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MUNICIPAL, PLANNING & DEVELOPMENT LAW

# 2014 OACA CONFERENCE

27 May 2014

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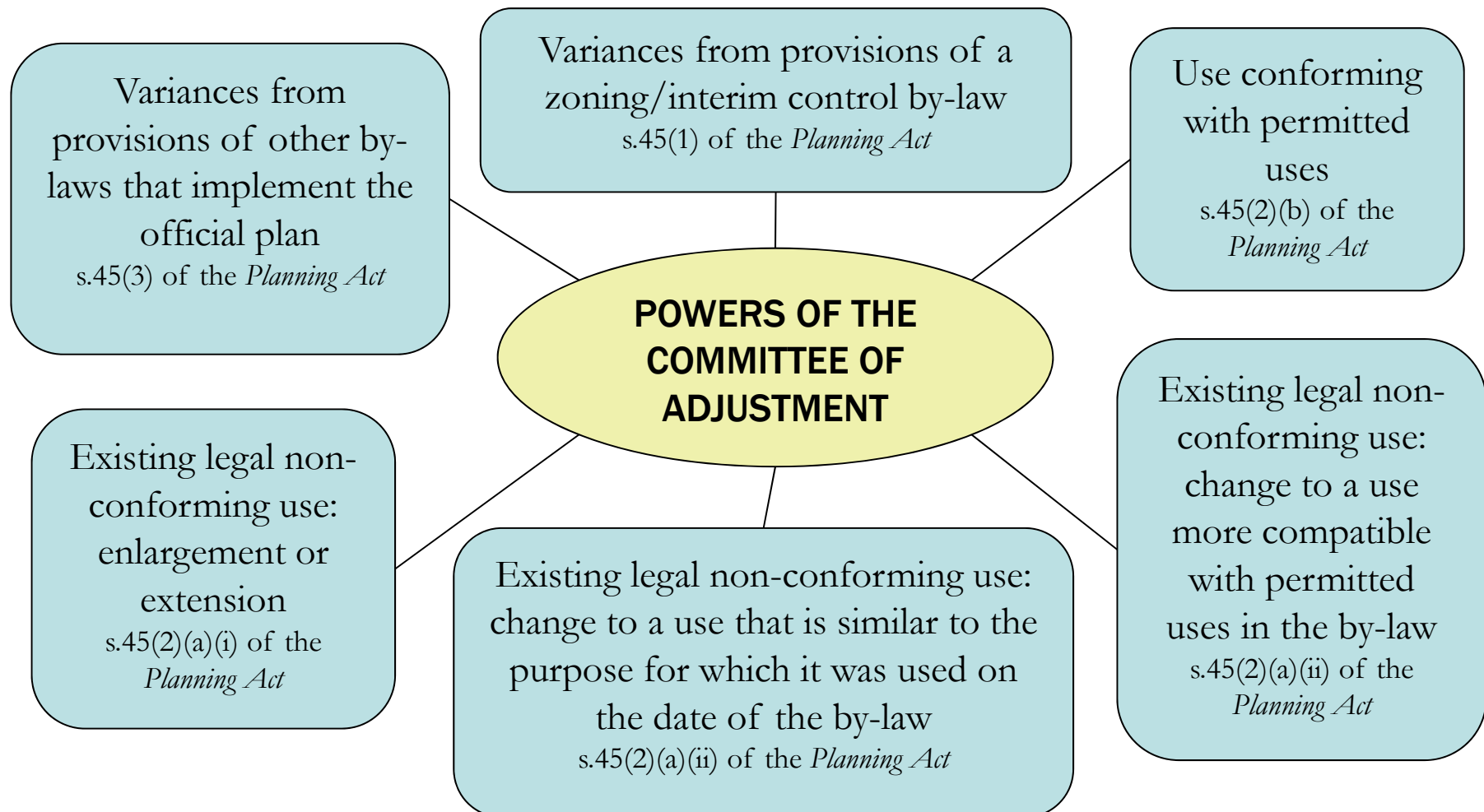
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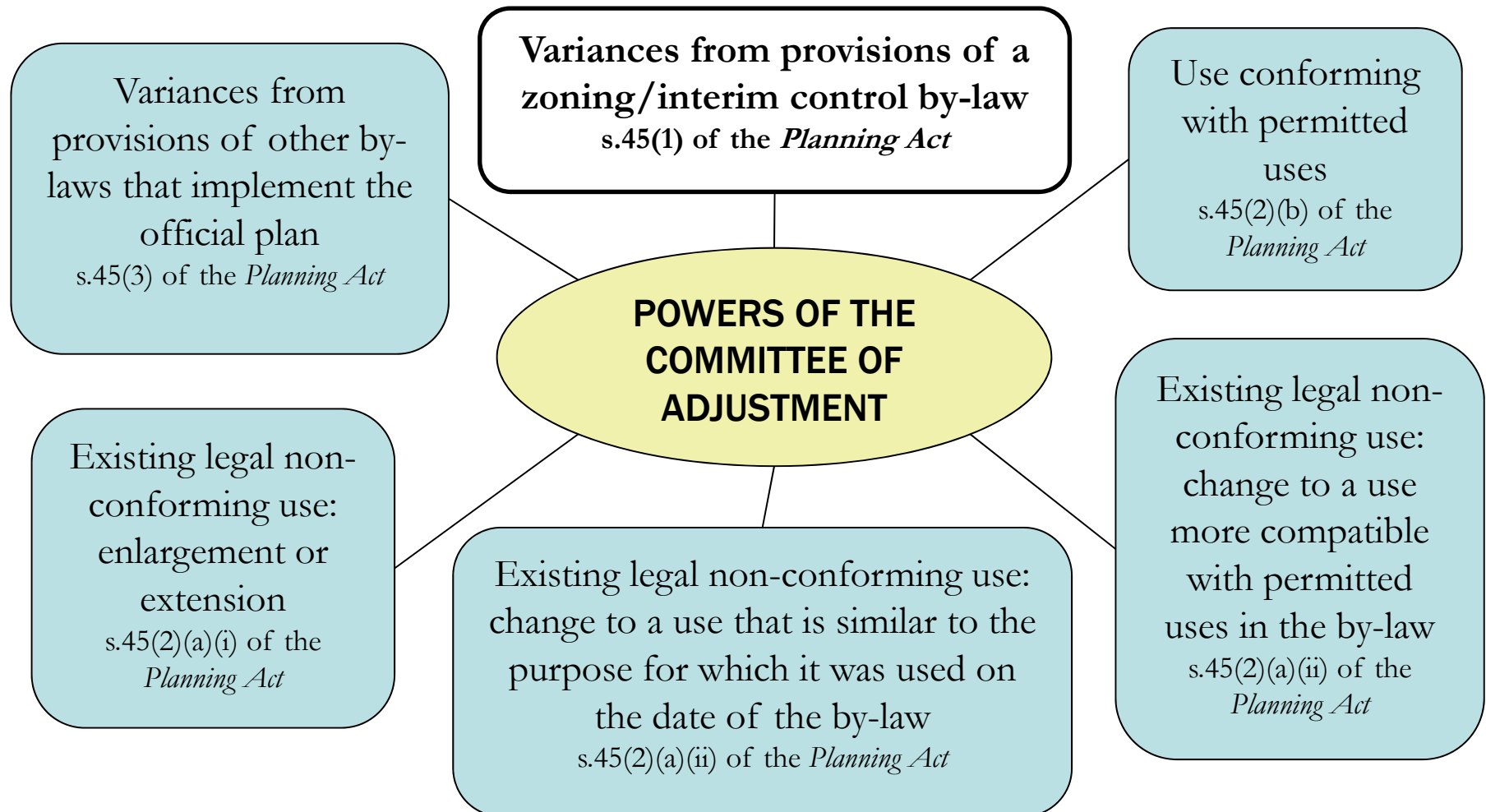
**Exploration of Legal Non-Conforming  
Uses and Related Committee of  
Adjustment Powers**  
*(Updated Presentation Slides)*

