

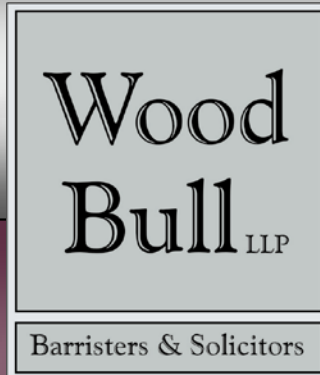
MUNICIPAL, PLANNING & DEVELOPMENT LAW

# **The Commons Institute**

**MUNICIPAL LAW:**

**Practice Primers & Contemporary Developments**

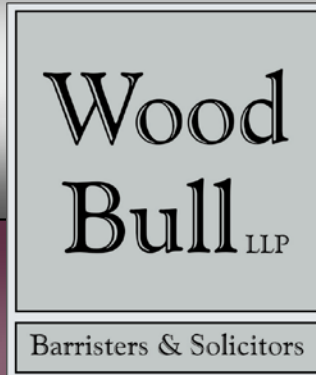
**26 February 2013**



MUNICIPAL, PLANNING & DEVELOPMENT LAW

# **Some Recent Developments in Planning and Development Law**

**Presented by Johanna Shapira**



MUNICIPAL, PLANNING & DEVELOPMENT LAW

- (1) Recent Case Law**
- (2) Guidelines: Role / Weight**
- (3) Minor Variances / Sufficiency of Reasons**

Wood

## **Some Recent Case Law**

Bull LLP

- ***St. Mary's Cement Inc. v. Clarington***  
(Court of Appeal) (Released in December 2012)  
- by-law interpretation
- ***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
(Div Ct) (February 2013)  
- appellant status at OMB
- ***Hobo Entrepreneurs Incorporated v. Sunnidale Estates Ltd. et al***  
(Div Ct) (January 2013)  
- OMB power to modify

## *St. Mary's Cement*

- SMC operates a cement manufacturing plant in the municipality of Clarington. The plant is permitted in the municipal by-law as a “cement manufacturing plant”.
- SMC proposed to introduce three test alternative fuels to replace some of the conventional fossil fuel being used at its plant.
- Clarington took the position that this introduced a new second land use – namely “waste disposal area” – to the site, and that use was prohibited.
- Issue centered around whether the introduction of the alternative fuels constituted introduction of a “waste disposal area” at the site.

## *St. Mary's Cement*

continued

- SMC made an application to the Superior court for an interpretation of Clarington's Zoning By-law.
- Application judge decided that the introduction of the proposed fuel substitution introduced a new and additional use to the site, and that as such SMC would be operating a "waste disposal area".

## *St. Mary's Cement*

continued

- SMC appealed to Court of Appeal (CoA)
- CoA judge found that the application judge “failed to consider, and therefore analyze, the wording of the definition [of “waste disposal area”] as it appears in the by-law.”
- “Waste disposal area” meant “a place where garbage, refuse or domestic or international waste is dumped, destroyed, or stored in suitable containers”.
- Clarington argued the waste was being “destroyed” on the site.
- CoA judge found that the use of the alternative fuel would not be considered “destruction of waste” - just as the use of the conventional fuel would not be considered the destruction of that fuel.



## *St. Mary's Cement* continued

- CoA judge found that the use of the alternative fuel did not constitute the introduction of a second land use.
- CoA allowed the appeal.
- CoA clear that this decision was strictly
  - a land use planning decision, not an environmental one
  - a decision about the interpretation of a specific by-law, not the powers of a municipality

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- Developer sought a rezoning and severance of land in Town of Bracebridge
- Among the individuals who made submissions on the application were Champion and Smith – both of whom were members of a ratepayers’ association
- Developer was successful in obtaining rezoning and severance from the Town
- Appeals were launched at the OMB
- Appeals were dismissed, and the developer and Town sought costs as against the appellants, cited as Champion and Smith

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- “Appellants” stated in OMB Notice of Hearing and style of cause on the decision were Champion and Smith
- Champion and Smith took the position that the real appellant was the ratepayers’ association - requested a “minor amendment” to the OMB decision changing the appellant to the ratepayers’ association (Rule 108)

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***

- Application for leave to appeal to Div Ct on two related decisions of the OMB
  - Original decision by a Member on a motion re proper parties
  - Section 43 decision by the Chair of the Board
- Both decisions held that an earlier decision of the OMB was correct in naming two individuals (Campion and Smith) as appellants before the OMB
- Leave to appeal denied

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- OMB held hearing on proper parties – determined that:
  - As a question of fact, the ratepayers’ association had never been a party before the Board – facts relied on included the manner in which the appellant forms were filled out (with no reference to the ratepayers’ association) and that no request had been made to change the name of the appellants at hearing
  - Since the ratepayers’ association had not been a party, the requested change in the name of appellants went beyond a “technical error” or “minor error”
  - Since the change requested would be a substantive change in the decision, Rule 109 applied and the Board was required to treat the request as a request for a review under Section 43 of the OMB Act, which was a jurisdiction vested solely in the Chair of the OMB
  - Member refused to process the request because it was made to the wrong party – the Member and not the Chair – and the request was not filed within the proper time limits

