

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



**ISSUE DATE:** April 04, 2017

**CASE NO(S):** PL151130

**PROCEEDING COMMENCED UNDER** subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Coalition For Rural Ontario Environment Protection
Subject:	By-law No. 15-238
Municipality:	City of Hamilton
OMB Case No.:	PL151130
OMB File No.:	PL151133

**Heard:** November 22 and 23, 2016 in Dundas, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

Coalition for Rural Ontario  
Environmental Protection

Peter Pickfield and Arthur Ho

City of Hamilton

Joanna Wice

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

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**INTRODUCTION**

[1] The matter before the Board is an appeal made by the Coalition for Rural Ontario Environmental Protection ("CROP") in respect of Rural Hamilton Official Plan Amendment No. 9 ("RHOPA 9"), By-law No. 15-173, and By-law No. 15-238. These planning instruments are applicable to the rural area of the City of Hamilton ("City"). The focus of CROP's appeals are the proposed policies and regulations dealing with landscape contracting businesses and in particular, the proposed "grandfathering" of 61

existing operations (situated in the former Towns of Flamborough and Ancaster) through the enactment by City Council of Special Exception 253.

[2] Counsel for CROP worked with the City to scope the issues, resulting in a proposed settlement of certain aspects of the appeals. At the conclusion of the November 2016 hearing, the Board was asked to withhold its decision on the appeal of Special Provision 253 (also referred to as Special Exception 253) until it was known if Council would support the other aspects of the appeal that were tentatively resolved. Those matters having been resolved at a settlement hearing held on March 3, 2017 (and addressed by a separate order of the Board), the matter of Special Exception 253 is disposed of in accordance with these reasons and order of the Board.

[3] The issues raised by CROP's appeal of Special Exception 253, include: the proposed zoning designation of all properties subject to Special Provision 253 (By-law 15-173, para. 9); Exception 253 in its entirety as it pertains to the properties listed in the By-law (By-law No. 15-173, para. 10); and By-law No. 15-238 (in its entirety). In support of the CROP appeal, evidence was provided by Allan Ramsay, qualified to provide opinion evidence in the discipline of land use planning. Evidence was also provided by John Bennett and John Rowe, members of CROP. Both Mr. Bennett and Mr. Rowe reside adjacent to landscape contracting businesses. The City did not call any evidence, but participated throughout the hearing through cross-examination and argument in support of the decision taken by Council. Several of the landscape contractors which benefit from the provisions of Special Exception 253 were afforded participant status during the initial pre-hearing process and testified at the hearing in support of the planning instruments under appeal, including: Tammi Perreault; Brad Paton; James Feenstra; Phil Zylstra; Jamie Holmes; Debra Shelton; Trevor Toplinski; Craig Graynor; Catherine McMaster; and Tony Di Giovanni, representing Landscape Ontario. The collective position of these participants (several of whom amalgamated their evidence and testified on behalf of their neighbours) was that Special Exception 253 was designed to recognize long standing businesses in the community, support established landscape contractors who make a significant contribution to the local economy and to protect (as opposed to permit any expansion) existing operations. It

was the position of the City and the participants that Special Exception 253 should be in full force and effect, as directed by City Council.

## **EVIDENCE AND FINDINGS**

[4] By way of background, the appeals were filed in the context of the City's review of its rural area OP policies and zoning regulations, which were eventually enacted in July, 2015. Following the amalgamation of the City, a program was initiated to harmonize the zoning by-laws of the various municipalities. The review was undertaken in several phases and the review of rural zoning regulations commenced in 2010. That review was put on hold, pending approval of Rural Hamilton Official Plan ("RHOP") which occurred on March 12, 2012 and staff re-commenced work on its rural zoning review in 2013. A number of open houses were held in 2013 and 2014 in the former municipalities that now constitute the City. While the rural zoning review tackled several issues, what is relevant to these appeals are the provisions relating to landscape contracting business. Recommendations, including amendments to the RHOP and to the zoning affecting all uses in the rural area, were provided by staff in March 2015. On April 8, 2015, City Council directed staff to incorporate changes to the rural zoning by-law to permit and recognize rural landscaping contracting establishments existing as of March 31, 2015. The necessary by-law amendments were enacted by Council in July 2015. In addition, RHOPA 9 was adopted by Council, the purpose of which was to amend certain policies, add new policies and most significantly, amend mapping within the RHOP to enable the implementation of new rural zoning (Exhibit 1, Ramsay witness statement, para. 10).

