

December 23, 2011

PG10.6.1

Via Email: pgmc@toronto.ca

Chair Peter Milczyn and Members of the
Planning Growth and Management Committee
10th floor, West Tower, City Hall
100 Queen Street West
Toronto, ON M5H 2N2

Attention: Merle MacDonald

**Re - 158, 164, 181 and 200 Sterling Rd - Official Plan Amendment and Zoning
Amendment Applications - Preliminary Report (Ward 18) - Agenda Item PG10.6 -
PGMC Meeting January 5, 2012**

Please be advised we are the solicitors for the applicant Castlepoint Studio Partners Limited in respect of the above referenced applications.

We have reviewed the staff report and are disappointed to see staff advance to the Committee a legal interpretation of the Provincial Policy Statement, the Growth Plan and the Planning Act that has been rejected by the Ontario Municipal Board and the Divisional Court of the Superior Court of Justice.

The lands that are the subject of the within applications are not within an Employment District in the City of Toronto Official Plan and therefore the lands are not within an employment area as defined by the Provincial Policy Statement and the Growth Plan..

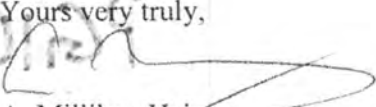
I have attached for your information the Ontario Municipal Board decision dated August 28, 2009 in file PL070048 concerning 2205 Sheppard Avenue East and a Divisional Court decision from the OMB decision that both stand for this proposition.

Council is permitted to make a decision on the applications prior to the municipal comprehensive review and in accordance with the Growth Plan.

We would request we be listed as a deputant to the PGMC meeting of January 5.

Kindly acknowledge receipt of this letter in writing and provide the author with notice of any meetings held by the Committee to consider these applications.

1. J. O. 1/2/11
Yours very truly,



A. Milliken Heisey
AMH/ir

cc . Councillor Ana Bailao Ward 18
cc. Castlepoint Studio Partners Limited
cc Pino di Mascio – Urban Strategies

ISSUE DATE:

Aug. 28, 2009



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL070048

Dorsay Investments Limited and 1666500 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Toronto to redesignate lands at the southwest corner of Sheppard Avenue East and Settlers Road from Employment Areas to Mixed Use Areas to permit the development of three residential buildings and street related commercial or mixed uses along the Sheppard Avenue frontage

Approval Authority File No. 06 199562 NNY 33 OZ
OMB File No. O070161

Dorsay Investments Limited and 1666500 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 7625 of the City of Toronto to rezone lands respecting 2205 Sheppard Avenue East from "MO(5) – Industrial-Office Business Park Zone" to permit the development of three residential buildings and street related commercial or mixed uses along the Sheppard Avenue frontage

OMB File No. Z070111

Dorsay Investments Limited and 1666500 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 69(3) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, to protest against the levying of the fees in relation to an application to rezone the lands known municipally as 2205 Sheppard Avenue East in the City of Toronto

OMB File No. M070004

APPEARANCES:

Parties

Dorsay Investments Limited and
1666500 Ontario Inc.

City of Toronto

Counsel

M. R. Flowers
J. Davies

B. Ketcheson, A. Biggart
R. Balfour

DECISION DELIVERED BY K. J. HUSSEY AND J. G. WONG

Dorsay Investments Limited and 1666500 Ontario Inc. (Appellants) have brought these appeals pursuant to subsections 22(7), 34(11), and 69(3) of the *Planning Act*. As

noted in the Board's Procedural Order issued on August 6, 2008, the appeals were scheduled to be heard in two phases. Phase 1 concerns Council's refusal to enact a proposed amendment to the City of Toronto's Official Plan to redesignate lands located at 2205 Sheppard Avenue East from "Employment Areas" to "Mixed-Use Areas". The parties will proceed to Phase 2 of the hearing if the Applicants are successful in this first phase.

The Appellants propose to develop a parcel of land situated at the northwest portion of a 7.94-hectare holding known as the Atria complex. It is the last parcel to be developed in the Atria complex. Three other parcels were developed between 1978 and 1989, each with an office building. These three buildings are known as Atria 1, a four-storey office building located on the northeast corner of the lands; Atria 2, a 17-storey office building on the southeast; and Atria 3, also a 17-storey office building on the southwest portion of the lands. The three buildings contain a combined total gross floor area of 100,950 square metres or approximately 1.09 million square feet of mostly Class A office space.

The subject site, Atria 4, is approximately 2.12 hectares and has 143 metres of frontage along Sheppard Avenue. It was zoned in 1982 for an office building of 30,000 square metres or 325,000 square feet but was never developed. It is currently occupied by 287 surface parking spaces, tennis courts and a landscaped area. The Appellants are now proposing for this site a mixed-use development consisting of 914 residential units, approximately 3,285 square metres of retail and commercial space, and a day-care centre. This development would be integrated with the existing office complex.

Issues

The parties submitted the following 10 issues that are to be determined in the first phase of these appeals.

1. Does the application to designate constitute a conversion under the Growth Plan for the Greater Golden Horseshoe or a conversion under the Provincial Policy Statement 2005?

2. Does the application conform to the Growth Plan and is it consistent with the policies of the PPS?
3. Are the subject lands subject to the Employment District policies in the City of Toronto Official Plan?
4. Does the application conform to the applicable policies of the City of Toronto Official Plan?
5. Is the application in Toronto's long-term planning interest to achieve the City's employment intensification objectives and targets?
6. Is the application in Toronto's long-term planning interest to achieve population and housing intensification objectives and targets?
7. Are the lands subject to this application suitable for employment uses and employment intensification?
8. Are the lands subject to this application suitable for mixed-use development including residential uses and intensification?
9. Does this application seeking to permit residential uses in this location satisfactorily identify and address impacts related to the loss of employment land and the impacts of the surrounding employment lands, including assessing the implications to the continued viability and stability of the Employment District and Employment Area and employment uses?
10. Does the application represent good and appropriate land use planning and is it in the public interest, having regard to, among

other matters, the *Planning Act*, including in particular matters of Provincial interest identified in Section 2, viz.:

- (f) The adequate provision and efficient use of communication, transportation sewage and water services and waste management systems;
- (h) The orderly development of safe and healthy communities;
- (i) the adequate provision of a full range of housing;
- (k) the adequate provision of employment opportunities;
- (l) the protection of the financial and economic well-being of the Province and its municipalities;
- (m) the coordination of planning activities of public bodies;
- (n) the resolution of planning conflicts involving public and private interests; and
- (p) the appropriate location for growth and development.

Central to this appeal, is whether Atria 4 is part of the Consumers Road *Employment District* and therefore falls within the definition of *employment areas* under the *Growth Plan for the Greater Golden Horseshoe 2006* ("the Growth Plan") and the *2005 Provincial Policy Statement* ("PPS"); or whether, because of its location on an *Avenue* identified on Map 2, the City's Urban Structure Map, it is subject to the *Avenues*

policies in the City's Official Plan and may be considered for redesignation to "Mixed-Use Areas".

Background and Location

Atria 4 is east of Consumers Road on the south side of Sheppard Avenue East. It is west of Victoria Park Avenue, north of Highway 401 and east of Highway 404 and the Don Valley Parkway. Sheppard Avenue is a major six-lane arterial road with excellent public transportation service. It has high-frequency bus service that links directly to the Don Mills subway station, which is about 1.2 km from the subject site. It is anticipated that light rail transit will be extended along Sheppard Avenue from Don Mills Station to Meadowvale Road, and this could be in place in short measure. The Atria complex runs a shuttle bus service to the Don Mills subway station and, at mid-day, to the Fairview Mall, a regional shopping centre northwest of the subject site.

