

ISSUE DATE:

**March 18, 2010**



PL080959

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

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellants:	See Attachment "1"
Subject:	By-law No. 2008-250
Municipality:	City of Ottawa
OMB Case No.:	PL080959
OMB File No.:	PL080959

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

City of Ottawa

T. Marc\* and C. Enta\*

The TDL Group Corporation

M. Polowin\*

Richcraft Homes Limited, Petro Canada Inc.,  
2024644 Ontario Inc., David Rosetti

J. Bradley\* and E. Blanchard\*

Loblaws Properties Limited, Rockcliffe Park  
Residents Association, Timberwal  
Developments Inc.

A. Cohen\* and J. Cohen\*

The Riotrin Group of Companies

K. Ross\*

Campanale Homes

D. Paquette

College Square Properties, Emparrado  
Corporation, Greater Ottawa Home Builders  
Association, Urbandale Corporation, KNL  
Developments Inc., Zena Kinder Holdings  
Limited, Arnold Kimmel Timothy and Edith  
Fauquier

D. Kelly\*  
U. Melinz\*

James and Pamela Cain, 585977 Ontario  
Ltd.

P. Vice\*

Sunset Lakes Development Corporation

P. Webber\*

**MEMORANDUM OF ORAL DECISION DELIVERED BY N. C. JACKSON ON  
FEBRUARY 25, 2010 AND ORDER OF THE BOARD**

This is a continuum in a series of Pre-hearings and Hearings on the 70 Appeals filed to the City of Ottawa's Comprehensive Zoning By-law 2008-250. The City of Ottawa had undertaken to review all Appeals in an informal mediation between Parties and has done so for a significant number of the Appeals. For the remaining Appeals which the City has not yet responded to in meetings, the City now undertakes to advise the Appellants in writing by March 29, 2010 whether there is any agreement, whether a hearing is necessary to resolve issues or whether there is agreement to more formal OMB Mediation. The Appellants will respond in this process, to the City in writing by April 12, 2010. The Parties will then appear at a further General Pre-hearing of this Board now fixed, by this Decision for May 10, 2010, at 10:00 a.m. at Ottawa City Hall before the current panel. No further Notice is required. The City will confirm room space. At this Pre-hearing, dates will be set for further proceedings. Counsel P. Vice, P. Webber, U. Melinz, M. Polowin, K. Ross, J. Cohen, J. Bradley, E. Blanchard and agent D. Paquette are present and formally consent to this procedure on behalf of their respective clients set out in the Style of Cause.

Appeal 49 by 2024644 Ontario Inc will proceed to a Hearing. Due to complexities and timing, a Pre-hearing specific to this Appeal is requested by counsel J. Bradley. This specific Pre-hearing is fixed for May 11, 2010, 10:00 a.m. at Ottawa City Hall. No further notice is necessary. The City will confirm room space.

Appeal 43 by Richcraft Homes on consent by Counsel Bradley and Counsel Marc is to proceed on May 12, 2010, 10:00 a.m. at Ottawa City Hall. Three days are reserved. No further notice is necessary. The City will confirm room space.

Counsel Melinz confirmed she will be withdrawing in writing, the Appeal by Zena Kinder Holdings Limited.

## **Motions**

### **All Motions are to amend By-law 2008-250**

#### **Motion 1**

##### **Appeal 26 by Sunset Lakes Development Corporation**

The City and Appellant have reached general agreement that it is appropriate to recognize uses permitted under prior zoning as open space uses. The amendment is reflected generally at pages 45 to 51 of exhibit one. Further mapping changes on pages 49 and 50 are necessary and on consent, will be provided to the Board's Planner no later than one week from February 25, 2010. This Appeal will continue in part.

##### **Appeal 47 by David Rosetti**

Motion 1 also seeks to put into effect a settlement for Appeal 47. On the basis of long standing Institutional Zoning and the deeming of that Zoning under Section 24 of the *Planning Act*, the City agrees to reinstate the former permitted uses set out in exception 366r in the draft By-law on pages 45 to 51 of Exhibit 1. This Appeal continues in part.

Based upon the planning evidence of planner Carol Ruddy (by affidavit) and the submissions of Counsels Marc, Webber and Blanchard, the Board finds the settlement of Appeals 26 and 47 to be in conformity with the Official Plan and consistent with the Provincial Policy Statement and to represent good planning.

The Board allows Motion 1 and allows Appeals 26 and 47 to the extent necessary to give effect to the settlement set out in Exhibit 1. The Board amends By-law 2008-250 in the form of the draft By-law set out on pages 45 to 51 made Attachment "2" to this Decision.

### **Motion 2 - TDL Group Corporation Appeal 36**

This Motion seeks to put into effect a settlement mediated by the Board with respect to the difficult issue of drive-throughs and restaurants. Previous zoning had recognized drive-throughs as accessory uses. Counsel consent to this panel proceeding with the Hearing. An Official Plan Amendment proceeding from this settlement, but with separate process, will recognize the special nature of high profile parts of the City of Ottawa in respect of these uses. Significant additional notice was provided of the Planning and Rural Affairs Committees, and Council meetings, and today's OMB proceedings. No one is present to oppose. Ottawa Council approved of the settlement unanimously.

Based upon the planning evidence of Ottawa planner Francoise Jessop and submissions of Counsels Marc and Polowin, the Board finds the settlement to represent good planning. The Board allows Motion 2 and the TDL Appeal in part so as to give effect to the settlement set out in Exhibit 3. Specifically the Board amends By-law 2008-250 in the form of the By-law set out in Exhibit 3, pages 14 to 18, made Attachment "3" to this decision.

