



Big Box Development and Employment Lands

**Dennis H. Wood
Johanna Shapira**

February 2010

Ontario Bar Association
Continuing Legal Education

BIG BOX DEVELOPMENT AND EMPLOYMENT LANDS

WHAT ARE EMPLOYMENT AREAS/EMPLOYMENT LANDS?..... 2

HOW ARE EMPLOYMENT LANDS PROTECTED AGAINST NON-EMPLOYMENT USES?
..... 6

IS A RETAIL USE AN EMPLOYMENT USE? 8

CONFORMITY WITH PROVINCIAL PLANS/CONSISTENCY WITH PPS (2005) 12

CONVERSION OF LANDS WITHIN EMPLOYMENT AREAS FOR MAJOR RETAIL
PURPOSES: LIMITATIONS ON PRIVATE APPLICATION APPEALS..... 13

PLANNING FOR EMPLOYMENT IN THE GREATER GOLDEN HORSESHOE:
BACKGROUND PAPER (MAY 2008)..... 14

BALANCING RETAIL AND NON-RETAIL EMPLOYMENT 15

WHAT ARE EMPLOYMENT AREAS/EMPLOYMENT LANDS?

1. In order to address the topic of big box or large scale retail development within the context of the burgeoning array of policies intended to “protect” employment lands or employment areas, it is first necessary to identify what is meant by “employment areas” and “employment lands”.
2. Although the title of this paper is directed to “employment lands”, it is necessary to address both “employment lands” and “employment areas”.
3. The definitions of an “area of employment” and “employment area” are found, respectively, in the *Planning Act*, the Provincial Policy Statement (2005) (the “PPS (2005)”), and the Growth Plan for the Greater Golden Horseshoe 2006 (the “Growth Plan”). **Table 1** attached to this paper compares the definitions in these three documents. The definitions are essentially the same.
4. For the purposes of this discussion, we can refer to the definition in the *Planning Act*, which is as follows:

Interpretation

1.(1) In this Act, “area of employment” means an area of land designated in an official plan for clusters of business and economic uses including, without limitation, the uses listed in subsection (5), or as otherwise prescribed by regulation;

Uses re “area of employment”

1. (5) The uses referred to in the definition of “area of employment” in subsection (1) are,
(a) manufacturing uses;
(b) warehousing uses;
(c) office uses;
(d) retail uses that are associated with uses mentioned in clauses (a) to (c); and
(e) facilities that are ancillary to uses mentioned in clauses (a) to (d).

and the definition in the PPS (2005) which reads as follows:

Employment area:

means those 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.

5. There is no provincial definition of “employment lands” as distinct from the defined term “employment areas” but it is quite clear that there is a difference, or, at least, I would argue, there should be a distinction between the two, in particular in the context of a consideration of the conversion of land within “areas” to non-employment uses.

The matter is further complicated by the manner in which various municipalities have gone about defining these terms.

6. A review of recently adopted upper tier official plans indicates that in some cases (i.e. Halton and Niagara), municipalities have simply used the same defined term as is in the Growth Plan/PPS (2005); in others, using the same defined term but substituting the term “employment lands” for the term “employment area” (i.e. Peel). I refer you to **Table 2** to this paper, which outlines the different approaches undertaken by upper tier municipalities.
7. The individualistic approach is seen in York and Durham Region, who have adopted their own definitions of the terms. They are as follows:

- (a) In York, the term “employment lands” is defined for the specific purpose of considering the conversion of “employment lands” to “non-employment land uses” as follows:

...employment lands are lands which are designated for employment uses including land designated as industrial and business park in local official plans

- (b) In Durham, the term “employment areas” is given a specific definition as follows:

8C.2.1

Employment Areas, as designated on Schedule 'A', are set aside for uses that by their nature may require separation from sensitive uses, or benefit from locating close to similar uses. Permitted uses may include manufacturing, assembly and processing of goods, service industries, research and development facilities, warehousing, offices, business parks, hotels, storage of goods and materials, freight transfer and transportation facilities. Such uses shall be designated in appropriate locations in the respective area municipal official plans, in accordance with the provisions of this Plan. Rural Employment Areas, as designated on Schedule 'A', shall be developed in accordance with the provisions of Sub-Section 9B.

8. The City of Toronto official plan speaks of “employment areas” and “employment districts” without defining precisely what these words mean either in terms of provincial definitions or local definitions.
9. To further complicate matters, each municipality has taken a different approach to the designation of “employment” areas or lands.
10. A clear “takeaway” from a review of the provincial definitions and the approach taken in the above-noted municipal official plans is that an “area” may be an employment area even if it is not specifically designated as an “employment area”.
11. This conclusion is supported by the recent Board decision of *Creebank Properties (Oakville) Ltd v. Oakville (Town)*, OMB Case No. PL080593, Issue Date: May 05, 2009, in which the Board determined that lands designated “Arterial Commercial” located in proximity to other lands designated “Employment”, in a particular quadrant of Oakville located within the “Midtown Core Employment District Secondary Plan”, were part of an “employment area” under the Growth Plan and PPS (2005). The consequence of this finding will be reviewed later in the context of the discussion of the conversion of land within an “employment area” to a non-employment use. The *Creebank* decision is attached to this paper, for reference.

12. In reaching its decision regarding whether the subject lands were located within an “employment area”, as defined in the Growth Plan and the PPS (2005), the Board heard evidence from Oakville that:

- *Employment areas include "areas designated in an Official Plan for clusters of business and economic activities". This indicates that "area" refers to a geographic area not a single property and that the land use permissions must be for business and economic activities.*
- *Employment areas are defined not by existing uses but by designated uses.*
- *Employment areas do not need to be a single designation. Multiple designations with employment uses may be included in a single Employment area.*
- *The activities are to include "but are not limited to, manufacturing, warehousing, offices and associated retail and ancillary facilities." An Employment area may include one, some or all of the activities listed in the definition.*
- *The phrase "including but not limited to" recognizes the huge range of variation in Official Plan policies throughout the Greater Golden Horseshoe area. The intention is to establish a broad definition, which provides municipalities with sufficient flexibility to establish Employment areas, which meet the needs to the municipality.(page 8)*

13. Now, this decision was rendered in the context of official plan policies which were approved over twenty years before the PPS (2005) and the Growth Plan were established; so, it is possible that the findings might be different in the context of official plan provisions which were adopted and approved after these provincial policies documents were in effect inasmuch as the organization of land use designations and definitions in an official plan may point to the conclusion that it was not intended that non-employment area designations (which contain employment type uses) should be construed as employment areas.

HOW ARE EMPLOYMENT LANDS PROTECTED AGAINST NON-EMPLOYMENT USES?

14. The following policy of the Growth Plan is intended to preserve the employment land base.

2.2.6.5. Municipalities may permit conversion of lands within employment areas, to non-employment uses, only through a municipal comprehensive review where it has been demonstrated that –

a) there is a need for the conversion

b) the municipality will meet the employment forecasts allocated to the municipality pursuant to this Plan

c) the conversion will not adversely affect the overall viability of the employment area, and achievement of the intensification target, density targets, and other policies of this Plan

d) there is existing or planned infrastructure to accommodate the proposed conversion

e) the lands are not required over the long term for the employment purposes for which they are designated

f) cross-jurisdictional issues have been considered.

For the purposes of this policy, major retail uses are considered non-employment uses.(underlining added)

15. Section 2.2.6.6 limits the application of Section 2.2.6.5:

2.2.6.6 Policy 2.2.6.5 only applies to employment areas that are not downtown areas or regeneration areas. For those employment areas that are downtown areas or regeneration areas, Policy 1.3.2 of the PPS, 2005 continues to apply.