In addition to the three office buildings on the Atria Complex there is structured and surface parking with approximately 1859 spaces; the 287 surface parking spaces that are currently on the Atria 4 site are used by monthly permit holders and do not contribute to the parking requirements for the office complex, which has a surplus of its requirement.

To the north of Atria 4 is an established residential development known as Pleasant View and on the east side of Victoria Park Avenue there are also residential communities. Immediately opposite Atria 4 is a row of semi-detached dwellings backing onto Sheppard Avenue. In the immediate vicinity along Sheppard Avenue East, there is a wide variety of commercial and retail uses including fast food restaurants, apartment buildings, retail stores and automotive-related businesses. The commercial and retail buildings in this area are mostly one and two-storey structures. The area has a full range of community services.

Atria 4 is at the periphery of Consumers Road Business Park (land use Planner Peter Smith pointed out that the name Consumers Road Business Park does not exist as a formal entity in any of the current planning documents). The Business Park is about 79 hectares. It accommodates approximately 60 buildings, ranging in height from

1 to 18 storeys. The buildings are mainly surrounded by large surface parking lots, which make up about half of the business park.

This Business Park was established in the 1960s and was originally zoned for industrial purposes but has evolved into an office node. There are few remaining light industrial uses. There are some commercial uses within the Business Park, such as rental car agencies, some hotels and extensive institutional uses. The institutional uses consist of private schools, places of worship, day-care facilities, a banquet and conference centre, and community centres.

The majority of office buildings in the Business Park were constructed between the 1960s and 1980s. 1991 was the last time that an office building was constructed in that area.

The Witnesses

In support of the Appellants' case, the Board heard opinion evidence from the following witnesses:

1. Land use planner, Peter Smith, director and partner of Bousfields Inc. Mr. Smith's experience in the City of Toronto and the former City of North York is extensive. He has been involved with many large-scale residential and mixed-use developments. Mr. Smith was retained by the Appellants to provide planning opinion with respect to the subject application.
2. Dr. Frank Clayton, Altus Group Economic Consulting. Dr. Clayton is an Economist with specific expertise in land economics and related economic research. Dr. Clayton was retained to do an economic market analysis for the mixed-use development proposal on the Atria 4 lands, which was submitted to the City as part of the original application. Dr. Clayton provided a review of the Consumers Road area office market and provided opinion evidence with respect to future demands for new offices in the local market. Dr. Clayton also reviewed the City of Toronto's economic development efforts and the

likely benefit of those programs to the Consumers Road Area.

The City presented opinion evidence from the following witnesses:

1. Tom Ostler, land use planner, with expertise in the areas of policy development and growth management. Mr. Ostler is employed by the City as a Manager in Policy and Research for the Planning Department. He was involved in the background studies that were undertaken for the growth strategy expressed in the Official Plan.
2. Corwin Cambray, employed by the City of Toronto Planning Department is a senior planner in the policy and research division. Mr. Cambray's role with the City is to provide Official Plan interpretation to City staff, agencies and applicants. Mr. Cambray also provides policy recommendations and advice to committees of council.
3. Rebecca Condon is a land use planner with expertise in the area of economic development. Ms Condon is employed as an Economic Development Officer within the City's Business Services Division.
4. Russell Mathew, Hemson Consulting Ltd. was retained by the City to provide a review and critique of the economic analysis prepared by Altus/Clayton in support of the applications, and to review and comment on the application in the context of the Long Term Employment Land Strategy for the City of Toronto. Mr. Mathew is a land use planner with specific expertise in land economics. Mr. Mathew was the primary author of the Growth Outlook for the Greater Golden Horseshoe, the document that was the basis for the population and employment forecasts in Schedule 3 to the Growth Plan. Mr. Mathew directed the preparation of the Long Term Employment Land Strategy for the City of Toronto.

Evidence and Argument

This appeal is not subject to the sections of the *Planning Act* as amended by Bill 51, as the application was filed before January 1, 2007.

The threshold Issues 1 and 3 have first to be determined before the other eight issues on the list above are considered. Determination of Issue 1 hinges on Issue 3.

The City and the Appellants have both described the subject lands, identified on Map 2, as an *Avenue* adjacent to an *Employment District*. However, the parties differ on whether that identification excludes Atria 4 from the City's *Employment Districts*. *Employment Districts* are considered *employment areas* as that term is defined in the PPS and the Growth Plan, which is distinct from the "Employment Area" land use designation in the City's Official Plan, and which also includes lands outside the Employment Districts.

The City's Position

Issue 1

Does the application to redesignate constitute a conversion under the Growth Plan for the Greater Golden Horseshoe or a conversion under the Provincial Policy Statement 2005?

The City's position is that Atria 4 falls within the definition of *employment area* under the PPS and the Growth Plan, which is defined in both documents as "*those areas designated in an Official Plan for clusters of business and economic activities including, but not limited to, manufacturing, warehousing, offices, and associated retail and ancillary facilities*".

The City contends that Atria 4 is part of the Consumers Road *Employment District*, which is a large contiguous area of land designated "Employment Area" that forms part of the City's strategic long-term employment lands.¹ It is therefore subject to

¹ In this decision, the term "*employment areas*" refers to strategic lands within Employment Districts that cannot be converted except as provided by the PPS and Growth Plan. The term "Employment Areas" refers to lands so designated by the Official

protection by the conversion requirements under the PPS and Growth Plan. The City submits that this site-specific application to convert employment lands for a residential development, where it is not currently planned or anticipated, is in conflict with the policy directions of the PPS and Growth Plan on how *employment areas* should be protected, and the process by which conversion to non-employment purposes may be considered.

Policy 1.3.2 of the *PPS* provides that planning authorities may permit conversions of lands within *employment areas* only where it has been demonstrated through a *comprehensive review*, that lands are not required for employment purposes over the long term and there is a need for conversion. The Growth Plan imposes even more stringent requirements for conversion of *employment area* lands. The Growth Plan prevails where there is a conflict with the PPS. The Growth Plan provides that conversion of lands within *employment areas* is only permitted through a *municipal comprehensive review* where it has been demonstrated that:

- a) there is a need for the conversion;
- b) the municipality will meet the employment forecasts allocated to the municipality pursuant to the Plan;
- c) the conversion would not adversely affect the overall viability of the *employment area*, and achievement of the *intensification target*, *density targets* and other policies of the Plan;
- d) there is existing or planned infrastructure to accommodate the proposed conversion;
- e) the lands are not required over the long term for the employment purposes for which they are designated; and

Plan that can either be employment lands within an *Employment District* or outside the *Employment District* and in which case may be considered for other use.

- f) cross-jurisdictional issues have been considered.

A "*municipal comprehensive review*" is a defined term. It is an Official Plan review or Official Plan Amendment initiated by a municipality that comprehensively applies the policies and schedules of the Growth Plan.

The City submits that the application does not meet the requirements for conversion of land within *employment areas*.

- a) Is there need for the Conversion?

The City submits that there has been no *municipal comprehensive review* that demonstrates need for conversion. On the contrary, there is a sufficient supply of residential lands within Toronto to meet the City's projected long-term population growth.

According to Tom Ostler, a Manager in Policy and Research for the Planning Department, the long-term growth forecast by the Official Plan allocates 537,000 additional residents between 1996 and 2031 and it has been determined that the City contains more than enough residential land, in areas designated for growth, to accommodate the forecast.

