



Swansea Area Ratepayers' Group

Written on behalf of the Swansea Area Ratepayers Group

November 30, 2017

Mayor John Tory & City Councillors,
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Ref: PG24.12 Request for Direction – Official Plan Amendment 258 (Official Plan Policies to Implement a Development Permit System) as walked onto the P & G Committee Agenda November 15, 2017

Swansea Area Ratepayers Group (SARG) is a Party to the appeal of the OPA 258 – DPS in support of our communities' right to have a voice in how their communities are planned and developed. For over three years, SARG along with other resident & ratepayer associations have suggested amendments to the OPA. Our concerns have been with the City Wide component and strengthening the community consultation process to conform with the promises made by staff. These promises were related to how communities would be consulted and correcting the lack of specificity in the OPA in describing this involvement and consultation.

The City's Planning and Legal Departments have been constant in their refusal to budge from their determined position that the OPA must be City wide. Had the City gone with two pre-tests developing DPS in a couple of willing communities over two years ago, it would have saved time, money and respect for the Community Consultation process in terms of where we are today.

The OMB noted such a pre-test would have allowed for the community involvement and tweaking needed to improve the structure of the DPS By-Law. The OMB adjourned the OPA Hearing in a strongly worded document which reinforced the views and concerns of the community groups.

Critical to the OMB's thought was the change to the Planning Act stating once the OPA is approved and in place, it cannot be 'tweaked' for five (5) years! As residents have been deprived of their Third Party Right of Appeal, any deficiencies that are discovered cannot be amended unless the Planning Department of the City of Toronto recognise, initiate or consent to the fact of needing changes. The promise made was that it could be 'tweaked' once passed. In light of the current circumstances, this is most likely 'fake' news!

Similarly it is completely within staff's control whether they start a DPS study and by-law in a community or not. It is insinuated that the community is empowered with making the decision but there is no described process as to how this would be done. We ask the question: why has the City not gone forward with a DPS by-law in the last 15 years if it is such a panacea?

Instead City Legal wants to take this OMB Decision to Divisional Court. What does this say about the City's respect for its communities, its taxpayers and their right to voice their concerns about a flawed and unworkable process? More importantly what does this say about City Council's belief in involving their local communities in participatory planning?

Suggestions for Answers to the Request for Direction:

- 1. Withdraw from the Divisional Court Motion to Appeal and conduct the test of the DPS By-Law in two willing communities with the intention of ‘tweaking’ and modifying for improvements;**

Alternatively

- 2. Ask the Divisional Court for a deferral or hold on the Motion to Appeal to allow for good faith discussions and consultations with the Parties to the OPA Appeal to improve the direction and conditions of the DPS By-Law and allowing time if necessary for the tests of the By-Law.**

Over the past three years, time could have been better spent collaborating with our communities’ voices and opinions. With a pursuit of Divisional Court support for their position, at least another year of lost time and finances will be spent on legal wrangling. This legal wrangling will be based on positions that have been independently assessed as weak without making any improvements to the DPS By-Law. Our money is better spent on implementing two pre-tests including enhanced community consultation with greater potential for successful outcomes.

The greater consideration here is that the City is taking action against the better interests of property owners and good planning for our communities. We ask the City Council to bring reasonableness and even sanity to this process with consideration of our two suggestions in their answer to this Request for Direction. Your communities are depending on you to maintain the integrity of the Planning Process.

Sincerely,



Veronica Wynne,
SARG V-P
swansearatepayers@bell.net

Attachment:

- OMB Decision re Adjournment of OPA 258 PL140906

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 02, 2017

CASE NO(S):

PL140906

PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Avenue Road Eglinton Community Association (ARECA)
Appellant: Building Industry & Land Development Association (BILD)
Appellant: Confederation Of Resident & Ratepayer Ass. (CORRA)
Appellant: Deltera Inc.
Appellant: Lakeshore Planning Council Corp.
Appellant: Riocan Management Inc.
Appellant: Swansea Area Ratepayers Group
Appellant: Terracap Management Inc.
Appellant: Teddington Park Residents Association (TPRA)
Subject: Proposed Official Plan Amendment No. OPA 258

Municipality: City of Toronto
OMB Case No.: PL140906
OMB File No.: PL140906
OMB Case Name: Avenue Road Eglinton Community Association v. Toronto (City)

PROCEEDING COMMENCED UNDER section 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended, and Rule 63 of the Board's Rules of Practice and Procedure

Request by: Building Industry & Land Development Association (BILD), Deltera Inc., RioCan Real Estate Investment Trust., RioCan Holdings Inc., RioCan Management Inc. and Terracap Management Inc.
(the "Moving Parties" for the Joint Motion)

Request for: Adjournment of a hearing event

Heard: July 13, 2017 in Toronto, Ontario

APPEARANCES:

Parties

Counsel*/Representative

City of Toronto

Brendan O’Callaghan*

Building Industry and Land
Development Association (“BILD”)

David Bronskill*

Deltera Inc.
Riocan Real Estate Investment Trust
RioCan Holdings Inc.
RioCan Management Inc.
Terracap Management Inc.

