



THE CORPORATION OF THE CITY OF BRAMPTON

BY-LAW

Number 255-97

To amend By-law 151-88 as amended

The Council of the Corporation of the City of Brampton ENACTS as follows:

1. By-law 151-88, as amended, is hereby further amended:
 - (1) by deleting therefrom, section 721.1.1 (aa) and 721.1.1 (bb).
 - (2) by adding to section 721.1.1 thereto, the following:

“721.1.1 (aa) building supplies outlet;

(bb) a supermarket; and

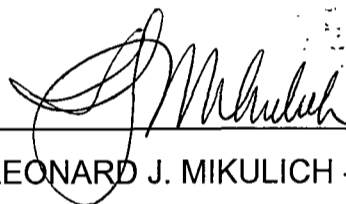
(cc) purposes accessory to the other permitted purposes.”
 - (3) by deleting the word “and” at the end of section 721.1.2 (g).
 - (4) by adding to section 721.1.2 thereto, the following:
 - “(i) the maximum gross leasable floor area for the entire development shall be 37,160 square metres;
 - (j) 15% of the total gross leasable floor area permitted by section (i) shall be in commercial retail units having a floor plate over 929 square metres in area;
 - (k) a minimum of 60% of the total gross leasable floor area permitted by section (i) shall be in commercial retail units having a floor plate over 1,858 square metres in area;

- (l) a maximum of 7% of the total gross leasable floor area permitted by section (i) shall be in commercial retail units having a floor plate less than 465 square metres;
- (m) a maximum of one supermarket shall be permitted; and
- (n) the maximum gross leasable floor area devoted to the sale of food within a supermarket shall not exceed 6,038 square metres."

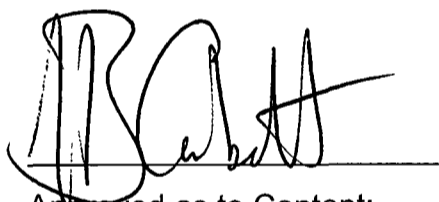
READ a FIRST, SECOND and THIRD TIME, and PASSED, in OPEN COUNCIL, this 27th day of Oct. 1997.



PETER ROBERTSON - MAYOR



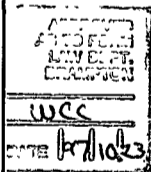
LEONARD J. MIKULICH - CITY CLERK



Approved as to Content:

John B. Corbett, MCIP, RPP
Director of Development Services

AR/blair.doc



HIGHWAY #7

GATEWAY
BLVD

SUBJECT PROPERTY

AIRPORT ROAD

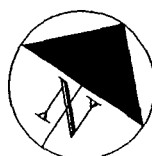
WALKER DR

COVENTRY RD

NEVETS RD



Key Map By-Law 255-97



CITY OF BRAMPTON
Planning and Building

Date: 1997 02 24

Drawn by: CJK

File no. C6E5.7

Map no. 65-19D

(order)

IN THE MATTER OF the *Planning Act*, R.S.O.
1990, c.P.13, as amended, section 34;

AND IN THE MATTER OF the City of Brampton
By-law 255-97 being a by-law to amend
comprehensive zoning By-law 151-88, as amended,
pursuant an application by AIRPORT – 7 POWER
CENTRES LIMITED (File: C6E5.7)

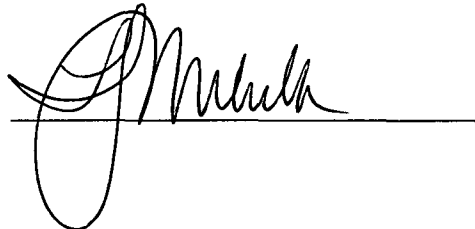
DECLARATION

I, LEONARD JOSEPH MIKULICH of the City of Brampton, in the Region of Peel, DO
SOLEMNLY DECLARE THAT:

1. I am the Clerk of The Corporation of the City of Brampton and as such have knowledge of the matters herein declared.
2. By-law 255-97 was passed by the Council of the Corporation of the City of Brampton at its meeting held on the 27th day of October, 1997.
3. Written notice of By-law 255-97 as required by section 34(18) of the Planning Act was given on the 5th day of November, 1997, in the manner and in the form and to the persons and agencies prescribed by the Planning Act as amended.
4. By Order Number 0642, the Ontario Municipal Board order that the appeal against by-law 255-97 is hereby dismissed.

DECLARED before me at the
City of Brampton in the
Region of Peel this
July 6, 1998

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A handwritten signature in cursive script, appearing to read 'L. Mikulich', is written over a horizontal line.



A handwritten signature in cursive script, appearing to read 'J. [unclear]', is written over a horizontal line.

A Commissioner, Etc.

