

LAND USE COMPATIBILITY

Case Study: Ferrero Rocher

“The Not so sweet Smell of Hazelnut Success”

FERRERO -- BRANTFORD OMB HEARING WITH ODOUR IMPLICATIONS



Land Use Compatibility

Overview:

1. The Ferrero Property and its History
2. The Waterfront Master Plan – City v. Developers “The Vision Thing”
3. The Brantford Hearing – *Sifton Properties Ltd. v. Brantford (City)*

Overview:

TAKE-AWAYS:

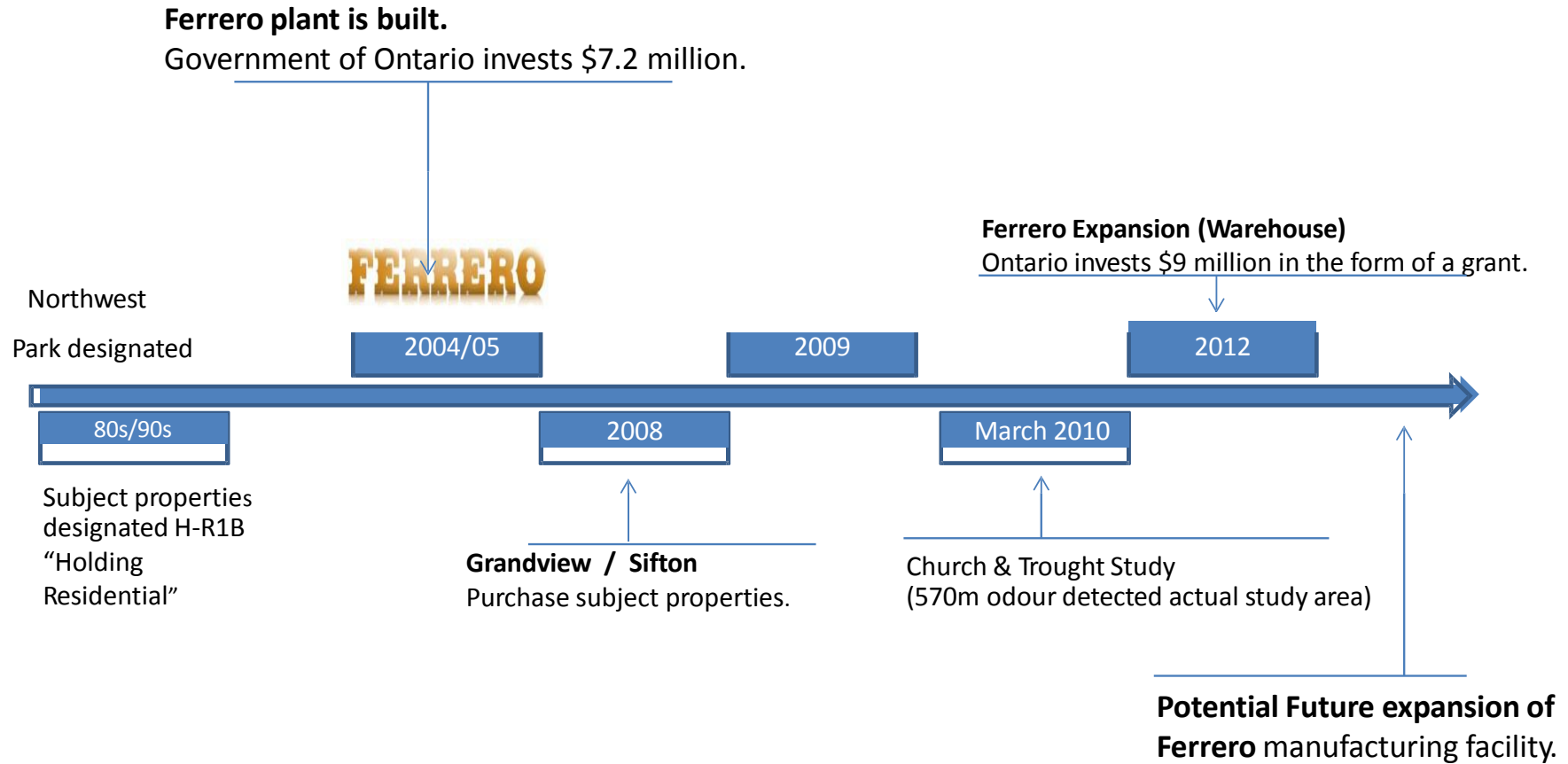
What we can learn from this Decision?

- Does it matter who was there first?
- Who is responsible for the studies, buffer and cost?
 - Developer?
 - Industry?
 - Both?

