

TO:	CHAIR AND MEMBERS STRATEGIC PRIORITIES AND POLICY COMMITTEE MEETING ON MAY 22, 2014
FROM:	JAMES P. BARBER CITY SOLICITOR
SUBJECT	<i>RETHINK LONDON</i> Process and Legislation

RECOMMENDATION

That, on the recommendation of the Director, Legal & Corporate Services and City Solicitor, this report with respect to the recommendation of the City Planner for a new Comprehensive Official Plan **BE RECEIVED** for information.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

April 14, 2014 – Report to Strategic Priorities and Policy Committee outlining the next steps of the public engagement and review process for ReThink London

BACKGROUND

On April 14th, 2014, the Strategic Priorities and Policy Committee resolved that the Managing Director, Corporate Services and City Solicitor BE DIRECTED to report back at the May 22, 2014 special meeting of the Strategic Priorities and Policy Committee with respect to the process and legislation under which the new Official Plan is to be adopted;

What is the statutory authority in the *Planning Act* for the five year review of an official plan which was conducted under the name *Rethink London*?

Section 26 of the *Planning Act* which provides for revising an official plan every five (5) years is attached to this report. The council revises the official plan in accordance with s. 26 of the *Planning Act* if it amends the official plan and in the course of making amendments complies with clauses 26(1) (a) and (b) and with all the procedural requirements of section 26.

In order to comply with section 26, the amendments must ensure that the official plan as amended “conforms with provincial plans or does not conflict with them, as the case may be”, “has regard to the matters of provincial interest listed in section 2” of the *Planning Act*, “is consistent with policy statements issued under subsection 3 (1) of the *Planning Act*; and “revise[s] the official plan, if it contains policies dealing with areas of employment”.

Although section 26 may be satisfied by amending the official plan in accordance with that section which amendments are subject to approval of Minister of Municipal Affairs and Housing and appeals to the Ontario Municipal Board, the City Council adopted the recommendation of the Managing Director, Planning and City Planner that a new comprehensive official plan be adopted arising out of the *Rethink* process and based upon the further advice of the City Solicitor that this occur both in accordance with section 26 and section 17 of the *Planning Act*.

What is the case law and Ontario Municipal Board jurisprudence concerning the obligation to comply with section 26 of the *Planning Act*?

There are various court cases which describe the scope of the obligation to comply with section 26 and the relationship between the statutory requirements of section 17 and those of section 26 of the *Planning Act*. The combined effect of these cases suggests that if a new comprehensive official plan results from a section 26 planning review process, it must comply with the enhanced requirements of section 26, which include approval of the Ministry of Municipal Affairs and Housing.

The leading case appears to be the Divisional Court decision in *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd*¹, where the Court addressed the scope of section 26 of the *Planning Act* as follows:

“24 Section 26 of the *Planning Act* provides *inter alia* that, every five years, the council of a municipality is required to,

- (a) revise the 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 (of the *Planning Act*), and
 - (iii) is consistent with policy statements issued under subsection 3(1) (of the *Planning Act*).

25 The public consultation process associated with municipally-initiated official plan amendments under section 26 of the *Planning Act* contains enhanced consultation requirements, compared to a private official plan amendment application pursuant to section 17. Thus, s. 26(5) of the *Planning Act* provides for public participation in five year reviews by giving persons who attend special meetings an opportunity to be heard and by requiring Council to have regard to any written submissions about what revisions may be required. This has the effect of broadening the pool of potential appellants, given the nature of the review and the requirement for enhanced consultation.

26 But while s. 26(5) broadens public consultation, under s. 26(1) of the *Planning Act* Council is only required to revise the official plan as required to ensure that it conforms with or is consistent with provincial policy. Council is not required to make a decision on the entirety of the official plan, nor on every policy with respect to which a submission has been made. There is no requirement to do so under the *Planning Act*, and in fact, section 26 specifically permits Council to limit its decision to revise only those policies that it determines require a change.”

¹ 2013 CarswellOnt 946

Similarly, the Ontario Municipal Board has described the effect of section 26 in *Metcalfe Realty Co. v. Ottawa (City)*² as follows:

“The new language substituted into section 26 of the *Planning Act* removes the need of Council to determine whether to revise and substitutes inter alia that Council shall revise the Official Plan as required to ensure it has regard to matters of provincial interest in section 2 of the *Planning Act* and is consistent with policy statements under section 3 of the *Planning Act*. City of Ottawa planning witnesses rely on the changes in the PPS and *Planning Act* for the Official Plan review undertaken leading to the adoption of OPA 76.”

In another case *SmartCentres Inc. v. Toronto (City)*³, the Ontario Municipal Board suggested that section 26 must be followed if what is being undertaken “is indeed an official plan revision captured by subsection 26(1)”:

“8 First, it is suggested that if I accept the position of Home Depot, then all future official plan amendments by municipalities in the Greater Golden Horseshoe (“GGH”) would be governed by s.26 and the need for s.17 of the Act would be eliminated. I disagree. Section 26(1) deals with municipally generated official plan amendments. It does not encompass private amendments. Moreover, section 26(1) only applies to a municipally generated amendment in the GGH if the amendment falls within the four corners of s.26(1)(b). It is entirely possible that some amendments will not deal with the employment policies of s.26(1)(b) and, as a result, s.26 would not apply.