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- **Rule 108: Correcting Minor Errors**

*The Board may at any time and without prior notice to the parties correct a technical or typographical error, error in calculation or similar minor error made in a decision or order ...*

- **Rule 109: Processing Request as a Review Request**

*If a party requests a correction or clarification that the Board finds is a request for a substantive change in the decision or order, the Board shall treat it as a request for review under section 43 of the Ontario Municipal Board Act.*

- **Rule 111: Request for a Review of Board Decision**

*The Chair shall consider a person's request for a review of a decision, approval, or order ...*

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- Request for a review of OMB decision on proper parties
- Chair of the OMB refused the request, finding:
  - Members could not hear reviews under Rule 109
  - No basis to interfere with Member's decision

***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- Leave to appeal to Div Ct sought
- Alleged errors (amongst others):
  - (a) Both the Member and the Chair erred in holding that the Member had no jurisdiction under Rule 109, which is an error in jurisdiction and an unlawful fetter on the discretion of the Member.
  - (b) The Member erred by ignoring or miscomprehending evidence so completely as to render his decision a mistake in law and a violation of natural justice because of the inadequacy of his reasons



***Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***  
continued

- Leave to Appeal Denied
  - Member and Chair were correct in concluding that the s. 43 review jurisdiction was properly that of the Chair, not the Member (Rule 109)
  - *Member's reasons were transparent and intelligible, and demonstrate the basis upon which he reached the conclusion he did. Although not every single argument advanced by counsel was specifically noted, there is no requirement to do so and it is apparent from the reasons that the Member was alive to all of the issues. The Member did not misapprehend or disregard any material evidence. ... (affirming Newfoundland and Labrador Nurses' Union (SCC, 2011))*
- Court reserved on issue of costs
- Potential issue of conflict of interest raised

## *Hobo Entrepreneurs Incorporated v. Sunnidale Estates Ltd. et al*

- Hobo sought various changes to Town's Official Plan policies dealing with transportation network - unsuccessful
- Hobo appealed Town's comprehensive OP review amendment (OPA 23)
- Respondents brought motion seeking to dismiss Hobo's appeal on the basis that the Board lacked jurisdiction to deal with the transportation issues raised by Hobo, since OPA 23 did not address transportation issues
- OMB agreed and dismissed Hobo appeal without a hearing

*Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al*

Appeal was dismissed on the basis that the OMB lacked jurisdiction to grant the relief requested by Hobo pursuant to ss. 17(50.1) of the Planning Act

***Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al***  
**continued**

***Planning Act***

Section 17(50)

*On an appeal or transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan.*

Section 17(50.1)

*For greater certainty, subsection (50) does not give the Municipal Board power to approve or modify any part of the plan that,*

- (a) Is in effect; and*
- (b) Was not dealt with in the decision of council to which the notice of appeal relates.*

## *Hobo Entrepreneurs Incorporated v. Sunnidale Estates Ltd. et al*

### **OMB Member said of ss. 17(50.1):**

*“Subsection 17(50.1) does not provide the Board with the power to approve or modify any part of a plan that is in effect and was not dealt with in the decision of council to which the appeal relates. This change effectively limits the Board’s modification powers respecting official plan and official plan amendments, constituting a significant restriction on the Board’s powers to resolve matters through such modifications. ...*

*[The subsection] is specific – the board has no power to approve or modify any part of a plan that is in effect and was not dealt with in the decision of council to which the notice of appeal relates. It is not a matter of degree. It is not a matter of which section of the land we are looking at. The door is not ajar; it is slammed shut. ...”*

***Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al***

**Quoted with approval from *Angus Glen North West* case (OMB 2011), where the OMB said of subsection 17(50.1):**

*This is not just a friendly reminder. It is a potent injunction against the Ontario Municipal Board to open up (“approve or modify”) an Official Plan or part which are in legal effect outside the purview of the decision of council to which the appeal notice relates.*

*Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al*  
**continued**

Hobo made motion for leave to appeal OMB decision  
to Divisional Court

**DISMISSED**

*Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al*  
**continued**

Amongst other issues:

- (1) Did the Board err in law in its interpretation of s. 17(50.1) of the Planning Act?
- (2) Did the Board err in law in its interpretation of s. 26 of the Planning Act?
- (3) Did the Board err in law by dismissing Hobo's appeal without a hearing?

**DISMISSED**



***Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al***  
**continued**

**(1) Did the Board err in law in its interpretation of s.  
17(50.1) of the Planning Act?**

Hobo argued that the effect of the Board's decision was to restrict appeal rights to those persons whose submissions were accepted by Council in the final form of the amended OP – conversely, denied right of appeal to persons whose submissions were not accepted by Council

Limiting the pool of appellants

*Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al*  
**continued**

Court disagreed – s. 17(50.1) does not limit appeal rights to those whose submissions were accepted by council.

