

ISSUE DATE:
MAR. 8, 2010



PL090372

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

First Dundas Leasing Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Hamilton to redesignate lands respecting 201 King Street East (Dundas) from "Parkland" to "Parkland – exception" to permit a self storage facility in addition to the existing defined range of uses currently permitted
City of Hamilton File No. OPA-08-003
OMB File No. PL090372

First Dundas Leasing Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 3581-86 (Dundas) of the City of Hamilton to rezone lands respecting 201 King Street East (Dundas) by adding self-storage as a permitted use with regulation and deleting the holding provision
OMB File No. PL090373

APPEARANCES:

Parties

First Dundas Leasing Limited
City of Hamilton
Protect Our Dundas (POD) Inc.

Counsel

B. Duxbury
M. Kovacevic
J. May & J. Croome

DECISION DELIVERED BY J. P. ATCHESON AND ORDER OF THE BOARD

First Dundas Leasing Limited ("the Applicant/Appellant") has appealed the decisions of the Council of the City of Hamilton ("the City") dated February 25, 2009, wherein Council denied the Applicant's applications for an Official Plan Amendment ("OPA") and a Zoning By-law Amendment ("ZBA") for lands, municipally known as 201 King Street East, Dundas (now in the City of Hamilton; hereinafter "the subject property"). The City opposed the re-designation and associated rezoning.

The purpose of the applications was for the approval of an "OPA" and "ZBA" to add as a permitted use a self-storage facility on the subject property, in addition to an

existing defined range of uses, currently permitted. The city opposed the re-designation and associated rezoning.

THE CONTEXT

The subject property is a 2.1 ha site located at the northwest corner of Olympic Drive and King Street East in the former Town of Dundas. The site is currently vacant with some minor vegetation cover. The site, by all accounts over the years, has been used for the extraction of soil material, a landfill and subsequently was used by the former Region of Hamilton-Wentworth to deposit fill material from the construction of the Combined Sewer Overflow (CSO) Tank facility situated adjacent to a portion of the western limit of the subject property. The CSO Tank facility is an overflow catchment facility associated with the Dundas Waste Water Treatment Facility located further to the west on King Street East.

Hydro One has a business field centre office, an open storage yard, and transmission station located immediately east across Olympic Drive from the subject property. Immediately north of the Hydro One facilities is the Olympic Arena and associated sports field complex.

The lands situated to the east of Olympic Drive are subject to the Parkway Belt West Plan. The lands located to the west of Olympic Drive including the subject property are subject to the planning policy regimes of the Region of Hamilton-Wentworth Official Plan, the Town of Dundas Official Plan, and the new City of Hamilton Urban Official Plan, as it may apply. This new Official Plan was adopted by City Council on July 9, 2009, and is awaiting final approval from the Minister.

A waste transfer station, a recycling and solid waste drop-off facility, as well as a household hazardous waste drop-off centre operated by the City is situated to the immediate north of the subject property. Beyond the recycling facility to the north is a pond known as Lake JoJo, which flows southward in an open ditch past the City's facility and adjacent to the subject property along the west side of Olympic Drive eventually emptying into the Desjardins Canal, which connects to West Pond and forms part of the Cootes Paradise, a Provincially Significant Coastal Wetland Complex. A sports field associated with the Olympic Arena complex abuts Lake JoJo to the northeast.

Immediately south of the Desjardins Canal are lands owned by the Royal Botanical Gardens, then Cootes Drive, a four-lane arterial road linking the Town of Dundas with West Hamilton. On the south side of Cootes Drive are lands owned by the Hamilton Conservation Authority.

Volunteer Marsh abuts a portion of the subject property to the immediate west. This is a wetland area which in its current form is the result of the disturbances to the area and surrounding developments that have occurred in the past. The remainder of the western boundary of the subject property abuts the CSO Tank property. Further to the west on the north side of King Street East is a school bus parking area, municipal ball diamonds, a City public works yard, the City of Hamilton Fire Prevention Office and the Dundas Waste Water Treatment Plant.

The following land uses are located on the south side of King Street East between King Street East and the Desjardins Canal being; a geese feeding area, lands recently acquired by the Hamilton Conservation Authority (Veldhuis property) to be used as a natural site remediation project, Dewitt Moving and Storage lands, a parking lot area associated with the Air Force Club and some service commercial uses the location of which are all depicted on an aerial photograph found at Exhibit 26A.

The uncontradicted evidence of Mr. Dakin (the Applicant's planner), was that the subject property had been redesignated in 1995 from "Major Utilities" to "Industrial" to permit light industrial development of the site, when owned by the Region of Hamilton-Wentworth but that this use proved impractical due to the poor bearing capacity of the soils found on the site. Mr. Dakin in 1998 on behalf of his client and with the consent of the Regional Municipality of Hamilton-Wentworth, the then owner of the lands, made applications to amend the designation in the Town of Dundas Official Plan and the Zoning By-law governing the subject property to permit open space uses together with associated commercial uses including a variety of restaurants uses, as are now permitted on the site. This application resulted in a special Open Space policy designation found at Section 3.9.2.6 of the Official Plan of the Town of Dundas which states:

"Notwithstanding policy 3.9.4.1, the primary permitted uses on the lands consisting of an area of approximately 2.1ha (5.2acres) situated on the northwest corner of King Street West and Olympic Drive will be for active and passive parks, community centres, public or private recreation uses, conservation uses and other uses which are ancillary

and support the primary uses where these uses will not destroy the essential "open space" nature of the land."

The lands to the north and west immediately adjacent to the subject property are designated "Utilities" by the Town of Dundas Official Plan and are zoned accordingly in the Town's Zoning By-law. Lands to the east are designated as "Public Open Space and Buffer Area" with a recognition of the electric power facilities of Hydro One as set out in the Parkway Belt West Plan (Exhibit 45).

Zoning By-law Amendment No. 4446-98 in 1998 zoned the subject property H-PR1-FP/S-85. This zone implements the special open space land use designation and places holding provisions on the property, there is as well as a requirement to employ flood proofing to the satisfaction of the Hamilton Conservation Authority before development could proceed on the site. The "H" holding provisions in the bylaw are as follows:

1. Site assessment and remediation in accordance with provincial guidelines to the satisfaction of the region; and
2. Review of the site plan by the Regional Environmentally Significant Area Impact Evaluation Group (ESAIEG).

By-law No. 4446-98 permitted a number of recreational uses as well as associated commercial uses including restaurant uses as set out at Exhibit 10, Tab18.

Mr. Dakin's client, subsequent to these approvals, purchased the property from the Municipality for some \$51,680.00. In 2003, Mr. Dakin's client made applications to the Municipality seeking permission to have the site used as a 565 commercial parking lot for McMaster University. This proposal was supported by municipal staff, however the project with McMaster failed and his client withdrew the application which was never considered by the municipal council of the day.

THE EVIDENCE

The Board, during the course of this 4-week hearing, heard from a number of participants who spoke both for and against the project and the following witnesses:

1. Mr. Ken Dakin, a qualified Land Use Planner, has been retained by the Applicant to provide planning advice for a number of years with respect to the subject property.
2. Mr. George McKibbon a qualified Land Use Planner with a specialization in environmental planning was retained by the Applicant to provide factual and opinion evidence on some of the issues raised in the Board's Procedural Order for this hearing.
3. Mr. J. Douglas Hammond, the President and a Principal of First Dundas Leasing Limited, spoke on his own behalf regarding the history of his involvement with the property and his desire to develop the property for a self storage facility.
4. Mr. Karl Konze, a qualified wildlife ecologist with a specialization in the evaluation of wildlife habitat, was retained in 2005 by the Applicant to prepare a scoped Environmental Impact Statement (Exhibit 24c, Tab 3c), with respect to the planning applications for a self storage facility. He continued his investigation of the site being used as nesting habitat for certain species of turtles in 2009.
5. Mr. James Kamstra is a qualified Terrestrial Ecologist with extensive experience in conducting environmental impact studies, biophysical inventories, with particular expertise in the fields of herpetology, ornithology and botany. He is also a qualified wetland evaluator in Ontario. Mr. Kamstra was retained in June of 2009 to provide expert advice on the use of the property by nesting turtles.
6. Mr. Jeffrey Allan, Vice President of Operations and Development for Apple Storage Inc. gave evidence on the type, and character of their self storage operations.
7. Mr. Glenn O'Connor, a qualified Landscape Architect, was retained by the Applicant to prepare landscaping plans and a visual impact assessment of the project now before the Board. He updated his findings in response to issues raised in the Procedural Order for this hearing.
8. Mr. Scott Llewellyn a qualified Professional Engineer was retained by the Applicant to undertake a preliminary grading and stormwater management study for the project.