9 Second, the City argues that the use of the phrase “provincial plans” in s.26(1)(a)(i) instead of the phrase “provincial plan” suggests that this section is intended to apply when more than one plan is being addressed. Since OPA 72 deals with only one plan, s.26 has no application in the City’s opinion. I am not persuaded by this argument. In my view, the pluralisation of the word “plan” to read “plans” is no more than the legislature’s way of ensuring that all future plans are captured in the same fashion as the phrase “policy statements” in s.26(1)(a)(iii) captures all future policy statements.

10 A third argument made was that s.26(1) was intended to deal with the totality of the five year official plan re-view process and not discrete conformity exercises such as the one reflected by OPA 72. Again I do not agree. The language of s.26(1) does not restrict its application to the “totality” of matters envisioned in a five year review. In my opinion, a plain reading of the subsection clearly allows for and contemplates the possibility of, the conformity exercise recently completed by the City. The adoption of OPA 72 met all of the criteria prescribed by s.26(1). It dealt with a provincial plan, it had to have regard to matters of provincial interest because of s.2 of the Act, it had to be consistent with the 2005 Provincial Policy Statement because of s.3(5) of the Act and, as I have already mentioned in these reasons, OPA 72 did indeed speak to employment area policies referred to in s.26(1)(b). There was also a suggestion by the City that the existence of s.26(2) limited the application of s.26(1). The intent of s.26(2) is made clear by its first three words: “For greater certainty...” Subsection 26(2) does not remove, exempt or change any obligation set out in s.26(1). Moreover, s.26(2) does not say that Council “only” revises its official plan under s.26(1) if it complies with s.26(2). What subsection 26(2) does therefore is to not only allow a conformity exercise to be completed in conjunction with a 5 year review but also, and in my estimation, more importantly, it confirms that a plan conformity exercise is indeed an official plan revision captured by subsection 26(1). As such, the consultative requirements of section 26 must come into play.”

² 2013 69 O.M.B.R.143

³ 2013 65 O.M.B.R. 507

It is the City Solicitor's understanding from discussions with the City's planners that the ReThink process was undertaken as a 5-year review under Section 26 of the Act, and that the statutory requirements contained in that section have been met by staff throughout the ReThink planning process, and that the City must comply with the procedural requirements of the section as required by s. 26(2)(b) if it adopts a new comprehensive official plan in place of amendments as contemplated by section 26.

What is the scope of the remedy to appeal to the Ontario Municipal Board for either amendments to an official plan under section 26 or for a comprehensive official plan adopted under sections 17 and 26?

New comprehensive official plans recently adopted by Mississauga and Hamilton were all widely appealed by a large number of appellants including developers and individual land owners. The City has only just completed a major Ontario Municipal Board hearing relating to the Southwest Area Plan which involved a large number of appeals.

Given the response in relation to the Southwest Area Plan, which was widely appealed and required months of hearing before the Ontario Municipal Board, as well as the response to official plan changes in recent years in other municipalities across the province, the potential for appeals in relation to any changes to the Official Plan, either by way of amendment or by way of a new comprehensive official plan, should be considered.

What is the potential impact of a new comprehensive official plan upon pending development applications?

Until such time as any new official plan document is in force, the policies of the existing official plan continue to apply to any pending or new development application. Council should consider the impact of proceeding with a Comprehensive Official Plan in relation to development plans based upon the current official plan provisions.

While the processes for adopting a new comprehensive official plan are being carried out and pending its final approval, the jurisprudence of the Ontario Municipal Board suggests that every applicant is entitled to have their application evaluated on the basis of the laws and policies as they existed on the date that the application was made which is described as the "Clergy" principle. The decisions of the Ontario Municipal Board have recently reconsidered the scope of the Clergy principle. The Board has, in one case, chosen "in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling interest." In a subsequent case, the Board declined to follow this approach and rejected the argument that policies in a pending new official plan could be considered in a planning application, and held that policies of a new official plan (even where known and adopted by Council) could not be considered in the processing of a planning application until such time as the new official plan was in force.

Can a lame duck council enact a comprehensive official plan?

At the present time it appears that the council will be lame duck as of September 12, 2014 in the sense that certain actions enumerated in s 275 of the *Municipal Act, 2001* may not be

undertaken after that date.⁴ The adoption of a new official plan, or official plan amendment, is not an enumerated restriction under subsection 275 of the *Municipal Act, 2001*, and the City Solicitor's Office is not aware of any case law involving a challenge to an official plan or official plan amendments based upon section 275.

Can a new comprehensive official plan be undertaken by a City Council at the end of its term in circumstances when it will likely be completed by a successive City Council?

The undertaking of a new comprehensive official plan is a something which may be identified at the beginning of the official plan process and may take a considerable period of time involving successive councils.