[5] As indicated above, several modifications were agreed to between the City and CROP and are addressed in a separate Board Order, issued on consent and following a settlement hearing held on March 3, 2017. The Board's Order modifies RHOPA 9, clarifying (among other matters) that in the rural area Landscape Contracting is permitted secondary to a Nursery and subject to several conditions and in accordance with the applicable zoning. The overall intent is to clarify that a landscape contracting business is secondary to the main agricultural use and to provide detailed regulations

and standards for these operations in the rural area. These modifications will provide clarity and certainty going forward. However, the one area (and related policy and zoning provisions) that CROP and the City could not agree upon was the introduction of Special Exception 253, which was devised to permit the continued operation of non-conforming landscaping businesses in the rural area. It is this aspect of the appeal and related planning instruments that this decision addresses.

[6] As indicated above, Special Exception 253 was enacted for the purpose of recognizing rural landscaping contracting establishments in Ancaster and Flamborough that were in existence as of March 31, 2015. City Council determined as part of the rural zoning review that it wanted to establish a program to permit and recognize existing rural landscape contracting establishments. Some operators would be able to secure legal non-conforming status, while other operators who did not establish their businesses in accordance with the in-force zoning, would become illegal non-conforming uses. Accordingly, a motion was adopted by Council on April 8, 2015 and provided:

- (a) That staff be directed to incorporate into the proposed amendments to the *Rural Hamilton Official Plan and Zoning By-law No. 05-200*, such changes as are necessary to permit and recognize rural landscape contracting establishments existing as of March 31, 2015 located in Ancaster and Flamborough, provided the establishments inform the City of the address or property description of the business;
- (b) That those rural landscape contracting establishments existing as of March 31, 2015 located in Ancaster and Flamborough that contact the City by no later than May 15, 2015 be included in the proposed amendments to the comprehensive Zoning By-law as special exceptions;
- (c) That for those rural landscaping contracting establishments existing as of March 31, 2015 located in Ancaster and Flamborough that identify their lands after May 15, 2015 and no later than August 30, 2015, that a onetime

separate by-law amendment be prepared to incorporate these lands into the comprehensive Zoning By-law as special exceptions and presented to the October 6, 2015 Planning Committee; and,

- (d) With respect to clause sub-section (c) above and in accordance with Section 34(17) of the *Planning Act*, no additional public meetings shall be required.

[7] The program was promoted throughout the community by the local Councilor, Landscape Ontario and the Flamborough Chamber of Commerce. As a result, 38 landscaping businesses initially responded to the City, followed by a further 23 operators, each indicating that they wanted their existing operations to be recognized as a permitted use. Each operator applying for the exemption was required to delineate on a map that portion of their property dedicated to landscape contracting. The rationale for setting out the actual area for each property dedicated to landscape contracting was to ensure that the special permission (or exception) would be restricted to existing operations and not be relied upon as a basis for any expansion. Approximately 61 operators (located in Ancaster and Flamborough) are subject to Special Exception 253, albeit during the course of the hearing it became clear that some of these operators would qualify in any event as legal non-conforming uses. That is, despite applying to the program, certain landscape contractors do not in fact require application of Special Exception 253 to their lands to continue to operate their businesses.

[8] The position of CROP and the opinion of Mr. Ramsay was that Special Exception 253 does not conform to Provincial policy, the RHOP or the proposed policies of RHOPA 9. CROP's argument was that landscaping businesses are not permitted in rural areas of the City and are supposed to operate in designated urban areas. CROP argued that Council's attempt to permit otherwise illegal non-conforming uses in the rural area via Special Exception 253 fails to conform to the policies of the RHOP and the policies of the Greenbelt Plan and in addition, is not consistent with the Provincial Policy Statement ("PPS"). The City argued that both conformity and consistency are achieved. More significantly, if CROP's appeal is allowed, the majority of the 61 operators who have obtained exemptions under the program will be forced to cease

operations at their current locations. The City's position throughout was that the action taken by Council reflects an appropriate balance of interests, addressing the concerns of rural residents regarding potential nuisances associated with the landscape contracting use against the reality that there are appropriate locations for landscape contractors to operate in the rural area. Moreover, the City argued, many landscape contractors are permitted to continue their operations because they were established in conformity with the in-force zoning in Ancaster and Flamborough. The exemption is intended to achieve parity across the rural area by permitting operations that, in most instances, have been established for years. In short, the use does exist in the rural area and that reality should be recognized. Appropriate policies are in place for the establishment of any new landscape contracting business in the rural area as set out in the policies of RHOPA 9 (as modified) and the associated zoning regulations, as revised.

