

Price Club Canada Inc. v. Ancaster (Town)

IN THE MATTER OF Section 34(11) of the Planning Act, (R.S.O. 1990, c. P.13) AND IN THE MATTER OF an appeal to this Board by Price Club Canada Inc. for an order amending By-law 87- 57 of the Town of Ancaster to rezone the lands located at Lot 1, Registered Plan 62M-697 from M2-334 (Prestige Industrial) to Special M2-334 (Special Prestige Industrial) to permit the sale of individual non-grocery items in the existing Price Club warehouse
O.M.B. File No.: Z 930001

Ontario Municipal Board Decisions: [1995] O.M.B.D. No. 22
File No. Z 930001

Ontario Municipal Board
B.W. Krushelnicki
January 6, 1995

COUNSEL:

R. Houser and T. Friedland, for Price Costco Canada Inc.
R. Arblaster and S. Zakem, for IPCF Properties Inc. and
Loblaws Inc.

DECISION delivered by B.W. KRUSHELNICKI AND ORDER
OF THE
BOARD:--

The matter before the Board is an appeal relating to an amendment to the Zoning By-law of the Town of Ancaster proposed by Price-Costco Canada Inc. for one of its facilities. The by-law amendment is supported by the Town. The Price Club facility in question is in fact built, open for business, and is in operation in a limited manner. The proposed amendment is opposed by IPCF, the real estate arm of the Loblaws organization. The Town, while supporting the position of Price-Costco, did not appear as a party before the Board.

By the account of both parties present, this dispute is about a matter of principle, although the exact characterization of the principle and the proposed resolution of the differences between the parties is quite expectedly a subject of disagreement.

Price-Costco seeks to amend the list of permitted uses in the zone in which its store is located so that it can undertake its full range of normal operations and, I think it is fair to say, to resolve certain ambiguities that have arisen over the brief history of the development and operation of this outlet. IPCF on the other hand sees the matter as a question of maintaining the integrity of the planning documents and the planning process. As a large, well known food store operator in the Province of Ontario, they claim an interest in seeing that land use policies and development

rules applicable to them and their competitors are evenly applied and firmly enforced. Their concern in this case, as they urge the Board to see it, is not with market share or business practice, but with the plain application of planning policy to members of their industry.

In short, Price-Costco wants to settle once and for all its land development problems in Ancaster with a by-law that will permit them to do business; IPCF wants the Board to examine the proposed by-law amendment rigorously and in light of the latest available intelligence on warehouse type stores, in order to determine whether the by-law as amended will conform as it must with the prevailing planning policy.

Before turning to these questions some background and history are useful in understanding the full picture of this dispute.

The Price Club store in Ancaster is located roughly at the intersection of Highway 403 and Mohawk Road, at the top of the Niagara Escarpment west of the City of Hamilton. Access to the store is by way of Legend Court, part of the road system that is internal to the development area in which the store is located, but the broad side of the Price Club site is adjacent to the Mohawk Road, a major arterial route leading between the City of Hamilton and the Town of Ancaster. It is clearly visible as one travels south and west on Highway 403. Of course it is precisely this kind of visibility and access that facilities such as Price Club seek.

Price Club is by now a reasonably well known artifact of the commercial structure of Southern Ontario. At the time of the hearing in the Summer of 1994, there were nine Price Club or Costco stores operating in Ontario. The two banners are now owned by Price-Costco Canada Inc. as a result of a merger of Price Club and Costco Wholesale in 1993.

Price Club and Costco stores are variously known as "Membership Warehouse Clubs", "Club Stores", "Big Box" stores, etc. For those familiar with the work of the Board, it will be known that several such facilities have come before this Board and a good deal has been said and written about them. Happily, it will not be necessary to review all that. The parties in this matter have carefully narrowed their differences.

The Price Club in Ancaster was built and opened in 1992. Before doing so, Price Club prudently consulted with the Town of Ancaster and the Regional Municipality of Hamilton-Wentworth to ensure that the site they had chosen was properly zoned and designated for the intended building and its proposed use. They were assured of this by the Town and the Region in correspondence filed as evidence in this hearing. They then obtained site plan approval and a building permit, and constructed the Price Club store. It opened in December of 1992.

