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PL051314

PL061112

PL080335

PL080565

Smart Centres Inc. (Toronto Film Studios Inc.) has 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 land at 629, 633 and 675 Eastern Avenue from the Restricted Industrial Area to permit construction of a mixed use development.

(Approval Authority File No. 04168616 STE, 30 OZ)

OMB File No: O060018

OMB Case No. PL051314

Smart Centres Inc. (Toronto Film Studios Inc.) has 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 438-86 of the City of Toronto to rezone lands respecting 629, 633 and 675 Eastern Avenue from I2 D5 to Employment Regeneration Area to permit construction of a mixed use development.

OMB File No: Z050208

OMB Case No. PL051314

Talisker (Sunlight) G.P. Inc., SmartCentres and the Rose Corporation have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Toronto to approve Proposed Amendment No. 5 to the Official Plan for the City of Toronto

OMB File No. O060215

OMB Case No. PL061112

Talisker (Sunlight) G.P. Inc., SmartCentres Inc., 1079744 Ontario Ltd. and 2006199 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Toronto to approve Proposed Amendment No. 23 to the Official Plan for the City of Toronto

OMB File No. PL080335

OMB Case No. PL080335

Talisker (Sunlight) G.P. Inc., SmartCentres Inc., 1079744 Ontario Ltd. and 2006199 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 130-2008 of the City of Toronto

OMB File No. PL080336

OMB Case No. PL080335

SmartCentres Inc. has appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Toronto to approve Proposed Amendment No. 379 to the Official Plan for the City of Toronto

OMB File No. PL080337

OMB Case No. PL080335

SmartCentres Inc. has referred to the Ontario Municipal Board under subsection 114(15) of the *City of Toronto Act*, S.O. 2006, c. 11, as amended, determination and settlement of details of a site plan for lands composed of 629, 633 and 675 Eastern Avenue, in the City of Toronto
OMB File No. PL080565
OMB Case No. PL080565

APPEARANCES:

Parties

Counsel

City of Toronto

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Talisker (Sunlight) G. P. Inc.

M. Flynn-Guglietti

DECISION DELIVERED BY JAMES R. McKENZIE AND ORDER OF THE BOARD

Toronto Film Studios Inc. and SmartCentres Inc. (TFS/SC) are desirous of redeveloping a jointly-owned property located at 629, 633, and 675 Eastern Avenue (Subject Property) with a significant mixed-use commercial, albeit substantially retail, development scheme. The Subject Property is physically situated in the South of

Eastern Employment District. The City of Toronto believes the TFS/SC scheme will destabilize the Employment District and preclude its hoped-for vision for the area.

There are seven matters before the Board on appeal, five of which were the subject of this 58-day hearing over the late spring, summer, and early fall of 2008. Those five matters include:

1. the appeal of an application to amend the former Toronto 1994 Official Plan as it applies to the Subject Property – filed by Toronto Film Studios (TFS);
2. the appeal of an application to amend the former Toronto Zoning By-law No. 438-86, as amended, as it applies to the Subject Property – filed by TFS;
3. the appeals of Official Plan Amendment No. 23 to the current Toronto 2002 Official Plan – filed by TFS/SC, 2006199 Ontario Inc. and 1079744 Ontario Limited (Numbered Companies), and Talisker (Sunlight) G. P. Inc. (Talisker);
4. the appeals of Official Plan Amendment No. 379 to the former Toronto 1994 Official Plan – filed by TFS/SC; and,
5. the appeals of Zoning By-law No. 130-2008 – filed by TFS/SC, the Numbered Companies, and Talisker.

For ease of reference, item nos. 1 and 2 above will be collectively referred to as the 'Site-Specific Applications' and item nos. 3, 4, and 5 as the 'City Instruments.' A sixth matter, Official Plan Amendment No. 5 to the current 2002 Official Plan, was not pursued in the hearing. All counsel agreed that Official Plan Amendment No. 5 was repealed by the same by-law adopting Official Plan Amendment No. 23 – By-law No. 128-2008 – and invited the Board to make finding to that effect on the face of the adopting by-law. A seventh matter, an appealed site plan approval application for the TFS/SC development scheme, was consolidated with the five matters noted above on the condition that it would not be advanced in the hearing given the lateness of its filing. It was, however, relied upon as an evidentiary basis for illustrating the details of what TFS/SC were specifically proposing as the development scheme for the Subject Property.

Previewing the outcome of this decision, the Board finds that the City Instruments do not represent good land use planning and they are not approved. The Board also finds that the Site-Specific Applications do not represent good land use planning and they too are not approved. Finally, the Board finds that Official Plan Amendment No. 5 has, in fact, been repealed. The appeals filed against Official Plan Amendment No. 5 are therefore moot and the Board's file for those appeals will be closed. Likewise, the appealed TFS/SC site plan approval application is moot. In light of the above outcomes, the status quo respectively applying to the South of Eastern Employment District and Subject Property remains in effect.

Background

It is important for what follows to set out several contextual matters that, taken together, establish a broad framework for the Board's findings. From this, the decision then deals with the City Instruments followed by the Site-Specific Applications.

The first involves explicating the relevant policy regime governing each set of appeals before the Board. At one of the last preliminary proceedings before the hearing, the parties impressed on the Board the appropriateness of determining the City Instruments and the Site-Specific Applications according to the respective policy regime within which each set is situated. Counsel submitted that the Board should evaluate the City Instruments in light of the planning regime existing on January 29, 2008, the date upon which they were adopted by Council, and evaluate the Site-Specific Applications in light of the policy regime that existing on June 24, 2004, the date upon which they were filed with the City. The Board accedes to these wishes. The policy regime governing the determination of the City Instruments consists of the *Planning Act* as it now exists following Royal Assent of Bill 51, the 2005 Provincial Policy Statement, the 2006 Growth Plan for the Greater Golden Horseshoe, and the current City of Toronto 2002 Official Plan. The policy regime governing the determination of the Site-Specific Applications consists of the *Planning Act* as it was in 2004, the 1997 Provincial Policy Statement, the former Metropolitan Toronto Official Plan, and the former City of Toronto 1994 Official Plan.

On April 2, 2008, the Board consolidated the appealed City Instruments with the appealed Site-Specific Applications. The second contextual matter therefore concerns the physical and policy relationship between the City Instruments and the Site-Specific Applications, as well as the physical composition of the South of Eastern Employment District and the Subject Property.

In terms of understanding the physical relationship between the Site-Specific Applications and the City Instruments, it is easiest to begin with some basic geography. The City Instruments apply to that area identified as the South of Eastern Employment District in the current 2002 Official Plan. Except for the Subject Property, the Employment District is that area bounded by Eastern Avenue on the north, Woodfield Road (the first street west of Coxwell Avenue) on the east, Lake Shore Boulevard on the south, and the Don River on the west – an area covering approximately 135 hectares (335 acres). The Site-Specific Applications apply only to the Subject Property. The simplest way to appreciate the spatial relationship between the Employment District and the Subject Property is to visualize a gentleman's bowtie: the slender, horizontal shape of the tie being representative of the Employment District, and the central location of the tie's knot representative of the Subject Property. The Subject Property divides the Employment District; each maintains Eastern Avenue and Lake Shore Boulevard as its north and south boundary, respectively.

Bearing in mind the earlier text concerning policy regimes, it is important to note that while the Subject Property is physically located in the Employment District, it is not a part of the Employment District from a policy perspective. When the Board approved the 2002 Official Plan in 2006, the Site-Specific Applications were already under appeal. To recognize the active status of those appeals, the Subject Property was exempt from the approved 2002 Official Plan pending a determination of the Site-Specific Applications. The Subject Property is therefore the only property in the Employment District to which the current Official Plan does not apply and for which the former City of Toronto Official Plan continues to apply.

As far as the location and configuration of employment districts go, the South of Eastern Employment District is like only one other in Toronto – the Liberty Village

Employment District located west of the Downtown Core. Both maintain a slender, horizontal configuration. During the hearing, these two Employment Districts were frequently referred to as the “shoulders” of the Downtown Core – a characterization having more to do with their physical proximity to the Core than with their role of providing it support.

In terms of current land uses, the South of Eastern Employment District is less uniform than other employment districts in the City. Containing a variety of uses and property sizes, it was referred to as “eclectic” during the hearing. Uses include industrial, retail, service commercial, and residential. Evidence was put before the Board that the Employment District consists of four distinct sections: a western sub-area consisting of industrial, automotive, and office and film studio uses; a central-west sub-area, consisting of industrial, retail, and office uses, as well as a modest pocket of low-density residential uses; a central-east sub-area, (which includes the Subject Property), consisting of employment, retail, and film studio uses, as well as a second very small pocket of low-density residential uses; and an eastern sub-area, consisting of industrial uses and a public works yard. A retail node containing a Loblaws store, a Price Choppers store, and two fast-food restaurants (Tim Horton’s/Wendy’s and Burger King) is found at the north-east and north-west corners of the Leslie Avenue and Lake Shore Boulevard intersection. A commercial development, including a Canadian Tire store, is situated just outside the Employment District at the south-west corner of Leslie Street and Lake Shore Boulevard, though it too is considered a component of the retail node.

The Subject Property has a rectangular shape with an area of 7.5 hectares (18.5 acres). It is located about a block west of Leslie Street and the retail node. At the beginning of the hearing, the buildings on the Subject Property were in their final days of being used by TFS for film studios and administrative offices. Those buildings are all located on the west portion of the Property. The east portion is vacant and was often used for outside storage. Nearing the conclusion of the hearing, TFS was in the process of relocating its operations to the newly-opened Filmport, a major purpose-built film studio complex located a short distance south of the Subject Property. During final

submissions, the Board was advised that TFS had obtained demolition permits to remove the on-site buildings.

A third contextual matter involves setting out the areas of testimony before the Board, both expert and lay, and who testified on behalf of whom during the hearing. Some professionals testified to both the City Instruments and the Site-Specific Applications; others testified only to one of them. Each professional was qualified by the Board as an expert or as an individual possessing specialized knowledge in his or her substantive field. Lay testimony was directed at the Site-Specific Applications only.

The City's evidence included testimony from the following individuals: Pino Di Mascio, a professional planning consultant; Jeffrey Climans, a professional real estate advisory consultant with expertise in office, industrial, and retail market opportunities, and in market valuation and property valuation matters; Russell Mathew, a professional planning consultant with a specialization and expertise in land economics; Kyle Benham, a professional planner and the City's former Director of Economic Development; Peter Finestone, the City's Film Commissioner and qualified as an authority on the City's screen-based industry; Nigel Tahair, a professional transportation planner in the City's planning department; and, Denise Graham, a professional planner in the City's planning department. A final witness, Jim Helik, was called in reply to address the City's employment survey practices.

The evidence of TFS/SC included testimony from the following individuals: Peter Smith, a professional planning consultant; Frank Clayton, a professional economist with a specialization in land economics and employment; Lee Parsons, a market analyst who is also a professional planner and land economist; Paul Morassutti, a commercial real estate expert with a specialization in the Toronto office and industrial markets; Robert Glover, a professional planner and architect with a specialization in urban design; Russell Fleischer, the architect who designed the development scheme proposed for the Subject Property; and, Anthony Yates, a civil engineer with a specialization in transportation planning. TFS/SC also tendered evidence from a film panel including: Jesse Prupas, an accomplished film and television producer; Bob Richards, an individual with extensive experience in audio and acoustical consulting to the film

industry; and, John Porter, a professional quantity surveyor. Through an agreement with City counsel once the hearing was underway, TFS/SC round-out its case by filing technical evidence relating to natural heritage and environmental impact, environmental remediation, noise, odour and dust, landscape, stormwater management, and technical servicing issues.

