

MUNICIPAL, PLANNING & DEVELOPMENT LAW

The Commons Institute

MUNICIPAL LAW:

Practice Primers & Contemporary Developments

30 November 2012

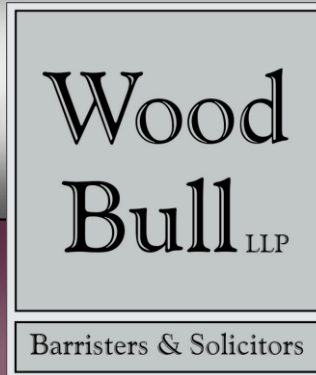
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MUNICIPAL, PLANNING & DEVELOPMENT LAW

Some Recent Developments in Planning and Development Law

Presented by Dennis Wood



MUNICIPAL, PLANNING & DEVELOPMENT LAW

- (1) Guidelines: Role / Weight**
- (2) Minor Variances / Sufficiency of Reasons**
- (3) Development Charges**

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Guidelines: Role / Weight

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Guidelines =

“Performance Standards”,

“Technical Guides”,

“Criteria” etc.

found in

public guidance documents

City of Toronto Tall Buildings Policy / Guidelines Framework

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- (1) Official Plan
- (2) Design Criteria for Review of Tall Building Proposals (2006)
- (3) Downtown Tall Buildings Vision and Performance Standards (2012)

(1) Official Plan (2002)

- **Built Form Policies (Section 3.1.2)**
- **Built Form – Tall Building Policies (Section 3.1.3)**
- **Area Specific Policies (Volume 3)**

(2) Design Criteria for Review of Tall Building Proposals (2006)

- Elaborates on Official Plan policies
- City-wide application (except Downtown, but including Downtown Secondary Plan Area)

(3) Downtown Tall Buildings Vision and Performance Standards (2012)

- Vision + Performance Standards
- Staff directed to use in evaluation of all new and current tall building proposals
- Applies to the Downtown only (excluding Secondary Plan areas)

**What is the status/role of
guidelines?**

Planning Act

- Not a *Planning Act* instrument
- No appeal process
- No amendment required for a development application

Official Plan Treatment

- Policy 5.3.2(1):

...guidelines will be adopted to advance the vision, objectives and policies of this Plan. These... guidelines, while they express Council policy, are not part of the Plan unless the Plan has been specifically amended to include them, in whole or in part, and do not have the status of policies in this Plan adopted under the Planning Act. (underlining added)

Design Criteria for Review of Tall Building Proposals (2006)

- Purpose of the Criteria

...this study identifies and compiles the key urban design criteria that should be brought to bear in the evaluation of tall building applications, and specifies how the applicant will demonstrate that these criteria have been satisfactorily addressed. Applying the design criteria and recommended application submission requirements will help implement the objective of the Official Plan “to ensure that tall buildings fit within their context and minimize their impacts”. (underlining added)

Downtown Tall Buildings Vision and Performance Standards (2012)

The Downtown Tall Buildings Vision and Performance Standards have being [sic] brought forward as design guidelines and as such are intended to provide a degree of certainty and clarity of common interpretation. However, as guidelines, they are also afforded some flexibility in application, particularly when looked at cumulatively. The guidelines are not intended to be applied or interpreted independently of each other. Rather, the performance standards will work together to determine whether a tall building development application has successfully met the overall intent of the guidelines. The City already has city wide tall building policies in the Official Plan and in the form of built form guidelines. ... (underlining added)

OMB Decisions

- Menkes Church Street Holdings
(October 2012)
 - Zoning application to permit 29-storey mixed-use residential building
- London Highbury Shopping Centres
(July 2008)
 - Appeal of OPA adding threshold test for “significance”

Menkes Church Street Holdings

- “The act of applying municipal guidelines ... to Official Plan policies in the assessment of development applications is a familiar exercise in these hearings. The weight to attribute to those guidelines and corresponding standards and criteria is often overstated by witnesses who oppose development applications. It is an area that is open to wide interpretation by all, including the Board in the assessment of this proposal.” (pages 10-11)
- “The Board finds that the Guidelines do not carry the weight of Official plan policies and they should not be construed as such.” (page 11)
- “...it is not fatal to any planner’s evidence should consideration of various criteria, standards or other elements of such materials be absent from planning analysis proffered to the Board ...” (page 11)
- Board found that the proposal met the intent of the relevant Guidelines, while approving a building that was 4 storeys higher than the height established in the Guidelines (ie 29 storeys vs 25 storeys)