16. Notably, the Growth Plan does not provide any definition of the words “downtown areas” and “regeneration areas”.

17. The companion policy in the PPS (2005) provides as follows:

1.3.2 Planning authorities may 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.

18. The *Creebank* decision referred to earlier provides a case study in the application of the conversion policies in the Growth Plan and the PPS (2005). The Applicant sought to amend the Town of Oakville official plan to re-designate lands located at the Trafalgar Road-QEW interchange from Arterial Commercial to Mixed Use, to permit a residential condominium complex. At the hearing of the private appeal, the Board considered the issue of whether the approval of the proposed official plan amendment would constitute a conversion of lands within an employment area, under Section 2.2.6.5 of the Growth Plan and Section 1.3.2 of the PPS 2005.
19. Once the Board determined that the subject lands were within an “employment area” (discussed above), the reasoning of the Board on the question of a possible prohibited conversion was follows:
 - the approval of the proposed official plan amendment would constitute a conversion,
 - a *comprehensive review* had not been completed; and, therefore,
 - the proposed official plan amendment to permit residential was barred from proceeding (ed. based upon the “conformity provisions” of the *Planning Act* discussed below).
20. The *Creebank* appeal was before the Board as a private appeal originating from an application for an official plan amendment because the application was not considered, originally, to be a conversion of lands within an employment area.
21. In a situation where the Growth Plan and PPS (2005) are in effect, the application could not have been made in the first place because a conversion of employment lands to residential uses can only be considered in the context of a “(*municipal*) *comprehensive review*” which is entirely within the control of a municipality.

22. A “municipal comprehensive review” is defined as follows in the Growth Plan:

An official plan review, or an official plan amendment, initiated by a municipality that comprehensively applies the policies and schedules of this Plan.

23. A “comprehensive review” is defined as follows in the PPS (2005):

a) for the purposes of policies 1.1.3.9 and 1.3.2, an official plan review which is initiated by a planning authority, or an official plan amendment which is initiated or adopted by a planning authority, which:

1. is based on a review of population and growth projections and which reflect projections and allocations by upper-tier municipalities and provincial plans, where applicable; considers alternative directions for growth; and determines how to best accommodate this growth while protecting provincial interests;

2. utilizes opportunities to accommodate projected growth through intensification and redevelopment;

3. confirms that the lands to be developed do not compromise specialty crop areas in accordance with policy 2.3.2;

4. is integrated with planning for infrastructure and public service facilities; and

5. considers cross-jurisdictional issues.

24. **Table 3** to this paper compares the definition of “municipal comprehensive review” in the Growth Plan with “comprehensive review” in the PPS (2005).

IS A RETAIL USE AN EMPLOYMENT USE?

25. The PPS (2005) includes the following policies respecting employment areas:

1.3 Employment Areas

1.3.1 Planning authorities shall promote economic development and competitiveness by:

providing for an appropriate mix and range of employment (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;

planning for, protecting and preserving employment areas for current and future uses; and

ensuring the necessary infrastructure is provided to support current and projected needs. (underlining added)

26. The Growth Plan has a similar approach to the matter of retail employment as follows:

2.2.6.2 Municipalities will promote economic development and competitiveness by-

a) providing for an appropriate mix of employment uses including industrial, commercial and institutional uses to meet long-term needs...(underlining added)

27. The Board has confirmed that retail uses are considered “employment uses” for the purposes of the PPS (2005). The leading case in this regard is *North American Acquisition Inc., OMB Case No. PL050527, Decision/Order No: 3067, Issue Date: October 31, 2006*. At pages 23-24 of that decision, the Board states:

It is noted ... that Mr. Taylor had difficulty including commercial uses within the definition of “employment areas” and that he delineated between “industrial” jobs and “commercial” jobs. This interpretation is not supported by a plain reading of the 2005 PPS ... Failing to include commercial uses within the definition of “employment areas” leads to the absurd conclusion that retail and service commercial uses are considered “non-employment uses” within Policy 1.3.2, given that Section 1.3 of the 2005 PPS generally speaks to the protection of land uses that generate jobs. ... (emphasis added)

28. The Board confirmed its interpretation of “employment uses” in the context of Policy 1.3 of the PPS 2005 in a subsequent case, *Towerhill Developments*, OMB Case No. PL060427, Decision/Order 1064, April 17, 2007. In *Towerhill Developments*, a private application for a zoning by-law amendment was filed to permit a warehouse membership club store and accessory gas bar in the City of Peterborough. In considering the issue as to whether the proposed zoning by-law was consistent with the PPS 2005, the Board found that:

Under section 1.3.2 of the 2005 PPS a comprehensive review is required if an employment area is converted to a non-employment use. Under section 1.3.1 (a) employment is defined to include industrial, commercial and institutional. Based upon the evidence of Sorensen, I accept the submission of the City that there is no change to a non-employment use. Costco will have employment for approximately 200 employees. This interpretation is consistent with the Board interpretation in North American Acquisition Inc. v. Barrie Decision 3067, October 31, 2006. (page 9)

29. In a recent Board decision, where a party and a number of participants challenged whether a retail development provided “employment” within the context of the PPS (2005) and the Growth Plan, and also challenged the quality of the retail “jobs”, the Board noted as follows:

The initiative to repurpose the Subject Property from a film studio to a significant retail development brought to the surface two issues that warrant early treatment as final contextual matters. They are: the nature of retail employment, especially its qualitative aspects; and, how important a role the film sector plays in the South of Eastern Employment District.

The Board has carefully examined the evidence before it with respect to these two issues.

Concerning the former, the nature of retail employment and its qualitative aspects, the Board was alert to a not-so-subtle motivation in both the City's and the ETCC's respective case that retail jobs represent inferior employment given wage rates, lack of job security, and lack of benefits typically characterizing such employment. Indeed, notwithstanding the City's inability to stop demolition of the existing buildings on the Subject Property, each case was largely premised on maintaining the existing buildings to facilitate their use for smaller budget film production or more agreeable types of employment. Those witnesses testifying to this expectation either ignored or were oblivious to this constraint on the City.

Aside from statistical support or whether an individual pursues retail employment by choice or by default, the Board finds the issue to be a red herring. 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." Ms Graham,

one of the City's planning witnesses, acknowledged in cross-examination that she was not aware of any example wherein planning staff had taken wage rates into account as a basis for evaluating a land use proposal. Mr. Smith, TFS/SC's planning witness, testified that provincial policy does not direct a municipality to remove retail use permissions from employment areas where such uses have been determined to be appropriate, that this hearing was not a contest between types of jobs and, finally, that it is not for the Board to get into this latter philosophical argument.

Any comment on the nature of retail employment and its qualitative aspects, if it is to be taken even half seriously, must acknowledge both the subjectiveness of the topic as well as its own value-laden underpinnings. For all of the above reasons, the Board will not contribute to the stigmatization or denigration of retail employment by making any ruling on its nature and qualitative aspects. The Board will, however, address retail employment in the context of provincial policy, and that is taken up in the section of this decision dealing with the Site-Specific Applications.....

The Board has already addressed the matter of what counts as employment in an earlier passage of this decision, though it bears repeating here given its importance: there is nothing in provincial policy barring large scale retail uses from employment areas where a municipality has determined such uses to be appropriate; and, the jobs generated by retail uses absolutely count toward achieving employment forecasts mandated in provincial policy (underlining added) (SmartCentres Inc. (Toronto Film Studios Inc.), OMB Case NO. PL051314, PL061112, PL080335, PL080565, Issue Date: March 03, 2009, at pages 9-10, and 41-42)

30. On the question of whether a “major retail” use could be a permitted use within an employment area in the face of the definition of “employment area” in the Growth Plan, in the *Creebank* decision, the Board noted that the Applicant’s planner had opined that since the Arterial Commercial designation applying to his client’s property permitted major retail uses, it could not be an “employment area” for the purposes of the Growth Plan. The Board rejected this opinion and found that:

“... the Growth Plan does not exclude major retail uses from employment uses in general. It is only in the case of a conversion of employment lands to non-employment uses that the Growth Plan classifies major retail uses as a non-employment use. If the

permission for the location of the major retail use within an Employment area is not a conversion, then the classification of major retail uses as a non-employment use does not apply.” (p. 12)

CONFORMITY WITH PROVINCIAL PLANS/CONSISTENCY WITH PPS (2005)

31. As is well known, subsection 3(1) of the *Planning Act* authorizes the Province to issue policy statements on municipal planning matters that are of provincial interest. All decisions of a municipal council, local board, minister of the Province, or other board or agencies must be “consistent with” policy statements issued under Subsection 3(1).
32. Furthermore, various provincial statutes enable the Province to make “provincial plans” under these statutes, such as the Greenbelt Plan, the Growth Plan, the Niagara Escarpment Plan and the Oak Ridges Moraine Plan. Under both the statutes authorizing the making of the plans and under the *Planning Act*, official plan and zoning documents must “conform with” the provincial plans.:

Policy statements and provincial plans

3. (5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,

(a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and

(b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. (emphasis added)

Same

(6) Comments, submissions or advice affecting a planning matter that are provided by the council of a municipality, a local board, a planning board, a minister or ministry, board, commission or agency of the government,

(a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date the comments, submissions or advice are provided; and

(b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

33. So, where there is a lack of conformity of a proposed official plan or zoning by-law, for instance, with the policies of the Growth Plan, or a lack of consistency with the PPS (2005), as in the *Creebank* case, then the proposed amendments should not be approved.

