ISSUE DATE:
APR. 22, 2005
DECISION/ORDER NO:
1040

Ontario

PL980724

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Eight Acres Limited has appealed to the Ontario Municipal Board under section 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Mississauga to approve Proposed Amendment No. 3 to the Cooksville District Plan to designate lands identified as "Site 1" in OPA No. 3 as "Residential - Low Density I", "Residential – Medium Density I" and "Greenbelt"
OMB File No: O980170

A P P E A R A N C E S :

Parties	**Counsel**
City of Mississauga	B. Duxbury
Eight Acres Limited	G. Swinkin

DECISION DELIVERED BY S. D. ROGERS ON A MOTION WITH RESPECT TO THE BOARD'S JURISDICTION AND ORDER OF THE BOARD

The file before the Board today relates to an appeal, filed by Eight Acres Limited in 1998, of Official Plan Amendment No. 3 to the Official Plan of the City of Mississauga. A motion has been filed by the City of Mississauga requesting the Board to rule that there is no longer any valid appeal over which the Board has jurisdiction in this matter. The motion is brought on the basis that the City has, since the appeal of OPA No. 3 was filed, adopted a new Official Plan and repealed the old Official Plan, and that there is therefore no amendment on which the Board can rule.

Facts

Eight Acres owns approximately eight acres of land located in the Cooksville District of the City. The lands are located just east of Hurontario Street and are bounded by King Street to the north and Paisley Blvd., on the south. The lands have a rather complicated planning history.

The lands were designated “Residential Multiple Family” in OPA 151 to the Toronto Township Official Plan which was approved in 1963. It is agreed that this designation was a form of high density designation.

In 1984, the Cooksville Munden Secondary Plan was developed, which re-designated these lands as “Residential - Low Density I”. As a result of concerns expressed by the owner, this new designation of the lands was deferred and never approved by the City.

In 1997, a new Official Plan, named “City Plan”, was approved by the Region of Peel, however a new designation for the Eight Acres lands was again deferred and never approved.

Following the adoption of City Plan, in 1998, the City adopted Official Plan Amendment No. 3, which included revised policies for the Cooksville District. The amendment showed the Eight Acres lands as being designated for “Residential - Low Density I” and “Residential - Medium Density I” uses. The City, however, deferred adoption of this designation for the lands. When the Region of Peel approved OPA 3, the lands of Eight Acres were shown as “Non-decision”. Eight Acres appealed the decision of the Region to the Board on August 10, 1998.

In 2000, the City began the process of reviewing and updating its Official Plan under the *Planning Act*. A proposed updated Official Plan was brought forward and named “Mississauga Plan”. Mississauga Plan was adopted by the City by By-law Number 0317-2002 on July 10, 2002. With some exceptions, that by-law deemed City Plan to be repealed on the date Mississauga Plan received final approval by the Region of Peel. The Region issued its decision on April 14, 2003, approving Mississauga Plan. Eight Acres filed an appeal of Mississauga Plan, however that particular appeal was filed one day after the last date for appeal, and the Board determined that there was no appeal by Eight Acres of Mississauga Plan.

Arguments

The City is seeking an order of this Board stating that the Board is without jurisdiction to hear the appeal by Eight Acres of OPA No. 3 to City Plan. The City is not seeking an order to dismiss the appeal without a hearing pursuant to Section 17(45) of the *Planning Act*. That section implies that there is, in fact, an actual appeal to dismiss.

In the motion before the Board, the City argues that there is no longer any appeal over which the Board has jurisdiction.

In support of its motion, the City argues:

1. An official plan that was adopted by a municipality comes into effect as an official plan on the day after the last day set for filing a notice of appeal, subject to any appeals that may be filed. Mississauga Plan received final approval with respect to the lands of Eight Acres on May 5, 2003 the day after the last date for appeals. Those lands are now designated under that Official Plan as "Residential - Low Density I" and "Residential - Medium Density I" and "Greenbelt" under Mississauga Plan.

2. Section 21 of the *Planning Act* requires that any amendments or a repeal of an Official Plan are subject to the provisions of Section 17 of the *Act.* While the new Official Plan went through the process of public review and public meetings, it was made clear in planning reports and throughout the process that it was the intention of the City that City Plan would be repealed when the new Official Plan was approved.

3. As a result of By-law 0317-2002, the City's new Official Plan, Mississauga Plan, took effect and City Plan was simultaneously repealed. Therefore, any appeal under City Plan or any amendments thereto, cease to exist and there is no matter before the Board to consider.

Eight Acres responds with the following arguments:

1. The City of Mississauga Official Plan must conform to the Region of Peel Official Plan and therefore the City of Mississauga cannot be without an official plan and that plan must be consistent with the Region's Official Plan.