Provides appeal rights to those who made submissions on some aspect of the OP that was **changed** by the decision of Council. Would similarly apply to person who made submissions to revise a policy, that Council subsequently **deleted**.

***Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al***  
**continued**

**(2) Did the Board err in law in its interpretation of s. 26  
of the Planning Act?**

Section 26 provides that every five years the council of a municipality must:

- (a) Revise its official plan as required to ensure that it,*
  - (i) conforms with provincial plans or does not conflict with them, as the case may be,*
  - (ii) has regard to the matters of provincial interest listed in section 2, and*
  - (iii) is consistent with policy statement issued under subsection 3(1)*

*Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al*  
**continued**

Board found that it was within Council's discretion to decide which sections of the official plan to deal with in its five-year official plan review. The entire OP did not open up for challenge.

Hobo argued that Board erred in allowing Council's decision as opposed to what was before Council, to define and limit the scope of the Board's jurisdiction.

***Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al***  
**continued**

Court looked at specific language of Subsection  
17(50.1):

*...subsection (50) does not give the Municipal Board power to approve or modify any part of the plan that,  
(b) was not dealt with in the decision of council to which the notice of appeal relates.*

And said:

*The principles of statutory interpretation dictate that every word in a statute is presumed to have meaning and function. The inclusion of the words “in the decision of council” in subsection 17(50.1) of the Planning Act indicate that the Legislature intended that the decision of Council, not the submissions or materials that were part of the planning process preceding that decision, would determine the Board’s appellate jurisdiction”*

*Hobo Entrepreneurs Incorporated v.  
Sunnidale Estates Ltd. et al*  
continued

**(3) Did the Board err in law by dismissing Hobo's appeal without a hearing?**

Hobo argued that the Board was required to hold a hearing of the appeal, unless the requirements of subsections 17(45) and (45.1) are met.

# *Hobo Entrepreneurs Incorporated v. Sunnidale Estates Ltd. et al*

## **continued**

Court found

*The Board has the authority to hold hearings and make determinations in respect of only those matters for which jurisdiction has been conferred on it by statute. The Board cannot hold a hearing or make a determination on a matter where it has not been granted the authority to do so or where it has been expressly prohibited from doing so. Subsection 17(50.1) ... constitutes such a prohibition on the Board's jurisdiction. ...*

*Where the Board has no jurisdiction, it need not assess the requirements in subsections 17(45) and 17(45.1) ... before it dismisses an appeal without a hearing. These provisions create a means for the Board to dismiss an appeal without a hearing in certain circumstances, even though the matter is properly within its jurisdiction. This is not the situation in this case.*

Wood

**Guidelines: Role / Weight**

Bull LLP



**Guidelines =**

**“Performance Standards”,**

**“Technical Guides”,**

**“Criteria” etc.**

# City of Toronto Tall Buildings Policy / Guidelines Framework

Wood  
Bull<sub>LLP</sub>

Barristers & Solicitors

- (1) Official Plan
- (2) Design Criteria for Review of Tall Building Proposals (2006)
- (3) Downtown Tall Buildings Vision and Performance Standards (2012)

## **(1) Official Plan (2002)**

- **Built Form Policies (Section 3.1.2)**
- **Built Form – Tall Building Policies (Section 3.1.3)**
- **Area Specific Policies (Volume 3)**

## **(2) Design Criteria for Review of Tall Building Proposals (2006)**

- Elaborates on Official Plan policies
- City-wide application (except Downtown, but including Downtown Secondary Plan Area)

## **(3) Downtown Tall Buildings Vision and Performance Standards (2012)**

- Vision + Performance Standards
- Staff directed to use in evaluation of all new and current tall building proposals
- Applies to the Downtown only (excluding Secondary Plan areas)

**What is the status/role of  
guidelines?**

# Planning Act

- Not a *Planning Act* instrument
- No appeal process
- No amendment required for a development application

# Official Plan Treatment

- Policy 5.3.2(1):

*...guidelines will be adopted to advance the vision, objectives and policies of this Plan. These... guidelines, while they express Council policy, are not part of the Plan unless the Plan has been specifically amended to include them, in whole or in part, and do not have the status of policies in this Plan adopted under the Planning Act. (underlining added)*



# Design Criteria for Review of Tall Building Proposals (2006)

- Purpose of the Criteria

*...this study identifies and compiles the key urban design criteria that should be brought to bear in the evaluation of tall building applications, and specifies how the applicant will demonstrate that these criteria have been satisfactorily addressed. .... Applying the design criteria and recommended application submission requirements will help implement the objective of the Official Plan “to ensure that tall buildings fit within their context and minimize their impacts”. (underlining added)*