Ferrero Plant in Brantford



Timeline of Key Events



Ferrero Plant in Brantford

- Built in 2004 – 2005
- City's Largest Employer – Over 1000 Employees
- Located in the “North West Business Park”



Ferrero Plant in Brantford

- Produces Odours and Noise in their Manufacturing Processes
- Operates 24/7 in high season (Xmas) – produces truck traffic at all hours
- Between a Class II and Class III facility (D-6 Guidelines)



THE PROPOSED DEVELOPMENTS (RESIDENTIAL)



THE “WMP” – Waterfront Master Plan

- Broad based study of a 35 km long reach of the Grand River that runs through the city.
- Identifies the significant natural heritage features and the recommended buffer zones
- *Found that residential use of the Grandview and Sifton lands was not appropriate*
- Adopted by the city with significant community support.

Sifton Properties Ltd v Brantford (City), [2014] OMBD No 472, 81 OMBR 1.

- 19 week Hearing
- 39 Expert Witnesses
- 27 Participants

Sifton Properties Ltd v Brantford (City), [2014] OMBD No 472, 81 OMBR 1.

Ferrero's Position:

- An important economic player in Brantford and should be protected.
- Not opposed to residential development in principle, **BUT** does not want their current operations, and future expansion, hampered by the introduction of a sensitive use.
- Full and proper studies have not been done regarding noise and odour impacts on the potential residents
- Proposed Developments do not represent “good planning” and are not in accordance with the Provincial Policy statements and planning legislation.

Sifton Properties Ltd v Brantford (City), [2014] OMBD No 472, 81 OMBR 1.

Developers Position:

- Sensitive receptors are already present and Ferrero must satisfy their obligations to them.
- Ferrero was aware of residentially zoned land when it acquired the property in 2004.
- Ferrero “simply wants the developers to pay for its pollution control”.
- Proposed Developments represent “good planning” and are in accordance with the Provincial Policy statements and planning legislation.

GUIDELINE D-6

“This guideline is intended to be applied in the land use planning process **to prevent or minimize future land use problems** due to the encroachment of sensitive land uses and industrial land uses on one another”

“Adequate buffering of incompatible land uses is intended to supplement, *not replace controls which are required by legislation for both point source and fugitive emissions at the facility source*”

City of Brantford Official Plan

10.6 Buffering

- 10.6.1 Certain areas within the City will require buffering or screening in order to minimize potential conflicts between land uses which may detract from the amenity and functioning of other adjacent land uses.
- 10.6.7 Where industrial and sensitive land uses are proposed in proximity to one another and require official plan and/or zoning amendment, **appropriate studies shall be completed** to the satisfaction of the City **and in accordance with Ministry of Environment Guidelines** demonstrating that the proposed development will have no adverse affects on existing industrial facilities or sensitive land uses.

GUIDELINE D-6

Fugitive Emissions

Reasonable expected/predictable contaminant associated with normal operational practices and procedures (e.g. materials handling or outdoor storage) of industrial facilities, which are generally difficult to practically control at the source or on-site. These emissions are not point sources (i.e. not from stacks or vents).

Fugitive emissions are from all sources. These emissions may include **odour, noise, vibration** and particulate such as dust. Emissions from breakdown are also not considered “fugitive”. Breakdown emissions would be covered under a Certificate of Approval contingency plan, or are considered to be a “spill”.

