SUBJECT: Application to Amend the Flamborough Zoning By-law No. 90-145-Z for Lands Located at 245 4th Concession Road West (Flamborough) (PED07225) (Ward 15)

RECOMMENDATION:

That Zoning Application ZAR-06-36, Pauline Waddington, Owner, to amend the current Agricultural “A” Zone to add an auto repair and servicing business as a temporary use for a maximum period of three years, for lands located at 245 4th Concession Road West, former Town of Flamborough, as shown on Appendix “A” to Report PED07225, be denied on the following basis:

(a) That the proposal does not conform to the Greenbelt Plan, since non-agricultural uses are not permitted in Prime Agricultural Areas.

(b) That the proposal is not consistent with the Provincial Policy Statement (PPS), since non-agricultural uses are not permitted in Prime Agricultural Areas.

(c) That the proposal does not conform to the Hamilton-Wentworth Official Plan or the Flamborough Official Plan, since non-agricultural commercial uses are not permitted at this location.

Tim McCabe
General Manager
Planning and Economic Development Department
EXECUTIVE SUMMARY:

The purpose of the application is to amend the current zoning to add an auto repair and servicing business as a temporary use for a maximum period of three years in order to legalize the existing use of the property.

Staff does not support the application since it does not conform to the Greenbelt Plan, is not consistent with the Provincial Policy Statement, and does not conform to the Hamilton-Wentworth and Flamborough Official Plans.

BACKGROUND:

Proposal

The applicant has applied to amend the Agricultural “A” zoning of the subject lands, known as 245 4th Concession Road West (see Appendix “A”), through a Temporary Use By-law, in order to permit an existing auto repair and servicing business to continue for a maximum period of three years.

Based on the application submitted and a site visit conducted, the operation consists of an auto repair operation that takes place within a 112.5 square metre (1,210.93 square feet) framed garage. The garage is setback approximately 45 metres (148 feet) from the road and is screened by a two-storey dwelling and a solid board fence with a gate (see Appendix “B”).

Zoning By-law Amendment Application No. D14-FL

Zoning By-law Amendment Application No. D14-FL, which sought to legalize the existing auto repair and servicing business on the subject lands at 245 4th Concession Road West (Flamborough), was denied by the former Town of Flamborough Council on April 26, 1999. The decision was appealed by the applicant to the Ontario Municipal Board.

The Ontario Municipal Board, in its Decision/Order No. 0328, dated February 28, 2001, (attached as Appendix “C”), ordered that the appeal be allowed in part and the municipality be directed to prepare a Temporary Use By-law, that would legalize the existing automobile repair and servicing business for a maximum period of three years, along with a site plan. The prescribed three year period would allow the applicant to adjust the operation in accordance with the Board’s Decision/Order and continue operating for 3 years, or relocate the operation. When the owner did not submit a site plan application, the City of Hamilton (via outside counsel) sent a letter (attached as Appendix “E”) to the applicant’s solicitor (Mr. Derek R. Fazakas) informing that the applicant had yet to apply for a site plan approval and noted that without the site plan agreement and consequent amendment to the By-law, the auto repair and servicing business continues to be a violation of the City of Hamilton Zoning By-law. A site plan
application was never received and, as a result, the City of Hamilton did not prepare a Temporary Use By-law in accordance with the Board’s Order. The Ontario Municipal Board has indicated that it will not re-issue its Order and that the applicant should consult the municipality on how to proceed. The municipality has requested the applicant to proceed with the subject application due to a complaint made by a member of the public to the Building Services Division regarding the illegal use.

Complaints

The City’s Building Services Division received a number of complaints regarding the current use of the property, which were filed after the above-noted OMB Decision/Order (May, 1, 2003, April 7, 2004, May 11, 2004, September 7, 2004, and February 6, 2006). The complaints related to inoperable and unlicensed vehicles on the site, the garage being used as a workshop, the air pressure tools being used outside the garage, excessive noise coming from the site, and ongoing problems with noise and noxious odours/fumes due to the spray painting of vehicles in the garage. On the original May 1, 2003 compliant, staff investigated and did not identify any Zoning By-law infractions. Investigation of the May 1, 2003 complaint noted that in regard to the principles set down in the OMB Decision/Order for a Temporary Use By-law (cited on Pages 4 and 5 of this report), that conflicts with the principles existed in terms of both sons working in the garage but not residing at the site, and air pressure tools were being used outside of the garage when the compressor was working, with excessive noise resulting from the tools. In discussing these findings with the owner, Building Services staff was advised in each case that the owner intended to file a rezoning application to legalize the use. Staff is presently awaiting the outcome of the subject application.