### **Motion 3 - TDL Appeal 36 Rehearing pursuant to section 43 of the *Ontario Municipal Board Act***

As part of its Appeal, TDL sought to have this Board repeal section 3 of By-law 2008-250. This section dealt with non conforming uses but also the regularization of uses not complying as to regulation. Subsections 1 to 5 of section 3 dealt with non conforming uses while subsections 5 to 8 dealt with regulations or performance standards. There was some drafting relationship in the subsections. The City attempted to draw the line in subsections 1 to 5 of section 3 respecting non conforming uses as refinements of section 34(9) of the *Planning Act* (permitting the continuance when demolition or damage was involuntary, but not permitting continuance when demolition or damage is voluntary). The Ontario Municipal Board otherwise constituted (Decision PL080959, issued July 28 2009, and the Divisional Court on Appeal (2009 Carswell Ont 7168 Docket 09 –DV-1542 Issued November 9, 2009) (Leave Denied), found there was not authority to do so and the TDL appeal succeeded. In the Court proceeding, TDL

made it clear that it did not seek the repeal of subsections 3(6) to (8). The Court stated clearly in its Decision this could be dealt with by the OMB under section 43 of the *OMB Act* as a rehearing. The Board's Executive Vice Chair agreed in correspondence dated February 10, 2010, with the setting of this matter down to be heard by Motion. The Letter of February 10, 2010 from the OMB specifically directed the rehearing to consider whether subsections 3(6) to (8) restricted the non conforming rights of property owners.

Based upon the planning evidence of Francoise Jessop (oral and affidavit) and the submissions of Counsel Marc for the City and Polowin for TDL, the Board finds the redrafted Section 3(6) to (8) removing reference to section (1) to (5) does not restrict non conforming rights in the manner of the impugned provisions 3(1) to (5). The effect of subsections 6 to 8 of section 1 is to supplement section 34(9) of the *Planning Act* by carefully considering planning circumstances where applications to the Committee of Adjustment will not be necessary. Instead the City has legislated conformity when regulations or performance standards were at issue. Examples are where the use is permitted but development or an addition is proposed when lot area or lot width requirements are deficient, and permitting a change to another permitted use. This is carefully considered good planning increasing the flexibility in planning, not restricting, but increasing property rights where appropriate. Other zoning provisions will still apply requiring the footprint to be set back so that there is no undue impact.

On consent, Motion 3 is allowed, and the Appeal of TDL is allowed in part. The Board amends By-law 2008-250 in the form of the draft By-law set out on pages 11 and 12 of Exhibit 5 made Attachment "4".

The Board so Orders.

"N. C. Jackson"

N. C. JACKSON  
MEMBER

**ATTACHMENT 1**

Kanata Research Park Corporation (various properties)  
Kanata Research Park Corporation (940 and 945 Klondike Road)  
HG & GB Investments - 915 Klondike Road  
Thomas Cavanagh Construction Ltd. (Almonte Quarry & Kinburn Quarry)  
Urbandale Corporation  
Urbandale Corporation & KNL Developments Inc.  
Signature Centre Ltd. (c/o Taggart Realty Management)  
The TDL Group Corp.  
College Square Properties Inc.  
Campanale Homes  
595799 Ontario Limited  
Rockcliffe Park Residents Association  
555 March Road Inc. and DIR Investments Inc. (555 and 591 March Road)  
Emparrado Corporation  
Loblaws Properties Ltd.  
Timburwal Developments Inc.  
Greater Ottawa Home Builders Association  
Sunset Lakes Developments (1374421 Ontario Inc) and Sunset Lakes Owners Association Inc.  
David Rossetti  
Denis Labelle  
Canadian Tire Real Estate Limited & Canadian Tire Corporation Limited  
Trinity Property Holdings Inc.  
Richcraft Homes Ltd.  
Central Canadian District of the Christian and Missionary Alliance in Canada ("Redeemer Alliance Church")  
Strandherd Meadows Inc. & Petro Canada Inc.  
Capital Parking Inc.  
2024644 Ont. Inc.  
Claridge Homes (Centretown) Ltd.  
Minto Commercial Properties Inc. (1926 St. Joseph Boulevard)  
Mildred Marshall  
  
James & Pamela Cain  
RJ Motors (168672 Ontario Inc.)  
  
Timothy & Edith Fauquier  
Zena Kinder Holdings Limited

Riotrin properties (Hazeldean)

Riotrin properties (Belcourt)

Woodway Developments Limited

Riotrin properties (Merivale)

Riotrin properties (Orleans)

Riotrin properties (Barrhaven) and 2024201 Onatrio Ltd.

Gary Underwood & Stephen Shingler

DIR Investments Inc.

## ATTACHMENT "2"

### BY-LAW NO. 2010 - XX

A by-law of the City of Ottawa to amend By-law No. 2008-250 of the City of Ottawa to change the zoning of lands known municipally as 7268 Parkway Road, 6798 and 6803 Lakes Park Drive, 5671 Third Line Road, Blocks 84, 86, 87 and 88 on Plan 4M-1295, Block 34 on Plan 4M-1295, Blocks 61 and 67 on Plan 4M-1305 and Blocks 43 and 44 on Plan 4M-1306.

The Council of the City of Ottawa, pursuant to Section 34 of the *Planning Act*, R.S.O.1990, enacts as follows:

1. The Zoning Map of By-law No. 2008-250, entitled the "City of Ottawa Zoning By-law" is amended by:

- (a) rezoning the lands shown as Area A on Attachment 1 to this by-law from O1 to O1[365r],
- (b) rezoning the lands shown as Area A on Attachment 2 to this by-law from O1 to O1[365r],
- (c) rezoning the lands shown as Area A on Attachment 3 to this by-law from O1[621r] to O1[365r],
- (d) rezoning the lands shown as Area A on Attachment 4 to this by-law from O1 to O1[365r],
- (e) rezoning the lands shown as Area A on Attachment 5 to this by-law from AG2 to AG2[366r].