Mr. Ostler testified that the estimated growth target between 2001 and 2031 is for a housing stock of 239,000 units to accommodate a population of 3.080 million by 2031. The priority areas for potential development to accommodate that growth are identified on Map 2, Urban Structure Map. These areas are the *Downtown*, the *Centres*, and the *Avenues*, and there is sufficient capacity in those designated areas to satisfy and exceed the established targets.

Flashforward: Projecting Population and Employment to 2031 in a Mature Urban Area, the background work for the Official Plan, indicates that a maximum potential of 407,000 additional residential units could be built (this number is adjusted to 367,000 because of the 1996 base year for the Official Plan as opposed to the 2001 base year

for the Growth Plan). As of June 2008, 118,000 residential units have been built in Toronto, more than half the number required for the projected population growth.

Mr. Ostler concluded that the plan is working and the City is on track, with sufficient development in the pipeline, to accommodate the inevitable ebb and flow of housing demand cycles. There is no need to take lands designated for employment purposes for residential use.

- b) Will the municipality meet the employment forecasts allocated to the municipality pursuant to the Plan?

Russell Mathew and Rebecca Condon testified that the entire supply of employment land would be required to meet Municipal and Provincial employment targets. This evidence was based largely on information gleaned from the Hemson Phase 1 Report, *the Long-Term Strategy for Retaining Employment Lands and Stimulating New Investment and Job Creation*.

That report indicates that the *Employment Districts* within the City have historically accommodated an average of 31% of the City's total employment. Ms Condon testified that these areas remain a focus for the City's future employment growth. Based on Official Plan targets, the *Employment Districts* would need to accommodate 112,000 new jobs by the year 2031. Of the 7200 net hectares of employment land supply in *Employment Districts*, 93% is currently developed. Mr. Mathew opined that 95% is considered to be full development and therefore the Atria 4 site is of great value to the City. Mr. Mathew noted that there are few sites of that character and quality available within the City's vacant supply because the site is well located and available for development.

- c) Would the conversion adversely affect the overall viability of the employment area, and achievement of the intensification target, density targets and other policies of the Plan?

Mr. Mathew opined that putting residential uses on the subject site would have a destabilizing effect on the remaining employment lands in the Consumers Road Business Districts. In particular, it would create a precedent for other owners seeking redesignation of other parcels in the vicinity and that in turn, would increase value expectations of nearby landowners.

Ms Condon was fully in agreement and again, she referred to the Hemson Report, which states that Toronto is under pressure to permit employment lands to be redeveloped for other uses, especially residential, primarily because of the higher short-term economic return that can be achieved. Ms Condon opined that every application that succeeds in converting employment land to residential use undermines the long-term growth management strategy of the City's Official Plan by harming the competitiveness of all employment land throughout the City. It sends a signal to the market that the default use for all vacant employment land is residential. This has a significant impact on the financial viability of developing these lands for employment purposes.

Ms Condon further opined that businesses seek land use certainty in long-term planning. If there is a pattern of residential encroachment on *Employment Districts*, this could have an impact on business location decision-making and have a destabilizing effect on the District.

- d) Is there existing or planned infrastructure to accommodate the proposed conversion?

It was acknowledged by Mr. Mathew that there is existing and planned infrastructure to accommodate either residential or employment uses.

- e) Are the lands required over the long-term for the employment purposes for which they are designated?

The City's position is that the entire amount of employment lands currently designated is needed over the long-term to contribute to a range of opportunity and choice for potential employment development as Toronto grows.

f) Have cross-jurisdictional issues been considered?

Mr. Mathew proffered that cross-jurisdictional issues are of no great relevance to the subject site.

The Appellants' Position

Issue 1

The Appellants' position is that the subject site is not an *employment area* as defined by the PPS and the Growth Plan. Peter Smith, land use planner, opined that the definition of *employment areas* in the Provincial documents as "...*areas designated in an Official Plan for clusters of business and economic activities...*" is intended to apply to strategic *employment areas*; those are lands found in the City's *Employment Districts* and not to lands designated for employment purposes that are outside the *Employment Districts*.

Mr. Smith testified that the City has repeatedly distinguished between lands designated "Employment Areas" within *Employment Districts* shown on Map 2, and "Employment Areas" that are outside *Employment Districts*, especially for the purpose of considering the conversion policies in the Provincial policy documents. Mr. Smith directed the Board to examples in which this was done, without the need for a *comprehensive review*, but with the requirement that local considerations such as land use compatibility were satisfactorily addressed.

Mr. Smith opined that consistent with the City's approach, Atria 4 is not an *employment area* within the meaning of the PPS and the Growth Plan. The lands are, instead, designated "Employment Areas" on the Land Use Map and shown on Map 2 as *Avenue*. Atria 4 is adjacent to, but not located within, the *Employment District*.

Accordingly, a comprehensive review is not required in order to permit non-employment uses.

The Appellants argue that only lands within *Employment Districts* identified on Map 2 should be thought of as lands that the City must retain for future employment growth and that are therefore ineligible for conversion except as directed by the Provincial documents. The subject site is identified as *Avenue*, for which the Official Plan emphasizes residential and mixed-use growth. The Appellants further argued that the proposed development with 3285 square metres of commercial space with the addition of residential use does not constitute a conversion as contemplated by policy 1.2.2 of the PPS and policy 2.2.6.5 of the Growth Plan.

Mr. Smith opined that although the term “conversion” is not defined in either the PPS or the Growth Plan, applying the common meaning, *i.e.*, “exchanging one thing for another”, has the following result. Regardless of whether Atria 4 is within an *employment area* as defined in the PPS and Growth Plan, the proposal would not constitute a conversion to a non-employment use. The proposed development would support and maintain the existing employment uses at Atria 1, 2 and 3; it would add residential use and business and economic activities; it would not displace other employment use and would therefore not constitute a conversion. Mr. Smith opined that in this circumstance, a redesignation application may therefore be considered where other relevant planning considerations are satisfied.

The City’s Position

Issue 3

Are the subject lands subject to the *Employment District* policies in the City of Toronto Official Plan?

The City’s position is that Atria 4 has traditionally been, and continues to be, part of the Consumers Road Business Park.

The City submits that the subject lands have been zoned and designated for employment purposes for many years by the former City of North York and by the amalgamated City of Toronto. The City’s desire to maintain these lands for employment

purposes was carried forward in the new City of Toronto Official Plan land use designation "Employment Areas" as illustrated in Land Use Plan, Map 19. This designation was not appealed following the Plan's adoption by Council in November 2002.

The subject lands are shown on Map 2 as an *Avenue* adjacent to an *Employment District*. The City submits that the *Avenues* depiction on Map 2 is purely schematic, with no defined depth or boundaries. It is not a land use designation and it does not establish any land use entitlements. To translate it into something meaningful, one has to look behind the map and into the policy framework. Policy 4 of Section 2.2.3 of the OP states "*The land use designation policies in Chapter 4 of this plan apply to and prevail on lands broadly shown on Map 2 as Avenues.*"

The City submits that the *Avenue* policies identify areas within *Avenues* where growth may be directed. While that growth may encompass situations where mixed-use development, including residential or commercial, may be appropriate, the *Avenue* policies also contemplate and provide for growth in employment, consistent with the "Employment Area" designation.

The City's position is that along the portion of Sheppard Avenue East on which Atria 4 is located, the *Avenues* identification should be considered as supportive of intensified employment development undertaken in accordance with the existing "Employment Areas" designation. It is not an indicator that these lands should be considered inappropriate for future employment development or a candidate for conversion to residential use through the approval of a Mixed-Use designation.