London Highbury Shopping Centres

London Official Plan Policies: Guideline Documents

19.2.2. Guideline Documents	Council may adopt guideline documents to provide detailed direction for the implementation of Official Plan policies. Guideline documents proposed pursuant to these policies and adopted by Council, shall be added to the list in Section 19.2.2.ii). Provincial guideline documents are also used in the implementation of Official Plan policies. (Section 19.2.2. amended by OPA 438 Dec. 17/09)
Purpose	i) Guideline documents will be initiated by Council and may contain policies, standards, and performance criteria that are either too detailed, or require more flexibility, in interpretation or implementation, than the Official Plan would allow. Depending on the nature of the guideline document, they will provide specific direction for the preparation and review of development proposals, the identification of conditions to development approval, or the planning of improvements to public services and facilities.
Content	ii) Guideline documents may be adopted by Council to assist with the implementation of any aspect of the Official Plan. In particular, guideline documents shall be adopted to assist with the implementation of any aspect of the Official Plan for the following, but are not limited to the following: (Clause ii) amended by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23) (a) Site Plan Control Guidelines; (b) Subdivision Design Guidelines; (c) Road Access Guidelines; (d) Noise and Vibration Attenuation Guidelines; (e) Master Drainage Plans; (f) Stormwater Management Guidelines; (g) Erosion Control Guidelines; (h) Conservation Master Plans for Environmentally Significant Areas;

London Highbury Shopping Centres

London Official Plan Policies: Guideline Documents

(cont'd)

Content (cont'd)	<ul style="list-style-type: none">(i) Urban Design Guidelines;(j) The City of London 2005 Inventory of Heritage Resources; (Amended by OPA No. 413 approved 07/07/23)(k) Descriptions of Potential Heritage Conservation Districts;(l) Subwatershed Planning Studies; (Sub-clause (l) added by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23)(m) Ecological Buffers and Development Setback Guidelines; (Sub-clause (m) added by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23) (Amended by OPA 438 Dec. 17/09)(n) Environmental Management Guidelines; (Sub-clause (n) added by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23)(o) Guidelines for the identification of Cultural Heritage Landscapes; and(p) Cultural Heritage Landscape Guidelines. (OPA No. 269 - approved 03/02/17)(q) Bicycle Master Plan (OPA No.368 - approved 05/10/3)(r) Old East Heritage Conservation District Plan and Guidelines. (OPA No. 390)(s) Guideline Document for the Evaluation of Ecologically Significant Woodlands (March 2006) (OPA No. 401)(t) Sunningdale North Area Plan. ((OPA No. 410)(u) West Woodfield Heritage Conservation District Plan and Guidelines (OPA #446)
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London Highbury Shopping Centres

London Official Plan Policies: Guideline Documents

(cont'd)

(cont'd)

- (v) Dingman Drive (Industrial) Area Plan (OPA 451)
 - (w) Dingman Drive Industrial Area – Urba Design Guidelines
OPA #451)
 - (x) City of London Placemaking Guidelines – November 2007
(OPA 452)
 - (y) W12A Landfill Area Plan (OPA 462)
 - (z) Environmental Impact Study Guidleines;
 - (aa) Environmentally Significant Area Identification and Boundary Delineation Guidelines;
 - (ab) Significant Woodland Evaluation Guidelines;
 - (ac) Plant Selection Guidelines for Environmentally Significant Areas, Natural Heritage Areas
and Buffers;
 - (ad) Community Energy Plan;
 - (ae) Sustainable development and green building initiatives;
 - (af) Transportation Master Plan;
 - (ag) Transportation Impact Study Guidelines;
 - (ah) Access Management Guidelines;
 - (ai) Facility Accessibility Design Standards;
 - (aj) Tree Preservation Guidelines; and
 - (ak) Small Lot Subdivision Design Guidelines.
- (Clauses (z) to (ak) added by OPA 438 Dec. 17/09 and renumbered under Section 19.12.8. i) of
the Official Plan)
- (al) Downtown Heritage Conservation District Plan
(OPA 524)

