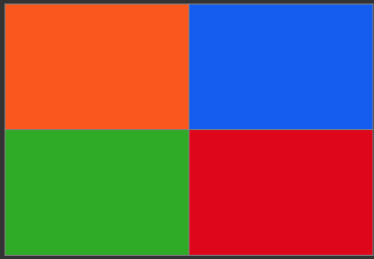


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**Getting Municipalities to Work,
or Getting Work to Municipalities:
Protection and Conversion of Employment Lands**

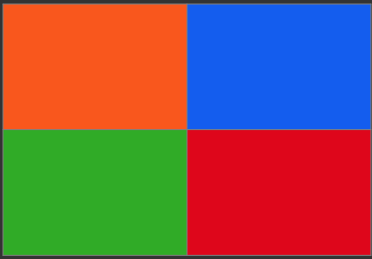
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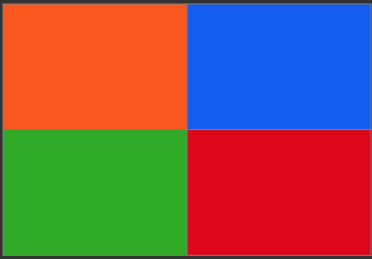
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Introduction

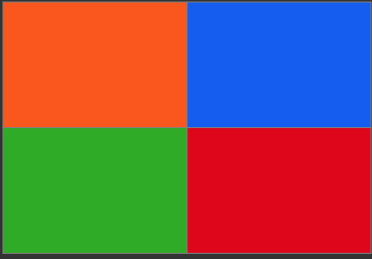
- Over the course of the last decade a variety of factors have contributed to the migration of employment uses from urban cores and older suburbs within many urban municipalities – particularly in the Greater Golden Horseshoe ("GGH") - to more suburban or outlying areas
- The inner city employment areas that remained have been undergoing varying degrees of redevelopment ("revitalization")



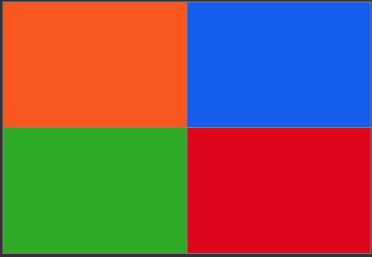
- The revitalization of an employment area can and often does have many benefits for a broader surrounding area, as well as the municipality as a whole – e.g.:
 - increased property tax base
 - catalyst to spur additional redevelopment in the immediate vicinity and beyond
 - prevent further displacement of employment uses and conversion of employment lands to other uses, which can degrade the inventory of employment lands within older urban areas



- This reduction in designated and serviced employment lands is now moving to the suburbs, where municipalities often find themselves opposing development that would further diminish their employment land supply
- Increasingly profitable for landowners and developers to favour applications for mixed and retail uses over employment uses, which often involves a higher degree of risk and leveraging of assets

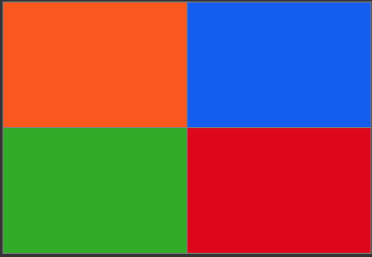


- At the core of the employment land preservation issue:
 - the Greater Golden Horseshoe (GGH) is growing at one of the fastest rates in North America
 - By 2031, a projected 3.7 million people and 1.8 million jobs will be added to the area
 - Ongoing pressures for the construction of non-employment uses to be located in designated employment areas
 - Result: municipalities will continue to be challenged to develop policies that are sufficiently restrictive to attract business and employment uses while defending their supply of employment lands



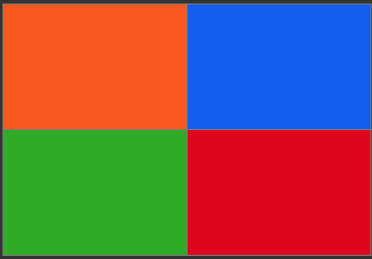
Intervention by the Province:

- Through policies within the 2005 Provincial Policy Statement ("PPS") and the Growth Plan for the Greater Golden Horseshoe (the "Growth Plan"), the Province has spearheaded a regime to protect against the infiltration of "major retail centres" into employment areas
- "employment areas" defined as "areas designated in an official plan for clusters of business and economic activities including, but not limited to, manufacturing, warehousing, offices, and associated retail and ancillary facilities"