9. Ms Julia Kollek, the Chair of Protect Our Dundas Inc. (POD), gave evidence through a slide presentation expressing (POD's) concerns about the development of the site.
10. Ms Katherine Menyes, the Director of Watershed Planning and Engineering for the Hamilton Conservation Authority, gave evidence under summons from the Applicant.
11. Mr. Edward John, a qualified Land Use Planner employed as a Senior Planner with the City of Hamilton, gave evidence under summons from the Applicant. Mr. John is the author of the planning report to Council on the subject applications now before the Board.
12. Ms Patricia Chow-Fraser, Ph.D., who is the Chair of the Department of Biology at McMaster University, was qualified as an ecologist with a specialization in wetland analysis. Dr. Chow-Fraser was retained by POD on a pro bono basis to assist them in the matters now before the Board. Dr. Chow-Fraser in May of 2009 was appointed to the Regional Environmentally Significant Area Impact Evaluation Group (ESAIEG) of the City of Hamilton.
13. Mr. Dennis Kerr a qualified Professional Engineer with expertise in geotechnical, geo environmental and Hydrogeological engineering was retained by the Applicant to provide preliminary engineering assessments of the subject property in relation to the engineering feasibility of the proposal. Mr. Kerr's firm has undertaken similar studies of the site dating back to 1993.
14. Ms Pamela Hubbard, a qualified Land Use Planner with a specialization in design and environmental policy planning, was retained by POD to assist them in the matters now before the Board.
15. Mr. J. Berridge, a qualified Land Use Planner and Urban Design expert, was retained by the Municipality in August of 2009 to assist it in the matters now before the Board. Mr. Berridge, in July of 2008, undertook a study at the request of three citizens on a pro bono basis of the site and the surrounding Environmentally Significant Area (ESA). His study is known as the Eco Park Plan. Mr. Berridge also advised the Board that he had been retained by the

Hamilton Conservation Authority to prepare plans for the restoration of the Veldhuis Greenhouse property.

The Board will give a summary what it perceives to be the key evidentiary components provided by the key witnesses, before it makes the requisite findings on the matter. These components are somewhat detailed as the varying concepts and opinions of the various witnesses and participants, are significant and important to the decision the Board is required to make.

Mr. Dakin through his evidence as set out in his witness statement (Exhibit 10), his reply statement (Exhibit 21), and his planning review (Exhibit 25), provided the Board with a development history of the property, the surrounding land uses and character of the area as well as his opinions regarding the consistency of the proposed development with the 2005 Provincial Policy Statement, the Growth Plan for the Greater Golden Horseshoe Area, and the conformity of his client's applications with the Region of Hamilton-Wentworth Official Plan and the Town of Dundas Official Plan. These Official Plan documents are the current policy documents governing the property. He also provided the Board with his opinion regarding the conformity of his client proposal with the policy directions found in the New Urban Official Plan for the City of Hamilton. Mr. Dakin noted that the special policies designating the subject property in the Town of Dundas Official Plan had been carried forward as a special policy section into the new Urban Official Plan for the City of Hamilton, as set out at Exhibit 24A, page 128. He reviewed a conceptual site plan and elevation depicting what the proposed self storage buildings might look like as set out in a series of plans found at Exhibit 26b and c. These plans formed part of the submissions to the Municipality in support of the applications.

It should be noted that these site plans are not before the Board for approval as no formal site plan application has been filed with the Municipality.

It was Mr. Dakin's opinion that in light of the previous Official Plan approvals, and the limited addition of, the proposed self storage facility, which he characterizes as a "benign use" that the proposed change would be consistent with the Provincial policy directions for this part of Hamilton and that the subject amendment now before the Board, would be in conformity with the policy and objectives of the Official Plans governing the subject property, a position held as well by the Municipal Planner.

Mr. Dakin advised the Board that the proposed Zoning By-law Amendment as drafted by City staff (Exhibit 36) would place special zoning provisions in a special Highway Commercial Zone with lot coverage of 50% and not the 25% coverage found in the existing special zoning regulations for the site. He further noted that a new lower building height of 7.5 metres had been applied instead of the 10.5 metres found in the current Zoning By-law. He further noted that the front yard, exterior yard, and interior yard setbacks had all been increased in the proposed new Zoning By-law. He confirmed that the conceptual site plan Exhibit 26b expressed total building lot coverage for the four proposed buildings of some 38% but that city staff had recommended the 50% lot coverage.

Under cross-examination he freely admitted that the application he submitted on behalf of his client requested changes to the Open Space designation of the Town of Dundas Official Plan and a modified list of permitted uses in a Special Park and Recreation Zone to Zoning By-law 3581-86 of the Town of Dundas, but that city staff had determined in their report to the Economic Development and Planning Committee, that the amendments and special provisions should be placed within a special "General Commercial" designation in The Town of Dundas Official Plan and that a special "Highway Commercial" zoning category was being proposed for the site.

He also agreed that from a planning perspective, he had no preference where the special provisions were located within these documents, as in his opinion, the end result would be the same.

Mr. Dakin further advised the Board, that the subject property was subject to special floodplain policies of the Official Plan, which in his opinion, would permit development on the site subject to meet the flood proofing requirements of the Hamilton Conservation Authority. He confirmed under cross-examination that this policy would prohibit the "bulk storage of substances of a chemical, hazardous or toxic nature" on the site and that this provision had been added to the Zoning By-law Amendment (Exhibit 36), now presented to the Board with the consent of the parties.

He also confirmed for the Board that the site was subject to Special Policy Area 4 of the Official Plan, which sets out site plan requirements in recognition of the site's location adjacent to wetlands and its visibility from adjacent roads at the eastern end of the Town of Dundas.

It was Mr. Dakin's opinion that the addition of self storage facilities in the manner shown on Exhibits 26b and 26c, would be able through the site plan approval process, to meet all of the objectives of these two Special Policy Area directions found in the Town's Official Plan.

Mr. Dakin admitted under cross-examination that the self storage facility was a permitted use found only in the Industrial zone of the Town of Dundas Zoning By-law and was not a permitted use in the Highway Commercial zone of the Town's Zoning By-law.

He maintained the opinion that the Official Plan Amendment (Exhibit 35) and the Zoning By-law Amendment (Exhibit 36) as presented to the Board, were site specific limiting what could occur on the site and that in his opinion, the proposed self storage facility as shown in Exhibit 26b was a "benign use" to be preferred to some of the uses that might occur as of right under the current zoning permissions. He admitted under questioning from the Board that the amendments as proposed did not bring any certainty as to what might ultimately be developed on the site and that in their present form the Board could not rely upon the site plans found at (Exhibit 26 b and c).

Mr. McKibbon, in his evidence, endorsed in part the evidence of Mr. Dakin that the proposed self storage use was a "benign use" to be preferred to some of the uses currently permitted as of right on the site. He proffered that the site was a disturbed upland area, was not connected in any significant way with the Cootes Paradise Coastal Wetland Complex, and that the subject lands were the last lands in the area to be rehabilitated from the former extraction and landfill uses.

He proffered that the corridor system and trails both existing and proposed would not be negatively impacted by the development of the site as the Municipality has retained public lands along the King Street East in front of the subject property, as well as the Volunteer Marsh lands to the immediate west.

From his many years of experience working in the area, Mr. McKibbon advised that the subject lands in the early 1970's had been removed from both the Niagara Escarpment Area Plan and the Parkway Belt West Plan, and as such, these provincial policy documents had no applicability to the subject property and the proposed uses.

He proffered the opinion that the "Cootes to Escarpment Park System Conservation and Land Management Strategy", a document released in November of 2009, was not an official planning document nor had the document been adopted in any official way by the City of Hamilton. He sees the document more as a strategy to manage and coordinate existing public lands held by various public jurisdictions within the Hamilton Burlington area. He conceded under cross-examination that the document had listed the subject property as a "potential" acquisition site but that there was no implementation strategy in place to enunciate how this acquisition might take place. He further opined that there were other more important sites identified in the study area which in his opinion would have a higher priority for acquisition. He suggested that in his review of the New Official Plan for the City of Hamilton, that there was nothing in this document that should give the Board pause in considering the proposal of the Applicant. He suggested that the proposed use was more consistent with the existing development currently in place in the immediate area and would create no negative impacts on surrounding lands.

