

ISSUE DATE:

**February 3, 2012**



PL110080

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

IN THE MATTER OF subsection 17(36) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant: 1541179 Ontario Ltd. and Lea Silvestri Investments Ltd.  
(jointly)  
Appellant: 1589805 Ontario Inc.  
Appellant: 2140065 Ontario Inc.  
Appellant: 2163846 Ontario Inc. and others  
Subject: Proposed Official Plan  
Municipality: Regional Municipality of Waterloo Region  
OMB Case No.: PL110080  
OMB File No.: PL110080

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

Regional Municipality of Waterloo

B. Duxbury\*

Lea Silvestri Investments Ltd.  
1541179 Ontario Ltd.

P. Pickfield\*

Activa Holdings Inc.  
2140065 Ontario Inc.  
Stonefield Properties Corp.  
Northgate Land Corp.  
Hallman Construction Ltd.  
Gatestone Development Corp.

R. Howe\* and I. Andres\*

Brenda and Rusty Brissette

B. Brissette

Breslau Properties Ltd.

J. Doherty\*

Madison Homes Inc.

B. Horosko\*

Ministry of Municipal Affairs and Housing

P. Singh (Student at Law)

Plains Westmount Farms Limited  
Wonderland Farms Limited

P. Kraemer\*

Mattamy Development Corporation

L. Townsend\* and J. Meader\*

**Participants**

Rare

L. Robson

Empire Communities – Riverland Ltd.

P. DeMelo\*

**DECISION DELIVERED BY N. C. JACKSON AND ORDER OF THE BOARD**

**Background**

The Regional Municipality of Waterloo adopted a new Official Plan (ROP) on June 16, 2009. The intent was conformity with the Provincial Growth Plan “Places to Grow: Growth Plan for the Greater Golden Horseshoe” (GP). The ROP has been through a considerable public process leading to its adoption and subsequent approval by the Minister of Municipal Affairs and Housing on December 22, 2010. Following Notice of Decision by the Province, 26 Appeals were received. One Appellant has withdrawn. In Ontario Municipal Board (Board) prehearings, eight Participants were added for the future Hearing event.

When there was little or no agreement on the phasing of Appeals, the Board conducted, in a separate stream from the Hearing, a Mediation, wherein it was agreed that:

1. Phasing would be determined by Motion before the Board.
2. The issue of the appropriate Planning Horizon would be determined by the Board on a separate Motion.
3. Housing Mix as part of a Land Budget would not be determined by Motion but in the Hearing where the context may be set with *viva voce* testimony.

Motions 1 (respecting phasing) and 2 (respecting the Planning Horizon) were scheduled for December 15 and 16, 2011, and January 12 and 13, 2012, respectively.

The Decision on the Phasing Motion was reserved and issued on December 29, 2011. That Motion brought by the Regional Municipality of Waterloo (Region) succeeded. The Board ordered the Land Budget phase to proceed first on April 16, 2012, as requested by the Region and the circulation of a draft Procedural Order.

Motion 2 respecting the Planning Horizon proceeded on January 15 and 16, 2012, following which, the Board reserved its decision.

First the Board will deal with housekeeping matters on consent:

1. Mattamy by affidavit in the December Motion suggested that the Planning Horizon be determined in the context of a hearing with the Land Budget and not by Motion. That Position by Mattamy is now abandoned.
2. Counsel Duxbury confirmed the circulation of the draft Procedural Order for the April 16, 2012, Hearing but indicated there was now concurrence of Counsel on a May 22, 2012, commencement date. The Board amends its calendar to so reflect. Following the issuance of this January Motion Decision on the Planning Horizon, the Board requests Counsel Duxbury of the Region to consult with other counsel respecting a further Prehearing Conference by Telephone or by Appearance.
3. Counsel Doherty confirms that his Appearance in the present Motion and the December Motion is on behalf of Breslau Properties Ltd.. The Appearance list for the December 29 Decision is amended to reflect this.
4. V. Bacher was present on the December Motion for clients and to report to the Province. No position was taken by the Province on the December Motion. The Province requests its removal from the December 29, 2011, Appearance list and such is amended accordingly.
5. Counsel Costello, on behalf of Woolwich Township, confirmed to the Board planner that Aggregate Issues are scheduled under mediation. There is no request for an earlier Aggregate Hearing Phase in the manner of her written Response on the December Motion. No request is now made for an earlier Aggregate Hearing Phase.

