

evidence on the three applications consecutively. With respect to two of the developments (1171 Queen Street West and 48 Abell Street), the parties have reached a settlement. This application proceeded with respect to the development at 150 Sudbury Street ("the Sudbury project").

[2] The City, supported by the respondent Active 18, seeks leave to appeal on five questions stated in paragraph 3 of its Factum. They allege errors arising from the Board's failure to properly interpret municipal and provincial planning documents and policies that aim to preserve and promote a mix of uses in the Triangle that support employment in the City. It is submitted that the Board erred in law because the effect of its decision is to convert a mixed-use residential/non-residential area to a high-density residential area in a manner that is inconsistent with the *Planning Act*, Provincial Policy Statements and the Official Plan for the City of Toronto.

The Test for Granting Leave

[3] Leave to appeal should be granted if the City can demonstrate that the Board's decision raises a question of law that is of sufficient importance to warrant the attention of the Divisional Court and that there is some reason to doubt the correctness of the decision. Doubt as to correctness must be based on the totality of the decision and the Board's order and when considering leave to appeal, some measure of deference commensurate with the degree of independence and expertise of the Board is required: *Concerned Citizens of King (Township) v. King (Township)*, [2000] O.J. No. 3517 (Div. Ct.) at paras. 8-10.

[4] The proper interpretation of the *Planning Act* and the proper consideration of matters of provincial interest are questions of law: *Concerned Citizens of King (Township)* at paras. 15-24; *Juno Developments (Parry Sound) v. Parry Sound (Town)*, [1997] O.J. No. 976 at paras 28-31. The proper interpretation and application of an Official Plan and the conformity of a proposed development with an Official Plan is a question of law: *Juno Developments* at paras. 16-18. This satisfies the first prong of the three-part test for granting leave.

Background

[5] The lands in question comprise a very large portion of the lands in the Triangle and represent one of the remaining opportunities for new development along Queen Street West within the Garrison Common North Part II Official Plan area (the "Secondary Plan"). The developers sought amendments to the Official Plan and zoning for primarily residential projects with densities between about 2.7 and 6.3 times the area of the lot comprised of between 97 and 100 per cent residential development. The City proposed maintaining a mix of uses in the Triangle and presented a compromise position whereby the minimum amount of non-residential gross floor area would be no less than 0.7 times the area of the lot, somewhat less than that required by the official plan policies that applied to these projects, but considerably greater than that envisioned by the proposed developments.

[6] In July 2006, a new Official Plan was brought into force in the City of Toronto. Under the new Official Plan, the province established growth targets that require the addition of 540,000 new jobs by 2031. In the new plan, the Triangle lands are designated as a Regeneration area, and under the new Secondary Plan, an area study is required before significant development is approved. During the course of the hearing, the area study for the Triangle required under the new Official Plan was reported on to City Council and presented to the Board. The planner's recommendation, known as the "no net loss policy", was that the existing average density in the Triangle of 0.7 non-residential be used as a minimum for employment space and be applied to these projects.

[7] Prior to the commencement of the hearing, the City took the position that if the Board was going to consider the new Official Plan, the hearing was premature as it should await the completion of an area study. The Board determined (and the parties agreed) that the official plan policies that applied to the projects were the City of Toronto's Part I Official Plan and Secondary Plan that were in force before July 2006.

[8] Under the City's Official Plan and Secondary Plan, the Triangle area is designated 'Mixed Industrial-Residential' ("MIR"). This designation provides for a mix of a wide range of residential uses, community services and facilities, street related retail and service uses and

industrial uses which are environmentally compatible with adjacent and neighbourhood uses. In MIR areas, the Official Plan permits wholly residential development at a density of up to 2 times the lot area and wholly industrial development at a density of up to 3 times the lot area. For buildings with a mix of both, only two-thirds may be residential and the remaining one-third must be non-residential, if built out to the maximum density. In other words, an applicant can achieve the maximum permissible density of 3 times the lot area only by providing one-third of the space for employment uses. With the exception of some frontage on Queen Street, the lands are zoned industrial (employment).