He proffered to the Board that the "Eco Park" concept prepared by Urban Strategies (Exhibit 27a, Tab 45), was just that, a concept plan, or vision of how this area might develop but that it had not been adopted by City Council and that further, in his opinion, the subject property was not needed to implement this concept.

He proffered that the proposal before the Board would finish the remediation efforts for this area and that the subject lands, from his perspective, were not functionally related to the Cootes Paradise Area other than through the riparian landscape associated with the ditch along the east side of the property adjacent to Olympic Drive, and that this connection could be appropriately handled through landscaping of the banks as shown on Exhibit 26b at the time of the site plan application.

He maintained under cross-examination that from his research and understanding of the area that Volunteer Marsh resulted from the disturbances that had occurred in the past and maintained the opinion that Volunteer Marsh was not an environmentally significant area. He confirmed under cross-examination that to the best of his knowledge, staff had taken no action to change the open space designation in the new Official Plan for the City of Hamilton in the time period between when City Council turned down the applications and the time that the new Official Plan was adopted by

City Council in July of 2009. He confirmed that the new Official Plan for the City of Hamilton carried forward the land use designation previously found in the Town of Dundas Official Plan for this site.

Mr. McKibbon's overall opinion was that the self storage facility use was the best use for the site as set out at Exhibit 26b and c and that to restrict this use as the sole permitted use on the site, would provide for the orderly development of the property.

The Board also heard from Mr. Hammond, the President of First Dundas Leasing Limited. He confirmed to the Board in no uncertain terms that the only use he wished to make of the property was the development of a self storage facility substantially in the form found at Exhibits 26b and 26c and that he was prepared to give up the other "as of right uses" he currently has under Zoning By-law Amendment No. 4446-98. He confirmed his more than twenty years of involvement in attempting to find an appropriate use for the site. He confirmed that the rehabilitation of the site began in 2001 to 2002 when he permitted the placement of material on the site from the construction by the municipality of the CSO tank facility. He confirmed for the Board through a series of photographs (Exhibit 13, Tab 2), that this area was previously used as a municipal land fill site and that with the development of the municipal CSO tank there has been an on going process of remediation of the area to productive after uses. In this regard, he also traced the development and expansion southward towards his property of the municipal waste transfer station, recycling and solid waste drop-off facility and household hazardous waste drop-off centre operated by the City of Hamilton (Exhibit 13, Tab 4). It was clear to the Board from this evidence that this municipal facility is a significant land use in the area that it is well lighted and a generator of both municipal truck and private vehicle traffic along Olympic Drive. It was also abundantly clear to the Board from the photographs found at Exhibit 13, Tab 5 that the stream outlet from Volunteer Marsh adjacent to Mr. Hammond's property is in a poor state of land stewardship by the Municipality being strewn with garbage and other refuse. Mr. Hammond, through his photographs, clearly displayed to the Board that significant night lighting exists on the streets, at the playing fields, the Hydro One property, and the other municipal sites in immediate area.

He advised the Board that he had not received any inquires from any public body interested in acquiring the subject property.

Mr. Hammond freely admitted under cross-examination that he bought the property on an "as is basis" from the Municipality and that he had originally agreed to the list of uses found in Zoning By-law Amendment No. 4446-98 but that over time, the surrounding properties had expanded and changed and that he had not been able to find a viable recreation use for the site.

Mr. Hammond advised that based upon his research, the development of a state of the art self storage facility as shown on Exhibits 26b and 26c, would be a viable use for the site and could function in harmony with the surrounding uses. His evidence was that this use would employ between one and two employees and would have associated with it a small office and retail facility to provide storage supplies such as boxes, and other related uses to those who might use the facility.

Mr. Konze, a wildlife ecologist, confirmed that the scoped Environmental Impact Statement he prepared in support of the applications (Exhibit 24C, Tab 3a), had been reviewed and subsequently accepted as being adequate by the staff of the Hamilton Conservation Authority and the Regional Environmentally Significant Area Impact Evaluation Group (ESAIEG) of the City of Hamilton. Mr. Konze confirmed through his evidence that there was no significant natural vegetation on the site and that of the 26 species of wildlife documented as "from or directly adjacent to the site, none of the species were designated as 'Provincially Significant', or of 'Special Concern', 'threatened' or 'endangered'. He noted that while the Eastern Kingbird had been documented, its habitat had subsequently been cleared when the municipal recycling facility was expanded.

Mr. Konze confirmed from his investigations, that the "natural heritage resources associated with this site are generally of low quality and low diversity."

He also conducted field surveys in 2009 in relation to the potential of turtle nesting locations being on or in the immediate site area as set out in his witness statement (Exhibit 16). He undertook this work as a response to the concerns raised about turtle nesting on the site when the planning applications were considered by the City of Hamilton's Economic Development and Planning Committee. The results of his investigation were that five turtle nesting sites were confirmed on the subject property in 2009 of which 4 were nests of the "snapping turtle". This turtle species in 2008 was classified as a "species of concern". The other confirmed nest was that of the "painted turtle". He concluded that turtle nesting sites "should not be impacted as the proposed

development would not encroach onto the previously documented and or potential turtle nesting site along King Street East and Olympic Drive". He proffered that due to the clay soils on the site that the area was of poor quality for turtle nesting and if natural vegetation was to occur on the site that the turtle nesting capability would diminish. He proffered that nesting sites where turtles did not have to cross municipal roads were to be preferred as significant mortality occurs to breeding females and young hatchlings when they are required to cross municipal roadways. In this regard, he pointed out that the community gardens (Exhibit 26a) already is a preferred turtle nesting site and the Veldhuis site directly adjacent to Desjardin canal, when restored, could be designed to be a preferred turtle nesting habitat as well. Both sites avoid the risk of nesting turtles having to cross public roads.

It was Mr. Konze's opinion that the actual development of the site could provide a benefit to the turtle population in the Cootes Paradise area as it would discourage them from crossing public roads and being injured and or killed.

He concluded his evidence stating that with the exception of the "snapping turtle" there were no significant species associated with the site and that in his opinion, the subject lands did not function as an important nesting habitat for the "snapping turtle" in relation to the other available sites found adjacent to and in proximity to West Pond and the Desjardin Canal.

He also proffered that as a result of his work, the proposed development of the subject site would not negatively impact any of the Environmentally Sensitive Area (ESA) criteria for which the Cootes Paradise ESA was designated. He further noted that Volunteer Marsh to the immediate west of the subject property was a low quality wetland that was not complexed with Cootes Paradise. In this regard, he relies on a Ministry of Natural Resources letter (Exhibit 48), which did not complex Volunteer Marsh with the Cootes Paradise wetland when the Cootes Wetland was being considered and designated.

Mr. Kamstra's evidence to the Board as a result of his investigations was that the subject property should not be considered a significant habitat for "snapping turtles" as defined by the PPS. His analysis in arriving at this conclusion is found in his witness statement (Exhibit 17). In arriving at his conclusion, he based his assessment on the "Significant Wildlife Habitat Technical Guide (OMNR2000)" and the criteria found in that

document for "Specialized Wildlife Habitat –Turtle Nesting Habitat" and the criteria for "Species of Special Concern" also found in Ministry documents.

He proffered to the Board that while the snapping turtle had recently been designated as a "Species of Concern" that it was a very common species of turtle both in Southern Ontario and in the Hamilton Region. He proffered the opinion that there were preferred nesting habitats closer to the Desjardin Canal and West Pond that would reduce the road mortality to egg bearing females and hatchlings.

He proffered the opinion that the subject property is not a significant habitat and that the development of the site for a self storage facility or other uses would have no negative impact on the features and functions of adjacent wetlands. He advised the Board that even with the development of this site, there would still be a viable wildlife corridor from the Desjardin Canal through Volunteer Marsh to Lake JoJo, and that the natural corridor to the north from West Pond through the sports fields to Lake JoJo would be unchanged.

He maintained his opinions under cross-examination.

