

March 1, 2013

Our File No.: 00-0031

Via Email

pgmc@toronto.ca

Planning and Growth Management Committee
City of Toronto, City Hall
100 Queen Street West
Toronto, ON M5H 2N2

Attention: Frances Pritchard

Dear Sirs/Mesdames:

**Re: New Draft City-wide Zoning By-law (“ZBL”)
Planning and Growth Management Committee (“PGMC”) Item No. PG21.1**

We have recently been retained as solicitors for A&W Food Services of Canada Inc., McDonald’s Restaurants of Canada Limited, The TDL Group Corp. (operators and licensors of Tim Horton Restaurants) and Wendy’s Restaurants of Canada, as well as their industry association, Ontario Restaurant Hotel & Motel Association (ORHMA) (the “Group”).

Our clients have concerns with the provisions of the ZBL which seek to prohibit or limit drive-through facilities (“DTF”) in many areas of the City. The Group previously submitted comments to the PGMC on September 27, 2012 (attached), and has additional comments, as outlined herein, with proposed revisions to the DTF provisions. As such, the Group respectfully requests that the PGMC defer consideration of the DTF provisions of the ZBL (or the entire ZBL if partial deferral is not possible), which would allow additional time for discussions with City Staff. If the ZBL is approved by Council in its current form, the Group intends to appeal the ZBL, but would welcome ongoing dialogue with City Staff to see if a hearing can be avoided.

Outstanding Issues

The Final Staff Report in respect of the ZBL (dated January 22, 2013) proposes revisions to some of the DTF provisions of the ZBL. However, these proposed revisions do not reflect or appropriately respond to the Group’s comments in their September 27, 2012 written submission to PGMC. As such, all of the comments noted in the September 27, 2012 letter remain applicable to the current draft of the ZBL.

Further, the proposed revisions to the DTF provisions set out in Attachment 3 of the January 22, 2013 Staff Report raise additional concerns:

1. **Revisions to Section 150.80.20(1):** our clients have advised that the revisions to this section of the ZBL impose additional restrictions on DTF uses beyond those contained in the first draft ZBL and beyond what currently exists in the in-force zoning by-laws of the amalgamated City of Toronto. In addition, the City has not provided the Group with any study or other information which justifies the additional restrictions being proposed.
2. **Revision to Section 150.80.20(6):** the proposed revisions permit a DTF stacking aisle to be located in the side yard between the building and the street on a corner lot, but only where the lot also contains a vehicle fuelling station. The Group questions whether such a DTF configuration would be appropriate for other locations, even where vehicle fuelling stations do not exist.


Conclusion

Our clients appreciate the hard work of City staff on this important matter. At this time, however, the Group's issues with the ZBL remain unresolved. Our clients believe that more can be done to ensure that DTFs receive appropriate protection and treatment by the ZBL. In particular, our client does not believe there is sufficient protection in the ZBL for existing and legal DTFs.

The Group would like to continue engaging City Staff in dialogue and believes that many issues can be resolved. In that regard, we ask that the PGMC defer a decision on the DTF provisions of the ZBL so that discussions may continue, failing which an appeal would be the only available remedy.

Yours very truly,

Goodmans LLP

per: 

David Bronskill

DJB/

cc: City Planning, Zoning By-law Project
Clients



montréal · ottawa · toronto · hamilton · waterloo region · calgary · vancouver · beijing · moscow · london

September 27, 2012

VIA FAX AND MAIL (FAX: 416 392-3821)

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Dear Sirs/Mesdames:

Re: City of Toronto Proposed New Comprehensive Zoning By-law ("ZBL")

We are the solicitors for A&W Food Services of Canada Inc., McDonald's Restaurants of Canada Limited, The TDL Group Corp. (operators and licensors of Tim Horton Restaurants) and Wendy's Restaurants of Canada, as well as their industry association, Ontario Restaurant Hotel & Motel Association (ORHMA). We write to you today in advance of the required statutory Public Meeting of the Planning and Growth Management Committee on this subject. We ask that you place on your notification list for this matter so that we receive notice from the City of Toronto of any future considerations on the current draft Zoning By-law by City staff or that of Committee or Council of the City.