### **The Motion by the Region on the Planning Horizon**

The Region by Notice of Motion with supporting Affidavit seeks an Order from the Board that the Planning Horizon adopted in the ROP as of 2029 is appropriate and in conformity with the GP. The Motion is also supported by a Reply Affidavit, and written Outline of Submissions together with a Brief of Authorities. The ROP Motion is opposed by Mr. Howes' clients as a group, who have filed a Response together with an affidavit and later, Written Submissions and a Brief of Authorities. The Motion is opposed by Mattamy with a Response, Affidavit and Factum. Counsel Pickfield's clients oppose the Regions Motion and have filed a Response and planning affidavit. Breslau Properties Ltd. opposes the Regions Motion in a filed Response with a planning affidavit. Madison Homes filed a written Response opposing the Regions Motion. Counsel have cross-examined three of the planning deponents to the Affidavits filed and the Transcripts of the Cross examinations, together with exhibits and undertakings to the Transcripts, are filed as exhibits. Counsels Kraemer and DeMelo oppose the Regional Motion but filed no written responses and made no arguments. Rare supports the Region, but without a written Response and without an Oral Argument.

The Board's Rules set times for the setting down of the Motion and for written Responses. There are no objections based upon timeliness or as to jurisdiction. The Board is aware of Bill 51 *Planning Act* amendments that restrict appeals on Urban Boundary issues (no further private Appeals). In this case, the Urban Boundary Appeals are respecting a new ROP (not Private Appeals). The Region on consent as to jurisdiction has brought this opposed Motion to the Board for adjudication. Those opposed to the Region's Motion argue that the appropriate planning horizon, in conformity with the GP, is the year 2031.

There is no dispute that the growth management provisions of the 2005 Provincial Policy Statement (PPS) continue to apply. However, the GP provides that generally it applies in the case of a conflict subject to exemptions (exceptions do not apply in this case). It is primarily the GP upon which the Parties argue conformity. The GP imposes the requirement of conformity, while the PPS test is "consistency with". There is no dispute that the more onerous test is "conformity with".

The Region acknowledges the many references to the year 2031 in the GP and in particular to the population and employment numbers allocated to the Region in Schedule 3 of the GP, and that it is required to use those numbers in the land budget exercise and urban boundary determination. The Region argues, however, that paragraph 2.2.2.8(b) of the GP restricts the Region to a Planning Horizon not exceeding 20 years. The Region asserts the 20 years would run from the date of adoption of the ROP on June 16, 2009, to the year 2029. The Region acknowledges that its land budget figures to the year 2029 of 712,000 population and 359,000 employment are accordingly less population and employment than used by the Province in Schedule 3 to the GP- 729,000 population and 366,000 employment to the year 2031. The Region has downwardly adjusted the Provincial population and employment numbers, based upon the shorter planning horizon used by the Region-2029 versus the Provincial at 2031. The Region in a Reply affidavit, asserts that it can make up the Provincial numbers on population and employment later in a five year review of its new ROP, under section 26 of the *Planning Act*.

Key to making this important determination is an understanding of the changes to the GP as it evolved, planning practice under the GP including public process, adoption, Ministerial approval, Appeals to this Board, and when the ROP comes into effect. This Board had the benefit of Hansard when interpreting the new Bill 51 provisions to amend the *Planning Act*. The GP amendments, GP itself, and resultant planning practice and *Planning Act* provisions with regard to effective dates, are the best interpretative aids the Parties have put to the Board to assist in the context of an Order in Council approval to determine the running of a planning period to its horizon(from what point in time to what date).