I, Leonard J. Mikulich, City Clerk, of the City of Brampton, hereby certify that the attached by-law, being By-law 151-88, and amending by-laws attached hereto and listed below, are true copies:

177-88, 182-88, 184-88, 186-88, 188-88, 191-88, 194-88, 196-88, 210-88, 218-88, 227-88, 232-88, 260-88, 261-88, 265-88,

03-89, 06-89, 14-89, 16-89, 39-89, 43-89, 47-89, 67-89,
101-89, 103-89, 112-89, 121-89, 135-89, 138-89, 153-89, 167-89, 183-89, 192-89, 194-89, 206-89,
223-89, 226-89, 234-89, 236-89, 241-89, 246-89, 267-89, 283-89, 301-89, 313-89,

23-90, 57-90, 70-90, 96-90, 112-90, 113-90, 115-90, 131-90, 137-90, 138-90, 141-90, 178-90, 196-90,
207-90, 250-90, 268-90, 299-90, 300-90,

4-91, 7-91, 9-91, 14-91, 38-91, 44-91, 46-91, 59-91, 61-91, 69-91, 74-91, 91-91, 113-91, 114-91,
128-91, 148-91, 176-91, 187-91, 212-91, 225-91, 242-91, 247-91 251-91,

10-92, 17-92, 18-92, 23-92, 27-92, 31-92, 56-92, 57-92, 102-92, 106-92, 155-92, 156-92, 157-92,
168-92, 172-92, 181-92, 188-92, 197-92, 217-92, 222-92, 225-92, 260-92, 269-92, 273-92,

3-93, 4-93, 9-93, 16-93, 63-93, 65-93, 76-93, 94-93, 112-93, 116-93, 118-93, 136-93, 149-93, 152-93,
161-93, 205-93, 208-93, 229-93, 244-93, 269-93, 272-93, 291-93

7-94, 8-94, 21-94, 24-94, 31-94, 63-94, 70-94, 71-94, 86-94, 87-94, 95-94, 105-94, 111-94, 121-94,
122-94, 136-94, 137-94, 166-94, 167-94, 168-94, 173-94, 174-94, 183-94, 201-94, 245-94, 246-94,
250-94, 275-94

6-95, 22-95, 59-95, 79-95, 91-95, 125-95, 127-95, 136-95, 201-95, 204-95, 205-95, 212-95, 262-95,
265-95, 266-95, 274-95

16-96, 17-96, 25-96, 30-96, 35-96, 65-96, 72-96, 81-96, 125-96, 152-96, 154-96, 159-96, 174-96, 183-
96, 230-96

4-97, 26-97, 43-97, 62-97, 78-97, 79-97, 106-97, 107-97, 109-97, 136-97, 138-97, 111-97, 119-97,
137-97, 180-97, 208-97, 233-97, 247-97, 250-97, 253-97, 255-97, 256-97, 258-97, 261-97, 270-97,
271-97

22-98, 33-98, 90-98, 115-98



Leonard J. Mikulich
City Clerk
July 6, 1998

file
cc Planning Dept

ISSUE DATE
MAR 12 1998
DECISION/ORDER No. 0642



PL971471

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Anclare Holdings 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, against Zoning By-law 255-97 of the City of Brampton
O.M.B. File No. R970377

Airport-7 Power Centres Limited has brought a motion before the Ontario Municipal Board under subsection 34(25) of the Planning Act, R.S.O. 1990, c.P.13, as amended, to dismiss the appeal without holding a full hearing

RECEIVED
CLERK'S DEPT.

MAR 17 1998

COUNSEL:

Janice Atwood-Petkovski

for City of Brampton

REG. No.: 608
FILE No.: 66E5.7

Dennis H. Wood
John Inglis

for Airport-7 Power Centres Limited

Gordon R. McClellan

for Anclare Holdings Inc.

**DECISION ON A MOTION delivered by RONALD J. EMO and
ORDER OF THE BOARD**

Airport-7 Power Centres Limited (Power) is the owner/developer of a "Power Centre" at the south west corner of Airport Road and Highway 7 (Queen Street) in the City of Brampton. A Walmart Store is either open or about to do so on the site. Power has brought a motion under Subsection 34 (25)(a) of the *Planning Act* (Act) to dismiss the appeal of Anclare Holdings Inc. (Anclare) of Zoning By-law 255-97. The City of Brampton is in support of this motion. Anclare is the owner of Southgate, a neighbourhood shopping plaza at 700 Balmoral Drive, and is the only appellant. Loblaws and Agora Food Merchants (IGA, Knechtels & Price Choppers) had also submitted appeals however, on January 23, 1998, Rick Penneycooke, planner and agent for Agora Food Merchants withdrew Agora's appeal

and then on February 20, 1998, Steven Zakem, counsel for Loblaws, withdrew its appeal. By-law 255-97 will permit a supermarket within the Power Centre development having a gross leasable floor area, devoted to the sale of food, of 6,038 m² (65,000 sq. ft.). Anclare has appealed on the grounds that Southgate's Loeb store is the nearest supermarket and as such will be severely impacted by the new food store in the Power Centre. Mr. Penneycooke's affidavit, in the response to the motion, quotes Tony Battistella, Anclare's president, to the effect that Southgate will suffer detrimental impact resulting in urban blight as a consequence of By-law 255-97. No evidence was presented in support of this contention.