Our clients have concerns about the proposed ZBL, to the extent that it seeks to prohibit drive-through facilities ("DTF") as a use in many areas of the City, and to unduly limit or regulate them in others. It is our client's view that the current recommendations are not underpinned by and do not accord with the law, the facts, or the science of DTF.

We are prepared to provide to staff decisions of the Board that acknowledge, contrary to clear assumptions in the latest recommendations, that DTF are transit-neutral, and that DTF do not promote automobile use. The evidence, accepted repeatedly by the Board, is that DTF rely for business on pass-by traffic, and effectively create little or no destination traffic. As such, DTF do not put people in cars or take them out of mass transit or other forms of non-automobile transit, such as foot or bicycle traffic. The same cannot be said, interestingly, for restaurants with parking lots alone.

It is our view that, appropriately studied, the facts surrounding DTF cannot support the extent of regulation contained in the draft bylaw. In terms of the law, there is a plethora of case law that goes to the point that to accomplish prohibitions of this kind, there is a duty upon municipalities to engage in a fulsome study of the issues surrounding the use. No such study has taken place in Toronto. Indeed the 2004 decision of the Ontario Municipal Board respecting by-laws regulating drive-throughs made the following reference with

respect to additional flexibility in the interest of reducing future site-specific zoning amendments:

“Mr. Lehmann also testified that a new City-wide zoning By-law was under development. The Board anticipates that new By-laws will, over time, need to be established to recognize the diversity of the amalgamated City. In this regard, following the completion of Phase II of the drive-through process, changes to the drive-through By-laws could be made to reflect this diversity, resulting in refinements that will narrow the scope of the application of the By-laws and provide greater flexibility for industry and ultimately, reduce the number of site specific zoning amendment applications.”

The recommendations of staff are internally contradictory, in that they allow gas stations and car washes in areas where DTF are prohibited. Surely, these uses are at least as much automobile related uses as is a DTF, and we would argue, much more so. In addition, gasoline stations bring with them environmental issues never raised by DTF.

We have provided previous written comment to the City and met with planning staff as well as made delegation to Planning and Growth Management Committee on the former By-law 1156-2010.

Our client is extremely concerned with the ZBL, both its effect on its existing locations and on the ability for its association members to grow/expand their businesses at both existing and future locations in the City of Toronto without unreasonable and unjustified restriction, regulation and prohibition as the case may be.

In summary then, it is our client's view that DTF, as compared to parking lots (which are not proposed to be as stringently regulated under the proposed ZBL), are more consistent with the aims of both the Official Plan, and the Provincial Policy Statement (“PPS”), in that among other things, they (DTF) promote environmental sustainability, and maximize the efficient use of land, and are neutral with respect to establishing alternatives to automobile use, and promoting transit use, whereas parking lots have a negative effect on all of these aims.

We therefore urge city staff, Committee and Council to refrain from passing those portions of the ZBL that seek to prohibit or unduly regulate or limit DTF. This would be more in keeping with the PPS and the OP related to intensity of land uses and environmental sustainability than would the alternative being larger parking lots in the same areas DTF are prohibited or unduly limited. As you may be aware, the OMB has recently ruled that there is for ZBL, a duty to bring them into accord with the PPS.

Our clients are extremely concerned with the ZBL as it stands. Currently, our clients have approximately 140 DTF in the City of Toronto. Of these, 70 sites are not yet dealt with in the ZBL, with these to be dealt with in the future. We specifically request that we be kept abreast of staff's intentions on these “blacked-out” sites, and are consulted as this develops. **Of the remaining 70 sites which are dealt with in the ZBL, all of them, 100% have been rendered legally non-conforming by the ZBL.** This represents an unjustified

and unwarranted attack on our client's business, with no science or study to back it up. Indeed, as the studies our clients have and are prepared to share, this attack will have results precisely the opposite of those intended by proponents of DTF regulation. For such an attack to be mounted on responsible businesses is simply beyond the pale.