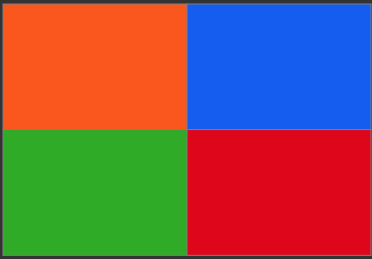


Legislative Framework:

- *Planning Act* requires that planning authorities, including such as the Ontario Municipal Board "*shall be consistent*" with the PPS when making land use planning decisions
- PPS allows planning authorities to "*permit conversion of lands within employment areas to non-employment uses through a comprehensive review, only where it has been demonstrated that the land is not required for employment purposes over the long term and that there is a need for the conversion*" (section 1.3.2)

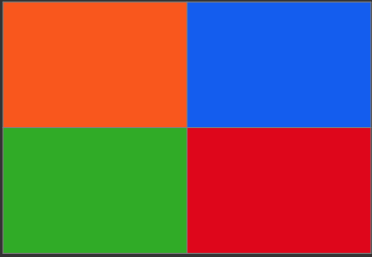


- Growth Plan goes a step further than the PPS:
 - requires municipalities to undertake a "*municipal comprehensive review prior to permitting the conversion of lands within employment areas to non-employment uses, where it is demonstrated that:*"
 - *there is a need for the conversion;*
 - *the municipality will meet the employment forecasts allocated to the municipality pursuant to the Growth Plan;*
 - *there is existing or planned infrastructure to accommodate the proposed conversion;*
 - *the lands are not required over the long term for the employment purposes for which they are designated; and*
 - *cross-jurisdictional issues have been considered*" (section 2.2.6.5)
 - Policy stipulates that "*major retail uses are considered non-employment uses*" – but no definition for "*major retail uses*", leaving it open to interpretation by municipalities, the development community and the OMB

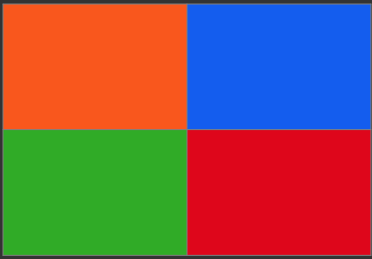


Commercial vs. Retail: A Hotly Debated Topic

- Among the mix of employment land uses encouraged by the province are "*commercial*" uses – e.g., Growth Plan encourages municipalities to "*promote economic development and competitiveness*" by:
 - providing for an appropriate mix of employment uses including industrial, commercial and institutional uses to meet long-term needs;
 - providing opportunities for a diversified economic base, including maintaining a range and choice of suitable sites for employment uses which support a wide range of economic activities and ancillary uses, and take into account the needs of existing and future businesses (section 2.2.6.2)



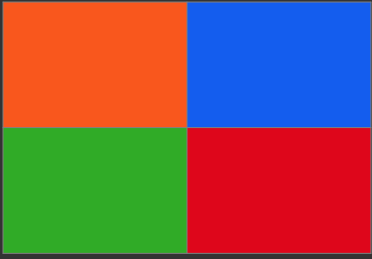
- Policy had led many to conclude that retail uses, which are a subset of commercial uses, are deemed to be employment uses
- Although commercial uses are among those that the province encourages as part of the mix to ensure economic competitiveness, their appropriate location and density is left to the interpretation of planning authorities, and is very much a hotly debated topic



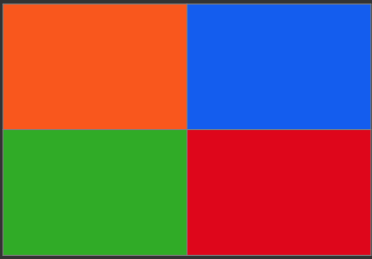
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"A job is a job"

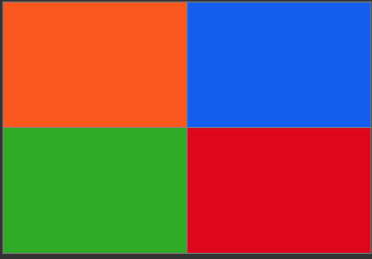
- Much of the debate about the conversion of employment lands to retail or mixed uses has been centered on the need to achieve municipal employment projections
- The Province encourages each municipality to have a mix of residential and employment uses to ensure that communities are balanced and can achieve sustained physical and economic growth
- Growth Plan encourages that each municipality contain an "*adequate supply of lands providing locations for a variety of appropriate employment uses . . . to accommodate the growth forecasts*" (section 2.2.6.1).
- Economic development, competitiveness and the growth of business are clearly identified as Provincial priorities, translating into policies which encourage strong protection of employment lands