# Downtown Tall Buildings Vision and Performance Standards (2012)

*The Downtown Tall Buildings Vision and Performance Standards have being [sic] brought forward as design guidelines and as such are intended to provide a degree of certainty and clarity of common interpretation. However, as guidelines, they are also afforded some flexibility in application, particularly when looked at cumulatively. The guidelines are not intended to be applied or interpreted independently of each other. Rather, the performance standards will work together to determine whether a tall building development application has successfully met the overall intent of the guidelines. The City already has city wide tall building policies in the Official Plan and in the form of built form guidelines. ... (underlining added)*

# Decisions offering possible insight

- *Menkes Church Street Holdings*  
(OMB) (October 2012)
  - Zoning application to permit 29-storey mixed-use residential building
- *London Highbury Shopping Centres*  
(OMB) (July 2008)
  - Appeal of OPA adding threshold test for “significance”
- *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*  
(Div Ct) (August 2012)
  - Appeal of Mining and Lands Commissioner (Tribunal) refusal of application to permit driveway across lands within jurisdiction of Niagara Peninsula Conservation Authority
  - Regulation vs. Policy

## *Menkes Church Street Holdings*

- “The act of applying municipal guidelines ... to Official Plan policies in the assessment of development applications is a familiar exercise in these hearings. The weight to attribute to those guidelines and corresponding standards and criteria is often overstated by witnesses who oppose development applications. It is an area that is open to wide interpretation by all, including the Board in the assessment of this proposal.” (pages 10-11)
- “The Board finds that the Guidelines do not carry the weight of Official plan policies and they should not be construed as such.” (page 11)
- “...it is not fatal to any planner’s evidence should consideration of various criteria, standards or other elements of such materials be absent from planning analysis proffered to the Board ...” (page 11)
- Board found that the proposal met the intent of the relevant Guidelines, while approving a building that was 4 storeys higher than the height established in the Guidelines (ie 29 storeys vs 25 storeys)

# London Highbury Shopping Centres

## London Official Plan Policies: Guideline Documents

<b>19.2.2. Guideline Documents</b>	Council may adopt guideline documents to provide detailed direction for the implementation of Official Plan policies. Guideline documents proposed pursuant to these policies and adopted by Council, shall be added to the list in Section 19.2.2.ii). Provincial guideline documents are also used in the implementation of Official Plan policies. (Section 19.2.2. amended by OPA 438 Dec. 17/09)
Purpose	i) Guideline documents will be initiated by Council and may contain policies, standards, and performance criteria that are either too detailed, or require more flexibility, in interpretation or implementation, than the Official Plan would allow. Depending on the nature of the guideline document, they will provide specific direction for the preparation and review of development proposals, the identification of conditions to development approval, or the planning of improvements to public services and facilities.
Content	ii) Guideline documents may be adopted by Council to assist with the implementation of any aspect of the Official Plan. In particular, guideline documents shall be adopted to assist with the implementation of any aspect of the Official Plan for the following, but are not limited to the following: (Clause ii) amended by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23) (a) Site Plan Control Guidelines; (b) Subdivision Design Guidelines; (c) Road Access Guidelines; (d) Noise and Vibration Attenuation Guidelines; (e) Master Drainage Plans; (f) Stormwater Management Guidelines; (g) Erosion Control Guidelines; (h) Conservation Master Plans for Environmentally Significant Areas;

# London Highbury Shopping Centres

## London Official Plan Policies: Guideline Documents

Content (cont'd)	<ul style="list-style-type: none"><li>(i) Urban Design Guidelines;</li><li>(j) The City of London 2005 Inventory of Heritage Resources; (Amended by OPA No. 413 approved 07/07/23)</li><li>(k) Descriptions of Potential Heritage Conservation Districts;</li><li>(l) Subwatershed Planning Studies; (Sub-clause (l) added by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23)</li><li>(m) Ecological Buffers and Development Setback Guidelines; (Sub-clause (m) added by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23) (Amended by OPA 438 Dec. 17/09)</li><li>(n) Environmental Management Guidelines; (Sub-clause (n) added by OPA No. 88 - OMB Order No. 2314 - approved 99/12/23)</li><li>(o) Guidelines for the identification of Cultural Heritage Landscapes; and</li><li>(p) Cultural Heritage Landscape Guidelines. (OPA No. 269 - approved 03/02/17)</li><li>(q) Bicycle Master Plan (OPA No.368 - approved 05/10/3)</li><li>(r) Old East Heritage Conservation District Plan and Guidelines. (OPA No. 390)</li><li>(s) Guideline Document for the Evaluation of Ecologically Significant Woodlands (March 2006) (OPA No. 401)</li><li>(t) Sunningdale North Area Plan. ((OPA No. 410)</li><li>(u) West Woodfield Heritage Conservation District Plan and Guidelines (OPA #446)</li></ul>
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# London Highbury Shopping Centres