The Board has held, in growth management cases under the PPS, that the Planning Horizon is the choice, based upon planning reasons, of the municipality undertaking this type of important review (Region of Halton Official Plan Amendment No.25 (2005) 51OMBR453 and City of Ottawa vs Greater Ottawa Homebuilders 2011, Board file PL100206). Notwithstanding the similar reference in the PPS to a planning horizon up to 20 years (contrasted to not exceeding 20 years in the GP), the Ministry of Municipal Affairs and Housing as the initial approval authority has approved of Official Plans Amendments based upon more than 20 years from the start date and from the adoption date (City of Ottawa vs Homebuilders IBID).

## **Evolution of the GP**

The *Places to Grow Act 2005* requires municipal councils to amend their official plans to conform with the GP before the third anniversary of the date on which the GP had come into effect. The GP came into effect on June 16, 2006. The ROP was adopted on June 16, 2009. The Province issued Notice of Decision, approving on January 4, 2011. 26 Appeals were filed in the 20-day appeal period that followed. All of the ROP has been appealed.

The first draft of GP is referred to by the Region to contrast with the final GP. Kevin Eby in his first affidavit, states that the Growth Plan first released in November 2005 as a draft did not contain the maximum 20-year restriction on expansions as was contained in the Growth Plan that was ultimately approved in Council by the Lieutenant Governor. He states the 20-year restriction as outlined in Policy 2.2.8.2(b), was a modification by the Province. It is important to review all relevant modifications. In the first draft, policy 2.2.8 1 provided that “ the Minister of Public Infrastructure Renewal, in consultation with individual upper and single tier municipalities, will determine the need for, and maximum amount of, additional designated Greenfield area required for each upper and single tier municipality to accommodate the growth forecasts contained in Schedule 3.” In the final GP, this policy regarding the Minister determining the need for, and amount of additional designated Greenfield area required to accommodate the growth forecasts in Schedule 3 was deleted. It had been contemplated that the Province would perform a dual role of forecasting growth in all municipalities and then determining the need for, and amount of, additional designated Greenfield area to accommodate the growth forecasts in Schedule 3.

Prior to the GP, growth management under the PPS had neither the Provincial forecasts nor the determined accommodation to meet that growth. Municipalities undertaking growth management exercises under the PPS in more complex land budgeting exercises had to forecast their own growth and then determine the accommodation of the growth. Policy 1.1.2 of the PPS reflects the need for sufficient land to be made available through intensification and redevelopment and if necessary, designated growth areas for an appropriate range and mix of employment opportunities, housing and other land uses, to meet projected needs for a time horizon of up to 20 years.

In the first draft of the GP, both the forecasting in Schedule 3 and the allocations were contemplated as Provincial functions. As the Region argues, that changed in the final GP when forecasting remained Provincial in Schedule 3, but the determination of the accommodation of that growth was deleted as a provincial responsibility. Policy 2.2.8.2 was deleted, as was 2.2.8.3(a), which read “the proposed expansion does not exceed the maximum amount of additional designated greenfield established in accordance with policy 2.2.8.2” (Minister’s determination of accommodation).

Also modified in the final text of the GP, was Policy 2.2.1. This had read “Population, household and employment forecasts for all upper- and single-tier municipalities contained in Schedule 3 will be used as the basis for planning and managing growth in the GGH.” Among the changes the words “as the basis” were deleted. The words “will be used” remained.