The Numbered Companies called evidence on both the Site-Specific Applications and the City Instruments. Concerning the former, two witnesses were called: Paul Stagl, a professional planning consultant; and, Nick Poulos, an expert in transportation planning and traffic engineering. Mr. Stagl also testified on the latter.

The Toronto East Community Coalition (ETCC) actively participated in the hearing. The Coalition called three witnesses: Ute Lehrer, a professional planner and professor in environmental studies; Steven Tufts, a professor of sociology with a specialization in labour markets and community economic development, particularly economic activity clusters; and, Paul Young, a landscape architect by formal training, but, given his recent work experience and focus, called to testify on active transportation (i.e., walking and cycling) and community health promotion.

Talisker called a professional planning witness, Craig Hunter, with respect to a settlement it had negotiated with the City concerning its appeal of Official Plan Amendment No. 23 and Zoning By-law No. 130-2008.

Finally, the Board also heard from the community in connection with the Site-Specific Applications. Sixty individuals testified over three public sessions. Opposition outpaced support for the proposed development scheme by a ratio of 3:1.

Following the consolidation of appeals, the parties organized the issues for the hearing in to two lists: a Consolidated Issues List of 43 issues for the Site-Specific Applications; and, a Supplemental Consolidated Issues List of 35 issues for the City Instruments. A fourth contextual matter relates to indicating how the Board has dealt with these 78 formal issues identified in the hearing's Procedural Order.

All of these issues are unquestionably important; however, given that both the City Instruments and the Site-Specific Applications were engaged almost exclusively at a macro policy level by the parties, the Board has determined that those issues relating to land use planning policy assume a primacy relative to the others on each Issue List. For this reason, the Board has focused on these prime issues as a basis for framing its analyses. More will be said about this framing in the respective sections of this decision dealing with the City Instruments and the Site-Specific Applications.

The initiative to repurpose the Subject Property from a film studio to a significant retail development brought to the surface two issues that warrant early treatment as final contextual matters. They are: the nature of retail employment, especially its qualitative aspects; and, how important a role the film sector plays in the South of Eastern Employment District.

The Board has carefully examined the evidence before it with respect to these two issues.

Concerning the former, the nature of retail employment and its qualitative aspects, the Board was alert to a not-so-subtle motivation in both the City's and the ETCC's respective case that retail jobs represent inferior employment given wage rates, lack of job security, and lack of benefits typically characterizing such employment. Indeed, notwithstanding the City's inability to stop demolition of the existing buildings on the Subject Property, each case was largely premised on maintaining the existing buildings to facilitate their use for smaller budget film production or more agreeable types of employment. Those witnesses testifying to this expectation either ignored or were oblivious to this constraint on the City.

Aside from statistical support or whether an individual pursues retail employment by choice or by default, the Board finds the issue to be a red herring. Every planning, market, and economic expert called in the hearing testified that retail jobs are recognized both as economic development and as jobs counting toward the fulfillment of employment targets mandated by provincial policy. Each also acknowledged that "a retail job is a job." Ms Graham, one of the City's planning witnesses, acknowledged in

cross-examination that she was not aware of any example wherein planning staff had taken wage rates into account as a basis for evaluating a land use proposal. Mr. Smith, TFS/SC's planning witness, testified that provincial policy does not direct a municipality to remove retail use permissions from employment areas where such uses have been determined to be appropriate, that this hearing was not a contest between types of jobs and, finally, that it is not for the Board to get into this latter philosophical argument.

Any comment on the nature of retail employment and its qualitative aspects, if it is to be taken even half seriously, must acknowledge both the subjectiveness of the topic as well as its own value-laden underpinnings. For all of the above reasons, the Board will not contribute to the stigmatization or denigration of retail employment by making any ruling on its nature and qualitative aspects. The Board will, however, address retail employment in the context of provincial policy, and that is taken up in the section of this decision dealing with the Site-Specific Applications.

Turning to the latter, how important a role the film sector currently plays in the Employment District, the City, the ETCC, and TFS/SC each vigorously pursued this issue along two lines: gauging the significance of an early-1990's branding exercise to establish a "Studio District" in the South of Eastern area; and, ascertaining whether a film cluster exists in the Employment District. The parties deemed the issue of significant import because the film sector's presence in the South of Eastern area was appropriated by the City as a principal motivation for pursuing the City Instruments.

Much of the pursuit of this issue dealt with both the number of firms and the number of jobs associated with film-related uses in the Employment District. On these matters, the Board has carefully considered the evidence of Mr. Clayton, Mr. Smith, Mr. Prupas, and Mr. Richards, as well as the evidence of Mr. Benham, and the evidence of Ms Lehrer and Mr. Tufts. The Board has also considered the respective submissions of Mr. O'Callaghan, Mr. Gillespie, and Mr. Wood.

From the evidence before the Board on this issue, there is no question that the film sector maintains a physical presence in the Employment District with three remaining film studios and a good number of film-related businesses located within its

borders. Whether any social networking takes place among the employees of or independent contractors to these businesses is debatable. Equally debatable is any actual function of a “Studio District” in the South of Eastern area. It is clear, however, from the 2007 Strategic Plan for the Screen-based Entertainment Production Industry that employment within the screen-based industry as a whole represents a cluster for the City as a whole. Interesting though these facts may be, the Board finds the issue to be inconsequential, and for this reason it is unnecessary to direct any further attention to the evidence proffered. The rosy perception of the sector’s role in the Employment District certainly fuelled both the City’s and the ETCC’s respective motivations; however, absolutely nothing turns on the presence of the film sector in the Employment District from a land use planning point-of-view.

The City Instruments

The City Instruments were adopted by Council on January 29, 2008. Official Plan Amendment No. 23 is an amendment to the current 2002 Official Plan to establish a Secondary Plan for the South of Eastern Employment District. Official Plan Amendment No. 379 is a site-specific amendment to the former 1994 Official Plan for the Subject Property given that it (the former Plan) remains active as a part of the policy regime regulating the Site-Specific Applications. Both Amendments are intended to work in tandem to articulate and make manifest the City’s hoped-for vision for the Employment District. By-law No. 130-2008, if approved, would amend Zoning By-law No. 438-86, as amended, to give effect to Official Plan Amendments No. 23 and 379.

The City maintains that its Instruments have their genesis in the results of a required study triggered by the Site-Specific Applications pursuant to Policy 9.18 of the former 1994 Official Plan. In that regard, the City insists that its Instruments are direct products of the Policy 9.18 Study. TFS/SC and the Numbered Companies maintain otherwise: that the City Instruments bear no relationship to the findings of the Policy 9.18 Study. To make sense of these divergent views, it is necessary to very briefly step into that history of the Site-Specific Applications concerning the Policy 9.18 Study.

Policy 9.18 of the former 1994 (Part I) Official Plan is directed at discouraging the loss of industry in the City. It stipulates that Council will not consider redesignating industrially-designated lands to permit a non-industrial use without first undertaking an area study, although no policy language is provided to either specify or guide the delineation of a study area. The study is to be undertaken for the purpose of recommending policies for adoption in Part II of the Official Plan – Part II being a section of the Plan containing more detailed policies for particular areas of the City. Moreover, Policy 9.18 requires that the study have regard for:

- (a) the number and types of industrial firms and employees in the area that would be adversely affected;
- (b) the impact on any surrounding industrial lands that would not be redesignated; and
- (c) the environmental condition of the lands and the need for soil decommissioning.

These sub-clauses functionally stand as tests for any application to redesignate. The Board will return to Policy 9.18 in the following section of this decision dealing with its analysis of the Site-Specific Applications.

The Site-Specific Applications filed in June 2004 triggered the application of Policy 9.18 and its requirement for a study. Planning staff assumed responsibility for conducting the Policy 9.18 Study and commenced that work in December 2004, looking only at that area bounded by the Don River on the west, Eastern Avenue on the north, Leslie Street on the east, and Lake Shore Boulevard on the south. Later, in June 2005, citing that the initial study area did not function as a discrete employment area, the Study boundary was expanded south to Lake Ontario and east to Coxwell Avenue. This new Study area encompassed the full South of Eastern Employment District as well as a significant area situated between it and the Lake. The Study culminated in a June 24, 2006 “Findings Report.” A December 13, 2007 “Final Report” was also prepared. The Board will address these reports under its analysis of the City Instruments.

It will suffice to say at this point that the Final Report and the proposed bills accompanying its presentation to Council "...implement Council's direction to remove any policies that would permit consideration of large scale, stand alone-retail stores" in the South of Eastern Employment District. Council adopted the proposed bills on January 29, 2008, which upon their adoption became the City Instruments.

Those lands in the Employment District that were designated for industrial uses under the former 1994 Official Plan are now designated as Employment Areas in the current 2002 Official Plan. Policy 4.6.3 of the 2002 Official Plan permits large scale retail uses, although that permission is contingent upon locational requirements as well as impact tests set out in sub-clauses (a) and (b).

Policy 4.6.3 states:

Large scale, stand-alone retail stores and "power centres" are not permitted in Employment Areas in the Central Waterfront and are only permitted in other Employment Areas fronting onto major streets as shown on Map 3, that also form the boundary of the Employment Areas through the enactment of a zoning by-law. Where permitted, new large scale, stand-alone retail stores and "power centres" will ensure that:

- a. Sufficient transportation capacity is available to accommodate the extra traffic generated by the development, resulting in an acceptable level of traffic on the adjacent and nearby streets; and
- b. The functioning of other economic activities within the Employment Areas and the economic health of nearby shopping districts are not adversely affected.

Ms Graham is a senior planner with the City of Toronto and was responsible for the Study undertaken pursuant to Policy 9.18 as well as the preparation of Official Plan Amendment No. 23, Official Plan Amendment No. 379, and Zoning By-law No. 130-2008. She was also the author of the Findings Report and the Final Report. Ms Graham testified that the City Instruments expand the range of "targeted permitted uses" for the Employment District and limit – that is, remove – other uses which the City believes are adverse to its espoused vision for the District. She also testified that the City Instruments provide a policy framework that: encourages a creative atmosphere conducive to employment growth, attracts new investment, reinforces existing economic

sectors, encourages new economic sectors, creates a good quality working environment, and introduces green policies in the Employment District.

Ms Graham testified that “the South of Eastern Employment District functions well, did not require a complete overhaul, and only required some fine-tuning.” She drew attention to Findings Report as the basis for this opinion.

Mr. Benham testified that the City Instruments build upon the success of previous Official Plan policies and lay a foundation for the continuing evolution and adaptation of the Employment District to new economic opportunities – opportunities that he believes can achieve upwards of 2,600 new jobs by the year 2031. Taking the Board through several older Part II Official Plan studies and policies, Mr. Benham also testified to a history of City planning actions in the South of Eastern area directed at “stripping out [i.e., removing] retail as a permitted land use.” Several of these initiatives had their genesis in an ongoing response to what was at the time the as-of-right Loblaw development at the north-east corner of Leslie Street and Lake Shore Boulevard. Mr. Benham held out the City’s actions as a clear confirmation of its continuous intention for the Employment District.

Mr. Benham also testified that the primary economic function of the Employment District in the future will be to function “as a modern business campus ideally suited for companies that use imagination, innovation and intelligence as key attributes of the goods and services they produce. This vision focuses on supporting the creation of high value jobs....” He further opined that the policies of Official Plan Amendment No. 23 in particular “will guide implementation particularly with respect to allowing new office based employment while at the same time limiting competing lands uses.”

