PG 2.5.82

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2011 APR -8 A 8:25

April 7, 2011

Mayor Rob Ford and Members of Council
City of Toronto
Toronto City Hall
100 Queen Street West
Toronto ON M5H 2N2

Attention: City Clerk

Attention: Merle MacDonald, Administrator, Planning and Growth Management Committee

Your Worship and Members of Council:

Re: Repeal of Zoning By-law 1156-2010
Item PG2.5 – Amendments to Zoning By-law 1156-2010

Further to the meeting of Planning and Growth Management Committee of March 24, 2011 and on behalf of the clients identified in our March 23, 2011 letter submitted to the Committee, we wish to address two matters related to the repeal the City's proposed New Zoning By-law.

We will characterize the two matters as follows:

1. Can a by-law repealing the New Zoning By-law be itself appealed to the Ontario Municipal Board?

2. Is the New Zoning By-law necessary as an Official Plan conformity exercise?

We have discussed the contents of this letter with other law firms that have been actively involved in the New Zoning By-law process, and we understand that they will be submitting letters to the City confirming their agreement with our conclusions as set out below.

1. Can a repeal of the New Zoning By-law be itself appealed to the Ontario Municipal Board?

An issue raised at the Planning and Growth Management Committee meeting was whether the repeal of the New Zoning By-law was a matter that could be appealed to the Ontario Municipal Board.

We understand that this was an issue of concern, insofar as an appeal of the repeal might not provide for the hiatus period that the Committee felt is necessary in order to address the fundamental flaws with the New Zoning By-law (that is, because if the repeal were appealed, the

Building Department would have to continue to enforce the New Zoning By-law as if it were in effect).

In our view, the matter is settled, as reflected in *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 OR (2d) 20, 39 DLR (3d) 188 and in *Re Hamilton (City) Official Plan Amendment 12 and Zoning By-laws 84-46 and 88-86*, (1989) 23 OMBR 476: A decision by City Council to repeal of the New Zoning By-law while the New Zoning By-law is itself under appeal to the Ontario Municipal Board cannot be appealed.

As succinctly stated by the Ontario Municipal Board in the *Hamilton* case:

> As stated by the courts, no express limitation is to be found in this statute [i.e., the *Planning Act*] on Council's right to repeal in whole or in part a by-law passed but not yet in force. No right of appeal from such action is given in the statute. Therefore, none exists and this Board is without jurisdiction to hear such "appeals".
>
> (emphasis added)

A repealing by-law is not a zoning by-law passed under Section 34 of the *Planning Act* and the public process (including the requirement to hold a public meeting) attendant on zoning by-laws is not required.

2. Is the New Zoning By-law necessary as an Official Plan conformity exercise?

We further understand that there has been some suggestion that the requirement to adopt the New Zoning By-law was a legislated "conformity" exercise under the *Planning Act* and that repeal of the New Zoning By-law would run afoul of this exercise. With respect, this is quite simply not the case.

A zoning by-law conformity exercise is only required by the *Planning Act* in the circumstances set out in Section 26(9) of the Act. The requirement to update the City's zoning by-laws within a three-year time period applies only **after** the City has revised its Official Plan to conform with provincial plans in effect (i.e., the Growth Plan for the Greater Golden Horseshoe) under Section 26 of the Act.

The City's Growth Plan conformity exercise required by the *Places to Grow Act* remains incomplete, and the City's five-year Official Plan review has not even commenced. Therefore, the three-year time period referred to in Section 26(9) of the Act has not yet started to run.

In fact, on the basis of Section 26(9), the City will be required to complete a zoning by-law conformity exercise within three years after the Growth Plan conformity exercise is finally complete and/or after the five-year Official Plan review. In light of these circumstances, it would be exceedingly inefficient to continue with the fundamentally flawed New Zoning By-law, including costly and prolonged adjudication of matters at the Ontario Municipal Board.

In short, it would be inaccurate to say that the City must not repeal the New Zoning By-law on the basis of a legislated requirement to update the City's zoning by-laws. The *Planning Act* requirement to update the City's zoning by-laws has not yet been triggered.

We hope this information will be of assistance to your deliberations.

Yours very truly,

McCarthy Tétrault LLP

Per:

Christopher Tanzola
CT/skf

c: Councillor Peter Milczyn (Ward 5)
Chair, Planning and Growth Management Committee