CONVERSION OF LANDS WITHIN EMPLOYMENT AREAS FOR MAJOR RETAIL PURPOSES: LIMITATIONS ON PRIVATE APPLICATION APPEALS

34. The *Planning Act* provides no right of appeal by an applicant from an adverse decision of a municipal council respecting the “removal of land from areas of employment” (i.e. a “conversion”), where a municipality has policies dealing with such removal. The relevant subsections of Section 22, Request for Amendment, are as follows:

Appeal to O.M.B.

(7) When a person or public body requests an amendment to the official plan of a municipality or planning board, any of the following may appeal to the Municipal Board in respect of all or any part of the requested amendment, by filing a notice of appeal with the clerk of the municipality or the secretary-treasurer of the planning board, if one of the conditions set out in subsection (7.0.2) is met:

- 1. The person or public body that requested the amendment.*
- 2. The Minister.*
- 3. The appropriate approval authority. ...*

Appeals restricted re certain amendments (underlining added)

(7.1) Despite subsection (7) and subsections 17 (36) and (40), there is no appeal in respect of,

(a) a refusal or failure to adopt an amendment described in subsection (7.2); or

(b) a refusal or failure to approve an amendment described in subsection (7.2).

Application of subs. (7.1)

(7.2) Subsection (7.1) applies in respect of amendments requested under subsection (1) or (2) that propose to,

(a) alter all or any part of the boundary of an area of settlement in a municipality;

(b) establish a new area of settlement in a municipality; or

(c) amend or revoke official plan policies that are adopted to permit the erecting, locating or use of two residential units in a detached house, semi-detached house or rowhouse situated in an area where residential use, other than ancillary residential use, is permitted.

Same

(7.3) If the official plan contains policies dealing with the removal of land from areas of employment, subsection (7.1) also applies in respect of amendments requested under subsection (1) or (2) that propose to remove any land from an area of employment, even if other land is proposed to be added. (emphasis added)

35. The clear implication of this appeal limitation is that a municipality does not need to defend, on appeal to the Board, a decision to refuse an application for the “removal of land from an area of employment”.

36. It is understood that the only time when there will be an opportunity for a private owner to seek a conversion in use is when the municipality conducts a “(municipal) comprehensive review”.

PLANNING FOR EMPLOYMENT IN THE GREATER GOLDEN HORSESHOE: BACKGROUND PAPER (MAY 2008)

37. The following quotation comes from a report released by the Ministry in May 2008 that was intended to provide some direction to municipalities in addressing, amongst other things, locational issues related to “major retail” facilities

Retail trade is a fundamental economic activity and accounts for a large number of jobs in the Greater Golden Horseshoe. Retail is also a key component of mixed-use communities. Local retail activity offers the opportunity for residents to meet their daily needs traveling by foot, bicycle, and public transit. Retail businesses also improve the overall

quality of life in a community and contribute to neighbourhood revitalization.

Better planning for retail activities will not only help to take advantage of the opportunities for more vibrant, complete communities, but it will also help to protect important employment lands that are better suited for other types of economic activities. In recent decades, many new retail developments have taken the form of power centres clustered around major highways. These large-format retail stores are often designed primarily for automobile access, with large parking lots and low-rise buildings that fragment important employment lands. Clarity and consistency in municipal official plans regarding which employment areas may or may not include retail uses will go a long way to ensuring that land is available for the industries requiring large contiguous blocks near major infrastructure, while at the same time ensuring that appropriate areas are identified for retail uses.

Proposed Strategy

Feedback is sought on the following proposed strategy:

5.4a) The Province should work with stakeholders to develop a set of guidelines to support better planning for retail activities. Some of the areas that these guidelines may examine include:

Proactively planning for the appropriate location and design of major retail, including large-format retail

Overcoming barriers to mixed-use retail developments in intensification areas

38. This document makes quite clear that the provision of retail employment is a part of the provincial planning vision. The question is not, should there be retail service and employment; rather where should it be provided and that is to be determined in the context of periodic “(municipal) comprehensive reviews”.

BALANCING RETAIL AND NON-RETAIL EMPLOYMENT

39. The Official Plan of the City of Toronto has an interesting approach to bridging the tension between competing uses in employment areas and the need to provide for land for large scale retail uses.

40. The policies respecting employment lands are found in Section 2.2.4 and Section 4.6 of the Toronto Official Plan. Section 2.2.4 relates to the “Employment District” element within the Urban Structure of the plan, and Section 4.6 relates to the “Employment Area” designation. Not all “Employment Areas” are within “Employment Districts”.

41. Sections 4.6.3 and 4.6.4 of the Toronto Official Plan establish permission for large scale retail uses within Employment Areas. Section 4.6.3 permits large scale retail uses in Employment Area lands that front onto major roads, and that form the boundary of the Employment Area, through a rezoning:

4.6.3 Large scale, stand-alone retail stores and “power centres” are not permitted in Employment Areas in the Central Waterfront and are only permitted in other Employment Areas fronting onto major streets as shown on Map 3, that also form the boundary of the Employment Areas through the enactment of a zoning by-law. Where permitted, new large scale, stand-alone retail stores and “power centres” will ensure that:

a) sufficient transportation capacity is available to accommodate the extra traffic generated by the development, resulting in an acceptable level of traffic on adjacent and nearby streets; and

b) the functioning of other economic activities within the Employment Areas and the economic health of nearby shopping districts are not adversely affected.

42. Section 4.6.4 permits large scale retail uses in Employment Area lands that do not form the boundary of an Employment Area by way of an official plan amendment.

4.6.4 Consideration may also be given to permit large scale and stand-alone retail stores in locations on major streets, as shown on Map 3, that do not form the boundary of Employment Areas, other than in the Central Waterfront, only by way of an Official Plan Amendment, if it can be demonstrated, among other matters, that:

a) such development will not undermine the stability of the Employment Area and will have particular regard for the viability of industrial uses;

b) sufficient transportation capacity is available to accommodate the extra traffic generated by the development, resulting in an acceptable level of traffic on adjacent and nearby streets; and

c) the economic health of nearby shopping districts is not adversely affected.

43. These sections in the Toronto Official Plan are illustrative of the fact that municipalities may include permission for “major retail” facilities within their locally-designated employment areas. Further, this approach, which is supported by the Ministry as to policy 4.6.3, rebuts any suggestion that the inclusion of “associated retail” in the defined term “employment area” in the Growth Plan and PPS (2005) precludes the inclusion of major retail in a locally-designated “employment area”.

Growth Plan Conformity

44. The City of Toronto underwent a planning exercise in 2009 for the stated purpose of amending its official plan to bring it into conformity with the Growth Plan. The exercise resulted in Official Plan Amendment No. 72 (“OPA 72”), which was adopted by City Council in May 2009. OPA 72 is currently under appeal at the Board.
45. The highlights of OPA 72 are as follows:
- Amends the employment forecast of 1.84 million jobs by 2031, to a “range of forecasts” between 1.64 and 1.84 million.
 - Adds the following policy:

To ensure a diverse economic base and provide fulfilling and well-paid employment opportunities for Toronto residents, all lands designated as Employment Areas within the Employment Districts as shown on Map 2 of this Plan are required to achieve the City’s range of employment forecasts by 2031. No lands designated Employment Areas within the Employment Districts as shown on Map 2 will be considered for conversion to non-employment uses, including major retail uses, without the completion of a Municipal Comprehensive Review to be undertaken every five years as part of a full review of this Plan. (emphasis added)
 - Deletes Section 4.6.4.
46. This amendment is under appeal.