## London Official Plan Policies: Guideline Documents

Content (cont'd)	<ul style="list-style-type: none"><li>(v) Dingman Drive (Industrial) Area Plan (OPA 451)</li><li>(w) Dingman Drive Industrial Area – Urba Design Guidelines OPA #451)</li><li>(x) City of London Placemaking Guidelines – November 2007 (OPA 452)</li><li>(y) W12A Landfill Area Plan (OPA 462)</li><li>(z) Environmental Impact Study Guidleines;</li><li>(aa) Environmentally Significant Area Identification and Boundary Delineation Guidelines;</li><li>(ab) Significant Woodland Evaluation Guidelines;</li><li>(ac) Plant Selection Guidelines for Environmentally Significant Areas, Natural Heritage Areas and Buffers;</li><li>(ad) Community Energy Plan;</li><li>(ae) Sustainable development and green building initiatives;</li><li>(af) Transportation Master Plan;</li><li>(ag) Transportation Impact Study Guidelines;</li><li>(ah) Access Management Guidelines;</li><li>(ai) Facility Accessibility Design Standards;</li><li>(aj) Tree Preservation Guidelines; and</li><li>(ak) Small Lot Subdivision Design Guidelines.</li></ul> <p>(Clauses (z) to (ak) added by OPA 438 Dec. 17/09 and renumbered under Section 19.12.8. i) of the Official Plan)</p> <ul style="list-style-type: none"><li>(al) Downtown Heritage Conservation District Plan (OPA 524)</li></ul>
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# London Highbury Shopping Centres

## London Official Plan Policies: Guideline Documents

Status	iii) Guideline documents will be adopted by resolution of Council. Development proposals shall be reviewed to determine their conformity with the provisions of any applicable guideline document and conditions may be imposed upon the approval of the development. <u>Council may allow a reduction, change, or waiver of the provisions of a guideline document if it is of the opinion that such action is warranted and that the general intent of the Official Plan will be maintained.</u> (underline added)
Public Record	iv) A record will be maintained of the guideline documents (and any associated modification) that have been adopted by Council under Section 19.2.2. Copies of all adopted guideline documents will be made available and accessible to the members of the public. (Clause iv) added by OPA 438 Dec. 17/09)
Public Participation and Review	v) The preparation of a guideline document will include provisions to encourage input from agencies, associations, and individuals that have an interest in the subject matter. Before adopting a guideline document, Council will hold a public meeting to provide for input from interested parties. (Clause v) renumbered by OPA 438 Dec. 17/09)



## *London Highbury Shopping Centres*

- City proposed an Official Plan Amendment (OPA 403) that included a threshold for determining whether a woodland is “significant”
  - *“The Woodland would be considered “Significant” if it achieves a minimum of one high or five medium criteria scores as determined by application of the Guideline Document for the Evaluation of Ecologically Significant Woodlands...” (S. 15.4.5.1) (underlining added)*
- Appellants challenged OPA 403 on several grounds, including whether OPA 403 inappropriately delegated Official Plan policy functions to a guideline document

## *London Highbury Shopping Centres continued*

- OMB did not agree with Appellants.
- Found guidelines to be “objective, relevant and based on sound research ... based on best practices and grounded in good science” .... (while recognizing that the guideline document was not under appeal)
- Found the City witnesses gave a clear and detailed account of the links between the guidelines, the OP and the PPS and was therefore “unable to agree ... that the evaluation system for significant woodlands is not linked to policies, definition and criteria contained in planning instruments.”

## *London Highbury Shopping Centres continued*

*“If it turns out that lands have been inappropriately designated in a particular case, the landowner will now have an opportunity to challenge such a decision because the threshold will be incorporated within the Official Plan. In such a case ... the Board’s view is that the criterion selected is subject to challenge for failing to meet the standard of significance according to an evaluation of the considerations set out in section 15.4.5 of the Official Plan. Mere enumeration of a criterion in the [guideline] is not necessarily enough.”*

## *London Highbury Shopping Centres continued*

- *“In the event of a conflict or inconsistency between the [guideline] designation of significance and the Official Plan designation thereof, the latter will always govern.”*
- *“...it is standard practice that guideline documents are used to fulfill official plan policies. ...”*

## *London Highbury Shopping Centres*

*continued*

- OMB decision upheld by Court of Appeal

*“Despite the statement in OPA 403 that, if certain criteria set out in the 2006 guideline are achieved, the woodland “will” be considered significant, the City explains that neither it nor the OMB are fettered in their discretion. All of the factors set out in s. 15.4.5, the balance of the official plan and other relevant matters must be considered in deciding whether a specific woodland property is “significant”...”*

# ***3437400 Canada Inc. v. NPCA***

## **JUXTAPOSE:**

### **Conservation Authorities Act and Regulation:**

*...an authority may make regulations applicable to the area under its jurisdiction ... requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development;*

*The Lieutenant Governor in Council may make regulations governing the content of regulations made by authorities ...*