Calvin Lantz*

Teddington Park Residents
Association (“TPRA”)
Confederation of Resident &
Ratepayer Associations (“CORRA”)
Avenue Road Eglinton Community
Association (“ARECA”)

Eileen Denny

Lakeshore Planning Council Corp.
 (“LPCC”)

Peggy Moulder

Swansea Area Ratepayers Group
 (“Swansea”)

William Roberts*

Ministry of Municipal Affairs and
Housing

Irvin Shachter* and Ugljesa Popadic*

**DECISION DELIVERED BY DAVID L. LANTHIER AND K. J. HUSSEY AND ORDER
OF THE BOARD**

INTRODUCTION

[1] Before the Board is a joint motion (“Motion”) brought by BILD, Deltera Inc., Riocan Real Estate Investment Trust RioCan Holdings Inc., RioCan Management Inc. and Terracap Management Inc. (collectively, the “Landowners”) and supported by the LPCC. and Swansea. Although some additional comments and clarification were provided by the representative for TPRA, CORRA and ARECA, these three ratepayer associations also support the Landowners’ motion (Collectively, for the purposes of this Decision, all the residents’ associations are referred to herein as the “Ratepayers”).

[2] The Motion is opposed by the City of Toronto (“City”) and the Ministry of Municipal Affairs and Housing (“Ministry”).

[3] By this Motion the Landowners seek an Order of the Board to adjourn the ten-day hearing of the appeals to Official Plan Amendment (“OPA”) 258 that is scheduled to commence on January 15, 2018 (the “Hearing”) without a fixed return date, pending the drafting and evaluation and enactment of at least one Development Permit By-law (“DPB”) by the City for a specific geographic area. The Landowners take the position that the hearing of the appeals would be premature in the absence of a DPB. The issue of prematurity is among those listed in the issues list for the Hearing.

[4] The City and the Ministry take the position that the Board has no jurisdiction to provide the relief sought by the Landowners under the legislation.

OBJECTION – ADJUDICATION OF THE ISSUES RELATING TO PREMATURETY

[5] It is necessary to first address a submission advanced by the City (and the Ministry) during argument requesting that in the event the Board dismisses this Motion, the issues relating to prematurity on the Issues List should be struck on the basis that the Board would have determinatively adjudicated these matters in this Motion. The

Landowners objected and took the position that if the Motion is dismissed, the issue as to whether the hearing is premature as the basis for the appeal would remain a live issue to be decided on the merits at the Hearing and could not be summarily dismissed and eliminated.

[6] For two reasons, the Board would not be inclined to accede to such a request by the City and the Ministry, were the Motion to be dismissed. First, as a matter of procedure, if the City and Ministry were of the view that the issue of prematurity should be struck from the already agreed-upon Issues List, having already been adjudicated in this Motion, it could only be done by further and separate motion. Essentially, the Board would be granting relief under s. 17(45) and 22(11) of *Planning Act* (the "Act"), summarily dismissing those issues without a full hearing. Such a significant ruling would have to be carefully considered and the Board would require a motion in such circumstances.

[7] Second, if the Board were to deny the Motion, the issues relating to prematurity as set out in the Issues List, would not necessarily have been determined on a final basis in the disposition of this motion. The issue of prematurity would still remain to be fully adjudicated on the basis of all the evidence to be received at the Hearing.

[8] Ultimately it is unnecessary for the Board to deal with this request since the Board, for the reasons indicated, finds that it is appropriate to grant the Motion and to adjourn the hearing of the appeals relating to OPA 258, in the manner provided for in this Decision.

ANALYSIS

THE NEW DEVELOPMENT PERMIT SYSTEM – A FUNDAMENTAL CHANGE

[9] The legislation governing the new Development Permit System, and the basis upon which the City will pass a DPB is straightforward. The enabling provisions are contained within s. 70.2 of the Act and the implementing regulations that were passed pursuant to that section. At the time that OPA 258 was passed by the City, the regulation that was in effect in relation to the Development Permit System was Ontario Regulation (“O. Reg.”) 608/06. As a result of amendments that regulation was withdrawn and replaced with O. Reg. 173/16.

[10] The new regulation included changes in terminology and the references to the Development Permit System and a DPB were altered (referring instead to a “Community Planning Permit By-Law”). For the purposes of this Motion, there is no significant or relevant distinction between the two forms of the regulations as they relate to the issues and the Board will, for ease of reference, refer to O. Reg. 608/06 (the “Regulations”) and the terms used at the time that the City passed OPA 258.

[11] It is the Board’s view that, as submitted by the Landowners and the Ratepayers, the implementation of a Development Permit System represents a significant and fundamental change in the way that a municipality implements its official plan and practically governs planning and development. As an alternative to the different segmented application and planning processes, the Development Permit System is intended to be a faster, more efficient and responsive “one stop” whole-approval process for zoning amendments, site plan approval processes, and minor variance applications.