London Highbury Shopping Centres

London Official Plan Policies: Guideline Documents

(cont'd)

Status	iii) Guideline documents will be adopted by resolution of Council. Development proposals shall be reviewed to determine their conformity with the provisions of any applicable guideline document and conditions may be imposed upon the approval of the development. <u>Council may allow a reduction, change, or waiver of the provisions of a guideline document if it is of the opinion that such action is warranted and that the general intent of the Official Plan will be maintained.</u> (underline added)
Public Record	iv) A record will be maintained of the guideline documents (and any associated modification) that have been adopted by Council under Section 19.2.2. Copies of all adopted guideline documents will be made available and accessible to the members of the public. (Clause iv) added by OPA 438 Dec. 17/09)
Public Participation and Review	v) The preparation of a guideline document will include provisions to encourage input from agencies, associations, and individuals that have an interest in the subject matter. Before adopting a guideline document, Council will hold a public meeting to provide for input from interested parties. (Clause v) renumbered by OPA 438 Dec. 17/09)

London Highbury Shopping Centres

- City proposed an Official Plan Amendment (OPA 403) that included a threshold for determining whether a woodland is “significant”
 - *“The Woodland would be considered “Significant” if it achieves a minimum of one high or five medium criteria scores as determined by application of the Guideline Document for the Evaluation of Ecologically Significant Woodlands...” (S. 15.4.5.1) (underlining added)*
- Appellants challenged OPA 403 on several grounds, including whether OPA 403 inappropriately delegated Official Plan policy functions to a guideline document

London Highbury Shopping Centres continued

- OMB did not agree with Appellants.
- Found guidelines to be “objective, relevant and based on sound research ... based on best practices and grounded in good science” (while recognizing that the guideline document was not under appeal)
- Found the City witnesses gave a clear and detailed account of the links between the guidelines, the OP and the PPS and was therefore “unable to agree ... that the evaluation system for significant woodlands is not linked to policies, definition and criteria contained in planning instruments.”

London Highbury Shopping Centres continued

- *“If it turns out that lands have been inappropriately designated in a particular case, the landowner will now have an opportunity to challenge such a decision because the threshold will be incorporated within the Official Plan. In such a case ... the Board’s view is that the criterion selected is subject to challenge for failing to meet the standard of significance according to an evaluation of the considerations set out in section 15.4.5 of the Official Plan. Mere enumeration of a criterion in the [guideline] is not necessarily enough.”*

London Highbury Shopping Centres continued

- *“In the event of a conflict or inconsistency between the [guideline] designation of significance and the Official Plan designation thereof, the latter will always govern.”*
- *“...it is standard practice that guideline documents are used to fulfill official plan policies. ...”*

London Highbury Shopping Centres

continued

- OMB decision upheld by Court of Appeal

“Despite the statement in OPA 403 that, if certain criteria set out in the 2006 guideline are achieved, the woodland “will” be considered significant, the City explains that neither it nor the OMB are fettered in their discretion. All of the factors set out in s. 15.4.5, the balance of the official plan and other relevant matters must be considered in deciding whether a specific woodland property is “significant” ... ”

Bloor Street Case Study

Four Seasons
(55/31)
(205m+125m)

37 Yorkville
(70/58)
(238m+183m)

Cumberland
Terrace
(48/36)
(162m+125m)

50 Bloor West
(83)
(277m)

1 Bloor East
(81)
(290.5m)
(As Approved)

Current Development
(76)
(254.4m)
(Under Construction)



Policy/Guidelines “Layers”

- (1) Official Plan policies, including
Area Specific Policy 211
- (2) Bloor-Yorkville/North Midtown Urban
Design Policies (2004)
- (3) Downtown Tall Buildings Vision and
Performance Standards (2012)

