

OMB Variability

May 20, 2009

Most municipalities subject to the provincial growth plan are still going through exercises required to ensure that their official plans conform with provincial policy. Municipalities that are lacking in designated employment lands and which will struggle to achieve the growth plan's employment targets should be aware of the Ontario Municipal Board's variability on this issue. Such municipalities will need to craft policies that make the intent and function of designated employment lands, including permitted uses, very clear and designed to achieve a specific goal. Without such policies, many municipalities will risk the loss of employment lands to non-employment uses in the face of the growth plan and *Provincial Policy Statement*.

There has been considerable debate as to whether municipalities can, through their conformity exercises, pass official plan policies that are more onerous and restrictive with respect to employment land conversions than those that exist within the growth plan. A related question is whether "targets" that are incorporated within growth plan policies represent maximum restrictions or "caps," or whether they constitute targets in the more traditionally understood sense of that term—that is, objectives that can be exceeded in appropriate circumstances. In some respects, the "jury is still out" on this issue.

Neither the *Provincial Policy Statement* nor the growth plan provides a definition for "employment uses" or "major retail uses." As such, the interpretation of these terms and what they include or exclude is, to a considerable degree, left up to local planning authorities who are charged with the responsibility of implementing land use policies and objectives through official plans and zoning by-laws. Since the argument that a job is a job is widely accepted by planning experts and the OMB, it is reasonable to extrapolate that any use that creates employment should be permitted within an employment area, including retail.

The argument that retail uses are employment uses is strengthened by the inclusion of "commercial" among the uses encouraged in employment lands by the growth plan. While no definition for "commercial uses" is provided in the growth plan, some planning and economics experts contend that retail uses are among those accepted within the planning sphere as "commercial uses" and are, therefore, permitted in employment areas. Due to the vagueness of provincial policies, the OMB has been challenged to interpret these policies on this issue. In addition, each OMB decision is coloured by local official plan policies as well as circumstances and planning context.

If one digs deeper into the issue of employment land conversions, one discovers that the range of relevant issues is often highly specific to a given site and to the particular municipality in which the conversion is being proposed. Although applications that are subject to the growth plan have a greater onus to demonstrate that a retail use does not represent a conversion, as opposed to those with transitional status, such matters are ultimately judged on a case by case basis.

Land use planning is ultimately about a real or perceived need, functionality and serving the public good. The OMB has been inconsistent in its determination of what constitutes a conversion. This has left questions in the planning and development community about the intent and function of employment lands. For instance, does the infiltration of retail uses in employment areas have a destabilizing effect on surrounding employment lands? Such questions are fundamental to our understanding of how employment lands function notwithstanding the province's efforts to conserve them for years to come.

Unfortunately, there is little express language in the growth plan to provide guidance or direction on the manner in which municipalities must conform with its policy requirements. Consequently, much is left to interpretation through successive OMB decisions, or settlements that largely reflect trade-offs among competing interests. Some municipalities, such as the Town of Markham, have plans to exceed the growth plan's intensification targets because this is considered both desirable to the town and in keeping with its planned vision for future growth and development. However, this begs the question: if municipalities can exceed intensification targets, why then should they be barred from exceeding the restrictions contained in the growth plan's employment land conversion policies? This question has yet to be tested before the OMB. Until that happens, what the future holds in this regard may be as much a matter of crystal ball-gazing as anything else.

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