Corwin Cambray testified that in keeping with the policy interests of the Province, the aim of the Official Plan is to retain "Employment Areas" as places of business, and to develop and intensify job growth within these areas.

Mr. Cambray opined that where an *Avenue* is shown on Map 2 adjacent to an *Employment District* and the land use designation underlying the *Avenue* is "Employment Areas", the long-term employment objective of the *Employment District* applies to that portion of the *Avenue*. The *Avenue* in that case is a signal that employment intensification is the appropriate land use and the objective of the Official

Plan and the policy objectives of the *Employment District* apply, as it does in this application.

Mr. Cambray referred to Policy 1 of Section 2.2.4, *Employment Districts*, which states "*Employment Districts shown on Map 2 will be protected and promoted exclusively for economic activity...*" Mr. Cambray opined that the proposal to introduce residential uses on employment designated lands associated with the Consumers Road Business Park, which is an *Employment District* on Map 2, does not address the employment policies and objectives of the Official Plan.

The Appellants' Position

Issue 3

The Appellants reject the City's position that the *Employment District* policies are applicable where lands on an *Avenue* designated "Employment Areas" are adjacent to an *Employment District*.

The Appellants submit that there is no support for that position in the Official Plan. The Appellants submit that the purpose of Map 2 is to identify the areas in which future growth will be accommodated in the City. These areas are the *Centres*, the *Downtown* including the Central Waterfront, the *Avenues* and the *Employment Districts*. These areas are clearly and distinctly identified by different colors in the legend of Map 2. They are discrete elements of the City's urban structure. Each is subject to separate and distinct policies. Each has a different long-term vision. The Official Plan states that the mixed-use *Avenues* will emphasize residential growth, while the *Employment Districts* will focus on job intensification.

Section 2.2.3 contains the policies for the *Avenues*, in which there is no reference to the *Employment District*. Likewise, in Section 2.2.4 the policies for *Employment Districts* make no reference to *Avenues*. There is no other policy or non policy text in the Official Plan that provides or implies that where an *Avenue* is adjacent to the *Employment District*, the *Employment District* policies are to be imported or extended to the *Avenue*. A reasonable expectation would be that if these two elements were linked, there would be cross references; this is not the case.

The Appellants submit that to support their interpretation of the relationship between the *Avenues* and *Employment Districts* where the underlying land use designation is "Employment Areas", the City places undue emphasis on Policy 2.2.3.4 under the *Avenues* section.

This section provides as follows:

4. *The land use designation policies in Chapter Four of this Plan apply to and prevail on lands broadly shown on Map 2 as Avenues. Where a portion of an Avenue as shown on Map 2 is designated Neighbourhoods or Parks and Open Space Areas the policies of Chapter Four will prevail to ensure that any new development respects and reinforces the general physical character of established neighbourhoods, and that parks and open spaces are protected and enhanced.*

The Appellants submit that the second sentence of this policy is explicitly directed to "Neighbourhoods" and "Parks" and "Open Space" land use designations, and not "Employment Areas" or "Mixed-Use Areas". This is consistent with the fact that this policy was a late addition to the Official Plan, based on concerns raised by citizen groups about the implications of the *Avenues* identification on their local neighbourhoods and parks. Further, the first sentence of the policy is stating the obvious, that the *Avenues* identification on Map 2 is not a land use designation and does not establish any land use permissions.

The Appellants submit that this policy does not lend any support to the City's position that the *Employment District* policies would apply to the Atria 4 site.

The Appellants argue that the City's claim that the *Avenues* identification is intended to signal employment intensification at this location would render the *Avenues* identification completely redundant and unnecessary, as the *Employment Districts* are explicitly intended to focus on job intensification.

The Board's Findings on Issues 1 and 3

Having considered the evidence and submissions of both parties, the Board finds that the Atria 4 site is not an *employment area* as defined by the PPS and the Growth Plan and is therefore not subject to the conversion requirements in those documents.

The Board also finds that Atria 4 is not subject to the *Employment District* policies in the Official Plan.

The Board finds that the *Avenue* policies are applicable to the subject site and that those policies anticipate the type of development proposed by the Appellants, within the arterial corridor in which the subject site is located, provided that local planning considerations are satisfied and the development is in the overall public interest.

Mr. Cambray, for the City, provided the Board with an extensive explanation on how the Official Plan is to be read, and having done so, the Board does not accept the City's position on either Issue 1 or Issue 3. The Board prefers Mr. Smith's opinion and his interpretation of the Official Plan policies that relate to the issues. The reasons follow. Chapter 2 of the Plan sets out the growth management strategy for the City's urban structure and directs jobs and population growth to certain areas shown on Map 2. These areas are identified as the *Downtown* including the *Central Waterfront*, the *Avenues*, *Employment Districts* and the *Centres*. The Plan sets out the City's vision: a vibrant mix of residential and employment growth is seen for the *Downtown* and the *Centres*; the mixed-use *Avenues* will emphasize residential growth; *Employment Districts* will focus on job intensification. (Both parties agreed that the term "mixed-use" in this context is a general descriptor and not the Official Plan's land use designation "Mixed-Use").

The Board finds these elements are all separate; they are separately identifiable on Map 2 and, under separate sections of the Official Plan, each element has a distinct set of policies and explanatory text to implement the vision and the process by which change in each element will be managed.

The City asserts that the *Avenues* depiction on Map 2 is purely schematic, undefined, or as Mr. Mathew describes it "essentially elongated blobs", that run along the arterials, meaningless, except for the underlying designations. The Board finds that position to be at odds with the City's statement in the Official Plan that *Avenues* as depicted on Map 2 are important corridors where re-urbanization is anticipated and encouraged to create new housing and job opportunities. The City identified on Map 2 a tangible 160 kilometres of lands as *Avenues* that provide an opportunity for

redevelopment to accommodate growth. The Board does not accept that the "Avenues" identification is meant to describe the nebulous concept propounded by the City.

Thus, the Board does not accept the City's position that notwithstanding its identification on Map 2 as *Avenue*, Atria 4 is subject to the *Employment District* policies because of its designation "Employment Area" and its location on an *Avenue* adjacent to an *Employment District*. The Board finds that there is no policy, or even a suggestion in the Official Plan, that would lead to that conclusion. On cross-examination, the City's witnesses were also unable to point to a specific policy or non-policy text that could support the City's position.

If the City's argument is that the application of the *Employment District* policies is to be inferred from reading the Official Plan as a whole, the Board finds that the Official Plan is too vague to guide the public in that manner. The Board accepts instead, the Appellants' argument, and the Board has always upheld the principle, that an Official Plan should be clear, unambiguous and understandable to the public, to serve as a guide to public and private investors and to all decision-makers that rely on the Plan.

The Board finds that in this case, the Official Plan has unambiguously identified lands that are in the *Employment Districts*, and that does not include the subject property. The first policy enunciated in Section 2.2.3.1 *Employment Districts*, states, "*Employment Districts shown on Map 2* (emphasis added) will be protected and promoted exclusively for economic activity..." Atria 4 is clearly not shown on Map 2 as *Employment District*. It is instead shown as *Avenue*. As the City has acknowledged, Atria 4 is adjacent to an *Employment District*. The Board finds that the status of being "adjacent to" necessarily means that Atria 4 is not "part of" the proximate *Employment District*.