Presented by Dennis H. Wood

# Committee of Adjustment Powers (under s.45 of the *Planning Act*)



# Committee Powers: Variances



# Variations from Zoning/Interim Control By-law Provisions

Four-Part Test (s.45(1) of the *Planning Act*):

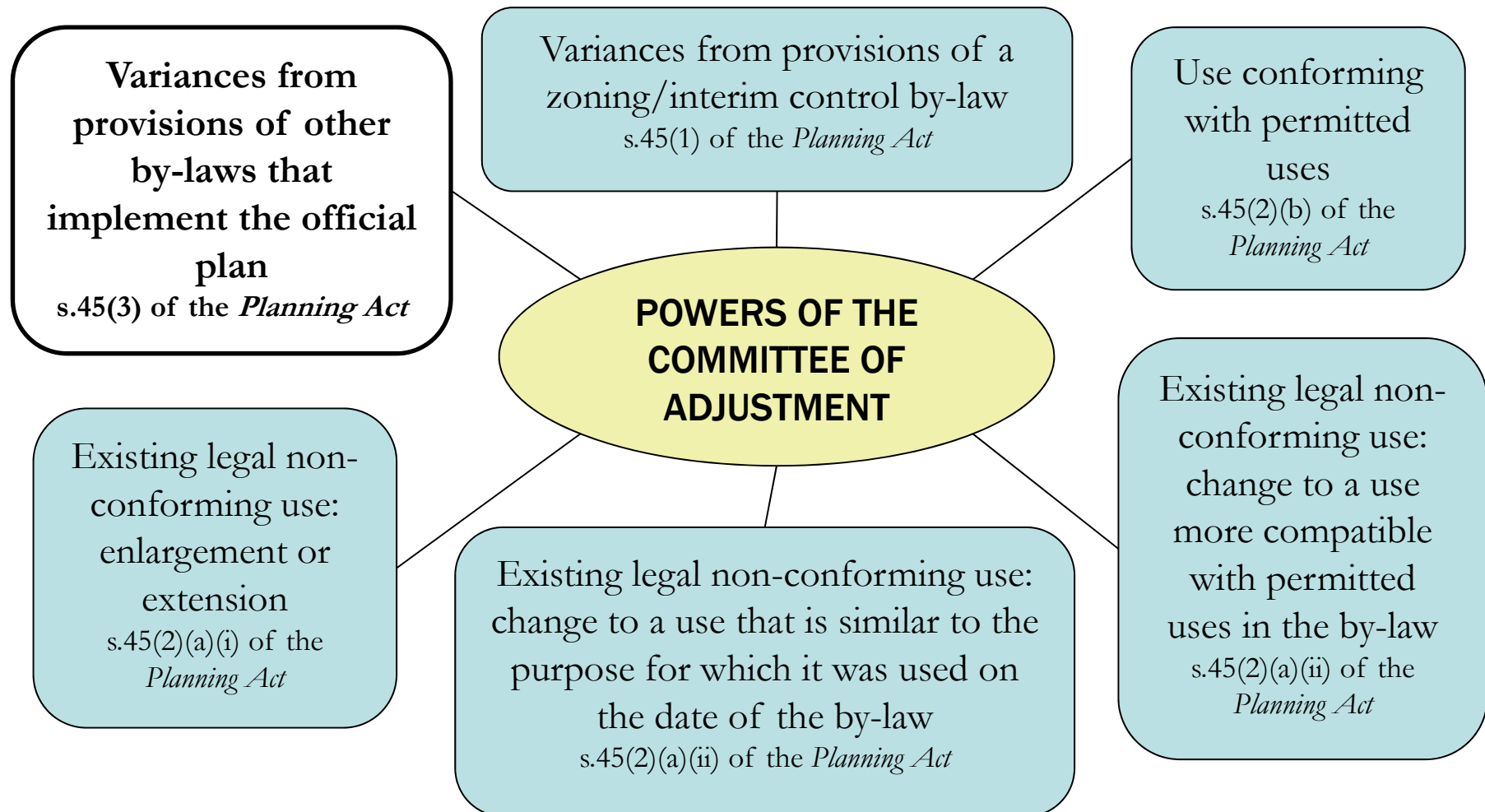
1. Is the variance minor?

2. Is the variance desirable for the appropriate development or use of the land, building or structure?

3. Does the variance maintain the general intent and purpose of the zoning by-law?

4. Does the variance maintain the general intent and purpose of the official plan?

# Committee's Powers: Variances From Other By-law Provisions



# Variations from Other By-law Provisions

45(3) *A council that has constituted a committee of adjustment may by by-law empower the committee of adjustment to grant minor variations from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement an official plan, and when a committee of adjustment is so empowered subsection (1) applies with necessary modifications.*