Finally, Mr. Benham testified about the financial incentives that the City has implemented through Community Improvement By-law No. 516-2008 to support its plans for the Employment District, incentives that promote office development, film studios, and facilities for knowledge-base sectors in the Employment District.

Mr. Di Mascio and Mr. Mathew each testified in support of the City Instruments. Each opined that the Instruments represent good planning, are appropriate, and should be approved. Each also testified that the Instruments are consistent with the *Planning Act*, the Provincial Policy Statement, and the Growth Plan.

Mr. Di Mascio further testified that the City Instruments serve the public interest by protecting employment lands from what he called “retail infiltration.” The Board will comprehensively deal with the notion of retail infiltration when it takes up Mr. Climans’ evidence in its consideration of the Site-Specific Applications.

Mr. Mathew also testified that the City Instruments protect the employment land base of the Employment District and are therefore consistent with the City’s Long-term Employment Lands Strategy. Picking up on Mr. Di Mascio’s introduction of retail infiltration, Mr. Mathew testified that such infiltration will enhance (i.e., raise) land values and, in turn, cause land speculation and a destabilization of the Employment District. In his opinion, the City Instruments provide land use certainty through a clear articulation of land use permissions. Such certainty removes the threat of speculation and promotes reinvestment. The removal of the Policy 4.6.3 retail use permissions would provide that certainty. Under cross-examination, however, Mr. Mathew acknowledged that the elimination of a land use permission already established in an official plan is not a case of providing land use certainty.

Mr. Smith testified in opposition to the City Instruments. He opined that they are not appropriate, workable, practical, or achievable, nor representative of good planning. Mr. Smith testified that the City Instruments, rather than expanding employment uses, in fact narrow land uses by removing the Policy 4.6.3 permissions for large scale retail uses, restaurants, hotels, and entertainment facilities – a fact Ms Graham acknowledged under cross-examination. He also testified that the City Instruments fail to reconcile an internal inconsistency between the vision of a modern business campus and attracting “high value” employment and the notion of maintaining and supporting existing uses and keeping land values more or less as they are.

Mr. Smith also testified that the City Instruments are distinguishable from the results of the Policy 9.18 Study. On this point, his evidence meticulously addressed several cases where an amendment to the Official Plan, in the form of a Part II Plan, was not the result of a 9.18 process. Responding to the City's assertion that "a logical conclusion of a Part II study [that is, a Policy 9.18 Study] is a Part II Plan," Mr. Smith convincingly demonstrated that the City had abandoned such follow-through, and his evidence on this point was not contradicted. Finally, Mr. Smith testified that the City Instruments were introduced to frustrate the Site-Specific Applications. The Board will return to this point in its analysis.

Mr. Clayton testified that the City Instruments are inherently flawed and economically unsound. He opined that office development in the Employment District would have the same effect of bidding-up land values as was alleged of the Site-Specific Applications.

Mr. Morassutti testified that the City Instruments fail to take into account goals that the City is advancing in other proximate planning areas, namely the East Bayfront and the West Donlands. In so doing, Mr. Morassutti testified that the City Instruments actually encourage competition between these areas, a situation that will prejudice the South of Eastern Employment District because the other areas are vastly superior in terms of their locational attributes and amenities. Mr. Smith echoed this opinion in his own testimony. With respect to office development, a use already permitted in the Employment District and which the City is encouraging, Mr. Morassutti testified that the South of Eastern Employment District is ill-suited for office development. On this subject, the Board was taken to an April 22, 2008 planning staff report addressing financial incentives, which noted,

Office buildings will face a variety of challenges in South of Eastern:

- The lack of amenities and the limited accessibility to the subway and GO [Transit];
- The area not currently being recognized as an office building location;

- Relatively high occupancy costs, because the buildings will be new and expensive to build (expensive parking; quality design and finish).

Mr. Morassutti testified that short-term financial incentives will likely prove ineffectual.

Mr. Stagl also testified that the City Instruments do not represent sound planning. (It is noted, however, that Mr. Stagl expressed no opinion on Official Plan Amendment No. 379 as it applies only to the Subject Property.) Like Mr. Smith, he testified that even though Official Plan Amendment No. 23 is put forth as expanding the range of employment uses in the Employment District, it does no such thing and, in fact, restricts the range of employment uses – all, in Mr. Stagl’s opinion, without any supporting planning rationale. Moreover, he testified that the Amendment neither establishes nor guides comprehensive or coordinated planning considerations. In Mr. Stagl’s opinion, Official Plan Amendment No. 23 and Zoning By-law No. 130-2008 are not in the public interest.

Analysis

The Board has carefully reviewed the Supplemental Issues List and three questions emerge as principal issues:

- Is the adoption of the City Instruments *bona fides*, in particular as they relate to the Site-Specific Applications/appeals?
- Is the intent of the City Instruments appropriate, practical, workable and achievable?
- Are the City Instruments in accordance with good land use planning principles?

While the other formally identified issues are important, they are ultimately subsidiary, and it is for that reason that the Board has directed its analysis to these three issues.

The Board finds that the City Instruments represent a panicked reaction to an unwanted development scheme and are neither a measured nor rational response. As will be explained below, they are not the product of a *bona fide* planning initiative, they are not appropriate, practical, workable, or achievable, and they do not represent good

land use planning. The matter of *bona fides* is addressed through a consideration of three things: the historical treatment of retail in the South of Eastern area, the sequence of events between the Findings Report and the Final Report, and what the Board finds to be a misdirected planning analysis following the Findings Report. Matters of appropriateness and practicality are then addressed, followed by the matter of good planning.

The Historical Treatment of Retail in the South of Eastern Area

Mr. Benham testified that the City Instruments are consistent with a long history of policy measures in the South of Eastern area that “strip out retail permissions.” He methodically charted that history, taking the Board to an earlier South of Eastern Part II Plan and the Knox-Eastern Part II Plan, then to the 1994 former City of Toronto Official Plan, and concluding with the current 2002 Official Plan. The stripping out of retail permissions was directed at protecting industrial lands. In cross-examination, Mr. Benham was asked whether he agreed with the proposition that the policy context framing former industrial uses was different from the policy context framing current employment uses. He responded that he did not regard them as different; he considered the latter to be a “natural progression” of the former.

From Mr. Benham’s testimony, it is clear that the policy context framing former industrial uses did not permit retail uses; and, from the Board’s approval of the 2002 Official Plan, that the policy context framing current employment uses permits retail uses pursuant to Policy 4.6.3 and its contingent locational requirements and impact tests. On a plain reading, Policy 4.6.3, when properly applied, has the same effect as those historical measures prohibiting retail land uses; that is, retail uses that do not satisfy its locational requirements and impact tests are prohibited. Mr. Benham testified that the exercise of preparing the 2002 Official Plan constituted a municipal comprehensive review to which his office had direct input. Policy 4.6.3 is a direct product of that thorough work. It does not really matter that the former policy framework removed retail use permissions and its succeeding policy framework put them contingently back in; the net effect of protecting industrial lands/employment areas remains unchanged. It is understandable, therefore, why Mr. Benham sees a natural

progression between the former and current policy contexts. The Board is left wondering, then, why the City would take the extreme measure of removing Policy 4.6.3 from the South of Eastern Employment District policy framework when Mr. Benham's evidence, perhaps by inadvertence, demonstrates it did not need to.

To begin answering this question, it is instructive to look at a portion of Mr. Smith's cross-examination in connection with the City Instruments.

Motivated by an assertion that Mr. Smith was declaring the City Instruments a failure without being given an opportunity to demonstrate their effectiveness, Mr. Smith was asked how much time an official plan policy should be given before it is declared a failure. Mr. Smith answered 5 to 7 years. Mr. O'Callaghan later submitted that the City was of the view that 5 to 7 years was not long enough, that a policy should be given more time to demonstrate its efficacy, although no amount of time was ever put before the Board.

As the City held the above view, it also held the view, explicit from the content of Official Plan Amendment No. 23, that Policy 4.6.3 is not appropriate in the South of Eastern Employment District, that it has somehow revealed itself to be a failure in less than two years since its approval. Not a whit of evidence was ever put before the Board to show that Policy 4.6.3 has not worked or will not work when properly applied. What is striking from this is the City's readiness to concurrently hold opposing views. Apparently, the City had absolutely no qualms about taking Mr. Smith to task about his disinclination to give the City Instruments even 5 to 7 years to demonstrate their efficacy while, at the same time, throwing under the bus one of its own policies that is the product of a municipal comprehensive review-like process, that withstood the scrutiny of an earlier Board Panel's analysis, that is less than two years old, and for which there was no evidence put before this Panel of its inefficacy. Aside from the glaring inconsistency, the Board finds this disingenuous.

Considering the above points together, the Board is again left wondering why the City would discard a comprehensively developed, scrutinized, and newly-minted policy that sustains a historical intent to protect industrial (now, employment) lands by

prohibiting large scale retail uses in the South of Eastern area where those uses are shown to be inappropriate. On this, the events leading up to the adoption of the City Instruments shed considerable light.

The sequence of events between the Findings Report and the Final Report

It is instructive to examine the circumstances of Official Plan Amendment No. 5 as a starting point for this sequence of events because it makes transparent what the Board finds to be the real motivations underpinning the City Instruments.

Official Plan Amendment No. 5 was adopted by Council on September 27, 2006 and subsequently appealed to this Board. It had the effect of removing power centres as a permitted use under Policy 4.6.3 in the South of Eastern Employment District. As noted at the outset of this decision, Official Plan Amendment No. 5 has been repealed through the adoption of By-law No. 128-2008. It remains germane, however, for what it reveals with respect to the circumstances of its conception and adoption; namely, that it arose as a political whim and advanced without one iota of substantiating planning analysis.

Upon consideration of the Findings Report, the local Councillor, in whose ward the South of Eastern Employment District is situated, successfully introduced and had adopted a motion by the Toronto and East York Community Council requesting planning staff to report on “mechanisms to amend the Official Plan to remove and/or restrict ‘power centres’ from the South of Eastern Employment District.” (No definition of power centres is provided in the Official Plan; however, it was understood in the hearing to be an assemblage of retail uses.) It is noteworthy that the Findings Report, following 22 months of study, did not conclude that power centres should be removed from the Employment District. At best, planning staff noted a general concern with large scale retail uses in the Employment District and recommended a list of 13 principles – most of which, Ms Graham acknowledged under cross-examination, concern urban design matters – to guide any further consideration that might be given to such uses.

Returning to the Councillor's motion, a report was prepared and presented to Council on July 25, 2006. The Board has read this 3-page report several times over and finds that while it matter-of-factly fulfils the direction to report on mechanisms, it does not include any substantive analysis supporting a removal of power centres.

On August 23, 2006, a newspaper notice was published announcing Council's intent to remove power centres as a permitted use in the South of Eastern Employment District. A second planning staff report and draft bill were presented to the Community Council on September 13, 2006. Again, the Board has several times read this 5-page report and each time struggled unsuccessfully to find any substantive analysis supporting the removal of power centres as a permitted use in the Employment District.

Upon receipt of the September 13th planning staff report, the local Councillor once again successfully introduced and had adopted a motion by the Community Council that, in addition to countenancing a staff recommendation to remove power centres, included a recommendation that Council, "support further policy restrictions on the consideration of stand alone, large scale retail stores and 'power centres' to ensure that the district does not become a barrier to the waterfront and to ensure that any new policies address the principles raised above...." (The "principles raised above" include an acknowledgement of the unique urban character of the South of Eastern Employment District, a perception convincingly disputed by several of TFS/SC's witnesses, and the need to create a supportive environment for the enhancement of employment issues. They come from an earlier sub-clause in the Community Council's recommendation to Council.) Council adopted the Community Council's full clause without amendment on September 25, 2006.