Mr. Allan testified and confirmed that his company had entered into a joint venture partnership to develop the site for a self storage facility with Mr. Hammond. He indicated that based upon the site plan (Exhibit 26b), that between 600 and 650 storage units might be developed on the site. He indicated that the company's contracts with tenants would prohibit the storage of dangerous or hazardous chemicals on the site and that they would not permit storage unit areas to be used as work areas. He estimated that on an average day one might expect some twenty vehicle trips both to and from the site. He freely admitted that the number of vehicle trips could vary depending upon the time of month. He confirmed that these sites often have mail box locations to assist their clients when moving and that there would be no open storage of any recreational vehicles, boats or cars on the site. He indicated that his firm was familiar with the site plan process and would meet any requirements put forward by the Municipality. He confirmed that the site would be fenced, gated and monitored by security cameras, and proffered that self storage units would normally serve the local population found within a 3 to 5 kilometre radius of the facility.

He confirmed under cross-examination that the normal hours of access to the site would be from 6:00 a.m. to 11:00 p.m. and that it was very unlikely that the facility

would permit unrestricted 24-hour access. He freely admitted that based upon special needs of a tenant they might extend on a case by case basis the hour of access to individual tenants. He confirmed that the facility would require security lighting but that this would be installed in accordance with any City lighting policy.

Mr. O'Connor confirmed that the landscape and visual impact assessment report (Exhibit 24c, Tab 1E), was submitted as part of the application to the Municipality. He also confirmed that his witness statement (Exhibit 15) had been updated to address issues raised by the parties in the Procedural Order for this hearing and included new figures being figures 6, 7, 8, 9, and 11. These figures together with the other figures in his witness statement were used to demonstrate the visual impacts of the proposed development concept from different site lines around the property to and from the Niagara Escarpment.

In undertaking his visual impact assessment, Mr. O'Connor used the Niagara Escarpment Commission criteria even though the subject property is located outside of the Niagara Escarpment Plan Area. He also had regard for the policies on urban design found in the Town of Dundas Official Plan as set out in Part 2.5 and the special site policies found in Section 3.10.3.4. Special Policy Area 4 of the Plan. He also has regard for the site specific policies carried forward into the New Urban City of Hamilton Official Plan being Section UDOS1.

As a result of his work, Mr. O'Connor opined to the Board that from a visual assessment perspective, "it is feasible to develop the subject lands for a self storage facility and minimize the visual impact on the Niagara Escarpment" and that the proposed development of the subject lands conforms to the relevant applicable visual objectives of the Official Plans governing the site. In this regard he reviewed and provided his opinion with respect to the applicable Official Plan policies as set out in his witness statement (Exhibit 15).

Under cross-examination he admitted that the proposed development would have a small impact on the views of the Niagara Escarpment from specific locations around the site. It was his evidence as shown on figures 4, 5, and 6, that in part, this resulted from the fill required to meet the flood proofing requirements of the Official Plan's Special Policy Area governing the site. It was his opinion that similar visual impacts would result with respect to some of the uses currently permitted for the site.

He also freely admitted that Section 2.5.2.5 of the Town of Dundas Official Plan set a goal to "preserve and enhance" the views in the Town of Dundas. He proffered to the Board that if this section were taken literally, there would be no new development permitted. However, he noted that in many viewsapes new buildings are used to frame views and thus enhance the visual aspect of a natural feature. He also confirmed under cross-examination that there were two gaps in the natural vegetation south of the Desjardin Canal as set out in Exhibit 15, figure 2, which permitted views of the Niagara Escarpment from Cootes Drive. He maintained the opinion as shown on Exhibit 15, figure 2, that the required filling of the site, would have, a minor impact on the views from these two locations of the Escarpment but that the view shed varied and improved depending on one's location around the site. He continued under cross-examination to maintain that he was confident that the development being proposed and shown on Exhibit 26b could meet the intent and purpose of the Official Plan policies for the site, during the site plan approval process.

Mr. Llewellyn advised that he had been retained by the Applicant to do a preliminary site grading design and to review the previous stormwater management reports that had been done in 2007. His full report is found at Exhibit 27a, Tab 39, in support of the current application. He confirmed for the Board that it was his understanding that the site would have to be raised to meet the special flood proofing policies governing the area. He confirmed that stormwater design would be required to meet the level 1 "enhanced" guideline of the Ministry of the Environment and that this could be achieved through the installation of appropriate stormceptors on the site. He advised the Board that the site could be designed to ensure that no stormwater from the site drained into Volunteer Marsh if that was the City's desire. He also proffered that if the Municipality and/or the Conservation Authority felt that some stormwater should enter Volunteer Marsh, that this as well, could be achieved. He confirmed for the Board that in his opinion, the site can be serviced and designed to meet the special policy flood proofing requirements of the Conservation Authority and that there were no other municipal servicing issues associated with the proposed development of the property.

Ms Kollek, the Chair of POD through her presentation Exhibit 57, reviewed the area and proffered that her group believes that the proposed use should not be permitted. The ultimate position of her group is that the subject site should become part of the public domain and restored as a natural area. Under cross-examination she indicated that she recognized the as of right uses currently permitted for the site, but

maintained the view of her group and that of other citizens of the area that this site should be maintained as part of the major open space found in the surrounding area and not developed.

Ms Menyes advised the Board that the Hamilton Region Conservation Authority in a memorandum of understanding with the City dating back to 1996 was the commenting agency for the City with respect to environmental hazards and the conformity of development proposal applications with the Hamilton Conservation Authority's regulations. She reviewed for the Board the Authority's staff recommendations with respect to the subject proposal, as set out at Exhibit 20, Tabs 3 and 4. She confirmed that subject to the conditions contained in these letters, the staff of the Conservation Authority had no concerns with the proposed development. She confirmed for the Board that the storm water solutions being proposed, from the staff perspective, would result in a Level "1" "Enhanced" stormwater discharge from the site and that this would be consistent with the Remedial Action Plan for the Hamilton Harbour. She noted as well, that the Authority had asked the City of Hamilton to remove the fill that had been deposited in Volunteer Marsh area but that the City to date had refused to take any action. She noted in her letter of September 15, 2008, that staff of the Authority accepted the proposal of the applicant to grade and plant native species on the filled lands associated with Volunteer Marsh but that the City did not want to deal with this matter. She also confirmed that the special policy area provisions for development within the flood fringe of the Stevens Creek watershed would apply to the subject property and that staff was in agreement with the findings and recommendations in the Environmental Impact Statement with respect to the setbacks and treatment from the watercourse along Olympic Drive and the grading and planting proposal along the western side of the property in the area of Volunteer Marsh. Ms Menyes proffered to the Board that the Authority's engineering staff would like to maintain the existing overland flow from this site into Volunteer Marsh and that the final design would be the subject of site plan approval. She also proffered that the data developed as a result of the additional work of Mr. Konze, should be added to the Environmental Impact Statement for the property. She confirmed for the Board that the position of staff was not supported by the Board of the Conservation Authority which recommended that the application not be approved.

On cross-examination, she testified that some parking lot areas, particularly those that do not have overnight parking, may not have to be flood proofed. She also

proffered that a setback of 30 metres from the boundary of Volunteer Marsh as defined by the Ministry of Natural Resources, would be required as well, but that these decisions and final design elements of the project would normally be made through the site plan approval process. She confirmed for the Board that her agency would be consulted and had input into the City of Hamilton's site plan approval process and that permits would be required from the Conservation Authority before any building permits could be issued.

When questioned by Counsel for the Municipality about the impact if the municipality refused to allow any remedial work to be done to Volunteer Marsh, she had no response, other than to say that her agency would encourage the City to undertake the remediation of Volunteer Marsh following good land stewardship practices.

Mr. John, the municipal planner, reviewed for the Board his planning opinion on the applications as set out in his planning report to the Economic Development and Planning Committee of Council found in the minutes of the committee meeting dated February 17, 2009 (Exhibit 20, Tab 20).

His conclusion after his review was that:

"The proposal has merit and can be supported since the change in zoning is consistent with the Provincial Policy Statement, and implements the intent of the Hamilton Wentworth Official Plan. The proposal is compatible with the surrounding uses, protects the existing environmental features, and is an appropriate development that will reinforce Dundas' economic vitality by strengthening existing uses and facilitating the creation of new employment and economic development opportunities."