Our specific concerns regarding the ZBL include, but are not limited to:

Objections to use Restrictions

1. Chapter 30.20.20.20 Commercial Local Zone (CL)

The CL zone proposes to permit, with limited restrictions, uses such as Retail Stores, Financial Institutions, Eating Establishments, and Vehicle Fuelling Stations as well as Vehicle Service Shops within this zone however, DTF is not permitted. A DTF should be a permitted conditional use as are the other previously noted uses and subject to similar regulations as applied to the otherwise permitted Vehicle Fuel Stations and Vehicle Service Shops within the CL zone. We are not aware of any specific justification for not permitting a DTF in this zone, particularly when other similar uses such as Eating and Take-out Eating Establishments, Vehicle Fuelling, and Repair Stations are permitted and therefore we object to this section.

2. Chapter 40.10 Commercial Residential Zone (CR)

Chapter 40.10.20.20 provides that DTF are only permitted on a lot if the CR zone has an "r" value of zero as set out in section 40.10.20.100 (12). This is internally contradictory, in that the otherwise limited restrictions of other forms of retail/commercial uses such as Retail Stores, Hotels, Office Uses, Eating Establishments, Vehicle Washing Establishments, Vehicle Dealerships (all with surface parking), and surface public parking lots are all permitted within CR zoned sites even where the "r" value is greater than 0.0. Further, the otherwise permitted surface parking lots in the CR zone are less compliant with the PPS and the OP than are DTF, and as such the provisions make little sense and we therefore object to this section.

3. Chapter 50.10 Commercial Residential Employment Zone (CRE)

The CRE zone proposes to permit limited restrictions on uses such as Retail Stores, Financial Institutions, Eating Establishments, and Vehicle Fuelling Stations as well as Vehicle Service Shops within this zone however, a DTF is not permitted per section 50.10.20 100 (2). We object to the exclusion of a DTF in this zone as a DTF should be a permitted conditional use as are the others noted above within the CRE zone.

4. Chapter 60.10 Employment Light Zone (EL)

DTF is presently a permitted use in conjunction with Take-out Eating Establishments in many zones that are proposed to become EL zones in the by-law, such as some

of the I1, I2 and IC zones of the former City of Toronto and some of the MC zones in the former City of North York. In our view, there is no planning basis for removing DTF as a permitted use as set out in 60.10.20.100 (5), especially as both Eating and Take-out Eating Establishments continue to be permitted uses. Further, we object to Eating and Take-out Eating Establishments be classified as an “ancillary use” in the EL zone, whereas it was a permitted-conditional use in the previous zoning bylaw. In addition, we object to the further limitations placed on the maximum allowable floor area for both Eating and Take-out Eating Establishments as contained within this chapter and the referenced 150.100 which are unjustifiably restrictive.

5. Chapter 60.20 Employment Industrial Zone (E)

This zone permits financial institutions, building supply yards, automated bank machines, vehicle fuel stations, and vehicle service shops, amongst other permitted quasi-retail type uses with limited restrictions. However, a DTF is only permitted on roads which are noted as having frontage on a “major street” as shown on the policy area overlay map and in section 60.20.20.100 (3,5). This appears to be an unjustified limitation placed on DTF and are opposed to by our clients.

6. Chapter 60.30.20 Employment Heavy Industrial Zone (EH)

This zoning seeks to prohibit Take-out Eating Establishments including associated DTF as set out in section 60.30.20.10 whereas these uses are currently permitted in the heavier industrial zones throughout the City. This is not harmonization and therefore we object to this section.

7. Chapter 60.40 Employment Industrial Office Zone (EO)

This zone permits, Eating and Take-out Eating Establishments, Financial Institutions, Building Supply Yards, Automated Bank Machines, Vehicle Fuel Stations, Vehicle Service Shops, amongst other permitted “quasi-retail” type uses with limited restrictions. However, a DTF is only permitted on roads which are noted as having frontage on a “major street” as shown on the policy area overlay map and set out in section 60.40.20.100 10B. This is, in our view, to be an unjustified limitation placed on a DTF, Eating or Take-out Eating Establishments and are opposed to by our clients.