The support for further policy restrictions on large scale retailing was reinforced in a subsequent Council resolution adopted July 16, 2007. This resolution arose out of a June 11, 2007 planning staff report seeking direction from Council with respect to the appeal of Site-Specific Applications. What is telling from a comparison of these two documents is the stark difference between staff's recommended course of action and a course of action introduced, again, by the Local Councillor through a motion subsequently adopted by the Community Council. Where staff was wisely encouraging

negotiation with TFS/SC to explore the possibility of a settlement, the Local Councillor was instead interested in attaching some 20 conditions to any discussions that would, in effect, make negotiation, let alone settlement, impossible. The Community Council eschewed the staff recommendation and unanimously adopted the Councillor's motion on June 27, 2007.

Interestingly, one of the conditions imposed upon any discussion between staff and TFS/SC – “Ensuring only a limited amount of retail uses be permitted on the ... [Subject Property] ... in recognition that both the Province in the Growth Plan ... and the City consider major retail uses as non-employment uses” – was factually incorrect. Mr. Smith testified that this condition misapprehends the Growth Plan's consideration of major retail uses, that the large scale retail uses contingently permitted by Policy 4.6.3 in the current 2002 Official Plan are recognized as employment uses. His evidence stands uncontradicted. Moreover, the Councillor's condition stands in stark contrast to a November 23, 2007 letter to the Ontario Growth Secretariat from the City's Director of Policy and Research (Exhibit 104). In that letter, planning staff acknowledge that Policy 4.6.3, being the product of an Official Plan review that stands as a comprehensive municipal study, is responsive to the Growth Plan. These points, taken together, demonstrate the sometimes unfortunate consequence of ignoring planning advice from qualified professionals.

Where the Findings Report kept a door ajar for the Site-Specific Applications, the Final Report slammed it shut. That difference is directly attributable to the single-minded actions of the Local Councillor – which in turn explain the content of the City Instruments and how they came to be adopted.

Given the difference between the Findings Report and the Final Report, and the actions of the local Councillor, Mr. Wood submitted that the Policy 9.18 Study up to and including the Findings Report and the ensuing planning work undertaken by planning staff leading to the Final Report and the City Instruments represent two distinct processes; that the City Instruments are new initiatives advanced solely at the initial behest of the local Councillor and then of Council, and are not the product of the Policy 9.18 Study as the City purports them to be. Referring to them as “an ex-poste facto

rationalization,” he submitted that the City Instruments represent nothing more than an effort to introduce “a patina of respectability on the arbitrary decision of Council.”

Given the events documented above, the Board agrees, although it equally finds that nothing really turns on this, at least from a planning point-of-view. Regardless of whether the two processes are distinct, the City maintains the right to regulate land use policy. The question for this hearing, though, is whether the City’s actions to regulate land use policy as it did in this case are *bona fide*. Did the City pursue its Instruments as a response to a legitimate land use planning concern, or as a reaction to a feared development scheme? On this question, Mr. Wood’s submissions strike directly at the motivations underpinning the City Instruments. In light of the analysis set out above, the Board finds the City Instruments to have their genesis squarely in political machinations borne of fear and a lack of confidence in both planning staff’s analysis and Policies 9.18 and 4.6.3, and not in any notion of sound planning for the South of Eastern Employment District.

Ms Graham testified that Official Plan Amendment No. 5 was and Official Plan Amendment No. 23 is appropriate and representative of good planning. What strikes the Board as curious is this: if initially removing power centres from the Policy 4.6.3 retail use permissions was appropriate, and further policy restrictions on large scale retail uses in the Employment District are now appropriate, why were these initiatives not identified as apposite planning results in the Findings Report? The Findings Report is silent on the notion of removing any kind of retail permission. As shown above, the removal of large scale retail use permissions arose exclusively from the Local Councillor’s actions and not as a conclusion of the, at that point in time, completed Policy 9.18 Study. In light of what it finds is a non-relationship between the results of the Policy 9.18 Study and both the removal of power centres and support for further policy restrictions on large scale retail stores, the Board cannot countenance the City’s planning evidence.

A Misdirected Planning Analysis following the Findings Report

The Findings Report represents the result of planning staff's work on the Policy 9.18 Study. It includes a detailed consideration of both the then existing and emerging policy frameworks for the Employment District. It also addresses employment in the District, noting that employment levels remained remarkably stable over the 20 year period preceding the Study. Commenting that the loss of jobs in the manufacturing sector have been steadily replaced with jobs in other sectors, notably office related activities, the Report states, "this reinvention of employment structure within this area illustrates its strong economic endurance as it relates to employment opportunities."

With regard to the Site-Specific Applications, the very matters that brought about the Report in the first place, there is a noticeable dearth of any explicit analysis of the Policy 9.18 tests. In fact, there is an absence of any specific substantive consideration of the Site-Specific Applications. The Findings Report generically comments on large scale retail uses pursuant to Policy 4.6.3, not Policy 9.18, noting that "staff are concerned that the Employment District will be jeopardized if large format retail can be considered anywhere within the Employment District. If permitted, it should connect to the larger format retailing that is already focused at the intersection of Leslie Street and Lake Shore Boulevard." As noted earlier, the Report then sets out 13 principles that staff recommend should apply in the event large scale retail uses are to be considered.

According to the testimony of Ms Graham, it was determined through the Policy 9.18 Study that the South of Eastern Employment District was doing well; so well, in fact, that its policy framework only required "fine-tuning." From this determination, it would be reasonable to anticipate that the current 2002 Official Plan's policy intent would be maintained, being as it is the product of a municipal comprehensive review-like process and less than two years old. But given Council's September 25, 2006 direction, a remarkable thing then happened. An extract from the Final Report is instructive.

The Final Report states,

This report implements Council's direction to remove any policies that would permit consideration of large scale, stand alone-retail stores. ...

The consideration of large scale retail in this Employment District would undermine the viability of the economic focus of this District and of the film production sector in Toronto. Allowing retail development on a large scale in this District will rapidly bid up the market value of industrial and commercial properties. This will be an incentive to redevelop property that could lead to lease terminations and lack of opportunities to renew existing leases for businesses that would prefer to remain in this area for such reasons as cost competitiveness and business linkages or other location reasons.

This extract is striking for what it reveals.

Council's direction to remove policies permitting consideration of large scale retail uses specifically targets Policy 4.6.3 of the current Official Plan and results in its removal from the South of Eastern Employment District policy framework. The analysis undertaken to support this direction, set out in the last two sentences of the second paragraph of the above extract, appropriates the analysis of Mr. Climans, who was retained by the City on October 16, 2007. (The Board will specifically address Mr. Climans' testimony in the section of this decision dealing with the Site-Specific Applications.) A plain reading of these two sentences in conjunction with a plain reading of Policy 4.6.3 unambiguously demonstrates that large scale retail uses would not be permitted in the South of Eastern Employment District given that they would not satisfy the test set out in the first part of sub-clause (b): the functioning of other economic activities within the District would be adversely affected. If anything, this analysis patently demonstrates Policy 4.6.3's efficacy and actually supports its retention in the South of Eastern Employment District – a conclusion the very opposite of what Council had directed. The Board has very carefully examined the Final Report and finds no analysis supporting the removal of Policy 4.6.3 from the Employment District's planning framework. Moreover, nor was any evidence put before the Board upon which it could properly find that such a result is appropriate according to the dictates of good planning. It is for these reasons that the Board concludes the planning analysis undertaken to support the City Instruments was misguided.

It is undeniable that the intent to protect industrial/employment lands from threatening land uses is maintained between Policy 9.18 and Policy 4.6.3. Mr. Benham's testimony demonstrated as much. Moreover, why else would TFS/SC have had its professional witnesses assess its proposed development scheme under both Policies?

The City's case opposing the Site-Specific Applications is premised on the intent of and protections provided by Policy 9.18 and, by extension although not determinative, Policy 4.6.3. As will be shown later in this decision, Mr. Climans' evidence on the Site-Specific Applications was found to demonstrate that the introduction of large scale retail uses will destabilize the Employment District. His evidence corroborates Policy 9.18 and Policy 4.6.3. In this regard, Mr. Climans' evidence is itself evidence of Policy 4.6.3's efficacy. The Board is yet again left wondering why the City would pursue a removal of Policy 4.6.3 from the South of Eastern Employment District when, on the face of Mr. Climans' evidence, it did not need to.

The removal of Policy 4.6.3 from the planning framework in the South of Eastern Employment District is only half of the loaf that is the City Instruments. The other half is represented by the hoped-for vision of a modern business campus. It is clear from the analysis thus far that the City's zeal to remove Policy 4.6.3 preceded any identification of a modern business campus and had nothing to do with sound planning for the Employment District. In fact, the notion of a modern business campus even eluded planning staff during the preparation of its Final Report. As will be explained below, the Board finds that the modern business park idea represents an after-the-fact rationalization of Council's earlier direction to remove the Policy 4.6.3 retail use permissions.

Turning then to the matters of appropriateness, practicality, workability and achievability, it is instructive to examine the City's hoped-for vision of a modern business campus for the Employment District, how it came in to being, and its associated implications.

The notion of a modern business campus was identified in a 2007 report (Business Campus Report) prepared by the City's Economic Development Division. When asked in cross-examination by Mr. Wood if it was an internal report, Mr. Benham, who was responsible for the Report's preparation, replied, "Yes, very much so." Ms Graham, too, was asked in cross-examination about the Business Campus Report. Specifically, Mr. Wood asked Ms Graham if she was in possession of it at the time she prepared the Final Report. She responded that she was aware of Mr. Benham's work, that she had some of his comments, but that she did not have the complete Business Campus Report.

Together, these events strongly indicate that the Business Campus Report was completed sometime after December 18, 2007, the date of the Final Report. No date for the completion or internal publication of the Business Campus Report was ever put before the Board, strange as that may be. These events also explain why the Final Report includes no reference to the Business Campus Report in either a section identifying background and other reports relevant to the City Instruments or the Site-Specific Applications, or in a section entitled 'Other Key Objectives.' These events do not, however, explain why the Preamble of Official Plan Amendment No. 23, under the heading 'Vision for the South of Eastern Employment District,' does not include a reference to or even hint at a modern business park. Mr. Smith testified that it was upon reading Mr. Benham's May 5, 2008 Witness Statement that he learned for the first time of the modern business campus notion. One would certainly have expected the idea of a modern business campus to figure prominently in the Final Report and the Preamble given that it underpins the City's hoped-for vision for the Employment District. It remains beyond the Board's grasp why something held out as so foundational was not addressed in either. From all the above, the lateness of the idea's coming to fruition speaks volumes.

Mr. Clayton testified that the vision of encouraging a modern business campus replete with significant office development would have the very effect of raising land values as was alleged would be the impact of approving the Site-Specific Applications. To this he added that the City appears to want low rents on one hand and growth and

intensification in the District on the other. Mr. Clayton's evidence on these points was not contradicted. In fact, it was suggested to Ms Graham in cross-examination that success with a modern business campus could make maintaining low-rent building stock difficult in the Employment District, to which she agreed that that could happen.

Mr. Smith echoed Mr. Clayton's testimony, and then went further to testify about what he called an "internal disconnect" in Official Plan Amendment No. 23. Mr. Smith pointed out that Official Plan Amendment No. 23 contains policies encouraging high-quality urban design and environmental practices, which have the effect of increasing the cost of development, as well as policies restricting permitted uses, which have the effect of driving down the cost of land. His evidence on this point was not contradicted.