He maintained throughout his evidence that the use being proposed was compatible with the surrounding uses and that the built form being proposed would meet the objectives of the Town of Dundas Official Plan. He proffered to the Board that the material submitted in support of the applications and the responses from the staff of the commenting agencies assisted him in formulating his opinion that the site and the proposed development could meet the planning objectives established by the municipality for this area. He supported the Official Plan Amendment (Exhibit 35) and the Zoning By-law Amendment (Exhibit 36), which contained some technical changes that varied somewhat from the same documents found in his report to the Economic Development and Planning Committee. He proffered that since development was already permitted on the site, he saw no difficulty in adding the requested use to a

modified list of recreation and restaurant uses already permitted on the site. He also advised the Board that he felt it more appropriate to change the Official Plan land use designation from "Open Space" to "General Commercial Exception" to avoid any confusion about development being permitted on the site and that the change he proposed would clearly identify that the site was slated for development. In support of this change, he relied on Section 3.3.2.1. of the Town of Dundas Official Plan. This same logic was translated into the draft Zoning By-law Amendment (Exhibit 36), which he continued to support. He noted that in this regard, the proposed lot coverage would be increased from 25% to 50% and proffered that in his judgement there would be no significant impacts based upon his assessment of the site, the material filed in support of the applications, the comments of the circulated agencies, and the sites context with the surrounding area. He confirmed on questioning from the Board that the same coverage of 50% would apply to the other uses permitted in his Zoning By-law Amendment.

His evidence to the Board was that the lands were not needed by the Municipality for parks purposes and further that there were no city planning documents suggesting that the lands be acquired for parks purposes.

He confirmed through his planning report and evidence to the Board the opinion that the Official Plan Amendment and Zoning By-law Amendment (Exhibits 35 and 36) would be consistent with applicable Provincial Policies and in conformity with a full and fair reading of the applicable Official Plan policies covering the area.

He advised the Board that the Eco Park document came directly to Municipal Councillors after he had prepared his report for Council. He confirmed under questioning that he had subsequently reviewed the document and concluded that he could not consider it as applicable planning policy for the subject property and that this document did not change in any way, his planning opinion about the development of the site.

He also advised the Board that at the time he formulated his opinion about the applications, the new Official Plan for the City of Hamilton was not available and as such, he did not consider it in arriving at his planning opinion on the applications. He confirmed that the new Official Plan carried forward the previous site-specific designations for the subject property and had not been changed to reflect the current

proposal. He confirmed for the Board that the new Official Plan was still awaiting the Minister's Notice of Decisions and could be appealed by those having status to appeal.

Mr. John maintained under cross-examination the opinion that the Official Plan Amendment and Zoning By-law Amendment reflected good planning and a compatible form of development for the area consistent with its surroundings. He confirmed as well that he now felt the holding provisions as now set out in Exhibit 36, were appropriate to ensure the orderly development of the area.

He confirmed under cross-examination that Council had delegated the approval of site plans to municipal staff and that the process was not subject to public input or appeal other than by the applicant. He confirmed that both the Hamilton Conservation Authority and the City's (ESAIEG) committee would be consulted as part of the site plan approval process, and that any new environmental information would be provided to these groups for comment during the site plan approval process. He freely admitted that there was no guarantee under the Zoning By-law Amendment before the Board that the self storage facility would be built. He confirmed as well, that the new standards proposed in the Zoning By-law Amendment would apply to the existing uses thus permitting a restaurant with 50% coverage where the previous zoning only permitted 25% coverage and that the new yard setbacks would apply to all uses as well.

He also testified under cross-examination, that in his opinion, the trails set out and shown on Schedule B-2 in the Town of Dundas Official Plan would not be affected by permitting development of the subject property.

When provided with the clerk's notice of Councils decision to refuse the applications (Exhibit 61), he proffered that the 4 reasons contained in the notice of decision were those put forward by residents in opposition and were not part of City Councils resolution refusing the applications.

He continued to maintain that from the material supplied with the application that he was satisfied that the site could be developed in conformity with the planning policies in place and with some minor changes, which could occur through the site plan review process, any of the new concerns presented to him could be met.

He proffered the opinion on questioning from the Board, that limiting the site to just the self storage facility in a manner substantially in the form found at Exhibits 26b

and c and subject to the new regulations and holding provisions found at Exhibit 36, would not be bad planning for the area and would bring some certainty as to the ultimate development of the site.

Dr. Patricia Chow-Fraser reviewed her ecological review (Exhibit 33), upon which she based her opinions with respect to Volunteer Marsh and the impact of the proposed development on this wetland and the surrounding Environmentally Significant Area. She confirmed that her assessment was undertaken from a landscape viewpoint using available air photography and available topographic mapping and her evaluation of the various environmental reports prepared over the years for the area. Based on her work, she provided the Board with a very different perspective on the environmental character and quality of Volunteer Marsh and the impacts that might occur from the development of this subject property. Dr. Chow-Fraser through a series of air photographs dating from 1943 to 2005 traced the evolution and changes that had occurred in the area. It was her evidence that Volunteer Marsh existed in the mid 1940's. She freely admitted as shown in her air photographs, the significant disturbances had occurred in the area, but maintained that an outline of Volunteer Marsh was still visible. She proffered that in her opinion, this wetland had been undervalued at the time that it was classified as a class 6 wetland. She indicated that it was her understanding of the City of Hamilton planning application review processes, that the additional work undertaken by Mr. Konze with respect to turtle habitat should be referred back to the City's (ESAIEG) committee for review and comments, and that this new information might have informed a different comment from the Committee. She suggested that more systematic studies of the entire area needed to be conducted to better understand the turtle habitat and their activities in the area before allowing development to proceed.

Mr. Kerr confirmed for the Board through his testimony, that the soils now found on the site would have a bearing capacity of some 100kPa (2000psf) which in his opinion, would support the proposed buildings. He indicated that boreholes tests conducted by his firm indicated the presence of methane gas in the soils on the site but that through proper engineering design of the foundations, together with a proper venting system and monitors in the buildings, that the project could be safely constructed. In his opinion such works would be required regardless of what structures were placed on the site, and would be subject to final design approval by the Municipality at building permit application. It was his evidence that the methane on the

site was being generated from organic soils found on the site and had nothing to do with the land filling that occurred in the general area.

Ms Hubbard provided the Board with her planning opinion on the proposed development as set out in her witness and reply statements (Exhibits 31 and 32). She proffered that the required filling of the site for the proposed development to meet the flood proofing requirements of the Special Policy Area, would impact the views of the Niagara Escarpment and would act as a visual barrier between this natural heritage landscape and public uses in the area.

She put forward the opinion that the increase in the building lot coverage to 50% significantly reduced the options to protect the visual views from and through the site to the Escarpment and that in her opinion, the impervious coverage of the site of some 78% as shown on Exhibit 26b, was not compatible with the recreational, open space and utility uses currently found in the area.

She proffered that maintaining maximum lot coverage on 25% provided greater flexibility to meet the objectives set out in Section 2.5.2.5 of the Town of Dundas Official Plan which states an urban design objective:

“To preserve and enhance views, vista and the physical access to natural features, landscapes and landmarks”

She proffered concerns regarding the stormwater management reports and the investigations and reports of Peto McCallum, prepared in support of the applications. With respect to her concerns about stormwater management, she relies on the changing views of the Hamilton Conservation Authority’s staff as expressed through Ms Menyes that the Authority would like now to maintain the overland flow into Volunteer Marsh from the subject property.

She proffered no independent evidence regarding her assertions regarding these engineering reports that the Board could rely upon.

She proffered the opinion that since the ecologists were not in agreement regarding the value of Volunteer Marsh and the impacts of development of the site on turtle nesting habitat that the Board should apply the “Precautionary Principal” and not approve the proposal. She proffered the opinion that the work of Mr O’Connor was incorrect and misleading and that the raising of the site would significantly impact the

views of the Niagara Escarpment. However, she undertook no independent analysis to verify or confirm her assertions other than one specific site visit.

Mr. Berridge provided the Board with his planning opinions about the applications which are set out in his witness and reply statements (Exhibits 28 and 29). He provided a very different perspective and planning opinion to that of Planners, Dakin, McKibbin, and John.