2. The provisions of Mississauga Plan as they apply to Eight Acres lands are precisely the same as the provisions of OPA No. 3 for the Eight Acres lands. The repeal and simultaneous re-enactment of substantially the same statutory provisions must be construed as a continuance of the statute in uninterrupted operation and all rights under that statute, including the appeal of the designation of the Eight Acres lands remains intact. R. V. Crown Zellerback Canada Limited 1954, 14 W.W.R. 434.

3. An official plan is not a law, it is policy adopted, not enacted by a municipal council.

4. Under Section 17(44) of the *Planning Act* a person who files an appeal with respect to a notice of decision regarding an official plan amendment is entitled to a hearing on the matter before the Ontario Municipal Board.

5. Under the *Interpretation Act*, the repeal of an *Act* shall not affect any right, privilege, obligation or liability acquired, accrued, or incurred under the *Act* so repealed or revoked.

Decision

The Board finds as follows:

1. Mississauga Plan was adopted and approved without a valid appeal being filed. Therefore, the lands owned by Eight Acres are currently designated as described in that plan, that is, “Residential - Low Density I”, “Residential - Medium Density I” and “Greenbelt”.

2. There was no specific repeal of the by-law adopting OPA No. 3 to City Plan. There was only a repeal of City Plan. Therefore, in so far as OPA 3 had become part of City Plan, it was repealed by the City by By-law 0317-2002, and has been replaced by the provisions of Mississauga Plan.

3. The part of OPA No. 3 under appeal by Eight Acres, and currently before the Board cannot be considered an amendment to, or part of, City Plan. The part of OPA No. 3, which was subject to appeal was “inchoate”, and not final, until the appeal was withdrawn or an order on the appeal was issued by the Board.

4. The appeal of OPA No. 3 was a valid appeal under the legislation. As such, the Board is required by law to hold a hearing into that appeal.

5. Should Eight Acres choose to proceed with the appeal of OPA No. 3, the Board may consider the policy as it applied on the date of appeal, as well as the currently applicable designation of the site. Any decision made by the Board as a result of the hearing on the existing appeal, can be ordered to be the official plan policy applicable to the Eight Acres lands under the Official Plan of the City of Mississauga, that is, Mississauga Plan, pursuant to Section 22(50) of the *Planning Act*.

Findings and Reasons

With respect to the arguments of Eight Acres, the Board finds no relevance to the argument that there is a requirement for there to be a City Official Plan which conforms to the Regional Official Plan. In the matter before the Board, there was no suggestion that the City’s official plan did not conform to the Regional plan. Nor was there any point at which it could be considered that the City was without an Official Plan.

While an Official Plan of a municipality may not be a law, it is a policy document which is adopted by a by-law of Council, and which receives a special status by virtue of Section 24 of the *Planning Act,* which states:

> 24(1) Despite any other general or special *Act*, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

An Official Plan therefore has powerful effect. It directly informs the course of the actions taken by municipalities and proscribes and directs the scope of the regulatory zoning by-laws passed by municipalities.

An Official Plan, however is not subject to the *Interpretation Act,* R.S.O. 1990, c. I.11. Section 1 of that *Act* states:

> 1.(1) The provisions of this *Act* apply to every Act of the Legislature contained in these Revised Statues or hereafter passed.....

An Official Plan, whether considered an Act, a law, an enactment, or neither; is clearly not an Act of the Legislature or contained in the Revised Statutes.

Counsel for Eight Acres argued extensively with respect to the similarities between Mississauga Plan and City Plan in support of the thesis that Mississauga Plan was simply a continuation of City Plan. The Board does not accept that an analysis of the similarities between two Official Plans is an efficient or effective form of deciding how an appeal of an amendment to one Official Plan should be treated, once a new Official Plan has been substituted therefore. To begin with, there are absolutely no objective criteria by which one can begin to measure whether one plan is sufficiently similar to another plan to be considered a true continuation of the prior plan.

Furthermore, Official Plans are not statutes but rather creatures of a provincial statute. For that reason the Board does not adopt the reasoning of R. V. Crown Zellerback Canada Limited 1954, 14 W.W.R. 434. In any event, the Crown Zellerback case dealt with a criminal case; is now more than 50 years old; and was decided in another province. The Board finds that it is the statute which creates Official Plans, that is the *Planning Act,* that must be looked to in determining how to treat this circumstance.

To that end, the Board notes the following sections of the *Planning Act,* which it finds relevant.