The Power Centre site, comprising some 33 acres, was the subject of a (1994) Board decision which included two pertinent modifications to OPA 206 which are relative to these proceedings. These sections are cited herewith:

3.6.2 The uses permitted within the HIGHWAY and SERVICE COMMERCIAL designation include:

- 3.6.2 (iii) retail warehousing (and other space extensive retailing) limited to those which are not engaged in the selling of food;*

- 3.6.2 (xi) retail establishments provided that where any retail establishment is proposed to sell in excess of 929 m² (10,000 sq. ft.) of food, a market impact analysis, satisfactory to the City will be provided prior to the enactment of a zoning bylaw (except with respect to Zoning By-law 173-94) to determine whether or not the proposed retail establishment will affect the viability of existing nearby retail commercial centres;*

Interestingly enough, Mr. McClellan took the position that subsection (iii) is the applicable Subsection and thus an amendment to the Official Plan is required. Conversely, Mr. Wood argued that (xi) is the applicable subsection. I accept Mr. Wood's argument. Mr. Wood also had referred me to section 4.2.8.8 of the (1993) Brampton Official Plan which recognizes that within secondary plans (ie. OPA 206) that the Business Industrial designation may accommodate retail uses that do compete with local retail uses.

The Board was advised that as part of Power's application for a rezoning to permit a supermarket larger than 10,000 sq.ft. a market impact study had been undertaken and filed with the City on or around January 28, 1997. This study, prepared by Jeryl L. Jaque (Malone, Given, Parsons) supported a food store of 85,000 sq.ft. within the Power Centre and concluded, with respect to Southgate, that its Loeb outlet could suffer a 10% decrease in sales as a direct result of the new store. A supplementary report was prepared in August of 1997 to "fine tune" the previous work to reflect the (now disclosed) exact nature of the proposed supermarket as a Provigo "Maxi & Co." store with 65,000 sq. ft. allocated to food sales. Mr. Jaque's conclusion in his updated (August) study is cited herewith:

We anticipate very little direct competition between the proposed Maxi & Co. and stores such as the Avondale and Lakeridge IGAs (local of 11,500 sq.ft. and 15,376 sq. ft. respectively) or the Southgate Loeb's, a 25,594 sq.ft. store at an interior location (Loeb's is also a Provigo store) because of their nature, role, function, locations and particular market niches.

The Board was further apprised that the City has a staff member within its Economic Development Office who is qualified in the analysis of market impact studies. The "peer review" by the City's staff expert supported Mr. Jaque's methodology and conclusions. In his argument, Mr. McClellan essentially appears to seek time for his client to retain a consultant to conduct an independent market analysis. I find that the staff review by the City's expert is essentially synonymous with what Mr. McClellan feels is needed. From my review of its planning reports, the City appears to be sensitive as to market impact on its existing local supermarkets. This seems to me to be the rationale for the OPA 206 requirement of a market impact study prior to allowing a food store within the Power Centre. The City's support of Mr. Jaque's methodology and conclusions indicates to me that Anclare's desire to conduct another peer review exercise is more akin to delaying tactics than prudent due diligence by a concerned plaza owner. Anclare has had almost six months in which to proceed with its own analysis. Mr. McClellan advised that should Anclare's contemplated market impact study indicate insignificant impact on its Loeb store,

it would abandon its appeal. In my opinion, Anclare can, and should, take comfort in the City's support of Mr. Jaque's conclusions. There is no need for a further study.

The expansion of several of Brampton's neighbourhood shopping centres was the subject of a Board hearing in 1991. As part of its decision, the Board allowed an extension and expansion of the Southgate Centre from some 29,271 sq.ft. to 57,369 sq.ft. including a 24,000 sq.ft. supermarket. The material submitted by Anclare indicated that it had originally sought a supermarket of 32,000 sq.ft. Photos of Southgate submitted by Mr. Wood (Exhibit 4) illustrate a thriving shopping centre with no apparent vacancies. Mr. McClellan candidly admitted that his client had to a large extent felt that its appeal was sheltered under the appeals by Loblaws and Agora Food Merchants. Anclare had, apparently only recently, realized that these food merchants had withdrawn their appeals..