The Board Decision

[9] The Board hearing lasted 35 days. At page 5 of the Decision, the Board identified "the appropriate amount of non-residential land use that should result from the redevelopment and intensification of the Triangle" as "one of the fundamental issues for this hearing". The following three pages of the Decision review some of the planning evidence and provide reasons for rejecting the City's "no net loss policy". The Board found it appropriate to designate all ground floor spaces in the three projects for non-residential uses, concluding that, "This will insure an appropriate amount of non-residential land use in excess of what exists today on the three subject sites".

[10] The Board Decision sets out form, massing and heights of the developments and left the final density figures to be provided in the final By-law amendments resulting from the Decision. City planning staff has calculated the densities that result from the Decision to be in the range of 2.32 to 4.90 times the area of the lot comprised of between 95.1 to 97.21 per cent residential development. The Sudbury project was approved at a total density of between 2.28 and 2.78 with a residential density of between 97.68% and 97.21% and a non-residential component ranging from 0.05% to 0.08%. The precise density depends on the location of parkland dedication. The Decision results in a conversion of an area designated as MIR to one that is residential.

Discussion

[11] The *Planning Act* forms the statutory basis of a policy-led planning regime in Ontario. Section 1.1 highlights the purposes of the Act including the promotion of sustainable economic development, the provision of a land-use planning system led by provincial policy, and the recognition of the decision-making authority and accountability of municipal councils in planning.

[12] Section 2 of the Act provides that all land use decisions shall have regard to matters of provincial interest, including the orderly development of safe and healthy communities, the adequate provision of employment opportunities, the protection of the financial and economic well-being of the province and its municipalities and the appropriate location of growth and development. Section 3 of the Act provides that the Minister may issue Provincial Policy Statements on matters relating to municipal planning that are of provincial interest and that decisions of the Board 'shall be consistent with' or 'shall have regard to' the policy statements. The current phrase, 'shall be consistent with', replaced the former phrase, 'shall have regard to' and applies to the Sudbury project.

[13] There are Provincial Policy Statements that speak expressly to promoting employment and ensuring effective growth and development in the province and its municipalities. The 2005 Provincial Policy Statement that applies to the Sudbury project and all future applications in the Triangle and the City as a whole, emphasizes the importance of employment and calls for efficient land use patterns that promote a mix of housing, employment, parks and open spaces that facilitate pedestrian mobility and other modes of travel.

[14] Both the Official Plan and Secondary Plan emphasize the need for a mix of uses to support the objective of achieving a balance in the levels of future employment and housing growth in the City. The Official Plan also provides that prior to passing By-laws to permit a change in use from industrial to residential in a MIR area, Council and therefore the Board must consider the advisability of retaining existing uses in terms of the retention of employment. Section 24 of the *Planning Act* states that where an Official Plan is in place, no public work shall be undertaken or by-law passed that is not in conformity with the Official Plan.

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[15] The importance of the City's Official Plan policies are highlighted in the Province's Policy Statements. The 2005 Provincial Policy Statement emphasizes that a municipality's official plan is the most important vehicle for implementing the Provincial Policy Statement. Sections 1.1.1 and 1.1.2 stress the need for an appropriate range and mix of residential and employment uses to meet long-term needs.

[16] The Board held two pre-hearing conferences which resulted in a procedural order that described the consolidated issues to be addressed at the hearing, including:

- (a) Are the proposed amendments consistent with the purposes of the *Planning Act* as set forth in Section 1.1 of the Act?
- (b) Do the proposed amendments have appropriate regard to the matters of provincial interest set forth in section 2 of the *Planning Act*, ... ?
- (c) Do the proposed amendments have appropriate regard to matters of provincial interest set forth in the Provincial Policy Statement (1997) pursuant to Section 3 of the *Planning Act*?
- (d) Do the proposed amendments comply with or maintain the intent of the in-force Official Plan of the (former) Metropolitan Toronto?
- (e) Do the proposed amendments comply with or maintain the intent of the in-force policies of the Official Plan and the Garrison Common North Part II Official Plan of the (former) City of Toronto?