Home Depot Decision

47. In a recent Section 43 decision, *Home Depot Holdings Inc. OMB Case No. PL080085*, *Issue Date: Oct 21, 2009*, the Board found that an application pursuant to Section 4.6.4 of the Toronto Official Plan would not constitute a conversion for the purposes of Section 2.2.6.5 of the Growth Plan. In arriving at its decision, the Board made a distinction between policies that establish a principle of use, and those that provide tests upon which a development is evaluated:

A conversion is a change of status from an employment use to a non-employment use in an Employment Area within and framed by these defined terms. Similarly, in an Employment Area, any attempt to change the status of any lands to large retail use would be considered a conversion. That is delineated clearly in the sub-clause of Section 2.2.6.5 of the Growth Plan as a special case. However, if the principle or permission for a proposed use for large retail commercial is already “established, authorise, or contemplated,” in an employment area, no conversion would be required. What is therefore important to discern is that a further planning process or instruments to evaluate the site condition or to implement such an authorisation is quite different from the process of introducing a use. The process of evaluation and implementation cannot and must not be confused with a “conversion”. (emph in original) (pp. 8-9)

Comparison Table - Definition of 'Employment Area'

Planning Act	Growth Plan for the Greater Golden Horseshoe, 2006	Provincial Policy Statement, 2005
Area Of Employment	Employment Area	Employment Area
means an		means those
area of land	Areas	areas
designated in an official plan	designated in an official plan	designated in an official plan
for clusters of business and economic uses	for clusters of business and economic activities	for clusters of business and economic activities
including, without limitation,	including, but not limited to,	including, but not limited to,
the uses listed in subsection (5), or as otherwise prescribed by regulation;		
Uses re "area of employment"		
(5) The uses referred to in the definition of "area of employment" in subsection (1) are,		
(a) manufacturing uses;	manufacturing,	manufacturing,
(b) warehousing uses;	warehousing,	warehousing,
(c) office uses;	offices	offices
(d) retail uses that are associated with uses mentioned in clauses (a) to (c); and	associated retail and	associated retail and
(e) facilities that are ancillary to uses mentioned in clauses (a) to (d).	ancillary facilities.	ancillary facilities.
	(Provincial Policy Statement, 2005)	

Table 2

Comparison Table - Regional and Single Tier Municipalities' Employment Area Policies

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
New Official Plan. Adopted 19 December 2009 With MMAH for approval.	DRAFT ROPA 24 (June 23, 2009) Not Yet Adopted	Regional Official Plan as amended by ROPA 38 ROPA 38 adopted 16 December 2009. With MMAH for approval	Regional Official Plan as Amended by ROPA 128 ROPA 128 adopted on 3 June 2009. With MMAH for approval	Regional Policy Plan as amended by ROPA 2-2009 ROPA 2-2009 adopted by Council on 28 May 2009 Appealed to OMB
4.3 Protecting Employment Lands	5.6 EMPLOYMENT LANDS	Employment Areas	8C Employment Areas	5.8 Employment Areas
	5.6.2 Policies		8C.2 Policies	
It is the policy of Council:	It is the policy of Regional Council to:	77.4 It is the <i>policy</i> of the <i>Region</i> to:		
6. That the conversion of employment lands to non-employment land uses is not permitted. For the purposes of this policy:				
a. employment lands are lands that are designated for employment uses including land designated as industrial and business park in local official plans; and,			8C.2.1 Employment Areas, as designated on Schedule 'A', are set aside for uses that by their nature may require separation from <i>sensitive uses</i> , or benefit from locating close to similar uses. Permitted uses may include manufacturing, assembly and processing of goods, service	

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
			<p>industries, research and development facilities, warehousing, offices, business parks, hotels, storage of goods and materials, freight transfer and transportation facilities. Such uses shall be designated in appropriate locations in the respective area municipal official plans, in accordance with the provisions of this Plan. Rural Employment Areas, as designated on Schedule 'A', shall be developed in accordance with the provisions of Sub-Section 9B.</p>	
			<p>8C.2.2 Residential uses shall not be permitted in Employment Areas. Other <i>sensitive uses</i> may be permitted as an exception, subject to applicable policies in area municipal official plans.</p>	
			<p>8C.2.6. Uses declared to be obnoxious under the provisions of any applicable statutes, regulations or guidelines shall not be permitted in</p>	

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
			Employment Areas.	
<p>b. uses not permitted on employment lands include residential, <i>major retail</i> and non <i>ancillary uses</i>.</p>	<p>5.6.2.8 Prohibit major retail uses, where defined in <i>area municipal official plans</i>, on employment lands</p>	<p>77.4(1) Prohibit residential and other non-employment uses including major retail uses in the <i>Employment Areas</i> except:</p> <p>a) to recognize uses permitted by specific policies of a Local Official Plan on the date of adoption by Council of this Plan; or</p> <p>b) for institutional uses identified in a Local Official Plan, as a result of a detailed study that sets limits and criteria on such uses based on the following principles:</p> <p>[i] the use is of small scale and such uses collectively within an <i>Employment Area</i> shall not change the character of that <i>Employment Area</i>;</p> <p>[ii] the location and design of the use meet the Land Use Compatibility Guidelines under Section 143(10) of this Plan;</p> <p>[iii] the use is located at</p>	<p>8C.2.13 <i>Major retail uses</i> shall not be permitted in Employment Areas, except where currently designated as a permitted use in an area municipal official plan.</p>	<p>5.8.2.2. For the purposes of policy 5.8.2 major retail uses are considered to be non-employment uses and are not permitted. Development applications for major retail uses on designated employment lands will need to be undertaken within the context of a municipal comprehensive review, and are subject to the policies of 5.8.2.</p>

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
		<p>the periphery of the Employment Area; and</p> <p>[iv] such uses do not collectively displace employment from the <i>Employment Area</i> to result in a shortfall in <i>Employment Areas</i> to meet the Local Municipality’s target for employment in Table 1.</p>		
			<p>8C.2.14 Notwithstanding Policy 8C.2.13, <i>major retail uses</i> may be considered along the north side of Taunton Road West between Goodman and Oshawa Creeks in the City of Oshawa provided:</p> <p>a) a transportation impact study is prepared and submitted to the Region for its approval; and</p> <p>b) the <i>development</i> is in accordance with Policy 8A.2.9</p>	
<p>7. That notwithstanding policy 4.3.6, the conversion of employment lands to non-employment land uses may be considered,</p>			<p>8C.2.15 The <i>conversion of Employment Areas lands</i> shall only be considered through a municipal <i>comprehensive review</i> pursuant to the provisions</p>	

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
<p>together with local municipalities, provided that a Regional municipal comprehensive review has been completed in accordance with the applicable policies, forecasts and land budget of the Region.</p>			<p>of the Growth Plan for the Greater Golden Horseshoe. In the case of a <i>downtown area</i> or a <i>regeneration area</i>, conversions shall be considered through a <i>comprehensive review pursuant to the provisions of the Provincial Policy Statement</i>.</p>	
			<p>8C.2.16 Decisions of regional Council to refuse applications, or non-decisions of Regional Council on applications, for the <i>conversion</i> of Employment Areas, shall not be subject to appeal to the Ontario Municipal Board, pursuant to the <u>Planning Act</u>.</p>	
<p>8. That the conversion of employment lands within Regional Centres and <i>key development areas</i> along Regional Corridors do not require a municipal comprehensive review for mixed-use development that supports the policies contained in Section 5.4 of this Plan.</p>				