Details of Submitted Application

Owner: Pauline Waddington
Applicant: D. Smith Equipment (477225 Ontario Ltd.)
Location: 245 4th Concession Road West (see Appendix “A”)

Description: Frontage: 22.86 metres (75 feet)
Depth: 70.10 metres (230 feet)
Area: 0.16 hectares (0.39 acres)

EXISTING LAND USE AND ZONING:

<table>
<thead>
<tr>
<th>Subject Lands</th>
<th>Existing Land Use</th>
<th>Existing Zoning</th>
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<tbody>
<tr>
<td>Single Detached Dwelling and Auto Repair and Servicing Shop</td>
<td>Agricultural “A” Zone</td>
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Surrounding Land Uses

<table>
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<tr>
<th></th>
<th>Agricultural</th>
<th>Agricultural “A” Zone</th>
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<tr>
<td>North</td>
<td>Agriculture</td>
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<tr>
<td>South</td>
<td>Single Detached Dwelling</td>
<td>Agricultural “A” Zone</td>
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<tr>
<td>East</td>
<td>Single Detached Dwelling</td>
<td>Agricultural “A” Zone</td>
</tr>
<tr>
<td>West</td>
<td>Agricultural (Poultry Farm)</td>
<td>Agricultural “A” Zone</td>
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**ANALYSIS/RATIONALE:**

1. The proposal cannot be supported for the following reasons:

   (i) The proposal does not conform to the Greenbelt Plan, since non-agricultural uses are not permitted in Prime Agricultural Areas.

   (ii) The proposal is not consistent with the Provincial Policy Statement (PPS), since non-agricultural uses are not permitted in Prime Agricultural Areas.

   (iii) The proposal does not conform to the Hamilton-Wentworth and Flamborough Official Plans, since non-agricultural commercial uses are not permitted at this location.

2. The Ontario Municipal Board (OMB) Decision/Order No. 0328 (attached as Appendix “C”), directed the City of Hamilton to prepare a By-law to recognize the existing auto repair garage for a maximum period of up to three years (expiring on February 28, 2004), subject to the following principles:

   “1) The permitted use be restricted to a maximum two-bay automobile repair garage and a single detached dwelling.

   2) The gross floor area shall be a maximum of 112 square metres for the automobile repair garage.

   3) Development on the site shall be as of the date of this decision to be represented in a surveyed drawing of applicable setbacks.

   4) Storage of vehicles, parts and related equipment shall be limited to the west boundary of the parking area, and the number of such parking spaces shall be determined by the appropriate municipal authority’s standards.
5) All servicing and repair operation shall be restricted to within the existing detached garage, which shall be wholly enclosed when the compressor is working.

6) The automobile repair garage shall be operated only by persons permanently resident on the premises.

7) All other zone provisions of Subsection 33.2 shall apply. Temporary Use By-law under s.39(1) of the Planning Act.”

The City's Building and Licensing Division received a complaint (dated May 1, 2003), and upon inspection, identified the following items as being in contravention of the principles cited in OMB Decision/Order No. 0328:

i) Both sons, who do not live at this location, were working in the garage.

ii) Air pressure tools were being used outside of the garage when the compressor was working, and excessive noise was being made by the air pressure tools.

Also, based on a site visit, staff identified several automobiles parked along the easterly lot line of the subject property, which is not consistent with the above noted principles outlined in the OMB Decision/Order.

The OMB Decision/Order states that “the prescribed initial three-year period will permit the operator to adjust his operations in accordance with this decision with consideration for his neighbour or to relocate to other less limiting locations”. The applicant has not adjusted the operation in accordance with the principles cited, or relocated the operation.

3. The applicable policies of the Greenbelt Plan, Provincial Policy Statement, Hamilton-Wentworth Official Plan, and Flamborough Official Plan prohibit the requested use and direct it to the Urban Area and Rural Business Parks in the Rural Area, which eliminate incompatibilities within Prime Agricultural Areas (see Pages 6-8). If the spray painting of vehicles is taking place on the subject property, the owner is also required to gain approval from the Ministry of the Environment under the Environmental Protection Act, as noted in the letter from pre-circulation (Appendix “D”).

4. On February 26, 1996, Flamborough Council adopted Official Plan Amendment No. 52 (Pages 9-10). The purpose of the amendment was to broaden the range of rural home based businesses and to facilitate a “forgiveness” programme for non-conforming rural home businesses (legal or illegal) which, like the subject requested use, existed prior to June 7, 1994, subject to certain conditions
including the appropriate rezoning process. Official Plan Amendment No. 52 was approved by the Region on December 10, 1996.

In regard to OPA 52 criteria, the neighbour immediately adjacent to the subject lands (Mr. Natilio Gago) has submitted a letter (attached as Appendix “D”), via solicitor Mr. Manfred Rudolph, in opposition of the application. The letter indicates that the existing auto repair and servicing business is incompatible with the abutting residential property, namely 243 4th Concession Road West. The City’s Building Services Section has received several complaints (dated December 19, 2001, May 1, 2003, April 7, 2004, May 11, 2004, September 7, 2004 and February 6, 2006) regarding excessive noise, the parking of inoperable vehicles, and noxious odours and fumes due to the spray painting of vehicles. Also, based on a site visit, staff acknowledged the outdoor storage of parts and vehicles, and the use of air tools with open bay doors.