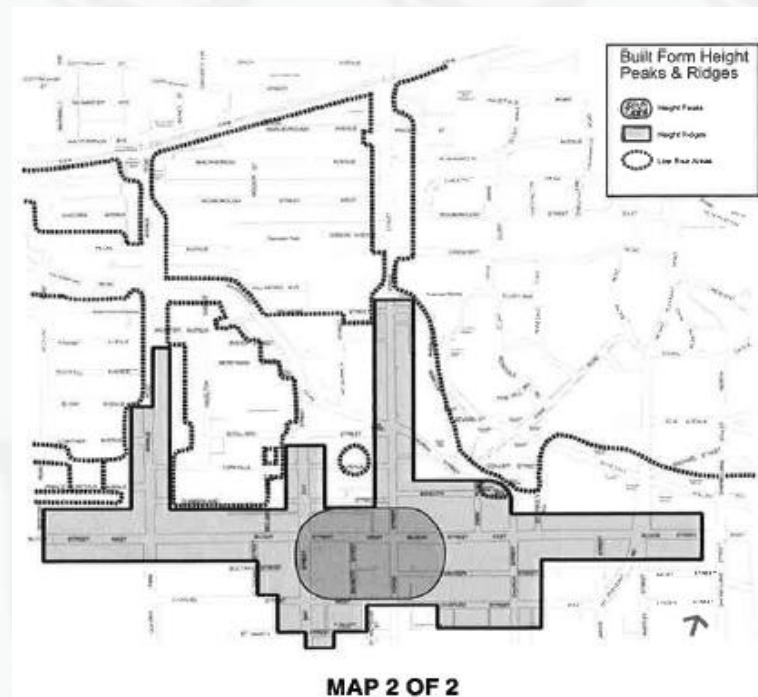
“Layers” are not consistent ...

Examples:

- Height
- Shadow Impacts

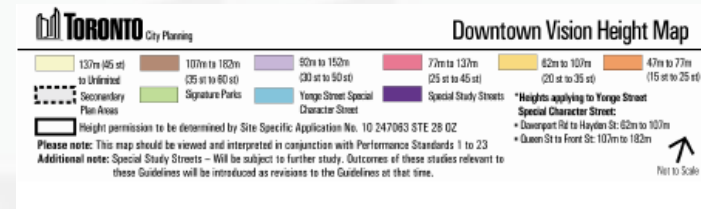
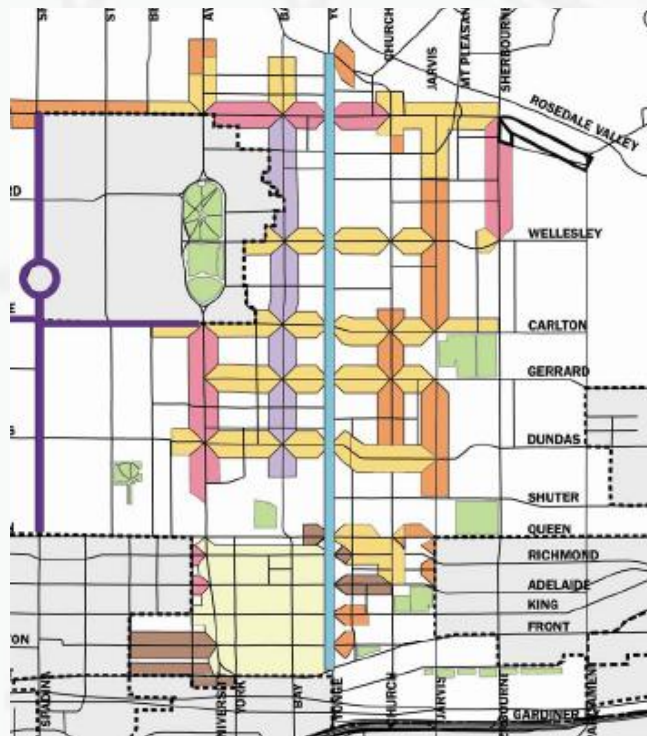
Height

- Area Specific Policy 211 specifies a height regime:



Height

- *Downtown Tall Buildings Vision and Performance Standards (2012)* identifies a different height regime:



Shadows

- Official Plan tests for shadow impacts:
 - Adequately limit shadow on neighbouring streets, properties and open spaces
 - Minimize additional shadowing on neighbouring parks
 - Adequately limit shadow impacts on adjacent neighbourhoods

Shadows

- Downtown Tall Building Vision and Performance Standards tests for shadow impacts:
 - No net new shadows will be cast by Downtown tall buildings on “Signature Parks/Open Spaces” between 10:00 AM and 4:00 PM on September 21st
 - No net new shadows will be cast .. on all other parks located within and adjacent to the Downtown Guideline boundary area, between 12 noon and 2:00 PM on September 21st.