In assessing the basis for the City's position, the Board referred to the background study performed to support the development of the long-term strategy for retaining employment lands. This study was undertaken in consultation with the City Planning Division, within the framework of the City's Official Plan. In this study the Board found no indication of the City's intention to include in the long-term strategic supply, those lands designated "Employment Area", located adjacent to an *Employment*

District. The Board found instead that the Report articulates and confirms the Appellants' understanding of the structural elements in the Plan. It states:

Employment Districts are large areas comprised exclusively of lands where the Employment Area designation applies. Employment Districts are a structural element of the Plan like the Avenues and Centres. This is distinct from the Employment Area designation, which is the underlying land use designation establishing the general uses to implement the strategy and zoning by-law....

...there are some lands designated Employment Area that are not included in the Employment Districts. The focus of the strategy on the Employment Districts is intended to assist the City in implementing its planned urban structure and Economic Development Strategy. The urban structures, including the Employment Districts, are the durable features of the urban landscape - the City's vision for what it will look like in 30 years. The Employment Area designations outside of the Employment Districts are still important. Applications for development in these areas will be considered on an individual basis within the context of other policies and goals of the Plan.

The Board finds that the Official Plan clearly expresses what is contained in that background information. It clearly expresses the City's vision for lands identified as an *Avenue* on Map 2. Atria 4 is clearly employment lands adjacent to, but outside of, the *Employment District*. Atria 4 is specifically identified as an *Avenue* on Map 2. The Board finds, therefore, that Atria 4 is subject to the *Avenue* policies. Further, in keeping with the policies of the Official Plan, the Board finds that the Application for development of these lands may be considered without the requirement of a *comprehensive review* (as defined and described above).

The Board finds that Mr. Cambray's opinion, that there is a distinction between the *Avenue* concept on Map 2 and other structural elements, is not inconsistent with the Appellants' position that this proposal may be considered in the context of the *Avenue* policies. Mr. Cambray opined that the *Avenue* concept applies to approximately 160 km of road and properties that front on those roads, and to get from the concept to implementation of the policies, further studies must be done as each *Avenue* differs in terms of lot sizes, configuration, and existing uses. The Board agrees.

The Official Plan states that *Avenues* will be transformed incrementally. Some *Avenues* that already serve as "main streets" have zoning in place to guide mixed-use development in a way that fits with the neighbourhood. Those areas would be a low

priority for *Avenue* re-urbanization studies. However, the Plan states clearly, that ultimately, all *Avenues* should perform this "main street" role. The Plan states that *Avenues* characterized by one or two-storey commercial buildings, vacant and underutilized lands and large areas of surface parking, will be the priorities for future *Avenue* studies.

The side-bar text, *Avenue Studies and Development Applications*, states that development can proceed where zoning is in place to permit it, but where zoning is not in place and/or the *Avenues* study is not yet completed, development applications may be received and under the *Planning Act* will have to be considered. This is in keeping with the City's position that there is no right conferred by the *Avenue* identification to remove the existing land use designation. However, in keeping with the directions of the Official Plan, the Board finds that it is appropriate to consider the proposal, which the Board will assess within the context of local issues, the Official Plan objectives, and the policies and objectives of the PPS and the Growth Plan. These considerations are embodied in Issues 2, and 4 to 10.

The Board has considered the City's submission that this matter has an importance to the City that goes beyond the subject site because there are other sites currently designated as "Employment Areas" with frontages on an *Avenue* shown on Map 2 adjacent to an *Employment District*. The City submits that a finding by the Board that the subject site is excluded from the *Employment Districts* and does not otherwise constitute an *employment area* (thereby removing the protection afforded by the Provincial conversion policies), by necessity, raises implications for these other sites in terms of potential for similar residential proposals in the future.

It has always been the Board's practice that each application received by the Board will be considered on its own merits and in the context of the relevant planning documents. Although the Board strives for consistency, approval of other applications is never automatically implied by a previous finding of the Board.

Board's Findings on Issues 2, 4 to 10

On the basis of the evidence and arguments that have been presented on Issues 2, and 4 to 10, the Board finds that the proposal represents good planning and is in the

public interest. The Board finds that local considerations are satisfied. The proposal is compatible with the adjacent uses; it is consistent with the PPS, conforms to the policies of the Growth Plan and would support the objectives of the City's Official Plan. The Board finds that the proposal has regard to matters of provincial interest under the *Planning Act*. The reasons follow.

The City argued that the application does not conform to the PPS and the Growth Plan. The thrust of that argument was based on Mr. Cambray's and Mr. Mathew's evidence that the policy direction of the Province has been toward increased emphasis on preserving employment lands, to secure the long-term interests of municipalities in achieving balanced growth within their communities.

The City submits that employment lands that are designated in the Official Plan as "Employment Area" but fall outside of the *Employment District* play an important role in accommodating employment growth. They represent 8.6% of employment lands, or 660 hectares, and support 32,300 jobs. The City argues that employment intensification at this location would complement and strengthen the Consumers Road Business Park and provide employment opportunities in proximity to diverse labor markets. Employment intensification would maximize the use of existing public infrastructure, including public transportation.

The Appellants' position is that replacing an existing surface parking lot with the intensified mixed-use residential proposal, in proximity to major office buildings and existing and planned higher-order transit, is consistent with policies found throughout the PPS and the Growth Plan. The application responds and conforms to the direction of both documents for intensification of built-up areas, especially corridors and major transit station areas. The Board agrees.

In support of their position, the Appellants directed the Board to the PPS Sections, 1.1.3.2; 1.1.3.3; 1.1.3.5; 1.1.3.6; 1.4.3; 1.6.5.5; 1.6.5.4; 1.8.1; 6.1). Also of relevance in the Growth Plan are Sections 2.1; 2.2.2; 2.2.3(6); 2.2.3(7) and 2.2.5(1). These are policies in the two documents that direct that land use patterns shall be based on densities and a mix of land uses which efficiently use land and resources, infrastructure, public service facilities, and which support a range of uses and opportunities for intensification and redevelopment.

Those are also policies that provide that transportation and land use consideration shall be integrated in the planning process to ensure a land use pattern, density and mix of uses that minimize the land used and the number of vehicle trips. Dr. Clayton also referred the Board to Policy 1.7, Long-Term Economic Prosperity, regarding optimizing long-term availability and use of land, resources, infrastructure, and public service facilities.

The Appellants submit that the proposal supports all those objectives as well as the City's substantial investment in the existing and future public transit system in the area. It would implement the Provinces direction to improve the mix of employment and housing uses to shorten commuter journeys and decrease transportation congestion.

The Appellants directed the Board to Policy 4.3, which provides that the PPS should be read in its entirety and that all relevant policies are to be applied to each situation. Similar sections of the Growth Plan are Sections 5.4.1(1) and 5.6(1).

The Board finds that the proposal is consistent with the policies of the PPS and the Growth Plan. The Board agrees with the Appellants that the proposal follows the policy directions of the provincial documents, to use lands more efficiently, particularly in that location where there is existing municipal infrastructure, public service facilities and which is within a corridor where there is a major transit station.

The City submits that the proposal is not in the City's long-term planning interest because it would diminish the City's ability to achieve employment intensification objectives and the long-term employment target. The City contends that there is a sufficient supply of designated land to accommodate future residential growth, whereas the entire employment land supply, including the subject site, is required to achieve its economic objectives. The Appellants disagree with this position. The Appellants submit that the application would help to achieve the housing supply target. The Appellants also dispute that the subject site is required to achieve the City's employment target.

In the Board's view, the City's contention that there is an adequate potential supply of residential lands identified to meet the projected growth, does not pose a barrier to the proposal. The Board accepts the Appellants' argument that the population projection, as indicated in the Official Plan, is a minimum expectation. Further, the City's

calculation of the future residential supply is only a potential supply. The estimate is based on a broad scale assessment. Individual applications would need to be assessed to determine whether those sites are indeed suitable for mixed-use or residential development. In addition, the sites identified do not necessarily reflect the owners' intentions for those lands.