For example, it appears that Mississauga adopted a new official plan on September 29, 2010, referencing both sections 17(22) and 26(1) of the Planning Act.⁵ That process began as a review under Section 26 in 2007⁶, which resulted in a proposed framework for a new Official Plan brought forward in 2008.⁷ The new official plan was then submitted to the delegated approval authority, the Regional Government, for approval with respect to conformity to the Regional Official Plan and the PPS. Similarly, it appears that Kitchener undertook a new official plan process commencing in 2010, citing both sections 17 and 26 of the Act, which remains in process.⁸ Once adopted, the Kitchener plan will be submitted to the Regional Government for approval.

As London is a single tier municipality, the approval authority under section 26 is the Minister of Municipal Affairs and Housing.

CONCLUSION

The City Solicitor's Office recommends that the ReThink planning process continue under Section 26 and that the statutory requirements of sections 17 and 26 be met in relation to any future process with respect to a new comprehensive official plan. It is the City Solicitor's understanding, from discussions with planning staff and the City Clerk's office, that the more onerous statutory requirements of Section 26 have, to date, been complied with in the ReThink planning process.

It is further recommended that the by-law for adoption of any new comprehensive Official Plan include reference to both Sections 17 and 26, which is consistent with the approach taken recently by other municipalities in Ontario when adopting new comprehensive official plans arising out of the five year review process.

⁴ <http://sire.london.ca/cache/2/3hk2xhjn3rsiv2f4gefz31/12897203192014033121152.PDF>
⁵ By-law (http://www6.mississauga.ca/onlinemaps/planbldg/OfficialDocs/NoticeOfAdoption_2010Oct13.pdf)
⁶ Staff Report, April 16, 2007 (<http://www.mississauga.ca/file/COM/CouncilMay9th.pdf>)
⁷ Staff Report to Council, October 14, 2008 (http://www.mississauga.ca/file/COM/Mississauga_Plan_Review.pdf)
⁸ Staff Report, February 20, 2013 (http://www.kitchener.ca/en/livinginkitchener/resources/PLAN_CSD-14-⁰¹¹-_Official_Plan_3rd_Draft_Final.pdf)

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RECOMMENDED BY:
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Updating official plan

26. (1) If an official plan is in effect in a municipality, the council of the municipality that adopted the official plan shall, not less frequently than every five years after the plan comes into effect as an official plan or after that part of a plan comes into effect as a part of an official plan, if the only outstanding appeals relate to those parts of the plan that propose to specifically designate land uses,

(a) revise the 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 statements issued under subsection 3 (1); and

(b) revise the official plan, if it contains policies dealing with areas of employment, including, without limitation, the designation of areas of employment in the official plan and policies dealing with the removal of land from areas of employment, to ensure that those policies are confirmed or amended. 2006, c. 23, s. 13.

Effect of provincial plan conformity exercise

(2) For greater certainty, the council revises the official plan under subsection (1) if it,

(a) amends the official plan, in accordance with another Act, to conform with a provincial plan; and

(b) in the course of making amendments under clause (a), complies with clauses (1) (a) and (b) and with all the procedural requirements of this section. 2006, c. 23, s. 13.

Consultation and special meeting

(3) Before revising the official plan under subsection (1), the council shall,

(a) consult with the approval authority and with the prescribed public bodies with respect to the revisions that may be required; and

(b) hold a special meeting of council, open to the public, to discuss the revisions that may be required. 2006, c. 23, s. 13.

Notice

(4) Notice of every special meeting to be held under clause (3) (b) shall be published at least once a week in each of two separate weeks, and the last publication shall take place at least 30 days before the date of the meeting. 2006, c. 23, s. 13.

Public participation

(5) The council shall have regard to any written submissions about what revisions may be required and shall give any person who attends the special meeting an opportunity to be heard on that subject. 2006, c. 23, s. 13.

No exemption from approval

(6) An order under subsection 17 (9) does not apply to an amendment made under subsection (1). 2006, c. 23, s. 13.

Declaration

(7) Each time it revises the official plan under subsection (1), the council shall, by resolution, declare to the approval authority that the official plan meets the requirements of subclauses (1)

(a) (i), (ii) and (iii). 2006, c. 23, s. 13.

Direction by approval authority

(8) Despite subsection (1), the approval authority may, at any time, direct the council of a municipality to undertake a revision of all or part of any official plan in effect in the municipality and when so directed the council shall cause the revision to be undertaken without undue delay. 2006, c. 23, s. 13.

Updating zoning by-laws

(9) No later than three years after a revision under subsection (1) or (8) comes into effect, the council of the municipality shall amend all zoning by-laws that are in effect in the municipality to ensure that they conform with the official plan. 2006, c. 23, s. 13.

Minister may request amendment to zoning by-law

[\(10\)](#) The Minister may, if he or she is of the opinion that a zoning by-law in effect in the municipality does not conform with the official plan as revised under subsection (1) or (8), request the council of the municipality to pass an amendment to the zoning by-law to achieve conformity. 2006, c. 23, s. 13.