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
<p>9. To require local municipalities to include employment land non-conversion policies within local official plans and secondary plans that are consistent with policies of the Province and the Region.</p>	<p>5.6.2.6 Direct area municipalities to include policies in their official plans that only permit the conversion of <i>employment land</i> to non-employment uses where it has been determined that:</p>	<p>77.4(4) Require Local Municipalities to prohibit the conversion of lands within the <i>Employment Areas</i> to non-employment uses including major retail uses unless through a <i>municipal comprehensive review</i> where it has been demonstrated that:</p>		<p>5.8.2.1. Municipalities may permit the conversion of lands within employment areas to non-employment uses only through a municipal comprehensive review where it has been demonstrated that:</p>
	<p>i. There s a need for conversion that has been established through a municipal comprehensive review;</p>	<p>a) there is a need for the conversion;</p>		<p>a) There is a need for the conversion.</p>
	<p>ii. <i>The Region</i> and municipality will continue to meet the employment forecasts of this Plan;</p>	<p>b) the conversion will not compromise the <i>Region’s</i> or Local Municipality’s ability to meet the employment targets of Table 1;</p>		<p>b) The municipality will meet the employment targets allocated to the municipality pursuant to this Plan.</p>
	<p>iii. The conversion does not affect the overall viability of employment areas in <i>the Region</i> and the achievement of <i>intensification</i> and density targets;</p>	<p>c) the conversion will not adversely affect the overall viability of the <i>Employment Area</i>, and achievement of the <i>intensification</i> and density targets of Table 2 and other <i>policies</i> of this Plan;</p>		<p>c) The conversion will not adversely affect the overall viability of the employment area and the achievement of the municipal intensification target, density targets and other policies of this Plan.</p>

Region of York	Region of Peel	Region of Halton	Region of Durham	Region of Niagara
	iv. There is existing or planned <i>infrastructure</i> to accommodate the proposed conversion;	d) there is existing or planned <i>infrastructure</i> to accommodate the proposed conversion;		d) There is existing or planned <i>infrastructure</i> in place to accommodate the proposed use.
	v. The lands are not required over the long term for employment purposes;	e) the lands are not required for employment purposes over the long term;		e) The lands are not required over the long term for employment purposes for which they are designated.
	vi. The lands do not fulfill the criteria for provincially significant <i>employment lands</i> ; and			
	vii. The lands do not affect the operations or viability of existing or permitted employment uses on nearby lands,			
		f) cross-jurisdictional issues have been considered; and		f) Cross jurisdictional issues have been considered.
		g) all Regional <i>policies</i> and requirements, financial or otherwise, have been met.		

DEFINITIONS				
	Employment Lands:	Employment Area:		Employment Area:
	lands designated for clusters of business and economic activities including, but not limited to, manufacturing, warehousing, offices, and associated retail and ancillary facilities.	means areas designated in an official plan for clusters of business and economic activities including, but not limited to, manufacturing, warehousing, offices and associated retails and ancillary facilities.		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.
Major Retail			Major Retail Use	
Major retail includes retail big box stores, retail warehouses and shopping centres.			means large-scale, retail operations and commercial facilities, having a gross leasable area of 2,000 m ² or greater.	
Ancillary Uses				
Small scale retail and commercial uses that primarily serve the business functions on employment lands.				
Key Development Areas				
<i>Intensification areas</i> along the Regional Corridors that are identified and planned for by local municipalities as part of their Intensification Strategy.				

Intensification	Intensification			
<p>The <i>development</i> of a property, site or area at a higher density than currently exists through:</p> <p>a. redevelopment, including the use of <i>brownfield sites</i>;</p> <p>b. the <i>development</i> of vacant and/or underutilized lots within previously developed areas;</p> <p>c. <i>infill development</i>; or,</p> <p>d. the expansion or conversion of existing buildings.</p>	<p>the <i>development</i> of a property or site at a higher density than currently exists through:</p> <p>a) redevelopment, including the reuse of brownfield sites;</p> <p>b) the <i>development</i> of vacant and/or underutilized lots within previously developed areas;</p> <p>c) <i>infill development</i>;</p> <p>d) the expansion or conversion and creation of existing buildings such as apartments or other accommodation in houses.</p>			
Development	Development		Development	
<p>The creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the Planning Act, but does not include:</p> <p>a. activities that create or maintain infrastructure authorized under an environmental assessment, Planning Act, or Condominium Act process; or,</p>	<p>means the creation of a new lot, a change in land use or construction of buildings and structures, requiring approval under the <u>Planning Act</u> but does not include activities that create or maintain <i>infrastructure</i> authorized under an environmental assessment process or works subject to the <u>Drainage Act</u>.</p>		<p>means the creation of a new lot, a change in land use, or the construction of buildings and structures, any of which require approval under the <u>Planning Act</u>, or that are subject to the <u>Environmental Assessment Act</u>, but does not include:</p> <p>a) the construction of facilities for transportation, infrastructure and utilities</p>	

<p>b. works subject to the Drainage Act.</p>			<p>used by a public body; b) activities or works under the <u>Drainage Act</u>. (In the case of lands on the Oak Ridges Moraine, this applies only to the reconstruction, repair or maintenance of an existing drain approved under the <u>Drainage Act</u>); and c) the carrying out of agricultural practices on land that continues to be used for agriculture purposes.</p>	
	<p>Area Municipal Official Plan</p>			
	<p>the Official Plan and any related planning documents of an area municipality in <i>Peel</i>.</p>			
	<p>the Region</p>	<p>the Region</p>		
	<p>the Corporation of the Regional Municipality of Peel</p>	<p>means the Council and administration of the Regional Municipality of Halton.</p>		
	<p>Infrastructure</p>	<p>Infrastructure</p>		
	<p>physical structures (facilities and corridors) that form the foundation for development. Infrastructure includes: sewage and water systems,</p>	<p>means the collection of public capital facilities including <i>highways</i>, transit terminals and rolling stock, municipal water and</p>		

	stormwater management works, septage treatment systems, waste management systems, electric power generation and transmission, communications, telecommunications, transit and transportation corridors and facilities, oil and gas pipelines and associated facilities.	wastewater systems, <i>solid waste</i> management facilities, storm water systems, schools, hospitals, libraries, community and recreation centres, other public service facilities and any other public projects involving substantial capital investment. It includes not only the provision of new facilities but also the maintenance and rehabilitation of existing ones.		
		Policy		
		means a statement which guides the use of the municipality's powers in the pursuit of its <i>goals</i> and <i>objectives</i>		
		Municipal Comprehensive Review	Comprehensive Review:	
		means an official plan review, or an official plan amendment, initiated by a municipality that comprehensively applies the policies and schedules of the Provincial Growth Plan, except as it applies to Section 137.9(4), in which case such a review will be	means an official plan review which is undertaken by the Region, or an official plan amendment which is undertaken by the region, in consultation with the respective area municipalities. A comprehensive review also	

		<p>focussed on the need for employment lands in order to achieve the employment targets of Table 1, as set forth by Schedule 3 of the Provincial Growth Plan.</p>	<p>includes an official plan review or an official plan amendment initiated by an area municipality that is in conformity with this Plan. For the purposes of this Plan, <i>comprehensive review</i> shall also mean a “municipal comprehensive review” in accordance with the Growth Plan for the Greater Golden Horseshoe, where applicable.</p>	
			<p>Sensitive Uses:</p>	
			<p>means such uses as residences, senior citizen homes, elementary & secondary schools, day care facilities, provincial healthcare facilities, places of worship and other similar institutional uses, and recreational uses which are deemed by an area municipality to be sensitive.</p>	
			<p>Conversion:</p>	
			<p>means a redesignation from Employment Area to another urban designation, or the introduction of a use that is otherwise not permitted in the</p>	

			Employment Areas designation.	
			Downtown Area:	
			means a designated Centre characterized by its historical significance, as a focal point for the broader community.	
			Regeneration Area:	
			means an area designated in an area municipal official plan through a municipal comprehensive review, with vacant lands and/or buildings that are in need of revitalization that will foster growth and physical change and bring new life to the area. These areas may include brownfield or greyfield sites.	