The Board finds that this application would contribute to achieving population and housing intensification objectives and targets and would be in Toronto's long-term planning interest. The Board finds that the proposal also conforms to the overall policy direction of the Official Plan to support re-urbanization and residential intensification, especially in this area in which intensification and transportation infrastructure can be integrated.

The Board agrees with the Appellants' submission that the subject site is well suited for this mixed-use development and perhaps more so than a number of other sites on *Avenues* that are not as well served by public transit. But, in addition to increased transit ridership for the existing high-frequency bus service and for the planned LRT extension, this proposal would make efficient use of an underutilized parcel that would help to re-urbanize Sheppard Avenue by introducing street related buildings that would improve the pedestrian environment, and provide additional shopping opportunities. The existing adjacent office uses would also be strengthened by the proposed new shops and services. This proposal would generate a number of new jobs that do not currently exist today on the site.

The Board does not accept the City's position that the lands are required to achieve its employment intensification objectives and targets, which the proposed amendment would defeat. The evidence does not support that conclusion.

Ms Condon and Mr. Mathew testified that the Consumers Road Business Park is a functional, unique and important *Employment District*. It has a healthy mix of large and small businesses and is one of the more successful Business Parks in the City of Toronto. Ms Condon clarified under cross-examination that she considered stability to mean static in terms of employment. She also acknowledged that there was significant turnover of businesses in the area.

Ms Condon observed that the lease rates are below the GTA average, which, she opined, provides opportunities for price-sensitive businesses wanting to lease space within the City limits and enables those businesses access to the transportation network and a significant labor force within commuting distance.

In the Board's view, it may well be that the Consumers Road District is a functional, unique, stable and important area, but that does not even dictate, far less guarantee, the existence of a new office building. The evidence is that it is not a feasible expectation. The Hemson Report prepared as part of the City's Long-Term Employment Land Strategy, concluded that a new office building in the Consumers Road area would not be financially viable. It reported that although development costs are lower in the Consumers Road area than in Mississauga, a new building would not be practicable at the Consumers Road location because of the low rents. Dr. Clayton also arrived at the same conclusion.

Dr. Clayton provided extensive evidence on the circumstances in the Consumers Road area compared to other employment areas in the City. He concluded that the area is in decline and is not performing properly in its planned function as an office centre; it has not achieved its objective for office employment growth and is unlikely to do so in the foreseeable future. He acknowledged that there have been more encouraging trends recently, but overall his opinion has not changed.

Dr. Clayton's evidence is that the Consumers Road area has been lagging behind the GTA over the last decade in office absorption rate and new office employment. That is especially true for Class A office space, which is what a new office building would provide. The commercial vacancy rates in the area are higher and the rents, as Ms Condon testified, are indeed lower. The average net rent for Class A office space in Consumers Road is even lower than the Class B rents for the GTA.

The reasons for this are many, chief among which is that the area faces competition from office nodes located along the Highway 404 corridor: Highway 404 and Steeles, Highway 404 and Highway 7, the Town of Richmond Hill and the Town of Markham. All these areas have experienced greater successes with the office market than the Consumers Road area, which has experienced vacancy rates of 15% or higher

in some years. Dr. Clayton testified that the Consumers Road area has had the dubious distinction of being at the top of the list of areas with problem buildings in the GTA.

There has been no new office building in the entire Consumers Road area since 1991 and there has been no industrial building since 1971. Although the subject site has had zoning in place since 1982 for office use, it has failed to attract any interest. Dr. Clayton testified that the owners of the subject property have attempted to market the site without success. They have responded to requests for proposals and it has yielded nothing. In Dr. Clayton's opinion, there does not appear to be any reasonable prospect that this will change within the 2031 planning horizon.

Atria 2 and 3 account for more than half of all the Class A office space in the Consumers Road area and the net effective rent realized for those properties is \$8.50 per square foot. Dr. Clayton opined that rental rate is too low to consider a new office building, especially where vacancy is already an issue.

The Appellants' submit that Section 4.5 of the PPS provides that Official Plan policies are to be attainable. Dr. Clayton opined that from an economic perspective, planning needs to be realistic and recognize market realities. The Board agrees. These lands have been held in abeyance for "Office Commercial" use for 17 years and nothing has happened to achieve its intended use. Ample time has passed. As the Appellants argue, and the Board concurs, to maintain these lands as "Office Commercial" in the face of a total lack of demand, runs contrary to the concept of optimization that is espoused in the PPS and the Growth Plan.

The Appellants further make the point that should the new office market emerge and in the future there is a demand in the area, this is not the last remaining site available for development. Exhibit 10 shows a vast amount of surface parking, almost half the lands in the Employment District, that could be developed and the City has, in fact, identified this potential for redevelopment.

In considering whether there is a lack of land that would impede employment growth, as the City has inferred, the Board takes particular note of the information provided in the joint document book, Exhibit 2(b), Tab 21 at page 49 of the City's Report "Toronto Economic Development Strategy" It states:

"As growth continues to take place mostly at the urban fringe, and the geographic centre of the region's labour force drifts further and further away from the City, so too will key knowledge economy jobs and investment. Historically, employment suburbanization has tended to follow on the heels of the residential suburbanization, with employers following their employees to fringe locations. Increasing residential population in Toronto can be expected to result in maintaining existing jobs and attracting new jobs in the City.

The fact that employment and business investment has not been following recent residential growth in the City cannot be attributed to a lack of land supply (emphasis added). Though Toronto is a mature city, it continues to evolve for all practical purposes; the amount of land available for re-urbanization in Toronto does not pose a constraint to accommodating new development. There are a number of large-scale redevelopment opportunities and virtually limitless small-scale opportunities all outside stable neighbourhoods and stable employment areas."

In the Board's view, that information does not comport with Mr. Mathew's and Ms Condon's opinion that it is necessary to preserve the subject site because there are too few available sites in the City. There is satisfactory evidence that Consumers Road in particular has sufficient underutilized lands within the *Employment District* to accommodate future opportunities, should any arise. The Board finds that there is no need to preserve the subject site any longer for that eventuality.

The Hemson Report that was filed in the joint document book Volume 3 Tab 71, at page 2290, in support of an application for a storage facility, states that there is ample capacity to accommodate major office employment growth in the Consumers Road District. This report was written in June 2007, and it provided the information that there is a total of 76,000 square metres or 820,000 square feet of vacant office space in the Consumers Road District. The vacant office space in the Consumers Road area alone could accommodate approximately 2800 major office jobs and would accommodate growth for a number of years before new construction is warranted. The City's employment target is for an additional 5150 major office jobs in the entire City's Employment Districts to the year 2031.

Mr. Mathew testified that Toronto remains a highly industrial economy and the City needs to preserve and protect employment lands to accommodate future demands,

even if a large amount of manufacturing employment growth is not expected. The Board accepts Mr. Mathew's evidence but finds that preserving the subject site will not help to accomplish that objective.

The Consumers Road area has been characterized by each witness as an office node with very few, if any, light manufacturing use. By all accounts, that situation is not expected to change. In addition, the evidence is that almost all the office employment growth is expected to be in the *Downtown* area and in the *Centres*. Only 5% of major office employment is accommodated in the City's *Employment Districts* and Consumers Road has ample capacity to contribute significantly to that 5% if there is ever the demand.