As such, the use is noxious by reason of noise, odours/fumes, and the unsightly storage of goods to the extent of interfering with the use and enjoyment of surrounding properties. The proposal does not conform to the criteria in OPA 52.

5. Based on a conversation staff had with the agent, the purpose of the requested Temporary Use By-law is to permit the existing operation to continue for a three year period to allow the applicant time to re-locate the operation to a more appropriate location or to adjust the operation to relieve the neighbour’s concerns. As noted earlier, the approval from the Ontario Municipal Board, if implemented by By-law, would have expired on February 28, 2004 and, as such, the applicant has had ample time to relocate the operation to a more appropriate location or to modify his operation to satisfy his neighbour’s concerns. Furthermore, as noted earlier, the City’s Building Services Section (as a result of a complaint) has identified that the operation is in contravention of the principles cited in the Ontario Municipal Board Decision/Order.

ALTERNATIVES FOR CONSIDERATION:

The applicant has the option of using the property for the current range of Agricultural “A” Zone uses should the application be denied.

FINANCIAL/STAFFING/LEGAL IMPLICATIONS:

Financial: N/A.

Staffing: N/A.

Legal: As required by the Planning Act, Council shall hold at least one (1) Public Meeting to consider an application for a change in zoning.
POLICIES AFFECTING PROPOSAL:

Greenbelt Plan

The subject property is designated “Protected Countryside – Prime Agricultural” in the Greenbelt Plan. Policy 4.1.1 states that non-agricultural uses are not permitted within the Prime Agricultural Areas in the Protected Countryside. Also, Policies 3.1.3.1 and 3.2.2.1 state that normal farm practices, and a full range of “agriculture-related” and secondary uses, are permitted in Prime Agricultural Areas.

As the nature of the application is to allow a commercial use to continue, the proposal does not conform to the Prime Agricultural policies of the Greenbelt Plan.

Provincial Policy Statement

The application has been reviewed with respect to the Provincial Policy Statement (PPS). Policy 2.3.3.1 states that the permitted uses in the Prime Agricultural Area are agricultural uses, secondary uses and agriculture-related uses.

As the nature of the application is to allow a commercial use to continue that is not related to agriculture, the proposal is not consistent with the policies of the Provincial Policy Statement.

Hamilton-Wentworth Official Plan

The subject property is designated “Rural Area” within the Hamilton-Wentworth Official Plan. Policy 3.2.2 states that in most situations, non-agriculturally related recreational, commercial, industrial and institutional uses will not be permitted outside of the Rural Settlement Areas of Rural Business Parks. This policy also states that there are limited uses which may be considered in the Rural Area that would not interfere with farming or agricultural lands. These uses must be related to agriculture or resources found in the rural area or provide services to rural residents, or require land extensive holdings; and they must not be suited for locations in the Urban Area. The purpose of this policy is to relieve development pressures on farm land, minimize land use conflicts and competition, and prevent scattered development, all of which will enhance the sustainability of the Rural Area.

As noted earlier (Background – Page 2), the operation consists of an auto repair operation. This use is not related to agriculture or resources found in the Rural Area, and does not require land extensive holdings, and the applicant has not submitted any information to indicate that the use is geared specifically to rural residents. An auto repair operation is suited for commercial zoned land within the Urban Area where it can be made compatible.
Also, Policy 3.2.3.4 of the Hamilton-Wentworth Official Plan states:

“3.2.3.4 Direct Area Municipalities to include in their Official Plans policies which recognize and regulate industrial or commercial uses existing in the Rural Area at the date of adoption of this Plan. Such policies must contain provisions to minimize negative impacts on the surrounding areas.”

The Flamborough Official Plan was amended (via OPA No. 52) as directed by the above noted policy of the Hamilton-Wentworth Official Plan. As noted earlier (Comment 4 – Pages 5 and 6), the proposal does not conform to the relevant criteria for recognizing non-conforming commercial and industrial uses in the rural area.

As the nature of the application is to allow a commercial use to continue, which does not fulfil any of the above requirements for a location in the Rural Area or for recognizing non-conforming uses, the proposal does not conform to the policies of the Hamilton-Wentworth Official Plan.

Flamborough Official Plan

The subject lands are designated “Agriculture” on Schedule “B”, Rural Land Use Plan, of the Flamborough Official Plan.

Policies B.2.1 and B.2.3 of the Flamborough Official Plan outline the principle and ancillary uses permitted within the “Agriculture” designation. Policy F.6.7 outlines certain criteria for Temporary Use By-laws.

“B.2.1 The uses permitted in areas designated AGRICULTURE on Schedule ‘B’ shall be agricultural operations, including cultivated field crops, animal husbandry, perennial forage crops, greenhouses, nurseries, forestry and reforestation projects and fish and wildlife management or similar uses.

