



Superior Court of Justice
Divisional Court
130 Queen Street West, Rm. 174
M5H 2N5
Tel: (416) 327-5100
Fax: (416) 327-5549

Facsimile Transmittal

To: E. K. Gillespie (416) 703-9111
J. Matera (416) 863-1515
B. Zarnett/T. Friedland (416) 979-1234

From: Maria	Date: March 30, 2005
Re: Residents for Sustainable Development in Guelph vs. 6 & 7 Developments Ltd. et al. Court File(s): 80/05	Pages (including coversheet): 8
CC:	

Urgent Review Please Comment Please Reply Please Recycle

Note: Please find attached the typed and written Endorsement of Madam Justice Macdonald in the above-noted matter.

Thank you.

COURT FILE NO.: 80/05

DATE: 20050330

**SUPERIOR COURT OF JUSTICE – ONTARIO
(DIVISIONAL COURT)****RE:** Residents For Sustainable Development in Guelph v. 6 & 7 Developments
Limited and The Corporation of the City of Guelph**BEFORE:** Ellen Macdonald J.**COUNSEL:** Eric K. Gillespie, for the Moving Party

Josephine Matera, for the City of Guelph

Benjamin Zarnett and Tom Friedland, for 6 & 7 Developments Limited

ENDORSEMENT

[1] This application is for leave to appeal to the Divisional Court from the decision of the Ontario Municipal Board (“the OMB or the Board”) by the Residents for Sustainable Development in Guelph (“RSD”). The OMB’s decision is dated December 29, 2004.

[2] The grounds of appeal are set out in detail in Volume 1 of RSD’s motion record. In summary, the grounds raise *Charter* issues including the Board’s finding that the *Charter* cannot be raised by a non-party to the proceedings before the Board. The Ignatius Jesuit Centre of Guelph (“IJCG”) was a non-party participant in the proceedings before the Board. Two of its representatives were witnesses. Father James Profit, S.J. and Dr. Dennis W.J. Galon were panelists at the hearing before the Board.¹ Their oral presentation, which I will comment on below, is contained in Volume 2 of the Motion Record.

[3] This leave application raises, among other issues, questions of the proper interpretation and application of s. 2(a) of the *Charter* to a dispute such as the one between the parties and the participants. RSD takes the position that the issues raised in this appeal have broad implications for planning law and practice throughout Ontario. At the hearing before the Board, RSD was the party in opposition to the City and 6&7. The IJCG was not a party although it had been at one time in the past. At its request, its status was that of a participant.² This status was not objected

¹ Father Profit is the Director of the IJCG. Dr. Galon has lived at the Centre from 1962 to 1966 as a Jesuit in Training. He was a member of the Society of Jesus (Jesuits) from 1962 to 1970. He is described as Agent for the Jesuit Centre in the Wal-Mart matter since 1998.

² The change in status from party to participant was driven by financial considerations of the ICCG. It was concerned about legal costs.

- 2 -

to with the result that the issue raised on this leave application as to its non-party status is a not a persuasive consideration although, if leave is granted, this may be one of the issues before a panel of the Divisional Court.

[4] The Board's decision approved amendments to the City of Guelph's Official Plan and Zoning By-Law to permit the development of commercial uses on lands controlled by the Respondent 6& 7 Developments Limited (6&7). This development will be comprised of a 135,000 square foot Walmart Store and 20,000 square feet of other commercial space. 6&7's initial application was for the development of 392,000 square feet. This was opposed by the City of Guelph. 6&7 appealed this decision to the OMB. Prior to the scheduled hearing of the appeal, the proposal was downsized to 155,000 square feet. The City then changed its position to one of support for 6&7's position before the Board. Hence, the presences of the City as a Respondent in this leave application supporting the position being advanced by 6&7.