Mr. Morassutti testified that the South of Eastern Employment District is ill-suited as a location for a modern business park promoting (and relying on) office uses for creative and knowledge-based businesses. He testified that there is a "staggering availability" of other sites in the City for office space geared toward such businesses, and he pointed in particular to the East Bayfront and Portland areas of the City's central waterfront. In his opinion, there is no compelling argument for potential users to leap-frog over these other locationally-superior areas to situate in the South of Eastern Employment District. He also opined that the City's reliance on financial incentives to attract office uses is further evidence of serious and significant challenges facing the Employment District, all of which points to its unsuitability as a business park. From all of this, he testified that the City's vision is not aligned with market realities, nor is it feasible or workable. Mr. Morassutti was not shaken in cross-examination.

Mr. Climans testified that office development represents a viable land use in the Employment District. In arriving at this opinion, he relied on statistics compiled and published by CB Richard Ellis (CBRE) summarizing the supply of office space in the Downtown East Office Node for the first quarter of 2008. It must be noted that the Downtown East Office Node is a label used only for CBRE's purposes and does not connote any kind of status insofar as formal planning documents or designations are concerned. Mr. Climans believes that the Downtown East Office Node represents a suitable surrogate for the South of Eastern Employment District given its proximity.

In cross-examination, Mr. Climans acknowledged that the CBRE statistics very likely did not include office buildings less than 10,000 square feet in size. He also acknowledged that he did not have any Downtown East Office Node statistics for office buildings less than 10,000 square feet in size, and that there were no buildings in the South of Eastern Employment District being used for office purposes that were larger than 10,000 square feet in size. Finally, he acknowledged that the bulk of office space in the Downtown East Office Node is adapted space, not newly constructed, purpose-built space – and it is upon this final point that he relied most heavily to draw inferences about the South of Eastern Employment District.

In considering Mr. Climans' testimony on this point, it is apparent to the Board that he has directed his assessment of the Employment District to the possibility of office space in adapted buildings and not specifically to the viability of office space in newly constructed, purpose-built buildings within the context of a modern business campus – the latter of which would, according to the April 22, 2008 planning staff report, be a principal ingredient of a modern business park were it to be viable. The Board finds that Mr. Climans' evidence, while valid, does not overcome the inherent flaws in the City Instruments identified by Messrs. Morassutti, Smith, and Clayton.

On the subject of economic viability more generally, Mr. O'Callaghan submitted that the City should not have to prove that a modern business park is economically viable in order to secure approval of the City Instruments. In saying this, he relied on Mr. Climans' testimony that "proving economic viability" is not a relevant consideration of land use planning. While proving economic viability may be putting it too strongly, the Board cannot agree that planning can or should be completely divorced from market realities and considerations. Indeed, Council's adoption of Community Improvement By-law No. 516-2008 is a de facto acknowledgment that economic viability is very much a relevant consideration when making land use decisions.

Taken together, the Board finds all of the foregoing evidence to be indicative of an approach that is ill-conceived from a planning point-of-view. Moreover, when taken in conjunction with the analysis preceding it, the espoused vision for the Employment District and all that it entails is revealed more as a rationalization of the City Instruments

than a rationale for them. Notwithstanding Mr. Di Mascio's and Mr. Mathew's evidence that the City Instruments are consistent with provincial policy, such consistency, though necessary, is not sufficient in and of itself to carry the day for the City Instruments.

Finally, the Board finds three submissions from Mr. Flowers to be particularly persuasive. First, as a response to Mr. O'Callaghan's submission that Policy 4.6.3 should never have been applied in the South of Eastern Employment District, Mr. Flowers submitted that the City could very easily have addressed this in the Board's process leading to the May 2006 approval of the City's 2002 Official Plan. That the City did not indicate any concern through a request of the Board to hold the approval of Policy 4.6.3 in abeyance, so as to allow further study of its application in the South of Eastern Employment District, is demonstrative of there not being any legitimate planning concern.

Further to the City's position that Policy 4.6.3 should never have been applied in the Employment District, the Board wonders what that means for Mr. Benham's testimony that Policy 4.6.3 represents an evolution of policy in the District. The Board finds this discrepancy to be further evidence of an ill-conceived planning exercise.

Second, submitting that if there were a legitimate planning concern in the Employment District, that if, as Ms Graham testified, Policy 4.6.3 is not appropriate for the District given its slender, horizontal configuration, Mr. Flowers argued that it would have been reasonable to see the same removal of the Policy 4.6.3 retail permissions from the Liberty Village Employment District – the other "shoulder" of the Downtown Core that maintains a slender, horizontal configuration like the South of Eastern Employment District. That that did not happen is further evidence of a complete absence of justification for the City Instruments. Moreover, it is demonstrative of there not being a legitimate reason or planning basis for treating the South of Eastern Employment District differently from any other employment district in the City.

Third, speaking colloquially, Mr. Flowers mused, "If it ain't broke, why fix it?" and then urged the Board to ask the same question during its deliberations. The Board has, and the results of it doing so have been set out above.

From the above analysis, the Board finds the City Instruments to be reflective of a knee-jerk reaction triggered by the Site-Specific Applications than of a reasoned planning initiative. They bear absolutely no relationship to the Policy 9.18 Study, and any reference to them as fine-tuning is both disingenuous and a mischaracterization of what in fact is a significant recalibration of the Employment District's policy framework. Accordingly, the Board prefers the evidence of Messrs. Smith, Clayton, and Morassutti, as well as the evidence of Mr. Stagl, and finds that Official Plan Amendment No. 23, Official Plan Amendment No. 379, and By-law No. 130-2008 do not represent sound land use planning. Consequently, they are not approved.

With respect to Section 2.1 of the *Planning Act*, the Board will say the following:

Legitimacy of purpose is the *sine qua non* of any proper planning exercise. It is also, by extension, a fundamental ingredient for any finding by this Board that a planning exercise is in fact proper. Having regard for a municipal decision must include examining how that decision was arrived at so as to ascertain whether that fundamental ingredient exists. Were it otherwise, municipal planning decisions would be impervious to review and critical examination, the transparency of those decision processes would be greatly diminished, and the Board's ability to ascertain legitimacy would be severely hindered. Given the Board's broad mandate, therefore, it is within the Board's jurisdiction to look behind a municipal council's decision, and that is what it has properly done in this case.

The Board received evidence in connection with a settlement negotiated between the City and Talisker. That agreement was set out in proposed amendments to the Official Plan Amendment No. 23 and Zoning By-law No. 130-2008. In light of the Board's decision, there is no need to address the evidence supporting that settlement.

The Site-Specific Applications

TFS/SC are desirous of redeveloping the Subject Property with a substantial mixed-use commercial scheme. The proposed scheme reflected in the consolidated site plan application and presented at the hearing consists of multi-level retail, service

commercial, office, and entertainment uses – all within a gross floor area of some 64,469 square metres (693,961 square feet). Retail uses would predominate. The scheme proposes a variety of retail unit sizes, including the possibility of two large scale retail units, the largest being up to 16,722 square metres (180,000 square feet). Two development blocks would be situated on either side of a centrally situated north-south spine, the north half of which would serve as a pedestrian promenade and the south half as a vehicular driveway. Parking for 1,737 vehicles is proposed, the majority of which is located in the interior of the Subject Property screened from adjacent residential properties by the proposed buildings which wrap-around a central parking structure.

In terms of its built form, the proposed development scheme is responsive to its context and represents the evolution of retail building design in an urban setting. It eschews the heretofore conventional suburban model of situating a 'big box' at the edge of a sea of parking that generally covers a large site. The proposed buildings are "pulled out" to the north and south boundaries of the Subject Property to create "strong edges" along both Eastern Avenue and Lake Shore Boulevard, and to respond to the City's goals of street-making. Building elevations are modulated with different brick colours and punctuated with off-set facades and varying roof-lines – all directed at emulating a series of individual buildings that reflect the animation and complexity of a regular city street. In advancing these ideals, the proposed scheme embraces its urban context and escapes the monolithic features and impact of its suburban predecessors. Finally, the proposed buildings have been designed to accommodate adaptive reuse should such need or desire ever arise.

Knowing that it would eventually be relocating its operations to Filmport, TFS filed applications on June 24, 2004 to redesignate and rezone the Subject Property to facilitate its redevelopment. It must be noted, first, that SmartCentres was not involved with TFS at the time the original applications were filed, and, second, that what was initially applied for and what was ultimately before the Board on appeal differ considerably. This decision focuses only on what was before the Board on appeal.

There is nothing to be gained from addressing either the content of the initial applications or SmartCentres' joining TFS.

The City and the ETCC opposed the Site-Specific Applications on the basis that the sought after redesignation and rezoning would, first, preclude the Subject Property from ever being used or redeveloped for what they believe are superior types of employment uses, and, second, deleteriously impact the Employment District. 2006199 Ontario Inc., the owner of 721 Eastern Avenue, which abuts the Subject Property on the east, took no position with respect to the Site-Specific Applications. Instead, it sought to ensure that any approval of the Applications would not deleteriously impact its ability to use its north-west access driveway to Eastern Avenue.

The former City of Toronto Official Plan designates the Subject Property as 'Restricted Industrial Area'. This designation permits a limited range of industrial uses as well as commercial uses that are incidental to industrial uses. The proposed mixed-use commercial development is not permitted under the Restricted Industrial Area designation. The application to redesignate to a non-industrial use triggered the requirement for a Policy 9.18 Study as was explained earlier in this decision under that section dealing with the City Instruments.

The intent of Policy 9.18 is clearly discernable, both from its title and its tests. While its content evolved over the years, it is clear that the City relied on Policy 9.18 to ensure that applications to redesignate industrial lands for non-industrial uses were appropriate and that the wider implications of such applications were properly taken into account.

Policy 9.18 figures prominently in the Board's determination of the Site-Specific Applications. It provides an articulate policy lens for considering the Site-Specific Applications. Issue No. 28 on the Consolidated Issues List specifically asks if the Site-Specific Applications should be approved in the context of Policy 9.18. Conformity with Policy 9.18, therefore, serves as a threshold issue for the Site-Specific Applications and the Board has accordingly directed its analysis to the tests set out in its sub-clauses. The test of sub-clause (c), however, was not an issue in the hearing.

It was generally understood and accepted among counsel that the contest regarding the Site-Specific Applications was one to be engaged at a policy level. It is for this reason that very little expert evidence was advanced by TFS/SC and the City with respect to more traditional site plan and land use impact considerations. To be fair, however, this was a view neither shared by the majority of local citizens who participated in the hearing nor reflected in their comments to the Board.

There were also two other exceptions to this general understanding.

The first concerned Paul Young's evidence on behalf of the ETCC. Mr. Young opined that the approval of the Site-Specific Applications would create a hazard by raising the potential for car-bike conflicts at access points to the Subject Property from Lake Shore Boulevard; especially, at those unsignalized access points that traverse the paved pedestrian/bicycle path adjacent to the Subject Property's south lot line.

The second is found in the case advanced by the Numbered Companies. It was Mr. Stagl's and Mr. Poulos' respective evidence that the Site-Specific Applications would, if approved without appropriate policies to address shared access, create a deleterious impact on the north-westerly driveway of their client's site (721 Eastern Avenue – 2006199 Ontario Inc.) abutting the Subject Property on the east.

Before setting out the Board's analysis and findings, the evidence relevant to those tasks is addressed by subject area.