ISSUE DATE:

May 05, 2009



PL080593

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Creebank Properties (Oakville) Ltd. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the Town of Oakville to redesignate lands on the west side of North Service Road, south of Oakville Place Drive and north-east of QEW west bound ramp to Trafalgar Road (municipally known as 360 Oakville Place) from Arterial Commercial to a Mixed Use to permit the development of 900 residential condominium units in 3 separate buildings with respective heights of 28, 30 and 33 storeys and a 4 to 5 storey building composed of retail, service, and office commercial use with up to 10,705 square metres of floor area
O.M.B. File No. PL080593

Creebank Properties (Oakville) Ltd. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 1984-63, as amended, of the Town of Oakville to rezone lands respecting 360 Oakville Place from C3A Special Provision No. 28 - Arterial Commercial to a site specific R9 with special provisions to permit the development of 900 residential condominium units in 3 separate buildings with respective heights of 28, 30 and 33 storeys and a 4 to 5 storey building composed of retail, service, and office commercial use with up to 10,705 square metres of floor area.
O.M.B. File No. PL080594

APPEARANCES:

Parties

Creebank Properties (Oakville) Ltd.

Town of Oakville

Region of Halton

Counsel

B. Horosko
C. Facciolo

P. Pickfield
E. Donaldson

C. Beck
L. Magi (Student-at-Law)

DECISION DELIVERED BY M. G. SOMERS AND ORDER OF THE BOARD

1. INTRODUCTION

Creekbank Properties (Oakville) Ltd. (“the Applicant”) has appealed to the Board pursuant to subsection 22(7) and 34 (11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, the failure of the Town of Oakville (“the Town”) to enact an amendment to the Town of Oakville Official Plan and Zoning By-law (Oakville Zoning By-law No. 1984-63, as amended) to permit the establishment of a 900-unit residential condominium apartment complex. The proposal involves three apartment towers with heights of 28, 30 and 33 storeys and a four to five storey building at the north eastern part of the site containing retail, service, and office commercial uses. The proposed office building could proceed independently.

The proposed site for the development is located on the northeast quadrant of the Trafalgar Road-Queen Elizabeth Way (QEW interchange), located west of the North Service Road and south of Oakville Place Drive (“the Subject Lands”).

Mr. Beck informed the Board that the Region would not be participating in Phrase One of the hearing. Mr. Beck then requested that the Region be excused from the first phase of the hearing and to be notified when Phase Two commences. Mr. Beck advised the Board that it is the Region’s position that the Application is not an employment conversion.

The Board heard planning evidence from five qualified land use planners. The Applicant called three planners in support of the Applications. Testimony was given by Mr. Robert Dragicevic and under subpoenas: Mr. Allan Ramsay, the Town’s former Manager of Long Range Planning and Mr. Peter Cheatley, the former Director of Planning for the Town. The Town’s two planning witnesses were Mr. Robert Lehman and Ms Dana Anderson, the current Director of Planning for the Town.

Ms Cynthia Perry, a participant in the proceeding was present and informed the Board that she would not be making a statement during the first phase of the hearing, but would do so in Phase Two. Mr. Abe Iskander who was granted participant status did not attend Phase One of the hearing.

Ms Anderson advised the Board that results of the Municipal Comprehensive Review, and the Town's proposed Employment areas, will be available within the next few weeks. In addition, the approval of the new Official Plan must occur by mid-June to meet the statutory requirements for conformity under the Growth Plan.

2. PRELIMINARY MATTERS

Mr. Pickfield advised the Board that the Town had concerns with respect to the testimonies of the summoned witnesses: Mr. Ramsay and Mr. Cheatley. Counsel notes that both planners were being asked by the Applicant to provide a specific opinion on the content of the Witness Statements and Affidavit material filed by the Town and the Applicant. In addition, the Applicant was providing the summoned witnesses compensation at their hourly rate in carrying out the aforementioned activities to arrive at their opinion.

It was Mr. Pickfield's position that this went well beyond the appropriate role of a summoned witness and would make them effectively retained planners for the Applicant. He argued that permitting these witnesses to testify would have a number of serious adverse consequences to the integrity of the hearing and would be prejudicial to the Town.

Mr. Pickfield requested that the Board exclude the evidence of the two summoned witnesses in its entirety. In the alternative, that the evidence of Mr. Ramsay and Mr. Cheatley be limited to their involvement in the planning process for the subject Applications and the opinions and advice that they provided at the time of their employment with the Town.

Mr. Horosko opposed any limit regarding the scope of evidence that the two Planners may provide at the Hearing.

The Board carefully considered the arguments/submissions of Counsel and finds that Mr. Ramsay and Mr. Cheatley's testimonies would not prejudice the Town. The Board orders that the testimony of the two planners may cover their involvement in the planning process for the subject Applications and the opinions and advice that they

provided at the time of their employment with the Town and whether their opinions have changed. The summoned witnesses may also comment on the *viva voce* evidence of other witnesses that they heard at the hearing.

3. PHASE ONE ISSUE AND EMPLOYMENT AREA

At the Pre-hearing Conference of September 3, 2008, the Town and the Region advised the Board that they would not raise employment conversion under section 2.2.6 of the *Growth Plan for the Greater Golden Horseshoe* (“the Growth Plan”) and/or section 1.3.2 of the Provincial Policy Statement, 2005 (“the PPS”), as an issue for the hearing.

On February 17, 2009, the Board did hear a Motion brought by the Town to add employment conversion as an issue to the hearing. In a decision dated March 10, 2009, the Board added the issue of employment conversion to the Issues List for the hearing. In addition, the parties requested that the hearing proceed in two phases. The first phase of the hearing will determine whether:

The approval of the Official Plan Amendment constitutes a conversion of lands within Employment areas under section 2.2.6 of the Growth Plan and/or under section 1.3.2 of the PPS?

The above issue can be broken down into three sub-issues:

- a. Are the Subject Lands located within an Employment area as defined by the PPS and Growth Plan?
- b. If so, would approval of the proposed development constitute a “conversion of lands within an Employment area to non-employment uses”?
- c. If so, has a comprehensive review been conducted in accordance with the PPS and Growth Plan?

Mr. Horosko acknowledged that if the Subject Lands were determined to be within the definition of the Growth Plan and/or the PPS, then the Applicant's proposal would represent a conversion. As the Municipal Comprehensive Review has not been completed, the Application cannot proceed. As such, the Phase One issue can therefore focus on one question: "Are the Subject Lands located within an Employment area as defined by the PPS and Growth Plan?"

The PPS and the Growth Plan provide the following definition of Employment area:

Employment area: means those 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 (PPS, Exhibit 21, Section 6.0, at page 30; Growth Plan, Exhibit 22, Section 6, at page 42).

4. PLANNING EVIDENCE

(i) Applicant's Evidence

In their evidence, Mr. Ramsay and Mr. Dragicevic started their inquiry into the threshold question by focusing the Board on the Town's Official Plan. The Official Plan sets out a structure for the commercial land use categories, establishing a hierarchy of commercial areas. Within this hierarchy the Plan includes a designation of Arterial Commercial land use, which is defined to provide a particular function within the hierarchy. Part D section 2.6 (b) of the Official Plan provides the following description of the intended use within the Arterial Commercial designation:

Description – Arterial Commercial uses will consist predominantly of commercial uses designed to serve the travelling public and the automobile-using consumer.

Both Mr. Dragicevic and Mr. Ramsay testified that the planned function of the Arterial Commercial land use designation in the Official Plan is to provide for commercial uses serving the travelling public. These uses are typically large-scale retail

warehouse, hotels, motels, and gas bars, and other uses similar to those already permitted on the Subject Lands. Mr. Dragicevic and Mr. Ramsay maintain that the lands within are not, as a matter of policy and practically speaking, necessarily supportive to the Employment land use areas or designations. It is Mr. Dragicevic's and Mr. Ramsay's opinion that there is no plausible or clear nexus to the assertion that the aforementioned uses are necessary to support the Employment area.