# Variations from Other By-law Provisions

## Four-Part Test (s.45(1) of the *Planning Act*):

1. Is the variance minor?

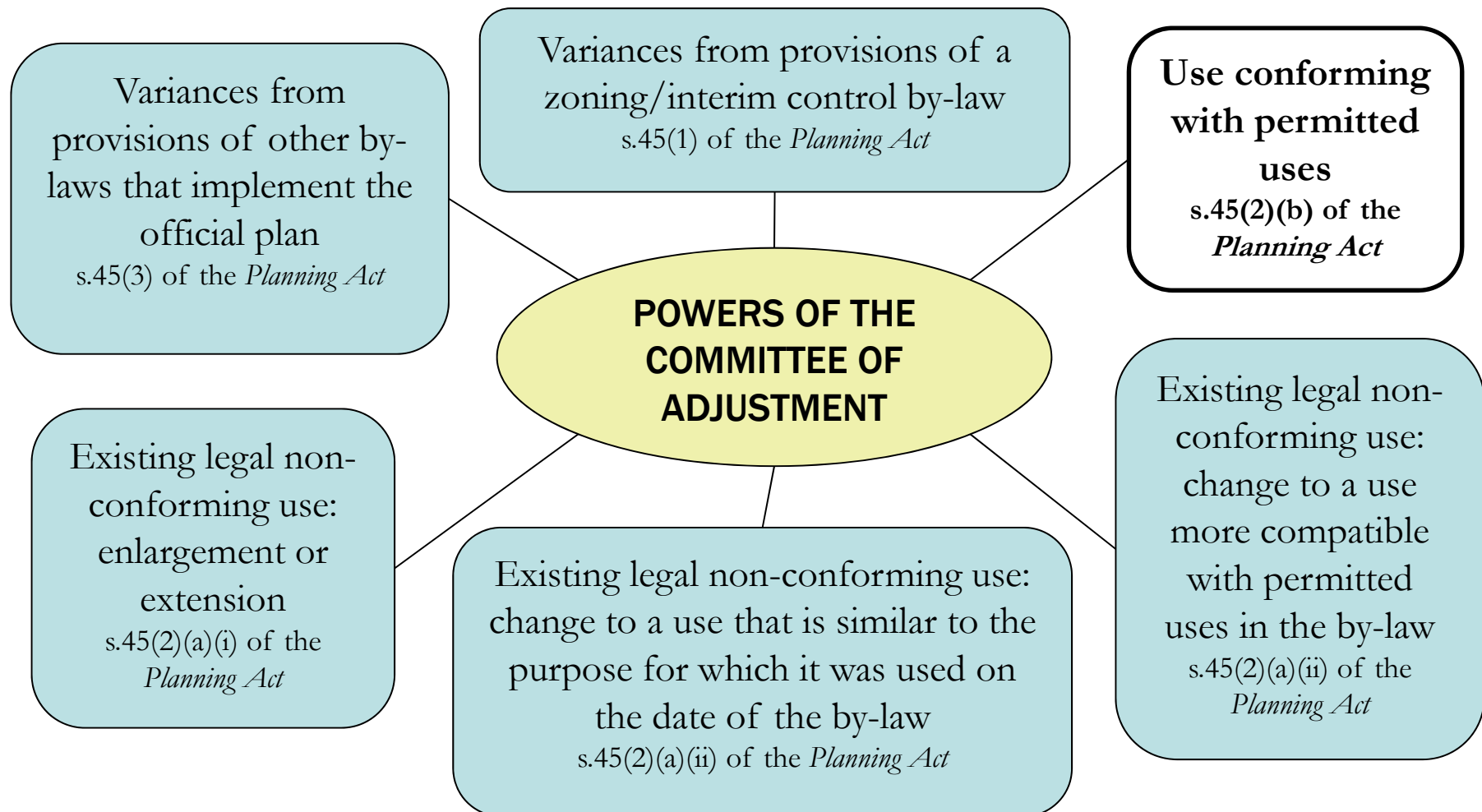
2. Is the variance desirable for the appropriate development or use of the land, building or structure?

3. Does the variance maintain the general intent and purpose of the zoning by-law?

4. Does the variance maintain the general intent and purpose of the official plan?



# Committee's Powers: Use Conforming with Permitted Uses

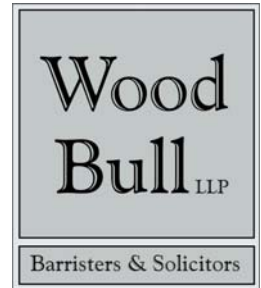