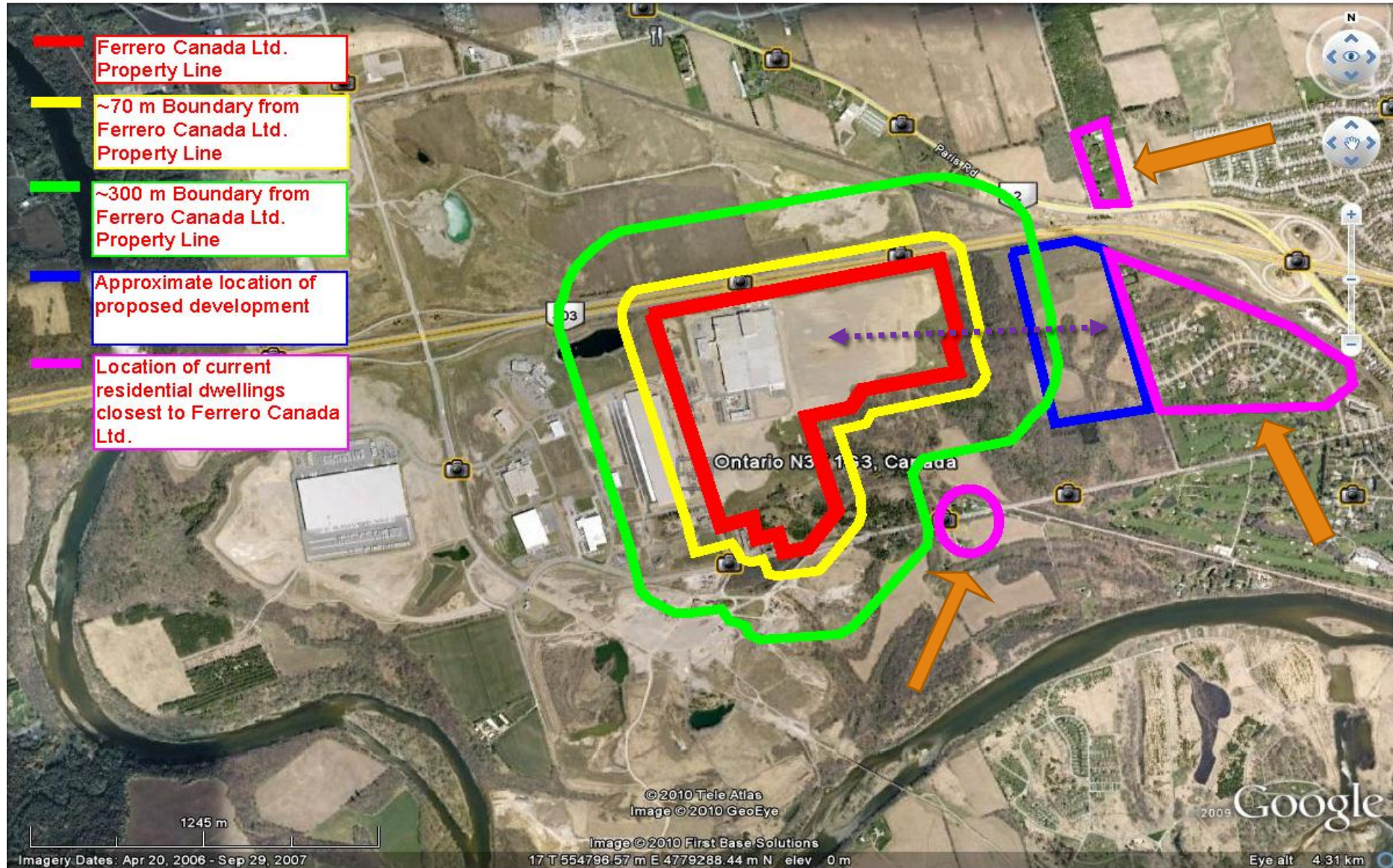
GUIDELINE D-6

4.1.1 **Potential** Influence Areas for Industrial Land Uses

The Ministry has identified, through case studies and past experiences, the following potential influence areas (i.e. areas within which adverse effects may be experienced) for industrial land uses:

- **Class I – 70 metres**
- **Class II – 300 metres**
- **Class III – 1000 metres**

D6 – Class I, Class II and Class III Distances



WHERE ARE THE EXISTING ODOURS?

“...the assessment found that there was a faint hazelnut odour detected *approximately 420 m from the Ferrero property line [actually building]...*

The Board heard that the odour was detected by an individual *who was not on the Grandview property on one day in March with moderate winds.*



GUIDELINE D-6

4.3 Recommended **Minimum** Separation Distances

No incompatible development other than that identified in Section 4.10, “Redevelopment, Infilling and Mixed Use Areas” should occur in the areas identified below and illustrated in Appendix C, even if additional mitigation for adverse effects, as discussed in Section 4.2 of Procedure D-1-1, “Types of Buffers”, is provided:

- **Class I – 20 metres minimum separation distance**
- **Class II – 70 metres minimum separation distance**
- **Class III – 300 metres minimum separation distance**

GUIDELINE D-6

4.6 Studies

Air quality studies for noise, dust and odour *should be provided by the proponent* to the approving authority.

4.6.3 Odour

Odours contaminants are particularly difficult to control on-site. *Although the contaminants emitted may meet the Ministry's standards and interim standards, experience indicates that complaints may still be received from residents living in proximity to the industry*, for the reasons set out in Section 4.6.2. Emissions of odorous contaminants may result in off-site odour problems which could constitute an “adverse effect”. *An “adverse effect” is a violation of Section 14 of the Environmental Protection Act.*

Environmental Protection Act, R.S.O. 1990, c. E.19 -- “Adverse Effect” & “Contaminant”

Prohibition, discharge of contaminant

14. (1) Subject to subsection (2) but despite any other provision of this Act or the regulations, a person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment, *if the discharge causes or may cause an adverse effect.*

“**Contaminant**” means any solid, liquid, gas, **odour**, heat, sound, vibration, that causes or may cause an adverse effect;

Environmental Protection Act, R.S.O. 1990, c. E.19 s.14 and s. 1 “Adverse Effect”

S. 1 “adverse effect” means one or more of,

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(g) loss of enjoyment of normal use of property, and....