[5] To put perspective on the location of the proposed development, it is in the north end of the City, at the intersection of Woodlawn Road (Highway 6) and Woolich Street (Highway 7). One of the key issues present throughout the lengthy process before the Board was one of compatibility between existing neighbourhood land uses and that of 6&7's proposed use. The key issue underlying the compatibility issue is the lack of non-physical i.e. social, spiritual or religious compatibility between the proposed development and three mayor existing land uses. They are the Woodlawn Public Cemetery, the Marymount Catholic Cemetery and the Ignatius Jesuit Centre (sometimes referred to throughout these reasons as the Jesuit Centre or Loyola Centre or IJCG). The two cemeteries neither objected to nor participated in the proceedings.

[6] For purposes of what I have to decide on this, being an application for leave, I do not see the neutral positions taken by the cemeteries as being conclusive to the issues. Their choices cannot be elevated to the status of being a complete answer to the discrete issues being raised by the Ignatius Jesuit Centre.

[7] The Ignatius Jesuit Centre is a 600-acre spiritual retreat that for over 90 years has attracted retreatants from all over the world. There was a great deal of evidence before the Board regarding the direct conflict and interference with Ignation Contemplation that could occur if the proposed development went forward.

[8] The Jesuits agreed that the potential *physical* impacts by the proposed development on their lands could be mitigated. This agreement was memorialized in a letter agreement dated December 6, 2001 signed by Rev. Philip Shano, S.J. and Mr. Tom Freidland from Goodman and Carr, solicitors for 6&7. The second paragraph of this letter reads as follows:

6&7 is very pleased that through our discussions it has been able to address the concerns set out in your letter, such that physical impact and mitigation issues will not be raised by the IJCG at the Ontario Municipal Board hearing, or in any other forum, respecting the 677 Development. 6&7 agrees, however that even though you have acknowledged that all the potential physical impacts can be satisfactorily mitigated, you will not be precluded from objecting to the *principle*

- 3 -

of commercial development of the 6&7 site, on the basis that the "intangibles" of life at the IJGC will be impacted by the 6&7 Development. (Emphasis in the original)

[9] RSD seeks leave to appeal solely on the basis of the issue of compatibility, and how the question of compatibility is defined in relation to the issues that may arise from the application of the *Charter*. As I read it, the focus of the decision was on matters other than those that were raised by the Jesuits.

[10] Para. H on pages 30 and 31 of the reasons of the Board are set out below:

Even if the Board is wrong in its conclusions on the four threshold questions it has now answered, the Board believes that a decision of freedom of religion cannot translate into a prohibition of a highly common and well known and understood urban land use designation of a Community Commercial Centre. Its approval will not infringe the religious beliefs of the users of the Jesuit Centre or anyone else. No one is asked or required to alter their beliefs and no one's religious beliefs will be affected.

The Board also finds that it does not infringe upon the practice of religion by the residents and/or visitors to the Jesuit Centre which would disrupt their ability to practice Ignatian contemplation. The Board's reasoning on this has already been expressed earlier in this Decision dealing with the planning issues and it does not change simply by attempting to bring it back into play under a different guise. No one is being directly constrained from exercising whatever practices he or she pleases on the Jesuit Centre lands.

The Board find 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). Once again, if the Board is wrong in this conclusion, nevertheless, the Board finds that the alleged infringement must, factually, be characterized as trivial and insubstantial for the reasons set out earlier and in particular:

- i) There will not unacceptable physical impacts;
- ii) the proposed development will not even be visible from the vast majority of the 600 acres of the Jesuits and the 10 kilometre trail network;
- iii) anyone wishing to avoid the possibility of distraction from a glimpse of the proposed Wal-Mart store has vast, other areas in which to undertake spiritual contemplation;
- iv) the Jesuit Centre has adapted to change both on an off of its property as outlined earlier and the users of the Jesuit Centre have demonstrated the ability to carry out their religious practices notwithstanding the presence of

- 4 -

- Canadian Tire and Staples and major industrial operations and the noise emanating from Imperial Tobacco;
- v) The Anselm decision stand for the proposition that the allegation of infringement is a question of fact that should be based on "an analysis of whether the alleged belief is consistent with his or her religious practices". The Board agrees with Ms Houser when she argued that the assertion that the establishment of a Wal-Mart store would interfere with religious practice cannot be viewed as credible where the users currently conduct their religious practices in an environment that is in the urban area of Guelph and includes urban and commercial activities. It also agrees with her when she argued that, in the absence of physical impact from a Wal-Mart store on the 6 & 7 property, the assertion that a Wal-Mart store would interfere with spiritual contemplation, when the same facility at another location would not, is simply not credible.