# Uses Conforming with Permitted Uses in By-law

## The Committee:

45(2)(b) *where the uses of land, buildings or structures permitted in the by-law are defined in general terms, may permit the use of any land, building or structure for any purpose that, in the opinion of the committee, conforms with the uses permitted in the by-law.*

# Uses Conforming with Permitted Uses in By-law



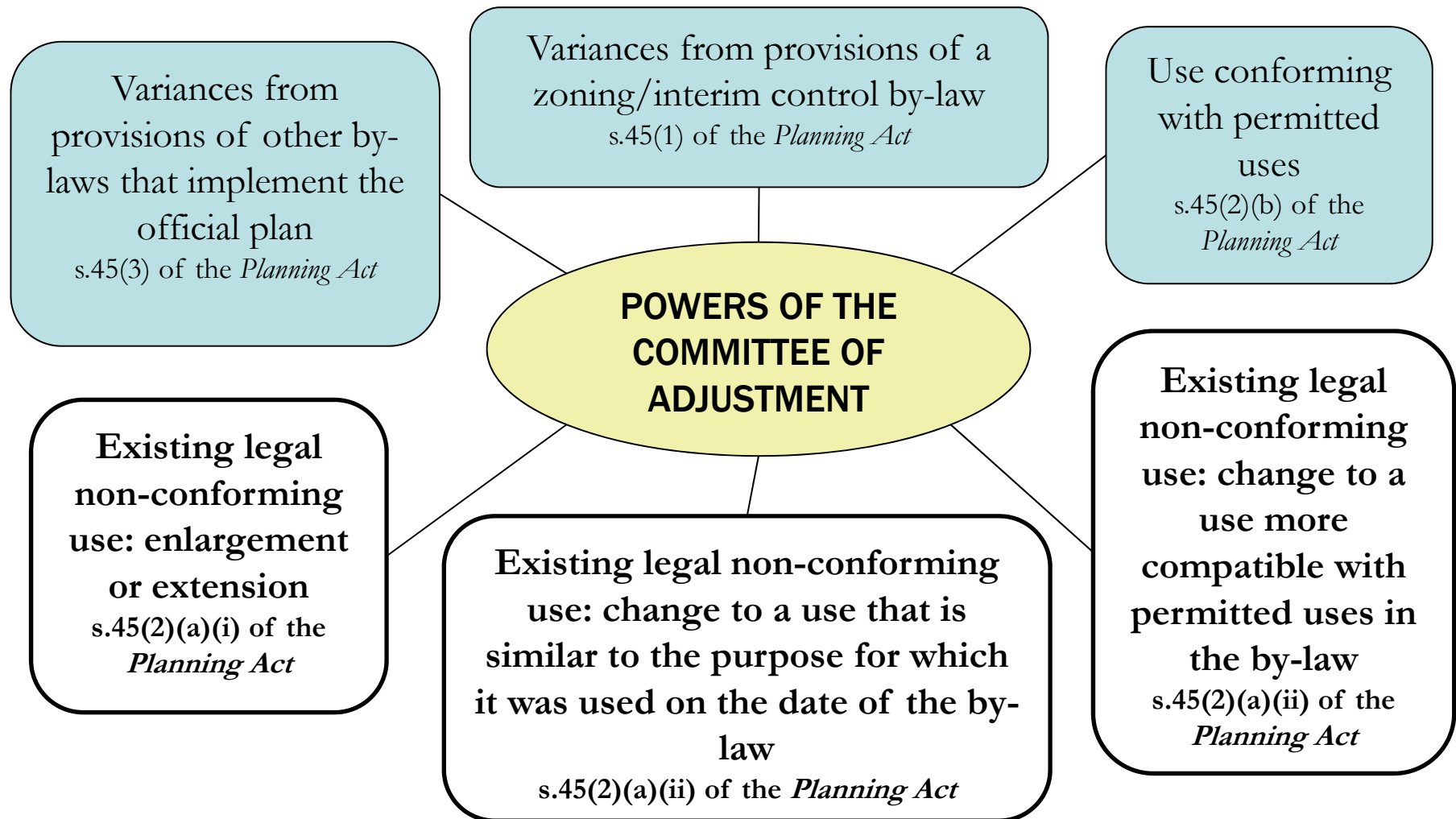
## Considerations:

Non applicability of s. 45(1) Four-Part Test?

*Fishburn Holdings Ltd. v. Halton Hills (Town)*, [2012] O.M.B.D.  
No. 564

*“Unlike s. 45(1), there is no four part test set out in s. 45(2)(b). The section merely states that if the uses permitted in the governing by-law are defined in general terms, additional uses may be permitted as long as they conform with the uses permitted in the by-law.”*

# Committee's Powers: Legal Non-Conforming Uses



# What constitutes a Legal Non-Conforming Use?

Planning Act, R.S.O. 1990, Chapter P.13, Subsection 34(9)(a)

*"Excepted lands and buildings*

*34(9) No by-law passed under this section applies,*

*(a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose"*

## 1. PROHIBITED PURPOSE

*"No by-law passed under this section applies,  
(a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law ..."*

## 2. LAWFULLY USED

*"...if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law..."*

## 3. CONTINUOUS USE

*"...so long as it continues to be used for that purpose"*

# What constitutes a Legal Non-Conforming Use?

## FLOWCHART 1. PROHIBITED PURPOSE

*"No by-law passed under this section applies,*

*(a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law ..."*

Step 1. CURRENT USE: Identify the current use of the subject land, building or structure.



Step 2. ZONING PROVISIONS: Identify the relevant provisions in the current applicable zoning by-law for the subject land, building or structure.



Step 3. NATURE OF NON-CONFORMITY: Establish how the purpose for which the land, building or structure is used is prohibited by the current applicable zoning by-law.



**THE CURRENT USE OF THE LAND, BUILDING OR STRUCTURE IS FOR A PROHIBITED PURPOSE**

Proceed to Flowchart 2

# What constitutes a Legal Non-Conforming Use?

## FLOWCHART 2. LAWFULLY USED

"No by-law passed under this section applies,  
...if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law..."

### Step 1. LAWFUL USAGE:

Establish when the current use was permitted e.g. review previous zoning by-laws.

### Step 2. PASSING OF PROHIBITING BY-LAW:

Establish when the zoning by-law that prohibits the purpose and created the non-conformity was passed.

### Step 3. USE ON DAY THE PROHIBITING BY-LAW PASSED:

Establish that the lands, building or structure were being lawfully used for the prohibited purpose on the day that the prohibiting zoning by-law was passed.

- i. Consider: the actual use on the date of the by-law, not a prior use or a potential use
- ii. If use was not fully developed on the day that the prohibiting by-law was passed, consider:  
Was there a real intention to use the land, building or structure for the prohibited purpose, and an actual user so far as that purpose could be carried out at that time?