B.2.3 The following ancillary uses are permitted in the AGRICULTURE designation, subject to amendment to the Zoning By-law, provided that they are compatible with agricultural uses, support the agricultural economy, have no adverse impacts on ground and surface water systems and the capabilities of the land for safe septic disposal, and comply with all other provisions of this Plan:

(i) Farm implement dealerships.

(ii) Fertilizer and agricultural chemical sales.

(iii) Livestock assembly points, grain milling facilities and storage of fresh produce.
(iv) Small scale institutional uses (maximum land area of two hectares) which cater to the agricultural community.

(v) Residential uses in accordance with the policies of this Plan.

(vi) Tack shops.

F.6.7 Council, from time to time, may enact a Temporary Use By-law to authorize the temporary use of land, buildings or structures for any purpose which is set out in the By-law.

Such uses will be in accordance with the policies of this Plan. However, uses not allowed by the applicable policies of this Plan may be permitted if before passing a Temporary Use By-law, Council is satisfied that the following conditions are met:

(i) The proposed development or redevelopment must be of temporary nature without any buildings or structures that cannot be easily removed after the expiry date of the Temporary Use By-law.

(ii) The proposed use is compatible with the adjacent use.

(iii) The size of parcel of land and the buildings and structures is appropriate for the area.

(iv) Services such as roads, water and sewer supply, storm drainage and other appropriate services are sufficient to accommodate the proposed temporary use."

The proposed auto repair operation is not a permitted use, as outlined by the “Agriculture” policies of the Flamborough Official Plan. Also, the proposal does not satisfy the relevant conditions for a Temporary Use By-law, since the proposed use is not compatible with the adjacent residential and agricultural uses.

The following are relevant policies of Amendment No. 52:

“B1.11.5 It is recognized that certain non-conforming commercial and industrial uses may exist in the RURAL AREA which do not conform with the policies of this PLAN. Council may consider recognizing non-conforming uses, provided the following conditions are met:

(i) The use existed prior to June 7, 1994.

(ii) Recognition will not permit a change in use that would aggravate any situation detrimental to adjacent uses.
(iii) The use does not constitute a danger to surrounding uses and persons by virtue of its hazardous nature or traffic generated.

(iv) The use is not obnoxious by reason of odour, noise, vibration, dust, smoke, gas, fumes, interference with radio and television reception or unsightly storage of goods to the extent of interfering with the ordinary enjoyment of surrounding property.

(v) The use and/or storage of flammable or hazardous materials is prohibited.

(vi) The use is, or can be, serviced with an adequate water supply and sewage disposal system.

(vii) The use does not interfere with the desirable development of surrounding area, including the use of adjoining properties for agricultural use.

(viii) Appropriate zoning standards can be maintained.

Since the intent of this policy is to allow for the recognition of existing uses, any proposal for expansion or enlargement, or change in use shall:

(i) Include the demonstration that it is not practical to locate/relocate to an appropriate site in the Urban Area, a Rural Industrial Park or a Settlement Area.

(ii) Not consume good agricultural land.

(iii) Conform with Section F.10.5".

The proposal does not conform to the relevant criteria for legalizing non-conforming uses in the Flamborough Official Plan, as discussed in the Analysis/Rationale Section of this report.

The new Rural Hamilton Official Plan

The new Rural Hamilton Official Plan was adopted by Council on September 27, 2006, and has been forwarded to the Minister of Municipal Affairs and Housing (pending approval).

For information purposes, the subject property is designated “Rural” within the Rural Hamilton Official Plan. Policy D.4.1 states that the uses permitted in the Rural designation are limited to agricultural uses, agricultural-related commercial uses, agricultural-related industrial uses, and other resource-based rural uses and institutional
uses serving the rural community. Policy D.2.1.2 defines agricultural-related uses, while Policy D.4.1.1 a) defines resource-based uses.

“D.2.1.2 Agricultural-related uses are farm-related commercial and farm-related industrial uses that are small scale, producing products and services, wholly and directly related to farming operations and which are required in close proximity to an agricultural use. They are uses necessary to support agricultural uses…

D.4.1.1 Resource-Based Commercial and Resource-Based Industrial uses are permitted provided the following conditions are met:

a) The use must be directly related to and require a location on or in close proximity to a rural resource. Permitted resource-based commercial and resource-based industrial uses shall include commercial tree farms, retail greenhouses and nurseries, cement/concrete production, commercial water-taking, and sawmills.”

As the nature of the application is for the establishment of a commercial use which is not related to agriculture, does not require a location on or in close proximity to a rural resource, and does not fulfil any of the above conditions, the proposal does not conform to the policies of the Rural Hamilton Official Plan.

**RELEVANT CONSULTATION:**

The following Departments/Agencies had no comments or objections:

- Public Works Department (Traffic Engineering and Operations Section).
- Corporate Services Department (Budgets & Finance Division).
- Corporate Services Department (Revenues Division).
- Hydro One Networks Inc.
- Hamilton Conservation Authority.
- Union Gas.

