

ISSUE DATE:

**August 31, 2012**



PL090224

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Cytec Canada Inc.  
Subject: By-law No. By-law 04-2009  
Municipality: City of Thorold  
OMB Case No.: PL090224  
OMB File No.: PL090224

**APPEARANCES:**

**Parties**

City of Thorold

Cytek Canada Inc.

Terma Holdings Inc.

**Counsel**

Stuart Ellis

Jeffery Wilker

Rocco Vacca

**DECISION DELIVERED BY C. HEFFERON**

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The subject proceeding, which took place on August 22, 2012, was conducted by telephone conference call.

**Background**

Terma Holdings Inc. ("applicant") applied to the City of Thorold ("City") for permission to add a concrete/asphalt recycling facility to its existing permitted uses on lands municipally known as 1701 Thorold Townline Road ("subject lands"). Zoning By-law 04-2009, which amends the City's Comprehensive Zoning By-law 2140(97) was adopted by Council on January 12, 2009.

Cytek Canada Inc. ("appellant") appealed that decision. Counsel for the appellant, Mr. J. Wilker explained that the appellant is North America's sole manufacturer of the chemical, "phosphene", which is used in the manufacture of circuit boards among other applications.

### **Matter before the Board**

The matter before the Board is Zoning By-law 04-2009 (“By-law”), which amends the City’s Comprehensive Zoning By-law 2140(97).

### **Applicant’s position**

The applicant advised that it has prepared a Storm Water Management Plan, which has been approved by the Niagara Peninsula Conservation Authority (“NPCA”) and has signed a Site Plan Agreement with the City. The Site Plan Agreement requires that the applicant obtain all necessary Ministry of the Environment, Ontario (“MOE”) approvals.

The applicant maintains that its recycling process will not impact the waters of Thompson Creek. It also advised that it has applied to the MOE for an Environmental Compliance Approval certificate (“ECA”). It is currently waiting for MOE’s decision on its application.

### **Appellant’s position**

The appellant’s reasons for appealing the By-law involve its concerns that the applicant’s proposed asphalt/concrete recycling and open storage facility would interfere with the quantity (and quality) of the water in Thompson Creek. The appellant explained that for historic reasons, the part of the creek bed on the Cytek lands is wholly owned by the appellant, Cytek. It advised that the creek waters are an important component of the Cytek’s manufacturing process.

### **City’s position**

Council for the City, Mr. S. Ellis, advised that it wants to avoid adverse environmental impact from the applicant’s proposed recycling operations not only on the waters of Thompson Creek but also on the two environmentally-sensitive parts of the subject lands in the northwest and southeast corners. A portion of the subject lands in the northwest corner has been designated Provincially Significant Waterway (“PSW”).

Mr. Ellis explained that the City had been relying on its Site Plan Approval process (under subsection 41(7) of the *Planning Act*) to ensure that the environmental concerns are addressed. He advised that the City now agrees with the appellant that a Site Plan

Agreement would not be entirely satisfactory to the appellant since it would not be directly involved in the process. The City agrees with the appellant and applicant that an ECA is also needed.

### **Settlement agreement**

At the commencement of the hearing, Mr. Wilker advised that a Settlement between and among the three parties has been reached. The one-paragraph Settlement Agreement, which is entered in evidence as Exhibit 5, reads:

The parties have agreed to request the Board as follows: That Cytek's appeal of the zoning by-law (04-2009) is dismissed on a without costs basis, on the condition that the Board's Order granting the dismissal not issue until the Board has been advised by the parties that the ECA with respect to the stormwater management system as review by the City and the NPCA has been issued by the MOE.

A letter dated August 13, 2012 from Mr. Vacca in support of the Settlement is entered in evidence as Exhibit 4.

### **Evidence and analysis**

Mr. E. Darbyson gave land use planning opinion evidence in the form of an affidavit dated August 14, 2012. Mr. Darbyson is a qualified land use planner. The affidavit is entered in evidence as Exhibit 2.

Mr. Darbyson's affidavit entered into evidence a copy of the implementing Zoning By-law 10-2009 ("By-law") and the Registered Site Plan Agreement between the applicant and the City. These two documents are entered into evidence as Exhibit 3. Council approved the By-law to enter into the Site Plan Agreement on February 7, 2012. The Site Plan Agreement contains Condition 15, which requires that the applicant obtain an ECA from MOE for those activities that require a certificate.

Paragraph 10 of the affidavit also specifies that the appellant "cannot support approval" of the By-law if "said ECA in respect of storm water management has been issued".

Mr. Darbyson testified that the Settlement Agreement is consistent with Provincial policy as expressed in both the Provincial Policy Statement ("PPS") and the Growth Plan for

the Greater Golden Horseshoe (“Growth Plan”) as the NPCA supports the applicant’s storm water Management Strategy and that it provides protection for the PSW on site.

He also testified that the By-law conforms to the Regional Policy Plan as the “Rural” designation in the By-law permits some non-farm development in the form of industrial uses and the application recognizes the environmentally significant wetland features on site and provides for their conservation and protection through the By-law.

He further testified that the By-law conforms to the City of Thorold Official Plan (“OP”):

- The Dry Industrial designation permits industrial uses of a dry nature. The use of the subject lands for an asphalt recycling facility is not dependent on large volumes of water and therefore is in keeping with the intent of the Dry Industrial policies.
- The OP contains policies that require the preservation of items of archeological significance. Staff had received a letter from the Ministry of Culture, which cleared the subject lands of any archeological significance and therefore is in keeping with the intent of these OP policies.
- The OP contains policies that encourage the maintenance of its woodlots and discourage development that would endanger them. The Zoning By-law Amendment zones these woodlot features Environmental Conservation “EC-1”, which is the highest form of protection of environmentally significant lands available in the Comprehensive Zoning By-law and therefore conforms to the intent of these OP policies.
- The OP contains policies that require development adjacent to watercourses to be set back in accordance with Ministry of Natural Resources standard setback requirements. The approved Site Plan regulates the location of the asphalt/concrete storage areas and reflects the NPCA’s comments. It therefore conforms to the intent of these OP policies.

The By-law is in keeping with the Comprehensive Zoning By-law as the environmentally significant areas were zoned EC-1. A similar use exists on the abutting property to the north and the surrounding lands are intended for industrial purposes.

MOE has indicated (Exhibit 2, page 22) that "... any structure constructed for wastewater or storm water management will require approval by the Minister pursuant to section 53 of the *Ontario Water Resources Act*. The Minister reconfirmed this in correspondence dated December 19, 2008, which is entered in evidence as Exhibit 2, page 19.

If the applicant does not obtain said ECA in respect of storm water management, the approval of the By-law cannot be supported (by the City).

Mr. Darbyson's evidence was adopted by Mr. G. Wellings. Mr. Wellings was qualified by the Board to present opinion evidence on land use planning. He was retained by the appellant.

### **General finding**

The Board accepts the evidence of Mr. Darbyson and finds that the By-law is consistent with Provincial policy, and conforms to the general intent and purpose of the Regional Policy Plan, the (Thorold) OP and Comprehensive Zoning By-law.

### **Disposition**

The Board accepts the Settlement Agreement as shown above.

The Board Orders the appeal is dismissed without costs. The final order is withheld until the parties advise the Board that the ECA with respect to storm water management system as reviewed by the City and the NPCA has been issued by the MOE.

The Board may be spoken to.

"C. Hefferon"

C. HEFFERON  
MEMBER