## THE LAND, BUILDING OR STRUCTURE WAS "LAWFULLY USED" FOR THE PROHIBITED PURPOSE ON THE DAY THAT THE PROHIBITING ZONING BY-LAW WAS PASSED

\*Note: "lawful" does not include a consideration of whether the use meets other legal requirements [*Town of Richmond Hill v. Miller Paving Ltd.* (Ont. H.C., 1978); *City of Toronto v. San Joaquin Investments, Ltd.*, (Ont. H.C., 1978; *aff'd* Ont. Div. Ct., 1979; *Teed v. Charbonneau*, [1961] O.R. 169 (H.C.); and *Bibun v Long Branch* (1960) CarswellOnt 218 (OCA) ]

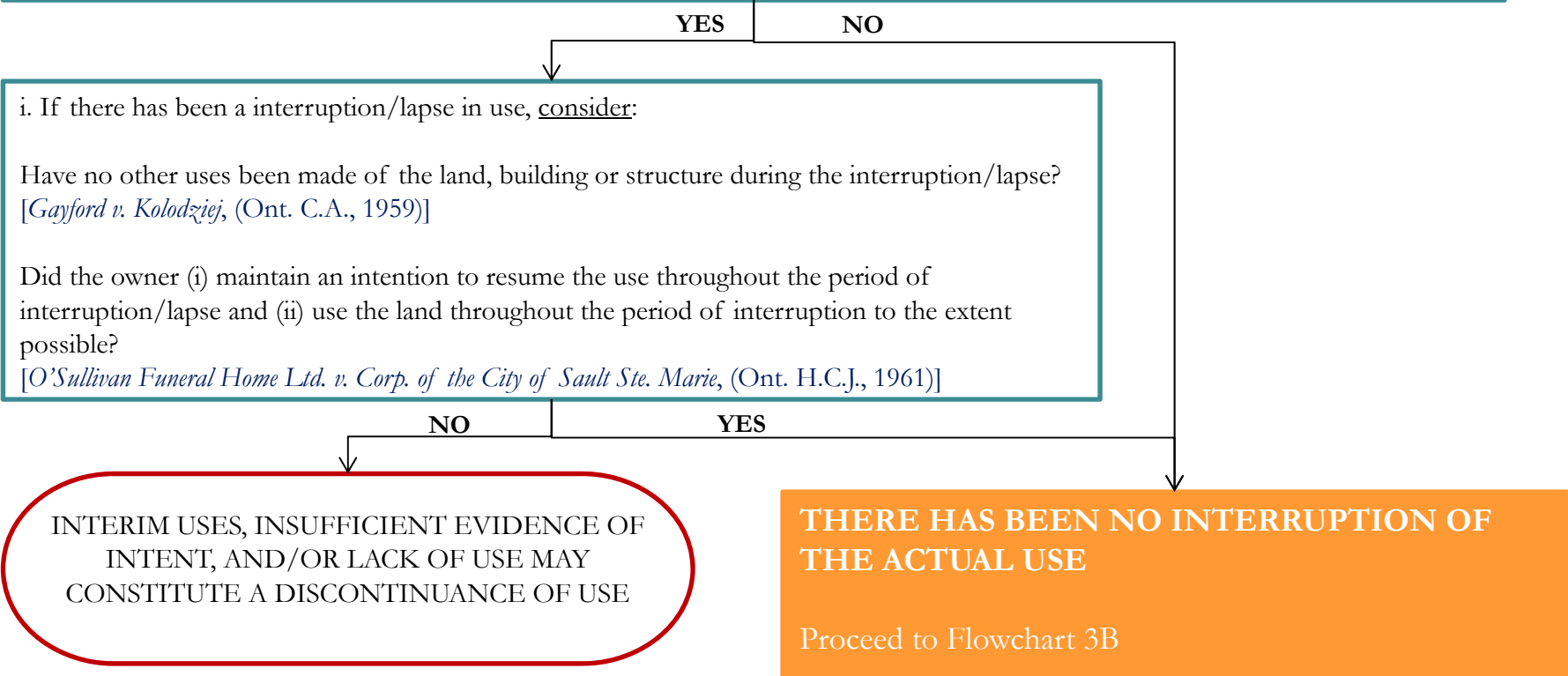
Proceed to Flowchart 3

# What constitutes a Legal Non-Conforming Use?

## FLOWCHART 3A. CONTINUOUS USE

*"No by-law passed under this section applies ... so long as it continues to be used for that purpose"*

A. DISCONTINUANCE OF USE: Has there been an interruption/lapse of the use from the day the prohibiting by-law was passed to today?





# What constitutes a Legal Non-Conforming Use?

## FLOWCHART 3B. CONTINUOUS USE (cont'd)

*"No by-law passed under this section applies, ... so long as it continues to be used for that purpose"*

B. CHANGE IN USE: Has the use changed from the day the prohibiting by-law was passed to today?

MAYBE / YES

NO

i. INCREASED SCALE OR INTENSITY OF CURRENT USE: If there was an increase in the scale or intensity of the current use, consider:

Does the increase go beyond a matter of degree and constitute, in terms of community impact, a difference in kind, so as to lose the protection of the subsection? [*Saint-Romuald v. Olivier* (SCC, 2001)]

