

ISSUE DATE:

**Jan. 03, 2008**



PL070485

**Ontario Municipal Board**  
**Commission des affaires municipales de l'Ontario**

1693534 Ontario 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 24982 of the City of Toronto to rezone lands respecting 1780 Markham Road from Highway Commercial (HC) to add Marketplace Signs, Personal Service Shops, Places of Entertainment and Retail Stores as permitted uses, in addition to the uses permitted by the HC zone  
OMB File No. Z070058

1693534 Ontario Inc. has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of a site plan for lands respecting 1780 Markham Road, in the City of Toronto  
OMB File No. M070050

**APPEARANCES:**

**Parties**

City of Toronto

1693534 Ontario Inc.

**Counsel**

G. Whicher

E. Costello

**DECISION OF THE BOARD DELIVERED BY N. JACKSON**

The Appellant 1693534 Ontario Inc. (hereinafter the Appellant) seeks to rezone property at 1780 Markham Road near the intersection with Shepherd Avenue East, being Part Lot 19, Concession 3, to permit a 39,400 square foot commercial retail and service centre. Proposed are four buildings for uses including a Shoppers Drug Mart, a bank with a drive-through, retail and restaurant uses. The largest building would house the Shoppers Drug Mart at approximately 17,080 square feet. Parking spaces are proposed in the number of 180. The site is approximately 3 acres in size and was used formerly for the sales of Ford vehicles for approximately 25 years. The former Ford dealership building remains on site.

Currently the property is zoned Highway Commercial under Scarborough Zoning By-law 24982.

When Council did not act on the Rezoning By-law and Site Plan Applications within 120 days, both were appealed to this Board under sections 34(11) and 41(12) of the *Planning Act*.

### **Motion of the City for Dismissal**

Prior to the commencement of the hearing, the City served a Motion and supporting Affidavit to request a finding that an Official Plan Amendment was required and in the absence of such being applied for, the Board should dismiss or adjourn the hearing. Following service of a Response and Cross Motion to the City's Motion, the City withdrew its Motion on the Friday afternoon before the commencement date of the hearing on the following Monday. The withdrawal was unconditional. The Appellant maintains its right to Costs requested in its Response and Cross Motion.

Both parties agree with this panel's jurisdiction to hear the Costs Motion orally at this time.

The Appellant simply states it has incurred costs by its legal counsel in preparation for the City's Motion and in the preparation of the Response and Cross Motion. Such Costs for approximately 10 hours of preparation time are quantified at \$4,000.00. No claim is made for the appellant's planner who was also involved in the preparation of the Response. The Appellant's counsel argues that her time would have been better spent on preparing for the hearing. The City's response is that in withdrawing it was making the time available for the hearing when the time allocated was required to hear witnesses give *viva voce* evidence.

The Board finds costs were indeed thrown away that were incurred as a direct result of the City's decision to bring the Motion to be heard at the commencement of the hearing. Withdrawal of the Motion unconditionally does not mean the responding Party who has responded and has a Cross Motion is without remedy. The conduct of the City was unreasonable and has, through the abandonment of its position sought on the Motion, left the responding party out of pocket for its costs incurred. The Board hesitates to award costs which, under Board rules, do not follow the event. Here however, a fresh step was initiated by the City. The City then withdrew its Motion

unilaterally following the Response from the Appellant. The Appellant in fairness is entitled to costs incurred directly as a result of the City's initiative.

The Board will award costs. In reviewing the Motion and Response materials it is evident that issues on the Motion were also issues for the hearing and thus there exists some overlap. The Board has also taken into account the Cross Motion and its nature and purpose. The Board will reduce the quantum, otherwise not disputed, accordingly, and will order \$1000.00 as Costs to the Appellant. Such Costs are to be payable only on demand.

### **The Hearing**

The Board heard evidence and argument over four days. The Appellant called planner, Peter Smith. The City called two planners, Gerry Rogalski and Thomas Ostler. No members of the public sought status to give evidence in the hearing. Several persons were present as neighbouring property owners including Terry Li. They took no position before the Board and presented no evidence.

The main issue in this hearing is conformity of the proposal with the Toronto Official Plan and the Provincial policies set out in the Provincial Policy Statement and the Growth Plan. Put another way, is it necessary for the Appellant to apply for an Official Plan Amendment as argued by the City? Also argued, at some length, by both Parties, was the fairness of the City process. The Site Plan and site plan conditions, both exhibited in this hearing, are not disputed by the City. They have been developed with City staff in the various departments and according to Peter Smith's evidence, there is general agreement. That agreement is conditional upon approval of the Zoning Application. It is the Zoning Application that the arguments of conformity with the Official Plan bear upon with the site plan seen as implementation in the event that the appeal on the rezoning results in some success.