Ms Condon testified that the City has taken steps to encourage business development by addressing the concern that industrial and commercial properties are taxed at a significantly higher rate than single use residential. The City will limit municipal budgetary tax increases for commercial and industrial property owners to a maximum of 1/3 of any residential budgetary increase. By the year 2020 commercial, industrial and multi-residential taxes will be set at a ratio of 2.5 times residential. Decreasing the ratio will create a more competitive environment regionally. In addition, there would also be tax relief for new building construction in targeted sectors.

Ms Condon stated that these new programs have not yet had the opportunity to be fully realized by potential users. She opined that Atria 4 is one of the premier sites available for development in the area and could benefit from these initiatives. Non-employment use on this site would only undermine the City's initiatives.

On the basis of the evidence that only certain incentive programmes would be applicable in the Consumer Road Area, the Board finds that these initiatives would not necessarily change the fortunes of the Consumers Road area and may even put this area at a further disadvantage. The *Downtown* area and the four *Centres* are the focus for office use and those areas meet eligibility requirements for incentives for major offices and corporate headquarters, whereas Consumers Road is ineligible for certain of those programmes. In addition, over three million square feet of office space will be built in the downtown area starting in 2009. As the Appellants argued, with more incentives and more availability in the Downtown area and the Centres, those locations become

more competitive with Consumers Road. Also, certain of these general initiatives, such as the tax programme, require Provincial authority, which at the time of the hearing, had not been procured.

The Board has considered the City's argument that the lack of existing market demand for new office development within the Consumers Road Business Park does not mean that the subject property should now be made available for residential development. The site is able to support a range of employment opportunities in conformity with the existing designation and zoning.

Mr. Smith opined and the Board agrees, that developing a low scale commercial building, such as a car wash, restaurant, gas station or other permitted use, would not necessarily contribute any more than the proposal would, to the City's employment growth target. Further, that alternative is not a preferable outcome for this site, compared to the proposal. That alternative would not support intensification objectives of the Province or City and would provide little justification for and would reap little benefit from the major investment in public transportation. In light of the Board's finding that the site is on an *Avenue*, for which the City envisages intensification and a mix of uses, it would not be in the public interest to add a development that goes against that vision. This is especially the case because the City has stated that its priority for change is *Avenues* that are characterized by one and two-storey commercial buildings, vacant and underutilized lands and large areas of surface parking.

The City has argued that residential use restricts operation of neighbouring employment lands. The Board does not accept that there is a likelihood that land use incompatibilities would arise because of the proposal. There is no industry that currently exists or that is likely to be established in that area in the future, that would be obstructed in its operation because of proximity to a residential use. There have been no industrial or manufacturing activities in the area for well over 30 years. The adjoining uses are offices and small institutional, which are not considered to be in conflict with residential use.

Accordingly, the Board finds that there would be no impact on the surrounding employment lands from the proposal. The Board finds that the proposal would have no negative implications on the continued viability and stability of the *Employment District*.

Conclusion

For all these reasons, the Board finds that the Appellants have put forward a valid planning rationale to support a change in the designation of the Atria 4 lands, to permit the proposed mixed-use development. The Board finds that the proposal will achieve an efficient use of the Atria 4 land, in keeping with the City's and the Province's objectives. The Board finds that the proposal represents good and appropriate land use planning and is in the public interest.

Although nothing in this case ultimately turns on it, this panel of the Board does not agree with the Appellants' interpretation of what constitutes a conversion of *employment area* for the purposes of the PPS and Growth Plan. The Appellants argued that even if Atria 4 were considered to be within an *employment area* as defined in the PPS and Growth Plan, the proposal would not constitute a conversion to a non-employment use because the proposed development would add residential use and business and economic activities; it would not displace other employment use.

This panel agrees with the submissions by Counsel for the City that if that interpretation were to be accepted, then it would effectively neutralize any protection from conversion that is afforded *employment areas* by the PPS, the Growth Plan and municipal Official Plans. This Panel agrees that the purpose of the policies is not simply a matter of creating jobs or maintaining jobs, but rather to protect the supply of designated employment lands. The conversion is triggered by the introduction of a non-employment use.

The Board will allow the appeal under subsection 22(7) of the *Planning Act* to redesignate the Atria 4 lands at 2205 Sheppard Avenue East from "Employment Areas" to "Mixed-Use Areas" to permit the proposed residential development and the street related commercial or mixed uses along the Sheppard Avenue frontage. The Board will withhold its final order until the details of the Official Plan Amendment are determined.

The parties are encouraged to meet and try to resolve as many of the remaining issues as possible to avoid a lengthy Phase 2 hearing. The parties are requested to contact the Board's Planner after they have had these discussions to schedule a

Prehearing Conference to review the issues and the procedure for the Phase 2 hearings.

"K. J. Hussey"

K. J. HUSSEY
MEMBER

"J. G. Wong"

J. G. WONG
MEMBER

CITATION: Toronto (City) v. Dorsay Investments et al, 2010 ONSC 3212
COURT FILE NO.: 597/09
DATE: 2010/06/03

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: City of Toronto, Applicant

AND:

Dorsay Investments et al, Respondents

BEFORE: H. Sachs J.

COUNSEL: R. Andrew Biggart, for the Applicant, City of Toronto

Mark Flowers and Isaiah Banach, for the Respondents, Dorsay et al.

HEARD: May 27, 2010 at Toronto

ENDORSEMENT

INTRODUCTION

[1] The City of Toronto (the “City”) seeks leave to appeal from a decision of the Vice-Chair of the Ontario Municipal Board (the “Board”) dated November 24, 2009 (the “Decision”). In the Decision the Vice-Chair refused to order a rehearing or a review of a decision released on August 28, 2009 in which a panel of the Board granted approval to the Respondents for a mixed use development containing 914 residential units.

[2] Central to the Respondents’ original application before the Board was whether they could receive permission for a development that includes residential units on lands designated under Toronto’s Official Plan as “Employment Areas” without going through a municipal comprehensive review. The City took the position that because of the provisions of the Growth Plan for the Greater Golden Horseshoe Area (the “Growth Plan”), they could not. The Respondents submitted, and the Board accepted, that since the lands were not located within the City’s “Employment Districts”, a site specific conversion request could be considered without the necessity of a municipal comprehensive review.

[3] The issues in this application involve the interpretation of the City's Official Plan and the Growth Plan and the exercise of the Board's discretion under s. 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 ("OMBA"). Section 43 of the OMBA provides that the Board may rehear, review, rescind, change, alter or vary any decision it has made. The OMB *Rules of Practice and Procedure* set out the procedure for making such a request and the basis for exercising the discretion available under s. 43. One of the bases for exercising that discretion is if the Vice-Chair is satisfied that the request for review "raises a convincing and compelling case that the Board...(c) made an error of law...such that the Board would likely have reached a different decision" (OMB Rule 115.01).

[4] On this motion the City submits that there was a convincing and compelling case that the original panel of the Board made an error of law in its interpretation of the Official Plan and the Growth Plan such that the Vice-Chair should have exercised his discretion to grant a rehearing of the application.

[5] Pursuant to s. 96 of the OMBA appeals from the Board to the Divisional Court lie only with leave, on a question of law. In *Niagara River Coalition v. Niagara-on-the-Lake (Town)*, 2010 ONCA 173, 2010 CarswellOnt 1332, the Ontario Court of Appeal held at para. 43 that the interpretation of an official plan is a question of law.

HISTORY OF THE PROCEEDINGS

[6] The Respondents sought to develop a parcel of land that was designated under the City of Toronto's Official Plan as an "Employment Area". The Official Plan prohibits the development of lands designated as Employment Areas for residential uses. The Respondents' development includes 914 residential units as well as retail and commercial space and a day-care centre. The Respondents applied to City Council seeking an amendment to the Official Plan to redesignate their lands from "Employment Areas" to "Mixed-Use Areas". Council denied their request and the Respondents appealed to the Board.

