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MEMORANDUM

ISSUE: **Legality of MTO Policies and Guidelines**

DATE: March 27, 2012

Purpose

The purpose of the Memorandum is to consider the legality of MTO's response to circulation of Planning Act applications, such as a rezoning application, requiring, for example a 24 metres acquisition for widening of the QEW and a further 14 metre building setback from MTO lands, presumably as a condition for their issuance of a land use permit pursuant to the *Public Transportation and Highways Improvement Act* R.S.O.1990, c.P.50 ("PTHIA") and as a condition of the municipality approving the rezoning application.

This memorandum will address the jurisdiction of MTO to require the aforesaid land acquisition and set back as well as their jurisdiction requiring a land use permit.

For my purposes I will assume a rezoning application develop a hi-rise residential building in the area of the QEW and Hurontario Streets, north of the North Service Road, in Mississauga, Ontario.

MTO Jurisdiction

The PTHIA grants jurisdiction to the Ministry of Transportation ("MTO") to restrict or prohibit private land owners from doing certain acts on their property that would otherwise be legal, without first obtaining a permit from MTO. This power relates to two classifications of roads - highways designated as a "King's Highway" and those designated as a "controlled-access highway". Because interference with property rights has long been considered by the courts as an extreme power and one not to be easily "inferred" any statute granting such powers is to be strictly construed, with any ambiguity accruing to the benefit of the private land owner. Accordingly, a close review of the PTHIA and the courts' interpretation of the applicable statutory provisions is necessary.

The PTHIA also gives MTO the power to impose fees as a condition of the issuance of such a permit. Ontario Divisional Court's ruling in the case of Charter Construction on this point is discussed below.

i. *King's Highways and Controlled-Access Highways*

A King's Highway can only be created by the Lt. Governor In-Council designating same by a Regulation pursuant to s. 7 of the PTHIA and registering same against the title to the lands on which

the King's Highway is located. Similarly, pursuant to ss. 36 (1) a controlled-access highway can only be created, for the purposes of this Act and MTO jurisdiction, if the Lt. Governor makes a regulation to this effect and registering same against title to the affected lands. Once so designated the controlled-access highway becomes part of the King's Highway and subject to the same legislative and regulatory provisions that apply to a King's Highway. For my purposes I refer to the combination of the two roads as the "King's Highway designated system".

For the purposes of this paper I have obtained from MTO a copy of their mapping showing the QEW in portions of Mississauga in the area of Hurontario Street, including the area north of the North Service Road. I have also obtained copies of the Orders In-Council approved by the Lt. Governor in Council. I have not done a subsearch of title for these lands so my comments hereafter come with that proviso. The North Service Road east of Hurontario St. are shown as a Highway "Designated" but "Not Owned" by MTO. However, these lands are not shown as designated as a "controlled-access highway" nor a "King's Highway" pursuant to ss. 36 and s.7 respectively.

The lands noted as "Land disposed of or Highway Transferred" meaning they are not within the jurisdiction of MTO.

ii. MTO Land Use Permits

The jurisdiction of MTO to require private land owners to obtain permission from MTO to construct a new building in the area of highways under their control is limited to 34 (2) for King's Highways and ss. 38(2) for controlled-access highways. Similar language is used in both subsections. I will deal with the former sub-section first.

Subsection 34(2) "...no person shall except under a permit from the Minister,

- (a) place, erect or alter any building...or other structure or any road upon or within 45 metres of any limit of the King's Highway, or upon or within 180 metres of the centre point of an intersection; (my underlining)
- (d) use any land, any part of which lies within 800 metres of any limit of the Kings Highway for the purposes of a shopping centre, stadium, fair ground, race track, drive-in theatre or any purpose that causes persons to congregate in large numbers; (my underlining);

Sub-section 34(2)(a)

- a. With regard to (a), reviewing these plans, I note lands that lands on the north side of the North Service Road are in excess of 45 metres from the northerly limit of the QEW and the "King's Highway" designated lands, which are therefore not part of the "King's Highway" designated system (QEW and controlled-access highways).
- b. With regard to (a) and the standard of "180 metres of the centre point of an intersection", the phrase "centre point of an intersection" is defined in ss. 34(1) to mean:

"..the point where the centre line of the through part or parts of the King's Highway meets the centre line of or the centre line of the prolongation of any other highway that intersects or meets the King's Highway." (my underlining)

- c. The word “highway” as used in the phrase “any other highway” is defined in S. 1. of the PTHIA to include any public street or driveway “intended for or used by the general public for passage of vehicles...”.
- d. Reviewing the MTO plan, the closest intersection of any road to the “King’s Highway” would be the intersection of the North Service Road with Hurontario Street.

Subsection 34(2)(b)

- a. Clearly lands north of the North Service Road are within the 800 metre radius are subject to MTO jurisdiction, provided the “use” provision is met. The relevant language is a *“purpose that causes persons to congregate in large numbers.”* This phrase is not defined within the PTHIA.
- b. For a hi-rise development project, the relevant question is whether or not such development falls within this phrase. In my opinion it does not. The intent of PTHIA is the control of traffic, and not the appropriateness, otherwise, of a proposed development or land use. The list of specified uses clearly defines those that are “crowd-attracting commercial uses...most creating a surge potential of commercial uses (racetracks and stadia) or opening and closing times and holidays (for shopping centres or fairgrounds)”. The ancillary retail use to a hi-rise residential building is, in my opinion, of no consequence. I am supported in my opinion by the 2007 Decision of Justice Howden of the Ontario Superior Court dealing with a proposal by Charter Construction Limited in Orillia close to King’s Highways 11 and 12. I have attached a copy of this decision to this memo. In Charter’s case they were proposing a residential development on 246 acres composed of low, medium and hi-density residential uses for a total of 2, 265 residential units which was found not to be a use that *“causes persons to congregate in large numbers.”*

Conclusion

Based on the foregoing I am of the opinion that MTO does not have permitting powers with regard to a proposed hi-rise residential development within the described area.

In addition, based on the Charter decision, I am of the opinion MTO cannot impose requirements for land acquisition or highway setbacks as a municipal condition for rezoning that are unrelated to traffic controls. A 14 m. setback from the existing QEW would not extend past the North Service Road. Accordingly, for lands north of the North Service Road, the set back is irrelevant. MTO’s legislative mandate is to control traffic, not to affect land use decisions that have no relevance to that mandate. In the absence of such traffic evidence, MTO has no jurisdiction attempting to impose such zoning conditions. Nor, in my opinion should they be given party status at any OMB appeal of such rezoning application. If MTO wishes to acquire lands from a private landowner, section 11 of the PTHIA provides them with Expropriation powers for that purpose if a voluntary acquisition cannot be accomplished. Such cannot be done indirectly by attempting to influence municipal decisions. Similarly, such cannot be a condition imposed by the municipality as a condition for rezoning.

GP

Encl.