Objections to Various Proposed Regulations

8. Section 2.1.1(4) Reduction of Lot Area – Conveyance to a Public Authority

The provisions of paragraph (A) which provide that a conveyance to a public authority shall not cause a property not to be in compliance with the ZBL provided that not less than 85% of the frontage, area, or depth of the lot remains, are unreasonable. A conveyance to a public authority should not result in a non-compliance as the conveyance is non-consensual.

9. Chapter 2 Compliance with this By-law, Chapter 2.1.1 General (3)

Sub-chapter (3) should be expanded on to add the following to the end of the opening sentence as follows: *"or has obtained a site specific Zoning By-law Amendment or Minor Variance Application approval to recognize/permit the lot area of the retained lot."*

10. Chapter 5.10.30 Lot Requirements and 5.10.30.1 General (2)

This chapter renders it impossible to subdivide land in the absence of frontage. It would prevent a form of development quite common in the retail industry, specifically shopping centre properties where retail uses are constructed on "pads" which have access to the public street by way of the grant of easement. This difficulty could also be alleviated with a provision in the zoning by-law which provided that in the event of issuance of consent pursuant to Section 53 of The Planning Act, that the Committee of Adjustment could provide that the property could be treated as one lot for by-law purposes.

11. Chapter 30.20.150.1 (Waste)

We object to this regulation that would require the storage of waste and recyclable material in a wholly enclosed building in most cases. We note that the definition of "building" within the new ZBL included partially enclosed building or "structure" and we are not aware of any specific justification having been previously provided to require "wholly" enclosed building to store waste or recyclable material. Each case and location should be reviewed independently on a site by site basis and a matter of Site Plan Control and design guidelines.

12. Chapter 30.20.20.20 Ancillary Use

This chapter should include reference to Outdoor Patio as a permitted ancillary use subject to applicable regulations to be established in the final determination in this and any other related objection.

13. Chapter 40.10.20.100 Conditions

(a) As a Drive-Through Facility (DTF) is noted as being a permitted Principle Conditional Use, it should also be listed in specific condition (21) as being permitted to have an Outdoor Patio ancillary to the DTF.

14. Chapter 40.10.80.20 Separation

(1) Location of Outdoor Surface Parking – Corner Lots in SS2 Area

This section requires that a parking space must be at least 7.5m from a lot in a Residential Zone category or Open Space zone category. A 7.5m setback in this

case seems excessive and we are not aware of any specific justification provided for this and further it is unclear if this setback applies to all yards of the corner lot or only the yard which abuts a street i.e. exterior side yards.

15. Chapter 40.10.150 Waste

40.10.150.1 General - (1) Waste and Recyclable Materials Storage – (B) the building must be a minimum of 7.5 metres from a lot in a Residential Zone category, or Open Space Zone category.

We object to this required setback as we are not aware of any specific justification having been previously provided and feel the required setback is substantial given the fact that the waste and recyclable material is wholly enclosed in a building so why would a 7.5m setback be required in this case?

16. Chapter 50.10.20. 100 Conditions in a CRE Zone

(a) as required by 50.10.20.100 (2), this is unduly restrictive and we are not aware of any specific justification previously provided to restrict all Eating Establishments and Take-out Eating establishments to a maximum permitted interior floor area of 400 sq.m. when it is within 6.1 metres of a lot within a residential zone.

In addition, given that the *interior floor area* definition does not provide for area exclusions currently afforded to eating establishments, a 400 square metre *interior floor area* maximum is less than a 400 square metre *gross floor area* maximum.

(b) Chapter 50.10.20.100 (25) (B) (i), (iii), (iv), and (v) unduly restricts Outdoor patios for Eating Establishments and Take-out Eating Establishments and we are not aware of any specific justification to restrict outdoor patios to the extent noted in these conditions.

17. Chapter 50.10.150 Waste

50.10.150.1 General (1) Waste and Recyclable Materials Storage – (B) the building must be a minimum of 7.5 metres from a lot in a Residential Zone category, or Open Space Zone category.

