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DECISION/ORDER NO:
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Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL970953
PL000353

The Region of Halton has requested that The Ministry of Municipal Affairs and Housing refer an application to the Ontario Municipal Board under subsection 17(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, in respect to Deferral 9 to its Official Plan for the Region of Halton
OMB File No. O010049 (PL970953)

The City of Burlington has requested that The Ministry of Municipal Affairs and Housing refer an application to the Ontario Municipal Board under subsection 17(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, in respect to Deferral 22 to its Official Plan for the City of Burlington

Paletta International Corporation has requested that The Ministry of Municipal Affairs and Housing refer an application to the Ontario Municipal Board under subsection 51(15) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, in respect to a proposed plan of subdivision on lands composed of Part Lot 20, Concession 1 N.D.S. in the City of Burlington
24T-94005/B
OMB File No. S000031 (PL000353)

A P P E A R A N C E S :

Parties	**Counsel*/Agent**
Paletta International Corporation	Scott Snider*
Regional Municipality of Halton	Jeffrey Wilker*
City of Burlington	John Hart*
Niagara Escarpment Commission	Alison Mackenzie*
Conservation Halton	Robert Edmonston

DECISION DELIVERED BY J. de P. SEABORN AND ORDER OF THE BOARD

The matter before the Board is a Motion brought by the Regional Municipality of Halton (Region), the City of Burlington (City) and the Niagara Escarpment Commission (NEC) seeking an order dismissing, without holding a hearing, a draft plan of subdivision filed by Paletta International Corporation (Paletta), Deferral 9 to the Region's Official Plan (1995) and Deferral 22 to the City's Official Plan (1997). In the alternative, the government agencies seek an order adjourning the hearing until such time as Paletta files applications with the NEC for an amendment to the Niagara

Escarpment Plan (NEP) and development permits and all matters are referred to a Joint Board constituted under the *Consolidated Hearings Act*. The motion is supported by Conservation Halton.

Background

In March 1994 Paletta submitted a draft plan of subdivision for approval of a rural estate plan of subdivision, a permitted use under the City's Official Plan, the Region's Official Plan and the NEP. The 1985 NEP was amended in June 1994 and rural estate plans of subdivision were removed from the list of permitted uses. The *Niagara Escarpment Planning and Development Act* (NEPDA) was amended in 1999 to include a provision that a development permit is required prior to granting draft plan approval. The main issue before the Board is whether Paletta's plan of subdivision should be evaluated under the policies and legal requirements in place at the date of application.

The government agencies argue that the application was never complete and that it can only proceed under the existing policy framework. If the existing policy framework applies, then Paletta requires both a development permit from the NEC and plan amendments before it can proceed with its *Planning Act* appeal before the Board. Consequently, the agencies argue that it would be contrary to law and an abuse of process, to continue with an appeal under the provisions of the *Planning Act* in the absence of Paletta first obtaining the necessary approvals pursuant to the provisions of the *NEPDA*. In particular, the NEC argues that rural plans of subdivision were removed as a permitted use in the Escarpment Rural Area pursuant to the 1994 NEP, approved on June 15, 1994. Similarly, the most recent NEP, approved on June 1, 2005 does not allow rural plans of subdivision in the absence of a plan amendment. In addition to the requirement for a plan amendment, the provisions of the *NEPDA* now require Paletta to obtain development permits. For these reasons, the appeal before the Board should either be dismissed or in the alternative, adjourned *sine die*, pending Paletta's applications under the *NEPDA*.

Paletta argues that it is entitled to proceed under the policy regime and provisions in place as of the date of its application (March, 1994) which is prior to amendments made to the NEP which removed rural estates as a permitted use. Accordingly, Paletta submits that the motion to dismiss its application without a hearing

has no merit. The alternative relief sought, adjourning the hearing *sine die* until applications are made for plan amendments and development permits would require Paletta to proceed under a new and more stringent policy regime, effectively removing all development rights that it enjoyed at the date of its application.

Issues

The motion raises the following issues for determination by the Board:

1. Does the Board have the jurisdiction to dismiss the referral of the proposed plan of subdivision and the deferrals of the official plan amendments without holding a hearing.

2. Was Paletta's application properly filed in March, 1994.

3. Which policy regime applies to Paletta's application.

4. Should Paletta's appeal to the Board be adjourned pending applications for plan amendments and development permits.

Issue 1: Jurisdiction of the Board to Dismiss an appeal without holding a hearing.