[12] Since the amendments to the legislation were first passed, only four smaller municipalities out of 444 municipalities in the Province have adopted a Development Permit System. The evidence of Land Use Planner Peter Smith is that each of the four municipalities that have adopted a Development Permit System more or less passed their DPB concurrently with their OPA. In Gananoque and Carleton Place, two relatively small communities, the new system was implemented in the entire municipality. In Lake of Bays, the Development Permit System applied only to the waterfront area, and in Brampton, it was limited to a defined area on Main Street North.

[13] The Board would agree with the submission of the Landowners and the expert planning opinion of Mr. Smith, that because the City's adoption of a new Development Permit System is on a city-wide basis under OPA 258, it will represent such a fundamental change to planning and development in the largest urban area of the Province, "it is imperative to get it right". Once implemented all existing zoning by-laws and related variances in the City will have been effectively repealed and replaced, and with them, the land use regulation system that has been in place for over 60 years.

[14] The Ratepayers fully support the Landowners' position, especially on the significance of changes under Development Permit System regime. The Ratepayers were granted party status in this proceeding and clearly have a strong interest in the outcome of the appeals, since the manner in which such groups will be involved in appeal proceedings will be significantly affected by the implementation of a Development Permit System.

[15] Swansea submits that the new Development Permit System will directly affect the rights of private citizens in all aspects of planning development and described the new regime as a "fundamental shift" in planning and development. As such, Swansea also takes the position that it is in the interests of all ratepayers groups and members of the public in the City that the Board have the best possible evidence before it when considering the issues. That best evidence must include a DPB that demonstrates the

form and manner in which the rights and interests of the public and ratepayers will be considered in decision making under the new regime. The Ratepayers agree with the Landowner's that the absence of a DPB when the appeals are adjudicated will result in prejudice to the ratepayers and the public at large.

[16] The Board accepts this position of the Ratepayers and these shared submissions relating to the importance of safeguarding the public interest.

[17] In striking comparison to the other four municipalities, the City has not passed its DPB concurrently with the OPA and the OPA, as passed, is to apply to the entirety of the City. In the absence of a DPB, and on its face, the Development Permit System is to apply to the largest, and most densely populated urban area of Ontario. In these appeals, the Board is being asked to adjudicate issues relating to the necessary OPA that permits a DPB to be passed, without knowing what the City's DPB would contain, or to what area of the City the DPB would actually apply once it is passed.

THE LEGISLATIVE FRAMEWORK FOR THE DEVELOPMENT PERMIT SYSTEM

[18] The primary sections of the Regulations which are relevant in this Motion are contained within s. 3, which provide as follows:

Conditions re official plan

- 3.(1) The council shall not pass a development permit by-law for any area in the municipality unless, before the passing of the by-law, the official plan in effect in the municipality,
- (a) identifies the area as a proposed development permit area;
 - (b) sets out the scope of the authority that may be delegated and any limitations on the delegation, if the council intends to delegate any authority under the development permit by-law; and
 - (c) for each proposed development permit area identified under clause (a),
 - (i) contains a statement of the municipality's goals, objectives and policies in proposing a development permit system for the area,

- (ii) sets out the types of criteria that may be included in the development permit by-law for determining whether any class of development or any use of land may be permitted by development permit, and
- (iii) sets out the types of conditions that may be included in the development permit by-law in accordance with clause 4 (2) (i) and subsections 4 (4), (5) and (6).

(2) The types of criteria described in subclause (1) (c) (ii) and the types of conditions described in subclause (1) (c) (iii) shall be in accordance with the goals, objectives and policies described in subclause (1) (c) (i).

(3) For greater certainty, subsection (1) is subject to subsection 24 (2) of the Act.

- (4) The official plan may,
- (a) set out information and materials that are required, in addition to those set out in Schedule 1, in an application for a development permit; and
 - (b) exempt any class of development or any use of land from any of the requirements of Schedule 1, but only if the official plan sets out what information and materials are to be provided in an application that falls within that class or use.

(5) The official plan may contain policies relating to the application of paragraph 5 of subsection 4 (5), respecting conditions requiring the provision of specified facilities, services and matters in exchange for a specified height or density of development, which may be within the ranges set out under clause 4 (2) (c) or outside those ranges as set out under clause 4 (3) (f).

[19] Section 3 of the Regulations is very specific in imposing the restriction that prevents the Council of a municipality from passing a DPB *unless* they have first amended the Official Plan to include the mandatory provisions set out in s. 3. This is not disputed by the parties.

[20] The Regulations then provide for the requirements and optional matters that are to be contained within the DPB. Subsection 4(2) of the Regulations first provides a detailed outline of 11 mandatory requirements of the DPB. In this respect, the Board is able to know that these aspects will be contained within the DPB. However, of those 11 mandatory provisions only (h) and (k) are really predetermined by the Regulations, and the remaining nine provisions still permit the municipality extensive discretion to “fill in the details” – and there is *much* detail to be provided with that discretion. These

discretionary details significantly affect the breadth of impact of the DPB and makes up the substantive core of the DPB as it will govern planning and development.