**Public Consultation**

In accordance with the Public Participation Policy that was approved by Council on May 29, 2003, this application was pre-circulated to 14 property owners within 120 metres of the subject lands.

One letter (attached as Appendix “D”) was received in response to the pre-circulation letter. Concerns were raised regarding the incompatibility of the proposal with the neighbouring residential properties. An analysis of these concerns is discussed in the Analysis/Rationale Section of this report.
Notice of the Public Meeting for this rezoning application will be circulated to property owners within 120 metres of the subject lands, and through a sign posted on the property in accordance with the regulations of the Planning Act.

CITY STRATEGIC COMMITMENT:

By evaluating the “Triple Bottom Line”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Community Well-Being is enhanced.  ☐ Yes ☑ No

Environmental Well-Being is enhanced. ☐ Yes ☑ No

Economic Well-Being is enhanced. ☐ Yes ☑ No

Does the option you are recommending create value across all three bottom lines?

☐ Yes ☑ No

Do the options you are recommending make Hamilton a City of choice for high performance public servants?

☐ Yes ☑ No

:DF
Attachs. (5)
ISSUE DATE:  
Feb. 28, 2001

DECISION ORDER NO:  
0328

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

D. Smith Equipment - 477225 Ontario Ltd. 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 90-145-Z of the Town of Flamborough to rezone lands known municipally as 245 4th Concession Road West from "Agricultural - A" to "Site Specific Agriculture - A-60" in order to permit the lands to be used for an automobile repair garage in addition to the uses permitted in an Agricultural zone
O.M.B. File No. Z000124

APPEARANCES:

Parties                      Counsel
Peter Russell Waddington,    D. Fazakas
D. Smith Equipment and 477225
Ontario Ltd.                
(Former) Town of Flamborough K. L. Beaman
(Now) City of Hamilton       
L and M Gago                M. Rudolph

DECISION DELIVERED BY W. R. F. WATTY AND ORDER OF THE BOARD

Peter Russell Waddington is the owner of D. Smith Equipment Ltd. described by him as a small scale automobile repair and servicing business specializing primarily in engine and transmission servicing and particularly in older model volkswagen cars. He currently operates out of his home premises at 245 4th Concession Road West in the Town of Flamborough where he has constructed/modified and maintained a rear yard building for this purpose, and uses part of the rear yard and side yard driveway for parking and/or storage of vehicles. Mr. Waddington has appealed the refusal of the Town Council to enact a zoning by-law amendment with respect to his property under certain "amnesty" provisions enacted by the Town, which would have the effect of recognizing and regulating existing illegal uses, such as the subject.

This is a property comprising some 0.6 hectares or .40 acres with a frontage of
22.85 feet along the north side of the 4th Concession Road and extending approximately 70 metres or 230 feet to the north. It lies between a poultry rearing operation to the west and a string of rural non-farm residences to the east, the closest of which abuts the subject and is owned by L and M Gago, appearing with counsel in opposition to the appeal. On the south side of the concession road is also a string of residences, together forming a residential cluster of sorts.

It is not disputed among the parties as follows:

1. In 1995 policies of the Regional Municipality of Hamilton Wentworth were enacted in its Official Plan directing area municipalities to amend their Official Plans to "recognize and regulate industrial or commercial uses existing in the rural area at the date of adoption of this plan". In the language of the amendment it is recognized that such recognition may impact adjacent properties, and the plan requires: "such policies must contain provisions to minimize negative impacts on the surrounding areas". (Board's underlining).

2. In response to this direction, the then Town of Flamborough enacted Official Plan Amendment OPA 52 which is introduced in the basis of the amendment as follows: "Council deems it desirable and expedient to amend the Official Plan to allow for additional business development opportunities in the rural area, particularly as a means of assisting farm operators to supplement their incomes and as a result continue to farm, thereby retaining land for agricultural use. It is also considered appropriate to provide an opportunity through the planning process for existing non-conforming uses to be considered for recognition on a site-specific basis".

3. The language of the amendment as contained in Section B.1.11.5 .......
   "Council may consider recognizing non-conforming uses provided the following conditions are met:
   i) the use existed prior to June 7, 1994;
   ii) the recognition will not permit a change in use that would aggravate any situation detrimental to adjacent uses;
   iii) the use does not constitute a danger to surrounding uses and persons by virtue of its hazardous nature or traffic generated;
   iv) the use is not obnoxious by reason of odour, noise, vibration, dust,
smoke, gas, fumes, interference with radio and television reception or unsightly storage of goods to the extent of interfering with the ordinary enjoyment of surrounding property;

v) the use and/or storage of hazardous or flammable materials is prohibited;

vi) the use is or can be serviced with adequate water supply and sewage disposal system;

vii) the use does not interfere with the desirable development of the surrounding area, including the use of adjoining properties for agricultural use; and

viii) appropriate zoning standards can be maintained."