## **Fairness of the City Process**

The *Planning Act* requires in sections 1.1(d) and 61 that applicants be treated fairly and be given a fair hearing.

The facts in this case are as follows:

1. Prior to filing its Planning Applications, the Appellant undertook extensive consultations with planning staff of the City, in the Scarborough District in which the subject property is located. Meetings took place in the months of April to June of 2006. Peter Smith testified that the Appellant presented a Conceptual site plan depicting the Shoppers Drug Mart and other uses with square footages.
2. On August 3, 2006, David Beasley of the Toronto Planning Department (Scarborough) advised the Appellant's planners that he and his manager, Marilyn Stuart, found that the Concept Plan was very similar to an earlier version they saw in March and were prepared to support it. "We believe it is generally consistent with the Toronto Plan. Please proceed with the zoning and site plan submissions."
3. The Rezoning Application was filed on September 14, 2006 and the site plan application on November 22, 2006.
4. City planning staff authored a preliminary staff report dated December 21, 2006 indicating that the proposed development was considered as small scale as provided for Employment Areas of the Toronto Official Plan. They went on to say that if the stores were larger and comprised a power centre, they would also be permitted.
5. City planning staff, Mr. Beasley and the director of the Scarborough planning district, recommended in the aforementioned report that the proposal be processed and brought forward for a community consultation and statutory public meeting.

6. In February 2007, Mr. Beasley advised the planner for the Appellant, that staff were required to revisit its past advice and that Planning Policy staff had concluded that the proposal did not conform to the Toronto Official Plan.
7. The Appellant's planner sought explanation and the continued processing of the proposal without response in February and March of 2007.
8. A community consultation meeting was held on March 6, 2007 without opposition appearing from the neighbourhood. The Statutory public meeting was never scheduled nor held.
9. Mr. Rogalski of the City Policy Planning took carriage of the Zoning file in September 2007 while Mr. Beasley retained the site plan file.
10. Mr. Rogalski later authored an Action report to Council recommending refusal and Council accepted that staff position.

That there is a change in staff position is not alarming since staff are in an advisory position only and even a unified staff position can be rejected by Council. Of concern is the failure to proceed to a statutory public meeting which was recommended and the deep division in planning staff regarding the interpretation of their own Official Plan. While some may rely on the staff position, there cannot be legal reliance when the position is advisory. The schism does however go to the interpretation of the relevant sections of the Official Plan.

The City, in addition to changing its position on the Motion it had brought to Dismiss and on the Zoning Application (planning staff), changed its position on Bill 51, whether under that legislation there could still be an Appeal to the OMB from an Employment Area related issue. Bill 51 does not apply to the earlier zoning Application, but it was suggested by the Appellant that following the change in the Planning Department position, that a later application to amend the Toronto Official Plan could be under Bill 51 and there would not then be the opportunity of an Appeal from the refusal of the official plan application to this Board. The City witness after originally opining that such an Appeal was not restricted by Bill 51 since the Toronto Plan had no conversion

policy, returned after completing his evidence to clarify that indeed Bill 51 would restrict Applications and Appeals made under it if it was proposed to remove land from an employment area. These changes in position go to credibility in the interpretation of the Plan.

### **Whether the Proposal is Consistent with the 2005 Provincial Policy Statement(PPS)**

City Planning Staff in this hearing contend that commercial uses are non employment in nature and as a result in the context of the Toronto Official Plan, the rezoning results in a conversion under Section 1.3.2 of the PPS. Section 1.3.2 of the PPS provides that a conversion of lands within employment areas to non employment uses may only be permitted following a comprehensive review demonstrating that the lands are not required for employment purposes and that there is a need for the conversion to the non employment use.

What must be first determined before applying the need for the comprehensive review is whether the proposal amounts to a change from an employment use to a non employment use. It is not enough to look at the former retail use and compare it with the new proposed uses. The former use under Highway Commercial zoning preceded the new Toronto Official Plan. The wording of the PPS is instructive. The PPS defines Employment Area as “those areas designated in an official plan for clusters of business and economic activities including, but not limited to manufacturing, warehousing, offices, and associated retail and ancillary uses.” This definition read alone creates some ambiguity whether retail freestanding is an employment use. The PPS must be read as a whole according to its interpretation doctrine. Section 1.3.1 of the PPS states that

#### **“1.3 EMPLOYMENT AREAS**

1.3.1 Planning authorities shall promote economic development and competitiveness by:

- a) providing for an appropriate mix and range of employment (including industrial, commercial and institutional uses) to meet long-term needs;
- b) providing opportunities for a diversified economic base, including maintaining a range and choice of suitable sites for employment uses which support a wide range of economic activities and ancillary uses, and take into account the needs of existing and future businesses;
- c) planning for, protecting and preserving employment areas for current and future uses.