2. Section 240 – Rural Exceptions of the said By-law No. 2008-250 is amended by adding the following exceptions:

I Exception Number	II Applicable Zone	Exception Provisions		
		III Additional Land Uses Permitted	IV Land Uses Prohibited	V Provisions
365r	O1[365r]	- community centre - golf course - marine facility - one detached dwelling accessory to a golf course or marina - place of assembly limited to a club		
366r	AG2[366r]	- cemetery - one detached dwelling accessory to a cemetery - place of assembly limited to: (i) one building containing a		

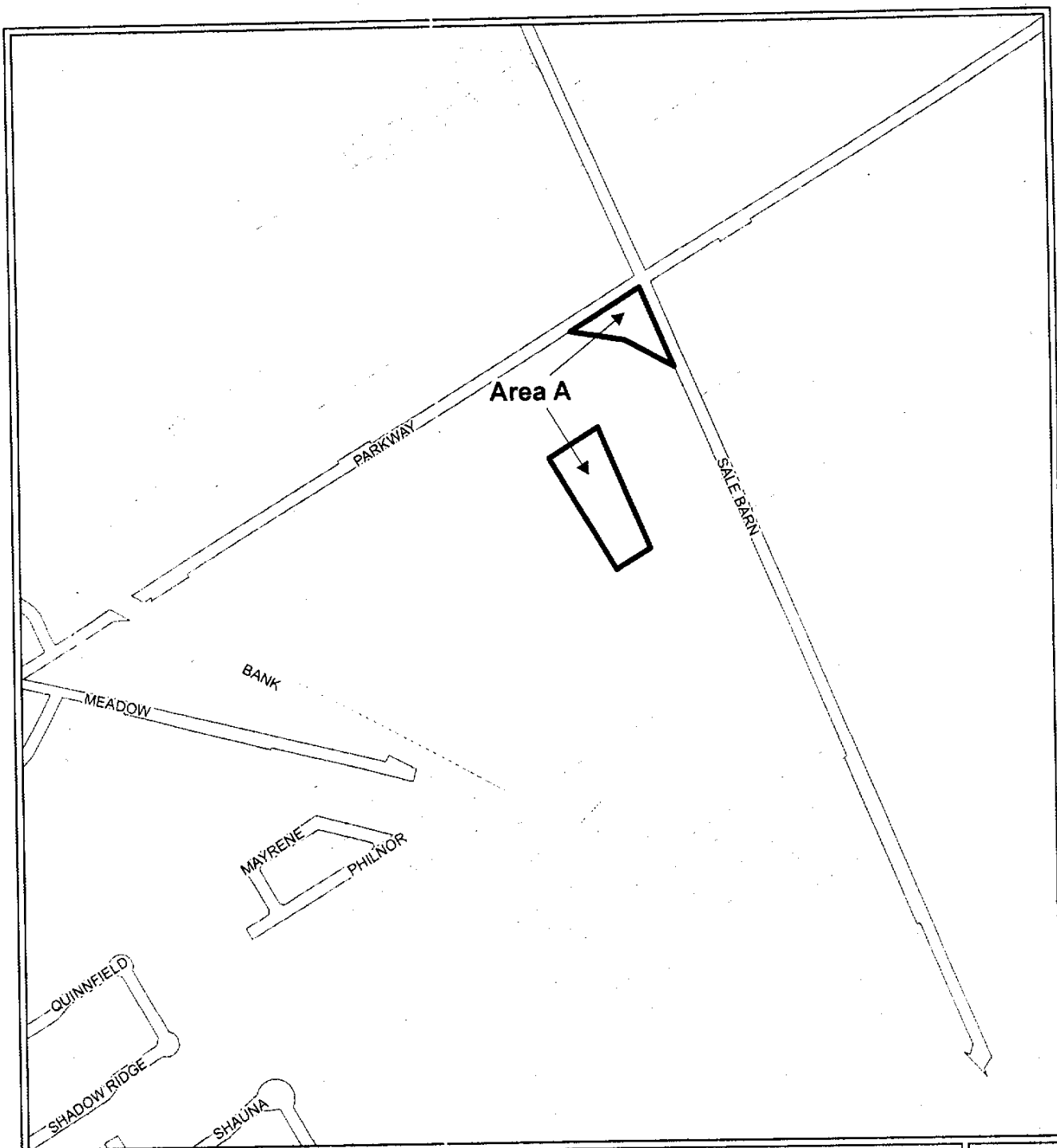


		visitor's centre accessory to a cemetery, and (ii) an auditorium or a club - place of worship		
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ENACTED AND PASSED this 25<sup>th</sup> day of February, 2010.

CITY CLERK

MAYOR



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 and Community Sustainability  
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 et Viabilité des collectivités

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**Lands Affected Part of  
 The Zoning Map  
 of By-law No. 2008-250**