It is argued that the insertion of policy(b) “the expansion makes available sufficient lands for a time horizon not exceeding 20 years, based on the analysis provided for in Policy 2.2.8.2(a)” provides a limit on the planning horizon. Policy 2.2.8.2(a) references growth forecasting in Schedule 3 wherein, clearly, the 2031 planning horizon is set out. This is the ultimate issue; how to make sense of the positive 2031 reference and the negative limit of 20 years when both are used in close reference to each other. The task is to determine if logically they can be read together or not. The Region, based upon the timing of its exercise, felt the need to adjust the Provincial growth forecasting in Schedule 3 to meet the 20-year limit, counting from the date of adoption and running to 2029.

### **Planning Practice in the GGH under the GP**

The Region admits it is facing an uphill battle when considering planning practice in the GGH. All municipalities in the GGH covered by the GP have commenced GP analyses and exercises leading up to the adoption of Official Plan Amendments, as required by the *Growth Plan Act*. Most adopted Plans in the required three-year period, and some sought and received extensions. All adopted Plans to date, excepting the Region of Waterloo, have used the Schedule 3 GP forecasts without adjustment. Materials in exhibit 7 show that the Regions of Peel, York, Durham, Halton, Niagara and the City of Hamilton have all used the Schedule 3 forecasts of the Province with the

2031 planning horizon year. Exhibit 3 shows the 2031 list to also include Brant County, City of Brantford, Dufferin County, City of Guelph, Haldimond County, Kawartha Lakes, Northumberland County, City of Peterborough, Peterborough County, Simcoe County, City of Toronto and Wellington County. Exhibit 7 shows that the adoption dates generally occurred in 2009. There are differences in the dates of Ministerial approval. Ministry comments in the approval process did not object to the 2031 planning horizon. All OPs adopted and approved are subject to Appeals and are not yet in effect. As a result, this planning practice as an interpretative tool in the use of the provincial time horizon 2031 is informative, but limited and not determinative. This issue has not yet been adjudicated. The Region reminds the Board that in the case of Waterloo Region, the Minister, after the lodging of its Plan with the Ministry for approximately 18 months, did approve the Waterloo Plan, with the Horizon of 2029 intact.

### **Planning Practice in the Waterloo Region**

Based upon Mr. Ebys' affidavit, lower tier municipalities in Waterloo have, in their GP analysis, used the 2029 planning horizon year. The lower tier work has not proceeded to adoption and is awaiting the disposition of Appeals on the ROP. This planning background at the lower tier in this Region is also informative but self serving since the local official plans must conform to the ROP. More to the point, is the planning process followed for the ROP in the Region and what planning horizon was in use in public meetings and information sessions leading up to the adoption of the ROP? When a Planning horizon as a fundamental part of a growth management exercise is stipulated early as a planning consideration and followed consistently to completion with elucidation on the many assumptions and response from the public on a consistent horizon apparent, it can strengthen the Plan when under attack later.

Growth Management exercises are complex and often time consuming processes involving significant planning and land economic work. The Region commenced its growth management strategy in 2001 which led to the adoption of a Regional Growth Management Strategy by Council in 2003. The Regional Growth Management Strategy was based upon a time horizon of 30 years (2031) which was later extended to 2040. The Regional Growth Management Strategy was the subject of extensive public consultation. This Regional Growth Management Strategy is reflected in the ROP with language that the ROP is consistent with, and compliments, the



Regional Growth Management Strategy. The ROP process at its inception in 2005 was in public process, repeatedly referred to as a blueprint for growth to 2031. It was intended to link land use, infrastructure and human services for the year 2031. Newsletters referred to a fixed, long term planning horizon of 2031 and to the GP projected population for the Region of 729,000 by 2031. The references were to the Regional Plan 2031. These references continued after the GP came into effect.

The Region does not dispute that its planning reflected initially, the 2031 Horizon approved by the Council. The Region's position is that it changed with the final growth Plan modification in 2.2.8.2(b) (20 year limit). There are, however, references to 2031 in public process after the GP came into effect. In one later newsletter, the Region references both 2031 and the next 20 years. Only with the Land budget and the drafting of the ROP in the latter part of the public process was it clear that the 2029 Planning Horizon was used as the basis of the ROP.