The Board has held in similar cases that retail uses are part of the range of employment uses in 1.3.1 a) under the word commercial North American Acquisition Inc. v Barrie (City) OMB Decision /Order No. 3067, October 31, 2006 and Towerhill Developments v. Peterborough (City) - OMB Decision, Order No.1064, April 19, 2007.

In this case there is no conversion from an employment use to a non employment use necessitating a Conversion study under the PPS. There remains a careful consideration of the Toronto Official Plan and whether that Plan has more restrictively dealt with Employment Areas so as to create a Conversion. More on the Toronto Plan follows later in this Decision.

### **Whether the Proposal Conforms with the Growth Plan (GP)**

The GP provides for Employment Lands in a manner similar to the PPS. In section 2.2.6 of the GP “ Municipalities will promote economic development and competitiveness by -

- a. providing for an appropriate mix of employment uses including industrial, commercial and institutional uses to meet long-term needs,
- b. providing opportunities for a diversified economic base.”

There is a difference from the PPS in the tests required for the Conversion Study in 2.2.6.5 and in that the GP states: "For the purposes of this policy, major retail uses are considered non-employment uses." There is no definition of major retail in the GP. The Board agrees with the witness Smith's opinion on the GP. Smith who was qualified in the planning area with particular expertise in commercial land use planning, noted that the exception for major retail uses in 2.2.6.5 was tied to the specific policy and in any event was intended for the Big Box phenomenon of a size of approximately 125,000 square feet. This he opined was to prevent the loss of large tracts of land to big box retail expansive uses. There was no dispute with this opinion. The proposal is for 40,000 square feet with the particular concern of the City being the 17,000 square foot Shoppers Drug Mart. On the face of the GP, the Board finds there has not been a conversion from an employment use to a non employment use requiring further comprehensive study. The Board will however pursue this issue in the context of the City Official Plan as raised by the City witnesses.

### **Whether the Proposal conforms with the City Official Plan (OP)**

The Board accepts the evidence of City planner Ostler that the Plan adopted in 2002 was intended to provide for growth in conjunction with economic development and to channel that growth into the Downtown, Avenues ,city centres and employment areas. Mr. Ostler pointed to more general permission for retail in Mixed Use Designations. The Plan as a result of Ministers' modifications provides for a minimum of 3 million residents and 1.835 million jobs by 2031. The City strives to protect Employment lands for the purposes of providing the anticipated jobs.

The subject lands are located within the Tapscott Marshalling Yards Employment Area which is recognized by the witness Ostler and City through yearly studies as a successful employment area providing substantial employment and remaining healthy in this respect to the present day. Mr. Ostler confirmed the intent, as one of the authors of the Official Plan, that the Plan was broadly written such that it could be interpreted differently in the varying contexts that made up the new City of Toronto post restructuring. The commentary in the plan for Employment Areas in section 4.6 states, "A Broad and inclusive approach to employment uses in Employment Areas is needed



for the City's economic future." The interpretation section of the Plan 5.6 states: "the commentary provides context and background and assists in understanding the intent of policies. The Commentary is not policy. Changes to the Commentary are to be made through Official Plan Amendments under the *Planning Act*".

The Tapscott Marshalling Yard Employment Area is governed by the generic Employment Area Policies set out in section 4.6 of the OP. The key policies are 4.6(1) and (3).

1. "Employment Areas are places of business and economic activity. Uses that support this function consist of: offices, manufacturing, warehousing distribution, research, and development facilities, utilities, media facilities, parks, hotels, retail outlets ancilliary to the preceding uses and restaurants and small scale stores and services that serve area businesses and workers."
2. "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 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."

There are no definitions of small-scale stores nor large-scale stand-alone retail stores nor power centres in the OP. The position of the two planners testifying for the City is that the proposal is neither small-scale stores serving area businesses and employees, nor large-scale stand-alone retail stores. The City contends that the size of

the Shoppers Drug Mart at 17,000 square feet and its array of some destination products places it in a category of what the City planners testifying call medium scale retail stores that are not referred to at all in the Official Plan. The City's point is that if they are not mentioned as permitted in the Official plan, they are excluded and not permitted.

The Appellants planning evidence agreeing with the Scarborough operating planners of the City is that the Shoppers Drug Mart is permitted as small scale since it does serve area businesses and employees. Their opinion is that the proposal also qualifies as large scale since it meets the tests in policy 3.