4. The appellant is one of some 32 applicants who responded to the Town’s invitation to regularize their uses. From the evidence of Pat Parker, the Town’s Planner, called under summons, only two applicants were denied rezoning, one of which was the subject despite the fact that planning staff had recommended approval in this case. The reasons for refusal were not obvious to the planner nor available to the Board except for the fact that the adjacent neighbour had opposed approval. (Exhibit 2 - Tab 10).

It is Ms Parker’s evidence that all of the rezoning approvals to recognize and regulate were in the form and style of Exhibit 2, Tab 10:

(a) permitting any use permitted in an "A" zone;

(b) permitting the use to be recognized;

(c) providing for a regulation limiting the maximum gross floor area;

(d) providing for the imposition of all of the other zone provisions of subsection 33.2 of the zoning by-law.

Consequently, in approving all other rezonings, no consideration was given to whether or not the rezoned properties met all other zone regulations. They were simply subject to the provisions of Subsection 32.2 in effect making them legal non-conforming, if they did not.

5. The proposal for rezoning of the subject as drafted by the Town’s planners is further expanded to address specific additional regulation included
because of their neighbours' concerns:

(a) storage of vehicles shall be limited to the west side of the parking area between the existing single detached dwelling and detached garage;

(b) the operation of any compressor shall be restricted to the existing detached garage which shall be wholly enclosed when the compressor is operating;

(c) the automobile repair garage shall be operated only by the members of the household residing on the premises;

6. Recognizing that the subject was not in conformity with some of the applicable regulations of the by-law the appellant's planner proposed that the zoning by-law amendment be further revised to recognize the deficiencies from the regulations of the zone as follows:

(a) a minimum lot frontage of 22.8 metres whereas the by-law requires 30 metres;

(b) a maximum lot coverage of 35% whereas the by-law establishes a maximum of 20%;

(c) a minimum front yard setback of 4 metres whereas the by-law requires 7.5 metres;

(d) minimum interior side yard setback of 0 metres in place of the by-law requirement of 1.8 metres;

(e) maximum lot coverage for an accessory structure of 6.8% in place of the required 5%. (Exhibit 2, Tab 1, 22)

To which it is suggested that a further provision needs to be made to recognize a minimum lot area of 1600 square metres in place of the by-law provisions of 2000 square metres.

It is however conceded by Edward Fothergill, the appellant's planner, that the above further provisions are approximate only, crudely measured by him without benefit of formal survey.

The Board finds from the evidence that there is no basis for disputing that Mr. Waddington operated a garage at the subject premises before June 7, 1984 as deposited
in corroborative statements of clients included in Exhibit 2, Tab 15. The Board finds for this purpose that it is irrelevant whether or not the intensity of use varied as Mr. Waddington's fortunes ebbed and flowed. Under cross-examination it was established that Mr. Waddington had, on at least two occasions, established a more expanded garage business elsewhere in the Town. It is not shown conclusively that garage repairs were ever interrupted or discontinued at the subject premises.

Mr. Waddington himself agrees that his neighbour, Mr. and Mrs. Gago, may have justifiable cause to complain about his operations on grounds of noise and unsightliness. He does not however believe that either can't be ameliorated to an acceptable level and to that end offered in Exhibit 2, Tab 14, to operational controls designed to address these perceived concerns as to:

- hours of operations
- controlled parking and storage of vehicles
- noise attenuation of work from within the building through insulation
- restricting use of the compressor to inside the building with the garage door closed

These offers were rejected by the neighbours.

The Waddington property consists of a family home occupied by himself, his wife and four children. The home is surrounded at least on the common lot line with the Gagos by a six-foot high solid fence, with fencing also along the front lot line. The garage building is located in the rear yard with some additional lands beyond to the rear lot line. It is separated from the residence by a paved apron towards the east (that is, towards the Gagos), on which Mr. Waddington stores vehicles awaiting repair. Towards the west side of the intervening area is an in-ground pool with a surrounding deck. The garage and parking area are accessed by a driveway between the two neighbours' homes with a security gate at approximately the front face of the residence. The driveway is used for angled family parking and for drop-off of vehicles for repair, when the gate is closed. A laneway continues past the garage to the rear yard where it is alleged by the Gagos, the appellant sometimes stores vehicles through rear exit doors at the back of the garage. The space between the garage and the common lot line is sometimes used for parking a trailer, on top of which from photographs in evidence the appellant appears to store various parts, equipment and materials.
The Gagos next door occupy an attractive residence on a lot of approximately similar dimensions. The driveway to their garage is along the same lot line as the subject – approximately 8 feet apart as stated by Mrs. Gago. Their bedroom is located in the north western corner of their home and by the evidence has clear view to the Waddington lot over the separator fence where they claim they have seen in excess of 30 cars awaiting repair. They have converted a rear accessory building into a carpentry and woodworking shop. Mr. Gago is in the house building business and admits to doing some related work there. He admits that the work is noisy, but he conducts it only within reasonable hours and on an intermittent basis. There is a row of trees between the two lots which affords some visual relief, but the trailer and the materials on top of it are clearly visible in spite of the fence and the vegetation. Mr. Waddington admits to having raised the roof of the garage ostensibly to provide additional clearance for storage of vehicular parts in the attic. In so doing, he also created dormer windows looking out to the east and his neighbours’ property.