[17] Apart from a passing reference to "the existing statutory and policy framework", there is no indication that the Board gave any consideration to these issues. The Board Reasons are devoid of any discussion of the *Planning Act*, Provincial Policy Statements and the City's Official Plan as they apply to these lands. The Board is critical of the City for not coming up with a specific policy under the new Official Plan for quantifiable employment uses on a site-by-site basis in the Triangle, although the Official Plan that the Board determined would apply to the lands sets out the appropriate mix of residential and non-residential uses. The 2-to-1 ratio density is a quantifiable standard. Despite this, the Board approved projects that maintain only a fractional non-residential component on the lands.

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[18] The Board appears to conclude that the preservation of employment uses should be left to Employment Districts. The Decision states that "this was acknowledged" to offer the best long-term protection for employment uses within the City contrary to evidence that the majority of employment in Toronto is supported in mixed-use areas and contrary to the City's position that the on-going conversion of employment lands in mixed-use areas will prevent the City from complying with Provincial Policy Statements and employment targets.

[19] In rejecting the City's reliance on a mix of uses, the Board noted that there were no similar mixed-use policies in the new Official Plan. Having found that the new Official Plan did not apply to these projects, the Board's reliance on it to support residential intensification was an irrelevant consideration. Further, the Board failed to appreciate that explicit density mixes are not found in the new Official Plan because all density numbers will now be contained in the Zoning By-Law. As well, the Board failed to appreciate that if the new Official Plan were applied to the Triangle, it would require an area study to determine the proper mix of residential and non-residential uses. This was the area study that proposed a requirement of 0.7 non-residential use that the Board rejected as inadequate.

[20] At the core of the Board's decision-making in planning cases is the determination of the public interest. The Board provides no rationale or analysis to support its conclusion that the projects were in the public interest: *Re Cloverdale Shopping Centre Ltd. et al.* (1966), 57 D.L.R. (2d) 206 (Ont. C.A.). The *Planning Act* requires that all planning applications, especially by-law amendments must conform to the Official Plan as a means of ensuring that the practical mechanisms of planning approval are consistent with the planning objective of the community. The Board failed to consider whether the projects are contrary to broad City policies that support a mix of uses as reflected in the Official Plan. The Board Reasons are deficient in justifying its decision and provide no indication that the Board considered this or had regard to whether the projects were consistent with the *Planning Act* and provincial policy.

[21] Taking the reasons as a whole, there is reason to doubt the correctness of the Board's decision.

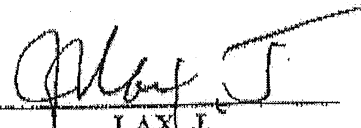
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[22] Those engaged in the planning process are entitled to know the appropriate weight and consideration to be given to provincial policies as well as to official plan policies in decisions concerning land use planning. The proper interpretation and application of the *Planning Act* and provincial policy to land use development in the downtown area of a major Canadian city is sufficient importance to warrant the attention of the Divisional Court.

[23] Leave to appeal is therefore granted on the following questions:

- (i) Did the Board err in failing to apply or properly interpret sections 1, 2 and 3 of the Planning Act?
- (ii) Did the Board err in approving a predominantly residential use of the lands in issue contrary to the City's Official Plan Policies, Zoning By-Law and Provincial Policies;
- (iii) Did the Board err in its interpretation of relevant provincial Policies that promote employment and economic development;
- (iv) Did the Board err in its interpretation and application of the City's Official Plan Policies; and,
- (v) Did the Board err in concluding that the development proposals are in the public interest?

[24] Costs are reserved to the Panel hearing the appeal.



MARY J. LAX J.

Released: July 25, 2007