



**STAFF REPORT
ACTION REQUIRED
Confidential Attachment**

**Review of OMB Decision
840-842 York Mills Road and 16 Lesmill Road –
Home Depot Application**

Date:	November 18, 2009
To:	City Council
From:	City Solicitor
Wards:	Ward 34 – Don Valley East
Reason for Confidential Information:	This report contains advice or communications that are subject to solicitor-client privilege. It concerns litigation that affects the City.
Reference Number:	

SUMMARY

To report on the Ontario Municipal Board (OMB) decision issued on October 21, 2009 regarding a Section 43 rehearing of a phased OMB appeal to construct a large-scale retail Home Depot site at 840-842 York Mills Road and 16 Lesmill Road (the Site) and to seek additional instructions to protect the City’s planning policies.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council adopt the confidential recommendations in Attachment 1; and
2. City Council authorize the public release of the confidential recommendations in Attachment 1 if adopted by Council.

Financial Impact

The financial impact is discussed in the confidential information Attachment 1 of this report.

DECISION HISTORY

There are existing staff reports respecting the Site and related matters that have been considered by Council. City Council at its meeting of March 3, 4 and 5, 2008 refused the Official Plan and zoning by-law amendment applications intended to permit the establishment of approximately 28,000 m² of large-scale retail uses at the Site. Planning staff had recommended refusal.

On consent of the parties, the hearing was split into two phases: firstly, dealing with threshold issues relating to the impact of the Provincial Growth Plan which came into effect in June of 2006, prior to the Home Depot application; and secondly, dealing, if necessary, with the substantive planning issues relative to the development of the site.

The first phase hearing was initially the subject of a Decision of the OMB issued January 29, 2009. In that Decision the OMB found in favour of Home Depot, ruling that the Growth Plan would not prevent permission on the Site allowing for large-scale retail uses. In a letter dated March 26, 2009, the Chair of the OMB granted the City's request for a re-hearing of this matter. That rehearing has now occurred, and on October 21, 2009, a new panel of the OMB found that the governing Official Plan Policy, Policy 4.6.4 dealing with large-scale retail applications within the interior of Employment Areas, creates an acknowledgement or existing permission for large-scale retail uses such that the prohibition found in the Growth Plan against such "conversions" of land without first conducting a municipal comprehensive review is not triggered.

Related decisions made by City Council include the adoption of OPA72 on May 27, 2009, which includes a deletion of Policy 4.6.4 from the Official Plan in order to conform to the Growth Plan upon the advice of both municipal and provincial planning staff.

ISSUE BACKGROUND

As outlined above, the issues concerning this appeal directly affect the impact of the Provincial Growth Plan upon an application for large-scale retail uses made under Policy 4.6.4. of the Toronto Official Plan. Policy 4.6.4. was introduced during the Official Plan approval process in June, 2006, as a result of negotiations between Home Depot and the City. Home Depot sought to extend the current Policy 4.6.3 permissions, which would allow through a rezoning the establishment of large-scale retail uses on the periphery of an employment area to the interior of employment areas.

Following the release of the Provincial Growth Plan on June 16, 2006, it became the opinion of City planning staff that the Home Depot application for the York Mills/Lesmill site amounted to a conversion of employment lands under the Growth Plan and therefore could not be approved without the City first conducting a "municipal comprehensive review". This is intended to be an extensive survey of all existing employment lands in the municipality in relation to the attainment of provincial employment growth targets. The City planning staff opinion was confirmed by the Province in its review of the Official Plan for conformity to the Growth Plan.

At both the initial hearing and subsequent rehearing, the City argued that, unlike Policy 4.6.3, Policy 4.6.4. intentionally gave the interior of employment lands a higher level of protection by not actually granting the large-scale retail use as a permission, as an Official Plan amendment is required in order to permit the use. No permission is granted by Policy 4.6.4. The City also argued that the effect of the Growth Plan was to now prohibit site specific official plan amendments to achieve such permission, which must now be dealt with only in the context of a municipal comprehensive review.

In the rehearing Decision issued October 21, 2009, the Board did not directly opine on the legality of Policy 4.6.4 but rather found that in substance, it “established, authorized and contemplated” the principle or permission for large-scale retail commercial uses. Thus, as the permission was found to already exist in the Employment Areas designation within the Toronto Official Plan, no “conversion” of lands would occur, and the application could be considered further on its planning merits.

COMMENTS

A copy of the OMB Decision has been filed with the Clerk.
The Confidential Attachment to this report provides further information

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SIGNATURE

Anna Kinastowski, City Solicitor

ATTACHMENTS

Attachment 1 – Confidential Information