*A regulation shall provide that the authority may grant permission for development ... if, in the authority's opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development ...*

# ***3437400 Canada Inc. v. NPCA***

*continued*

## **NPCA Regulation:**

*2(1) Subject to section 3, no person shall undertake development ... in or on areas within the jurisdiction of the Authority that are ... river or stream valleys that have depressional features ... hazardous lands ...*

*3(1) The Authority may grant permission for development in or on the areas described in subsection 2(1) if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development. (emph added)*

## **DISCRETIONARY POWER**

# *3437400 Canada Inc. v. NPCA*

*continued*

## *NPCA's Policy, Procedures and Guidelines for the Administration of Ontario Regulation 155/06:*

Policy 3.1 – prohibits development within a “valleyland” or “hazardous land” (amongst others) except where allowed under Policies 3.4 to 3.28.

Policy 3.25 re “valleylands” – provides that no new development will be permitted where the bank height is equal to or greater than 3 metres.

**OUTRIGHT PROHIBITION**



# *3437400 Canada Inc. v. NPCA*

*continued*

**Tribunal refused application.  
Divisional Court found that:**

*“The Tribunal essentially concluded that the Policies prohibited new development in the valley and that no applicable exception existed. In reaching this conclusion, the Tribunal erred in finding that the legislator’s primary intention was clearly to prohibit development in certain areas that the applicable policy was consistent with this. The Tribunal viewed O Reg 155/06 as establishing a general prohibition against development subject to certain exceptions ... The prohibition in subsection 2(1) is clearly made “subject to section 3” pursuant to which permission to develop may be granted in certain circumstances. Development is not prohibited unless the permission made possible by s. 3 is not granted having regard to the criteria set out there.”*

# ***3437400 Canada Inc. v. NPCA***

***continued***

*“Although both the Tribunal and the Respondent’s lead witness ... commented on certain aspects of this particular application and this particular ravine, it is clear that both were ultimately of the view that the Policies prohibited new development in it and that that was dispositive of the application ....”*

**Division Court set aside Tribunal decision and remitted the matter back to the Tribunal for a hearing before a different Commissioner.**

# **Bloor Street Case Study**

Four Seasons  
(55/31)  
(205m+125m)

37 Yorkville  
(70/58)  
(238m+183m)

Cumberland  
Terrace  
(48/36)  
(162m+125m)

50 Bloor West  
(83)  
(277m)

1 Bloor East  
(81)  
(290.5m)  
(As Approved)

Current Development  
(76)  
(254.4m)  
(Under Construction)



## Policy/Guidelines “Layers”

- (1) Official Plan policies, including  
Area Specific Policy 211
- (2) Bloor-Yorkville/North Midtown Urban  
Design Policies (2004)
- (3) Downtown Tall Buildings Vision and  
Performance Standards (2012)

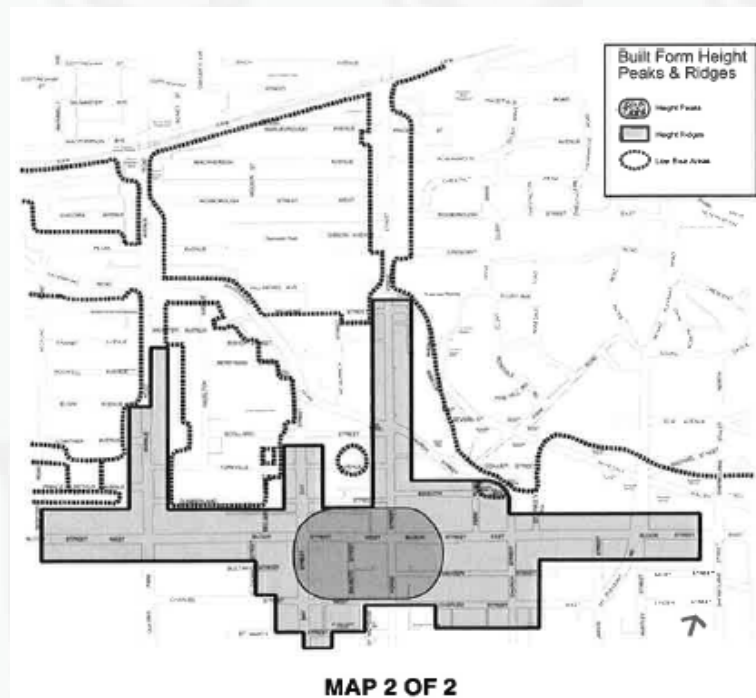
# “Layers” are not consistent ...

