appeal was granted by E. Macdonald J.

[3] One of the central issues before the Board was the compatibility between the proposed use and three major existing neighbouring land uses: Woodlawn Public Cemetery, Marymount Catholic Cemetery and the Ignatius Jesuit Centre ("IJC"), a 600 acre spiritual retreat centre which, for more than 90 years, has attracted retreat participants from around the world.

[4] RSD appeared as a party at the hearing of the Board, while the IJC appeared as a participant. The IJC had previously entered into a written agreement with 6 & 7 in which it agreed that any possible physical impacts of the proposed development would be

adequately mitigated. However, it provided a statement in opposition to the development based on its concerns about the social incompatibility of the proposal on its operations. For example, it stated, "The big box spirituality defining meaning and value in possessions is incompatible with the Jesuit spirituality defining meaning and value in seeking the Divine in all things".

[5] Just prior to the completion of the evidence at the hearing, RSD raised for the first time the issue that the Board must find that the right to freedom of religion of the users of the IJC would be offended by the presence of the commercial activities of Wal-Mart on the neighbouring lands, because the consumerism of the development conflicted with the spirituality of the retreat process.

[6] The Board concluded that the proposed amendments represented good planning, were in the public interest, and should be approved.

[7] The Board also considered whether the Charter issue should be considered, and made three threshold rulings:

- i) that the Charter issue should not be heard because it had not been raised in any of the 18 pre-hearing conferences before the hearing and, therefore, was not appropriately raised as an issue;
- ii) that there was no causal link between the proposed planning instruments, which permit a generic junior department store use, and the alleged infringement of the Charter; and
- iii) that the appellant lacked standing to raise the issue of an infringement of the freedom of religion of the users of the IJC, and the IJC had never raised the issue of the Charter itself.

[8] Despite those rulings, the Board went on to consider whether there would be an infringement of the freedom of religion of the IJC users if the development was approved. The Board made the following findings:

- i) that approval of the development would not infringe the religious beliefs of the users of the IJC;
- ii) that the approval of the development would not infringe on the practice of religion, in the form of Ignatian contemplation, on the IJC lands by the residents or visitors to the IJC;
- iii) that freedom of religion does not protect religious practices that could be affected by the presence of a nearby land use or particular user; and
- iv) that, in the alternative, if there was an interference with the religious practices of the users of the IJC, the infringement of the right to freedom of religion was trivial and insubstantial, given that there will be no unacceptable physical contacts; the proposed development would not be visible from the vast majority of the IJC's lands, including its 10 kilometres of trails, and could be avoided by those who wished to avoid seeing it; and the IJC had adapted to other

commercial and industrial uses nearby, such as Canadian Tire, Staples and Imperial Tobacco, and converted one of its own buildings for commercial use. Finally, the Board concluded that in the absence of physical impact from the Wal-Mart, the claim of interference with spiritual contemplation because of the presence of the store at that location, but not at another location in the city, was not credible.

[9] On appeal, the Divisional Court has no jurisdiction to consider questions of fact, questions of mixed fact and law, or questions of the exercise of the Board's discretion (*Concerned Citizens of King Township v. King (Township)* (2000), 19 M.P.L.R. (3d) 103 (Div. Ct.) at 106). The proper standard of review to be applied in determining whether the Board has committed an error of law is correctness or reasonableness, depending on the nature of the particular question of law being considered (*London(City) v. Ayerswood Development Corp.* (2002), 34 M.P.L.R. (3d) 1 (Ont. C.A.) at 3-4).

[10] In our view, regardless of the standard of review applied, the Board made no error of law when it held that the Charter issue had not been properly raised in accordance with its procedure. Eighteen pre-hearing conferences were held over a period of nine years in this matter. One purpose of such conferences is to identify and narrow the issues (*Ontario Municipal Board Rules of Practice and Procedure*, Rule 73(a)). At no time was the Charter raised as an issue, and Issue No. 4 refers to the non-physical impacts on the activities of the IJC without mention of freedom of religion. The decision of this Court in *Grushman v. Ottawa (City)*, [2001] O.J. No. 4642 has held that the Board is not required to consider a Charter issue which has not been properly raised.