### **Coordination in the Region of land use planning and infrastructure planning**

Reference is made in policy 2.2.8.2(e) of the GP to the existing or planned infrastructure required to accommodate the proposed expansion, to be provided in a financially and environmentally sustainable manner. Similar references in the GP policies 3.2.1 and 3.2.2.2 link transportation and land use planning. Both the GP and the PPS intend there to be coordinated efforts between the planning for growth itself and for the related infrastructure. The PPS in policies 1.2.1 and 1.6 makes specific reference to the coordination between planning and infrastructure. The use of 2029 in the ROP is not coordinated with infrastructure planning when different planning horizons are in place. The Regional Transportation Master Plan approved by Council in 2010 used a planning horizon of 2031. The Regional Water Supply Strategy Report approved in 2007 uses a date of 2041, but references GP forecasts of 2031. The Regions Wastewater Treatment Master Plan's horizon is to 2041. The Regions Human Services Planning Framework uses growth to 2031. These documents contrast with the ROP planning horizon of 2029.

### **The Running of the 20 year limit in policy 2.2.2.8(b)**

The Region asserts that the 20-year cap runs from the date of adoption of the ROP in 2009, to 2029. It is crucial to determine whether the adoption date is effective as

a measuring stick. Section 12 of the *Places to Grow Act* requires Municipalities to amend their Official Plans to conform with the GP. The requirement is to be acted upon within the third anniversary of the GP. Amendments to Official Plans are to be within the three-year period. The adoption date is recognized in practice as an important date. The *Places to Grow Act* does not, however, establish the effective date of Official Plan amendment. The effective date of the Official Plan or amendment to the Official Plan rests in the process prescribed under the *Planning Act*.

In this case, the ROP is subject to approval from the Minister as the Approval Authority. Under 17(38) of the *Planning Act*, the ROP would come into effect if there were no Appeals on the last date for the filing of a Notice of Appeal. In this case, there were 26 Appeals. Under section 17(39) of the *Planning Act*, if all appeals are withdrawn the ROP would come into effect as an official Plan or amendment on the day the last outstanding appeal has been withdrawn. The Appeals remain and are now in adjudication.

Under section 17(47) of the *Planning Act*, if the Municipal Board dismisses all Appeals without a hearing, the Official Plan or Amendment comes into effect on the day the last outstanding appeal has been dismissed. If the Appeals proceed to Hearing, the Official Plan or Amendment comes into effect as the date of the Decision or Order of the Board (section 17(50) of the *Planning Act*). There is no backdating to the date of adoption, even if there were no Appeals. The intricate legislative framework of the *Planning Act* for when Official Plans and Official Plan Amendments may come into force (effect) is ample reason to explain a cautionary approach to a simple fast-forwarding in a straight line from the adoption date. On a careful reading of policy 2.2.8.2(b) which references in relation to the 20 years, it is clear the expansion makes “available” sufficient lands for the time horizon. Although available is not defined in the GP, there are similar references in the PPS.

It is apparent that possible later in force and effect dates for the ROP would make it consistent with both the 20-year cap in 2.2.8.2(b) and with the year 2031 Horizon in Schedule 3, and as referenced in the GP in:

1. the Introduction,
2. section 1.2 Vision to 2031,

3. section 1.4 How to read this plan,
4. section 2.2 Growth forecasts in Schedule 3 will be used,
5. section 2.2.4.5 urban growth centres planned to achieve by 2031.

The Board concludes that the bare calculation of 20 years from the adoption date to the year 2029 and the use of 2029 as the planning horizon do not conform with the GP. It follows that the Regional Motion seeking confirmation of the use of the planning horizon of 2029 fails. The Region's Motion is dismissed.

The Board so Orders

"N. C. Jackson"

N. C. JACKSON  
VICE - CHAIR