Examples:

- Height
- Shadow Impacts

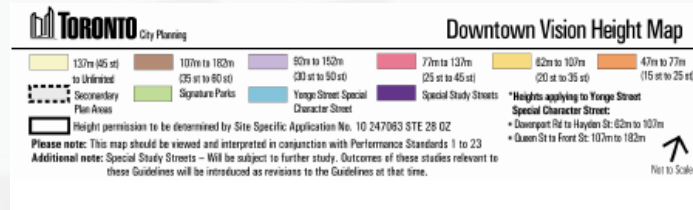
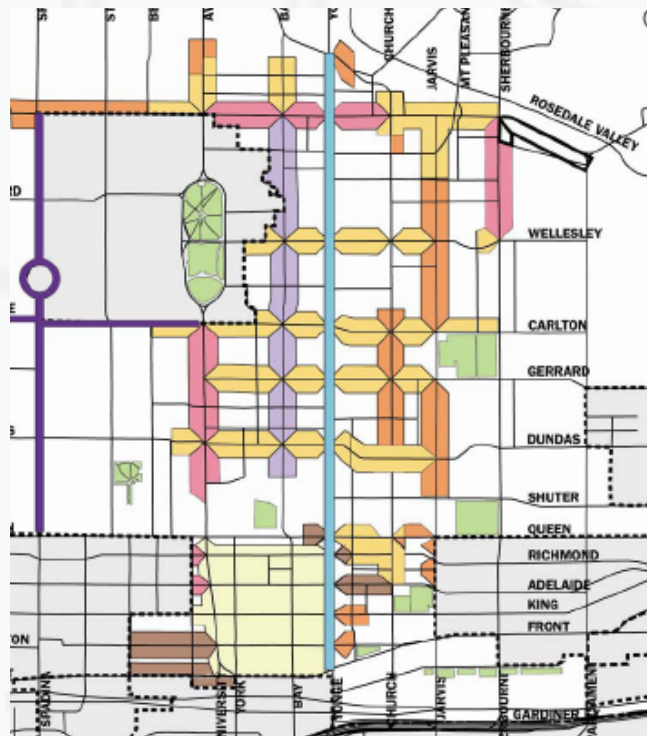
# Height

- Area Specific Policy 211 specifies a height regime:



# Height

- *Downtown Tall Buildings Vision and Performance Standards* (2012) identifies a different height regime:





# Shadows

- Official Plan tests for shadow impacts:
  - Adequately limit shadow on neighbouring streets, properties and open spaces
  - Minimize additional shadowing on neighbouring parks
  - Adequately limit shadow impacts on adjacent neighbourhoods

# Shadows

- Downtown Tall Building Vision and Performance Standards tests for shadow impacts:
  - No net new shadows will be cast by Downtown tall buildings on “Signature Parks/Open Spaces” between 10:00 AM and 4:00 PM on September 21<sup>st</sup>
  - No net new shadows will be cast .. on all other parks located within and adjacent to the Downtown Guideline boundary area, between 12 noon and 2:00 PM on September 21st.

**How is this inconsistency resolved?**

**Minor Variances**

/

**Sufficiency of Reasons**

# Sufficiency of Reasons – Evolution (Some Cases)

- 1999 – *Baker v. Canada (Minister of Citizenship and Immigration)* (S.C.R.)
- 2005 - *DeGasperis v. Toronto COA* (OMB 2003; Div Ct 2005)
- 2008 *Dunsmuir v. New Brunswick* (SCC 2008)
- 2009 (May) – *Toronto (City) v. Romlek Enterprises* (Div Ct, 2009)
- 2009 (September) - *Clifford v. OMERS* (Ont. Ct Appeal, 2009)
- 2010 (November) - *Simon v. Bowie* (OMB 2010; Div Ct 2010)
- 2011 – *Newfoundland Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)* (SCC 2011)
- 2011 (December 7) - *621 King Development Ltd. v. Toronto (City)* (OMB 2011; Div Ct 2011)
- 2011 (December 22) - *Aurora (Town) v. Sikura* (OMB 2011; Div Ct 2011)
- 2012 (April) - *Opara v. Leslie* (Div Ct 2012)
- 2012 (November 29) - *Construction Labour Relations v. Driver Iron Inc.* (SCC 2012)
- 2013 (February) - *Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.* (Div Ct, 2013)

# Minor Variances

## 4 Part Test

Section 45(1) of the *Planning Act* requires that the variance:

- (1) be minor;
- (2) be desirable for the appropriate development or use of the land;
- (3) maintain the general purpose of the zoning by-law; and
- (4) maintain the general purpose of the official plan.