[9] Mr. Ramsay reviewed the applicable policies, concluding that the provisions of proposed By-law No. 15-173 and proposed By-law No. 15-238 which recognize and permit the landscaping businesses listed in Special Exception 253 do not conform to the RHOP and the Greenbelt Plan and are not consistent with the PPS. It was Mr. Ramsay's opinion that City staff had held a similar view and the motion by Council to establish the program whereby operators could apply for the exception is contrary to the policy structure of the RHOP and the Greenbelt Plan. On this basis, Mr. Ramsay concluded conformity is not achieved.

[10] The zoning regime applicable to the former Town of Flamborough and Town of Ancaster permitted several landscape operations by way of site specific exceptions. These businesses are considered to be legal conforming uses and under proposed By-law No. 15-173, these uses would continue their legal conforming status (Special Exception 103). Mr. Ramsay indicated that the landscape operators within Flamborough identified in Special Exception 253 are considered to be non-conforming uses "as these uses are not permitted by the Flamborough Zoning By-law. Furthermore, these uses can be described as "illegal, non-conforming" since these uses were established in contravention to the zoning in effect at the time" (Exhibit 1, Ramsay

witness statement, para. 43). With respect to the former Town of Ancaster, under By-law No. 87-57 a Landscape Gardener is only permitted as a site specific exception. Those businesses listed are legal conforming uses and in Mr. Ramsay's view, all of the landscape operators located within the former Town of Ancaster and identified in Special Exception 253 are (like Flamborough), non-conforming uses as they are not permitted by the Ancaster zoning by-law (Exhibit 1, Ramsay witness statement, para. 49).

[11] Mr. Bennett explained that he is one of the founding members of CROP, a small ratepayers group formed and incorporated in April 2015 for the purpose of addressing environmental and planning issues in the rural area, in particular issues related to landscaping operations. CROP includes about 12 members and was incorporated in 2015 for the purpose of addressing concerns with landscape contractors and issues generally pertaining to the Green Belt Plan. Mr. Bennett has participated in the planning process considering policy and zoning modifications applicable to the rural area and his family has lived on Orkney Road, in the former municipality of Flamborough, since 2000. The property (about 13 acres) is located in an agricultural area, surrounded by farms growing corn and other cash crops and was once a berry farm, a tree farm and now primarily consists of forest and protected wetlands.

[12] In 2011 Green Collar Landscaping ("Green Collar") purchased a multi-acre farm next to the Bennett property and its commercial landscaping business operates from the property. Mr. Bennett outlined several impacts associated with the landscaping operation, including noise, truck traffic, dust and instances of the burning of waste materials. These issues have been raised with the City and Mr. Bennett is concerned that the current operation could intensify further. Despite the fact that Special Exception 253 is intended to exempt a specific area that recognizes existing operations, Mr. Bennett's view was that the uses at Green Collar cause impact now and could expand. He testified that part of the area subject to the exemption includes lands that are not actively used. In response, the position of Green Collar (Tammi Perreault testified) was that the area of its property to which the exception applies is in fact consistent with existing operations and does not reflect an expanded area. Moreover, there is no

evidence of any by-law infractions or charges against Green Collar. In this regard, Ms. Perreault provided a detailed submission explaining their operations, extensive participation in the planning process leading up to the adoption of Special Exception 253.

[13] Mr. Rowe (a member of CROP) testified that he has farmed his property in rural Hamilton since 1986. In 1993, the 10-acre property to the north was purchased and Cedar Springs Landscaping Group ("Cedar Springs", now CLS Group) began operations. Mr. Rowe explained that over the past three years Cedar Springs has evolved into a large scale commercial landscaping business with a contractor's yard and offices. There is considerable truck traffic in and out of the site and Mr. Rowe indicated his property is visually exposed to the operation, he experiences noise impact, impact from illumination, and, in the winter, trucks arrive in the evening for the purpose of being loaded with salt. Truck traffic is a concern, as is noise, lighting visual impact and general environmental concerns. Mr. Rowe filed several photographs of his property and the neighbouring landscape contracting business, CLS Group. Mr. Rowe testified that his farm operations have been affected by the expanding business of CLS Group, which has received an exemption to be recognized as a landscaping business under Special Exception 253 for about 2 hectares ("ha") or 5.46 acres of the property.