Section 17(44) states “On an appeal to the Ontario Municipal Board, the Board shall hold a hearing.....” The word “shall” is used, which implies that a hearing is a mandatory requirement. Section 17(45), provides for the few circumstances in which the Board may dismiss an appeal without a hearing. In addition, the Board may be unable to hold a hearing if the relevant statutory provisions operate so that there is no valid appeal before the Board. An example would be if an appeal is filed after the final day for appeal or if a statute is passed which retroactively invalidates the appeal. In those cases, the appeal letter cannot be considered a valid appeal and the Board cannot consider it.

It is also possible that a matter before the Board is withdrawn, or ceases to exist. In that case, there is nothing for the Board to consider. An example of this would be when the by-law adopting an Official Plan or an amendment is repealed. In the case before the Board, a by-law was passed which repealed the Official Plan which was in force, and which underlaid the appealed amendment. Does this have the effect of rendering invalid, an unresolved appeal of an amendment to that Official Plan?

The Board was referred to a number of cases. In Re Ottawa-Carleton Planning Area Official Plan Amendment 22 (1981) 12 O.M.B.R. 253, the Region had adopted OPA No. 22 in December of 1980 by by-law. In March of 1981 the bylaw adopting the Official Plan Amendment was repealed also by by-law. Within the three months, the OPA had been referred to the Ontario Municipal Board for a hearing. There was a motion seeking clarification as to whether the Council had the ability to repeal the OPA, once the OPA had been referred to the Board. The Board found as follows:

> “The Board therefore concludes that the Council was acting within its legislative authority in *repealing the adopting By-law* and consequently there is nothing before the Board for its consideration.”

This case is distinguishable from the case before the Board on a number of counts. Firstly, the issue before the Board was whether Council had the authority to repeal its adoption of the Official Plan Amendment. Upon concluding that Council did have the authority to repeal the adoption of the Official Plan Amendment, the Board concluded that there was nothing before the Board for consideration. The case before this Board deals with an amendment to an Official Plan, which amendment was not specifically repealed. Secondly, in the Ottawa-Carleton case, Council specifically repealed the by-law adopting the Official Plan Amendment. Here, there is no repeal of the by-law adopting the Official Plan Amendment.

Similarly in Re Cadillac Development Corp and City of Toronto (1973) 1 O.R. (2d) 20, the High Court of Justice, on an application to quash a repealing by-law, considered the question as to whether the municipality had the authority to repeal a zoning by-law which had been passed and was then appealed to the Ontario Municipal Board. The Court decided that the municipality did have the authority to repeal a zoning by-law. At page 34, the Court states:

> ...None of theses exceptions or limitations provide in clear terms or by plain implication that a municipal council may not repeal or amend its own by-law before it has been approved by the Ontario Municipal Board. Indeed, in these circumstances, the by-law at this stage is inchoate requiring another act, the approval of the Board to give it the force of law. It is at this stage an expression of legislative intent only. I do not consider that the provisions to which I have referred preclude the Council, in its judgment as representatives of the electorate, from unilaterally undoing what it has previously done and by repealing it, withdrawing the incipient by-law from the Ontario Municipal Board as being a policy that the Council is no longer prepared to support.

Again the decision made in the Cadillac case was that the municipality had the authority to repeal a zoning by-law it had passed, (provided notice was given of the repealing by-law in the same manner as the passage of a zoning by-law), even though the by-law had been appealed to the Board.

Of more direct relevance is Darling v. City of Brockville Committee of Adjustment (1994) 31 O.M.B.R. 285. This involved a minor variance application of a zoning by-law which was no longer in force as of the date of the hearing of the minor variance appeal. While the Board, in that case, used the application amendment provisions of the *Planning Act* to rectify the situation and proceed with the hearing, this Board finds the Boards comments at page 293 directly on point.

> The second question is slightly more complex. It is clear that the variances sought were from the old By-law, and were it still in force, the Board would undoubtedly be varying it. However, it no longer exists. Can the Board vary something that no longer exists? The most obvious alternative – finding that the application is a nullity or something akin thereto – is hardly appealing. For all of the reasons discussed above with respect to precipitating an unnecessary court action, the Board finds not at all attractive the idea that it should require the applicant to go back to square one and apply for variances under the new By-law. That would just occasion another round at the Committee of Adjustment and another Board hearing.

The Board shares the concerns of Member Melling in the Darling case, with respect to making a decision which would render an appeal a nullity, requiring the appellant to recommence proceedings - in this case by making an application for an

Official Plan Amendment, and requiring the municipality to again engage in an expensive and lengthy public process of considering an issue which has been discussed and considered, both publicly, and otherwise, since 1984.

It is clear from the cases and from Section 21 of the *Planning Act* that a municipality can repeal an Official Plan, provided the municipality follows the same process as it uses to adopt official plans.