This is Attachment 1 to By-law Number \_\_\_\_\_, passed \_\_\_\_\_, 2010

**Lands Affected by By-law**

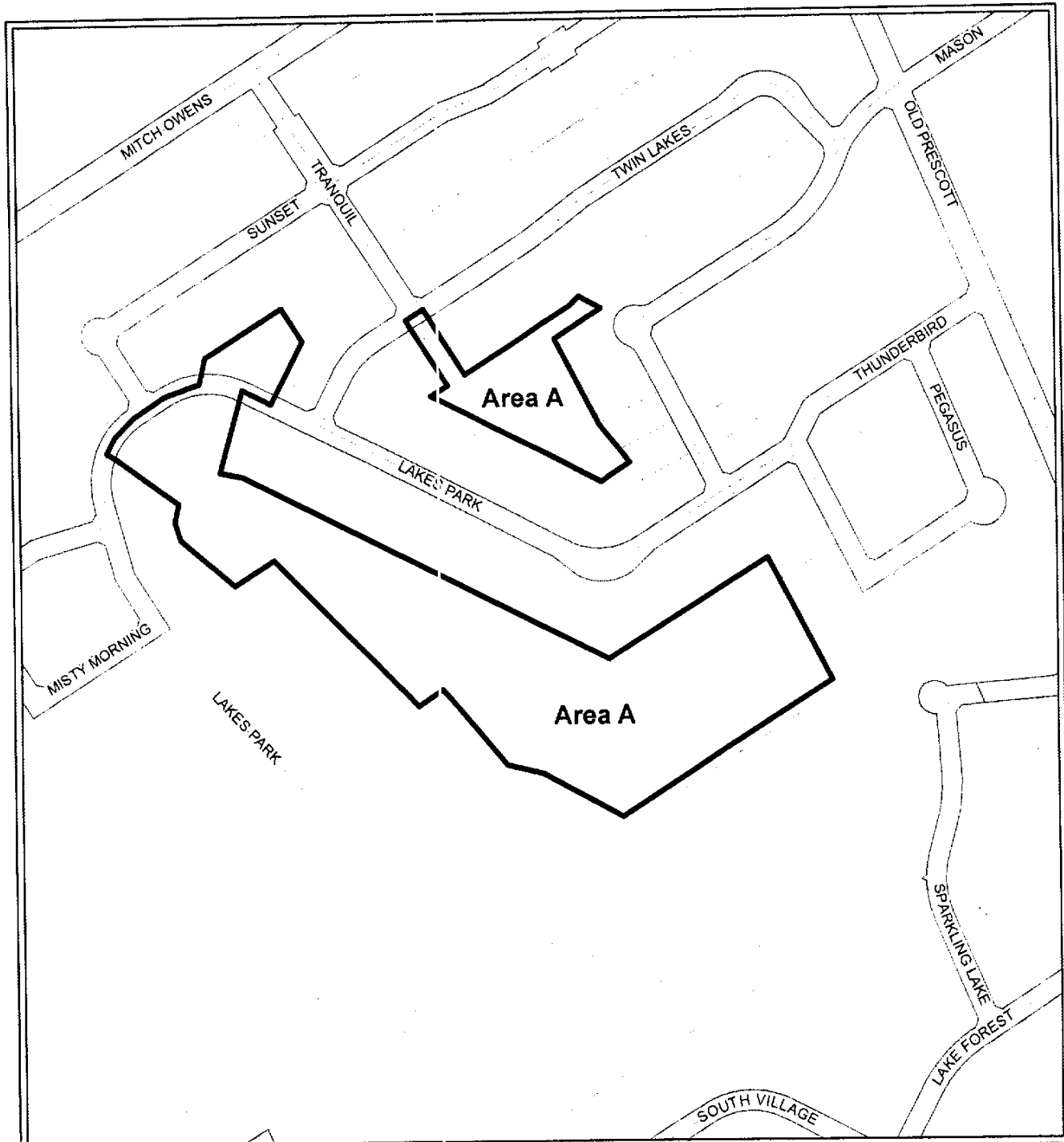
Area A rezoned from O1 to O1[365r]

Flood Plain (Section 58)  
 Plaine inondable (Article 58)

( 43200501 Denotes Teranet-Polaris Parcel Identification Number

Échelle  
 N.T.S.  
 Mètres

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**Lands Affected Part of  
 The Zoning Map  
 of By-law No. 2008-250**

This is Attachment 2 to By-law Number \_\_\_\_\_, passed \_\_\_\_\_, 2010

**Lands Affected by By-law**

Area A rezoned from O1 to O1[365r]

043190223 Denotes Teranet-Polaris Parcel Identification Number

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**Lands Affected Part of  
 The Zoning Map  
 of By-law No. 2008-250**

This is Attachment 3 to By-law Number \_\_\_\_\_, passed \_\_\_\_\_, 2010

**Lands Affected by By-law**

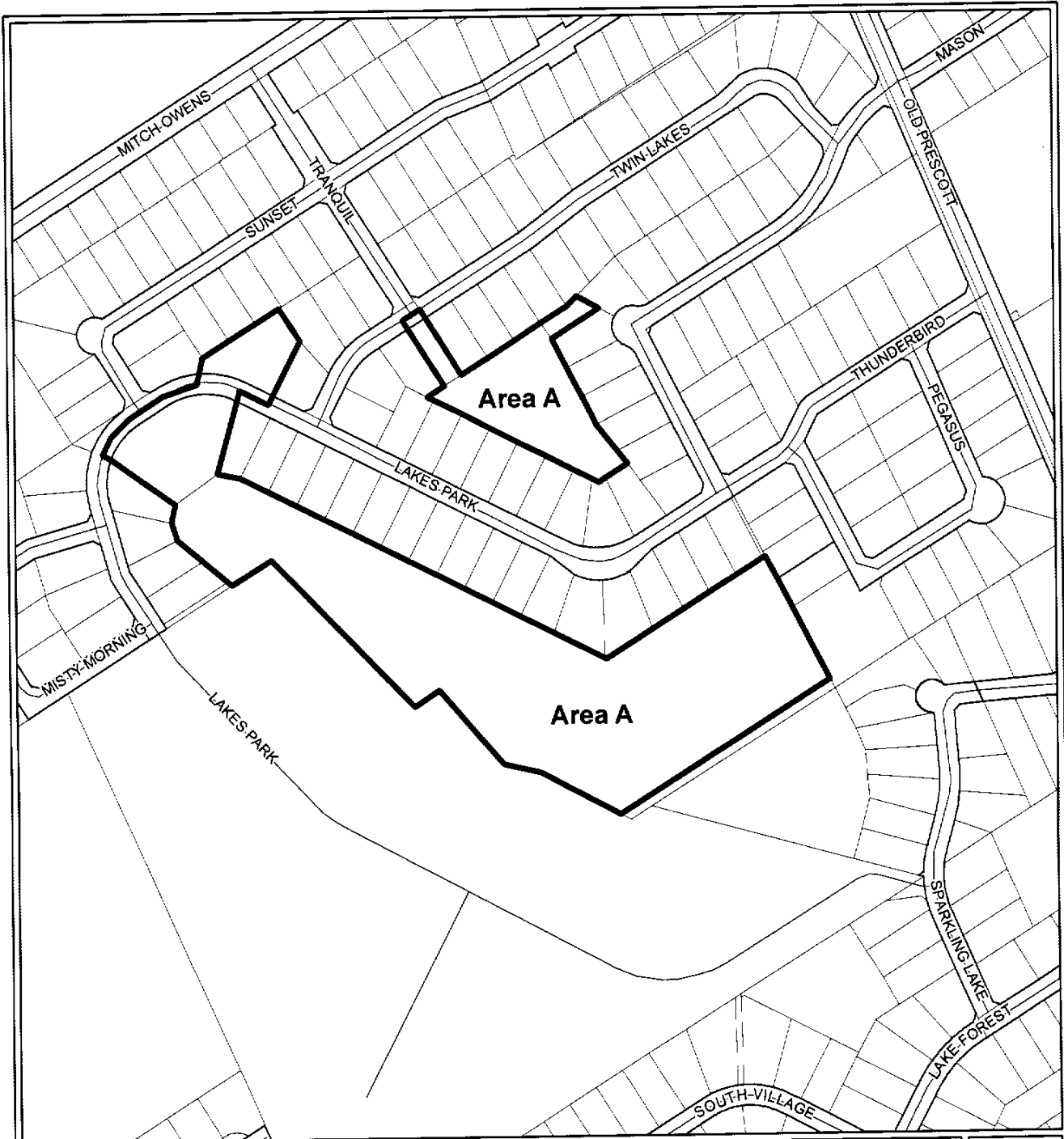
Area A rezoned from O1[621r] to O1[365r]