[14] Based on the testimony of Mr. Bennett and Mr. Rowe, I accept that landscape contracting operations adjacent to residential uses, including farm related uses, can lead to land use conflicts and their respective concerns should not be diminished. However, going forward the City has attempted to address concerns and reduce the potential for land use conflicts by introducing clearer zoning standards and regulations that regulate the size of operations through limitations on gross floor area, number of employees and restrictions on parking of vehicles and outdoor storage. The land use conflict is primarily caused by the size and scale of landscape operations as opposed to the use, per se. In this regard, by-law enforcement is an important mechanism that should be employed by the City when complaints arise. Landscape contracting is in fact a permitted use, albeit as a secondary use in the rural area as a result of the new policy



regime. There are bound to be complaints and local issues between neighbours that require strict adherence to by-law that regulate impacts.

[15] As one landscape contractor testified, disputes between neighbours should not result in an over-reaction that would “cancel” a program designed to benefit an important industry. The evidence from the many landscape contractors who testified (listed at the outset, as participants) was persuasive. These are primarily small businesses (many family run) that collectively provide significant employment and for the most part, operate in harmony with their neighbours and contribute to the local community. Agricultural and agricultural-related uses can be, by their very definition, intense. As many participants testified, farm operations (which are obviously a permitted and encouraged use in the rural area) result in noise, track and tractor traffic. Depending on proximity and intensity, agricultural and agricultural-related operations can conflict with neighbours (like Mr. Bennett) in the rural area. As Ms. Perreault pointed out, the RHOP makes it clear that non-farm residential uses are attracted to the rural area by the image of quiet, peaceful open space and may be adversely impacted by normal farm practices. Normal farm practices create odour, noise, dust, flies, smoke, light and vibration associated with livestock, cultivation, farm maintenance and heavy machinery, and include early morning and late evening activities, especially during planting and harvesting periods. Several participants put it well when they testified that the rural area is in fact a busy place and neighbours co-exist and rely on a community that, for the most part, is in harmony.

[16] Despite the potential for conflict (which was recognized by the City when it considered how best to regulate landscape contractors) the impact of requiring established operators to either move or shut down their businesses would be catastrophic. This outcome underscores the rationale as to why Council determined that a special “onetime” exception program should be instituted on a site specific and limited basis. The goal is to protect a relatively small group of operators, accepting the substantial economic contribution the industry makes to the Region and more generally, to the Province. Mr. Di Giovanni, Executive Director of the Horticultural Trades Association Inc. (carrying on business as Landscape Ontario), testified that there are

about 300 member companies operating across the City with approximately 10,000 businesses across the Province. The horticultural industry is significant both in terms of its contribution to the local economy, but also as a small business employer. Most operators have less than seven employees and much of the work is seasonal. In this regard, Mr. Di Giovanni indicated that CLS Group (which operates next to Mr. Rowe) is not a typical operation and its scale and size represents perhaps 1% of the industry.

[17] With respect to the RHOP, Mr. Ramsay testified that the majority of the rural area in Hamilton is designated either Agriculture, Rural or Open Space. These designations permit agricultural uses, agricultural-related uses and on-farm secondary uses. Mr. Ramsay's opinion was that a landscaping operation does not fall within the scope of an agricultural use or agricultural-related use and it is not an operation listed among the range of permitted on-farm secondary uses. The opinion provided by Mr. Ramsay was that a landscaping operation is not a permitted use in any of the designations of the existing RHOP. These operations are instead permitted under certain urban area land use designations. I accept that landscape contracting as a primary use is directed toward the urban area. However, RHOPA 9 amends the policies for on-farm secondary uses and includes landscape contracting as a permitted use in the Agricultural and Rural designations, provided the conditions set out in the amendment are met. On this basis, it is clear that landscape contractors can and do operate in the rural area. I adopt and rely upon the submission of Ms. Wice that conformity with the City's official plan policies is in fact achieved. Council introduced the program to create a level playing field and to recognize existing businesses in the rural area. Without the exception it is true that many landscape contractors can continue to operate, however several others will be forced to shut down even though they were established prior to March 2015. The provisions of RHOPA 9 set out clear policies going forward and the zoning by-law amendments set specific standards that will apply to all operators. As described above, the zoning regime (including the various definitions of a landscape contractor) varied amongst the different amalgamated municipalities that now constitute rural Hamilton. Some certainty has now been achieved and clear standards are in effect as provided for in RHOPA 9 and the rural zoning regime. Given the specific parameters associated with

exception and the fact that landscape contracting does operate in the rural area, I conclude that Special Provision 253 conforms to the RHOP.