[21] The first of these discretionary matters to be determined in the DPB is the description of the area of the municipality to which the by-law is to apply. The second discretionary area of detail is the identification of the permitted uses of land. The third area is the comprehensive list of minimum and maximum performance standards for development in the City, which obviously is to contain the substantial body of standards currently contained in the City's zoning by-laws. These substantive and required elements of the by-law, and the remainder of the mandatory requirements, represent key aspects of the manner in which the OPA will result in the creation of a Development Permit System.

[22] Subsection 4(3) of the Regulations then sets out six discretionary areas which will also form part of the substantive core of the DPB and they address the permitted uses, classes of development, exemptions, the criteria for making decisions and the range of variances that are to be permitted from the performance standards set out in the DPB. These elected provisions of the DPB, again, form the manner in which the Development Permit System is created and operates under the OPA.

[23] Subsections 4(4) to 4(5) further permit the municipality to decide the form and manner under which conditions will be imposed for development and use of lands and how agreements will be used to govern site-specific development as anticipated by the OPA.

[24] The new planning and development processes created by the amendments to the legislation clearly require an OPA as the prerequisite planning instrument to create the construct for the new Development Permit System, but the Board recognizes that following the recognized hierarchical form of the provincial planning regime, it is really the DPB that practically and substantively implements the way in which the official plan,

as amended under s. 3 of the Regulations, will enact the new Development Permit System. One follows the other.

THE NATURE OF THE PREMATURITY – LEGISLATIVE OR PROCEDURAL

[25] The primary point of contention between the parties relates to the issue of prematurity as the basis upon which the Board is asked to adjourn the hearing. More specifically, where the parties differ is in their *approach* to the issue of prematurity.

[26] The Landowners fully acknowledge that the Regulations do not require the passing of the DPB concurrent with the OPA, an important assertion advanced by the City. The Board concurs, and there is no dispute that the OPA is itself not premature without a DPB also having been passed.

[27] However, the Landowners, with precision, have stated their position as to the relief sought and the grounds upon which the Motion is based. They pointedly confirm that they are not alleging prematurity based upon the enabling legislation; they are also not seeking an order requiring the City to pass a DPB for the purposes of compliance with the Regulations.

[28] The Board agrees that such relief cannot be granted to the Landowners given the clarity of the legislation.

[29] Succinctly, what the Landowners are instead seeking is a procedural order that the *hearing* of the appeals is premature in the absence of a DPB and request an adjournment of the Hearing on the basis that the Board practically requires a draft DPB approved by the City and tested, in order to properly adjudicate the issues in the appeals relating to the policies, goals and objectives of OPA 258. The Landowners thus assert that it is premature to require the Board to adjudicate the appeals without the benefit of a DPB having been passed, and tested.

ARE THERE COMPELLING REASONS TO ADJOURN THE HEARING?**The Nexus of the Official Plan and the DPB**

[30] The underlying reason advanced by the Landowners for the adjournment of the hearing is based upon the framework of the Regulations as described above. The Landowners assert that while OPA 258 creates the enabling framework for the new Development Permit System within the City's planning regime, it is the DPB that provides the substantive and practical manner in which the system is implemented and then works where it applies, and the procedures, criteria, mechanisms and systems that are applied. The Landowners submit that it is this nexus between the OPA and the DPB, and the logical necessity of knowing what will be in the DPB before deciding the issues relating to OPA 258 that necessitates an adjournment of the hearing. Without the availability of the DPB for review, there will be significant prejudice to the Landowners, the Ratepayers and the public at large.

[31] The Board accepts Mr. Smith's evidence in support of this assertion and relies upon his analysis of the nature of the Regulations and framework and implementation processes involved in the Development Permit System, as outlined above.

[32] As the evidence indicates, Mr. Smith stands in the unique vantage point of having been consulted by the Ministry regarding the structure and content of the Development Permit System at its inception. Mr. Smith is of the opinion that without a DPB in place, it is not possible to see how the Development Permit System will work or to reasonably or practically assess the appropriateness, completeness and land use planning merits of OPA 258. The Board considers that Mr. Smith's intimate involvement in the pilot project and the originating processes and critical review of the pros and cons of moving forward, is to be given some considerable weight.

[33] The City and the Ministry have provided no planning evidence to challenge this opinion. In Joe D'Abramo's affidavit, filed on behalf of the City, he indicates that the City has met its basic legislative requirements, satisfied the first of a two-step process and, in his opinion, is required to do nothing more at this point. This evidence speaks only to the basic legislative requirements of the City and the strict minimum legislated requirements of the Official Plan, and not to the public interest or the interests of Landowners or Ratepayers.