- When assessing the value of employment lands from the perspective of job creation, however, it raises the question of whether certain types of jobs should be valued over others
- Municipalities and the OMB have been challenged with the notion that the creation of any job - retail, manufacturing or office - is important to the person who holds it, and that it would be discriminatory and prejudicial to give higher priority to one job over another

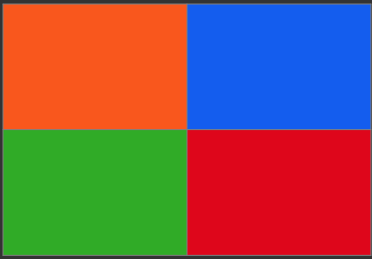


- OMB's view - the value of a given employment use can be measured only by the number of jobs being created, and not by their category or type:
 - "As a matter of public policy, the Board does not assign a particular value to one job over another. Every job – fulltime, part-time and volunteer – is a valuable job to the person who holds it, with few limitations, to the community as a whole"*
(*St. John's McNicoll Centre v. City of Toronto*)
 - *"Every planning, market, and economic expert called in the hearing testified that retail jobs are recognized both as economic development and as jobs counting toward the fulfillment of employment targets mandated by provincial policy. Each also acknowledged that "a retail job is a job". . . The Board will not contribute to the stigmatization or denigration of retail employment by making any ruling on its natural and qualitative aspects"*
(*SmartCentres and Toronto Film Studios v. City of Toronto*)
- Accordingly, the issue of retail and mixed uses within employment areas is one of provincial policy and land use planning, not the value of the job being created

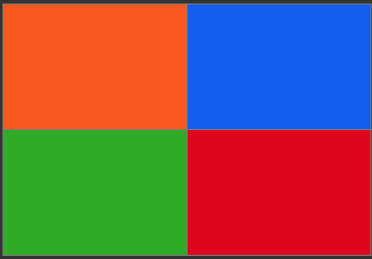


What Constitutes a "Conversion"?

- Neither the PPS nor the Growth Plan provides a definition for "*employment uses*" or "*major retail uses*" – leaving their interpretation up to local planning authorities through official plans and zoning by-laws
- Since the argument that "*a job is a job*" is now widely accepted by planning experts and the OMB, arguably any commercial use that generates employment could be permitted within an employment area, including retail
- However, outcomes vary widely - the key issues are often specific to the site and to the particular municipality in which the conversion is being proposed; typically judged on a case by case basis



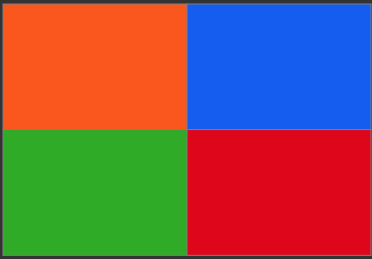
- Land use planning is ultimately about a real or perceived need, functionality and serving the public good – but the OMB has been inconsistent in its determination of what constitutes a conversion
- **RESULT:** questions in the planning and development community about the intent and function of employment lands – e.g.:
 - does the infiltration of retail uses in employment areas have a destabilizing effect on surrounding employment lands?



Cases in Which the OMB Decided There was No "Conversion"

Towerhill Developments v. City of Peterborough:

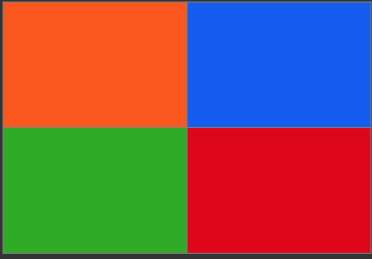
- Developer proposed a retail warehouse use in an established employment area (Costco)
- Key issue for OMB: whether the subject lands should be preserved to enable the City to maintain an adequate supply of serviced industrial lands
- OMB found that Peterborough had an excess of designated employment lands that went beyond its need to achieve the projected employment growth to 2031, as required by the Growth Plan
- OMB also found that the proposed retail warehouse would create 200 jobs, and therefore would not constitute a conversion to a non-employment use.
- OMB determined that Costco fell under the "*commercial*" use category identified in the PPS and section 2.2.6.2 of the Growth Plan