Planning

Mr. Smith gave evidence in connection with both the substantive merits of the proposed development scheme as well as the process by which the City engaged and processed the Site-Specific Applications. Mr. Smith's overarching professional opinion is that the Applications are appropriate, represent good planning, and warrant approval. Drawing from his witness statements and his oral testimony, he expressed the following expert opinions:

- i. the proposed mix of uses is consistent with the evolving mixed-use nature of the area;
- ii. the proposed uses will assist in achieving mandated employment forecasts given that retail is considered employment in provincial policy;
- iii. the Applications satisfy the tests set out in Policy 9.18 and 9.15 of the former City of Toronto Official Plan. (Policy 9.15 deals with the introduction of new retail development);
- iv. the redevelopment of the Subject Property will help to revitalize an underutilized brownfield area and generate substantial employment, consistent with numerous policy directions set out in the 1997 Provincial Policy Statement, the former Metropolitan Toronto Official Plan, and the former Toronto 1994 Official Plan;
- v. the proposed buildings and site design break new ground with respect to the design of commercial development; the building design is consistent with the City's requirements as stipulated in its Big Box Retail Design Guidelines; and,
- vi. the development scheme would have numerous public benefits, including urbanizing and beautifying the Subject Property's Eastern Avenue frontage, thereby acting as a catalyst for additional redevelopment and reinvestment in the area; creating active uses fronting on the Lake Shore Boulevard open space corridor; fostering site permeability with a north-south pedestrian connection through the Subject Property, thereby linking Eastern Avenue and Lake Shore Boulevard with a quasi-public space; providing a wider range of shopping opportunities for area residents; and, creating a destination commercial centre with the potential to attract visitors and tourists.

Regarding the means by which the City processed the Site-Specific Applications, Mr. Smith testified that the proposed development scheme was entirely consistent with the emerging policy context for the area at the time the Applications were filed and up to the point of SmartCentres' involvement. With that, he opined that the City did not fairly

or appropriately process the Site-Specific Applications, and instead pursued the adoption of the City Instruments in an attempt to defeat or delay the Site-Specific Applications.

Mr. Di Mascio testified that the Site-Specific Applications are inappropriate, represent poor planning, and warrant refusal. Drawing from his witness statements and his oral testimony, he expressed the following professional opinions:

- i. the Applications do not conform with the *Planning Act* or the 1997 Provincial Policy Statement;
- ii. the Applications do not meet the tests established under Policy 9.18 of the former Toronto 1994 Official Plan; and,
- iii. the Applications would, if approved:
 - a. have the practical effect of removing a large, strategically located, and therefore valuable employment site from the City's employment land inventory. (Under cross-examination, Mr. Di Mascio acknowledged that the proposed development does not constitute a conversion of employment lands as that term is both intended and understood in provincial policy);
 - b. create a "retail island" by bisecting a strategically located Employment District (i.e., strategically located vis-à-vis its proximity to the Downtown Core); and,
 - c. undermine the planned function of the Employment District and result in its destabilization.

Ms Graham was responsible for the daily carriage and processing of the Site-Specific Applications. As noted previously, she was also responsible for the required Study under Policy 9.18. Those responsibilities encompassed the preparation of numerous reports to Council regarding the Site-Specific Applications and the 9.18

Study. Also noted previously, she was responsible for the process relating to and the preparation of the City Instruments. Like Mr. Di Mascio, Ms Graham testified that the Site-Specific Applications are inappropriate, represent poor planning, are not in the public interest, and warrant refusal.

Ms Lehrer testified in opposition to the Site-Specific Amendments. It was her professional planning opinion that the Applications do not conform to the *Planning Act*, the 1997 Provincial Policy Statement, the former Metropolitan Toronto Official Plan, or the former Toronto 1994 Official Plan. She believes that the proposed development scheme will result in an incompatible land use because it threatens the future viability of what she calls a “locally concentrated cluster of cultural content producing media and TV industries.” Others in the hearing more simply referred to these industries as either a film cluster or a concentration of film-related businesses.

Mr. Stagl testified on behalf of the Numbered Companies. His evidence with respect to the Site-Specific Applications was directed exclusively to discrete issues concerning the relationship between the proposed development scheme and 721 Eastern Avenue. His analysis therefore did not engage Policy 9.18 as it was beyond his clients’ interests.

Land and Market Economics

Mr. Clayton provided economic analysis and advice in support of the Site-Specific Applications, and his firm prepared an economic analysis report under his direction, dated August 29, 2007. That report set out his analyses and opinions. Mr. Clayton generally opined that the Site-Specific Applications would be a positive addition to the South of Eastern area. More specifically, he testified that:

- i. retail uses are a sustaining element of a strong economic base, and that the proposed development scheme would generate numerous economic benefits, including municipal revenues as well as 1931 jobs (1609 direct, 322 indirect), plus over 1800 person-years of work relating to the construction of the proposed buildings;

- ii. the proposed development scheme would generate: (a) annual property tax revenues of \$3.4 million for the City and approximately \$3 million for the Province; (b) development charge revenues of approximately \$3.2 million; and, (c) building permit revenues of approximately \$910,000. (Mr. Mathew testified that the City would achieve such general benefits through any redevelopment of the Subject Property);
- iii. the South of Eastern area/Employment District is underutilized and characterized by unrealized economic potential;
- iv. the South of Eastern Employment District contains an assortment of land uses including offices, retail and service commercial, traditional industrial, and pockets of residential;
- v. the film industry accounts for only modest employment in the District. (In 2005, the film industry accounted for approximately 15 percent of employment in the South of Eastern Employment District. However, with access to detailed employment statistics maintained by the City through its annual employment survey, Mr. Clayton very lucidly demonstrated the effect of including “film-shoot employees” in employment statistics. Film-shoot employees are those individuals contractually employed by a movie studio during film production. When studios are not in production, these workers are not working in the District. With detailed 2005 statistics, Mr. Clayton demonstrated that the film industry accounted for 18.4 percent of employment in the District with film-shoot employees included, and only 5.4 percent with them excluded); and,
- vi. the Applications meet the tests of Policy 9.18.

Mr. Climans was retained by the City to provide advice regarding market and economic issues relating to both the 9.18 Study and, in particular, the potential implications of introducing a large scale retail development in the South of Eastern Employment District. He testified that the Site-Specific Applications represent a specific

threat to the viability of the Employment District, such that their approval will undermine its economic function. He explained that retail designated lands are worth more – that is, valued higher – than industrial/employment designated lands. Approving the proposed development would create a difference, or gap, between the value of the Subject Property and other industrial/employment designated lands in the Employment District. That value gap would then trigger a rapid bidding-up of land values on adjacent industrial/employment designated properties as those property owners become enticed to pursue retail use approvals.

As a further consequence, Mr. Climans testified that approving the Site-Specific Applications would remove a barrier of entry to other retail uses in the Employment District. By this, he meant that any approval of a large scale retail use would have the effect of “lowering the bar” for each subsequent application for retail permission.

Referring to this overall phenomenon as “retail contagion” and the incentive it represents to other owners – what Messrs. Di Mascio and Mathew called retail infiltration – he pointed to an earlier attempt by 2006199 Ontario Inc., the owner of 721 Eastern Avenue, to pursue a redesignation of its lands similar to that pursued in the Site-Specific Applications through Board powers under the *Planning Act*. (That attempt was subsequently abandoned for the purposes of the hearing, although more will be said on this point in the Board’s analysis following this section.) Mr. Climans testified that the consequences of retail contagion are manifested in lease terminations and the withdrawal of opportunities to renew leases, a displacement of price-sensitive businesses that rely on proximity to the Downtown Core and/or other similar companies, and a general disruption of the business fabric of the area. Drawing on this latter evidence, Mr. O’Callaghan subsequently submitted that the City would lose the ability to attract foot-loose firms as a consequence of not having available designated employment lands.

Mr. Climans also testified that the market and economic study undertaken by Mr. Clayton did not address the test set out in Policy 9.18(b), in that his study did not “...have regard for ... the impact on any surrounding industrial lands that would not be redesignated.”

Retail Impact

Mr. Parsons testified in connection with the retail dimensions of the Site-Specific Applications. His evidence was directed to two areas: his analysis of the tests set out in the former 1994 and current 2002 Official Plan that deal with the introduction of retail uses; and his analysis of those elements of Policy 9.18 concerning retail considerations. The latter also included an assessment of Mr. Climans' retail contagion evidence.

Mr. Parson's evidence in both areas is taken up in the following section dealing with the Board's analysis of the Site-Specific Applications. The Board's analysis, however, focuses primarily on Mr. Parsons' assessment of Mr. Climans' retail contagion evidence as both fall within the threshold parameters established by Policy 9.18.

The State of the South of Eastern Employment District

Mr. Clayton testified that the South of Eastern Employment District is underutilized and characterized by unrealized economic potential – features, in his view, that point to its stagnation. He described the Employment District as maintaining large expanses of paved surfaces. He also testified that employment in the District has been declining, a symptom of an area that is not healthy in his opinion. Furthermore, Mr. Clayton opined that investment in an area is evidence of its health and initially testified that he saw no evidence of investment in the Employment District. Under cross-examination, however, Mr. Clayton acknowledged the award-winning BMW sales and service facility as investment in the Employment District.

Mr. Smith also testified that the Employment District is underutilized and in need of some kind of revitalization.

The City's witnesses maintained a markedly different view of the Employment District. All of the City's witnesses testified to its locational attributes: chief among them being its proximity to the Downtown Core and its accessibility to the Don Valley Parkway and Gardiner Expressway.

Mr. Mathew testified that the Employment District has been “amazingly stable over the past 20 years,” noting that at present 96 percent of its net land base is occupied by active uses. (At the start of the hearing, only two properties were vacant: 45 Logan Avenue and 415 Eastern Avenue. At its conclusion, both were in the process of being occupied.) He described the Employment District using a more nuanced notion of infrastructure, saying that the District supports the Downtown Core by being home to a variety of “city-serving businesses.” Mr. Mathew also disagreed with Mr. Clayton and took umbrage with his testimony calling the District stagnant.

Messrs. Mathew and Climans each testified to the quality of the existing building stock throughout the District, a subject about which Mr. Benham stated “it may not be postcard quality, but it’s usable and it’s being used.” Mr. Di Mascio, too, testified that there is continued interest in the District, that it is viable, and that there is no evidence of blight or distress.

Early in the hearing, the Board and counsel undertook a site visit taking in the Subject Property as well as a tour of the Employment District. This experience left the Board with the distinct impression that the Employment District is performing as expected despite it not being the most attractive in terms of aesthetics, and even with the vacancies at that date of 45 Logan Avenue and 415 Eastern Avenue. Later in the hearing, the Board received evidence that 45 Logan Avenue had been acquired by Urbacon, a land development company, who was making an extensive investment to transform the existing structure into its new corporate offices. The Board, therefore, finds the Employment District to be viable and performing well.

The Importance of Employment Lands and What Counts as Employment

Not surprisingly, the parties were sharply divided in this particular subject.

The Board has already addressed the matter of what counts as employment in an earlier passage of this decision, though it bears repeating here given its importance: there is nothing in provincial policy barring large scale retail uses from employment areas where a municipality has determined such uses to be appropriate; and, the jobs

generated by retail uses absolutely count toward achieving employment forecasts mandated in provincial policy.

Drawing on Mr. Clayton's uncontradicted evidence concerning employment generation, Mr. Wood submitted that the 1931 jobs generated by the proposed development are "real jobs to those people who will have them" and, alluding to the 2,600 jobs that would be generated by the City's modern business park scheme by 2031, went on to suggest that real jobs are preferable to hoped-for jobs.