Mr. Berridge proffered that the self storage use was not an appropriate use in an open space area and that in his opinion, the current Special Policy Open Space Designation and uses currently allowed by the Zoning By-law for the site, represented good planning for the area and should be maintained. He maintained that the site-specific policies found at Section 3.9.2.6 should be given weight as they provided a clear direction to maintain the open space character of the site while allowing limited development subject to the other policies of the Official Plan. He suggested that while amendments to Official Plans were permitted, that they should not be undertaken lightly and must meet the tests for such a change as set out in the Town's Official Plan (Section 5.16). He proffered that the Town's Official Plan is clear that the self storage facilities should be located in Industrial areas and that to allow the encroachment of this use into this area, would not be consistent with the Town's or former Region's long term vision for this area as set out in their respective Official Plans. In this regard, he noted that the Region's Official Plan recognizes that the subject property is within an Environmentally Significant Area in what the Official Plan defines as a Core Natural Area. He proffered that the Regional Official Plan provides no support for a private Industrial use on this site.

He suggested to the Board that the move from a Special Open Space designation to the Special General Commercial designation was an "extreme planning shift" that was not supported by the 2005 Provincial Policy Statement, Section 1.1.3.2, or the Places to Grow legislation which directs a Municipality to take care of and preserve significant natural areas within their jurisdiction. In this regard, he opined that the use of a special "Highway Commercial Zoning" was not consistent with these Provincial directions for this area.

He further proffered that the inherent characteristics of the self storage facility use are:

1. The need for uniform grades, and paved circulation routes around and to the storage buildings.
2. The need and ability for only perimeter landscaping and the increased coverage not only of the buildings but of the total impervious surface coverage was not consistent with the open space character of the area as displayed by the low coverage percentages of the existing and surrounding utility uses;

and that as a result, the self storage use was not conducive to the open space directions of the governing Official Plans.

He further suggested to the Board that in the absence "of negative impacts was not a justification for an inappropriate land use" being permitted by an Official Plan Amendment, nor in his opinion should the soil bearing characteristics of the site be a determinant in arriving at an appropriate Official Plan designation. It was his opinion that the change being proposed would be at odds with the policy directions found in Region of Hamilton-Wentworth Official Plan, the Town of Dundas Official Plan, the new City of Hamilton Urban Official Plan, a position he detailed in his witness statement.

He finds no support in the planning justification put forward by Mr. John in his report as Mr. Berridge perceived the economic benefit from the Official Plan Amendment change to be minimal consisting of only one or two jobs. In his opinion, some of the existing permitted uses would create more jobs and greater economic and tourist opportunities which would be more consistent with the vision and goals set out in the Official Plans for this part of Dundas.

It was his opinion that a full and fair reading of the planning policies in place as set out in his witness statement, would not support the change in land use designation being proposed by Exhibit 35, nor did he subscribe to the notion that the self storage facility use was a "benign use" but instead proffered that its inherent design characteristics and site needs, were not consistent with the direction to maintain and "not destroy the open space nature of the area".

Mr. Berridge under cross-examination freely admitted that changes had occurred to municipal lands that bound the site and that the site and surrounding area were the result of disturbance to the area in the past but maintained that these changes, would not in his opinion, restrict the ability of the subject property to be developed in the

manner and for the uses currently permitted. He also confirmed that the new Official Plan for the City of Hamilton allowed for self storage facilities within the Arterial Commercial designation (Exhibit 80) and that this designation had not been applied to the subject property from which, he concluded, that this would not be an appropriate land use designation for this area as provisions have been made to allow the self storage facility use in other areas of Urban Hamilton of which the Town of Dundas is now a part. He further opined that there were other areas in the Town of Dundas and in the surrounding area currently designated for the self storage use, and that he sees no economic or planning justification to allow the self storage, Industrial use, on this site.

He concluded his remarks by offering complete support for the existing Official Plan policies and zoning permissions set out for the site.

He maintained his opinions under cross-examination.

The Board also heard from 7 participants who spoke in favour of the project while some 16 spoke in opposition to the proposed development. The full participant's statements of those in favour of the development are found at Exhibit 22; while the participant's statements of those in opposition to the development are found at Exhibit 23. The Board also had the benefit of the additional submission made to City Council, Exhibit 60.

The salient propositions put forward by those participants in favour of the project were:

1. The self storage facility was a needed use for this part of Dundas;
2. The use is compatible with its surrounding uses; and
3. The development of the site would provide needed tax revenue to the municipality.

The participants in opposition to the proposed development raised a long list of concerns. However, in the Board's view, the salient concerns expressed by these residents may be summarized as follows:

1. The existing uses on the site are to be preferred;
2. The proposed self storage use is not compatible with the Cootes Paradise ESA;

3. The lot coverage proposed is too large and not consistent with the policy to maintain the open space nature of the site;
4. The proposed development is not consistent with the long term vision for this area as a major open space area;
5. The proposed use is not consistent with remedial actions being taken to improve the Hamilton Harbour area;
6. The use will have negative impacts on the surrounding open space areas and animal habitat including Volunteer Marsh;
7. The increased traffic flow from the site will have a negative impact on turtles in the area and will diminish their habitat;
8. Increased traffic will have a negative impact water fowl using Desjardin Canal and the turtles crossing existing streets.
9. The proposed development underestimates the visual impacts on the Niagara Escarpment views;
10. The proposed development does not meet the Provincial Growth Plan objectives for the City of Hamilton; and
11. The Environmental Impact Statement in support of the application is incomplete.

FINDINGS AND CONCLUSIONS

The Board, after carefully reviewing the evidence, the exhibits filed and the submissions made by the parties and the participants, makes the following findings.

The Board would note that during the course of this 4 week hearing, it received more than 82 exhibits and heard from the witnesses and participants as outlined earlier in this decision, and that in responding to the issues raised in the Procedural Order, the Board may have been provided with evidence and opinions by the parties and participants that was not before City Council when it made its decision on the matter.

Counsel for the Municipality suggested that the Board should not find in favour of the Appellant on the basis that the City's (ESAIEG) committee had not been provided

with the additional information that Mr. Konze presented at this hearing regarding turtle habitat and that the (ESAIEG) committee had not been privy to the views of Dr. Chow-Fraser and the changing opinions of Ms Menyes. He noted that Section 1.2.2 b) and c) of the Regional Official Plan provides the mandate for the (ESAIEG) committee to consider and advise staff on the appropriateness of any changes within designated Environmentally Significant Areas of the Municipality and that this new material might have altered the recommendation of the Committee upon which staff relied.

The Board notes that the (ESAIEG) committee is an advisory body set up by the Municipality and is not a decision-making body nor has City Council delegated any of its determinative or approval functions to this body. Unlike the Conservation Authority, the (ESAIEG) committee has no permitting or approval functions, but is only an advisory committee to staff and ultimately City Council. In this case, the City Council had the views of its (ESAIEG) committee before them and decided not to accept or follow them. The Board finds that any decision of the Board with respect to the appeals before it would not fetter in any way, the advisory role of the (ESAIEG) committee when asked to comment on a site plan application for this property be it for the uses currently in place or the new use now being proposed.

That being said, the Board is cognizant of the new provisions set out in subsection 34 (24.3) of the *Planning Act* which state:

New information and material at hearing

(24.3) This subsection applies if information and material that is presented at the hearing of an appeal described in subsection (24.1) was not provided to the municipality before the council made the decision that is the subject of the appeal. 2006, c. 23, s. 15 (12).

Same

(24.4) When subsection (24.3) applies, the Municipal Board may, on its own initiative or on a motion by the municipality or any party, consider whether the information and material could have materially affected the council's decision, and if the Board determines that it could have done so, it shall not be admitted into evidence until subsection (24.5) has been complied with and the prescribed time period has elapsed. 2006, c. 23, s. 15 (12).

Notice to council

(24.5) The Municipal Board shall notify the council that it is being given an opportunity to,

- (a) reconsider its decision in light of the information and material; and
- (b) make a written recommendation to the Board. 2006, c. 23, s. 15 (12).

Council's recommendation

(24.6) The Municipal Board shall have regard to the council's recommendation if it is received within the time period mentioned in subsection (24.4), and may but is not required to do so if it is received afterwards. 2006, c. 23, s. 15 (12).

Conflict with SPPA

(24.7) Subsections (24.1) to (24.6) apply despite the *Statutory Powers Procedure Act*, 2006, c. 23, s. 15 (12).

At no time during the course of this hearing, did Counsel for any party bring a motion that any or part of the evidence provided to the Board during the course of this hearing, should be referred back to the Municipal Council for reconsideration as contemplated by subsection 34(24.4). Nor did the Board conclude that the material provided during the course of this hearing would "have materially affected the Council's decision" in this matter not to approve the amendments.