[11] Similarly, the Board made no error of law in refusing to grant standing to the appellant to raise the Charter issue. In determining whether to grant public interest standing, the Supreme Court of Canada has outlined a three part test in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* (1992), 88 D.L.R. (4th) 193 (S.C.C.) at 204-205:

- (a) a serious issue exists regarding the validity of the law in question;
- (b) the party claiming standing is directly affected by the law or, if not, has a genuine interest in its validity; and
- (c) no other reasonable and effective way exists for challenging the validity of the law.

In this case, the Board properly applied the test for standing and reasonably concluded that there was another way in which the Charter issue could have been raised – namely, by the IJC. As well, we have grave reservations about the validity of the status of the RSD to act, in effect, as surrogate champion of the IJC, which itself did not assert a Charter infringement.

[12] We need not determine whether the Board erred in holding that there was no causal link between the planning instruments and a Charter violation, since the planning instruments only regulate uses (that is, the junior department store) and not users (that is,

Wal-Mart). While that analysis is technically correct, the decision of the Board did have the ability to affect Charter rights.

[13] Despite its conclusions on the threshold issues, the Board went on to consider the Charter argument. Earlier in its reasons, in determining whether the proposed development was compatible with the neighbouring land uses, the Board refused to consider the subjective reactions of the users of the IJC to the proposed land user, Wal-Mart. At p. 22 of its reasons, it stated,

Land use planning is not based on subjective perceptions and regard for the probable impact on the social environment of the area cannot result in a rejection of a totally, appropriate, well-planned proposal, which meets the tests of the O.P., because of someone's perceived subjective impact results in an undue and adverse impact for that person.

[14] The Board's decision on the compatibility of the proposed project was a matter within its specialized expertise. Its conclusion is consistent with traditional planning analysis and, absent Charter considerations, the Board committed no error of law in refusing to deny a land use because of the subjective impressions of neighbouring landowners about that use (*Grushman, supra*).

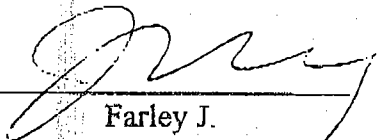
[15] The Board itself agreed that it must conduct its task having Charter values in mind (p. 27 of the decision), and it went on to consider the Charter issue over and above its regular decision-making process relating to standard principles of land use. That further analysis would be subject to review on the standard of correctness.


[16] The Board correctly applied the appropriate legal principles set out in the decisions of the Supreme Court of Canada to determine whether there had been an infringement of the Charter right in s. 2(a), "freedom of conscience and religion". That guarantee protects the individual's right to entertain religious beliefs and to manifest or practise religious beliefs (*R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.) at 354). It prohibits burdens or impositions on religious beliefs or practices only if they are not "trivial or insubstantial" (*Syndicat Northcrest v. Amselem* (2004), 241 D.L.R. (4th) 1 (S.C.C.) at paras. 58 -59). The right to freedom of religion is also limited by the rights and freedoms of others and subject to reasonable limits to protect such interests as public health and safety or order (*Big M, supra* at 354).

[17] RSD attempts to challenge the findings of fact made by the Board when it determined whether there was an infringement of the right to freedom of religion. The Board assessed the alleged impact of the proposed development on the religious beliefs and practices of the users of the IJC. It concluded that there was no infringement of the religious beliefs or interference with the religious practices of the users of the IJC, concluding that "The Board finds that freedom of religion does not extend to protect religious practices that could be affected by the mere presence of a nearby land use (or a particular user)." Otherwise, there would, in effect, be a "zone of exclusivity" created that would limit a lawful use of neighbouring land. Alternatively, the Board held that if there

was an infringement, it was trivial and insubstantial for the reasons set out earlier in paragraph 8 of this endorsement. The evidence supported these conclusions. Given that the proper legal principles were applied, there was no error of law in the application of the Charter.

[18] As the appellant has failed to demonstrate that the Board made any error of law, the appeal is dismissed. As neither party sought costs, no costs are awarded.


Farley J.


Swinton J.


Croll J.

Released: August , 2005

RESIDENTS FOR SUSTAINABLE DEVELOPMENT - and - 6 & 7 DEVELOPMENTS Limited et al.

Court File No. 80/05

*heard August 8/9, 2005 before
Faulley, Sweeney & Cole J.J.
This appeal is dismissed without
costs. See endorsement affected
dated Aug. 12, 2005.*

TM FARLEY

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding Commenced at Toronto

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