[34] As the Landowners argue, and Mr. Smith has opined, the satisfaction of the basic legal requirement of passing an OPA fails to address the importance and necessity of having all necessary planning instruments in place under the Regulations to assist the Board in determining the issues in the appeal and whether the policies contained in OPA 258 are complete and whether a full and meaningful assessment of the land use planning merits of the amendment have been undertaken.

[35] The Board also concurs with the Landowners that the importance of having the necessary DPB in place is all the more highlighted by the fact that OPA 258, as drafted, applies on a city-wide basis.

[36] Finally, as to the reality that the Official Plan and the DPB are integrally connected, the City's argument itself recognizes that further updates to OPA 258 or area-specific OPAs may very well be required upon review of the DPB once passed. As the Landowners' submit, this raises the question as to why the DPB should not be passed now before the hearing of the planning merits of OPA 258 is adjudicated by the Board. The City's approach also fails to recognize that the right of appeal is barred for the five-year period, as discussed further below.

[37] For these reasons, the Board prefers the planning evidence of the Landowners over that of the City's, and finds that there is a compelling interrelationship and connection between the DPB and the OPA that practically demands the DPB to be reviewed and assessed concurrently with the appellate review and assessment of OPA 258 undertaken by the Board.

Prejudice Arising from the Absence of a DPB

[38] It is also Mr. Smith's opinion that the Landowners, Ratepayers and the public at large will be prejudiced if a policy framework of an untested Development Permit System is rolled out giving the City the authority to enact multiple by-laws in advance of demonstrating that the system works.

[39] Also to the matter of prejudice, the Landowners have drawn the Board's attention to the fact that the new limitations to amend the OPA will be prohibited for five years after the amendment is passed. Practically speaking, if the Board were to hear the appeals in January of 2018 and the DPB enacted two years later, raising concerns about the impact of OPA 258 due to the manner in which the DPB was drafted, the Landowners, Ratepayers and the public at large would be prohibited for five years from requesting that OPA 258 be revisited. The Board is unable to accept Mr. D'Abramo's assertion that issues will be "simply addressed" through the amendment process and that if OPA 258 is found lacking, that Council may amend those policies with the amendment process. This fails to recognize the time limitations and practicalities involved with revisiting deficiencies in OPA 258 found to exist after the hearing of the appeals is concluded and the DPB only then enacted. That situation would not serve the public well.

[40] The Board has considered the affidavit evidence submitted by the City. The City (and the Ministry) has proffered no planning evidence to counter Mr. Smith's concerns arising from the absence of a DPB when hearing the appeals.

[41] The City has failed to provide any evidence of prejudice that would be caused by the passage of the DPB or by any finding by the Board that the hearing of the issues in these appeals would be premature without the benefit of a DPB enacted by the City and available to the Board. Mr. D'Abramo's affidavit is silent on the issue of prejudice to the City if the hearing is adjourned in the manner requested and there is no evidence before the Board to suggest that the adjournment will adversely affect, or delay the passing of the DPB.

[42] What is noticeably lacking in the evidence before the Board in this Motion is any explanation by the City as to why it has not passed the DPB in the more than three years that have elapsed since OPA 258 was passed or why it is delaying the passage of the DPB. The City has not provided any evidence or argument of necessity or good planning grounds to explain or justify the delay in the passing of the DPB. To the contrary, the City has been very forthright in stating that the timing of the passage of the DPB, and the decision to proceed with OPA 238 is purely a matter of preference. As noted in Mr. D'Abramo's planning evidence, City Council relies upon its prerogative whether to pass a development permit by-law and there is nothing in the Regulations forcing the Council to pass such by-laws.

[43] The Board notes that the City, for reasons unknown, has not responded to the central argument of the Landowners and the Ratepayers that the passage of the DPB is essential for the proper adjudication of the issues relating to the policies enacted through OPA 258 and that the hearing would be premature in the absence of a DPB. The City provides no evidence that might support a submission that it is necessary for the appeals relating to OPA 258 to be adjudicated without the benefit of a DPB or alternatively why it is not reasonable to have a DPB in place before the appeals are

heard. The City provides no persuasive explanation as to why it is opposed to having a DPB in place before adjudicating the issues before the Board with respect to OPA 258, save and except that it is not obligated to do so under the legislation.

OPA 258 is “Only Administrative”

[44] The City submits that OPA 258 is “only” an administrative amendment and as such, there is no need to consider what will be contained in the DPB in order to adjudicate the issues in the appeal. The City likens it to an official plan prerequisite to the passage of site plan agreements and forms of development.

[45] Characterizing OPA 258 as “only” an administrative amendment, in the Board’s view, diminishes the significance of OPA. The legislation requires the amendment to the Official Plan to be passed, and as with all parts of an official plan, once enacted, OPA 258 forms part of the overarching policy framework for the entirety of the DPS framework. The Board cannot accept the submission of the City as to the character and importance of OPA 258 for three reasons:

1. First, it is almost trite to say that once OPA 258 is passed, it becomes part of the City’s Official Plan as a whole. Time and again the Board recognizes the provisions of the official plan, and general planning law, which emphasize that the City’s Official Plan must be taken and considered, in its entirety as a holistic planning instrument and that sections of the Official Plan should not be considered in isolation. The vast majority of planning decisions made in the City require conformity with the Official Plan as a complete document. Once OPA 258 is passed, it will form an integral part of the plan’s objectives, goals and policies.