043192098 Denotes Teranet-Polaris Parcel Identification Number

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**Lands Affected Part of  
 The Zoning Map  
 of By-law No. 2008-250**

This is Attachment 2 to By-law Number \_\_\_\_\_, passed \_\_\_\_\_, 2010

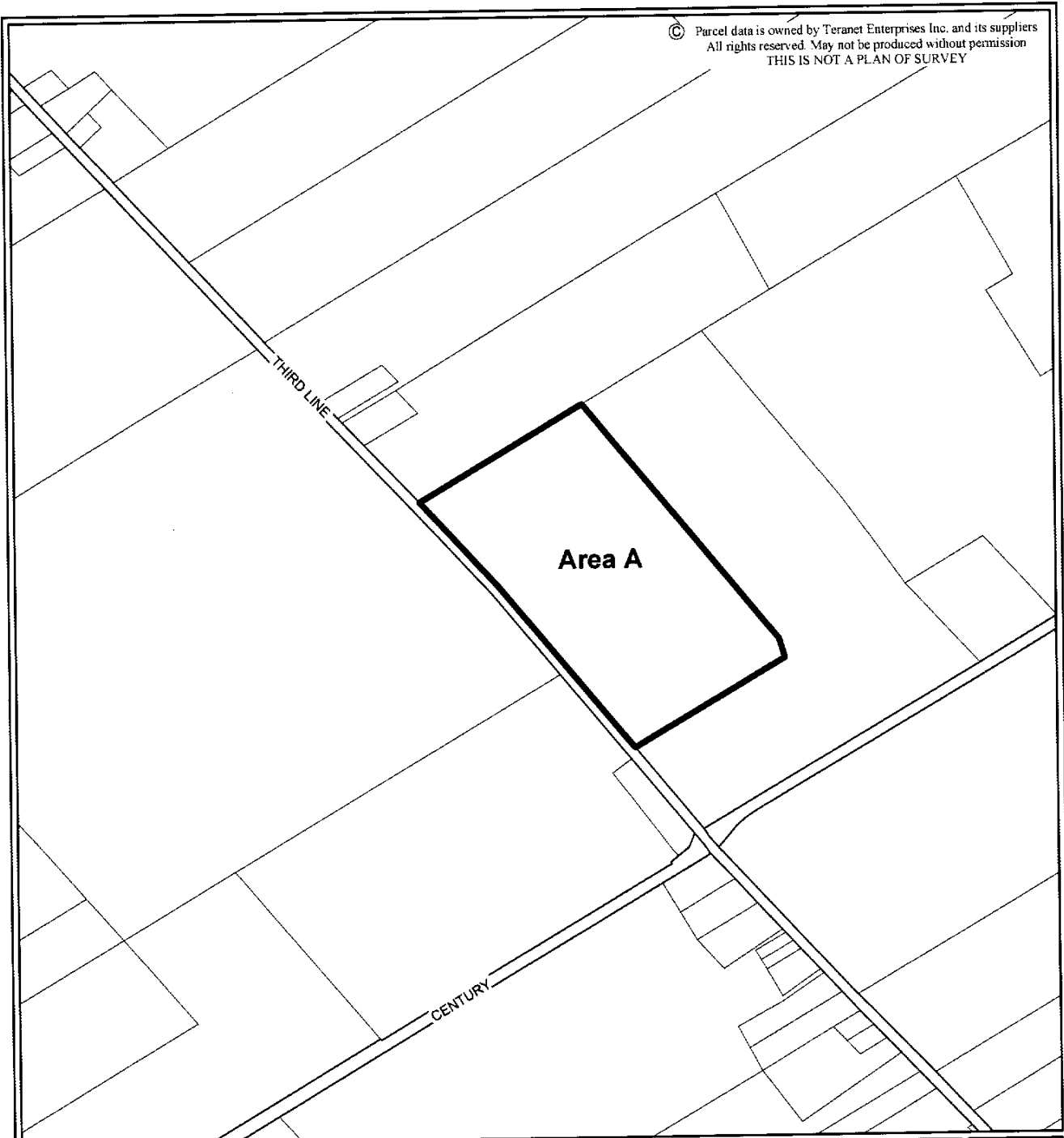
**Lands Affected by By-law**

Area A rezoned from O1 to O1[365r]

043190223 Denotes Teranet-Polaris Parcel Identification Number

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**Lands Affected Part of  
 The Zoning Map  
 of By-law No. 2008-250**

This is Attachment 4 to By-law Number \_\_\_\_\_, passed \_\_\_\_\_, 2010

**Lands Affected by By-law**

Area A rezoned from AG2 to AG2[366r]

039010014 Denotes Teranet-Polaris Parcel Identification Number

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## ATTACHMENT "3"

14

### ONTARIO MUNICIPAL BOARD ORDERED BY-LAW

A by-law of the City of Ottawa to amend By-law No. 2008-250 of the City of Ottawa to harmonize the treatment of drive-through facilities and various types of restaurants throughout the City and to rezone the property known municipally as 911 Watters Road.