The parties were in agreement that the Board has the jurisdiction to dismiss the appeals before it without holding a hearing and accordingly the Board finds that it has the ability to dismiss Paletta's appeal without the necessity of holding a full hearing. While the provisions of the *Planning Act* provide the Board with this jurisdiction, the Board will only do so in clear cases. On motions to dismiss, each case is decided on its own facts and in this instance, for the reasons that follow, the Board will not exercise its discretion in favour of the government agencies.

Issue 2: Was Paletta's application properly filed in March, 1994.

There was substantial and detailed argument presented to the Board with respect to the status of Paletta's application as of March, 1994. Counsel for the Region and the City argued that Paletta failed to meet the mandatory processing requirements for a plan of subdivision in the Escarpment Rural Area. The affidavit evidence filed in support of the motion outlined what transpired and the facts were largely not in dispute.

Rather, Counsel had differing views as to what interpretation the Board should place on the chronology.

By way of background, the Paletta lands are 32-hectares in size, located at the southeast corner of Cedar Springs Road and No. 1 Side Road in the former Nelson Township area of the City of Burlington. The draft plan of subdivision proposes the development of 24 rural estates, 1-acre lots and an internal street system. Surrounding land uses include rural residential subdivisions, rural residential development, some agricultural land and a golf course. At the date of the application, rural estate plans of subdivision were permitted on lands designated Escarpment Rural Area under the NEP and permitted under the Region's Official Plan. Under the City's Official Plan, the lands were designated residential and partly natural resources. The application was submitted to the Region on March 4, 1994, the requisite fee was paid and a file number was assigned. Paletta had undertaken other development in the area including the Mount Nemo Settlement Area, just 3 kilometres to the north, and accordingly had a reasonable understanding of the hydrogeological regime in the vicinity of the proposed development. However, no hydrogeological study was submitted with the application.

The Region acknowledged the application by letter dated March 15, 1994 indicating that if a decision is made not to circulate the application, Paletta would be notified. In addition, the Region noted that Paletta required a signed clearance letter from the City prior to circulation. That clearance letter was never obtained by Paletta and in August 1994 the Region repeated the need for such a letter yet went on to state that staff had met with the City and the NEC on the application and the Region would be forwarding it to the City on behalf of Paletta. There was no further correspondence on the application until September 25, 1996 when the Region sent a warning letter to Paletta indicating it would be refused due to inactivity.

On September 8, 1998 Paletta requested the Region to refer its application to the Board. The Region did not make any referral as requested and in March, 2000 Paletta repeated its request for referral. The Region recommended referral, along with deferrals of the Region's Official Plan (No. 9) and City's Official Plan (No. 22), and the matters were forwarded to the Board. There was no further activity on the application until a pre-hearing was convened in 2005 and a motion date was eventually set.

The Region's position is that without a hydrogeological study and clearance letter, mandatory requirements for a plan of subdivision, Paletta's application was never complete in the first instance. Accordingly, the application cannot be considered as properly filed as of March, 1994 and the policy regime in place as of the date of filing cannot apply to evaluate the plan of subdivision. The City submitted that in the absence of a complete application the Region had no authority to refer the matter to the Board and consequently the Board has no jurisdiction to hear any appeal. Counsel for the City argued that the application requirements under the *Planning Act* are mandatory and the Region and Paletta cannot grant jurisdiction to the Board by means of the referral.

Paletta argued that at the time the application was made, the Minister's power to approve a plan of subdivision had been delegated for many years to the Region under the delegation regulation (O.Reg.476/83), and Regional Council was required to adopt an application form for the receipt of applications. The form relied upon by the Region was never formally adopted as required by the delegation regulation and therefore the mandatory requirement for the hydrogeologic study and clearance letter were invalid and void. In short, the Region failed to fulfill its obligation to require that certain documents and studies form part of a completed application. Paletta cannot now be penalized for failing to provide sufficient information when it was never properly prescribed by regulation. Moreover, the Region ultimately made a referral and cannot now argue the application was defective in the first instance.