Mr. Ostler testified that the City in writing the Plan had considered medium retail but decided to not refer to it explicitly concluding it was not small scale but that it could be permitted in power centres under policy 3, also without saying so explicitly.

Exhibit 9 further depicts the contradictory manner in which the City has interpreted their OP in 5 different applications on different sites, all within Employment Area designations. In one at 1561 the Queensway four commercial buildings with a total GFA of 6,532 square metres were approved. An Official Plan Amendment was required because the large scale stand-alone retail, originally 4,224 square metres and later divided into two, was not on the boundary of the Employment Area. Policy 4 of the Employment Areas permits large scale retail in the interior of employment areas only if an official plan amendment is passed.

The Board is not satisfied the proposal at hand is small scale. The use objected to by the City, the Shoppers Drug Mart does serve local businesses and employees. It also will serve others beyond the boundaries of the employment area (destination shopping) but the OP does not so differentiate, only requiring the serving of area businesses and employees. The commentary in the OP refers to stores and services to meet the daily needs of business and customers. The commentary also refers to the draw of shoppers from broad catchment areas that can have serious impact on local traffic movement. The Shoppers will meet some of the daily needs of business and customers. The Shoppers Drug Mart locations displayed in Exhibit 20, some 122 over all of Toronto, depict catchment areas of approximately 2 kilometres that limits destination shopping. Small scale stores must however be small scale and the Board

finds that 17,000 square feet in the context of policy one and its commentary not to be small.

The Board finds the City evidence on medium scale is not helpful when those ideas of medium scale considered in the Official Plan review did not make their way into the Plan itself in either the policies nor commentary. The analogy the City draws to section 34 of the *Planning Act* wherein the legislation speaks to prohibiting the use of land, for or except such purposes as may be set out in the By-law is not applicable to the policy nature of Official Plans and their enabling legislation under section 17 of the *Planning Act*. In other designations of the Official Plan, the City chose to explicitly prohibit uses that were not intended to be permitted. For example in the designation of Regeneration Area, large-scale, stand-alone retail stores and power centres are not permitted explicitly.

The Board finds the proposal does conform with Policy 3 for the following reasons :

1. In the context of section 4.6 when read as a whole the proposal is large scale free-standing retail as a whole at approximately 40,000 square feet and with the Shoppers Drug Mart at 17,000 square feet. The City has followed this interpretation in Exhibit 9.
2. The proposal would be located on a major street defined as such in the Official Plan-Markham Road and is located on the boundary of the Marshalling Yard Employment Area.
3. There is sufficient traffic capacity in the existing streets to accommodate any additional traffic generated by the proposed development.(Testimony of Smith)
4. The functioning of other economic activities within the Employment Area and the economic health of nearby shopping districts are not adversely affected. (Testimony of Smith)
5. The Proposal will provide up to approximately 120 jobs. The Shoppers Drug mart will have approximately 55 jobs of which half will

be full time. The Official Plan does not distinguish between full time and part time even though Mr. Ostler confirmed the intent of the City to be well paying full time jobs.

6. The Board finds other uses proposed as personal service and restaurant and bank to be of types of use in the OP Employment commentary and to contribute to the economic function of the subject lands and to be already permitted in the existing Highway Commercial Zoning.
7. The proposal will not detract from the Employment Area. There may be, as the City suggests, less land for traditional industrial type of use, if it is used for commercial purposes but there is no evidence that the commercial use will detract from the employment area. To the contrary there is evidence of similar commercial uses off site and in surrounding frontages on Markham Road and on Shepherd Avenue East. City concern in the past has been primarily with conversion to residential and possible incompatibility of industrial uses with residential uses.
8. The Proposal for commercial uses is in conformity with policy 3 of the OP in the context of section 4.6 wherein the City clearly recognizes commercial uses including retail subject to tests as Employment Area uses. It is not consistent with section 4.6 for the City to claim conversion.

The Board finds the Proposal to be good planning and representative of uses that are appropriate in the existing commercial corridor on Markham Road as an expansion of existing Highway Commercial Zoning permissions. Size of the property, its configuration and access are appropriate for the intended purpose.

## **Conclusions**

For the aforementioned reasons the Board will allow the Appeal on Zoning and the Appeal on the Site Plan referral. The Board's Order is withheld pending final revisions to the draft Zoning By-law to impose caps cumulatively and individually on uses and to permit final review of Site Plan conditions and the Site Plan agreement. The Board will withhold its Order for the period for up to two months firm. Documentation and draft order is to be submitted to the Board Planner, Leesa Kwong, who will administer the process to the issuance of the final Order.

"N. M. Jackson"

N. M. JACKSON  
MEMBER