How is this inconsistency resolved?

Minor Variances

/

Sufficiency of Reasons

Sufficiency of Reasons - Evolution

- 1999 – *Baker v. Canada (Minister of Citizenship and Immigration)* (S.C.R. 1999)
- 2005 - *DeGasperis v. Toronto COA* (OMB 2003; Div Ct 2005)
- 2008 *Dunsmuir v. New Brunswick* (SCC 2008)
- 2009 (May) – *Toronto (City) v. Romlek Enterprises* (Div Ct 2009)
- 2009 (September) - *Clifford v. OMERS* (Ont. Ct Appeal 2009)
- 2010 (November) - *Simon v. Bowie* (OMB 2010; Div Ct 2010)
- 2011 – *Newfoundland Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* (SCC 2011)
- 2011 (December 7) - *621 King Development Ltd. v. Toronto (City)* (OMB 2011; Div Ct 2011)
- 2011 (December 22) - *Aurora (Town) v. Sikura* (OMB 2011; Div Ct 2011)
- 2012 (April) - *Opara v. Leslie* (Div Ct 2012)
- 2012 (November 29) - *Construction Labour Relations v. Driver Iron Inc.* (SCC 2012)

Minor Variances

4 Part Test

Section 45(1) of the *Planning Act* requires that the variance:

- (1) be minor;
- (2) be desirable for the appropriate development or use of the land;
- (3) maintain the general purpose of the zoning by-law; and
- (4) maintain the general purpose of the official plan.

DeGasperis

Ontario Municipal Board

- Four minor variances sought
- COA refused application, owners appealed
- Appeal allowed in part
- OMB discussion references four parts of test, but appears to focus on impact

DeGasperis

continued

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Divisional Court

- Leave granted on following issue:

“That the OMB erred in law by subsuming three of the four tests under ss. 45(1) of the Planning Act to the sole question of impact, thereby failing to properly address three of the four tests under that section.”

DeGasperis

continued

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Divisional Court (On Appeal)

- Appeal allowed

“It is incumbent on a committee of adjustment, or the Board in the event of an appeal, to consider each of [the four] requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirements.”

DeGasperis

continued

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“It requires, without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests.”

Simon v. Bowie

Ontario Municipal Board

- Four minor variances sought
- COA approved application; neighbour appealed
- Appeal dismissed

Simon v. Bowie

continued

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Divisional Court – Leave Denied

Appellant submission:

“...the Board must consider each element of the test separately and apply it to the evidence with respect to that aspect of the test. Further, it is obliged to apply the test separately to each variance sought.”

Simon v. Bowie

continued

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Court:

“...I am not satisfied that the Board was required, as a matter of law, to follow the methodology or precise recipe he advanced for the application of the test. Rather ... the law requires the substantive application of the tests required by s. 45(1) of the Planning Act.”

Simon v. Bowie

continued

Court:

“I do not agree that DeGasperis (Div. Ct.), supra, requires that each test be applied entirely separately and formulaically It is sufficient if the reasons make it clear that the Board applied the correct tests substantively, takes the appropriate factors into consideration, and that it considered the evidence properly. In my view, the Board’s reasons meet these requirements.”

621 King

Ontario Municipal Board

- Nine variances sought
- OMB approved

621 King

continued

Divisional Court

- Leave granted on following issue:

“Did the Board err in law by failing to conduct an independent analysis of each of the four test of s. 45(1) of the Planning Act for all of the contested minor variances under appeal?”