We object to this required setback as we are not aware of any specific justification having been previously provided and feel the required setback is substantial given the fact that the waste and recyclable material is wholly enclosed in a building so why would a 7.5m setback be required in this case.

18. Chapter 80.10 Institutional General Zone (I)

80.10.20.100 Conditions (7)

We object to the referenced/required distance of 6.1 metres for Eating Establishments and Take-out Eating Establishments taken from the lot adjacent a Residential Zone Category. The setback of 6.1 metres should be taken from the location of the use on the lot and not the entire lot as condition (7) stipulates.

19. Chapter 80.30 Institutional Educational Zone (IE)

80.30.20.100 Conditions

Similar to the above, we object to the referenced distance of 6.1 metres for Eating Establishments and Take-out Eating Establishments taken from the lot adjacent a Residential Zone Category. The distance of 6.1 metres should be taken from the location of the use on the lot and not the entire lot as condition (13) stipulates.

20. Chapter 150.80 Drive-through

Chapter 150.80.20 Use Regulations

(a) Section 150.80.20 (1) indicates that a drive-through facility is not permitted within a zone that also permits a dwelling unit. This is internally contradictory with respect to the treatment of many other permitted and similar uses such as a Vehicle Washing Establishment or a Vehicle Fuelling Station or Service Shop, Eating Establishments, Retail Stores and Retail Service, and Public Parking to name a few that are permitted on the same site that may contain a dwelling unit. We are not aware of any specific study having been previously prepared to justify this restriction as required by 150.80.20 (1).

(b) Section 150.80.20 (4) indicates that no portion of a DTF stacking aisle is to be located in a front or side yard that abuts a street, unless the lot is in and abuts a lot in a E, EO or EC zone. It is our view that this is an unjustified restriction on DTF, bearing in mind the absence of study, and that all zones that would otherwise permit surface parking areas within front or side yards abutting streets should also permit a DTF in the same fashion.

(c) Section 150.80.20 (6) appears to permit a DTF stacking aisle between a building and the side yard that abuts a street but only when associated with a vehicle fuelling station. We question why this is acceptable with a vehicle fuelling station, but in no other circumstances.

21. Chapter 150.80.40 Building Regulations

(1) Drive Through Facility – Separation Distance

We object to this section which requires a minimum 30 metre setback from any lot in a residential zone category, residential apartment zone category, commercial residential zone category or commercial residential employment zone category. No

study or justification has been provided for this setback for a DTF adjacent to abutting residential zones. We acknowledge the 2003 OMB Hearing but note that several years have passed since that decision and more recent studies related to noise, air quality, noise attenuation technology, etc. have all been further refined to support a setback much lower than the proposed 30 metres in the Zoning By-law and that the related setback should be taken from the order board intercom station. We also question whether section 34 of the Planning Act allows a setback to be taken from what is in essence a parking lot. In addition, we object to the requirement to have the setback taken from "all parts of the drive-through facility" as based on the definition of a DTF including reference to "premises" as based on the definition of premises in the ZBL it could be interpreted that the setback from any part of the DTF applies to any part of the building. This would mean that even in cases where the overall eating establishment/drive-through building was placed between the stacking lane and abutting residential land uses, (which would be appropriate in some instances to provide screening and buffering etc.), the building would need to be relocated because it doesn't meet the minimum 30 metre setback as it is currently drafted as the definition of "drive-through facility" and "premises" refers to a "building". There is simply no justification for this possibility.

We note with interest that the 30m metre setback is substantially greater than what is required in the new By-law for setbacks of parking lots in general, Vehicle Service Shops and Vehicle Washing Facilities, Fuel Pump Islands and Employment Industrial Uses adjacent a Residential Zone.

Further, we object to this setback being applied to all abutting Commercial Residential or Commercial Residential Employment Zones even if that abutting zone has an "r" value of 0.0. applied to it.