Mr. Dragicevic testified that the Official Plan provides a strong preference for the Arterial Commercial designation to be in a node as opposed to a linear or strip fashion along the arterial corridors. He maintains that the Arterial Commercial land use designation applies to areas in the Town based on their suitability and the locational characteristics of those areas to provide for the needs of the types of uses to be permitted in those locations.

Mr. Dragicevic and Mr. Ramsay acknowledge that some uses permitted within Arterial Commercial land use designation may also serve Employment area populations within the vicinity, but both planners maintain that those uses are not intended and were not intended to provide primary service or necessary support to those Employment areas. Mr. Dragicevic notes that the Town has applied an Arterial Commercial designation to the Subject Lands and all of the properties in the northeast quadrant of Trafalgar Road and the QEW for over twenty-five years.

The Midtown Core Employment District Secondary Plan designates the Subject Lands as Arterial Commercial (Exhibit 20). It was Mr. Dragicevic's evidence that the Arterial Commercial uses consist predominantly of commercial uses designed to serve the traveling public and the automobile using customer; they are permitted only in a very limited number of suitable locations on arterial roads and are encouraged to establish in nodal or campus fashion. Mr. Dragicevic states that it is important to note that the Midtown Core Employment District Secondary Plan is the prevailing document and the changes to the Plan can be made without the necessity of an amendment to Part D, Section 2 of the Official Plan.

Mr. Dragicevic and Mr. Ramsay testified that none of the above uses are necessary to the function of the Employment area or district. It is their opinion that these are uses that were intended to serve other needs in the community and to serve the

travelling public. In addition, the Employment designation already contains the uses included in the Arterial Commercial designation and therefore the Arterial Commercial designation is not intended to be included as part of Employment areas. Mr. Dragicevic maintains that the uses individually and cumulatively permitted under the Arterial Commercial land use designation have no direct relationship to the Employment land designation within the Midtown Core Employment District.

(ii) Town's Evidence

It is Mr. Lehman's and Ms Anderson's position that Mr. Ramsay's and Mr. Dragicevic's analysis is incorrect as they provided a narrow interpretation to Employment areas. Specifically, Mr. Ramsay and Mr. Dragicevic concluded that for the purposes of the Applications, the term Employment area should be equated to the Employment designation set out in the Official Plan.

Mr. Lehman, whose evidence Ms Anderson adopted, begins his planning analysis with a consideration of the Growth Plan and the PPS. Mr. Lehman starts his planning analysis by referencing section 1.3.1 of the PPS, which supports a broad definition of Employment areas (Exhibit 21). Section 1.3.1 directs planning authorities to promote economic development by:

- a) Providing for an appropriate mix and range of employment (including industrial, commercial and institutional uses) to meet long-term needs;
- b) 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;
- c) Planning for, protecting and preserving employment areas for current and future uses.

Mr. Lehman provided the following evidence with respect to the definition of Employment areas as it relates to the Subject Lands:

- Employment areas include “areas designated in an Official Plan for clusters of business and economic activities”. This indicates that “area” refers to a geographic area not a single property and that the land use permissions must be for business and economic activities.
- Employment areas are defined not by existing uses but by designated uses.
- Employment areas do not need to be a single designation. Multiple designations with employment uses may be included in a single Employment area.
- The activities are to include “but are not limited to, manufacturing, warehousing, offices and associated retail and ancillary facilities.” An Employment area may include one, some or all of the activities listed in the definition.
- The phrase “including but not limited to” recognizes the huge range of variation in Official Plan policies throughout the Greater Golden Horseshoe area. The intention is to establish a broad definition, which provides municipalities with sufficient flexibility to establish Employment areas, which meet the needs to the municipality.

Mr. Lehman testified that with respect to the designation of the Subject Lands that all of the uses within the Arterial Commercial designation involve employment-generating activities. Further, all of the uses involve business and economic activities. In addition, the Arterial Commercial designation includes two of the four main categories of employment generating uses identified in the definition: offices and associated retail and ancillary facilities.

Mr. Lehman stated that the area east of Trafalgar Road, with its strong geographic boundaries on the north, west, south and east, and its designations for both Arterial Commercial and Employment represents an area which is designated for a cluster of business and economic activities, such as offices and associated retail and

ancillary facilities. It is his opinion that the Subject Lands are located within an Employment area as defined by the Growth Plan and PPS.

It was the testimony of Mr. Lehman that the following Official Plan provisions support the inclusion of Arterial Commercial in an Employment area:

- The Town's Official Plan has established six secondary planning areas, which are called Employment Districts. (Official Plan, Exhibit 20, Part E)
- With one specific exception (a mixed use designation which coincides generally with the Towns' Urban Growth Centre) all six-employment districts contain only two active designations: Arterial Commercial and Employment.
- The Midtown Core Employment District provides specific policy direction, which indicates the intention that the lands east of Trafalgar Road, including the Subject Lands, be used for employment generating purposes. (Official Plan, Exhibit 20, at page 361)

In summary, it was Mr. Lehman's evidence that the above-mentioned policies support the policy intention that the combination of Arterial Commercial and Employment designations in this area of the Town functions as a cluster of business and economic activities. In his opinion the Official Plan makes it clear that this area is designated and intended for employment uses as defined by the PPS and Growth Plan as a whole.

(iii) Findings of the Board

Mr. Dragicevic and Mr. Ramsey focused on the Town's Official Plan policies as the key determinative interpretative tool in determining what constituted an Employment area for the purpose of the PPS and Growth Plan. The Board disagrees with this approach. Mr. Lehman stated in his testimony that the Official Plan should not be considered determinative in this process as the Official Plan was approved over twenty years before the PPS and Growth Plan were established. While the Official Plan has

been amended over the years, all of the relevant Town Official Plan policies were in place years before the Town had the benefit of the current Provincial Policy direction as to what constitutes an Employment area.

Furthermore, the Growth Plan and the PPS directs municipalities to address broad population and employment objectives over a thirty-year period. In considering whether lands are to be retained as part of Employment areas, existing uses on those lands as well as potential future and interim uses such as retail commercial uses, need to be viewed within a longer term planning horizon. As such, the Board finds that the policies of the PPS and Growth Plan must first be reviewed to determine what constitutes an Employment area. That the definition of Employment area must be read, first and foremost, in the context of the entire Growth Plan construct.

Mr. Dragicevic and Mr. Ramsey testified that the Official Plan states that the Arterial Commercial designation is intended to serve the travelling public and is therefore purely commercial in nature. Mr. Lehman disagreed with this premise. For example, Mr. Lehman emphasized the office uses permitted within the designation served as a pure employment function. The Board finds Mr. Lehman's evidence persuasive and finds that the permitted uses within the Arterial Commercial designation provides a broader function than just services to the travelling public. The Board further finds that the commercial uses contained in the Arterial Commercial designation are employment generating and are therefore part of the Employment area.

It was Mr. Dragicevic's evidence that the Employment designation is the only designation in the Official Plan, which contains all of the listed uses in the Growth Plan definition of Employment area and therefore is the one that matches most closely with the Employment area designation. However, the Board notes that the Growth Plan does not require the protection of all uses identified in the definition of a single Employment area. Even Mr. Dragicevic acknowledged under cross-examination that an Employment area could include only office uses and still be considered an Employment area. As previously mentioned the policies of the PPS and Growth Plan must first be reviewed to determine what constitutes an Employment area. The Board finds that the economic activities in an Employment area are to include but are not limited to, manufacturing, warehousing, office and associated retail and ancillary facilities. In addition, an Employment area may include one, some or all of the activities listed in the definition.

Mr. Dragicevic testified that the Employment designation is the only designation that includes a provision (Official Plan, Exhibit 20, Part D, section 3.2k), which restricts the redesignation of lands for non-employment generating uses based on a conversion test similar to the Growth Plan and PPS. It was Mr. Dragicevic's evidence that the employment conversion policies set in section 3.2k do not apply to lands designated Arterial Commercial. However, the Board notes that section 3.2k (part D) of the Official Plan predates the Growth Plan and the PPS by five to seven years. In his testimony, Mr. Lehman maintains that the conversion protection provided in the Growth Plan is intended to protect a broader range of employment uses, such as the office uses that are permitted in the Arterial Commercial designation. Mr. Lehman notes that in meeting the Growth Plan targets for employment, the Town may well require these additional lands and should be able to rely upon the broader Growth Plan conversion protection policies to ensure it meets those targets. The Board finds the evidence of Mr. Lehman to be more persuasive and finds the conversion protection provisions in the Growth Plan to protect a broader range of employment uses, such as office uses.