Mr. Gago claims that in recent years, Mr. Waddington has intensified his operation to a degree that he finds it unacceptable. In his view nothing short of discontinuance of this use would be acceptable to him:

1) The hours of operation of his neighbour are preventing the peaceful and quiet enjoyment of his property.
2) The view from his property is one of unsightliness.
3) His evenings are disturbed by clients dropping off cars and blowing of their horns to alert Mr. Waddington, should the gate be closed.
4) Angled parking in the driveway and occasional on-street parking reduces site lines or obscures approaching traffic, creating a hazard.
5) These and other concerns including an appraisal report indicating a possible loss in property value fuel the objections of the Gagos.

On the other hand, the Board heard evidence from three neighbours in support of Mr. Waddington’s appeal. Mr. Venne lives directly opposite the subject lot and has no complaints as to noise, traffic or unsightliness. In fact, he has allowed Mr. Waddington to park the occasional car on his lot when necessary. Mr. Dick Lammers is the poultry farmer on a larger rural lot to the west. He states that chickens are by nature intolerant of loud noises and although his barn is 100 feet from the subject garage, they have not been adversely affected. Another neighbour, Mr. Jim Jutte, who claims to be sensitive to issues of environmental impacts and hazards came forward in support of the appeal. In his
opinion, this is an acceptable operation with little adverse consequences on this small community and the natural environment.

Clearly, the Gagos are likely to be the most affected by the application for rezoning and have raised a number of concerns which demand attention. The evidence is that they raised no complaints until the rezoning application was initiated, a circumstance which in default allowed what grew to be an illegal operation. It may well be that in recent years the garage repair business intensified causing greater concern to the Gagos. It may also be that the modification to the roof line and the construction of the dormer window finally taxed the Gagos' patience. Even so, it is untenable to accept the argument of counsel for the Gagos that these actions, by themselves as proof of illegal conduct by Mr. Waddington, are sufficient to refuse his application. On the contrary, the Board finds that it is actions such as these that the OPA 52 and now the proposed rezoning now seek to recognize and regularize. Prior residency by the Gagos, evidence of exemplary conduct as law abiding citizens, and their patience in suffering through these annoyances are not sufficient to disenfranchise Mr. Waddington from applying for "recognition". Whether or not he should be recognized depends on his qualification under Section B.1.11.5 of the Official Plan.

These tests were reviewed by both Mr. Fothergill and by Mr. Dorfman, a planner called by the Town. The Board finds as follows:

1) The use existed prior to June 1994. The appellant qualifies under this provision.

2) The recognition will not permit a change in use that would aggravate any situation detrimental to adjacent uses.

While the range of activities circumscribed by "the existing use" may be many and varied, the Board finds that this range of uses may be appropriately limited under rezoning to reduce existing irritations and aggravations and to ensure that no opportunity arises for increased adverse impact on the future. The appellant has agreed that the definition of Automobile Repair Garage No. 96-92-Z in this case be further amended to delete "the installation of undercoating".

3) The use does not constitute a danger to surrounding uses and persons by virtue of its hazardous nature or traffic generated.

From all of the evidence it is adequately demonstrated that provisions have been satisfactorily made for collection and disposal of waste materials. As to traffic hazards, it lies with the Town to enforce no on-street parking
regulations, if such be the case, and to enforce any front yard parking prohibitions.

4) The use is not obnoxious or unsightly.

All evidence points to certain obnoxious and unsightly features of Mr. Waddington’s operations which are sufficient to cause concern to one of his neighbours. The degree of adverse impact is difficult to assess from the evidence due in part to few complaints, inadequate investigation by municipal officials and poor enforcement. Given the above, the Board finds that any approval should be based on strict guidelines and performance criteria which can be monitored as input to any permanent approvals.

5) Use and storage of flammable or hazardous material is prohibited.

Such materials are not necessary for the operation of the facility.

6) Provision for adequate water supply and sewage disposal system.

Adequate facilities are available to this site for the purpose intended.

7) The use does not interfere with the desirable development of the surrounding area including the use of adjoining properties for agricultural use.

Except for the Gagos, none of the surrounding land owners have concluded that the development and use of the properties will be affected by this application. How serious this impact is on the Gagos is very much in doubt. That notwithstanding, much can be done by Mr. Waddington to improve the desirable use and enjoyment by his neighbours of their property.

8) Appropriate zoning standards can be maintained.

The Board finds it inappropriate to judge the acceptability of this rezoning within the regulation of the by-law for “Industrial” uses in the Automotive Commercial Zone. The purpose of rezoning is to recognize and to regulate such uses in such a manner that the standards are appropriate to the type, nature, and impacts of the use to be recognized.