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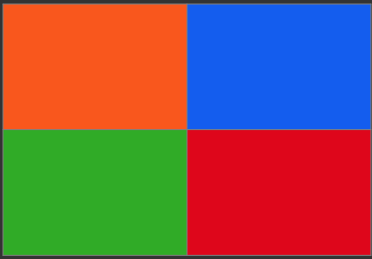
North American Acquisition Inc. v. City of Barrie:

- OMB considered whether a proposed mixed retail and employment uses would serve the City of Barrie and surrounding region better than a business park, which was preferred by the City
- It was believed that the business park would likely be partially vacant due to a lack of demand for office and higher order employment uses.
- OMB determined that there was a surplus of land for employment uses, and that such uses could be accommodated in other parts of the City or surrounding areas
- OMB also took into account local and site specific attributes of the subject property and found that the surrounding area would benefit from the road and traffic improvements incurred by the proposed development



On the issue of employment land conversion:

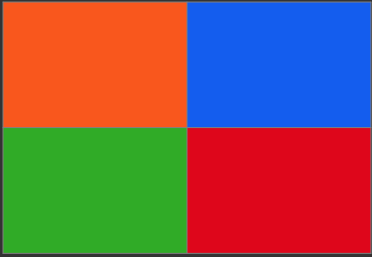
"The word "employment" in Section 1.1.1 [of the PPS] specifically includes industrial, commercial and institutional uses ("ICI"). No definition of "employment" is given that contradicts or narrows this listing of employment uses. The PPS directs that undefined terms are intended to include the normal meaning of the word. Since retail and service commercial uses are employment generating uses, it is reasonable and appropriate to reference commercial as an employment use within the 2005 PPS."



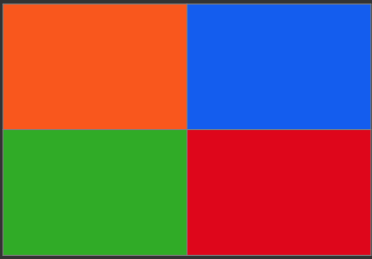
1693534 Ontario Inc. v. City of Toronto:

- What is the meaning of "major retail" in the absence of a definition in the Growth Plan?
- OMB –based on expert evidence:

"[One expert]... noted that the exception for major retail uses in 2.2.6.5 [of the Growth Plan] was tied to the specific policy and in any event was intended for the Big Box phenomenon of a size of approximately 125,000 square feet. This he opined was to prevent the loss of large tracts of land to big box retail expansive uses. . . On the face of the Growth Plan, the Board finds there has not been a conversion from an employment use to a non employment use requiring further comprehensive study" (para 21).



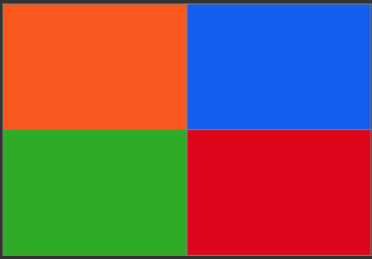
- Although some might argue "approximately 125,000 square feet" is arbitrary, this decision goes beyond the others in identifying the potential conflicts between major retail, or "big box" retail, and employment uses that the province was likely trying to circumvent
- Big box retail and employment uses are often similarly designed and located, such as near major highways and infrastructure, and each require large tracts of land
- However, unlike office or industrial uses, big-box retail often can and does have an adverse impact on existing retail establishments especially in older downtown areas
- Result: to lump these uses together as "employment" can be counter-productive if the overall effect is no net gain in employment, and related impacts such as erosion of the tax base



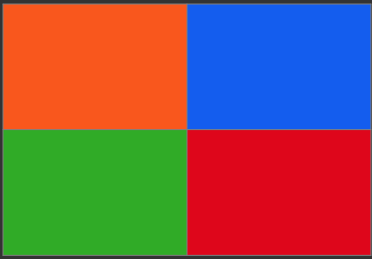
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Menkes Gibson Square Inc. v. City of Toronto:

- Proposed redesignation of a property designated for office-commercial uses to residential for a high rise condominium building
- Although the subject property was designated for employment uses, it was part of the Downtown North York planning area, which is a mixed use area and not a designated employment area as defined by the PPS or the Growth Plan
- OMB - redesignation of the site would not amount to a "removal of "areas of employment" within the meaning of the Planning Act", based on expert evidence that there was no concern about the supply of office space in Downtown North York
- OMB emphasis also on how best to optimise infrastructure, such as immediate access to higher order transit