GUIDELINE D-6

4.7 Mitigation

Additional mitigation measures, may need to be incorporated on either the development lands or the surrounding properties, **at the expense of the developer**, where the industry facility is operating in compliance with legislated Ministry requirements.

Sifton Properties Ltd v Brantford (City), [2014] OMBD No 472, 81 OMBR 1.

Major findings of the Board

- There is an expressed intent in the applicable planning documents for some residential use to be permitted on the properties;
- The WMP constitutes downzoning;
- The Board did not remove the Residential designation of the lands in favour of the WMP
- Natural Heritage features can be protected through appropriate subdivision design

DECISION

Sifton Properties Ltd v Brantford (City), [2014] OMBD No 472, 81 OMBR 1.

506 “The Board heard that Ferrero’s interest was not to prevent development, but simply to ensure that its operations were not negatively affected. If it were determined that there were a problem then mitigation measures could be enacted by the developers to deal with the issue.”

DECISION

Sifton Properties Ltd v Brantford (City), [2014] OMBD No 472, 81 OMBR 1.

Where Do You Measure From?

504 Ferrero noted that in the D-6 guideline, separation distances are to be calculated **from property boundaries** which could place some of the Grandview lands in the area of influence. Also, the detection of odour is subjective, and while the individual in Mr. Trought's study detected only a faint odour, **others may consider the odour to be a problem and it could be considered an "adverse effect" under MOE legislation.**

PROPONENT V. INDUSTRY RESPONSIBILITY – ODOUR-NOISE


507 “...the Board is concerned that no analysis was completed for the Sifton lands and that the assessment for Grandview did not include work on the subdivision site... The Board also recognizes that the D-6 guideline *places responsibility on the industry as well as those proposing the sensitive land uses.*

456 However, the Board does not agree with Mr. Westaway’s contention that noise from Ferrero is necessarily a matter only for Ferrero to deal with through its Environmental Compliance Approval. The Board has found elsewhere in this decision that the D-6 guideline **places a responsibility both on the industry and those who may be developing sensitive land uses.**

ADEQUATE STUDIES OF ODOURS IN *APPROPRIATE* CONDITIONS

508 “However, in order to be assured that the D-6 guideline has been complied with the Board will require an **update** to Mr. Trought’s study including an assessment of odours undertaken on the Grandview subdivision lands *during conditions when odours are likely to be detected*. A similar assessment should be undertaken on the Sifton subdivision lands...”

TAKE AWAYS:

1. D-6 GUIDELINES: Are just that -- GUIDELINES
 - Proponents must PROVE with adequate studies that Guidelines are met; and
 - Deal with the likelihood of “No Adverse Effects” – s 1, 14 EPA
 - Measure from property lines taking into account expansion potential
2. Who Must Pay for Remediation? On-site -- difficult for Odours – For Separation?
 - If separation – developer proponent by adjusting, revising, accommodating existing use, **BUT**
 - Once development there  Industry left holding the bag
3. For Hearing: Parties should submit *full and persuasive studies* or risk being deemed “not ready” for development

**SO YOU SAY THE ODOURS FROM MY
FACTORY WONT BOTHER YOUR RESIDENTS?**



PROVE IT

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ORTECH Comments

- The D-6 Guidelines were created more than 15 years ago (1999)
 - Weaknesses have been identified
- **But** no resources to upgrade/expand
 - Halton Guidelines are of some help here.



ORTECH



ORTECH Comments

- Guideline D-6 includes
 - 4.1.1 Potential Influence Areas for Industrial Land Uses and
 - 4.3 Recommended Minimum Separation Distances
- **But** 4.1.2 ‘The actual .. influence area for particular facility is site-specific.’
 - In this case the Developers consultant detected odours 580 m away on a random day



ORTECH



ORTECH Comments

- From the OMB decision: “If it were determined that there were a problem then mitigation measures could be enacted by the developers to deal with the issue.”
- **But** typically the Developer is long gone after the complaints begin,
- So comprehensive studies and cost assessments and agreements early in the approval process



ORTECH



ORTECH Comments

- **‘no odours are good odours’**: even the smell of chocolates and fresh baked bread can be a ‘nuisance’ to some.
 - Think allergies/sensitivities/related experiences
- In general, **new receptors are more sensitive** than existing ones
 - **So** the lack of current complaints may say little or nothing about the potential complaints from brand new subdivisions or condos



ORTECH