2. Second, s. 3 of the Regulations expressly provides that the required OPA is being enacted to lay out, within its framework, the goals, objectives and policies as set out in the Regulations. The legislation itself identifies this OPA as something beyond merely administrative and the Board cannot accept that the implementation of goals objectives and policies as part of the overall planning framework necessary for the creation of a Development Permit System is purely administrative in nature.
3. Third, it is a fundamental aspect of planning law that there is a hierarchy of planning documents in the Province of Ontario. Accordingly, the Board's role in assessing the propriety of planning and development decisions always requires the examination of the larger objectives goals and policies that have been identified by the municipality in the Official Plan. This always necessitates a review of the content of the Official Plan in order to understand the implementation of those policies goals and objectives through the by-laws, including zoning and other by-laws, which in turn implement the practical planning and development restrictions, requirements, limitations and directives that impact planning and development.

[46] The legislation governing the creation of the Development Permit System is no different. As an example, under s. 8(1) of the Regulations, s. 45 relating to minor variances would no longer apply under the Development Permit System but under s. 2.4(3)(f), the City will enact similar provisions to allow for variances in a manner that will require conformity in some manner with the Official Plan. How the new system will do this is unknown until the DPB is passed, and the manner in which the current provisions of the Official Plan, such as those in the "Neighbourhoods" designation, will apply to variation applications.

[47] The connectivity between the DPB and the Official Plan, as it is enabled by OPA 258, is clear. Accordingly, the form of OPA 258 as it will enable the DPB and connect it to the entirety of the Official Plan cannot, in the Board's view, be dismissed as being only administrative, as the City argues. As Mr. Smith has indicated, the appropriateness, completeness and planning merits of OPA 258 cannot be determined without knowing how the DPB will practically implement the Development Permit System, and this includes the system's operation in conformity with the Official Plan.

[48] The evidence before the Board, and the Board's consideration of the legislative framework and the significant practical and substantive connectivity between an official plan enabling a Development Permit System and the DPB that actually creates the planning and development policies and processes, and implements the new system, leads the Board to a finding that in order to fully and effectively assess the planning merits of OPA 258 and the issues placed before the Board, it must have before it a DPB drafted and brought into force by the City. Without the DPB, the Board finds that it is unable to properly adjudicate the issues in these appeals, and as such, it would be premature to proceed with the hearing of the appeals.

JURISDICTION TO GRANT THE ADJOURNMENT OF THE HEARING

The City's Position

[49] The City argues that the Board has no such jurisdiction to direct the City to pass the DPB as a prerequisite to the conduct of the Hearing. The City has stated that even if the Landowners and Ratepayers do not like the process, the City has the ability to determine the process and exercise their preference to first pass OPA 258, and delay the passage of the DPB as they may wish. The City's stance that they control that process without interference from the Board, and that the Board has no jurisdiction to require a DPB to be passed before the Hearing of the Appeals was, in argument, based upon four things:

- (1) a delay in passage of the By-law is “common planning practice”;
- (2) the decision of the Ontario Divisional Court in *Mattamy (Rouge) Ltd. v. Toronto (City)* [2003] O.J. No. 4829 (“*Mattamy*”). *Mattamy* is authority for the fact that the Board lacks jurisdiction to order a municipality to pass a DPB;
- (3) the wording of s. 3 of the Regulation does not require a municipality to pass its DPB concurrently with its OPA and the City may delay the passage of a DPB as it wishes and to require the DPB to be passed is “contrary to the legislative requirements”; and
- (4) the Board has no jurisdiction to adjourn the hearing and require the City to pass a DPB and the City is entitled to a hearing of the appeals.

(1) “*Common Planning Practice*”

[50] Dealing with the submission that the delay is “common planning practice”, the Board cannot agree. Given the significance of the new DPS in the Province and the fact that only four other smaller municipalities have, to date, implemented a Development Permit System regime, what is now before the Board hardly represents an example of “common planning practice”. More so, these four smaller municipalities which represent the only precedent cases of the Development Permit System, implemented their DPB concurrently with, or very shortly after their official plan was amended. Accordingly, if anything, the limited precedent that does exist would suggest a commonality of concurrent, or close to concurrent, passage of both the OPA and the DPB. What the City is proposing does not seem to be at all “in common with” the few municipalities that have elected to move forward under this new planning regime.