IPCF became involved at his point by way of an application under the Building Code Act which alleged that the warehouse membership club (WMC) use did not conform to the definition of uses permitted by the by-law in the zone, which in this case is a Prestige Industrial M2-334 zone. In a long list of permitted uses the following are included "wholesale establishments, warehousing, and uses, buildings, and structures accessory to the foregoing". In its letter of zoning verification, the opinion of the Town's planner was that:

a warehouse retail establishment, typically operated by the Price Club would qualify as a wholesale establishment given that it meets the definition of this use which is:

... a building used for bulk storage and sale of quantities of goods, merchandise and materials .
(emphasis added)

The appeal to the courts resulted in an order and declaration stating "... that a portion of Price Club's intended use of the proposed building is contrary to Zoning By-law 87-57 of the Town of Ancaster. The prohibited portion is any activity that is not bulk storage or sales of quantities of goods, merchandise and materials or any proper accessory use to those activities". The decision had the effect of preventing Price Club sales that were not in "bulk" or in "quantities". An appeal of this decision has been filed but at the time of the Board hearing, the appeal had not been heard. In the meantime the Divisional Court has issued a stay which permits Price Club to sell only "non-supermarket items" on an individual basis. This means, for example, that Price Club is permitted to sell a single television, but can only continue to sell supermarket type items in bulk or in quantity.

Price Club now seeks to bring this matter to a conclusion by proposing to amend the By-law. Originally their amendment would be to add the following permitted use to Section 334:

"Specialized Wholesale Establishment", meaning a building used for the bulk storage of goods, merchandise and materials together with the sale of goods, merchandise and materials, on an individual or bulk basis, including direct sales to the public.

The proposed amendment was then further modified on the way to this Board to read as follows:

"Specialized Wholesale Establishment" means a building with common storage and sales floor area used for both of the following:

(i) Bulk storage of goods, merchandise

and materials; and

(ii) The sale of goods merchandise and materials on a bulk basis and on an individual basis including direct sales to the public with the exception that grocery items namely food, health and beauty aids, cleaning and laundry supplies and cigarettes shall only be permitted for sale in bulk. (emphasis added)

Clearly Price Club aimed to settle the matter by tailoring a by-law to address its intended use and then added this last part (which I have underlined) to give the supermarkets some comfort or at least to remove the apparent rationale for their appeals. It did neither. The supermarket in this case is unconvinced of the sincerity of the Price Club and the appeal remains. IPCF supports its suspicion with evidence that it alleges proves that even under the current court ordered limitations, the Price Club continues to sell items on what it considers to be an individual basis and in what it considers to be normal household quantity sizes.

Of course, this is of little interest to the Board since we have no jurisdiction to monitor whether the provisions of a court order are being complied with. Similarly it is the practice of the Board to presume that when a by-law is passed, those subject to its provisions will comply. Only in exceptional circumstances would the question of anticipated compliance (or non-compliance as the case may be) affect the merits of the by-law. This is not such a case. The most that the Board can properly take from this evidence is that IPCF has demonstrable concerns and does not take comfort from the amendments proposed by Price Club.

The questions that are properly before this Board are whether the proposed zoning by-law amendments would be consistent with good planning practice and whether it would conform to prevailing planning policies of the Town and the Region.

The area in which this Price Club is located is known historically as the Mohawk-Meadowlands Business Park and began to be urbanized in the mid and late 1970s as part of the large Meadowlands development. The area eventually became the subject of a secondary plan incorporated first into the Region's Plan and later when the Town formulated its own parent plan it was incorporated into the Town's Official Plan of 1984.

Initially, the Town opposed development on any large scale in the area between the Town and the City east of Highway 403. A large development proposal encompassing residential uses and prestige industrial lands for this area

was referred to the Municipal Board and was successful. The planner retained by Price Club in this case testified that a key ingredient of the proposal as approved by the Board and ultimately as built was the industrial-commercial component at the intersection the Mohawk Road and the Highway. The importance of this is that it lends credence to the view that the intention of the planning documents as they came to be, was to permit a use such as the Price Club, even though such facilities were non-existent in Canada at the time. Her authority for this view is derived from the fact that the firm in which she is a senior partner was involved in the Board hearing leading to the approval of the development scheme for the area, although Ms Dale-Harris was not herself personally involved.

