

ISSUE DATE:  
**MAY 28, 2008**



PL080074

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Joe Kimpson 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 150-85 of the City of Cambridge to rezone lands respecting 1500 Kossuth Rd to approve a temporary use by-law for a period of three years. (OMB File PL080074)

**APPEARANCES:**

**Parties**

City of Cambridge

Flag Raiders Inc.

Region of Waterloo

**Counsel**

John Cosman

Harold Elston and D. Berney

D.Leggett

**MEMORANDUM OF ORAL DECISION DELIVERED BY S. J. SUTHERLAND  
ON MAY 13, 2008 AND ORDER OF THE BOARD**

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Joe Kimpson (Applicant/Appellant) owns a property at 1500 Kossuth Road in the City of Cambridge (subject property). He is requesting an amendment to Zoning By-law 150-85 in the form of a Temporary Use By-law (TUB) to permit the continued use of approximately 4.3 ha (10.6a) of the 24.6 ha (60.8a) site for the purpose of operating commercial/recreational establishment for a period of three years. The existing commercial/recreational use (outdoor paintball games) was first permitted for a period of three years in a TUB in 2001, and for a further three years in 2004. The current application seeks to extend the temporary use for another three years. The application was denied by the Council of the City of Cambridge (City).

The Applicant/Appellant is appealing Council's decision on the basis that:

- Council previously approved TUBs for the subject property.

- The recreational/commercial use was site plan approved by the City.
- The existing Agricultural use will be maintained except for the portion previously designated under the TUB as recreational/commercial.

At the commencement of the hearing, Mr. Elston, counsel for the applicant/appellant, told the Board that he was coming forward with an amended application requesting an extension of the TUB for a period of three months rather than three years because his client believed he had found a property to which he could relocate his operation. Mr. Elston requested a short adjournment for the purpose of discussing this amended application with the City and Region of Waterloo (Region). Counsel for the City replied that his instructions were to oppose any TUB for the subject property, and that the paintball operation had, in fact, been operating illegally on the property since February of 2007, when the second extension to the TUB expired and now will be closed down on May 24, 2008. That being the case, the Board found no purpose would be served by an adjournment.

David Aston gave expert land-use planning evidence on behalf of the applicant/appellant. The core of Mr. Aston's testimony was that there is nothing different in the current application from the two previous applications, which were approved by Council. He pointed to Section 24(1) of the *Planning Act*, which requires all by-laws to conform to the Official Plan (OP). He also stated that a TUB may be passed under Sections 34 and 39 of the *Planning Act*. He maintained that the TUB being sought conforms to Sections 11.5.1 and 11.5.2 of the OP, and maintained that 11.5.2 of the OP authorizes Council to pass a temporary use by-law for any use in any District that is otherwise prohibited by law. He stated that approval of the requested TUB conformed to the City's OP as it meets the intent of 11.5.2 of the OP.

Mr. Aston introduced a letter from lawyer David R. Sunday, of the firm of Gowling LaFleur Henderson, on the subject of whether Council has the authority to enact a TUB where there is debate as to whether the proposed use complies with the OP or the Regional Planning Policies (ROPP). In his reply, which stated that Council did indeed have such authority, Mr. Sunday stated "Council's earlier decisions followed municipal staff's advice that the proposed temporary use by-law was in conformity with the OP and ROPP by virtue of Policy 11.5.2" (Exhibit 10).

The open portions of the site are designated Class 1 (Prime) Agricultural in the Official Plan, which permits agricultural, and agricultural-related uses and recreation activities that existed when the OP was enacted. The paintball operation did not exist at that time. The woodlot and wetland portions of the property are designated Class 1 (Significant Natural Features) Open Space, which permits limited uses, including passive recreational activities and outdoor education and research. The wooded portions of the property include a wetland that is classified by the Ministry of Natural Resources as a Provincially Significant Wetland

Janet Babcock, Commissioner of Planning Services for the City, gave expert testimony on behalf of the City. Ms Babcock stated that neither planning staff at the City nor the Region had ever supported a TUB for the site precisely because they did not believe that it was in conformity with the OP or the ROPP. She directed the Board's attention to reports in Exhibit 11 dating back to 2000 which state categorically that the use does not comply with the OP. In her expert testimony on behalf of the Region, planner Brenna MacKinnon said the same applied to the ROPP.

Ms. Babcock told the Board that previous Councils had approved the TUB despite staff's advice that the use did not comply with the OP, which it must under the *Planning Act*, but those decisions had never been challenged at the Board. This time, she said, Council refused the TUB on the basis that the use did not comply with the OP. She also stated that both 11.5.1 and 11.5.2 of the OP state that "by-laws may be passed in accordance with the *Planning Act*" and added, "that is where you have to start." This does not, in her opinion, allow for "any use in any District that is otherwise prohibited by law."

She also stated that the use does not conform to the Provincial Policy Statement (PPS).

It was her expert opinion that the application does not represent good planning, and is contrary to the *Planning Act* as it is not in conformity with the OP or the ROPP.

Ms MacKinnon also stated that the use is not in conformity with the PPS.

Corey Kimpson, sister of the Applicant/Appellant, told the Board that she and her brother have been trying very hard to find another site for the paintball operation and

believe they have found one. She said they have already taken measures to move Flag Raiders Inc., although they may have to make an application to rezone the target property. She said paintball is growing in popularity and that Flag Raiders Inc. will need more space in any event. She said they have “absolutely no intention” of applying for another TUB.

It is the Board’s opinion that there has been, from the first application for a TUB, consistency in the opinion of successive professional planning staffs at both City and the Region that the use does not conform with either the City’s OP or the Region’s ROPP. The Board does not accept the position of Mr. Aston that Section 11.5.2 of the City’s OP would permit “any use in any District that is otherwise permitted by law”. To accept this argument would be ignoring the words “It is the policy of the City that by-law may be *passed in accordance with the Planning Act*”. As Mr. Aston himself acknowledged, Section 24.1 of the *Planning Act* requires conformity with the OP.

That previous Councils ignored the advice of staff that the use was not in accordance with the OP is not the issue. Councils do not always take the professional advice of their staffs, sometimes at Council’s peril. The current Council did take staff’s advice and refused a further extension of the TUB.

When rendering the oral decision, the Board was working under the assumption that what was being sought was a new TUB. Upon reviewing evidence and notes, the Board now realizes that it is not a new TUB, but an extension of the current TUB that is being asked for. Under the amended application, the extension is for three months, not the three years of the original application. Were it for three years, the Board would dismiss the appeal. The Board finds the expert testimony of Ms Babcock convincing and compelling, and accepts that the use is not in accordance with either the OP or the ROPP.

The Board, however, has no desire to close down Flag Raiders Inc. immediately when there may be a possibility of it relocating in the near future. It does not, at this point, seem reasonable to do so, given the undoubted importance of the summer season to the operation. The Board reminds the Applicant/Appellant of Ms Kimpson’s statement that Flag Raiders Inc. has “absolutely no intention” of seeking a further

extension to the TUB. In any event, the Board feels that such an extension would be, to say the least, difficult to come by given the evidence heard at this hearing.

The Board therefore Orders that the appeal is allowed and that Zoning By-law 150-85 be amended in the form of a Temporary Use By-law to expire on August 31, 2008, at which time the operation of Flag Raiders Inc. at its current location under By-law 150-85 shall cease.

The Board so Orders.

“S. J. Sutherland”

S. J. SUTHERLAND  
MEMBER