621 King

continued

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Divisional Court (Leave Motion)

“Nowhere in the Board decision is there is a clear analysis of the four-part statutory test as it relates to each of the proposed minor variances, as required by the Act. ...”

621 King

continued

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Divisional Court (On Appeal)

- Appeal dismissed

“In my view no error was committed by the Board. There were nine minor variances before it. However, the parties defined very narrowly the single issue before the Board. As the Board stated in its reasons at page 4: “[T]he applicant agreed with the City’s opening statement that this hearing is all about built form and compatibility with the historic character of the area”.

621 King

continued

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“Given the narrow issue presented by the parties, the Board was not obliged to expand at length upon other issues. It was not required to meticulously and formalistically set out each of the four tests for each of the nine minor variances. In the context of this large development, the expert evidence the Board heard from both sides, and its own expertise and experience in this area, the Board set out what was reasonably necessary to provide a pathway to its conclusion. ...” (underline added)

621 King

continued

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“In my view the decision provides more than adequate detail and transparency, especially when measured against the standard of reasonableness.”

***Do *Simon v. Bowie* and *621 King*
detract from *DeGasperis*?***

Other Cases re Sufficiency of Reasons

- *Clifford v. Ontario Municipal Employees Retirement System* (OCA, 2009)
- *Romlek Enterprises v. Toronto* (Municipality) (OMB 2008; Div Ct 2009)
- *Aurora (Town) v. Sikura* (Div Ct 2011)
- *Opara v. Leslie* (Div Ct 2012)

Clifford

“In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them ... This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase ... what the court says in R.E.M. at para 24, the “path” taken by the tribunal to reach its decision must be clear from the reasons read in the context of proceeding, but it is not necessary that that the tribunal describe every landmark along the way.”

Romlek

Ontario Municipal Board

- Four minor variances sought
- COA refused application, owners appealed
- Appeal allowed

Romlek

continued

Divisional Court (On Appeal)

“In the present case, the Board failed to give reasons explaining why the variances granted were properly considered minor. It proceeded on the basis that it could accept the opinion evidence of the respondents’ planner to that effect and treat this issue as a factual matter to be decided on the basis of expert evidence. ... that in itself is an error, as it was the Board’s duty to interpret the Official Plan and by-law instruments. ...”

Sikura

“It is well settled that an administrative tribunal is not obliged to refer to all of the evidence before it. The basis of the decision must be explained and the explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. The path must be clear but it is not necessary that the tribunal describe every landmark along the way.”

Opara

Motion for Leave to Appeal – Granted:

“There is no evidentiary record for this court to review and from which I can identify the substance of the issues and evidence that the Board actually grappled with. In the result ... the parties and this court are left to speculate and that paces this aspect of the decision outside the Boards obligation to consider and apply the third test ...”

[No appeal heard.]

Construction Labour Relations v. Driver Iron Inc. (Nov 29, 2012)

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The Board did not have to explicitly address all possible shades of meaning of these provisions. This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708).

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Development Charges

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“Net Population” v. “Gross Population”

- 2010 - *Orangeville District Home Builders Assn. v. Orangeville (Town)* (OMB 2010)
- 2011 - *Orangeville District Home Builders Assn. v. Orangeville (Town)* (Div Ct. 2011)

DC Act v. Growth Plan / Provincial Policy Statement

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- 2009 - *Chartwell Seniors Housing REIT v. Durham (Municipality)*, (OMB 2009)
- 2010 - *Chartwell Seniors Housing REIT v. Durham (Municipality)*, (OMB 2010)

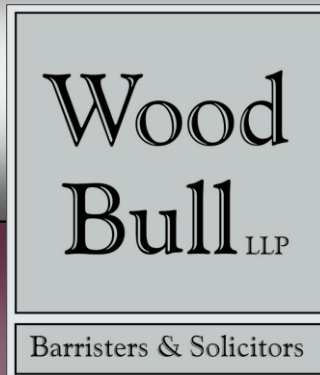
DC Act v. Growth Plan / Provincial Policy Statement

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Pending Cases:

- 2012 - *Halton (Region) v. Embee / Silwell*
- 2012 - *York v. 1834371 Ontario Inc. et al.*



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