

OMB rejects City procedure; repeals Growth Plan official plan amendment

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ABSTRACT

By decision dated 10 June 2010, Member S. J. Stefanko of the Ontario Municipal Board (the Board) struck down Toronto's City-wide Official Plan Amendment No. 72 (OPA 72) for the City's failure to follow the proper set of procedural requirements prescribed by the *Planning Act*. The stated purpose and effect of OPA 72 was to incorporate policies and text into the Toronto Official Plan to bring it into conformity with the Growth Plan for the Greater Golden Horseshoe, 2006 (the Growth Plan). A central theme of OPA 72 was the preservation of lands designated for employment uses. Absent a successful review or appeal of the Board's decision, the City will need to initiate a new process and adopt a new official plan amendment. Municipalities updating their official plans to conform with the Growth Plan should follow the procedural requirements set out in Section 26 of the *Planning Act*, if they wish to avoid a possible challenge to the amendment.

BACKGROUND

At its meeting on 25-27 May 2009, Council for the City of Toronto enacted By-law No. 563-2009 adopting OPA 72 to the Toronto Official Plan. The stated purpose and effect of OPA 72 was to incorporate policies and text into the Official Plan that would bring the document into conformity with the Growth Plan. OPA 72 applied City-wide.

A central theme of OPA 72 was the protection of lands designated for employment uses. Specific highlights of OPA 72 are as follows:

- Amended the Chapter 2 side bar, to add language indicating that successfully accommodating the anticipated growth in the City will require protecting and investing in the City's existing supply of lands designated for employment uses.
- Amended Chapter 2, Section 2.1 by deleting the employment forecast of 1.85 million jobs by 2031, and inserting a "range of forecasts", the range being between the Growth Plan prescribed employment forecast of 1.64 million jobs, "up to 1.84 million jobs".
- Added reference in Chapter 2, Section 2.1 to the provision of "fulfilling and well-paid" employment opportunities.
- Added a policy that "no lands designated *Employment Areas* within the *Employment Districts* as shown on Map 2 will be considered for conversion to non-employment uses, including major retail uses, without the completion of a Municipal Comprehensive Review to be undertaken every five years as part of a full review of this Plan".

- Added a minimum combined gross density target of 400 jobs and residents per hectare in the *Centres* and the *Downtown*.
- Deleted Policy 4.6.4, which permits large-scale and stand alone retail stores on major streets that do not form the boundary of an *Employment Area*, where certain matters can be demonstrated.
- Added a requirement that the Official Plan be considered every five years, which will include a Municipal Comprehensive Review of the City's *Employment Areas* located within *Employment Districts*.

OPA 72 was appealed to the Board by multiple parties, including SmartCentres Inc. and Home Depot Holdings Inc. (*OMB Case No.: PL090550*).

ONTARIO MUNICIPAL BOARD PROCESS AND DECISION

At the Board Prehearing on 28 April 2010, Home Depot brought a motion challenging the legality of OPA 72, on the grounds that the City failed to follow the proper procedural requirements in adopting the amendment.

In adopting OPA 72, the City followed the procedure set out in Section 17 of the *Planning Act*. Home Depot argued that the nature of OPA 72 was such that the City was required to follow the procedures prescribed by Section 26 of the *Planning Act*, which requires a municipality to update its official plan every five years and prescribes additional procedural requirements for such updates. The City took the position that since OPA 72 did not constitute part of the City's five year review, it was not required to follow

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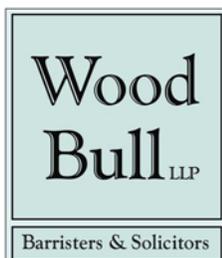
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Section 26. In support of its argument, the City called two witnesses from the Ministry of Municipal Affairs and Housing, who confirmed that the Ministry knew that the City of Toronto was processing OPA 72 pursuant to Section 17, and did not object to that course of action.

The Board issued a written decision dated 10 June 2010, repealing By-law 563-2009 and not approving OPA 72. In arriving at his decision, Member Stefanko rejected the City's arguments that:

- if Home Depot's position were accepted, the need for Section 17 would be eliminated;
- the use of the phrase "provincial plans" instead of "provincial plan" in Subsection 26(1)(a)(i) suggests that this section only applies where more than one plan is being addressed;
- Section 26(1) is only intended to deal with the totality of a five year review process, and not a discrete conformity exercise, such as OPA 72;
- the lack of opposition from the Ministry to OPA 72 was an indication that the City undertook the correct procedure in adopting OPA 72; and
- Home Depot did not suffer any prejudice as a result of the City following Section 17 rather than Section 26.

IMPLICATIONS

With the demise of OPA 72, the Toronto Official Plan remains without policies respecting the removal of lands from areas of employment, and accordingly, the restriction on appeals from applications to remove lands from an area of employment provided in the *Planning Act* does not apply in the City of Toronto. If the City intends to continue with the policy framework in OPA 72, absent a review or appeal of the Board's decision, the City will need to initiate a new process and adopt a new official plan amendment pursuant to Section 26. In addition to prescribing a more fulsome consultative process, Section 26 precludes an exemption order pursuant to Subsection 17(9), and accordingly, in the case of the City of Toronto, the Minister of Municipal Affairs and Housing will be required to approve the new amendment.

In a more general sense, the Board's decision means that municipalities updating their official plans to conform with the Growth Plan should follow the procedural requirements set out in Section 26, if they wish to avoid a possible challenge to the amendment. This would equally apply where a municipality is updating its official plan to ensure that it has regard for matters of provincial interest, is consistent with policy statements, and/or revises its official plan to ensure that the employment area policies are confirmed or amended.

The Board's decision leaves unanswered the question as to the status of official plan amendments adopted by other municipalities which are "in effect", where these municipalities proceeded with their Growth Plan conformity exercise pursuant to Section 17, rather than Section 26. The City alleged that a number of municipalities have proceeded pursuant to Section 17, such as the Regional Municipality of Halton, the City of Brantford, and the City of Guelph.

OTHER UPCOMING EMPLOYMENT AREA AMENDMENTS

In a report dated 3 May 2010, City staff brought forward a further proposed amendment to the Toronto Official Plan *Employment Areas* policies. Amongst other things, the proposed amendment limits large scale stand alone retail stores and power centres to specific major streets within *Employment Areas*, amends the permission for large scale stand alone retail stores and power centres to lots fronting onto major streets that form the boundary of an *Employment Area*, and adds a series of additional tests to be met for a rezoning to permit large scale stand alone retail stores and power centres. At its meeting on 19 May 2010, the City's Planning and Growth Committee adopted staff's recommendation to schedule community consultations, and to provide notice for a public meeting under the *Planning Act*. Stay tuned.

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