Much of the new material from all of the parties dealt with site plan matters and mitigative processes associated with the development of the site regardless of its use. These matters are not currently before the Board, and must first be considered by Council or in this case, its staff delegate through the site plan review process. This applies equally to the existing permitted uses and the proposed use or any combination thereof. It is the Board's finding that the site plan process can address and assess the salient concerns raised during this hearing and that any decision of this Board would not prejudice the site plan review and approval process of the City of Hamilton.

The additional work of Mr. Konze with respect to the finding of 5 turtle nests on the site in 2009, in the Board's findings after considering the fullness of his evidence and the evidence of Mr. Kamstra, would not have materially affected the Council's decision not to approve the applications. The Board would also note that the issue of potential turtle nesting was identified as a concern in the staff report dated October 15, 2008 (Exhibit 20, Tab 1), when the matter was considered by Council and is a matter that can be further explored and evaluated during the City's site plan approval process.

Counsel for the Municipality, in his final argument, reminded the Board of Section 2. of the *Planning Act* and in particular, section 2. (n) which requires that the Board shall have regard for matters of Provincial interest which in his submission, should include the following subsection:

2. (n) The resolution of planning conflicts involving public and private interests.

The balancing of public and private interests is a fundamental requirement of the *Planning Act*. The determination of and the balancing of public and private interests originally vests with, and is the obligation of the Municipal Council and upon appeal,

vests with this Board. It does not reside with private individuals or local interest groups. The determination of the public interest with respect to planning matters is not a popularity contest but must instead be based upon sound planning principals.

The Board notes that in considering the new directions of Section 2 of the *Planning Act* even more fundamental is Section 2.1 which states:

Decisions of councils and approval authorities

2.1 When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to,

- (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and
- (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a). 2006, c. 23, s. 4.

In this regard, the Board adopts the position put forward by Member Stefanko in his decision *Keswick vs. Sutherland* when he states that:

This section, in my view, requires the Ontario Municipal Board to consider the decisions of council and to weigh those decisions against the evidence heard by the Board. To read this section as creating some type of obligation on the Board to be bound by and to implement such decisions would be placing far too narrow [sic] an interpretation on the section. Other provisions of the *Act* such as ss.17 (36), 17(50), 34(19) and 34(26) clearly allow for, and contemplate the possibility of parties appealing a decision of a municipal council and the Board overturning it. Therefore, notwithstanding a level of inherent deference contained in s. 2.1, the Board does, and should, for obvious reasons, retain its independent decision-making authority. When considering the decisions made by Town Council and Regional Council, it is incumbent upon me to scrutinize those decisions to the extent possible.

The Board, in this case, has reviewed the minutes of the meeting of Council and its Economic Development and Planning Committee, the planning reports available to the Municipal Council and the submissions made by concerned citizens and groups to both Council's Economic Development and Planning Committee and to Council itself as found in the Exhibits filed during this hearing.

The reasons in the Notice of Decision (Exhibit 61), sent out by the City Clerk, are those of the clerk, and reflect some of the concerns raised by members of POD during the municipal hearings. However, this notice does not reflect the exact resolution of City Council found in the Council Minutes (Exhibit 27a, Tab 32), which accepted the report of

the Economic Development and Planning Committee (Exhibit 27a, Tab 31), which in turn merely recommended that the applications be denied without reasons.

The Board has also had the benefit of the *viva voce* evidence presented at this hearing by qualified land use planners and other experts, interest groups and citizens as cited in this decision. The totality of this material has informed the Board in arriving at its decision in this matter.

The Board notes that much of the material filed and referred to in the hearing dealt with site plan matters, urban design issues as articulated in current Official Plan policy, potential environmental impacts and the techniques to be employed to mitigate and or address these concerns, and the planning policy requirements established for this site. Much of this evidence would apply equally to the existing uses as well as the proposed self storage facility use and while helpful to the Board in understanding the context of the development proposal, many of these matters are not determinative of the fundamental issue the Board must decide; that being whether the Official Plan Amendment being proposed represents good planning within the planning policy framework for the Town of Dundas.

The best the Board can take from the new Urban Official Plan for the City of Hamilton is that Council is satisfied with the status quo for this particular site. Similarly, while the Eco Park Plan prepared by Mr Berridge provides a vision of how this area might develop and may have informed his opinion of the proposal it is just that, a concept without the force of law. The same is true for the recently completed "Cootes to Escarpment Park System Conservation and Land Management Strategy"

The Board understands and commends the efforts of Mr. Hammond to find a suitable use for his site. A site that he has owned for more than ten years. Nor does the Board doubt his sincerity when he stated that he wished only to develop a self storage facility on the site and that he would develop the site in a responsible manner. It is clear to the Board that Mr Hammond's desires for the property are genuine and guided by enlightened self interest. However, the Board must base its decision for this site within the context of the greater public interest as expressed by City Council through its planning documents.

It is clear to the Board after considering the long history associated with this site, at least since the mid 1990's, that the Councils of the day have deemed the lands

surplus to municipal needs and have sanctioned, albeit limited, the development of the site for recreational and some commercially related uses as set out in the Town of Dundas Official Plan policy Section 3.9.2.6 and implemented by Zoning By-law Amendment No. 4446-98.

No compelling evidence was placed before the Board that City Council now wishes to take the lands back and place them in public ownership or that the municipality wishes to further limit the current uses on the site. Nor was there any compelling evidence that other public bodies interested in public lands, have sought to acquire these lands for open space purposes. The only evidence before the Board in this regard, was a statement in the "Cootes to Escarpment Park System Conservation and Land Management Strategy" which suggested that this site was a potential acquisition site. However, this document has no official status nor has its recommendations as far as this site is concerned, been translated into official planning policy by the Municipality. The evidence of Mr. Berridge was that the Hamilton Conservation Authority had begun implementation work with respect to the Veldhuis greenhouse property, a property it recently acquired, and as such, the Board should conclude that implementation of the Cootes to Escarpment study had begun. The best the Board can take from Mr. Berridge's evidence in this regard is that the Conservation Authority, an independent body, and partner in the production of the Cootes to Escarpment document, is using the report in the management and redevelopment of its own property. However, the evidence to date was that the City of Hamilton had taken no actions with respect to the report and as such, the Board can give this document little weight as it might apply to the subject property.

All parties agreed that the primary planning document in play in this case is the Town of Dundas Official Plan. This Plan clearly sets out the tests to be met when considering an Official Plan Amendment.

It is clear to the Board, after considering all of the planning opinions presented during the course of this hearing, that the proposed change in the Official Plan's Land Use Designation (Exhibit 35), and the implementing Zoning By-law Amendment (Exhibit 36), have little planning context with respect to the planning policy regime in place and do not meet the tests for an Amendment to the Official Plan as set out in Section 5.16 of the Town of Dundas Official Plan which states in part:

5.16.2 When considering an application to amend the Official Plan Council shall consider the following matters;

5.16.2.1 The conformity of the proposal to the goals and objectives of the Plan;

5.16.2.2 The conformity of the proposal to the goals, objectives and policies of the Regional Plan, the Niagara Escarpment Plan and the Parkway Belt West Plan;

5.16.2.3 Suitability of the site for the proposed use especially in relation to the other sites or areas of the Town;

5.16.2.4 Compatibility of the proposed use with adjacent land uses designations;

5.16.2.5 the need for the proposed use in light of projected population and employment targets;

5.16.2.6 The extent to which the existing areas of the Town designated for the proposed use are developed or are available for development;

5.16.2.7 The impact of the proposed use on municipal services and facilities, the transportation system, community facilities and the natural environment; and

5.16.2.8 The financial implication of the proposed development.

The evidence of the planners was that the self storage facility use is found in the "Industrial" land use designation in the Dundas Official Plan and within the Industrial zoning category of the Town of Dundas Zoning By-law. The proposed OPA would remove the special "Park and Open Space" designation and would subsequently place the site in a special "General Commercial" Designation with a special Highway Commercial zone. The Board does not accept the proposition of Mr. Dakin that it does not matter what land use designation is used, as long as the designation is site-specific. It is the Board's finding that for Official Plans to be effective, public statements of municipal intent they must be clear and precise, and that the changing of the land use designation as set out in Exhibit 35, would abandon the concept that this site should be developed in a manner that "will not destroy the essential open space nature of the land". The change in the lot coverage from 25% to 50 % in the Board's finding negates this very significant planning concept for this site.