22. Additional Comments

(a) Eating and Take-out Eating Establishment Uses within the E, EL, EH and EO Zones:

(i) The ZBL introduces an outright prohibition of these uses including the DTF within the EH zone and further prohibits these uses within the EL zone unless they are combined with a primary employment use. These uses are complimentary to, and support the industrial areas within which they are located. In short, the proposed use restrictions are arbitrarily prohibitive, unjustifiable, and are unacceptable to our clients.

(ii) Within the E and EO zones, the ZBL introduces an arbitrary floor area cap of 300 sq.m. for these uses and 500 sq.m cumulatively for all retail services permitted on the lot. We seriously question the underlying justification and rationale for these caps which again, raises the issue of non-conformity to which our clients object. These related sections are 60.20.20.100(3) and 60.40.20.100(5).

(iii) Additionally, within the EC, EL and EO zones, the ZBL further restricts these uses by imposing certain separation requirements through floor to ceiling partition wall standards within principal uses to prevent public access from other uses. In our view, there is no planning basis, nor does the law provide for the introduction of these standards and no planning basis or justification has been provided to date by the City for the introduction of these standards. Our clients oppose this new bylaw standard. For an example of this, please refer to Chapter 60.10.20.100 (5,c), 60.20.20.100 (4, A,ii), 60.40.20.100 (23,A,ii).

23. Chapter 200 – Table 200.5.10.10 “Parking Space Rates and Parking Space Occupancy”

- (a) It is our view that parking standards for eating establishments with a DTF should be lower than the same use without a DTF. Such a reduction is justified on the basis of recent parking demand analysis of these facilities. In a number of municipalities, a minimum 20 percent reduction in the required parking can be applied to these sites where a DTF is established together with a sit-down eating option.
- (b) The parking requirements in Table 200.5.10.10 continues the exemption for Eating Establishments provided in the former City of Toronto and now extends it to: "all other areas of the City". (i.e., areas outside PA1 PA2, PA3 zones) as long as the floor area is less than 200 sq.m. after which parking is to be provided at 3 per 100 sq.m. Overall, this represents an appropriate direction on parking in the City. However, in one regard the proposed bylaw is regressive; namely, for an Eating Establishment greater than 200 sq.m. in the former City of Toronto, which would have had a zero parking requirement but would now require 3 per 100 sq.m. This is an unjustified and regressive step taken for parking requirements for Eating Establishments in this area of the City and therefore we object to this new requirement.

24. Chapter 800 Definitions

800.50 Defined Terms

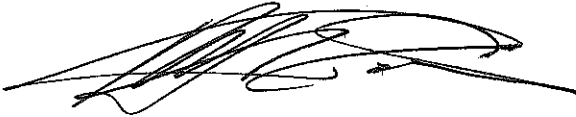
(320) Gross Floor Area.

We object to the definition of “Gross Floor Area” (GFA) as it is substantially different and broader than the previous definitions of GFA in the previous applicable Zoning By-law in the City of Toronto. Of particular concern for example is this new definition includes all “voids” (unusable floor space) such as stairwells, escalators, elevators shafts, ventilation and utility shafts etc. We believe this will result in many sites becoming non-conforming regarding permitted site GFA which is not acceptable. This new definition should be harmonized with the definitions of GFA of the previous Zoning By-laws. At the very least, the same gross floor area exemptions which apply to non-residential uses in the CR zone (per 40.5.40.40) should also apply to eating establishments in all other zones.

The above represents our specific comments and noted objections to several chapters and sections of the ZBL as currently drafted. By way of this letter, we reserve the right, and the rights of ORHMA, The TDL Group Corp., McDonald's Restaurants of Canada, A&W Food Services of Canada Inc. and Wendy's Restaurants of Canada to provide further comments during the review process of the ZBL, should new matters arise from further review of the zoning by-law. Further, we and our clients would be pleased to arrange a session with our air quality and transportation consultants, so that we might demonstrate directly to you, that which staff is already aware of, but has dismissed – that DTF are not in fact the problem they are suggested to be, but that instead, DTF are more supportive of the City's aims than the alternative.

Thank you for your attention to this matter.

Yours very truly,



Michael S. Polowin
Partner

MSP:abh

cc: Clients