YES

NO

INCREASE MAY  
AMOUNT TO A  
DISCONTINUANCE

THE PROHIBITED USE OF THE LAND, BUILDING OR  
STRUCTURE HAS BEEN CONTINUOUS SINCE THE DAY  
THE PROHIBITING ZONING BY-LAW WAS PASSED:  
LEGAL NON-CONFORMING USE ESTABLISHED

# What constitutes a Legal Non-Conforming Use?

## FLOWCHART 3B. CONTINUOUS USE (cont'd)

*"No by-law passed under this section applies, ... so long as it continues to be used for that purpose"*

B. CHANGE IN USE: Has the use changed from the day the prohibiting by-law was passed to today?

MAYBE / YES

NO

ii. NEW ACTIVITIES: If activities have been added, altered or modified within the scope of the original purpose (i.e., ancillary or closely related to the pre-existing activities), consider:  
The balance of the landowner's right to continued use against the broader planning interests of the community (e.g. any land use compatibility issues) by considering the following:

- Nature of the pre-existing use (i.e. degree of conflict with surrounding land uses)
- Degree of remoteness of the new use from the original use ( the closer to the original use, the more unassailable the use)
- Extent of new or aggravated neighbourhood effects from the new activities?

*[Saint-Romuald v. Olivier (SCC, 2001)]/R. v. Capital Parking Inc. [2002] O.J. No. 1511*

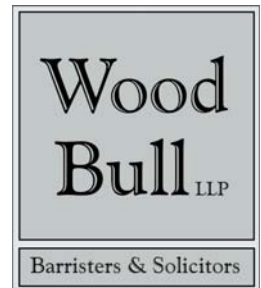
NO

YES

ACTIVITIES MAY HAVE CHANGED USE SO AS TO AMOUNT TO A DISCONTINUANCE

**THE PROHIBITED USE OF THE LAND, BUILDING OR STRUCTURE HAS BEEN CONTINUOUS SINCE THE DAY THE PROHIBITING ZONING BY-LAW WAS PASSED: LEGAL NON-CONFORMING USE ESTABLISHED**

# Legal Non-Conforming Uses: Comparison of s.34(9) Protection with s.45(2) Committee Powers



	<b>Enlargement or Extension</b>	<b>Similar Use</b>	<b>More Compatible with Permitted Uses</b>
34(9)	45(2)(a)(i)	45(2)(a)(ii)	45(2)(a)(ii)
(9) No by-law passed under this section applies,	(2) In addition to its powers under subsection (1), the committee,	(2) In addition to its powers under subsection (1), the committee,	(2) In addition to its powers under subsection (1), the committee,
(a) to prevent the use of any land, building or structure			
for any purpose			
prohibited by the by-law			
	upon any such application,	upon any such application,	upon any such application,
if	(a) where	(a) where	(a) where
such land, building or structure	any land, building or structure,	any land, building or structure,	any land, building or structure,
on the day of the passing of the by-law	on the day the by-law was passed,	on the day the by-law was passed,	on the day the by-law was passed,
was lawfully used for such purpose	was lawfully used for a purpose prohibited by the by-law,	was lawfully used for a purpose prohibited by the by-law,	was lawfully used for a purpose prohibited by the by-law,

	<b>Enlargement or Extension</b>	<b>Similar Use</b>	<b>More Compatible with Permitted Uses</b>
	...may permit	...may permit	...may permit
	(i) the enlargement or extension of the building or structure,	(ii) the use of such land, building or structure for a purpose that,	(ii) the use of such land, building or structure for a purpose that,
		in the opinion of the committee	in the opinion of the committee
		is similar to the purpose for which it was used	is more compatible with the uses permitted by the by-law than the purpose for which it was used,
[See above]		on the day the bylaw was passed,	on the day the by-law was passed
	if	if	if
	the use that was made of the building or structure on the day the by-law was passed,	the use for a purpose prohibited by the by-law	the use for a purpose prohibited by the by-law
	or	or	or
	a use permitted under subclause (ii)	another use for a purpose previously permitted by the committee	another use for a purpose previously permitted by the committee
so long as it continues to be used for that purpose	continued until the date of the application to the committee,	continued until the date of the application to the committee	continued until the date of the application to the committee
	but no permission may be given to enlarge or extend the building or structure		
	beyond the limits of the land owned and used in connection therewith		
	on the day the by-law was passed		

# Legal Non-Conforming Uses: Enlargement or Extensions

## The Committee:

45(2)(a) *where any land, building, or structure, on the day the by-law was passed, was lawfully use for a purpose prohibited by the by-law, may permit,*

(i) *the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed or a use permitted under subclause (ii)... continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed;*

# Legal Non-Conforming Uses: Enlargement or Extensions

## Statutory Tests:

Is it a legal non-conforming use?

Is it another use for a purpose previously permitted by the Committee?

Has it continued to the date of application?