The Ontario Municipal Board, pursuant to Section 34 of the *Planning Act*, R.S.O.1990, orders as follows:

1. Section 175 of By-law No. 2008-250, entitled the "City of Ottawa Zoning By-law" is amended by adding the following clause to subsection (1):

- (b) the following use is permitted only in association with amusement park, library, sports arena and theatre:  
**drive-through facility**

2. Section 186 of By-law No. 2008-250 is amended by:

- (1) deleting the uses **drive-through facility** and **restaurant** from the list of prohibited uses in clause (4)(c),
- (2) adding the use **drive-through facility** to the list of permitted uses in clause (5)(a),
- (3) adding the use **restaurant** to the list of permitted uses in clause (5)(b),
- (4) deleting the uses **restaurant, full service** and **restaurant, take-out** from the list of permitted uses in clause (5)(b).

3. Section 188 of By-law No. 2008-250 is amended by:

- (1) adding the use **drive-through facility** to the list of permitted uses in clause (2)(a),
- (2) adding the use **drive-through facility** to the list of permitted uses in clause (4)(a),
- (3) adding the use **drive-through facility** to the list of permitted uses in clause (5)(a),
- (4) adding the use **drive-through facility** to the list of permitted uses in clause (8)(a),
- (5) adding the use **drive-through facility** to the list of permitted uses in clause (9)(a),
- (6) adding the use **drive-through facility** to the list of permitted uses in clause (18)(a),
- (7) adding the use **drive-through facility** to the list of permitted uses in clause (21)(c).

4. Subsection 189(1) of By-law No. 2008-250 is amended by adding the use **drive-through facility** to the list of permitted uses.
5. Section 190 of By-law No. 2008-250 is amended by:
  - (1) adding the use **drive-through facility** to the list of permitted uses in clause (1)(a),
  - (2) adding the use **drive-through facility** to the list of permitted uses in clause (2)(a),
  - (3) adding the use **drive-through facility** to the list of permitted uses in clause (3)(a),
  - (4) adding the use **drive-through facility** to the list of permitted uses in clause (4)(a),
  - (5) adding the use **drive-through facility** to the list of permitted uses in clause (5)(a).
6. Clause 192(6)(a) of By-law No. 2008-250 is amended by adding the use **drive-through facility** to the list of permitted uses.
7. Section 200 of By-law No. 2008-250 is amended by:
  - (1) deleting the use **restaurant, fast-food** from the list of prohibited uses in clause (5)(a),
  - (2) deleting the use **drive-through facility** from the list of prohibited uses in clause (6)(b),
  - (3) adding the use **restaurant** to the list of permitted uses in subsection (7).
8. Section 202 of By-law No. 2008-250 is amended by adding the use **restaurant, fast-food** to the list of permitted uses in clause (1)(b).
9. Section 204 of By-law No. 2008-250 is amended by:
  - (1) deleting the use **restaurant, full service** from the list of permitted uses in clause (4)(a),
  - (2) adding the use **restaurant** to the list of permitted uses in clause (4)(a),
  - (3) deleting the uses **drive-through facility, restaurant, fast food** and **restaurant, take out** from the list of prohibited uses in clause (5)(a),
  - (4) deleting the uses **restaurant, fast food** and **restaurant, take out** from the list of prohibited uses in clause (6)(b),
  - (5) adding the uses **restaurant** to the list of permitted uses in clause (9)(b),



- (6) deleting the uses **restaurant, full-service** and **restaurant, take-out** from the list of conditionally permitted uses in clause (9)(b),
  - (7) adding the uses **drive-through facility** to the list of conditionally permitted uses in clause (9)(b),
  - (8) adding the following clause to subsection (9):
    - (e) **drive-through facility** is only permitted in association with the uses in 204(9)(b) and only when these uses are located within a building containing one or more of the uses listed in 204(9)(a).
10. Section 206 of By-law No. 2008-250 is amended by:
- (1) deleting the uses **restaurant, full service** and **restaurant, take out** from the list of permitted uses in clause (1)(a),
  - (2) adding the use **restaurant** to the list of permitted uses in clause (1)(a),
  - (3) deleting the uses **restaurant, full service** and **restaurant, take out** from the list of permitted uses in clause (2)(a),
  - (4) adding the use **restaurant** to the list of permitted uses in clause (2)(a),
  - (5) deleting the use **drive-through facility** from the list of prohibited uses in clause (4)(a),
  - (6) adding the following clause to subsection 206(4):
    - (d) **drive-through facility** is only permitted in association with a permitted use when the permitted use is located within a building containing other permitted uses.
  - (7) adding the use **drive-through facility** to the list of permitted uses in clause (7)(a),
  - (8) adding the following clause to subsection 206(7):
    - (c) **drive-through facility** is only permitted in association with the uses in 206(7)(b) and only when these uses are located in the same building as a use permitted under clause 206(7)(a) above.
  - (9) deleting the uses **drive-through facility, restaurant, fast food** and **restaurant, full service** from the list of prohibited uses in clause (8)(b),
  - (10) deleting the uses **drive-through facility, restaurant, fast food** and **restaurant, full service** from the list of prohibited uses in clause (9)(a),
  - (11) adding the use **drive-through facility** to the list of permitted uses in clause (10)(b),