# *DeGasperis*

## Ontario Municipal Board

- Four minor variances sought
- COA refused application, owners appealed
- Appeal allowed in part
- OMB discussion references four parts of test, but appears to focus on impact

# *DeGasperis*

continued

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## Divisional Court

- Leave granted on following issue:

*“That the OMB erred in law by subsuming three of the four tests under ss. 45(1) of the Planning Act to the sole question of impact, thereby failing to properly address three of the four tests under that section.”*



# *DeGasperis*

continued

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## Divisional Court (On Appeal)

- Appeal allowed

*“It is incumbent on a committee of adjustment, or the Board in the event of an appeal, to consider each of [the four] requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirements.”*

# *DeGasperis*

**continued**

*“It requires, without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests.”*

# *Simon v. Bowie*

## Ontario Municipal Board

- Four minor variances sought
- COA approved application; neighbour appealed
- Appeal dismissed

# *Simon v. Bowie*

continued

## Divisional Court – Leave Denied

Appellant submission:

*“...the Board must consider each element of the test separately and apply it to the evidence with respect to that aspect of the test. Further, it is obliged to apply the test separately to each variance sought.”*

# *Simon v. Bowie*

continued

Court:

*“...I am not satisfied that the Board was required, as a matter of law, to follow the methodology or precise recipe he advanced for the application of the test. Rather ... the law requires the substantive application of the tests required by s. 45(1) of the Planning Act.”*

# *Simon v. Bowie*

continued

Court:

*“I do not agree that DeGasperis (Div. Ct.), supra, requires that each test be applied entirely separately and formulaically .... It is sufficient if the reasons make it clear that the Board applied the correct tests substantively, takes the appropriate factors into consideration, and that it considered the evidence properly. In my view, the Board’s reasons meet these requirements.”*

# *621 King*

## Ontario Municipal Board

- Nine variances sought
- OMB approved

# *621 King*

continued

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## Divisional Court

- Leave granted on following issue:

*“Did the Board err in law by failing to conduct an independent analysis of each of the four test of s. 45(1) of the Planning Act for all of the contested minor variances under appeal?”*



# ***621 King***

**continued**

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## Divisional Court (Leave Motion)

*“Nowhere in the Board decision is there is a clear analysis of the four-part statutory test as it relates to each of the proposed minor variances, as required by the Act. ...”*

# *621 King*

continued

## Divisional Court (On Appeal)

- Appeal dismissed

*“In my view no error was committed by the Board. There were nine minor variances before it. However, the parties defined very narrowly the single issue before the Board. As the Board stated in its reasons at page 4: “[T]he applicant agreed with the City’s opening statement that this hearing is all about built form and compatibility with the historic character of the area”.*

# 621 King

continued

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*“Given the narrow issue presented by the parties, the Board was not obliged to expand at length upon other issues. It was not required to meticulously and formalistically set out each of the four tests for each of the nine minor variances. In the context of this large development, the expert evidence the Board heard from both sides, and its own expertise and experience in this area, the Board set out what was reasonably necessary to provide a pathway to its conclusion. ...”* (underline added)

# ***621 King***

**continued**

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*“In my view the decision provides more than adequate detail and transparency, especially when measured against the standard of reasonableness.”*

***Do *Simon v. Bowie* and *621 King*  
detract from *DeGasperis*?***

# Other Cases re Sufficiency of Reasons

- *Clifford v. Ontario Municipal Employees Retirement System* (OCA, 2009)
- *Romlek Enterprises v. Toronto* (Municipality) (OMB 2008; Div Ct 2009)
- *Aurora (Town) v. Sikura* (Div Ct 2011)
- *Opara v. Leslie* (Div Ct 2012)

# Clifford

*“In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them ... This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase ... what the court says in R.E.M. at para 24, the “path” taken by the tribunal to reach its decision must be clear from the reasons read in the context of proceeding, but it is not necessary that that the tribunal describe every landmark along the way.”*

# *Romlek*

## Ontario Municipal Board

- Four minor variances sought
- COA refused application, owners appealed
- Appeal allowed



# ***Romlek***

**continued**

## Divisional Court (On Appeal)

*“In the present case, the Board failed to give reasons explaining why the variances granted were properly considered minor. It proceeded on the basis that it could accept the opinion evidence of the respondents’ planner to that effect and treat this issue as a factual matter to be decided on the basis of expert evidence. ... that in itself is an error, as it was the Board’s duty to interpret the Official Plan and by-law instruments. ...”*

# *Sikura*

*“It is well settled that an administrative tribunal is not obliged to refer to all of the evidence before it. The basis of the decision must be explained and the explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. The path must be clear but it is not necessary that the tribunal describe every landmark along the way.”*

# *Opara*

Motion for Leave to Appeal – Granted:

*“There is no evidentiary record for this court to review and from which I can identify the substance of the issues and evidence that the Board actually grappled with. In the result ... the parties and this court are left to speculate and that paces this aspect of the decision outside the Boards obligation to consider and apply the third test ...”*

[No appeal heard.]

# ***Construction Labour Relations v. Driver Iron Inc. (Nov 29, 2012)***

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The Board did not have to explicitly address all possible shades of meaning of these provisions. This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708).

***Newfoundland and Labrador Nurses' Union v.  
Newfoundland and Labrador (Treasury Board)***

***Recently affirmed in Robert Smith representing and on behalf of the Bangor Ratepayers Association Inc. v. The Corporation of the Town of Bracebridge and 1712216 Ontario Inc.***

*“Reasons may not include all of the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. ... In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of reasonable outcomes, the Dunsmuir criteria are met.”*



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