Syndicate Northurst v. Anselm [2004] S.C.J. No. 46.

This concludes the decision of the board on all of the matters raised before it and the appeals are allowed and the clerk is authorized to assign numbers to the Official Plan Amendment and Zoning By-law Amendment for record keeping purposes.

This is the Order of the Board.

[11] In summary, the focus of the Board's decision seems to me on the conclusion that there was no unacceptable physical impact by the presence of Wal-Mart in the proposed location and the activities and purpose of the Loyola Centre. The Board found that freedom of religion does not extend to protect religious practices that could be affected by the presence of a proposed land use. It found that the alleged infringement (if it exists) must, factually, be characterized as trivial and insubstantial.

[12] This leads me to comment on several, but not all of the points raised by the IJCG, relevant to their purpose and traditions. They speak of the relevance of the land. They say that it is key to their retreatants' experience. They describe Ignatian Contemplation as a method prayer without any explanation of the underlying psychology or theological suppositions. The ultimate source of the retreat movement is the Judeo-Christian scriptures. An enduring aspect of this tradition is said to be to go out into Nature, leaving behind the concerns of this world, in order to experience the Divine in solitude, in the depths of one's being.

[13] The Jesuits said, in their presentation before the Board, that they, and another spirituality Centre in Wales were the catalysts for rediscovery of the refocus of prayer on the imagination in the context of quite solitude.

- 5 -

[14] The issues raised on this leave application are not simple. Should the questions of the competing interests of the parties and the participants be accepted as they are cast in the reasons for decision of the Board or should these questions merit the attention of the Divisional Court?

[15] I have concluded that leave should be granted. The results in *Grushman v. Ottawa (City)*, [2000] O.J. No. 4444 (QL) (Div. Ct) do not answer this question. Nor do I consider that *Regina V. Big M Drug Mart Ltd.* 18 D.L.R. (4th) 321, answers the issues raised on this application for leave. The issue in *Big M Drug Mart* was Sunday observance legislation.

[16] The issues in this application have not been fully considered by the Divisional Court. To my mind, this issue is not so narrow as a freedom of religion issue. In the context of the *Charter*, there are the unresolved issues of the competing interests such as those of the Jesuits who say that they, coming from a long standing history and tradition, are committed to preserving a location for the development of spirituality and quiet contemplation. The question of whether the Jesuits can successfully maintain this position in light of 6&7's plans for development is one of province wide public importance.

[17] Leave is granted. The parties agree that there should be no award of costs.

Ellen Macdonald J.

Ellen Macdonald J.

DATE: March 30, 2005

COURT FILE NO.: 80/05

DATE: 20050330

**SUPERIOR COURT OF JUSTICE -
ONTARIO
DIVISIONAL COURT**

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

BEFORE: Ellen Macdonald J.

COUNSEL: Eric K. Gillespie, for the Moving
Party

Josephine Matera, for the City of
Guelph

Benjamin Zarnett and Tom
Friedland, for 6 & 7 Developments
Limited

ENDORSEMENT

Court File No. DC-05000718-ML

80/05

Residents for Sustainable Housing - and - 6 & 7 DEVELOPMENTS et al.

Leave is granted. See my reasons released today.

*Elen Macdonald
30 March 2005*

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Brampton

MOTION RECORD

CUNNINGHAM & GILLESPIE LLP
Barristers & Solicitors
Suite 600, 10 King Street East
Toronto, Ontario
M5C 1C3

Eric K. Gillespie (37815P)
Tel: (416) 703-6362
Fax: (416) 703-9111

Solicitors for the Moving Party