(2) *The Mattamy Decision*

[51] With respect to the *Mattamy* decision, the Divisional Court in that case, was asked to rule on a stated case directed by the Board as to whether the Board had the jurisdiction to direct the municipality to pass a by-law to assume a roadway, which the developer argued was necessary under the circumstances of that case. The Divisional Court confirmed that the Board lacked jurisdiction under the *Planning Act*, the *Ontario Municipal Board Act* (“OMBA”), the *Surveys Act* or the *Municipal Act, 2001* to force a municipality to assume a roadway through the enactment of a by-law, contrary to the wishes of that municipality. The Court stated that there was nothing provided for within the Board’s general powers, or any specific provision (including that of the *Planning Act*) that empowered the Board to order the assumption of a roadway by a municipality. The Divisional Court agreed with the City’s argument that a decision as to whether a municipality should, or should not assume a highway, is one that is within the exclusive jurisdiction of the Municipal Council.

[52] The City argues that the circumstances of this Motion are exactly the same as those in *Mattamy* and that the Board cannot therefore force the City to pass at DPB. The Board disagrees.

[53] The legislative framework in place governing Development Permit Systems requires the City to pass OPA 258 in order to ensure that the City is able to pass its DPB. The fact that the singular purpose of OPA 258, as it is before the Board in these appeals, is to provide the City with the ability to enact a DPB is acknowledged by the City. The City also frankly acknowledges that it intends to pass the DPB, although it provides no explanation as to why it has not yet done so. As the Landowners posit, why would the City pass OPA 258 if not for the obvious purpose of implementing a Development Permit System? On this basis, it is rather disingenuous and incorrect for the City to argue that the Board would be “forcing” it to pass a by-law which it obviously intends to pass.

[54] Unlike the circumstances of *Mattamy*, if the hearing were to be adjourned until a DPB drafted and/or passed, the Board would not be ordering the City to do something over which the City has exclusive jurisdiction. There is no question that only the City may enact a DPB under the Regulations. What the Board would be doing is issuing a procedural order for the hearing to be adjourned until such time as the City decides to pass its DPB, which, as the City has pointedly argued, it has the exclusive right to decide.

(3) *The Regulations – Section 3*

[55] The Landowners fully concede, and the Board agrees that s. 3 of the Regulations does not require the City to pass the DPB concurrently with, or immediately following, the passage of OPA 258. The Regulations clearly states that OPA 258 must be in place *before* the DPB is passed.

[56] The Board cannot however agree with the City's submission that requiring the City to pass a DPB concurrently with the OPA would be contrary to the legislative requirements. Applying the general principles of interpretation, although the Regulations require the pre-requisite OPA to be enacted before a DPB is passed as drafted, they do not *prevent* the concurrent, or immediately successive passing of a DPB to allow for the consideration and review of both planning instruments in tandem.

(4) *No Jurisdiction of the Board to Adjourn until DPB is passed – Right to A Hearing – “Administrative Purgatory”*

[57] The City further argues that there is no other jurisdiction granted to the Board to order the City to pass a DPB. As previously stated, the Board agrees that it does not have the power to make an order directing the City to pass a DPB.

[58] The City submits that these jurisdictional restraints relating to the passage of the DPB summarily end the discussion, and for those reasons, the hearing of the appeals is not premature, and the Board cannot otherwise dictate that a DPB should be in place to properly adjudicate the issues before the Board with respect to the OPA 258 appeals. The City argues that the Landowners' request to adjourn the hearing is a "Draconian remedy" and to adjourn the hearing is to deny the City its statutory right to a hearing of the appeals pursuant to s. 17(44) of the Act.

[59] The Board would disagree with the colouring of the adjournment of the hearing as either Draconian or a denial of the City's legal right to a hearing. Although the Board is indeed required under s. 17(44) of the Act to hold a hearing, once the Board is seized with jurisdiction of an appeal, it is also vested with the powers and tools as described herein to schedule and conduct that hearing as it determines necessary to achieve a hearing that is fair, efficient, adequate and just. The "right" to a hearing under the legislation does not supersede or negate the Board's powers as to how that hearing is to be conducted, including the power to adjourn a hearing.

[60] Moreover, the "right" to a hearing, is equally that of all parties, and the Board is obligated to ensure that all parties, without prejudice, are entitled to a fair and just hearing of the issues, upon such terms, directions and requirements as it deems necessary to determine the merits of the appeal. For the reasons indicated herein, the evidence indicates that there will be prejudice to the Landowners, Ratepayers and the public, if the Board is not provided with the benefit of the DPB and that an adjournment is necessary to address that prejudice.

[61] The City has also submitted to the Board that if the adjournment is granted, the City will be left in "administrative purgatory" and "legal limbo" where they are unable to have a hearing of the appeals on the merits unless they pass the DPB, which they are under no legal obligation to undertake. These submissions are rather disingenuous.

[62] As indicated, the City has obviously initiated OPA 258 under the Regulations for the express and sole purpose of implementing a Development Permit System. Having done so, the City must logically proceed to the second of the two-step process and pass the DPB. The City has frankly argued that when it does so, is entirely within its control and it cannot be ordered to do so. Again, the Board agrees. The Board indeed cannot order the City to pass the DPB now or ever for that matter. However, applying the City's somewhat dramatic descriptive analogy, as is the case with any intermediate state of purgatory, the City is in such a state solely as a result of its own actions and only the City may itself choose to abide by the higher regulatory power and move forward, pass the DPB, and implement the Development Permit System. The City has been in this state of "limbo" for over three years of its own choosing.