*Parker v. City of Toronto* (OMB, 1986)

*Song v. Town of Cobourg Committee of Adjustment* (OMB, 1988)

*Imrie v. City of Toronto Committee of Adjustment* (OMB, 1990)

*Re O'Riley* (OMB, 1991)

*Ottawa (City) v. Ottawa (City) Committee of Adjustment* (OMB, 1993)

Is the enlargement or extension beyond the limits of the land owned and used in connection therewith on the day the by-law was passed?

*W. Koltun et al. v. The Joseph Brennan Construction Co. Ltd.* (OMB, 1986) [unreported]

# Legal Non-Conforming Uses: Enlargement or Extensions

## Other Considerations:

1. The four-part minor variance test does not apply

*Central Bakery of Toronto Ltd. et al. v. Sanchez* (OMB, 1986)

2. Impact on amenities and the surrounding neighbourhood

*Sims et al. v. Daschko* (OMB, 1975)

3. Public interest

*Re Township of Cumberland Interim Control By-law 64-86 and Martin et al. v. Township of Cumberland Committee of Adjustment* (OMB 1987)

4. Existing structure, not new structure

*Jewell et al. v. Town of Stoney Creek* (OMB, 1975)

5. Ownership of lands

*Mott v. County of Lanark Land Division Committee* (OMB, 1983)

6. Previous permission to enlarge or expand

*Town of Oakville v. Committee of Adjustment of the Town of Oakville* (OMB, 1984)

# Legal Non-Conforming Uses: Similar Use

## The Committee:

45(2)(a) *where any land, building, or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,*

*(ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or ... if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee;*



# Legal Non-Conforming Uses: Similar Use

## Statutory Tests:

Is it a legal non-conforming use?

Is it another use for a purpose previously permitted by the Committee?

Has it continued to the date of application?

*Parker v. City of Toronto* (OMB, 1986)

*Song v. Town of Cobourg Committee of Adjustment* (OMB, 1988)

*Imrie v. City of Toronto Committee of Adjustment* (OMB, 1990)

*Re O'Riley* (OMB, 1991)

*Ottawa (City) v. Ottawa (City) Committee of Adjustment* (OMB, 1993)

Is the proposed use similar to the purpose for which it was used on the day the prohibiting by-law was passed?

““Similar” must mean similar in terms of planning purposes, which means similar in terms of impacts, physical, economical and social”

*Frank Sciabbarrasi Holding Ltd v. Milton (Town)* (OMB, 2001)

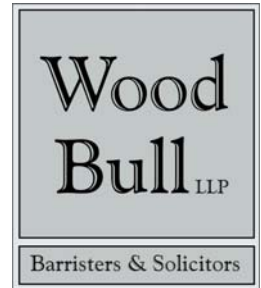
# Legal Non-Conforming Uses: More Compatible with Permitted Uses

## The Committee:

45(2)(a) *where any land, building, or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,*

*(ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, ... is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee;*

# Legal Non-Conforming Uses: More Compatible with Permitted Uses



## Statutory Tests:

Is it a legal non-conforming use?

Is it another use for a purpose previously permitted by the Committee?

Has it continued to the date of application?

*Parker v. City of Toronto* (OMB, 1986)

*Song v. Town of Cobourg Committee of Adjustment* (OMB, 1988)

*Imrie v. City of Toronto Committee of Adjustment* (OMB, 1990)

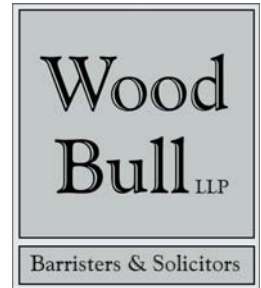
*Re O'Riley* (OMB, 1991)

*Ottawa (City) v. Ottawa (City) Committee of Adjustment* (OMB, 1993)

Is the proposed use more compatible [with the uses permitted by the prohibiting by-law] than the purpose for which it was used on the day the prohibiting by-law was passed?

*Sault Ste. Marie (City) v. MacWilliam* (OMB, 1974)

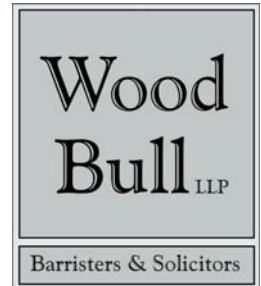
# Legal Non-Conforming Uses: More Compatible with Permitted Uses



## Other Considerations:

1. Non-applicability of the four-part minor variance test  
*Central Bakery of Toronto Ltd. et al. v. Sanchez* (OMB, 1986)

# Legal Non-Conforming Uses: By-law May be Amended (s.34(10))



*34 (10) Despite any other provision of this section, any by-law passed under this section or a predecessor of this section may be amended so as to permit the extension or enlargement of any land, building or structure used for any purpose prohibited by the by-law if such land, building or structure continues to be used in the same manner and for the same purpose as it was used on the day such by-law was passed.*

*Re Sault Dock Co. Ltd. and City of Sault Ste. Marie et al. [1972] 3 O.R. 793-801  
Bull v. Barr 2012 CarswellOnt 14991, 74 O.M.B.R. 414*

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