[7] The City's position before the Board that since the subject lands were designated as "Employment Areas", the provisions of the Growth Plan were clear – no conversion in use could take place without a municipal comprehensive review. Such a review only takes place every five years and involves the City considering what should happen to the designated "Employment Areas" on a comprehensive basis. In other words, any conversions on lands within the "Employment Areas" designation cannot be made on a site specific basis.

[8] A panel consisting of two Board members held an extensive hearing where they heard from a number of witnesses, including a number of expert witnesses. At the end of the hearing they allowed the Respondents' application to redesignate the subject lands from "Employment Areas" to "Mixed-Use Areas". In doing so they found that the subject lands did not fall within an *employment area* as that term is defined in the Growth Plan. Therefore, there was no need for a municipal comprehensive review before the conversion to Mixed Use could be considered. The panel then went on to consider whether the proposed conversion was appropriate and found

that it was. They then adjourned the hearing to consider the details of the Official Plan Amendment. The panel issued their decision on August 28, 2009.

[9] On September 24, 2009, the City wrote to the Chair of the OMB requesting a review pursuant to s. 43 of the OMBA of the August 28, 2009 decision. The City argued that the Board erred when it found that the application to redesignate did not constitute a conversion under the Growth Plan.

[10] On November 24, 2009 the Vice-Chair of the Board issued the Decision. With respect to the issue that is central to this application the Vice-Chair found as follows:

...The Board determined that a change in land use designation from *Employment Area* to *Mixed Use Area* did not constitute a conversion under the Provincial documents as the lands are not subject to the *Employment District* policies in the OP...Page 13 of the Decision discusses the distinction between the term *employment areas* as set out in the PPS and GP and *Employment Areas* as set out in the OP. *Employment areas* are defined in Provincial documents as areas designated in an OP for clusters of business and economic activities which equate to lands found in the City's growth areas identified as *Employment Districts* and not to lands designated as *Employment Area* for employment purposes that are outside *Employment Districts*. The Board found that the subject lands do not lie in *Employment Districts/employment area*, and the protection afforded by the conversion requirements under the Provincial documents does not apply.

[11] The Vice-Chair found that the Board's reasons in this regard disclosed no error of law and that he would not have reached a different decision.

ANALYSIS

[12] The City submits that in reaching the conclusion he did the Vice-Chair made the same errors of law that the original panel of the Board did. This error was two-fold. First, the Vice-Chair ignored the clear wording of the Growth Plan and the clear definition of "Employment Area" contained within that Plan. They also ignored the fact that under s. 14(2) of the *Places to Grow Act*, 2005, S.O. 2205, c. 13, the Growth Plan prevails over an Official Plan when the two are in conflict.

[13] Pursuant to Policy 2.2.6 of the Growth Plan,

5. Municipalities may permit conversion of lands within *employment areas*, to non-employment uses, only through a *municipal comprehensive review*...

[14] In the Definitions section of the Growth Plan *employment area* is defined as

Areas designated in an official plan for clusters of business and economic activities including, but not limited to, manufacturing, warehousing, offices and associated retail and ancillary facilities. (Provincial Policy Statement 2005)
[Emphasis added.]

[15] The Official Plan for the City of Toronto contains a reference to “Employment Areas”, “Employment Districts” and “Avenues”. The Plan also contains maps dividing the City up according to these and other terms. Only the term “Employment Areas” is an official land use designation term. The other two terms are not. Therefore, according to the City, the lands in question, which clearly fall within an “Employment Area” on the Land Use Designation map, are within an *employment area* as that term is used in the Growth Plan.

[16] The difficulty in this case is that the City’s Official Plan also contains a map entitled “Toronto Official Plan Urban Structure” that divides the City up in terms of, among other things, “Avenues” and “Employment Districts”. On this map the subject lands fall within an area called “Avenues”. The panel of the Board found as a fact that, given this, the lands in question do not fall within an “Employment District”, but only within an “Employment Area.” The City is not seeking to appeal this finding of fact.

[17] The Board reviewed the wording of the Growth Plan, the wording of the City’s Official Plan and the City’s own documents to come to the conclusion that the definition of *employment areas* within the Growth Plan applied to “Employment Districts” under the Official Plan. Since the subject lands were on an Avenue, and not within an Employment District, they were not subject to the conversion protection under the Growth Plan. In coming to this conclusion the Board also heard expert opinion evidence on the subject. The Vice-Chair declined to order a review of this decision.

[18] In considering whether to grant leave there are two other important considerations to keep in mind. First, although the decision concerns a question of law and the test for the granting of leave is whether there is good reason to doubt the correctness of the decision, I am conscious that the question engages the policy expertise of the Board and involves the equivalent of their “home” statutes. As such, the Divisional Court owes deference to the Board’s decision and the decision would likely attract a standard of reasonableness on the appeal itself. Second, the “Board’s right to review decisions under s. 43 of the OMBA is broad and discretionary” (*SmartCentres Inc. v. Toronto (City)*, 2009 CarswellOnt 7507, 63 O.M.B.R. 129 (S.C.) at para. 15).

[19] In reaching the decision it did, the Board considered the fact that the former Chief Planner of the City, in an internal memorandum dated November 25, 2005, stated that lands within Employment Areas that were not within Employment Districts would not be subject to a comprehensive review under the Provincial Policy Statement 2005 (from which the definition of *employment area* in the Growth Plan was derived). Furthermore, City Council has adopted this approach in several other applications to redesignate lands that were within an Employment Area, but not within an Employment District.

[20] On the motion before me, the City submitted that the Board erred in relying on this information since all of these documents preceded the passage of the Growth Plan in June of 2006 and the Growth Plan prevails over the City's Official Plan. In response, the Respondents produced a By-Law that was passed by Council of the City of Toronto in May of 2009.

[21] Under the Growth Plan, the City of Toronto had three years to bring its Official Plan into compliance with the Growth Plan. The purpose of the By-Law in question was to accomplish this goal.

[22] The By-Law provides as follows:

To ensure a diverse economic base and provide fulfilling and well-paid employment opportunities for Toronto residents, all lands designated as *Employment Areas* within *Employment Districts* as shown on Map 2 of this Plan are required to achieve the City's range of employment forecasts by 2031. No lands designated as *Employment Areas* within *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...

The need to review and revise this Plan will be considered every five years... This assessment will include a Municipal Comprehensive Review of the City's *Employment Areas* located within *Employment Districts* as shown on Map 2.

[23] Under this By-Law the City has committed to not considering any conversions to non-employment use on lands designated as "Employment Areas" within "Employment Districts" without a municipal comprehensive review. The clear inference to draw from this is that the City will consider conversions to non-employment uses on lands that are designated as "Employment Areas" that are not within "Employment Districts" without a municipal comprehensive review. This By-Law represents City Council's view of what is needed to bring its Official Plan into compliance with the Growth Plan. In essence that view is consistent with the approach taken by the Board on this application and consistent with the manner in which the Vice-Chair exercised his discretion under s. 43 of the OMBA. Given this, I am not persuaded that there is good reason to doubt the correctness of the Vice-Chair's decision.

CONCLUSION

[24] For these reasons the motion for leave to appeal is denied. The City shall pay the Respondents their costs of this motion, which I fix in the amount of \$10,000.00. These costs are payable within 30 days.

H. Sachs J.

DATE: June 3, 2010