- OMB interprets provincial policy to protect "employment areas", and minimize their fragmentation, as opposed to protecting all employment uses that may be mixed within existing communities
- HOWEVER - in order for mixed urban communities such as the City of Toronto to achieve the Growth Plan employment targets, the location of employment uses in mixed areas is crucial
- Need for clear and strong policies within official plans and secondary plans to set goals and targets for employment uses and to protect them from conversion; protection of employment lands should not be isolated to employment areas alone

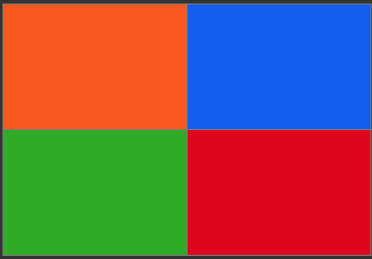


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Cases in Which the Board Decided There Was a "Conversion"

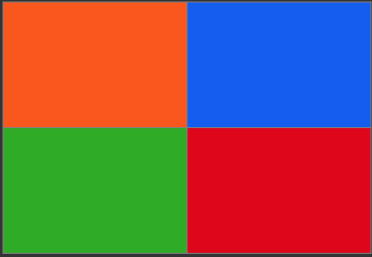
2053785 Ontario Inc. v. City of Toronto:

- Proposal to permit the conversion of an employment use to a mix of high density residential and office uses
- Site was located in the Junction Triangle area of the City of Toronto and was surrounded by similar conversions to residential and mixed use development
- OMB: since the City's Official Plan was silent on the issue of conversions, it meant that "*City Council had absolutely no intention of permitting conversion of lands within Employment District Areas*"

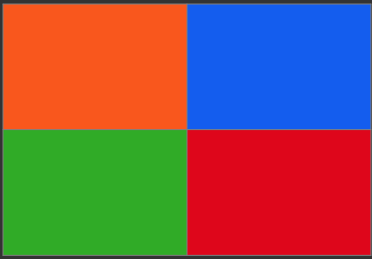


- Result: the policy evidence, combined with the lack of compatibility of residential with remaining employment uses, led the OMB to deny the appeal
- One of the arguments was that the City and the Board had permitted similar conversions in the past in the Junction Triangle area
- However - OMB concluded that such conversions might have continued to be rampant if the province had not intervened with the 2005 PPS:

"Indeed, until the Province with the adoption of the PPS 2005 put its foot down, as it were, on the conversion of employment lands anywhere in Ontario – even of underutilized industrial sites in the older parts of Toronto – it is possible that the transition of the entire Junction/Stockyards area may well have continued until no industrial or manufacturing uses remained"



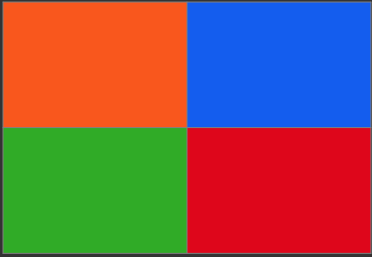
- A change in the OMB's view with respect to employment land conversions?
- Understanding and support for the Province's efforts to protect employment lands - may be strengthened by the conformity exercises that are being undertaken by municipalities, which should give municipalities and the OMB stronger local policies to combat unwanted conversions



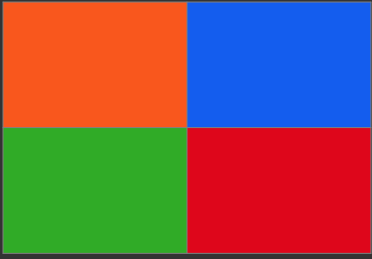
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More recently – *SmartCentres and Toronto Film Studios Inc. v. City of Toronto:*

- Proposed conversion of designated employment lands to big box retail (Wal-Mart)
- Decision provides a clear answer to many lingering questions surrounding conversions, as well as the likely direction that the OMB will take going forward
- OMB rejected appeals by SmartCentres Inc. and Toronto Film Studios Inc. (the appellants) from the City of Toronto's refusal to permit a big box retail centre on a site which had previously been used for a film studio but which is now vacant
- Main reason for the decision: the appellants could not demonstrate that the retail centre would not have negative impacts on the surrounding employment lands that would not be redesignated (one of the "tests" for retail applications in this area as per the City's Official Plan)

