

RSD backgrounder

RSD's appeal of the OMB Wal-Mart decision is a two step process.

- (a) a hearing to obtain Leave to Appeal to the Divisional Court
- (b) if Leave is granted, then there will be an Appeal hearing in the Divisional Court

And the party which loses that appeal, could appeal to the Court of Appeals, and the loser there could appeal to the Supreme Court. Each level of appeal has the same two step process. Any loss at the Leave to Appeal step, terminates the potential chain of appeals, since there is no appeal from a lost Leave to Appeal. In other words, Tuesday's hearing was a vital step, a must-win step.

In order to get Leave, RSD must satisfy the judge that the OMB made errors in law such that the correctness of the Board's decision is in doubt.

### **March 22, 2005 - summary of the day's proceedings**

NOTE: THIS IS NOT INTENDED TO BE A COMPLETE RECORD OF THE EVENTS, BUT AN INTERPRETATION OF ONE OF THOSE ATTENDING.

Eric Gillespie (RSD's lawyer) argued that the Board made five errors in law. Most were very specific legal things like whether or not RSD raised the issue of religious freedom in a "timely" fashion, or whether RSD had "standing" to raise religious freedom when the Jesuits did not raise that issue, or whether there must be a "causal link" between the planning instruments (the actual text of the bylaw) and religious freedom.

But the main Board error, the one we non-lawyers can understand and resonate with, is the Board's interpretation of "compatibility" as a planning principle in Guelph's Official Plan. Eric said the Board erred in its interpretation of compatibility as limited to physical compatibility (things like noise, light, traffic), specifically excluding the concept of "social compatibility," a compatibility of values, of a subjective sense of appropriateness. Social Compatibility was the heart of the Jesuits' entire argument, so by deciding that this concept of compatibility was not included in the Official Plan's use of that term, the OMB (Bob Boxma) dismissed the entire Jesuit position. Since the assertion of religious freedom is also an assertion of soft, subjective values, Boxma's interpretation of compatibility effectively dismissed that argument as well, even though in his decision he asserted he had taken religious freedom into account.

RSD spoke first (about 1 ½ hours, then Benjamin Zarnett for 6&7 (about 2 hours) and then Jose Matera for the City of Guelph (13 minutes).

The judge was clearly attentive, respectful, and grasping the arguments on both side--it was a very intellectual, academic day.

Then came RSD's opportunity for a final rebuttal (about an hour).

First, he pointed out that both sides in their arguments reference the same sections, the same words, in the Board's decision and in the case law they cited. But they drew opposite conclusions from this same material because they were looking at the material through different lenses, from different perspectives. The court should grant Leave so the Divisional Court can decide which of

these two perspectives is correct, not only for this case, but for future cases before the OMB involving compatibility and/or the Charter.

The RSD/Jesuit perspective is that divergent values, however subjective, must be considered by the Board when considering compatibility. The Board must arbitrate between value sets in order to take into account the Charter, which, as the first part of the Canadian Constitution, is the supreme law of the land.

The Board/6&7 perspective is that the Board is not there to arbitrate between subjective value sets. The planning process must be based on objective physical assessments.

Then Eric introduced a final analogy to make his point.

He asked the judge to consider Lake Louise, nestled among the mountains, as seen from the hotel side of the lake. Imagine a proposal to erect a massive billboard in the mountains on the far side of the lake, a billboard which would then dominate the scene tens of thousands of visitors come to see every year. Eric said that virtually all Canadians share a subjective set of values on the basis of which we would all object that this is incompatible, this doesn't fit, this doesn't belong. The assessment is not objective; it is not, for instance, based on the exclusion of all commercial activity, for the hotel, restaurants, and gift shops in the vicinity are very much commercial. Somehow we all get it, that such a development is incompatible in a national treasure like Lake Louise.

Then Eric argued that there is a subset of the Canadian population with a shared subset of values such that Wal-Mart is out of place among cemeteries and the Jesuit Centre. The Jesuits and their clients and many Guelph citizens who frequent the Jesuit Centre and cemeteries are convinced that Wal-Mart doesn't belong here, and this is analogous to the example of all Canadians concluding the billboard doesn't belong behind Lake Louise.

This is a minority view, a subjective view. It was expressed by RSD and the Jesuits and in five hours of public presentations as "incompatibility." Even if Guelph's Official Plan had been written to exclude social compatibility, the Charter of Rights and Freedoms requires that such minority views be taken into account when, as in this case, that view arises from religious belief and practice. The Charter does not require that the minority religious views must dominate or overwhelm the views of other minorities or the majority, but the Charter does require they be taken into account.