Mr. Mathew was retained by the City given his near 20-year involvement with it providing long-range planning and employment land advice, as well as his expertise in the preparation of long-term outlooks for both employment and real estate markets. He is the author of both the Phase I and Phase II Reports that constitute the City's Long-term Employment Lands Strategy. He testified that Toronto must maintain its supply of employment lands in order to, at a minimum, meet employment forecasts mandated by the 2007 Growth Plan and more ambitious employment targets set out in the current 2002 Official Plan.

To Mr. Mathew, an approval of the Site-Specific Applications would constitute a very real loss of the Subject Property for employment purposes, notwithstanding that the proposed scheme's retail jobs would count as employment for the purposes of achieving employment aims. Concerning the City's Long-term Employment Lands Strategy, he said that "the strategy won't matter much if the supply [of employment lands] disappears." Moreover, he testified that provincial policy with respect to the role of retail as employment is evolving as evidenced by Policy 2.2.6.5 of the Growth Plan.

Mr. Mathew testified that the Site-Specific Applications are neither appropriate nor representative of good planning, and that they should be refused. Mirroring Mr. Climans' evidence, he stated that their approval would destabilize the South of Eastern Employment District; that is, the introduction of the proposed development scheme would enhance land values, thereby inviting land speculation that, in turn, would erode Toronto's employment land base.

Finally, Mr. Mathew testified that land use certainty is as critical as ensuring a supply of employment lands.

It was evident from the testimony of Mr. Mathew, as well as the testimony of Mr. Di Mascio, that this hearing was not about whether a retail job counts as employment, but rather about the impact that new retail uses would have on the ability of employment lands to perform their intended function. It is for this reason that each maintained the opinion that the Site-Specific Applications will destabilize the Employment District.

Mr. Benham also testified that the Site-Specific Applications will destabilize the Employment District and that they should be refused. His testimony echoed that of Mr. Mathew: that Toronto must retain its employment land base in order to meet forecasts and targets. Emphasizing this point and connecting it to the City's goal of achieving an employment land base that will attract what he called "high value jobs," he testified "Toronto doesn't have a demand problem; it has a supply problem." Losing the Subject Property as well as other lands in the Employment District to retail development would exacerbate that supply problem and jeopardize the City's ability to meet its obligations under the Growth Plan and its aspirations under the current 2002 Official Plan.

Analysis

Pausing for a moment to look beyond Policy 9.18 and the Board's findings set out below, the Board would be remiss if it did not first address the attributes of the proposed development scheme and attend to some initial findings relating to concerns raised by Messrs. Stagl and Poulos, and by Mr. Young.

Beginning with the level at which the parties engaged the contest, the Board accepts that the proposed development scheme would be compatible with the residential uses situated on the north side of Eastern Avenue. Other than lay evidence suggesting an incompatible relationship between the two, no professional planning or other technical evidence was put before the Board to substantiate what are otherwise visceral reactions to an unwanted development.

Secondly, Mr. Yates' uncontradicted evidence demonstrated that the proposed scheme could be accommodated on the surrounding road network and that the propensity for infiltration into adjacent residential neighbourhoods was small given that local streets offer no significant advantage to drivers over higher order streets.

Third, both Mr. Clayton and Mr. Smith demonstrated that the proposed scheme would produce a number of economic benefits and accomplish several important planning objectives concerning the Subject Property's reintegration with its broader environs.

Fourth, it is clear from the design of the proposed scheme that Messrs. Fleischer and Glover pooled their considerable talents to fashion a development that is appropriately sensitive and responsive to the urban context within which the Subject Property is situated. The Board was impressed with Mr. Glover's uncontradicted evidence that the proposed design exceeds the policies set out in both the City's 1997 Urban Design Handbook and the 1997 Big Box Retail Design Guidelines.

Fifth, Mr. Parsons' retail analysis was both comprehensive and methodical, addressing Policies 9.9 and 9.15 of the former 1994 Official Plan as well as Policies 3.5.3 and 4.6.3 of the current 2002 Official Plan. His analysis demonstrated that the proposed scheme would not deleteriously impact either the Downtown Core, retail uses situated along Queen Street East in proximity to the Subject Property, or the economic health of other nearby shopping districts. The City sought to establish that the proposed scheme would poach retail uses from other areas of the City where they either exist or are planned for, and that Mr. Parsons' analysis did not establish a need for the proposed scheme. Mr. Parsons' evidence made very clear that neither the former nor current Official Plan contains any policy requiring need to be established. Moreover, his testimony that the proposed scheme would not pre-empt retail development in other areas of the City for which it is planned was very cogently presented and not devalued in cross-examination.

Sixth, the technical evidence filed on consent clearly demonstrates the proposed development scheme's appropriateness with respect to those substantive areas.

Finally, the Board was satisfied that concerns raised by Mr. Stagl and Mr. Poulos with respect to the interface between 721 Eastern Avenue and the proposed development scheme could be addressed through policy provisions and site planning. Likewise, the Board was satisfied that Mr. Young's concerns about car-bicycle conflicts could be adequately addressed through the site plan process. In light of the Board's decision, these concerns are now moot.

Turning then to the balance of the evidence relevant to its task, the Board has very carefully considered that evidence and supporting submissions within the context of the tests set out in Policy 9.18. Mr. Wood argued that only Mr. Clayton, Mr. Smith, and Mr. Parsons engaged its tests, that the City's witnesses and planning staff did not, and that all those tests have been satisfied. With respect, the Board finds this latter assertion to not fully be the case. Despite the many positive attributes outlined above, the Board finds that the Site-Specific Applications do not satisfy the test set out under Policy 9.18(b) – that the Applications do not have regard for the impact they would visit upon the surrounding (industrial, now employment) lands that would not be redesignated.

Reference is made to “surrounding industrial lands” in sub-clause (b); however, with the approval of the 2002 Official Plan, there are technically no longer any surrounding industrial lands – at least by way of a formal Official Plan designation. The surrounding industrial lands considered under the Policy 9.18 Study have been subsumed as part of the South of Eastern Employment District and designated Employment Lands. Even so, without breaching the policy regime by which the Site-Specific Applications are to be judged, it is reasonable and appropriate to infer for the purposes of test Policy 9.18 that surrounding industrial lands are those formerly designated industrial lands now having an Employment Area designation. Messrs. Clayton, Smith, and Parsons each considered Policy 9.18 in this vein.

The respective evidence of Messrs. Clayton, Smith, and Parsons are addressed in the balance of this analysis.

During his examination-in-chief, Mr. Clayton was asked if he had considered the tests of Policy 9.18. He replied that he had and was further asked how. He responded that his analysis focused on the economic base of the South of Eastern Employment District and specifically the presence of any adverse impact on the number and types of firms and employees. This is the test set out in Policy 9.18(a). Completing his answer, he directed the Board to his findings recited at two places: his March 20, 2008 Witness Statement and Section 3.3 of his August 29, 2007 Report.

The Board has carefully reviewed these two sources and has also thoroughly examined the balance of his August 29th report and his March 20th Witness Statement, as well as his May 5, 2008 Supplemental Witness Statement and its notes of his oral testimony. Mr. Clayton believes that the Site-Specific Applications will have a positive impact on surrounding lands and that the proposed development scheme will be economically beneficial on a number of grounds as previously described. That is the extent of his evidence with respect to test 9.18(b). At no point in any of the aforementioned sources does Mr. Clayton engage the possibility of other impacts – in particular, deleterious impacts – on lands not to be redesignated. The Board finds that somewhat puzzling in light of Mr. Climans' evidence with respect to retail contagion.

Where the test of sub-clause (b) requires regard to be had for the impact of a redesignation on lands that would not be redesignated, the Board finds that Mr. Clayton has had regard only for positive impacts. He has not addressed the totality of the intent of sub-clause (b), especially given its inclusion in a broader policy whose intent is to discourage the loss of City industry. There is no question that the proposed development scheme would provide benefits were it to be approved; however, to advance an analysis addressing only the benefits of a redesignation is not, in the Board's view, fully responsive to the Policy 9.18(b) test.

Mr. Clayton generally testified that the Site-Specific Applications will not have a negative impact insofar as sub-clause (b) is concerned; however, the Board found nothing in his study or analysis to substantiate that opinion. As meticulous as the balance of his analysis was with respect to the other matters pertinent to this hearing, Mr. Clayton's evidence on test 9.18(b) does not pass muster.

Turning to Mr. Smith's consideration of Policy 9.18, he first testified that planning staff did not properly engage the tests of Policy 9.18 when it undertook the required study. The Board largely agrees. From a detailed review of the Findings Report, one can find no explicit analysis directed to Policy 9.18. The analysis undertaken by MKI, moreover, examined three conceptual development scenarios, focusing only on the impact of redevelopment under each scenario on existing businesses. It focused on the Policy 9.18(a) test; it did not address the impact of a redesignation on surrounding industrial lands that would not be redesignated, as stipulated in the Policy 9.18(b) test. Given the intent of Policy 9.18 and its stipulation of specific tests, one would certainly have expected more in the Policy 9.18 Study.

Even with the above findings, however, there are two reasons supporting the Board's conclusion that not much turns on the level of staff's analysis in any event.

First, Council elected to ignore its planning staff's initial advice and retain external consultants to provide the principal support for its positions in this hearing – a course of action it has every right to pursue. Mr. Wood sought to make something of this in his opening questions of Mr. Climans' cross-examination. Mr. Climans was not shaken. That he determined he could support Council's position with respect to the Site-Specific Applications is, quite frankly, no different from the approach and experience of any of TFS/SC's professional witnesses. What's more, just as it has concluded with each of TFS/SC's professional witnesses, the Board finds nothing in Mr. Climans' approach or comportment to indicate that he undertook his assignment with anything less than the utmost professionalism and integrity. His retail contagion evidence squarely addresses the Policy 9.18(b) test even though the Findings Report does not. That planning staff did not focus on the Policy 9.18(b) test in its Findings Report, and then appropriated Mr. Climans' conclusions in its Final Report, are reflections on staff's approach and, if anything, reinforce the second reason set out below.

A responsibility rests with TFS/SC to unambiguously demonstrate that all of the Policy 9.18 tests have been satisfied – especially given Mr. Smith's opinion that planning staff did not satisfactorily address Policy 9.18. In answering that responsibility,

Mr. Smith relied on the work of Mr. Clayton, particularly with respect to his opinion concerning Policy 9.18(b). This is evident from his (Mr. Smith's) August 2007 Planning Rationale Report, his May 5, 2008 Witness Statement, and his May 15, 2008 Reply Witness Statement. In each of these documents, he maintained that the tests of Policy 9.18 had been satisfied. He directed his attention to the manner in which the City had historically applied Policy 9.18 and to the test in sub-clause (a) of Policy 9.18. There is nothing in this documentation constituting an analysis of the test in sub-clause (b) other than expressions of opinion supported by reliance on Mr. Clayton's analysis. In fact, Mr. Smith's analysis of the sub-clause (b) test is all of two paragraphs – both of which reference and rely upon Mr. Clayton's analysis. As Mr. Clayton's evidence goes, so too goes Mr. Smith's.

The matter of retail contagion falls within the scope of the test in sub-clause (b) of Policy 9.18. On this matter, it is important to note that Mr. Smith also testified at several points that there was no empirical evidence supporting Mr. Climans' claim of retail contagion. The Board finds that not to be the case.

During Mr. Climans' cross-examination, Mr. Wood asked him about retail contagion and the bidding-up of land values. Mr. Climans testified that the prospect of a retail redesignation bid-up land values by approximately three times. Not surprisingly, he was asked to prove this.