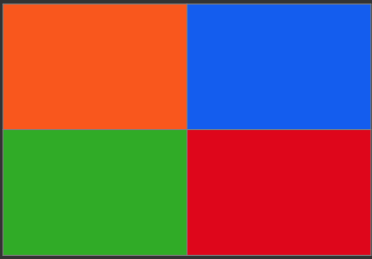


- OMB accepted expert evidence that major retail centres have a "bidding up" effect on land values that creates a domino effect within an employment area;
- Appellants' own purchase of a 50% interest in the land amounted to a per acre cost of three times the City average for employment lands
- OMB accepted the term "retail contagion" as descriptive of this process



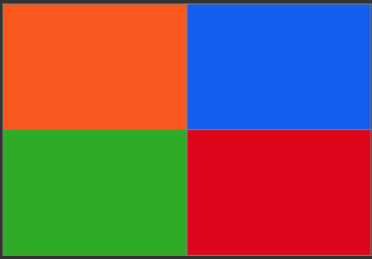
A precedent-setting decision?

- Addresses the lingering questions with respect to employment land conversions outside of the province's new policy regime
- Relies on good planning and the public interest; restricting retail from employment areas has nothing to do with the value of retail jobs
- Instead, goal is to prevent destabilization and bidding up of property values within employment areas - particularly within the inner city where values can be most impacted - to keep employment uses viable



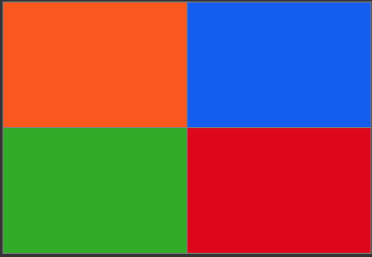
Competition for infrastructure:

- New forms of retail uses such as "power centres" cater to automobile access and contain large parking lots
- To maximize the target market, these uses tend to locate near major highways, which is also where employment areas tend to be clustered
- May 2008 "Planning for Employment in the Greater Golden Horseshoe" - Province asserts that the competition between power centres and employment uses that require highway exposure and access is part of the reason why some employment areas are fragmenting
- **Recommendation: municipalities should specify in their OPs which employment areas can/cannot include retail uses, to protect employment areas strategically located to take advantage of major infrastructure**

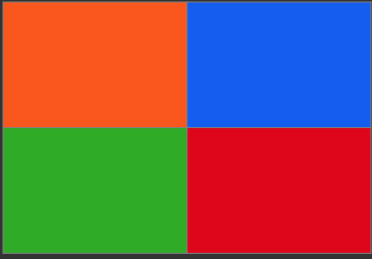


Summary: What Can Municipalities Do to Protect Employment Lands?

- Most municipalities subject to the Growth Plan are still going through exercises required to ensure that their OPs conform with provincial policy
- Municipalities lacking in designated employment lands and which will struggle to achieve employment targets should be aware of the Board's unpredictability
- Need for municipalities 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 PPS and/or Growth Plan**

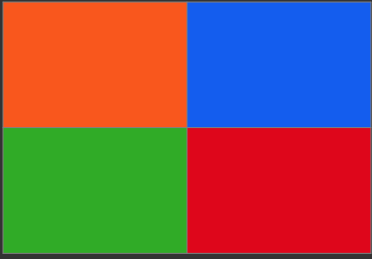


- Can municipalities pass OP policies more onerous and restrictive for employment land conversions than those in the Growth Plan?
- Related question re: "targets" within Growth Plan policies: do they represent maximum restrictions or "caps", or are they targets in the more traditional sense, i.e., objectives which can be exceeded where appropriate?



"The jury is still out"

- Unfortunately, little express language in the Growth Plan to provide guidance or direction on the manner in which municipalities must conform with its policy requirements
- Result: much is left to interpretation through successive Board decisions, or settlements which largely reflect trade-offs among competing interests



- Some municipalities have plans to exceed the Growth Plan's intensification targets because this is considered both desirable and in keeping with their planned vision for future growth and development
- Begs the question: if municipalities can exceed intensification targets, why should they be barred from exceeding the restrictions contained in the Growth Plan's employment land conversion policies?
- Question has yet to be tested at the OMB
- Until it is – "crystal ball-gazing"