Section 34 (25)(a) is a fairly new section of the *Planning Act* introduced in the Bill 163 version of the Act and essentially retained in the current (Bill 20) statute. As such, there has not been a great deal of Board jurisprudence on this new section and according to Mr. Wood, what there is, has not been appealed to the Courts. It is perhaps helpful to set out the pertinent portions of subsection 25 (a) upon which the motion relies:

- (25) Despite the *Statutory Powers Procedures Act* and subsections (11) and (24) the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own motion or on the motion of any party, if,
- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose an apparent land use planning ground upon which the Board could allow all or part of the appeal,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious, or
 - (iii) the appeal is made only for the purposes of delay

Mr. Wood referred me to the 1996 Board case of East Beach Community Association v City of Toronto unreported in which members Lee and McLoughlin dealt extensively with dismissal under the new legislation. It is Mr. Wood's position that I should use the East Beach decision as an appropriate precedent in this case. Prior to Bill 163, the Board dealt with the test of "sufficiency" as to the existence of "triable issues". In the East Beach decision, my colleagues suggest three provisions should be examined in determining whether the right of appeal should be taken away. These provisions are:

- i) authenticity in the reasons stated
- ii) are there issues that should affect a decision in a hearing
- iii) are the issues worthy of the adjudicative process.

Mr. Wood also reminded me of the higher standard the Board has traditionally set in dealing with commercial competition cases ie. "food fights". In hearing the complex market evidence in this type of case, the Board has found it helpful to require testimony from food store executives. In the hearing which could ensue from these proceedings, I cannot help but note the anomaly of the plaza owner, rather than the tenant (Loeb), mounting the appeal. Mr. McClellan admitted that his client was perplexed by Loeb's apparent lack of concern with the By-law. It is acknowledged that Loeb is also owned by Provigo. Mr. Wood told the Board that his investigation had revealed that Anclare's lease to Loeb runs until the year 2013. Should this appeal proceed to a full hearing, one wonders how Anclare could adduce evidence to the standard required by the Board in these type of cases.

In reviewing the wealth of material submitted by Mr. Wood, I note that Anclare did not appear to have been a party to the Board's hearing on OPA 206, which essentially set the stage for the current By-law. I further find that an appropriate market impact study, subjected to the City's own peer review, states that the proposed Maxi & Co, store will have no impact on the Southgate supermarket. It is perhaps instructive that Mr.

Penneycooke, whose planning opinion forms much of the basis of Anclare's defence, was the planner / agent who withdrew the Agora Food Merchants appeal. In addition, Loblaws which has not in the past shied away from taking appeals to the Board, has also withdrawn.

Counsel for the City told the Board, that Brampton had approached this proposal cautiously and with sensitivity. She went on to state that Anclare had presented no solid evidence to indicate that its Loeb supermarket would close and that six months was a sufficient time for it (Anclare) to have conducted its own market analysis if it was truly concerned. It is Ms Atwood-Petkovski's contention that a full hearing would lead nowhere and be a waste of time especially as the City has already spent a great deal of time and effort in its review of this proposal.

The Board is quite cognizant of its responsibility to ensure that apparent land use planning issues are not dismissed in a cavalier manner. Even so, given the record of time and expense experienced in previous commercial competition cases, the Board, rightly, has imposed a higher onus on the appellant in such cases. Mr. McClellan told me that Anclare did not want to get into a full scale "food fight" and yet he seeks a full hearing. To the extent that Loeb appears not be supportive of Anclare's appeal, one can only wonder how he could present an acceptable case to the Board. In dealing with the question of "apparent land use planning ground", I can do no better than to quote the East Beach case (page 5) as follows: *...it is our finding that it is not good enough to simply raise apprehensions. It would not constitute apparent planning grounds by saying that further expert study is required with the hope that once a hearing is convened, more real issues can come forth. Such an approach will never lead to any finality, no matter how careful and sound an opinion is founded.*

It has been almost six months since Anclare became aware of the proposed Power Centre supermarket. Surely, even a relatively unsophisticated plaza owner (as Mr. McClellan characterized his client) should have had the prudence to initiate such marketing

reviews as necessary to analyse the potential impact on its plaza. I note that of eight supermarkets located within a five kilometre radius of the Power Centre proposal, Anclare is the only appellant.

The only land use planning issue on which Anclare bases its appeal is market impact. This issue has been adequately canvassed by the Jaque reports which in turn were peer reviewed by the City's expert. Indeed, the City is very cognizant of the need to ensure that its neighbourhood shopping centres remain viable. It is therefore my finding that the appeal does not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal.

Accordingly, the motion is allowed and the appeal is dismissed.

The Board so Orders.

"Ronald J. Emo"

RONALD J. EMO
MEMBER