Mr. Climans testified that he had undertaken a title search of the Subject Property wherein he learned that SmartCentres had paid \$14 million for a 50 percent interest in the Subject Property. On that basis, he assumed a value of \$28 million for the Subject Property and, at 18.5 acres in size, calculated \$1.5 million (approx.) as a per acre value. He then compared that per acre value against the \$400,000 average per acre value of industrial land situated in the former City of Toronto, as determined by CBRE in its First Quarter 2008 Toronto Industrial Statistical Summary (Exhibit 67). From this comparison, he derived his conclusion that the prospect of a retail redesignation bid-up land values by about three times. Mr. Climans was then asked a series of questions about factors that might alter the \$400,000 denominator of his calculation, but nothing that shook the veracity of either his arithmetic or approach.

Despite the irony of SmartCentres' interest in the Subject Property being demonstrative of retail contagion, the Board finds this work to constitute empirical evidence.

Turning then to Mr. Parsons, only he took up the task in his May 15, 2008 Reply Witness Statement of directly responding to Mr. Climans' evidence on retail contagion. His critique of Mr. Climans' evidence was systematic, so the Board will address his evidence in detail.

Mr. Parsons began his critique by saying the retail contagion phenomenon is rooted in Mr. Climans' view of the South of Eastern Employment District as a small, but strategically located reservoir of employment lands possessing unique physical and functional attributes. Further on, he called this view a mischaracterization of the Employment District and stated his own opinion that the District is not any of what Mr. Climans holds it to be. Regardless of whether the Employment District is strategically located and/or in possession of unique attributes, the Board finds nothing in this having anything to do with Mr. Climans' evidence on retail contagion other than an insinuation that the threat of contagion is somehow either mitigated or removed by some lesser significance being attributed to or maintained by the Employment District.

Mr. Parsons opined that he does not agree with the use of the term contagion as used by Mr. Climans because it ignores Policy 4.6.3 of the current 2002 Official Plan which, as previously noted, permits large scale retail uses in Employment Areas subject to contingent locational requirements and impact tests. His evidence also suggested that a large scale retail use would not constitute contagion because it is contemplated by the current 2002 Official Plan. He confirmed this point in his oral testimony by stating, "You can't have contagion if the use was anticipated by official plan policy."

Setting aside for a moment the implicit assumption in both his written and oral evidence – that the tests of Policy 4.6.3 can be satisfied – Mr. Parsons appears to misapprehend the effect of Policy 4.6.3. Mr. Climans testified that the introduction of a large scale retail use would lower the bar represented by the impact tests of Policy 4.6.3 – tests which include protections against contagion. In other words, each introduction of a retail use would have the practical effect of rendering the impact tests increasingly

ineffectual. In Mr. Climans' opinion, other land owners, following in the wake of an approval of the Site-Specific Applications, would be motivated to pursue retail use permissions by a perception that an approval would be easier to achieve – hence the contagion effect. It appears as though Mr. Parsons has overlooked the fact that the Policy 4.6.3 retail use permissions are contingent permissions with protections against contagion built in.

In his Reply Witness Statement, Mr. Parsons asserted that Mr. Climans does not provide any meaningful assessment of the physical or use characteristics of the Employment District – as he did through his detailed parcel mapping – to support his opinion as to the likelihood of retail contagion or its implications. There is no question that Mr. Parsons' detailed parcel mapping work is meticulous. It appears, however, that Mr. Parsons is drawing a distinction between retail contagion occurring in the first instance, as opposed to the extent of any contagion were it to occur. The Board takes no stock of such a distinction for the simple reason that genies, once out of a bottle, are near-impossible to recapture.

Were there any doubt about the likelihood or implications of retail contagion, it is instructive to examine the case of 721 Eastern Avenue. This is the property abutting the Subject Property on the east. It also abuts the Price Chopper site, thus sandwiching it between the Subject Property and the retail node at Leslie Street and Eastern Avenue. As noted previously in this decision, Mr. Climans pointed to the initial intentions of its owner as evidence of the effect of a retail redesignation on the Subject Property.

The owner of 721 Eastern Avenue, 2006199 Ontario Inc., currently operates a film studio and related uses on the property. In an earlier version of the Issues List prepared for this hearing, 2006199 sought to achieve the same retail use permissions for its lands as TFS/SC were pursuing, by the inclusion of the following issue, identified as Issue No. 46:

If the Board approves an Official Plan Amendment for the site [Subject Property], would it be appropriate for the Board to extend all or a portion of the Official Plan Amendment

to include the adjacent property at 721 Eastern Avenue in order to address comprehensive planning and block-related considerations?

The City objected and sought a review of the Board's decision (by the Panel responsible for pre-hearing matters) so as to have this issue struck from the Issues List. The Board's Chair granted a motion to consider the City's request; however, 2006199 shortly thereafter withdrew Issue No. 46 thereby removing any need for the motion.

Mr. Parsons raised 721 Eastern Avenue in his evidence. He opined that if retail contagion were to occur at all, it would likely be limited to 721 Eastern Avenue and the two properties west of the Subject Property: 601 Eastern Avenue and 65 Heward Avenue. In his oral testimony, moreover, Mr. Parson had this to say about 721 Eastern Avenue in cross-examination: "...something will happen. It won't necessarily become retail, but that would be logical. It would be perverse to think that it will stay as it is." Mr. Clayton also testified that it was likely that 721 Eastern Avenue would become retail in the event of an approval of the Site-Specific Applications. The Board finds that both Mr. Parsons' and Mr. Clayton's testimony herein sustain Mr. Climans' evidence.

Mr. Parsons further opined that Mr. Climans offers no justification for why the existing retail node uses do not impair the Employment District's economic function and again pointed to 721 Eastern Avenue, stating that it would form a logical extension of that node. In supporting this position, he drew on a March 6, 2001 planning staff report dealing with the Price Chopper application and its conclusion that 721 Eastern Avenue and the easterly portion of the Subject Property should be redesignated to 'General Use,' a designation that permits retail uses.

There are three grounds upon which the Board finds this evidence and reasoning not persuasive. First, the suggestion that Mr. Climans needs to explain why the existing retail node does not impair the Employment District is a red herring. There is nothing within the existing node that is before the Board in this hearing. Second, the planning staff report upon which Mr. Parsons relies is eight years old. In asking the Board countenance his opinion on this point, Mr. Parsons is by implication asking it to take no account of any subsequent contextual changes, whether policy or otherwise, either at the local or provincial level. The circumstances within which the Price Chopper land

use change was considered are decidedly different from the circumstances of the Site-Specific Applications. Third, whether or not 721 Eastern Avenue on its own represents a logical extension of the retail node in the absence of retail on the Subject Property is open to debate. Mr. Parsons seems to ignore the hole-in-the-donut status that 721 Eastern Avenue would assume in the event the Site-Specific Applications were approved. Mr. Climans' testimony on retail contagion, in the case of 721 Eastern Avenue, looked at the impact on a property that would end up being sandwiched between two significant retail uses. Mr. Parsons' discussion of 721 Eastern Avenue is predicated on there being no hole-in-the-donut in the first instance.

Finally, in his Reply Witness Statement, Mr. Parsons asserted that retail contagion could, in effect, be completely prevented by a simultaneous approval of the Site-Specific Applications and Official Plan Amendment No. 23. (The Board notes parenthetically that this would also have to include, by necessity, a dismissal of Official Plan Amendment No. 379 and some form of modification to By-law No. 130-2008 – although none was ever advanced.) By approving Official Plan Amendment No. 23 and its removal of the Policy 4.6.3 large scale retail use permissions from the Employment District, the post-Bill 51 *Planning Act* and the 2007 Growth Plan would prevent lands within the Employment District from ever being used for large scale retailing. Early in the hearing, this dual approval possibility was referred to as “the firewall.” Later in the hearing, the label given this dual approval possibility was refined to “the major firewall” after Mr. Wood submitted that the Policy 4.6.3 tests serve as a “mini-firewall.”

Mr. Smith testified that the City Instruments do not represent good planning, and on cross-examination opined that he would also not consider such a result to be good planning. It therefore strikes the Board as curious that TFS/SC would advance this possibility. The Board agrees with Mr. Smith and will not countenance the suggestion. This Board is not in the business of rescuing what it finds is deficient planning by giving its benediction to other planning it finds even more wanting.

Aside from his title search research, Mr. Climans admitted under cross-examination that he had not undertaken direct research of his own. The Board does not find that to be fatal. In light of the clear intent of Policy 9.18, he raised a credible basis

for questioning the soundness of redesignating the Subject Property, and he was not shaken in any part of his cross-examination.

Based on all of the foregoing, the Board prefers the evidence of Messrs. Climans, Mathew, and Di Mascio and finds that the Site-Specific Amendments do not constitute good planning and will very likely destabilize the South of Eastern Employment District, an area inclusive of formerly-designated industrial lands included in the Policy 9.18 Study. In regard to this latter point, the Board finds that the test set out in Policy 9.18(b) – the effect of redesignation on lands that would not be redesignated – has not been met. For all of these reasons, the Site-Specific Applications are not approved; the appeals are therefore dismissed.

The Board also received evidence in connection with a settlement negotiated between TFC/SC and Loblaws. That agreement was captured in amendments to the proposed official plan amendment and zoning by-law amendment exhibits filed with the Board. In light of the Board's decision on the Site-Specific Applications, there is no need to address that evidence.

As a final point, given the Board's decision with respect to the City Instruments, and, in particular, its finding that Policy 4.6.3 if properly applied would appropriately protect the Employment District, the Board determines it necessary to generally address the proposed development scheme and Policy 4.6.3. Mr. Clayton, Mr. Parsons, and Mr. Smith each testified that the proposed development scheme meets the tests of Policy 4.6.3.

With respect to the locational test of Policy 4.6.3, the Board finds that the Subject Property satisfies the requirement of being located on a major street – Lake Shore Boulevard – that also forms a boundary of the Employment District. Mr. Di Mascio and Ms Lehrer each testified that from a policy perspective the Subject Property cannot be considered an edge property. The Board prefers the evidence of Mr. Smith who testified that the Subject Property is an edge property. In this case, the Board finds that one cannot argue with basic geography, a fact acknowledged in the Preamble of Official

Plan Amendment No. 23 where it is stated, "...much of the District is only one property deep. The result is that almost all the District is an edge condition...."

Turning to the impact tests of Policy 4.6.3, and relying on the connection between Policy 9.18 and Policy 4.6.3 established in the section of this decision dealing with the City Instruments, the Board finds that the proposed development scheme would not satisfy the test set out in the first part of sub-clause (b) of Policy 4.6.3. While this finding is in no way determinative of the Site-Specific Applications, the Board feels it necessary to take this step so as to discourage an immediate pursuit of a similar development scheme under the current 2002 Official Plan. That would decidedly not be in the public interest over the not-to-distant future.

Disposition

Based on all of the foregoing, the **BOARD ORDERS** that:

1. the appeals of the TFS/SC applications to amend the former City of Toronto 1994 Official Plan and Zoning By-law No. 438-86, as amended, as they apply to 629, 633, and 675 Eastern Avenue, are not approved;
2. the appeals of Official Plan Amendment No. 23 and Official Plan Amendment No. 379 are allowed, and each is not approved; and,
3. the appeals of Zoning By-law No. 130-2008 are allowed, and Zoning By-law No. 130-2008 is hereby repealed.

The matter of costs was raised prior to the hearing. Applications, if any, must be made in accordance with the Board's Rules of Practice and Procedure.

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PL061112
PL080335
PL080565

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This is the Order of the Board.

J. R. McKENZIE
VICE-CHAIR