The Landowners' and Ratepayers' Position

[63] The Board agrees with the Landowners' submissions that the basis upon which the Board can grant the relief sought in this motion is not based upon the Regulations or any powers relating to the passage of the DPB, but rather the powers and jurisdiction of the Board to control its own processes to achieve a hearing that is fair, efficient, adequate and just.

[64] The Board's jurisdiction provides the authority for the Board to grant adjournments and make such orders as are necessary to ensure that it is properly able to consider and adjudicate the issues before it; and to determine the manner in which it hears, and adjudicates matters before it.

[65] Under s. 37 of the OMBA, the Board is granted the general power to make such orders, and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under any general or special act. This would include the general power to adjourn a hearing pending receipt of such further documents or the satisfaction of an identified

prerequisite necessary for the full and proper adjudication of the issues before the Board.

[66] The power to adjourn a hearing is also expressly provided for in s. 87(2), which provides:

Interim orders

87(2) The Board may, instead of making an order final in the first instance, make an interim order and reserve further directions, either for an adjourned hearing of the matter or for further application.

[67] The *Statutory Powers and Procedures Act* (“SPPA”) also confer upon the Board, the specific power to grant an adjournment where it is deemed necessary to achieve a proper hearing. Section 21 of the SPPA provides as follows:

21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

[68] Finally, pursuant to the Board’s *Rules of Practice and Procedure* enacted under s. 91 of the OMBA, the Board retains discretionary powers to adjourn hearings and make such orders as are appropriate. Two of the Rules most relevant to the circumstances here are Rules 6 and 65(h) which provides that the Board may grant relief and make any order it considers appropriate to ensure that the issues before the Board are determined in a just, most expeditious and cost-effective manner.

[69] The Board has demonstrated a willingness to adjourn proceedings where the effective and efficient adjudication of issues demands it. The Board has, for example, adjourned appeals relating to consent applications where it determined that it is first necessary to allow for a minor variance application or a zoning by-law amendment to be addressed, even though the consent appeal could be dealt with in isolation. Although the circumstances are different in this case, the underlying reasons for the adjournment in this case are the same – although the hearing of the appeals in the absence of a DPB

is technically possible, the Board has determined that it would be more efficient and effective if the Board awaits the passing of the DPB.

CONCLUSION

[70] After considering the planning evidence presented by all parties and the submissions of counsel and representatives, the Board finds that there are compelling reasons to require that the City first pass a DPB before proceeding with the hearing of the appeals. In order to ensure that OPA 258 represents good planning and is in the public interest, avoid prejudice to the Landowners, Ratepayers and public, and ensure that the Board has before it the best, and most complete evidence to justly determine the planning merits of OPA 258, it is the Board's view that it must postpone the hearing of the appeals until such time as the City decides it is time to pass the DPB.

[71] For the reasons indicated the Board has found that there is no legislative provision that would prevent the adjournment or would prohibit a procedural direction that the DPB be passed before adjudicating the appeals. The Board finds there would be no prejudice to the City from the adjournment.

[72] The Board accordingly allows the Motion to adjourn the hearing of the Appeals to OPA 258.

ORDER

[73] The Board orders that the hearing dates for the appeals in this proceeding, scheduled to commence on January 15, 2018, are struck from the calendar and the Hearing is adjourned without a fixed date.

[74] The Board orders that the hearing of the appeals shall proceed at such time as the City has enacted, in final form, a Community Planning Permit By-Law (Development Permit By-law) pursuant to the Regulations applicable to such geographic areas of the City as the City has deemed appropriate pursuant to the Regulations, and the appeal period relating to such By-law has elapsed under the *Planning Act*.

[75] In the event any appeal of the By-law passed under the paragraph above is filed, the Board will consider such procedural matters as may arise from such appeal(s) in relation to the Appeals before the Board in this proceeding in accordance with the Rules.

[76] At such time as the Community Planning Permit By-Law has been passed in accordance with this Order, the City shall request that a Pre-hearing Conference (“PHC”) be scheduled, and notice provided, to permit the Board to address issues relating to the status of the proceedings and the scheduling of the Hearing.

[77] In the event the City has not enacted a Community Planning Permit By-Law within one year of the date of the issuance of this Decision, the City will submit a report to the Board, copied to all parties, outlining the status of its efforts to enact the By-law. In the event the status report is not filed within that timeframe, any party may request that a PHC be scheduled, and notice provided, to permit the Board to address issues relating to the status of the proceedings, the scheduling of the Hearing, and such further or other disposition as may be determined necessary.

[78] The panel of the Board is not seized of the hearing of the appeals.

“David L. Lanthier”

DAVID L. LANTHIER
MEMBER

“K. J. Hussey”

K. J. HUSSEY
VICE-CHAIR

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please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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