[18] With respect to the Greenbelt Plan, I do not accept the opinion of Mr. Ramsay that Special Exception 253 fails to conform. I find his opinion too restrictive. There is no question that under the Greenbelt Plan, all legally established existing uses are continued. Mr. Ramsay's argument was that several of the landscape contractors affected by Special Exception 253 were not legally established, cannot be continued and therefore conformity is not achieved. However, a landscape business is not a defined use under the Greenbelt Plan. Instead, the Greenbelt Plan permits agricultural uses, agricultural-related uses and secondary uses including home occupations, home industries, and uses that produce value-added agricultural products from the farm operation on the property. Several operators testified that their businesses were either agricultural-related uses and/or secondary uses. On this basis, conformity is achieved in any event. Moreover, as Ms. Wice argued Council determined that a select group of operators should not be forced to close in circumstances where they have been permitted to operate, in some instances, for several years. The City's position was that the myriad of by-laws in effect across the rural area have not been uniformly enforced and on this basis, it was Council's desire to regularize the requirements going forward. The RHOP and RHOPA 9 conform to the Greenbelt Plan. The rural zoning regime implements the policies of RHOPA 9 as it applies to landscape contractors. The requirements of the *Planning Act* stipulate that decisions must conform to, or not conflict with applicable provincial plans. I find no conflict between the enactment of Special Exception 253 and the Greenbelt Plan. Similarly, all decisions must be consistent with the Provincial Policy Statement 2014 ("PPS"). In this regard, I find that Special Exception 253 meets this requirement. The City embarked upon a process to implement the policies of its RHOP through the preparation of revised zoning for the rural area. In addition, modified policies were added through RHOPA 9. The most important vehicle for implementing the PPS is the applicable official plan. The zoning amendments enacted by Council, intended to provide for consistent zoning throughout the rural area, are consistent with the PPS.

[19] As indicated above, the position of CROP is that Council can only enact planning instruments that conform to applicable provincial policy and conform to the RHOP. In this regard, I adopt and rely upon the submissions of Ms. Wice that, in fact, conformity is achieved with the Green Belt Plan and the RHOP. Special Exception 253 was enacted in response to a specific concern and landscape operators who are intended to benefit from the program followed direction from the City and made their respective applications in accordance with the requirements of the program, identifying when their businesses began and the size of existing operations on their respective properties. The evidence was clear that entire properties are not exempt and the areas to which the exception is intended to apply are delineated and restrictive. That is, in most instances the area within which landscape contracting businesses can legally operate is small as compared to the overall site size. Irrespective of the exception, many operators meet the policy requirements of RHOPA 9 as modified, and the standards set out in the new zoning regime.

[20] Finally, in determining that Special Exception 253 should be supported, I have had regard to the decision of Council and the provincial interest, always factors for the Board to consider in determining the outcome of any appeal. I adopt and rely upon the submissions of Ms. Wice that Council enacted Special Exception 253 for a specific and well defined purpose and, on the facts of this case, that decision should not be interfered with lightly. Special Exception 253 has regard for the provincial interest, it provides an exemption for operators who, for the most part, operate in harmony with their neighbours, other rural businesses, and make a substantial contribution to economy of the Province. The rural zoning project addressed several issues that had been identified by the City as “gaps” under the individual regimes of the individual municipalities. In this regard, staff indicated that the new rural zones are intended to increase opportunities for on-farm diversification, provide flexibility while at the same time provide out one clear and consistent set of regulations. With respect to that area of the review and proposed changes in respect of landscape contractors, Special Exception 253 is a mechanism employed by Council to strike a balance by permitting existing operators to continue within a defined geographic area while acknowledging the potential for nuisance impact arising from larger scale operations.

[21] As indicated at the outset, CROP has achieved success insofar as it was able to reach an agreement with the City and resolve significant portions of the original appeal. The agreed upon modifications reflected in the Board's Order issued on March 13, 2017 (following the March 3, 2017 settlement hearing) provide greater certainty and strengthens requirements with respect to the circumstances under which a landscape contracting business can be established in the rural area.

### **DECISION AND ORDER**

[22] For all of the reasons given, the Decision and Order of the Board is to dismiss CROP's Phase 1 appeal in respect of Special Provision 253. The Phase 2 appeals, having been settled between CROP and the City, are addressed in the Board's decision and order issued on March 13, 2017.

*"J. de P. Seaborn"*

J. de P. SEABORN  
VICE-CHAIR

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### **Ontario Municipal Board**

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