Considerable argument was presented to the Board on the issue of whether the application was complete as of its date of filing. The chronology of events indicates that there was considerable delay in processing Paletta's application by the municipal authorities. Similarly, there was no particular urgency on the part of Paletta to address the alleged deficiencies or to ensure its proposal was being evaluated in a timely fashion by the Region, City and the NEC. What is clear from the evidence is that the application, whether complete or not, was provided to the NEC and the City by at least the summer of 1994. Moreover, the Region ultimately referred the application, as filed in March 1994, to the Board. Accordingly, the Board will not dismiss the application without a hearing on the basis that it was allegedly "incomplete" when filed with the Region. In arriving at this finding the Board relies in particular on the position of Regional staff, set out in its planning report prepared in March, 2000 which

recommended referral to the Board of the Paletta application. While staff indicated that they considered the application incomplete they also stated that the referral was not frivolous or vexatious and that the application for a rural estate subdivision was a serious proposal. Significantly, staff recommended a pre-hearing be convened before the Board to determine which planning policies (as of March 1994, or subsequent policies) would be applicable to the application. Staff recommended that a decision be obtained as to whether the subdivision application could proceed to circulation without amending any or all of the plans. Put another way, a preliminary issue at any pre-hearing would be for the Board to determine which policy regime applied and that decision would dictate the next steps. Accordingly, consistent with the position taken by the Region in March 2000, the substantive issue to be determined on this motion is which policy regime applies. The Board will not therefore dismiss the application on the basis of incompleteness.

In considering the matter, it is clear that from the time the application was filed with the Region in March 1994 to the date of referral to the Board, there was delay by all parties. Paletta did not pursue its application with vigour, nor did the Region, City or NEC take consistent positions with respect to processing, commenting and advising Paletta of the status of its application. Therefore, the question becomes one of prejudice and in this regard the Board finds that it would be prejudicial to Paletta to dismiss its application without any hearing. The issue is therefore what type of hearing should be convened to consider Paletta's application.

Issue 3: Which policy regime applies to Paletta's application.

The pivitol issue in the motion was framed by the parties as which policy regime applies. At the time of the application, the policies of the NEP, the Region's OP and the City OP all supported the use of a rural estate plan of subdivision on lands designated Escarpment Rural Area. Those policies have since changed and plan amendments are required by Paletta to pursue its project.

There have been a number of decisions that have considered how applications should be evaluated when there is a change in the policy regime between the date the application was filed and the date of consideration of that application by the Board. The applicable principle, set out in *Clergy Properties v. City of Mississauga (City) (*1996), 34

O.M.B.R. 277, is that an application must be tested against the policy documents in place at the date of the application. The principle itself is straightforward and makes practical sense. The clear philosophy is that it would be contrary to natural justice to allow the rules to change after an application is filed. "This is particularly so in these times of increasing delay between the original application and eventual Board determination. The framework within which the matter is heard must be fixed and that should be on the date the original application is submitted" *(Halton (Regional Municipality of Halton) v. Halton,* (1991) O.M.B.D. No.417 at p. 2). Paletta's position therefore is that when it filed its application, rural estates were permitted and applying the *Clergy* principle, that policy regime must prevail. Accordingly, a strict application of the *Clergy* principle suggests that Paletta's appeal should only be evaluated under the policy regime in place as of March 1994 and that is the end of the inquiry.

However, the Board finds that the timeframes involved in this case are particularly relevant in deciding the matter. As of March 2000, the Region had clearly delineated the issue of which policy regime should prevail as a matter that should be addressed at a pre-hearing conference. The delay between 2000 and 2006 was, in part, attributable to delay at the Board, a circumstance for which the parties and Paletta in particular, should not in any way be penalized. As well, the Province introduced new policies (*Places to Grow and The Greenbelt Plan*) during that time frame relevant to the area and planning regime. What is relevant in considering the applicability of the *Clergy* principle is the time period between the date of the application in 1994 and the original request for referral in 1998. During this four year period there was no sustained effort by Paletta to pursue its appeal. Enquiries were made from time to time as to the status of the application. But the deficiencies raised by the City and the Region with respect to the application were not consistently addressed nor does the record suggest that Paletta was pursing its application for draft plan approval with any particular vigour. Paletta requested referral to the Board in 1998, some four years after the original date of filing its application. Counsel for the NEC made a compelling argument that the Board cannot apply the *Clergy* principle on the facts of this case. The submission to the Board in this regard was that the *Clergy* principle is not intended to be relied upon in circumstances where there is substantial delay. The practical result of the Board finding that the policies in effect as of March 1994 are the only policies applicable to Paletta's project would be to apply the policies contained in the 1985 NEP to a development

proposed some twenty years later, a circumstance that the NEC argues cannot possibly constitute good planning.