This evidence is contrasted by that provided by Mr. Stamm, the marketing expert retained in this case by IPCF. As it happens, he too was involved in the Board hearing in the 1970s, but recollects from his personal experience that the intention of the developers at the time was, as he explained, to attempt to lessen the Town's opposition by providing prestigious industrial lands. Ancaster had always regarded itself as a quiet, small suburban bedroom community and to lessen the threat apparently posed by the large development, the developers promised only prestige housing and prestige industry. Importantly this did not encompass significant retail commercial facilities, in his evidence, except as may have been specifically provided for within a commercial designation.

The resulting planning policies and documents continue to reveal in varying degrees similar ambiguity as to whether commercial uses are permitted.

This is not as true of the Region's Plan as it might be of the Town's planning document. The Region's Plan is of a more recent vintage and provides specifically for the following uses within "Industrial Business Parks" such as Mohawk-Meadowland:

... ancillary and service type uses,
including limited office development, land
extensive commercial use with
warehousing/display areas requiring site
and building specifications similar to
industrial uses ...

The evidence of the Region's planner called to provide an interpretation of the Plan's intent and to explain their advice as provided to Price Club when it was considering the development was clear and unshaken. They had undertaken specific studies dealing with permitted uses in the business parks designation arising from controversies in other parts of the Region where amendments to the Region's Official Plan had been sought to permit retail warehouse furniture outlets. As a result of these studies, the policy respecting permitted

uses in business parks was adjusted by Official Plan Amendment 35 to permit land extensive commercial uses, while continuing to protect industrial areas from intrusive commercial uses by forbidding department stores, grocery stores and automobile dealerships from locating in them. The evidence of the planner was that while Price Club was not specifically encompassed, the planners at the Region were aware of the emerging trend from the United States and fully expected that the provisions of the Plan, especially those underlined above would permit the use. Mr. Pearce even went so far as to advise that Industrial Business Parks of this kind are probably most suited to the retail warehouse clubs because of their land use requirements and because they do not interfere with the kinds of industrial uses that locate there.

The Board accepts this as a correct interpretation of the intentions of Official Plan Amendment 35 and accepts also that the study leading to Official Plan Amendment 35 and the level of knowledge of the Region's planners even at the time of the passage of the amended policies were sufficiently sophisticated in respect to the operations of warehouse clubs that they could be considered and properly permitted by the policy. The Board has no doubt therefore of the conformity of the by-law to the Hamilton-Wentworth Official Plan. The Region's planner also ventured an opinion that the by-law conforms with the Town's Plan. He was both supported and opposed in this by other experts and it is to this question that we now turn.

The Official Plan for the Town of Ancaster contains several policies applicable to this issue. As part of the Objectives in Section 2.2 Economy, it states:

2.2.2. iii) To encourage the industrial development in Duff's Corners and Mohawk and Meadowlands Community areas as major employment centres in the Town, providing a range of fully serviced industrial establishments within a park-like setting;

iv) To encourage the commercial development in Duff's Corners and the Mohawk and Meadowlands Community areas as commercial support facilities for the industrial areas and also to meet the commercial needs of the residents of the Town and its environs and the travelling public.

A cursory reading of these provisions suggests the intent to have commercial uses within both Duff's Corners, an employment areas further to the west at roughly the intersection of Highways 53 and 2, and the Mohawk-Meadowlands areas. But nothing in these objectives suggest that such commercial uses should be permitted in areas designated industrial. In the meadowlands area, this is born out by the fact that large retail commercial facilities are accommodated

within a commercial designation designed specifically for conventional retail shopping. And further when additional needs within the area were identified, the commercial designation was expanded by amendments to both the local and regional Official Plans.

Furthermore, a study conducted by the Town's Planning Department of the issue of commercial development in industrial-business parks addresses the concern that industrial areas are being used for commercial uses. In the specific case of the Mohawk-Meadowlands area, the study points out that no further commercial uses are needed to serve industrial uses or the travelling public.

In other words these sections of the Plan do not establish compliance of commercial uses such as the Price Club with the industrial designation in the business-industrial park.

Turning to section of the Plan that addresses industrial designation, we see the following sections:

4.6.1. The predominant use of lands designated Industrial on Schedule "B" shall be for enclosed warehousing, offices, limited product distribution services, product showroom and display centres, research and development facilities...

4.6.3 Ancillary and service type uses supporting the primary activities as well as recreational facilities and limited office development associated with the primary uses may be permitted.