> 21(1) Except as hereinafter provided, the provisions of this *Act* with respect to an official plan apply with necessary modifications to amendments thereto or the repeal thereof, and the council of a municipality that is within a planning area may initiate an amendment to or the repeal of any official plan that applies to the municipality and section 17 applies to any such amendment or repeal.

In this case, the municipality, by Section 4 of By-law 0317-2002 repealed much of the City Plan Official Plan.

> 4. Subject to section 3 of this By-law, the City Plan (Official Plan), except that part containing the Retail and Service Commercial Policies and Retail and Service Commercial Land Use Designation shall be deemed to be repealed on the date the Mississauga Plan (Official Plan) receives final approval by the Regional Municipality of Peel, save and except where an appeal is filed to the Mississauga Plan (Official Plan), in which event the applicable parts of the City Plan (Official Plan) shall continue to apply in respect of those lands that are the subject of an appeal until full and final disposition of such appeals.

The Board distinguishes between the repeal of a by-law adopting an official plan and the repeal of the official plan itself. When repealing an official plan, a municipality is effectively legislating the end of a policy document which has had force and effect and under which certain rights and obligations accrued. This is to be distinguished from the repeal of a by-law adopting an official plan, which withdraws that official plan from having any effect and creating any rights or obligations – effectively rendering it a nullity.

In the Ottawa-Carleton case, the municipality had actually repealed the by-law adopting the official plan amendment. There was, therefore, no official plan amendment to consider, because the administrative act of adopting the amendment had been nullified. It was as if there never was an amendment.

In the case before the Board, the City did not repeal the by-law adopting OPA No. 3. Therefore, the Board has before it both a valid appeal and an official plan amendment which was adopted and approved by both the Region and the City. The

appeal of the amendment relates to the decision of the City and the Region not to provide for a specific designation for the Eight Acre lands. Thus, the issue put before the Board in this appeal is the appropriate designation of the lands.

While the by-laws adopting and approving OPA No. 3 have never been repealed, the policy document, which the amendment was seeking to amend, has been changed by repeal and adoption of a new document. The policy document, which was repealed, did not include the parts of OPA No. 3 now under appeal and currently before the Board, because those parts of OPA No. 3 have not been finalized. The parts of OPA No. 3 under appeal are, in the words of Mr. Justice Henry in the Cadillac case, "inchoate, requiring another act, the approval of the Board, to give them force and effect".

Subsequent events have now changed the applicable designation of the lands. Whereas, at the time of the appeal of OPA No. 3, the lands remained as designated in 1963 as "Residential – Multiple Family", they are now designated under the new Official Plan as "Residential – Low Density I", "Residential – Medium Density" and "Greenbelt". Nothing about the appeal of OPA No. 3 can change that fundamental fact. The currently applicable Official Plan is in force and effect and the designations are clear.

Should, however, Eight Acres decide to proceed with the hearing of the appeal of OPA No. 3, the Board may consider all of the relevant planning and policy factors, including the policy at the time the appeal was launched and the currently applicable designation under Mississauga Plan. The Board may then, under Section 22 (50) decide the appropriate designation of the Eight Acres lands, and order that the policies which it determines are appropriate become part of the official plan for the City of Mississauga, i.e. part of Mississauga Plan. Section 22 (50) states:

> (50) On an appeal or a transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan.

The Board therefore concludes that it has a valid appeal of an official plan amendment document before it; that no action has been taken by the municipality to repeal the adoption of that specific proposed amendment; and that it is required to hold a hearing in respect thereto pursuant to the provisions of Section 22(44), if the appellant wishes to proceed with such a hearing. The parts of the amendment under appeal to

this Board were not repealed by virtue of the repeal of City Plan, because, in the absence of a withdrawal of the appeal of OPA No. 3 or an order of the Board, those parts of OPA No.3 had not become part of the City Plan. Once the Board completes the hearing and determines the appropriate land use policies for the Eight Acres lands, the Board may order that those policies are part of the official plan for the City of Mississauga, that is Mississauga Plan, pursuant to Section 22(50) of the *Planning Act*.

The fact that there remains a valid appeal before this Board, does not change the fact that Mississauga Plan has since been adopted and the policies of that Plan applicable to the Eight Acres site are in force and effect, as of the last date for the appeal of that plan. However, those policies could be changed by a decision of the Board under the current appeal, after a full hearing into the matter.

Eight Acres therefore, is not required to apply for another Official Plan Amendment for its lands, but may continue with the current official plan appeal.

This is the order of the Board.

"S. D. Rogers"

S. D. ROGERS
MEMBER