11. Section 219 of By-law No. 2008-250 is amended by:
- (1) adding the use **drive-through facility** to the list of permitted uses in subsection (1),
  - (2) deleting the use **drive-through facility** from the list of permitted conditional uses in subsection (2),
  - (3) deleting clause (2)(c) and re-lettering clause (2)(d) to (2)(c).
12. Section 221 of By-law No. 2008-250 is amended by:
- (1) adding the use **drive-through facility** to the list of permitted uses in subsection (1),
  - (2) deleting the use **drive-through facility** from the list of permitted conditional uses in subsection (2),
  - (3) deleting clause (2)(c) and re-lettering clause (2)(d) to (2)(c).
13. Clause 230(1)(a) is amended by adding the use **restaurant** to the list of permitted uses effective on February 24, 2011.

14. Section 239 – Urban Exceptions of By-law No. 2008-250 is amended by adding the following exception:

I Exception Number	II Applicable Zone	Exception Provisions		
		III Additional Land Uses Permitted	IV Land Uses Prohibited	V Provisions
1729	LC5[1729]	restaurant, fast-food		

15. Section 239 of By-law No. 2008-250 is further amended by:
- (a) deleting the word “commercial” in column IV of exception 51 and replacing it with “non-residential”,
  - (b) adding the use “-drive-through facility” to column IV of exception 338
16. The Zoning Map of By-law No. 2008-250 is amended by rezoning the lands shown as Area A on Attachment 1 from LC5 to LC5[1729].

ORDERED this 25<sup>th</sup> day of February, 2010.



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**Lands Affected Part of  
 The Zoning Map  
 of By-law No. 2008-250**

This is Attachment 1 to By-law Number \_\_\_\_\_, passed \_\_\_\_\_, 2010

**Lands Affected by By-law**

Area A Rezoned from LC5 to LC5[1729]

145120734 Denotes Teranet-Polaris Parcel Identification Number

Échelle  
 N.T.S.  
 Mètres

Scale  
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 Metres

7. BY-LAW 2008-250, LEGAL, NON-CONFORMING USES, MOTION FOR LEAVE TO APPEAL  
RÈGLEMENT 2008-250, UTILISATIONS LÉGALES DÉROGATOIRES, MOTION EN  
AUTORISATION D'APPEL

COMMITTEE RECOMMENDATION

That Council confirm the seeking of leave to appeal by the City Clerk and Solicitor in respect of the decision of the Ontario Municipal Board concerning Section 3 of By-law 2008-250.

RECOMMANDATION DU COMITÉ

Que le Conseil confirme que le greffier municipal et chef du contentieux cherche à obtenir l'autorisation d'en appeler de la décision de la Commission des affaires municipales de l'Ontario concernant l'article 3 du Règlement 2008-250.

DOCUMENTATION

1. City Clerk and Solicitor's report dated 31 August 2009 (ACS2009-CMR-LEG-0020).
2. Extract of Draft Minutes, 8 September 2009.

**Report to/Rapport au :**

**Planning and Environment Committee  
Comité de l'urbanisme et de l'environnement**

**and Council / et au Conseil**

**31 August, 2009/le 31 août 2009**

**Submitted by/Soumis par : M.Rick O'Connor, City Clerk and Solicitor/Greffier et Chef du contentieux**

*Contact Person/Personne ressource : Timothy Marc, Senior Legal Counsel  
Legal Services/Services juridiques  
(613) 580-2424 x21444, timothy.marc@ottawa.ca*

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City Wide/à l'échelle de la ville Ref N°: ACS2009-CMR-LEG-0020

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**SUBJECT: BY-LAW 2008-250, LEGAL, NON-CONFORMING USES, MOTION FOR LEAVE TO APPEAL**

**OBJET : RÈGLEMENT 2008-250, UTILISATIONS LÉGALES DÉROGATOIRES, MOTION EN AUTORISATION D'APPEL**

**REPORT RECOMMENDATION**

**That Planning and Environment Committee recommend that Council confirm the seeking of leave to appeal by the City Clerk and Solicitor in respect of the decision of the Ontario Municipal Board concerning Section 3 of By-law 2008-250.**

**RECOMMANDATION DU RAPPORT**

**Que le Comité de l'urbanisme et de l'environnement recommande au Conseil de confirmer que le greffier municipal et chef du contentieux cherchera à obtenir l'autorisation d'en appeler de la décision de la Commission des affaires municipales de l'Ontario concernant l'article 3 du Règlement 2008-250.**

**BACKGROUND**

Following upon the second Ontario Municipal Board pre-hearing in February, 2009, a series of hearings have been scheduled with respect to sections of the comprehensive zoning by-law, By-law 2008-250, that have been appealed to the Ontario Municipal Board.

One of the matters appealed to the Board by The TDL Group Corporation was Section 3. The text of Section 3 is attached as Document 1 to this report. The principal thrust of the appeal by TDL was that the relevant legislation, *Planning Act*, does not permit a municipality to prohibit voluntary damage or destruction, and the subsequent repair or replacement, of a legal, non-conforming use if the repaired or successor building complies with the legal, non-conforming rights that it had 34(9). That clause reads as follows:

34(9) No by-law passed under this section applies,

- (a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose;

TDL also advanced the position that as “damage” within the by-law is an undefined term, the language of the by-law could conceivably prohibit the replacement of doors or windows, exterior work on a building or roof repair.

The matter came before the Board in June 2009 with the decision of the Board being released on July 28, 2009. While the City did present authority directly on point providing that voluntary demolitions resulted in the termination of legal, non-conforming rights, the Board was of the view that such a decision was inconsistent with the general direction of higher level court decisions. The Board concluded as follows:

The cases cited by the Appellant, especially the decisions of the Supreme Court of Canada, *Central Jewish Institute v. City of Toronto* and *Saint-Romuald (City) v. Olivier* affirm the right of a landowner to continue with a legal non-conforming use.