There is nothing in these provisions that clearly permits a Price Club type operation and so we turn to the policies relating to industrial designations in the Mohawk and Meadowlands Communities at Section 5.6.4. This is the key section and it states:

The area designated Industrial on schedule B in the Mohawk and Meadowlands Communities ... shall be developed as an Industrial Business Park. Uses permitted in this park may include offices, light manufacturing and assembling, wholesale activities (including direct sales to the public) warehousing and storage and other similar industrial uses. Commercial uses such as banks restaurants and service stations may also be permitted as uses accessory to the industrial uses provided that such uses will not detract from or conflict with the

satisfactory development of the area for Industrial purposes. (emphasis added)

It is this section, specifically the words "wholesale activities (including direct sales to the public)" and "warehousing" that the Town's planning reports suggest permit the use and provide compliance for the by-law. As the report says "It would appear that this policy contemplated a hybrid wholesale/retail use". And later in the paragraph, it is concluded that, "Consequently an amendment to the Official Plan is not required".

As the Board sees it, the main issue is whether this interpretation is, or remains, correct. I say "remains" because it may well be that at the time of the analysis, given the level of understanding by the planning staff when the Price Club was first being considered, compliance may have been a reasonable conclusion. With more knowledge and a more sophisticated understanding of the warehouse membership club, in terms of both form and function, the analysis may no longer hold. For the Board's purposes, the most current level of knowledge must be applied to arrive at the most reasonable finding and interpretation as to the conformity of the proposed by-law amendment to the prevailing planning policies.

There can be no doubt now that warehouse membership clubs do present characteristics of both retail and wholesale functions. Because of this and because of the way WMC's characterize themselves for marketing and other purposes, the Town's planning analysis led them to refer to WMC's as a "hybrid use". The proponent, Price Club, relies upon this characterization in advancing its view that their facility shares traits in common both with industrial and retail commercial uses by being both wholesale and retail.

Indeed the best available information suggests that WMC's do serve both wholesale warehouse and retail commercial functions. However, it has become increasingly clear in recent times that the relative size of the wholesale and retail functions have been misjudged in the past, leading to misapprehensions about the general or predominant character of the use. The notion of a "hybrid" implies that an individual is more or less equally derived from two different species or varieties, and so, more or less equally likely to manifest characteristics of either 'parent'. Since it can be equally identified as either retail commercial or wholesale warehouse, the implication therefore is that the use can be comfortably accommodated in either a retail commercial designation or an industrial category (respectively) or both.

The best evidence suggests that something between one-third and one-fifth of the volume of activity in a WMC is wholesale, while the remainder is retail. The Board finds it pointless to try to be more precise than this. In fact there is very little agreement on what is meant by "retail" and "wholesale" and even less on how it is to be measured. For

years the WMC's measured their sales according to the type of cardholder; this has since been abandoned as a reasonable measure. Others have used simple textbook definitions which place anything sold to a business in the wholesale realm. Mr. Stamm rejects these and, using a construct in which retail sales are defined by a matrix that distinguishes sales format (ie. in quantity, bulk and household size) and level of consumption (ie. final consumer and reseller) Mr. Stamm estimates the retail side of a WMC at about 85 percent of the store's trade volume. The Board found Mr. Stamm's analysis useful and compelling.

Mr. Dee whose Benchmark study uses actual Price Club data estimates that wholesale sales comprise \$20 - \$30 million of the sales of \$100 million per annum total sales for a typical store. He uses a different definition of wholesale than Mr. Stamm but, even so, it is hard to disagree with him when he then concludes that wholesale trade is significant to the store's total operation.

It is not necessary to establish with any greater precision the relative proportions of retail and wholesale sales at a WMC. Increased precision will not alter the fundamentally accurate assertion that by any of the prevailing methods of estimation or measure, WMC's are predominantly retail commercial establishments. Perhaps were it not for certain matters of form such as their size and finish, this would be much more obvious. It may be customary for some to call WMC's warehouses and a "significant" fraction of their business may, by some definition be regarded as wholesale. Nevertheless, the predominant business is retail trade with the consuming public who will consume and use the products stored and sold at the Price Club. The Board accepts that the limitation or exceptions proposed in subarticle (ii) of the proposed by-law may alter the mix of retail and wholesale trade, but does not expect that this would fundamentally change the predominant pattern of business.