It was also clear from the evidence of Mr. John that he no longer saw any merit in maintaining the open space character of the area, and wanted to make it abundantly

clear that this was a site available for new development. His opinion was not in the Board's findings supported by the overwhelming evidence that this site and surrounding area are an "Environmentally Significant Area", and a Core Natural Area within the Hamilton area adjacent to the Parkway Belt West Plan Area. A redesignation in the manner proposed would not in the Board's finding meet the test set out in sections, 5.16.2.1 and 5.16.2.2 of the Town of Dundas Official Plan

The Board has reviewed the land use designations as set out in the Town of Dundas Official Plan and would note that the self storage land use is found in the "Industrial" land use designation and that other lands within the Municipality have been designated for this purpose by the Official Plan of the Town of Dundas. Similarly the self storage facility land use has found expression and has been permitted by the Town Zoning By-law in the Industrial zone. The Board would note that the "General Commercial" designation is found generally in the Downtown area of Dundas and to install that designation albeit a special policy in this area, would send a wrong indication of the Town's (City of Hamilton) long term intent for this area. In looking to the new Urban Hamilton Official Plan, it is clear that additional locations for self storage units have been provided in the "Arterial Corridor" Designation as well as in Industrial designations, and identified Brownfield locations. No compelling need was demonstrated to the Board that the proposed additional use could not be located within these existing Industrial designations or in the newly proposed "Arterial Corridor" land use designation. The Board finds that sections 5.16.2.3, 5.16.2.5 and 5.16.2.6 of the Town of Dundas Official Plan, have not been justified to support the proposed new use of the site as shown on Exhibits 26b and c.

The Board heard conflicting opinions from the planning witnesses about the goals and objectives set out in the various Official Plan documents. The proponent's planners and the municipal planner assert that the proposal should be viewed from the perspective of the economic development objectives of the Official Plan and that the supporting information filed with the applications, have made a prima facie case that the property can meet the site plan, urban design and municipal engineering criteria of the municipality. Those opposed to the change rely on the open space and natural heritage goals and objectives of the 2005 PPS, the Places to Grow legislation, as well as the designations and policy directions found in the existing Official Plan documents; namely that this is an Environmentally Significant Area, that the existing open space designation with its limited commercial uses should remain and that this would be consistent as well

with the long term vision for the site as set out in the existing in force Official Plans and in the new Urban City of Hamilton Official Plan.

These matters go to the heart of Section 5.16.2.1 of the Town of Dundas Official Plan. The Board would note that Official Plans are policy documents that deal with a variety of topics and directions and that one must read them in their entirety and not just pick excerpts. It is the conclusion of the Board, after considering the applicable policy regimes that the Municipalities over the years have made conscious and deliberate planning decisions to maintain the open space character of this site due to its proximity to Cootes Paradise Wetland Complex, an Environmentally Sensitive Area. The Municipality has put policies in place to ensure that even limited development of the site is undertaken in a manner that respects the unique character of the area. The Board can find no compelling evidence that this intention has changed, nor does the Board find that changing the land use designation for this site to "General Commercial" albeit with a special policy restriction would meet the intent of Section 5.16.2.1 of the Town of Dundas Official Plan.

In this regard, the Board accepts and adopts the opinions of Mr. Berridge that the changing of the land use designation as proposed would abandon the fundamental planning concept that development may be permitted on this site provided that "will not destroy the essential 'open space' nature of the land."

The Board does not accept the opinions of several of the planners that the self storage facility is a "benign use" creating less impact than some of the existing uses now permitted for the site. In the Board's finding, the change proposed would announce a fundamental shift in the planning context for this site within the Town of Dundas' Official Plan and would demonstrate a clear willingness to accept other industrial or quasi commercial uses for this site which is not reflective of the long standing policy directions for this area which have been carried forward into the new Urban Official Plan for the City of Hamilton. If the amendments were approved, it would as Mr. John stated, make it clear that this was not an open space site but instead should be construed as a site to be fully developed. This in the Board's finding would alter the delicate balance established by current Official Plan policy for the sensitive development of the property.

The Board finds the notion that City Council would not allow sound stewardship practice to occur on the Volunteer Marsh, lands it currently owns, as incredible. The uncontradicted evidence was that the Applicant was willing to restore a portion of

Volunteer Marsh adjacent to his property that was impacted when the municipality constructed the CSO tank facility. He has also agreed to improve the slopes associated with the outlet stream from Lake JoJo. Both of these actions in the Board's findings would enhance the adjacent natural environment and should apply to the orderly development of the site under the current permissions. However, the Applicant's willingness to assist in the restoration and remediation of Volunteer Marsh while commendable is not a planning justification to amend the Official Plan designation for the site. One would anticipate that the same design criteria and stewardship responsibilities to enhance and protect adjacent natural areas would apply if the site was developed for some or any of the uses currently permitted.

The Board heard conflicting evidence regarding the compatibility of the proposed use with the adjacent land use designation as set out in the test found at Section 5.16.2.4 of the Town of Dundas Official Plan. The designations around the property are "Utilities and "Open Space" as shown on Schedule A to the Town of Dundas Official Plan. The lands immediately east of Olympic Drive are governed by the Parkway Belt West Plan and are designated as "Public Open Space and Buffer Area" with a recognition of the electric power facilities of Hydro One (Exhibit 45). These land use designations generally permit only open space uses together with public utility uses which according to the evidence of Mr. Berridge result in a low building coverage consistent with the open space and natural areas associated with the Cootes Paradise Area. The Applicant's planning witnesses on the other hand, characterized the area as having an industrial or mixed use feel and as such, the proposed self storage use would be compatible with the uses currently found in the immediate area. Compatibility in this view would be similar to the notion of Member Chapman when he stated in *Motisi v. Bernardi* (1987), 20 O.M.B.R. 129 at page 136:

...Being compatible with is not the same thing as being the same as. Being compatible with is not even the same thing as being similar to. Being similar to implies having a resemblance to another thing; they are like one another, but not completely identical. Being compatible with implies nothing more than being capable of existing together in harmony."

However, the Board finds that the test set out in section 5.16.2.4 goes beyond the simple test of uses "existing together in harmony". The test in this case is with

respect to the various Official Plan land use designations, their planned function, the structure, and character of the municipality of Dundas as found in a full reading of its Official Plan and its Land Use Designation Schedule. The evidence of Mr. John was quite clear that he sees the proposed Official Plan Amendment as a fundamental shift way from concept of limited development on the site that does not destroy the essential "open space" nature of the land and fully supports the new direction as found in the proposed Official Plan Amendment (Exhibit 35).

The insertion albeit of a special "General Commercial" designation into this area of the former Town of Dundas would in the Board's finding to be a fundamental shift away from the long standing planning directions set out in the Official Plan for this area. This new land use designation for this area would not in the Boards finding be compatible with the planned land use functions of the current or proposed Official Plans designations for the area and in the Board's opinion would have a destabilizing effect on the planned function for this part of Dundas. The Board finds that the land use designation as set out in the proposed Official Plan Amendment (Exhibit 35) would not be a compatible land use designation for this property as contemplated by Section 5.16.2.4.

It is the conclusion of the Board that the Official Plan Amendment application does not meet the tests for an Official Plan Amendment as set out in Sections 5.16.2.1, 5.16.2.2, 5.16.2.3, 5.16.2.4, 5.16.2.5 and 5.16.2.6 of the Town of Dundas Official Plan and on this basis alone the appeals should be dismissed.

The Board finds after considering all of this material and for the reasons given in this decision that no sound planning rationale exists to allow the appeals and to redesignate the lands as requested by the Applicant.

In light of the Board's decision with respect to the Official Plan Amendment, consideration of the Zoning By-law Amendment is moot.

Accordingly;

THE BOARD ORDERS that the appeal to amend the Official Plan of the Town of Dundas to redesignate 201 King Street East to permit a self storage facility is dismissed.

THE BOARD ORDERS that the appeal to amend Zoning By-law 3581-86 (Dundas) of the City of Hamilton as it relates to 201 King Street East to permit a self storage facility is dismissed.

This is the Order of the Board.

"J. P. Atcheson"

J. P. ATCHESON
MEMBER

