Invar Industrial Ltd. v. Whitby (Town) Committee of Adjustment

Invar Industrial Limited has appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the Town of Whitby which dismissed an application numbered A66/98 for a variance from the provisions of By-law 1784, respecting 1650 Victoria Street O.M.B. File No. V980565

[1999] O.M.B.D. No. 390
File Nos. PL981181, V980565

Ontario Municipal Board
R.A. Beccarea and J.R. Mills
Oral decision: March 17, 1999
Filed: April 12, 1999

COUNSEL:
Adam Brown, for Invar Industrial Limited.
Andrew Allison, for Region of Durham.
Richard Arblaster, for Town of Whitby.
Harvey Gefen, on his own behalf and for Anthony Lang, Douglas Dyck & others.

MEMORANDUM OF ORAL DECISION DELIVERED BY R.A. BECCAREA AND
ORDER OF THE BOARD:--

[para1] Mr. Arblaster's motion for an adjournment was denied for reasons given orally but the Board gave him the opportunity to reopen it at the conclusion of the applicant's case if he wished to do so.

[para2] What is before the Board is an appeal by Invar Industrial Limited, from a Committee of Adjustment ("the Committee") decision refusing an application for a variance to By-law 1784 as amended to basically split Unit I into two 10,000 sq. ft. units, when the By-law requires that the unit contain a single use of a size of 20,000 sq.ft. On December 3, 1998 the Committee denied the application on the grounds it was not minor, that the intent of the By-law and Official Plan is not being maintained, and further granting the application would not result in the proper and orderly development of the property.

[para3] The Board heard evidence from the applicant, and at the conclusion of the applicant's case in chief (save and except for hearing oral evidence from a representative of Enbridge, but did hear a submission of what that representative's evidence would be), was presented with a motion of non suit, from Mr. Arblaster, solicitor for the Town of Whitby, which was supported by Mr. Allison, solicitor for Durham Region, and Mr. Harvey Gefen, who was granted party status at the hearing, that the applicant through its evidence had not satisfied the four tests contained in Section 45(1) of the Planning Act. In particular, in this case, that the general intent and purpose of By-law 1784 as amended, and the Official Plans of both the Region of Durham and the Town of Whitby, are not maintained. If an applicant or appellant, through the evidence presented, fails to satisfy even one of the four tests, its application or appeal cannot succeed.

[para4] Through the evidence presented at the hearing, the Board has no doubt that both Giant Carpet and Enbridge Consumers Gas, would be successful locating in the subject property and would be of an appropriate size, and an appropriate use, under normal circumstances.

[para5] Both the Town and the Region have, however, chosen in both their Official Plans to require, in the case of Whitby that a retail warehouse, at this location, be a "single unit user ... have a minimum gross floor area of 2,000 sq. metres" and in the case of the Region that such retail warehouses have a "minimum gross leasable area of 2,000 sq. metres." By-law 1784 of the Town requires that the uses being proposed, which are retail warehouse facilities have a "minimum single user unit size of 1,860 sq. metres".

[para6] The applicant seeks to vary the By-law 1784's requirements from 1860 sq. metres to 929 sq. metres, and its counsel called Mr. Dragicevic, an experienced land use planner, who in his evidence was of the opinion that the application met the four tests of the Planning Act.

[para7] The Board finds that the evidence of Mr. Dragicevic, and the only other witness called Mr. Olive, did not satisfy the test of conformity with either the Town's or the Region's Official Plans.

[para8] Both the Town and the Region have decided, to use the words of Mr. Patrick Olive, to "err on the side of caution" in establishing 20,000 sq. ft. as being a minimum size for single unit retail warehouse facility users at this site, the purpose being to protect other commercial areas or hierarchy, namely the central area and sub-central areas in the Town and the Region. The Board as well, in a decision issued February 9, 1998 (only one year ago), supported the Region and the Town's Official Plan amendments which incorporated those provisions respecting minimum unit size limitations. The Board finds the decision of and the facts before Ms Santo although different in many respects, to be persuasive and applicable to this appeal.

[para9] Power Centres, according to the evidence, are a relatively new phenomenon to the Town and the Region.

[para10] The Board is of the view however, that the appropriate place for determination of the minimum size of retail warehouse facilities is through the Town and Regional Councils, in either Official Plan Amendment and Rezoning

applications of a site specific nature or as part of an overall administration review of the Official Plans and accompanying Zoning By-laws which could also provide flexibility provisions to cover certain situations. If Mr. Olive is convinced that 20,000 sq. ft. is too large a minimum, it is up to Mr. Olive and his counterpart at the Town to approach and convince both Councils that policy changes are needed.

[para11] The Board has heard the submissions of all parties on the motion of non suit and agrees with the submissions of Mr. Arblaster that the applicant's evidence has not satisfied Section 45(1) of the Planning Act, as it relates to Official Plan and zoning conformity.

[para12] The Board therefore allows Mr. Arblaster's motion and will accordingly dismiss the appeal.

[para13] The Board, despite the valiant efforts of Mr. Brown to keep the subject application from being a precedent with the inclusion of certain conditions, is of the opinion that, even with such inclusions, it would still constitute a precedent.

[para14] On the request by Mr. Arblaster and Mr. Brown to be allowed to bring a subsequent request for costs, the Board remains seized, and may be spoken to no later than 30 days from today, as to the manner and forum for such determination.

[para15] The Board so orders.

R.A. BECCAREA, Member
J.R. MILLS, Member