The Board therefore directed that Section 3 be repealed. The link to the Board’s decision is under Supporting Documentation.

Pursuant to the Delegation of Authority By-law, Schedule “A”, Section 36, the City Clerk and Solicitor is authorized to take any necessary action to protect the legal position of the City. A Notice of Motion for Leave to Appeal was therefore filed with respect to the decision of the Board and confirmation of this action is now being sought from Committee and Council.

DISCUSSION

It has been a long-standing common understanding that the voluntary demolition of a building leads to the end of any legal, non-conforming rights. While Clause 34(9)(a) of the Planning Act protects the status of a building at the time the applicable zoning is changed, where such building is voluntarily demolished, it is the view of Legal Services that it cannot be said to be “continued to be used for” its purpose as existing on the date the by-law was enacted. As a result, it is the opinion of Legal Services that the decision is incorrect in law and ought to be reversed by the Divisional Court.

Further, Subsections 3(6), (7) and (8) of the comprehensive zoning by-law actually grant additional rights to those allowed by the *Planning Act*, Clause 34(9)(a). In particular, Subsection 3(8) permits development on lots of record in certain rural zones (RU, V1, V2, V3 or VM) even though the lot is substandard in area or width. TDL did not request the repeal of these three subsections but their repeal was nonetheless ordered by the Board. It is the opinion of Legal Services that the repeal of these three subsections had no foundation in the evidence and argument proffered to the Board and the Board thus also erred in law with respect to these subsections.

In order to be granted leave to appeal, the following two-part test must be satisfied:

1. There must be reason to doubt the correctness of the decision of the Ontario Municipal Board; and
2. The matter must be of sufficient importance to warrant the attention of Divisional Court.

As discussed above, it is Legal Services' view that there is reason to doubt the correctness of the Board's decision. As to the second part of the test, given the admitted widespread utilization of provisions such as Section 3 by municipalities, it is also Legal Services' opinion that this is a significantly important matter to warrant the attention of the Court.

#### RURAL IMPLICATIONS

The repeal of Subsection 3(8) concerning lots of record in rural areas of the City has significant rural implications. It has been agreed by the Chair of the Agriculture and Rural Affairs Committee that in order to permit this report to be considered by Council on 23 September 2009 that this report would only rise to Planning and Environment Committee prior to submission to Council.

#### CONSULTATION

The TDL Group Corp has been advised that this report will be considered by Committee on 8 September 2009.

#### FINANCIAL IMPLICATIONS

The Motion for Leave to Appeal can be accommodated within the budget for the City Clerk and Solicitor department.

#### SUPPORTING DOCUMENTATION

Document 1-By-law 2008-250, Section 3, Link to Decision of Ontario Municipal Board:

<http://www.omb.gov.on.ca/e%2Ddecisions/pl080959%2Djul%2D28%2D2009.pdf>

#### DISPOSITION

City Clerk and Solicitor to pursue Motion for Leave before Divisional Court.

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**DOCUMENT 1**  
**SECTION 3**  
**BY-LAW 2008-250**

3. (1) Nothing in this section affects subsection 34(9) of the *Planning Act, R.S.O. 1990*, Excepted Lands and Buildings, which addresses non-conforming uses.
- (2) No person will repair or rebuild any part of any building housing or otherwise used in connection with a non-conforming use, except as set out in subsection (3).
- (3) When a building, structure, facility or otherwise, including septic and other servicing systems, used in connection with a non-conforming use is damaged or demolished, the non-conforming right is not extinguished if: (By-law 2008-462)
  - (a) the damage or demolition was involuntary;
  - (b) the building is repaired or re-occupied before the expiry of two years; and
  - (c) the building continues to be used for the same purpose after it is repaired as it was used before it was damaged or demolished.
- (4) Non-conforming rights are extinguished:
  - (a) where the damage, demolition or removal of a building is not involuntary;
  - (b) where a damaged building is not repaired or re-occupied before the expiry of two years; or
  - (c) where the non-conforming use,
    - (i) is abandoned, or
    - (ii) is changed without permission from the Committee of Adjustment.
- (5) This section applies, with all necessary modification, to a non-complying building.
- (6) Despite subsection (2), an addition to an existing principal building; a new accessory building, or an addition to an accessory building on land that is legally non-complying with respect to lot width or lot area is permitted if:
  - (a) the addition or new accessory building conforms to all other provisions of this by-law; and
  - (b) no additional dwelling units, rooming units or secondary dwelling units are created.
- (7) Despite subsection (5):
  - (a) a permitted use in a building or lot that does not comply with the regulatory provisions of this by-law may change to another permitted use without the need for a minor variance from the Committee of Adjustment, provided that the regulatory provisions are no more restrictive for the new use.
  - (b) the construction of an addition to a building or a permitted projection into a yard of a building that does not comply with the provisions of this by-law, is permitted without the need for a minor variance from the Committee of Adjustment, provided that:
    - (i) where compliance of certain provisions has been met with the existing building, compliance must be maintained;
    - (ii) any addition or a permitted projection into a yard to a non-complying building that proposes to expand the existing non-complying building envelope must move towards compliance with the zoning regulations such that the extent of the proposed addition falls at least halfway between the required provision and existing



non-complying situation; and (By-law 2009-164)

(iii) despite subclause 3(7)(b)(ii), this provision does not apply to building height or parking.

(8) Despite Section 2 - Compliance with Zoning By-law, development is permitted on any vacant lot existing as of the date of adoption of this by-law and which lot is legally non-complying with respect to lot width or lot area provided:

- (a) the proposed use is a use permitted in the zone in which the lot is located;
- (b) the proposed use does not contravene any other zone provisions; and
- (c) the lot is zoned RU, V1, V2, V3 or VM.