In support of its position, Counsel for the government agencies relied on the more recent decision of *James Dick Construction Ltd. v. Town of Caledon* (2003) O.M.B.D. No. 1195 which sets out a sensible rationale for the applicability of the *Clergy* principle. In particular, *James Dick* cites with approval the principle that policies passed after the application date, but before a decision on an application, can be considered by the Board in making a final decision (*Dumart v. Woolwich Township 36* O.M.B.R. 165). In fact, in *James Dick* the Board went further and found that the application must be reviewed on the basis of the most recent standards available, not on the basis of the policies in effect at the date the application was filed. Clearly, the passage of time since the date of the application and the hearing were instrumental in the Board's decision. Moreover, while the Board found there would likely be some level of prejudice to the applicant; some of the unfairness is mitigated by the fact that the applicant was fully aware from the outset that the policy environment was changing. Similarly, Paletta was aware that the NEP would be changing its policy to require plan amendments for rural residential estates. Paletta even participated in the public consulation process surrounding proposed changes to the NEP in 1994. Yet, Paletta made no effort to secure an early approval from the NEC. Rather, it relied on having filed its application prior to the change in policy and then failed to make a concerted effort to have the application considered by the appropriate municipal bodies.

The Board concludes that based on the facts of this case the *Clergy* principal cannot be relied upon by Paletta to entirely obsolve it from having its application evaluated under the current policy regime. However, the Board also finds that Paletta cannot be automatically frustrated in its attempt to obtain draft plan approval because the policy regime has changed. Accordingly, the Board finds that it would be prejudicial to Paletta to conclude that because there has been a change in policy, its rights to an appeal under the *Planning* Act are either lost or delayed. Paletta is entitled to a hearing. However, when evaluating the merits of the proposal for the lots, it is entirely appropriate for the Board to take into account the current policy environment. If after a consideration of these policies the Board determines that rural estate lots are either appropriate or inappropriate at this location, the Board will have done so based on

hearing all of the evidence. To do otherwise would be to dismiss Paletta's application on a "technicality". The reality is that considerable time has passed since the application was filed and "good planning" requires the Board to consider the appropriateness of the rural estate plan based on current circumstances. What is important is whether a rural estate plan is appropriate at this location and the Board requires evidence on planning merits as well as potential impact in order to arrive at a decision in this regard. The Board, therefore finds that given the application was filed when rural estate lots were permitted, Paletta is entitled to have a hearing. However, at the hearing it is entirely open to the government agencies to test the appropriateness, from a planning perspective, of rural estate lots given the passage of time since the date of the original application. Impacts and land use compatibility, in light of recent policy changes, will all be relevant factors.

Issue 4: Should Paletta's appeal before the OMB be adjourned *sine die* pending applications for plan amendments and development permits.

As indicated previously, there is no basis upon which to dismiss Paletta's application without the necessity of holding a hearing pursuant to the provisions of the *Planning Act*. However, to conduct a hearing ignoring the current policy regime would not be appropriate planning. Accordingly, the Board finds that while the application should be heard by the Board, the onus shall be on Paletta to show that the application constitutes good planning given current planning standards cannot be ignored by the Board in evaluating the application.

The NEC argued that the matter should be adjourned *sine die* in order that Paletta apply for an amendment to the NEP (and municipal official plans) and development permits. Refusal of these instruments would then be followed by a hearing before a Joint Board under the provisions of the *Consolidated Hearings Act*. The submission to the Board was that this approach would be more efficient and timely. The Board disagrees. In the event draft plan approval is given by the Board, Paletta will be required in any event to request development permits for each lot and satisfy any other legal requirements. The Board should first determine if draft plan approval constitutes good planning. If Paletta does not succeed, that is the end of the matter. If the Board determines rural estate lots are appropriate, Paletta has conceded that the

next step is for it to satisfy any other approvals it requires to proceed with the project. Accordingly, the Board finds that to adjourn the matter and wait for a Joint Board Hearing is not the most efficient way in which to proceed to have this matter resolved.

Decision

The motion to dismiss the appeal without holding a hearing is denied. The Board will convene a pre-hearing conference, upon the request of Paletta, following which procedural directions will issue and a hearing date shall be set.

This is the Order of the Board.

J. de P. SEABORN
VICE CHAIR