In light of this, the Board agrees with Messrs Goldberg and Stamm, witnesses for IPCF, that is not appropriate to see this as a "hybrid" use, but rather as a mixed use in which one of the uses predominates. Either both uses must be explicitly permitted within a designation, such as would be the case in a mixed use designation (eg. Industrial-Commercial), or the designation must identify and permit ancillary or sub-dominant uses. It is incorrect to grant a "hybrid" use as-of-right status in either designation. This would lead to the potentially absurd possibility that any mixed use (or any facility that combined several uses) that had some aspect of its operation consistent with a certain planning designation could locate within the designation irrespective of other conflicts and inconsistencies.

Instead the more appropriate approach is to consider the plain meaning of the predominant or primary use that is permitted in the designation and to compare this with the

predominant or primary use proposed. This is clearly the intention of most planning documents including those that are part of this debate. Accessory or ancillary uses (ie., the lesser partner in a mixed use) are explicitly permitted in addition to primary or predominant ones, but only in a controlled or very limited fashion. The Town's 1991 study of commercial uses in Industrial Business Parks reflects this proposition and affirms the practice when it considers policies that permit ancillary retail uses in industrial areas upon certain strict conditions or in very limited amounts (10 percent).

Using the preferred approach, it is clear that a WMC is predominantly a retail operation and the Industrial designation of the Official Plan as reflected in 5.6.4 above does not contemplate such uses. The words "wholesale activities (including direct sales to the public)" when read in the context of the entire policy and considered in light of common and ordinary meanings of the words does not contemplate a large scale use which is by its nature predominantly a retail use devoted in large measure to public, household, or personal consumption.

Neither do the words "warehousing and storage and other similar industrial uses" encompass a large, predominantly retail operation, even though the WMC may resemble a warehouse, has considerable storage and is similar to an industrial use in its form. Fundamentally it is not a "similar industrial use". It functions as a retail use and for all intents and purposes such as traffic, parking, impact on adjacent uses, land use conflicts, position within the commercial structure of the community, etc., it is simply more meaningful and appropriate to regard it as a retail use than as any other.

Even when the Board considers the application of the policy liberally and with an eye towards advancing the aims and objectives of the Plan, we must conclude that the industrial designation in the Mohawk-Meadowlands Plan does not encompass a Specialized Wholesale Establishment within the meaning of the proposed by-law amendment.

The conclusion of the Board is that the proposed use is not one that is permitted by the relevant policy of the Official Plan, namely Policy Section 5.6.3.

A proposed by-law which permits a use which is not permitted by the Official Plan cannot be regarded as complying with the Official Plan. And so by extension, the By-law Amendment proposed here, inasmuch as it would permit a "Specialized Wholesale Establishment" which, despite the label, is fundamentally a retail commercial operation, does not comply with the provisions of the designation applicable to these lands that obtain in the Official Plan of the Town of Ancaster.

In this case, the appeal is lodged by Price Club Canada Inc. as it then was under Section 34(11) of the Planning Act. The Board orders that the appeal is dismissed and By-law 87-57 is not amended in accordance with the proposal of Price Club Canada Inc.

The Board is aware that the obvious practical consequence of this decision is that, for the Price Club to achieve its ambition, it must now seek an amendment to the Official Plan of the Town of Ancaster. Consequently, it may be the conclusion of some that compelling Price Club to gain an Official Plan Amendment is merely a perfunctory obligation. The Board anticipates this and feels compelled to disabuse any of this view. First, the tests associated with an amendment to an Official Plan are substantive and relevant to the question of the larger planning merits of this facility. Should an amendment be made and referred to this Board, there may be certain questions that can be raised and that would have to be fully addressed by a hearing that may not have been addressed within the context of zoning by-law appeal.

However, it is also critical that the integrity of local planning documents of a municipality be maintained and that the documents "line up" consistently. Any reasonable person approaching this process and conscientiously observing it, must be able to conclude faithfully that no short cuts have been taken to accommodate the mere convenience of a commercial land developer and above all that the public interest has been observed properly and addressed completely before any final approval is granted.

The land development system in the Province of Ontario demands that everyone has complete faith in the process of interpreting the policy and planning documents that govern it.

And further all must have confidence that any applicant coming to the process will be treated fairly and without favour.

The Board orders the appeal dismissed. However, in light of the history of this matter, should an Official Plan Amendment be proposed and referred with an accompanying by-law, the Board will treat the matter expeditiously and this member will be seized of the matter, including any case management, pre-hearing conferences and practice directions, to ensure a concise, focused, and orderly trial of the issues.

B.W. KRUSHELNICKI, Member