The Employment designation, unlike the Arterial Commercial designation includes industrial and warehousing areas, which according to Mr. Ramsey and Mr. Dragicevic are the most difficult and most important areas to protect under the Growth Plan and PPS. The Board notes that Mr. Lehman acknowledged that it may be more difficult to protect lands for manufacturing and warehousing uses; however, he also notes that it is just as important, if not more important, to protect lands which are designated for offices uses. Mr. Lehman testified that office uses would likely be the most important use to protect in the foreseeable future given the decline in the manufacturing industries and the move toward a knowledge-based economy. The Board finds Mr. Lehman's evidence more persuasive and further finds office use in the Arterial Commercial designation is an employment generating use and as such is part of the Employment area and that it must be protected.

It was Mr. Dragicevic's evidence that the definition of Employment area in the Growth Plan should be narrowed to exclude major retail uses from Employment areas and therefore exclude the Arterial Commercial designation which permits major retail uses by virtue of the following provision in section 2.2.6.5:

“For the purposes of this policy, major retail uses are considered non-employment uses.”

The Board notes that none of the other planners who testified at the hearing supported Mr. Dragicevic’s analysis, including Mr. Ramsay, who acknowledged his disagreement under cross-examination.

Mr. Lehman testified that the flaw in Mr. Dragicevic’s interpretation was that it assumes that the above-quoted proviso was intended to apply to the entire Growth Plan including the definition of Employment area. Mr. Lehman maintains that the phrase “For the purpose of this policy” makes it clear that major retail uses to be considered non-employment uses for the purpose of section 2.2.6.5 and that it is only in the case where the municipality or an individual is seeking to change an existing designation within an Employment area to permit major retail uses. The Board finds that this makes sense as the Growth Plan maintains a broad definition of Employment area in order to allow municipalities the discretion to include major retail in Employment areas where it wishes to do so.

In summary, the Growth Plan does not exclude major retail uses from employment uses in general. It is only in the case of a conversion of employment lands to non-employment uses that the Growth Plan classifies major retail uses as a non-employment use. If the permission for the location of the major retail use within an Employment area is not a conversion, then the classification of major retail uses as a non-employment use does not apply.

In arriving at the conclusion that uses within both designations function as cluster of business and economic activity, Mr. Lehman’s analysis also took account of the functional relationship between the uses permitted in the Arterial Commercial designation and those permitted in the Employment designation. In his opinion, the Arterial Commercial uses combine with the Employment designation uses to form an employment community.

When asked to respond to this evidence regarding the functional relationship between employment uses in the Arterial Commercial and Employment designation, neither Mr. Ramsay nor Mr. Dragicevic specifically argued that those relationships did not exist. Instead their opinion was focused on Mr. Lehman’s opinion that ancillary

commercial uses permitted in the Arterial Commercial designation are “generally those that are necessary to the employment-generating function of the area.”

Under cross examination, Mr. Lehman justified his statement that the commercial uses contained in the Arterial Commercial designation are those which are generally necessary to the employment-generating function of the area. It was Mr. Lehman’s evidence that viewing manufacturing, warehousing and offices without considering other employment uses (such as banks and restaurants) ignores the fact that Employment areas are communities of workers, not just buildings. He also notes that the success of an Employment area depends on the ability of employers to attract good workers and the availability and quality of commercial amenities contributes to the success of an employment community. The Board concurs with Mr. Lehman and finds that offices, associated retail and ancillary facilities uses permitted in the Arterial Commercial designation support the employment-generating function of the area and as such, are part of the Employment lands.

5. CONCLUSIONS

The Board has carefully considered all the *viva voce* evidence of all of the planners and the documentary evidence presented at the hearing, as well as the submissions of Counsel. The Board prefers and finds the testimony of the Town’s planners, in particular Mr. Lehman’s testimony, to be more persuasive.

Mr. Horosko notes in his submissions that it is the Region’s position that the Application is not an employment conversion. Mr. Horosko submitted that the Region is a sophisticated Municipality with a full complement of planning advisors reviewing and interpreting matters of the PPS, the Growth Plan and the *Planning Act* on a regular basis. In addition, he notes that the Town’s Official Plan had to conform to the Regional Official Plan. Mr. Horosko states that the Region’s position has not changed from the Pre-hearing Conference of September 3, 2008. However, the Board notes that the Region did not participate in the hearing and did not provide any *viva voce* and/or documentary evidence to support its position.

Based on the above-mentioned reasons, the Board finds that the Subject Lands are located within an Employment area for the purpose of section 1.3.2 of the PPS and section 2.2.6.5 of the Growth Plan pursuant to section 3.5 of the *Planning Act*.

The Board further finds that approval of an Official Plan Amendment to permit the proposed residential development on the Subject Lands would therefore constitute a conversion of lands within an Employment area to non-employment use and therefore would not be consistent with the PPS and/or conform to the Growth Plan.

In addition, the Board finds that a comprehensive review has not been completed in accordance with the PPS and Growth Plan and, as such, the proposed residential development on the Subject Lands is barred from proceeding.

The Board Orders that these appeals are dismissed.

The Board so Orders.

“M. G. Somers”

M. G. SOMERS
MEMBER

Employment Areas: Conversion of Lands to Non-Employment Uses

GROWTH PLAN (Section 2.2.6.5)	PROVINCIAL POLICY STATEMENT, 2005 (Section 1.3.2)	
Municipalities may permit conversion to <u>non-employment uses</u> (i.e. includes <u>major retail uses</u>)	Planning authorities may permit conversion to <u>non-employment uses</u> (i.e. does not include <u>major retail uses</u>)	<p>“Employment uses” is not defined but other references to “employment uses” in the PPS, 2005 suggest that “employment uses” include retail uses:</p> <ul style="list-style-type: none"> -Planning authorities shall promote economic development and competitiveness by: ... providing for an appropriate mix and range of employment (including industrial, <u>commercial</u> and institutional uses) to meet long-term needs <p>Ref: PPS, 2005, Policy 1.3.1 a)</p> <ul style="list-style-type: none"> -Planning authorities shall support energy efficiency and improved air quality Promote the use of public transit and other alternative transportation modes in and between residential, employment (including <u>commercial</u>, industrial and institutional uses) and other areas ... <p>Ref: PPS, 2005, Policy 1.8.1 b)</p>
The conversion must occur through a <i>municipal comprehensive review</i> (“an official plan review or amendment initiated by a municipality that comprehensively applies the policies and schedules of the Growth Plan” – Section 6 - Definitions)	The conversion must occur through a <i>comprehensive review</i> . <i>Comprehensive review</i> [Section 6.0 - Definitions] means “an official plan review which is initiated by a planning authority, or an official plan amendment which is initiated <u>or adopted</u> by a planning authority, which:	
where it has been demonstrated that: ...	only where it has been demonstrated that:	
a) there is a need for the conversion	there is a need for the conversion.	
b) the municipality will meet the employment forecasts allocated to the municipality pursuant to this Plan		

Employment Areas: Conversion of Lands to Non-Employment Uses

GROWTH PLAN

c) the conversion will not adversely affect the overall viability of the *employment area*, and achievement of the *intensification target*, *density targets*, and other policies of this Plan

d) there is existing or planned infrastructure to accommodate the proposed conversion

e) the lands are not required over the long term for the employment purposes for which they are designated

f) cross-jurisdictional issues have been considered.

For the purposes of this policy, major retail uses are considered non-employment uses.

Ref: Growth Plan, Policy 2.2.6.5

PROVINCIAL POLICY STATEMENT, 2005

the land is not required for employment purposes over the long term;

(v) considers cross-jurisdictional issues.