It is agreed that confident reliance cannot be placed on the measurements of distances, areas and setbacks entered by Mr. Fothergill in Exhibit 2, Tab 22. The Board finds, however, that if necessary, recognition and regulation can be contingent on a
professionally prepared site plan drawing which adopts the existing automobile garage operation facility location, dimensions and setbacks.

The Board therefore finds that the proposed use might be recognized for a period not exceeding three years from date of this order and the appropriate regulations be governed by the following principles:

1) The permitted use be restricted to a maximum two-bay automobile repair garage and a single detached dwelling.

2) The gross floor area shall be a maximum of 112 square metres for the automobile repair garage.

3) Development on the site shall be as of the date of this decision to be represented in a surveyed drawing of applicable setbacks.

4) Storage of vehicles, parts and related equipment shall be limited to the west boundary of the parking area, and the number of such parking spaces shall be determined by the appropriate municipal authority's standards.

5) All servicing and repair operation shall be restricted to within the existing detached garage which shall be wholly enclosed when the compressor is working.

6) The automobile repair garage shall be operated only by persons permanently resident on the premises.

7) All other zone provisions of Subsection 33.2 shall apply. Temporary use By-law under s.39(1) of the Planning Act.

The Board orders that the appeal is allowed in part and the municipality is directed to prepare a consistent with the above criteria along with a site plan drawing showing the recognized use areas as presently existing and dimensions and setback distances for attachment to the by-law.

The Board finds that the prescribed initial three-year period will permit the operator to adjust his operations in accordance with this decision with consideration for his neighbour or to relocate to other less limiting locations. It will permit the Gagos an opportunity to respond to the adjusted noises and views. It will permit the municipality to assess on its own volition or on complaint, the subject operations as a basis for any future reconsideration of this application.
June 12, 2006

Mr. David Falletta
Development Planning
Planning 7 Economic Development Dept.
Development Division (West)
City of Hamilton
71 Main St. W., 7th Floor
Hamilton, Ontario
L8P 4Y5

Dear Sir:

Re: Zoning Amendment Application ZAR-06-36
Applicant - 477225 Ontario Ltd. (D. Smith Equipment)
245 - 4th Concession Road West, Flamborough, Ward 15
Our Client/File #: Gago - 40643

Further to our recent telephone conversation, this will confirm that I represent Natilio Gago who owns and resides at the property known municipally as 243 4th Concession Road West in Flamborough. It is immediately adjacent to the subject property.

Mr. Gago wishes to register his very serious concerns about the continued use of the neighbouring property as an auto repair and body shop. It is his position that such a use is totally and utterly incompatible with the legal residential use of his property.

Furthermore, the operation has continued illegally since temporary approval at the Ontario Municipal Board expired in 2004. In addition, the operation continues without appropriate certificates of approval under the Environmental Protection Act for the spray painting of vehicles which occurs on the site.

In Association with Scarfome Hawkins LLP
In light of the owners' disregard for the zoning by-laws and the requirements of the Environmental Protection Act, and in addition to the incompatibility of the use in and of itself, it is respectfully submitted that this application should be denied without question.

Finally, any suggestion that the Greenbelt legislation or the Minister's orders prior to the passage of the Greenbelt somehow prevented the owner from moving to ask for approval of his use when his temporary permission expired in 2004 is totally without merit. Bill 27 - an Act to establish a greenbelt study area which received royal assent on June 24th, 2004 clearly allowed the municipality to approve the extension of the temporary use under Section 39 of the Planning Act. Rather than pursue his clear rights to extend the temporary use that the Board permitted him at the subject property, the owner, as is his history, chose to continue to use his property for an illegal use without any colour of zoning right. Unless and until this particular property owner is forced to deal with the illegality at his property, his track record is to stick his head in the sand and hope nobody notices.

In all of the circumstances, then, we respectfully submit that this application should be denied.

Yours truly,

Rudolph Law Office

Manfred Rudolph
June 22, 2001

Dear Sir:

RE: ZONING APPEAL - D. SMITH EQUIPMENT
245 - 4TH CONCESSION ROAD WEST, FLAMBOROUGH
(NOW CITY OF HAMILTON)
OUR FILE NO. 10-1676

The Ontario Municipal Board issued its Decision in this matter on February 28, 2001. The Decision requires a site plan be prepared of your client's lands before the by-law specified in the Decision can be implemented.

I am advised by City staff that your client has yet to apply for this site plan agreement. Please be reminded that, without the site plan agreement and consequent amendment of the by-law as authorized by the Ontario Municipal Board, your client's land use continues to be a violation of the zoning by-laws of the City of Hamilton. I will have no alternative but to refer this matter to the City of Hamilton enforcement staff unless your client takes immediate steps to apply for the site plan agreement that is required to implement the change in zoning.

Please advise your client of this warning at your earliest convenience.

Yours very truly,

[Signature]

Kenneth L. Beamam

XLB: bh
bcc: Ms. Nancy Smith, Assistant Corporate Counsel
bcc: Mr. Peter Delulio